

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
WILSON DIVISION**

In re:)	
)	
NATIONAL GAS DISTRIBUTORS, LLC,)	Case No. 06-00166-8-ATS
)	Chapter 11
Debtor.)	
_____)	
)	
RICHARD M. HUTSON, II, TRUSTEE FOR)	Adversary Proc.
NATIONAL AS DISTRIBUTORS, LLC,)	No. 06-00267-8-ATS
f/k/a Paul Lawing, Jr., LLC,)	
)	
Plaintiff,)	
)	
v.)	
)	
THE SMITHFIELD PACKING COMPANY,)	
INCORPORATED,)	
)	
Defendant.)	
_____)	

**MEMORANDUM IN SUPPORT OF DEFENDANT’S MOTION: (A) TO DISMISS
TRUSTEE’S COMPLAINT FOR FAILURE TO STATE A CLAIM UNDER
FEDERAL RULE OF BANKRUPTCY PROCEDURE 7012, OR, IN THE
ALTERNATIVE, (B) FOR SUMMARY JUDGMENT UNDER
FEDERAL RULE OF BANKRUPTCY PROCEDURE 7056**

NOW COMES Defendant The Smithfield Packing Company, Incorporated (“Defendant”), by and through counsel, and files this Memorandum (the “Supporting Memorandum”) in Support of Defendant’s Motion: (A) To Dismiss The Trustee’s Complaint For Failure To State A Claim Under Federal Rule Of Bankruptcy Procedure 7012, or, in The Alternative, (B) For Summary Judgment Under Federal Rule Of Bankruptcy Procedure 7056 (the “Motion”). In support of the Motion, Defendant respectfully states as follows:

I. INTRODUCTION AND BACKGROUND

A “derivative” is simply “an agreement between a future buyer and future seller.” Michael Durbin, All About Derivatives (McGraw-Hill 2006), p. 1. In addition to specifying the buyer and the seller, every derivative specifies a future price at which some item can or must be sold and a future date on or before which such sale must occur. Id.

A “forward contract” is the simplest type of derivative – a forward contract obligates one party to buy and the other party to sell a particular item at a set price on some date in the future. Id. at 16.¹ In a forward contract relating to a commodity such as natural gas, the price of which fluctuates and cannot be predicted into the future with certainty, one virtual certainty does exist – one party to the contract, either buyer or seller, will have made a “bad bet.”² The parties will not know the “loser” on the bet or the magnitude of the loser’s loss (or, conversely, the winner’s gain) until delivery occurs under the forward contract. At that point in time, but not before, the parties will be able to judge whether the forward contract price is higher or lower than the market price of the commodity in question at the time of delivery.

Derivatives such as forward contracts have become a mainstay of the worldwide economy. As of the middle of 2006, there was a notional amount outstanding of interest rate swaps, options and currency swaps, and equity derivatives in excess of \$250 trillion.

See International Swaps and Derivatives Association (“ISDA”) 2006 Mid-Year

¹ A forward contract’s simplicity distinguishes it from certain other types of derivatives, such as a “futures contract” (a standardized forward contract executed at and tradable on an exchange) or an “option contract” (which grants the holder the right but not the obligation to buy or sell something at a specified price on or before a specified future date). Michael Durbin, All About Derivatives (McGraw-Hill 2006), p. 2.

² The theoretical possibility exists, of course, that the contract price and the actual market price of the commodity at the time of delivery will be precisely the same. The likelihood of this is null when the forward contract, as in this case, involves daily deliveries of a volatile commodity such as natural gas at the contract price over a multi-month period.

Summary, available at www.isda.org/statistics. Derivative contracts, such as “swap agreements,” “forward contracts,” “forward agreements,” “options,” and other “future” agreements, especially in the sale of commodities, are different from standard sale or supply contracts because such derivative contracts are risk-shifting in nature and their purpose is to hedge against fluctuations in the commodities market. H.R. REP. NO. 101-484, at 4 (1990), *reprinted in* 1990 U.S.C.C.A.N. 223, 226. Thus, such derivative contracts have long been accorded special treatment under the United States Bankruptcy Code, 11 U.S.C. § 101, *et seq.* (the “Code”), to avoid the ripple effect that could lead to the collapse of an affected market. Accordingly, the Code provides substantive protections and exemptions to parties to derivative contracts, excepting setoffs under such contracts from the effect of the automatic stay, excepting such contracts from the general unenforceability of *ipso facto* clauses, and, most pertinently, limiting the ability of a trustee to avoid, as preferences or fraudulent transfers, transfers made in connection with such contracts. *See, e.g.*, 11 U.S.C. §§ 546(e)-(g), 362(b)(6), and 362(b)(7).

Among the effects of these exemptive provisions in the Code is that the “winner” of the bet in a forward transaction is not penalized with fraudulent transfer liability if the “loser” becomes a debtor in bankruptcy shortly after the transaction. Such transactions can **never** result in constructive fraudulent transfer liability under the Code for the winner of the bet, no matter how big a “win” the winner enjoys. Even if the debtor entered into the forward transaction with actual fraudulent intent, such transaction is exempt from avoidance provided that (with respect to actual fraud only) the “winner” entered into the transaction in good faith.

In this case, the Trustee has ignored the fact that the “Transfers” (hereinafter, as

defined in the Complaint³) that he seeks to avoid were made under and in connection with “swap agreements” and he has filed the Complaint seeking avoidance and recovery of the Transfers in violation of the specific provisions of the Code that protect these transactions.

The Transfers that the Trustee seeks to avoid in this Complaint relate to natural gas delivered under forward contracts by National Gas Distributors, LLC, the debtor herein (the “Debtor”), to Defendant in the year preceding the Debtor’s bankruptcy petition date of January 20, 2006. The terms and conditions of the forward contracts were set forth in a form “Base Contract for Sale and Purchase of Natural Gas” promulgated by the North American Energy Standards Board, Inc. (“NAESB”) (the “Base Contract”), a copy of which was attached to the proof of claim (the “Proof of Claim”) filed by Defendant in the bankruptcy case. (A copy of the Proof of Claim is attached hereto as Exhibit A.) Generally, the Debtor would confirm the purchase and sale transaction by an email sent to Defendant setting forth the purchase price for the natural gas for a particular future “Delivery Period” (as defined in the Base Contract). Attached to the Proof of Claim is an email exchange dated August 12, 2005, which effectuated and confirmed the sale of natural gas for the period of November, 2005 through March, 2006 at a capped price of \$6.60 per dekatherm. Also attached hereto as Exhibit B-2 and Exhibit B-3 to the Authentication Declaration of Robert E. Miller, attached hereto as Exhibit B, are email exchanges dated April 2, 2004 and February 25, 2005, which effectuated and confirmed the sale of natural gas, respectively, for the period of April, 2004 through March, 2005 at a capped price of \$5.70 per dekatherm, plus basis

³ The use herein of the term “Transfers” as that term is defined in the Complaint is not an admission by Defendant as to any of the allegations in the Complaint.

(gas transport costs), and for the period of April, 2005 through October, 2005, at a capped price of \$5.75 per dekatherm, plus basis. (Hereinafter, the “Base Contract,” the April 2, 2004 email, the February 25, 2005 email, the August 12, 2005 email, and any other confirming emails or other oral or written confirmation are referred to collectively as the “Forward Contracts.”⁴)

In his Complaint, the Plaintiff, Richard M. Hutson, II, Chapter 11 Trustee (the “Trustee”), seeks to avoid the Transfers of natural gas from Debtor to Defendant as constructive fraudulent transfers under section 548(a)(1)(B) of the Code, alleging that the Debtor sold such natural gas to Defendant at below-market prices, such that the Debtor received less than reasonably equivalent value on account of such Transfers, and that the Debtor was insolvent at the time of, or rendered insolvent by, the Transfers.

Alternatively, the Trustee alleges that the Debtors made the Transfers with the actual intent to hinder, delay or defraud creditors of the Debtor such that the Transfers are actual fraudulent transfers under section 548(a)(1)(A) of the Code.⁵

The Forward Contracts between the Debtor and Defendant constitute “swap agreements,” as that term is defined under section 101(53B) of the Code. Pursuant to

⁴ Under the Base Contract between the Debtor and Defendant, the term “Contract” is defined as the “legally-binding relationship established by (I) the Base Contract, (II) any and all binding Transaction Confirmations, and (III) where the parties have selected the Oral Transaction Procedure in Section 1.2 of the Base Contract, any and all transactions that the parties have entered into through an EDI transmission or by telephone, but that have not been confirmed in a binding Transaction Confirmation.” The Debtor and Defendant selected the Oral Transaction Procedure referenced in Section 1.2 of the Base Contract.

⁵ In the First Claim of his Complaint, the Trustee apparently seeks to avoid the Forward Contracts themselves or the obligations incurred thereunder as both constructive and actual fraudulent transfers. See Complaint, ¶ 16 (“the contract(s) and any obligation incurred by the Debtor to provide natural gas to Plaintiff [sic]...is [sic] avoidable”). However, because of the broad definition in the Code of “swap agreement” (see pp. 10-13, *infra*), the forward transactions themselves constitute “swap agreements” triggering the application of sections 546(g) and 548(d)(2)(D). Thus, even if the Forward Contracts were themselves avoided, which would be a gross frustration of Congress’ intent to exempt such contracts in their entirety from the incidents of bankruptcy (*infra*), the transactions themselves fall within the exemptive provisions of the Code. Therefore, the Court should dismiss any claim of the Trustee for the avoidance of the Forward Contracts themselves for the reasons set forth herein.

section 546(g) of the Code, the Transfers are excepted from avoidance as constructive fraudulent transfers because they were made to a swap participant under or in connection with a swap agreement. Accordingly, the Court should dismiss under section 546(g) the Trustee's claims in the Complaint asserted under section 548(a)(1)(B).

Furthermore, section 548(c) of the Code prevents the Trustee's avoidance of the Transfers (or value thereof) as actual fraudulent transfers under section 548(a)(1)(A) of the Code. Section 548(c) prevents the avoidance of the Transfers because the Transfers were made to a swap participant under or in connection with swap agreements, which, under section 548(d)(2)(D), establishes conclusively that Defendant provided value to the extent of such Transfers. Further, though the Trustee in his Complaint acknowledges Defendant's defense under section 548(c) in his Complaint, he fails to allege, and cannot allege, that Defendant failed to receive the Transfers in good faith.⁶ Therefore, the Court should dismiss under sections 548(c) and (d)(2)(D) the Trustee's claims in the Complaint for avoidance of actual fraudulent transfers asserted under section 548(a)(1)(A) of the Code.

II. STANDARD FOR DISMISSAL

“The purpose of Rule 12(b)(6) is to test the legal sufficiency of a complaint” and not to “resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses.” Presley v. City of Charlottesville, 464 F.3d 480, 483 (4th Cir. 2006) (citing Edwards v. City of Goldsboro, 178 F.3d 231, 243-44 (4th Cir. 1999)). A Rule 12(b)(6) motion to dismiss should be granted “if, after accepting all well-pleaded allegations in the plaintiff's complaint as true, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief.” Migdal v. Rowe Price-Fleming Int'l,

⁶ See Complaint, ¶ 26.

Inc., 248 F.3d 321, 325 (4th Cir. 2001); see also Venkatraman v. REI Sys., Inc., 417 F.3d 418, 420 (4th Cir. 2005).

The Court should dismiss the Trustee’s claims because the Transfers at issue were made under or in connection with “swap agreements,” as defined under the Code, and cannot be avoided and recovered from Defendant as fraudulent transfers under the plain language of the Code. Since the Trustee references the Proof of Claim in the Complaint (see Complaint, ¶15), the Court can and should consider, as well as take judicial notice of, the Proof of Claim and the Forward Contracts attached thereto, in determining this Motion. Enron Corp. v. Citigroup Inc., 2004 Bankr. Lex. 2124, *14 (Bankr. S.D.N.Y. 2004)(“In reviewing a 12(b)(6) motion, the court may consider the allegations in the complaint, exhibits attached to the complaint or incorporated therein by reference, matters of which judicial notice may be taken, and documents of which plaintiff has notice and on which it relied in bringing its claim or that are integral to its claim. . . . As such, the document relied upon in framing the complaint is considered to be merged into the pleading.”)(internal citation omitted).

Alternatively, Defendant requests the Court determine the Motion under Rule 56 of the Federal Rules of Civil Procedure, made applicable to this matter by Bankruptcy Rules 9014 and 7056. Under Rule 56, a party is entitled to summary judgment when there is no genuine issue of material fact, and the facts, viewed in the light most favorable to the non-moving party, entitle the moving party to judgment in its favor as a matter of law. Hagan v. McNallen (In re McNallen), 62 F.3d 619, 623 (4th Cir. 1995). Summary judgment is not a “disfavored procedural shortcut,” but an important mechanism for filtering out “claims and defenses that have no factual basis.” Celotex Corp. v. Catrett,

477 U.S. 317, 327 (1986). The Court should grant summary judgment if there exists no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Scott v. Montgomery County Gov't, 164 F. Supp. 2d 502, 505 (D. Md. 2001). “A party who bears the burden of proof on a particular claim must factually support each element of his or her claim.” Id. “[A] complete failure of proof concerning an essential element . . . necessarily renders all other facts immaterial.” Celotex Corp., 477 U.S. at 323. Significantly, a “mere scintilla of evidence is not enough to create a fact issue.” Barwick v. Celotex Corp., 736 F.2d 946, 958-59 (4th Cir. 1984).

As discussed below, it is undisputed that the Debtor made the Transfers under and in connection with the Forward Contracts, that such Forward Contracts and the transactions themselves were “forward contracts” and “swap agreements” under the Code definitions, and that the Transfers are, therefore, not subject to avoidance or recovery from Defendant as fraudulent transfers.

III. ARGUMENT

A. The Transfers Are Not Avoidable As Constructive Fraudulent Transfers Under Section 548(a)(1)(B) Of The Code Because The Transfers Were Made To A Swap Participant Under Or In Connection With A Swap Agreement And Are, Therefore, Excepted From Avoidance As Constructive Fraudulent Conveyances Under Section 546(g) Of The Code.

Section 546(g) of the Code excepts from avoidance as constructive fraudulent transfers any transfer made under or in connection with a swap agreement:

Notwithstanding section 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer, made to a swap participant or financial participant, under or in connection with any swap agreement and that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

11 U.S.C. § 546(g).

Beginning in the original Code in 1978, Congress has included a number of provisions in the Code, including sections 546(e)-(g), 362(b)(6), and 362(b)(7), designed to protect certain transactions in and affecting financial markets. As noted by Congress in the legislative history for the 1990 amendments to the Code:

U.S. bankruptcy law has long accorded special treatment to transactions involving financial markets, to minimize volatility. Because financial markets can change significantly in a matter of days, or even hours, a non-bankrupt party to ongoing securities and other financial transactions could face heavy losses unless the transactions are resolved promptly and with finality.

H.R. REP. NO. 101-484, at 2 (1990), *reprinted in* 1990 U.S.C.C.A.N. 223, 224.

Specifically, “[s]ection 546 of the Bankruptcy Code provides a ‘safe harbor’ for certain types of transactions. The purpose of section 546 is ‘to protect the nation’s financial markets from the instability caused by the reversal of [covered] transactions.’” Enron Corp. v. J.P. Morgan Sec., Inc. (In re Enron Corp.), 325 B.R. 671, 684 (Bankr. S.D.N.Y. 2005) (quoting Kaiser Steel Corp. v. Charles Schwab & Co., Inc. (In re Kaiser Steel Corp.), 913 F.2d 846, 848 (10th Cir. 1990)). These safe harbors include section 546(g) as well as analogous provisions under other subsections of 546 protecting other derivative financial transactions. Bankruptcy courts have routinely applied these safe harbor provisions to insulate from avoidance actions financial transactions such as swap agreements, including forward agreements, and related transactions. See e.g., BCP Liquidating LLC v. Bridgeline Gas Mktg., LLC (In re Borden Chems. & Plastics Operating L.P.), 336 B.R. 214 (Bankr. D. Del. 2006)(summary judgment granted for defendant where court found challenged payments were “settlement payments” under “forward contracts” and therefore not avoidable as preferences, under section 546(e)); Enron Corp. v. Credit Suisse First Boston Int’l (In re Enron Corp.), 328 B.R. 58 (Bankr.

S.D.N.Y. 2005), aff'd, 2006 U.S. Dist. LEXIS 57422 (S.D.N.Y. May 2, 2006)(court recognized defense to preference and fraudulent transfer claims if transfers occurred under “swap agreement,” pursuant to sections 546(e) and (g)); Williams v. Morgan Stanley Capital Group, Inc. (In re Olympic Natural Gas Co.), 258 B.R. 161 (Bankr. S.D. Tex. 2001), aff'd, 294 F.3d 737 (5th Cir. 2002)(summary judgment granted for defendant where court found that payments were “settlement payments” under “forward contracts” and therefore not avoidable as preferences under section 546(e)); Interbulk, Ltd. v. Louis Dreyfus Corp. (In re Interbulk, Ltd.), 240 B.R. 195, 201 (Bankr. S.D.N.Y. 1999)(in case decided under predecessor version of section 546(g), court recognized defense to preference action for transfers “under a swap agreement”).

In 1990, Congress added Section 546(g) to the Code for the purpose of prohibiting:

a bankruptcy trustee from avoiding a transfer under a swap agreement entered into before the bankruptcy petition was filed. An exception is created [from the exemption from avoidance] for any swap agreement entered into with the actual intent to hinder, delay, or defraud any creditor of the debtor, in which case the trustee is permitted to avoid the transfer.

H.R. REP. NO. 101-484, at 5 (1990), *reprinted in* 1990 U.S.C.C.A.N. 223, 227. The protections under section 546(g) were clarified and expanded significantly under the October 2005 amendments to the Code under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”).⁷

⁷ One amendment to Section 546(g) under BAPCPA clarified that transfers made under or in connection with a “swap agreement” are not avoidable as constructive fraudulent transfers or preferences. 11 U.S.C. § 546(g). This amendment clarified the broad intent and application of the statute and settled a statutory ambiguity that had caused one court to find that a transfer must be both “under” and “in connection with” a swap agreement for section 546(g) to apply. See Interbulk, Ltd. v. Louis Dreyfus Corp. (In re Interbulk, Ltd.), 240 B.R. 195, 201 (Bankr. S.D.N.Y. 1999)(finding that previous version of section 546(g) required transfers be both “under” and “in connection with” swap agreement for section 546(g) to apply). In this case, the Transfers at issue were made **both** under and in connection with “swap agreements.”

The BAPCPA amendments substantially broadened the definition of “swap agreement” in the Code. (The full definition of “swap agreement” under section 101(53B) with blacklining showing the changes under BAPCPA is attached hereto as Exhibit C.) As Congress stated in the legislative history regarding this amendment:

As amended, the definition of “swap agreement” will update the statutory definition and achieve contractual netting across economically similar transactions.

The definition of “swap agreement” originally was intended to provide sufficient flexibility to avoid the need to amend the definition as the nature and uses of swap transactions matured. To that end, the phrase “or any other similar agreement” was included in the definition. (The phrase “or any similar agreement” has been added to the definitions of “forward contract,” “commodity contract,” “repurchase agreement” and “securities contract” for the same reason.)

H.R. REP. NO. 109-31, Pt. 1, at 128 (2005), *reprinted in* COLLIER ON BANKRUPTCY, App. Pt. 10-403 (2006).⁸

Since the recent amendments, there have been no reported bankruptcy cases that have analyzed or applied the protections under section 546(g) of the Code and the expanded definition of “swap agreement” to a Chapter 5 avoidance action. However, certain commentators noted the significant expanded protection of such transactions, stating:

The expanded definitions--especially the definition of “swap agreement”--are now so broad that **nearly every derivative contract is subject to the Code’s protection.** Instead of protecting particular counterparties to particular transactions, **the Code now protects any counterparty to any derivatives contract. Entire markets have been insulated from the costs of a bankruptcy filing by a financial contract counterparty.** Equally important, the amendments limit judicial discretion to assess the economic substance of financial transactions, even those that resemble

⁸ As discussed below, the Forward Contracts meet the current definition of “swap agreement.” The Forward Contracts would have also satisfied the definition of “swap agreement” before BAPCPA.

ordinary loans or that retire a debtor's outstanding debt or equity. The reforms of 2005 direct judges to apply a formalistic inquiry based on industry custom: a financial transaction is a "swap," "repurchase transaction," or other protected transaction if it is treated as such in the relevant financial market.

....

This shift in the Code effectively eliminates the concept of protected parties with respect to forwards and commodity contracts. **Any counterparty to these contracts is a "swap participant" and therefore protected.** This conclusion creates no tension with the various provisions--362(b)(6), 546(e), and 556--that permit only certain parties to forward and commodity contracts to enjoy the Code's safe harbors. These provisions protect particular parties, but they do not rule out safe harbors for other counterparties under other provisions of the Code. Indeed, courts have long recognized significant overlap in the Code's definitions, and **Congress was fully aware that the new definition of "swap agreement" would cover all forwards.** Indeed, legislative history indicates that Congress was aware that all of the Code's definitions overlap considerably.

Edward R. Morrison & Joerg Riegel, Financial Contracts and the New Bankruptcy Code: Insulating Markets from Bankrupt Debtors and Bankruptcy Judges, 13 Am. Bankr. Inst. L. Rev. 641, 652 (2005)(emphasis added).

A significant change under BAPCPA to the definition of "swap agreement" was the clarification that "a commodity index or a commodity swap, option, future, or **forward agreement**" falls within the definition of "swap agreement." 11 U.S.C. § 101(53B)(A)(i)(VII)(emphasis added). The inclusion of "forward agreement" in the expanded definition of "swap agreement" was intended to cover not only "forward contracts," as that term is defined in section 101(25) of the Code (see infra), but also any forward transaction. H.R. REP. NO. 109-31, Pt. 1, at 129 (2005), *reprinted in* COLLIER ON BANKRUPTCY, App. Pt. 10-405 (2006) ("The use of the term 'forward' in the definition of 'swap agreement' is not intended to refer only to transactions that fall within

the definition of ‘forward contract.’ Instead, a ‘forward’ transaction could be a ‘swap agreement’ even if not a ‘forward contract.’”).⁹ Thus, even an undocumented forward transaction constitutes a “swap agreement.”

i. The Forward Contracts At Issue Are “Forward Agreements” And “Swap Agreements” As Those Terms Are Defined Under The Code And Applicable Law.

Under section 101(25), “forward contract” is defined, to include, in pertinent part:

(A) a contract (other than a commodity contract) for the purchase, sale, or transfer of a commodity, as defined in section 761(8) of this title, or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade, or product or byproduct thereof, with a maturity date more than two days after the date the contract is entered into, including, but not limited to, a repurchase transaction, reverse repurchase transaction, consignment, lease, swap, hedge transaction, deposit, loan, option, allocated transaction, unallocated transaction, or any other similar agreement;

(B) any combination of agreements or transactions referred to in subparagraphs (A) and (C);

(C) any option to enter into an agreement or transaction referred to in subparagraph (A) or (B); [or]

(D) a master agreement that provides for an agreement or transaction referred to in subparagraph (A), (B), or (C), together with all supplements to any such master agreement, without regard to whether such master agreement provides for an agreement or transaction that is not a forward contract under this paragraph, except that such master agreement shall be considered to be a forward contract under this paragraph only with respect to each agreement or transaction under such master agreement that is referred to in subparagraph (A), (B), or (C) . . .

11 U.S.C. § 101(25). (A copy of the full text of section 101(25) showing the blacklined changes to this section under BAPCPA is attached hereto as Exhibit D.) In explaining

the “forward contracts” to be protected under the Code, the legislative history to the 1990

Amendments states:

The primary purpose of a forward contract is to hedge against possible fluctuations in the price of a commodity. This purpose is

⁹ The Forward Contracts would qualify as “swap agreements” under the former definition of “swap agreement” as well.

financial and risk-shifting in nature, as opposed to the primary purpose of an ordinary commodity contract, which is to arrange for the purchase and sale of the commodity. If the price of a commodity – such as crude oil or soy beans – rises or falls on some future date, the buyer or seller can minimize the risk involved through the use of forward contracts to offset the fluctuation in price from the date of the agreement to the actual date of transfer or delivery.

H.R. REP. NO. 101-484, at 4 (1990), *reprinted in* 1990 U.S.C.C.A.N. 223, 226.

In the instant case, the Forward Contracts meet the Code definition of “forward contract.” First, in applying this definition of “forward contract,” courts have deemed natural gas to be a commodity under this definition. See, e.g., BCP Liquidating LLC v. Bridgeline Gas Mktg., LLC (In re Borden Chemicals & Plastics Operating L.P.), 336 B.R. at 218 (“This Court believes that, at this point in time, it can hardly be questioned that natural gas is a commodity under the Code.”); In re Mirant, 310 B.R. 548, 565 (Bankr. N.D. Tex. 2004)(“natural gas is a commodity”).

Additionally, since the Forward Contracts provided for delivery of natural gas at a fixed price during a future Delivery Period (as defined in the Base Contract), the Forward Contracts have a maturity date beyond two days after the date of the contract. BCP Liquidating LLC v. Bridgeline Gas Mktg., LLC (In re Borden Chemicals & Plastics Operating L.P.), 336 B.R. at 223 (contract met definition of forward contract where natural gas delivered more than two days after contract date).

Specifically, section 1.2 of the Base Contract provides for gas and purchase transactions for a certain “Delivery Period” to be effectuated by an EDI (electronic data interchange, as specifically defined in the Base Contract) transmission or telephone conversation, which may then be confirmed by a written confirmation. This oral or EDI transmission will provide for the purchase price and “Delivery Period” for the natural gas

by the Debtor to Defendant. The Debtor then delivers the natural gas in the designated “Delivery Period” at the agreed upon price and invoices Defendant for such natural gas in the month after delivery.

For example, the email dated August 12, 2005, attached to the Proof of Claim, effectuated and confirmed the sale of natural gas from the Debtor to Defendant for the period of November 2005 through March 2006 at a capped price of \$6.60 per dekatherm. The emails dated April 2, 2004 and February 25, 2005, attached hereto as Exhibits B-2 and B-3, effectuated and confirmed the sale of natural gas, respectively, for the period of April, 2004 through March, 2005 at a capped price of \$5.70 per dekatherm, plus basis, and for the period of April, 2005 through October, 2005, at a fixed price of \$5.75 per dekatherm, plus basis. In this manner, the Debtor would effectuate a transaction with Defendant by email setting forth the natural gas price and the future “Delivery Period.” The Delivery Period set forth in these emails would be for multiple future months. Accordingly, the Forward Contracts between the Defendant and the Debtor provided for a maturity date well beyond the minimum two-day maturity period required under the Code definition of “forward contract.”

Finally, the Base Contract itself, which is a standard form contract produced by the NAESB, provides that, “the parties agree that the transactions hereunder constitute a ‘forward contract’ within the meaning of the United States Bankruptcy Code and that Buyer and Seller are each ‘forward contract merchants’ within the meaning of the United States Bankruptcy Code.” See Base Contract, ¶ 10.5. Accordingly, the parties agreed at the time of entering into the Base Contract that the Forward Contracts were “forward contracts.”

Therefore, by their plain terms, the Forward Contracts between Defendant and the Debtor meet the Code definition of “forward contracts.” However, even if there was any question of whether the Forward Contracts meet the definition of “forward contract” under section 101(25) of the Code, the Forward Contracts clearly involve forward transactions, i.e., the sale and delivery of natural gas at a fixed price during future delivery periods, such that the Forward Contracts constitute “forward agreements” as that term is used in definition of “swap agreement.” 11 U.S.C. 101 (53B)(A)(i)(VII); H.R. REP. NO. 109-31, Pt. 1, at 129 (2005), *reprinted in* COLLIER ON BANKRUPTCY, App. Pt. 10-405 (2006) (“The use of the term ‘forward’ in the definition of ‘swap agreement’ is not intended to refer only to transactions that fall within the definition of ‘forward contract.’ Instead, a ‘forward’ transaction could be a ‘swap agreement’ even if not a ‘forward contract.’”).

Accordingly, as a matter of law, the Forward Contracts between the Debtor and Defendant are commodity forward transactions and forward agreements and therefore meet the definition of “swap agreements” under section 101(53B)(A)(i)(VII) of the Code.

ii. Defendant Is A “Swap Participant” As That Term Is Used In Section 546(g) Of The Code.

One of the requirements under section 546(g) of the Code is that the transfers be made by or to a “swap participant.” The Code defines “swap participant” as “an entity that, at any time before the filing of the petition, has an outstanding swap agreement with the debtor.” 11 U.S.C. § 101(53C).

Since the Forward Contracts constitute prepetition “swap agreements,” it is indisputable that Defendant is a “swap participant” for purposes of the Code.

iii. Because The Transfers Were Prepetition Transfers Made To A Swap Participant Under Or In Connection With A Swap Agreement, Section 546(g) Prevents The Avoidance Of The Transfers As Constructive Fraudulent Transfers.

As noted above, Section 546(g) states, in relevant part, that, “notwithstanding section 548(a)(1)(B),” the trustee cannot avoid a transfer made to a swap participant under or in connection with any swap agreement, except under section 548(a)(1)(A). 11 U.S.C. § 546(g).

Because the Forward Contracts are “swap agreements,” Defendant is a “swap participant” and the Transfers the Trustee seeks to avoid were made under and in connection with such “swap agreements,” section 546(g) prevents the avoidance of the Transfers as constructive fraudulent transfers under section 548(a)(1)(B) of the Code. Therefore, the Court should dismiss in their entirety the Trustee’s section 548(a)(1)(B) claims in the Complaint.

B. The Transfers Are Not Subject To Avoidance And Recovery From Defendant As Actual Fraudulent Transfers Because Defendant Received Such Transfers For Value And In Good Faith, Such That Defendant May Retain Such Transfers Under Section 548(c) Of The Code.

In the Third Claim of his Complaint, the Trustee alleges that, “[p]ursuant to 11 U.S.C. §§ 548(c) and 550(a), Plaintiff may recover from the Defendant the full value of the Transfers as set forth herein for the benefit of the Debtor’s estate, except only to the extent the Defendant gave value to the Debtor in exchange for such Transfers [sic].” See Complaint, ¶ 26. In this paragraph, the Trustee appears to concede (as he must) Defendant’s good faith in entering into the Forward Contracts and further concedes that, under section 548(c) of the Code, Defendant can retain the Transfers (and the value of the Transfers) to the extent of the “value” that Defendant provided to the Debtor in exchange

for the Transfers.

Section 548(c) of the Code provides Defendant with a complete defense to the Trustee's claims seeking avoidance of the Transfers as actual fraudulent transfers under section 548(a)(1)(A) of the Code.¹⁰ Section 548(c) provides:

Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of this title, a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such a transferee or obligee gave value to the debtor in exchange for such a transfer or obligation.

11 U.S.C. § 548(c).

In another example of the Code's protection from avoidance of transactions in connection with a "swap agreement," section 548(d)(2)(D) provides a conclusive and irrebuttable presumption of "value" in exchange for transfers in connection with a "swap agreement." Section 548(d)(2)(D) provides:

(2) In this section –

(D) a swap participant or financial participant that receives a transfer in connection with a swap agreement takes for value to the extent of such transfer;

11 U.S.C. § 548(d)(2)(D). (The full text of section 548 of the Code showing the blacklined changes made to this section under BAPCPA is attached hereto as Exhibit E.) Section 548(d)(2)(D) confirms that value is given with respect to any transfers made by a debtor to a swap participant in connection with a "swap agreement." See Gredd v. Bear

¹⁰ To the extent section 548(c) of the Code is an affirmative defense, the Court can review this affirmative defense on this Motion since this affirmative defense appears on the face of the Trustee's Complaint (see Complaint, ¶26). Campbell v. Cathcart (In re Derivium Capital, LLC), 2006 Bankr. LEXIS 3592 (Bankr. D.S.C. Dec. 22, 2006) ("Notwithstanding the general rule that affirmative defenses should not be considered on a motion to dismiss, the Fourth Circuit allows defenses to be considered if they clearly appear on the face of the complaint.").

Stearns Securities Corp. (In re Manhattan Investment Fund Ltd.), 2007 Bankr. LEXIS 49, *35 (Bankr. S.D.N.Y. 2007) (citing to analogous provision, section 548(d)(2)(B)) (“There is no dispute that Bear Stearns took the transfers in question for value; however the relevant issue herein is whether or not Bear Stearns took in good faith.”); COLLIER ON BANKRUPTCY, ¶ 548.09[4] (15th ed. 2006) (in discussing similar language pertaining to master netting agreements, stating: “As a consequence, much like the effect of the other clauses of section 548(d)(2), section 548(d)(2)(C) [sic] essentially provides for a statutory presumption that value is given with respect to master netting agreements with respect to overall value across each of the connected financial contracts.”).

Congress’ intent to create a statutory presumption of “value” given in exchange for transfers in connection with a “swap agreement” is further demonstrated by the adoption of similar language dealing with master netting agreements, added as section 548(d)(2)(E) under BAPCPA. The legislative history for this new section 548(d)(2)(E) under BAPCPA describes that the purpose of the addition is:

to provide that transfers made under or in connection with a master netting agreement may not be avoided by a trustee except where such transfer is made with actual intent to hinder, delay or defraud and not taken in good faith. This amendment provides the same protections for a transfer made under, or in connection with, a master netting agreement as currently is provided for margin payments, settlement payments and other transfers received by commodity brokers, forward contract merchants, stockbrokers, financial institutions, securities clearing agencies, repo participants, and swap participants under sections 546 and 548(d), except to the extent the trustee could otherwise avoid such a transfer made under an individual contract covered by such master netting agreement.

H.R. Rep. No. 109-31, 109th Cong., 1st Sess. 132, footnote 11 (2005), *reprinted in* COLLIER ON BANKRUPTCY, ¶ 548.09[4] (15th ed. 2006).

Since the Transfers in the instant case were made to a “swap participant” in connection with “swap agreements,” Defendant provided “value” in exchange for such Transfers and is entitled to retain the full value of such Transfers under section 548(c) of the Code, to the extent Defendant received such Transfers in good faith.

As noted above, the Trustee references section 548(c) in his Complaint. In making this reference, the Trustee does not allege that Defendant received the Transfers in bad faith, nor is there any allegation in the Complaint that Defendant acted in bad faith. Accordingly, the failure of the Trustee to allege any lack of good faith on the part of Defendant in the Complaint, despite the reference to section 548(c), demonstrates there is no material issue of fact that Defendant received the Transfers in good faith.¹¹

Since there is no material issue of fact as to whether Defendant received the Transfers in good faith and gave “value” in exchange for the Transfers, section 548(c) of the Code prevents the Trustee from avoiding the Transfers as actual fraudulent transfers, and the Court should dismiss the Trustee’s claims under section 548(a)(1)(A).

IV. CONCLUSION

For the reasons stated above, the Court should grant the Motion, under Bankruptcy Rule 7012(b)(6), and dismiss the Trustee’s claims in the Complaint seeking to avoid and recover the Transfers as fraudulent transfers, under sections 548(a)(1)(A)

¹¹ To the extent the Court determines it must receive evidence on the Defendant’s “good faith” to determine completely the Defendant’s section 548(c) defense to actual fraudulent transfers, the Court should grant partial summary judgment under Rule 56(d) of the Federal Rules of Civil Procedure, made applicable by Bankruptcy Rule 7056(d), on the section 548(c) issue of “value.” See Fetla’s Trading Post, Inc. v. Granet (In re Fetla’s Trading Post, Inc.), 2006 Bankr. LEXIS 696 (Bankr. N.D. Ill. May 4, 2006) (“Fed. R. Civ. P. 56(d) provides for the situation when judgment is not rendered upon the whole matter, but only a portion thereof. The relief sought pursuant to Rule 56(d) is styled partial summary judgment. Partial summary judgment is available to dispose of one or more counts of a complaint in their entirety. Rule 56(d) provides a method whereby a court can narrow issues and facts for trial after denying in whole or in part a motion properly brought under Rule 56.”). The Defendant, of course, reserves all of its rights to dispute that the Debtor made the Transfers with actual fraudulent intent, as required by section 548(a)(1)(A).

and 548(a)(1)(B) of the Code. Alternatively, the Court should grant summary judgment in favor of Defendant as to the Trustee's claims in the Complaint seeking to avoid and recover the Transfers as fraudulent transfers, under both sections 548(a)(1)(A) and 548(a)(1)(B) of the Code. Finally, Defendant requests the Court to award it the costs and expenses, including attorneys' fees, it has incurred in defending against this adversary proceeding, and to grant Defendant such other and further relief the Court deems appropriate.

Respectfully submitted, this the 15th day of February, 2007.

McGUIREWOODS LLP

By: /s/ Robert A. Cox, Jr.
Thomas E. Cabaniss (NC Bar No. 25881)
Dion W. Hayes (not admitted in NC)
Robert A. Cox, Jr. (NC Bar No. 21998)
Bank of America Corporate Center
100 North Tryon Street, Suite 2900
Charlotte, North Carolina 28202
Telephone: (704) 373-4637

*Counsel to The Smithfield Packing
Company, Incorporated*

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION: (A) TO DISMISS TRUSTEE'S COMPLAINT FOR FAILURE TO STATE A CLAIM UNDER FEDERAL RULE OF BANKRUPTCY PROCEDURE 7012, OR, IN THE ALTERNATIVE, (B) FOR SUMMARY JUDGMENT UNDER FEDERAL RULE OF BANKRUPTCY PROCEDURE 7056 was sent to those parties receiving notice in the above-referenced proceeding through the Court's CM/ECF system and sent to the following parties by regular U.S. mail, this 15th day of February, 2007:

John A. Northen, Esq.
David M. Rooks, Esq.
Stephanie Osborne-Rodgers, Esq.
NORTHEN BLUE LLP
Post Office Box 2208
Chapel Hill, North Carolina 27515-2208

/s/ Robert A. Cox, Jr.
Robert A. Cox, Jr.

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EXHIBIT A

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA, Wilson Division

Name of Debtor
**NATIONAL GAS DISTRIBUTORS, LLC
fdba Paul Lawing Jr., LLC**

Case Number
06-00166

FILED

MAY 22 2006

PEGGY B. DEANS, CLERK
U.S. BANKRUPTCY COURT
EASTERN DISTRICT OF N.C.

Name of Creditor (The person or other entity to whom the debtor owes money or property):
THE SMITHFIELD PACKING COMPANY, INCORPORATED

- Check box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.
- Check box if you have never received any notices from the bankruptcy court in this case.
- Check box if the address differs from the address on the envelope sent to you by the court.

THIS SPACE IS FOR COURT USE ONLY

Name and Address where notices should be sent:
**c/o Robert A. Cox, Jr.
MCGUIREWOODS LLP
100 N. Tryon Street, Suite 2900
Charlotte, NC 28202-4011**

Telephone Number:

Account or other number by which creditor identifies debtor:

Check here if replaces this claim amends a previously filed claim, dated _____

1. Basis for Claim

- Goods sold
- Services performed
- Money loaned
- Personal injury/wrongful death
- Taxes
- Other _____

- Retiree benefits as defined in 11 U.S.C. §1114(a)
- Wages, salaries, and compensation (fill out below)
Your SS #: _____
Unpaid compensation for services performed from _____ to _____
(date) (date)

2. Date debt was incurred: December, 2005

3. If court judgment, date obtained:

4. Total Amount of Claim at Time Case Filed:

\$1,098,172.85 ** See attached pages

If all or part of your claim is secured or entitled to priority, also complete Item 5 or 6 below.

Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach itemized statement of all interest or additional charges.

5. Secured Claim.

Check this box if your claim is secured by collateral (including a right of setoff).

Brief Description of Collateral:

- Real Estate Motor Vehicle
- Other _____

Value of Collateral: \$ _____

Amount of arrearage and other charges at time case filed included in secured claim, if any: \$ _____

6. Unsecured Priority Claim.

- Check this box if you have an unsecured priority claim
Amount entitled to priority \$ _____
Specify the priority of the claim:
- Wages, salaries, or commissions (up to \$4,650),* earned within 90 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier - 11 U.S.C. §507(a)(3).
- Contributions to an employee benefit plan - 11 U.S.C. §507(a)(4).
- Up to \$ 2,100* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. §507(a)(6).
- Alimony, maintenance, or support owed to a spouse, former spouse, or child - 11 U.S.C. §507(a)(7).
- Taxes or penalties owed to governmental units - 11 U.S.C. §507(a)(8).
- Other - Specify applicable paragraph of 11 U.S.C. §507(a)(_____).

*Amounts are subject to adjustment on 4/1/04 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.

7. Credits: The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim.

THIS SPACE IS FOR COURT USE ONLY

8. Supporting Documents: Attach copies of supporting documents, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, mortgages, security agreements, and evidence of perfection of lien. **DO NOT SEND ORIGINAL DOCUMENTS.** If the documents are not available, explain. If the documents are voluminous, attach a summary.

9. Date-Stamped Copy: To receive an acknowledgement of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim.

Date **5/19/06** Sign and print the name and title, if any, of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any):

Robert A. Cox, Jr., attorney for The Smithfield Packing Co., Inc.

ATTACHMENT TO PROOF OF CLAIM

The Smithfield Packing Company, Incorporated. ("Smithfield") purchased natural gas from National Gas Distributors, LLC, the debtor herein ("NGD"), pursuant to a series of forward contracts, as that term is defined under section 101(25) of the Bankruptcy Code and used in section 53(B) of the Bankruptcy Code. The series of forward contracts between Smithfield and NGD were governed by the terms and conditions set forth in a certain "Base Contract for Sale and Purchase of Natural Gas," a copy of which is attached hereto. The last forward contract entered into between Smithfield and NGD provided for the sale of natural gas for the period of November 2005 through March 2006 at a capped price of \$6.60, as confirmed in that email dated August 12, 2005 from Paul Lawing to Bob Miller, a copy of which is attached hereto (the "Contract").

In December, 2005, NGD notified Smithfield that NGD could no longer sell Smithfield natural gas. As a result of NGD's failure to perform under the Contract, Smithfield was required to cover the loss of natural gas and purchase replacement natural gas from other providers. Based upon NGD's breach of the Contract in its failure to deliver natural gas, Smithfield is owed damages by NGD in the amount of \$1,098,172.85, which represents the damages to Smithfield in covering the loss and obtaining replacement natural gas for the period of December, 2005 through March, 2006.

Smithfield expressly reserves the right to amend or modify this Proof of Claim at any time for any reason, including without limitation, to add additional amounts due under the Contract for any interest, costs, and expenses to the extent permitted by applicable law. Smithfield also expressly reserves its rights against any and all third parties and/or individual guarantors with respect to the obligations set forth in this Proof of Claim. Smithfield further reserves its right to assert any other claims arising post-petition against NGD.

Base Contract for Sale and Purchase of Natural Gas

This Base Contract is entered into as of the following date: _____ The parties to this Base Contract are the following:

National Gas Distributors, LLC
 P.O. Box 58051, 1314D Rawford Road
 Fayetteville, NC 28305
 Duns Number: _____
 Contract Number: _____
 U.S. Federal Tax ID Number: 56-289079

and **Smithfield Foods Inc - Tar Heel** *BM*
 Highway 87 North
 Tar Heel, NC 28992
 Duns Number: 030985738
 Contract Number: _____
 U.S. Federal Tax ID Number: 94-0283930

Notices:
 National Gas Distributors, LLC
 Attn: Paul Lawing
 Phone: 910-484-9164 Fax: 910-484-9109

Smithfield Foods, Inc
 Attn: Bob Miller
 Phone: 757-357-8128 Fax: 757-357-8136

Confirmations:
 Attn: _____
 Phone: _____ Fax: _____

Attn: _____
 Phone: _____ Fax: _____

Invoices and Payments:
 National Gas Distributors, LLC
 Attn: Paul Lawing
 P.O. Box 58051
 Phone: 910-484-9164 Fax: 910-484-9109

Smithfield Foods Inc
 Attn: Bob Miller
 P.O. Box 9002, Smithfield VA 22331
 Phone: 757-357-8128 Fax: 757-357-8136

Wire Transfer or ACH Numbers (if applicable):
 BANK: Branch Bank & Trust - Fayetteville
 ABA: 053101181
 ACCT: 519469727
 Other Details: _____

BANK: _____
 ABA: _____
 ACCT: _____
 Other Details: _____

This Base Contract incorporates by reference for all purposes the General Terms and Conditions for Sale and Purchase of Natural Gas published by the North American Energy Standards Board. The parties hereby agree to the following provisions of said General Terms and Conditions. In the event the parties fail to check a box, the applicable default provision shall apply. **Select only one box from each section.**

<p>Section 1.2 Transaction Procedure</p> <p><input checked="" type="checkbox"/> Oral (default) <input type="checkbox"/> Written</p>	<p>Section 7.2 Payment Date</p> <p><input type="checkbox"/> 10th Day of Month following Month of delivery (default) <input checked="" type="checkbox"/> Net 10th Day of Month following Month of delivery</p>
<p>Section 2.5 Confirm Deadline</p> <p><input checked="" type="checkbox"/> 2 Business Days after receipt (default) <input type="checkbox"/> _____ Business Days after receipt</p>	<p>Section 7.2 Method of Payment</p> <p><input type="checkbox"/> Wire transfer (default) <input type="checkbox"/> Automated Clearinghouse Credit (ACH) <input checked="" type="checkbox"/> Check <i>BM</i></p>
<p>Section 2.6 Confirming Party</p> <p><input type="checkbox"/> Seller (default) <input checked="" type="checkbox"/> Buyer</p>	<p>Section 7.7 Netting</p> <p><input checked="" type="checkbox"/> Netting applies (default) <input type="checkbox"/> Netting does not apply</p>
<p>Section 3.2 Performance Obligation</p> <p><input checked="" type="checkbox"/> Cover Standard (default) <input type="checkbox"/> Spot Price Standard</p>	<p>Section 10.3.1 Early Termination Damages</p> <p><input checked="" type="checkbox"/> Early Termination Damages Apply (default) <input type="checkbox"/> Early Termination Damages Do Not Apply</p>
<p>Note: The following Spot Price Publication applies to both of the immediately preceding.</p> <p>Section 2.26 Spot Price Publication</p> <p><input checked="" type="checkbox"/> Gas Daily Midpoint (default) <input type="checkbox"/> _____</p>	
<p>Section 8 Taxes</p> <p><input checked="" type="checkbox"/> Buyer Pays At and After Delivery Point (default) <input type="checkbox"/> Seller Pays Before and At Delivery Point</p>	<p>Section 10.3.2 Other Agreement Setoffs</p> <p><input checked="" type="checkbox"/> Other Agreement Setoffs Apply (default) <input type="checkbox"/> Other Agreement Setoffs Do Not Apply</p>
<p>Section 14.5 Choice Of Law</p> <p style="text-align: center;">_____ <u>North Carolina</u> _____</p>	
<p>Section 14.10 Confidentiality</p> <p><input checked="" type="checkbox"/> Confidentiality applies (default) <input type="checkbox"/> Confidentiality does not apply</p>	
<p><input type="checkbox"/> Special Provisions Number of sheets attached: _____ <input type="checkbox"/> Addendum(s): _____</p>	

IN WITNESS WHEREOF, the parties hereto have executed this Base Contract in duplicate.

National Gas Distributors, LLC
 Party Name
 By Paul Lawing
 Name: Paul Lawing, Jr.
 Title: President

Smithfield Foods, Inc (Tar Heel location)
 Party Name
 By Bob Miller
 Name: Bob Miller
 Title: Energy Manager

General Terms and Conditions

Base Contract for Sale and Purchase of Natural Gas

SECTION 1. PURPOSE AND PROCEDURES

1.1. These General Terms and Conditions are intended to facilitate purchase and sale transactions of Gas on a Firm or Interruptible basis. "Buyer" refers to the party receiving Gas and "Seller" refers to the party delivering Gas. The entire agreement between the parties shall be the Contract as defined in Section 2.7.

The parties have selected either the "Oral Transaction Procedure" or the "Written Transaction Procedure" as indicated on the Base Contract.

Oral Transaction Procedure:

1.2. The parties will use the following Transaction Confirmation procedure. Any Gas purchase and sale transaction may be effectuated in an EDI transmission or telephone conversation with the offer and acceptance constituting the agreement of the parties. The parties shall be legally bound from the time they so agree to transaction terms and may each rely thereon. Any such transaction shall be considered a "writing" and to have been "signed". Notwithstanding the foregoing sentence, the parties agree that Confirming Party shall, and the other party may, confirm a telephonic transaction by sending the other party a Transaction Confirmation by facsimile, EDI or mutually agreeable electronic means within three Business Days of a transaction covered by this Section 1.2 (Oral Transaction Procedure), provided that the failure to send a Transaction Confirmation shall not invalidate the oral agreement of the parties. Confirming Party adopts its confirming letterhead, or the like, as its signature on any Transaction Confirmation as the identification and authentication of Confirming Party. If the Transaction Confirmation contains any provisions other than those relating to the commercial terms of the transaction (i.e., price, quantity, performance obligation, delivery point, period of delivery and/or transportation conditions), which modify or supplement the Base Contract or General Terms and Conditions of this Contract (e.g., arbitration or additional representations and warranties), such provisions shall not be deemed to be accepted pursuant to Section 1.3 but must be expressly agreed to by both parties; provided that the foregoing shall not invalidate any transaction agreed to by the parties.

Written Transaction Procedure:

1.2. The parties will use the following Transaction Confirmation procedure. Should the parties come to an agreement regarding a Gas purchase and sale transaction for a particular Delivery Period, the Confirming Party shall, and the other party may, record that agreement on a Transaction Confirmation and communicate such Transaction Confirmation by facsimile, EDI or mutually agreeable electronic means, to the other party by the close of the Business Day following the date of agreement. The parties acknowledge that their agreement will not be binding until the exchange of nonconflicting Transaction Confirmations or the passage of the Confirm Deadline without objection from the receiving party, as provided in Section 1.3.

1.3. If a sending party's Transaction Confirmation is materially different from the receiving party's understanding of the agreement referred to in Section 1.2, such receiving party shall notify the sending party via facsimile, EDI or mutually agreeable electronic means by the Confirm Deadline, unless such receiving party has previously sent a Transaction Confirmation to the sending party. The failure of the receiving party to so notify the sending party in writing by the Confirm Deadline constitutes the receiving party's agreement to the terms of the transaction described in the sending party's Transaction Confirmation. If there are any material differences between the parties' Transaction Confirmations governing the same transaction, then neither Transaction Confirmation shall be binding until, or unless such differences are resolved including the use of any evidence that clearly resolves the differences in the Transaction Confirmations. In the event of a conflict, among the terms of (i) a binding Transaction Confirmation pursuant to Section 1.2, (ii) the oral agreement of the parties which may be evidenced by a recorded conversation, where the parties have selected the Oral Transaction Procedure of the Base Contract, (iii) the Base Contract, and (iv) these General Terms and Conditions, the terms of the documents shall govern in the priority listed in this sentence.

1.4. The parties agree that each party may electronically record all telephone conversations with respect to this Contract between their respective employees, without any special or further notice to the other party. Each party shall obtain any necessary consent of its agents and employees to such recording. Where the parties have selected the Oral Transaction Procedure in Section 1.2 of the Base Contract, the parties agree not to contest the validity or enforceability of telephonic recordings entered into in accordance with the requirements of this Base Contract. However, nothing herein shall be construed as a waiver of any objection to the admissibility of such evidence.

SECTION 2. DEFINITIONS

The terms set forth below shall have the meaning ascribed to them below. Other terms are also defined elsewhere in the Contract and shall have the meanings ascribed to them herein.

2.1. "Alternative Damages" shall mean such damages, expressed in dollars or dollars per MMBtu, as the parties shall agree upon in the Transaction Confirmation, in the event either Seller or Buyer fails to perform a Firm obligation to deliver Gas in the case of Seller or to receive Gas in the case of Buyer.

2.2. "Base Contract" shall mean a contract executed by the parties that incorporates these General Terms and Conditions by reference; that specifies the agreed selections of provisions contained herein; and that sets forth other information required herein and any Special Provisions and addendum(s) as identified on page one.

2.3. "British thermal unit" or "Btu" shall mean the International BTU, which is also called the Btu (IT).

- 2.4. "Business Day" shall mean any day except Saturday, Sunday or Federal Reserve Bank holidays.
- 2.5. "Confirm Deadline" shall mean 5:00 p.m. in the receiving party's time zone on the second Business Day following the Day a Transaction Confirmation is received or, if applicable, on the Business Day agreed to by the parties in the Base Contract; provided, if the Transaction Confirmation is time stamped after 5:00 p.m. in the receiving party's time zone, it shall be deemed received at the opening of the next Business Day.
- 2.6. "Confirming Party" shall mean the party designated in the Base Contract to prepare and forward Transaction Confirmations to the other party.
- 2.7. "Contract" shall mean the legally binding relationship established by (i) the Base Contract, (ii) any and all binding Transaction Confirmations and (iii) where the parties have selected the Oral Transaction Procedure in Section 1.2 of the Base Contract, any and all transactions that the parties have entered into through an EDI transmission or by telephone, but that have not been confirmed in a binding Transaction Confirmation.
- 2.8. "Contract Price" shall mean the amount expressed in U.S. Dollars per MMBtu to be paid by Buyer to Seller for the purchase of Gas as agreed to by the parties in a transaction.
- 2.9. "Contract Quantity" shall mean the quantity of Gas to be delivered and taken as agreed to by the parties in a transaction.
- 2.10. "Cover Standard", as referred to in Section 3.2, shall mean that if there is an unexcused failure to take or deliver any quantity of Gas pursuant to this Contract, then the performing party shall use commercially reasonable efforts to (i) if Buyer is the performing party, obtain Gas, (or an alternate fuel if elected by Buyer and replacement Gas is not available); or (ii) if Seller is the performing party, sell Gas, in either case, at a price reasonable for the delivery or production area, as applicable, consistent with the amount of notice provided by the nonperforming party; the immediacy of the Buyer's Gas consumption needs or Seller's Gas sales requirements, as applicable; the quantities involved; and the anticipated length of failure by the nonperforming party.
- 2.11. "Credit Support Obligation(s)" shall mean any obligation(s) to provide or establish credit support for or on behalf of, a party to this Contract such as an irrevocable standby letter of credit, a margin agreement, a prepayment, a security interest in an asset, a performance bond, guaranty, or other good and sufficient security of a continuing nature.
- 2.12. "Day" shall mean a period of 24 consecutive hours, coextensive with a "day" as defined by the Receiving Transporter in a particular transaction.
- 2.13. "Delivery Period" shall be the period during which deliveries are to be made as agreed to by the parties in a transaction.
- 2.14. "Delivery Point(s)" shall mean such point(s) as are agreed to by the parties in a transaction.
- 2.15. "EDI" shall mean an electronic data interchange pursuant to an agreement entered into by the parties, specifically relating to the communication of Transaction Confirmations under this Contract.
- 2.16. "EFP" shall mean the purchase, sale or exchange of natural Gas as the "physical" side of an exchange for physical transaction involving gas futures contracts. EFP shall incorporate the meaning and remedies of "Firm", provided that a party's excuse for nonperformance of its obligations to deliver or receive Gas will be governed by the rules of the relevant futures exchange regulated under the Commodity Exchange Act.
- 2.17. "Firm" shall mean that either party may interrupt its performance without liability only to the extent that such performance is prevented for reasons of Force Majeure; provided, however, that during Force Majeure interruptions, the party invoking Force Majeure may be responsible for any Imbalance Charges as set forth in Section 4.3 related to its interruption after the nomination is made to the Transporter and until the change in deliveries and/or receipts is confirmed by the Transporter.
- 2.18. "Gas" shall mean any mixture of hydrocarbons and noncombustible gases in a gaseous state consisting primarily of methane.
- 2.19. "Imbalance Charges" shall mean any fees, penalties, costs or charges (in cash or in kind) assessed by a Transporter for failure to satisfy the Transporter's balance and/or nomination requirements.
- 2.20. "Interruptible" shall mean that either party may interrupt its performance at any time for any reason, whether or not caused by an event of Force Majeure, with no liability, except such interrupting party may be responsible for any Imbalance Charges as set forth in Section 4.3 related to its interruption after the nomination is made to the Transporter and until the change in deliveries and/or receipts is confirmed by Transporter.
- 2.21. "MMBtu" shall mean one million British thermal units, which is equivalent to one dekatherm.
- 2.22. "Month" shall mean the period beginning on the first Day of the calendar month and ending immediately prior to the commencement of the first Day of the next calendar month.
- 2.23. "Payment Date" shall mean a date, as indicated on the Base Contract, on or before which payment is due Seller for Gas received by Buyer in the previous Month.
- 2.24. "Receiving Transporter" shall mean the Transporter receiving Gas at a Delivery Point, or absent such receiving Transporter, the Transporter delivering Gas at a Delivery Point.
- 2.25. "Scheduled Gas" shall mean the quantity of Gas confirmed by Transporter(s) for movement, transportation or management.
- 2.26. "Spot Price" as referred to in Section 3.2 shall mean the price listed in the publication indicated on the Base Contract, under the listing applicable to the geographic location closest in proximity to the Delivery Point(s) for the relevant Day; provided, if there is no single price published for such location for such Day, but there is published a range of prices, then the Spot Price shall be the average

of such high and low prices. If no price or range of prices is published for such Day, then the Spot Price shall be the average of the following: (i) the price (determined as stated above) for the first Day for which a price or range of prices is published that next precedes the relevant Day; and (ii) the price (determined as stated above) for the first Day for which a price or range of prices is published that next follows the relevant Day.

2.27. "Transaction Confirmation" shall mean a document, similar to the form of Exhibit A, setting forth the terms of a transaction formed pursuant to Section 1 for a particular Delivery Period.

2.28. "Termination Option" shall mean the option of either party to terminate a transaction in the event that the other party fails to perform a Firm obligation to deliver Gas in the case of Seller or to receive Gas in the case of Buyer for a designated number of days during a period as specified on the applicable Transaction Confirmation.

2.29. "Transporter(s)" shall mean all Gas gathering or pipeline companies, or local distribution companies, acting in the capacity of a transporter, transporting Gas for Seller or Buyer upstream or downstream, respectively, of the Delivery Point pursuant to a particular transaction.

SECTION 3. PERFORMANCE OBLIGATION

3.1. Seller agrees to sell and deliver, and Buyer agrees to receive and purchase, the Contract Quantity for a particular transaction in accordance with the terms of the Contract. Sales and purchases will be on a Firm or Interruptible basis, as agreed to by the parties in a transaction.

The parties have selected either the "Cover Standard" or the "Spot Price Standard" as indicated on the Base Contract.

Cover Standard:

3.2. The sole and exclusive remedy of the parties in the event of a breach of a Firm obligation to deliver or receive Gas shall be recovery of the following: (i) in the event of a breach by Seller on any Day(s), payment by Seller to Buyer in an amount equal to the positive difference, if any, between the purchase price paid by Buyer utilizing the Cover Standard and the Contract Price, adjusted for commercially reasonable differences in transportation costs to or from the Delivery Point(s), multiplied by the difference between the Contract Quantity and the quantity actually delivered by Seller for such Day(s); or (ii) in the event of a breach by Buyer on any Day(s), payment by Buyer to Seller in the amount equal to the positive difference, if any, between the Contract Price and the price received by Seller utilizing the Cover Standard for the resale of such Gas, adjusted for commercially reasonable differences in transportation costs to or from the Delivery Point(s), multiplied by the difference between the Contract Quantity and the quantity actually taken by Buyer for such Day(s); or (iii) in the event that Buyer has used commercially reasonable efforts to replace the Gas or Seller has used commercially reasonable efforts to sell the Gas to a third party, and no such replacement or sale is available, then the sole and exclusive remedy of the performing party shall be any unfavorable difference between the Contract Price and the Spot Price, adjusted for such transportation to the applicable Delivery Point, multiplied by the difference between the Contract Quantity and the quantity actually delivered by Seller and received by Buyer for such Day(s). Imbalance Charges shall not be recovered under this Section 3.2, but Seller and/or Buyer shall be responsible for Imbalance Charges, if any, as provided in Section 4.3. The amount of such unfavorable difference shall be payable five Business Days after presentation of the performing party's invoice, which shall set forth the basis upon which such amount was calculated.

Spot Price Standard:

3.2. The sole and exclusive remedy of the parties in the event of a breach of a Firm obligation to deliver or receive Gas shall be recovery of the following: (i) in the event of a breach by Seller on any Day(s), payment by Seller to Buyer in an amount equal to the difference between the Contract Quantity and the actual quantity delivered by Seller and received by Buyer for such Day(s); multiplied by the positive difference, if any, obtained by subtracting the Contract Price from the Spot Price; or (ii) in the event of a breach by Buyer on any Day(s), payment by Buyer to Seller in an amount equal to the difference between the Contract Quantity and the actual quantity delivered by Seller and received by Buyer for such Day(s), multiplied by the positive difference, if any, obtained by subtracting the applicable Spot Price from the Contract Price. Imbalance Charges shall not be recovered under this Section 3.2, but Seller and/or Buyer shall be responsible for Imbalance Charges, if any, as provided in Section 4.3. The amount of such unfavorable difference shall be payable five Business Days after presentation of the performing party's invoice, which shall set forth the basis upon which such amount was calculated.

3.3. Notwithstanding Section 3.2, the parties may agree to Alternative Damages in a Transaction Confirmation executed in writing by both parties.

3.4. In addition to Sections 3.2 and 3.3, the parties may provide for a Termination Option in a Transaction Confirmation executed in writing by both parties. The Transaction Confirmation containing the Termination Option will designate the length of nonperformance triggering the Termination Option and the procedures for exercise thereof, how damages for nonperformance will be compensated, and how liquidation costs will be calculated.

SECTION 4. TRANSPORTATION, NOMINATIONS, AND IMBALANCES

4.1. Seller shall have the sole responsibility for transporting the Gas to the Delivery Point(s). Buyer shall have the sole responsibility for transporting the Gas from the Delivery Point(s).

4.2. The parties shall coordinate their nomination activities, giving sufficient time to meet the deadlines of the affected Transporter(s). Each party shall give the other party timely prior Notice, sufficient to meet the requirements of all Transporter(s) involved in the transaction, of the quantities of Gas to be delivered and purchased each Day. Should either party become aware that actual deliveries at the Delivery Point(s) are greater or lesser than the Scheduled Gas, such party shall promptly notify the other party.

4.3. The parties shall use commercially reasonable efforts to avoid imposition of any Imbalance Charges. If Buyer or Seller receives an invoice from a Transporter that includes Imbalance Charges, the parties shall determine the validity as well as the cause of such Imbalance Charges. If the Imbalance Charges were incurred as a result of Buyer's receipt of quantities of Gas greater than or less than the Scheduled Gas, then Buyer shall pay for such Imbalance Charges or reimburse Seller for such Imbalance Charges paid by Seller. If the Imbalance Charges were incurred as a result of Seller's delivery of quantities of Gas greater than or less than the Scheduled Gas, then Seller shall pay for such Imbalance Charges or reimburse Buyer for such Imbalance Charges paid by Buyer.

SECTION 5. QUALITY AND MEASUREMENT

All Gas delivered by Seller shall meet the pressure, quality and heat content requirements of the Receiving Transporter. The unit of quantity measurement for purposes of this Contract shall be one MMBtu dry. Measurement of Gas quantities hereunder shall be in accordance with the established procedures of the Receiving Transporter.

SECTION 6. TAXES

The parties have selected either "Buyer Pays At and After Delivery Point" or "Seller Pays Before and At Delivery Point" as indicated on the Base Contract.

Buyer Pays At and After Delivery Point:

Seller shall pay or cause to be paid all taxes, fees, levies, penalties, licenses or charges imposed by any government authority ("Taxes") on or with respect to the Gas prior to the Delivery Point(s). Buyer shall pay or cause to be paid all Taxes on or with respect to the Gas at the Delivery Point(s) and all Taxes after the Delivery Point(s). If a party is required to remit or pay Taxes that are the other party's responsibility hereunder, the party responsible for such Taxes shall promptly reimburse the other party for such Taxes. Any party entitled to an exemption from any such Taxes or charges shall furnish the other party any necessary documentation thereof.

Seller Pays Before and At Delivery Point:

Seller shall pay or cause to be paid all taxes, fees, levies, penalties, licenses or charges imposed by any government authority ("Taxes") on or with respect to the Gas prior to the Delivery Point(s) and all Taxes at the Delivery Point(s). Buyer shall pay or cause to be paid all Taxes on or with respect to the Gas after the Delivery Point(s). If a party is required to remit or pay Taxes that are the other party's responsibility hereunder, the party responsible for such Taxes shall promptly reimburse the other party for such Taxes. Any party entitled to an exemption from any such Taxes or charges shall furnish the other party any necessary documentation thereof.

SECTION 7. BILLING, PAYMENT, AND AUDIT

7.1. Seller shall invoice Buyer for Gas delivered and received in the preceding Month and for any other applicable charges, providing supporting documentation acceptable in industry practice to support the amount charged. If the actual quantity delivered is not known by the billing date, billing will be prepared based on the quantity of Scheduled Gas. The invoiced quantity will then be adjusted to the actual quantity on the following Month's billing or as soon thereafter as actual delivery information is available.

7.2. Buyer shall remit the amount due under Section 7.1 in the manner specified in the Base Contract, in immediately available funds, on or before the later of the Payment Date or 10 Days after receipt of the invoice by Buyer, provided that if the Payment Date is not a Business Day, payment is due on the next Business Day following that date. In the event any payments are due Buyer hereunder, payment to Buyer shall be made in accordance with this Section 7.2.

7.3. In the event payments become due pursuant to Sections 3.2 or 3.3, the performing party may submit an invoice to the nonperforming party for an accelerated payment setting forth the basis upon which the invoiced amount was calculated. Payment from the nonperforming party will be due five Business Days after receipt of invoice.

7.4. If the invoiced party, in good faith, disputes the amount of any such invoice or any part thereof, such invoiced party will pay such amount as it concedes to be correct; provided, however, if the invoiced party disputes the amount due, it must provide supporting documentation acceptable in industry practice to support the amount paid or disputed. In the event the parties are unable to resolve such dispute, either party may pursue any remedy available at law or in equity to enforce its rights pursuant to this Section.

7.5. If the invoiced party fails to remit the full amount payable when due, interest on the unpaid portion shall accrue from the date due until the date of payment at a rate equal to the lower of (i) the then-effective prime rate of interest published under "Money Rates" by The Wall Street Journal, plus two percent per annum; or (ii) the maximum applicable lawful interest rate.

7.6. A party shall have the right, at its own expense, upon reasonable Notice and at reasonable times, to examine and audit and to obtain copies of the relevant portion of the books, records, and telephone recordings of the other party only to the extent reasonably necessary to verify the accuracy of any statement, charge, payment, or computation made under the Contract. This right to examine, audit, and to obtain copies shall not be available with respect to proprietary information not directly relevant to transactions under this Contract. All invoices and billings shall be conclusively presumed final and accurate and all associated claims for under- or overpayments shall be deemed waived unless such invoices or billings are objected to in writing, with adequate explanation and/or documentation, within two years after the Month of Gas delivery. All retroactive adjustments under Section 7 shall be paid in full by the party owing payment within 30 Days of Notice and substantiation of such inaccuracy.

7.7. Unless the parties have elected on the Base Contract not to make this Section 7.7 applicable to this Contract, the parties shall net all undisputed amounts due and owing, and/or past due, arising under the Contract such that the party owing the greater amount shall make a single payment of the net amount to the other party in accordance with Section 7; provided that no payment required to be made pursuant to the terms of any Credit Support Obligation or pursuant to Section 7.3 shall be subject to netting under this Section. If the parties have executed a separate netting agreement, the terms and conditions therein shall prevail to the extent inconsistent herewith.

SECTION 8. TITLE, WARRANTY, AND INDEMNITY

8.1. Unless otherwise specifically agreed, title to the Gas shall pass from Seller to Buyer at the Delivery Point(s). Seller shall have responsibility for and assume any liability with respect to the Gas prior to its delivery to Buyer at the specified Delivery Point(s). Buyer shall have responsibility for and any liability with respect to said Gas after its delivery to Buyer at the Delivery Point(s).

8.2. Seller warrants that it will have the right to convey and will transfer good and merchantable title to all Gas sold hereunder and delivered by it to Buyer, free and clear of all liens, encumbrances, and claims. EXCEPT AS PROVIDED IN THIS SECTION 8.2 AND IN SECTION 14.8, ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR OF FITNESS FOR ANY PARTICULAR PURPOSE, ARE DISCLAIMED.

8.3. Seller agrees to indemnify Buyer and save it harmless from all losses, liabilities or claims including reasonable attorneys' fees and costs of court ("Claims"), from any and all persons, arising from or out of claims of title, personal injury or property damage from said Gas or other charges thereon which attach before title passes to Buyer. Buyer agrees to indemnify Seller and save it harmless from all Claims, from any and all persons, arising from or out of claims regarding payment, personal injury or property damage from said Gas or other charges thereon which attach after title passes to Buyer.

8.4. Notwithstanding the other provisions of this Section 8, as between Seller and Buyer, Seller will be liable for all Claims to the extent that such arise from the failure of Gas delivered by Seller to meet the quality requirements of Section 5.

SECTION 9. NOTICES

9.1. All Transaction Confirmations, Invoices, payments and other communications made pursuant to the Base Contract ("Notices") shall be made to the addressee specified in writing by the respective parties from time to time.

9.2. All Notices required hereunder may be sent by facsimile or mutually acceptable electronic means, a nationally recognized overnight courier service, first class mail or hand delivered.

9.3. Notice shall be given when received on a Business Day by the addressee. In the absence of proof of the actual receipt date, the following presumptions will apply. Notices sent by facsimile shall be deemed to have been received upon the sending party's receipt of its facsimile machine's confirmation of successful transmission. If the day on which such facsimile is received is not a Business Day or is after five p.m. on a Business Day, then such facsimile shall be deemed to have been received on the next following Business Day. Notice by overnight mail or courier shall be deemed to have been received on the next Business Day after it was sent or such earlier time as is confirmed by the receiving party. Notice via first class mail shall be considered delivered five Business Days after mailing.

SECTION 10. FINANCIAL RESPONSIBILITY

10.1. If either party ("X") has reasonable grounds for insecurity regarding the performance of any obligation under this Contract (whether or not then due) by the other party ("Y") (including, without limitation, the occurrence of a material change in the creditworthiness of Y), X may demand Adequate Assurance of Performance. "Adequate Assurance of Performance" shall mean sufficient security in the form, amount and for the term reasonably acceptable to X, including, but not limited to, a standby irrevocable letter of credit, a prepayment, a security interest in an asset or a performance bond or guaranty (including the issuer of any such security).

10.2. In the event (each an "Event of Default") either party (the "Defaulting Party") or its guarantor shall: (i) make an assignment or any general arrangement for the benefit of creditors; (ii) file a petition or otherwise commence, authorize, or acquiesce in the commencement of a proceeding or case under any bankruptcy or similar law for the protection of creditors or have such petition filed or proceeding commenced against it; (iii) otherwise become bankrupt or insolvent (however evidenced); (iv) be unable to pay its debts as they fall due; (v) have a receiver, provisional liquidator, conservator, custodian, trustee or other similar officer appointed with respect to it or substantially all of its assets; (vi) fail to perform any obligation to the other party with respect to any Credit Support Obligations relating to the Contract; (vii) fail to give Adequate Assurance of Performance under Section 10.1 within 48 hours but at least one Business Day of a written request by the other party; or (viii) not have paid any amount due the other party hereunder on or before the second Business Day following written Notice that such payment is due; then the other party (the "Non-Defaulting Party") shall have the right, at its sole election, to immediately withhold and/or suspend deliveries or payments upon Notice and/or to terminate and liquidate the transactions under the Contract, in the manner provided in Section 10.3, in addition to any and all other remedies available hereunder.

10.3. If an Event of Default has occurred and is continuing, the Non-Defaulting Party shall have the right, by Notice to the Defaulting Party, to designate a Day, no earlier than the Day such Notice is given and no later than 20 Days after such Notice is given, as an early termination date (the "Early Termination Date") for the liquidation and termination pursuant to Section 10.3.1 of all transactions under the Contract, each a "Terminated Transaction". On the Early Termination Date, all transactions will terminate, other than those transactions, if any, that may not be liquidated and terminated under applicable law or that are, in the reasonable opinion of the Non-Defaulting Party, commercially impracticable to liquidate and terminate ("Excluded Transactions"), which Excluded Transactions must be liquidated and terminated as soon thereafter as is reasonably practicable, and upon termination shall be a Terminated Transaction and be valued consistent with Section 10.3.1 below. With respect to each Excluded Transaction, its actual termination date shall be the Early Termination Date for purposes of Section 10.3.1.

The parties have selected either "Early Termination Damages Apply" or "Early Termination Damages Do Not Apply" as indicated on the Base Contract.

Early Termination Damages Apply:

10.3.1. As of the Early Termination Date, the Non-Defaulting Party shall determine, in good faith and in a commercially reasonable manner, (i) the amount owed (whether or not then due) by each party with respect to all Gas delivered and received between the parties under Terminated Transactions and Excluded Transactions on and before the Early Termination Date and all other applicable charges relating to such deliveries and receipts (including without limitation any amounts owed under Section 3.2), for which payment has not yet been made by the party that owes such payment under this Contract and (ii) the Market Value, as defined below, of each Terminated Transaction. The Non-Defaulting Party shall (x) liquidate and accelerate each Terminated Transaction at its Market Value, so that each amount equal to the difference between such Market Value and the Contract Value, as defined below, of such Terminated Transaction(s) shall be due to the Buyer under the Terminated Transaction(s) if such Market Value exceeds the Contract Value and to the Seller if the opposite is the case; and (y) where appropriate, discount each amount then due under clause (x) above to present value in a commercially reasonable manner as of the Early Termination Date (to take account of the period between the date of liquidation and the date on which such amount would have otherwise been due pursuant to the relevant Terminated Transactions).

For purposes of this Section 10.3.1, "Contract Value" means the amount of Gas remaining to be delivered or purchased under a transaction multiplied by the Contract Price, and "Market Value" means the amount of Gas remaining to be delivered or purchased under a transaction multiplied by the market price for a similar transaction at the Delivery Point determined by the Non-Defaulting Party in a commercially reasonable manner. To ascertain the Market Value, the Non-Defaulting Party may consider, among other valuations, any or all of the settlement prices of NYMEX Gas futures contracts, quotations from leading dealers in energy swap contracts or physical gas trading markets, similar sales or purchases and any other bona fide third-party offers, all adjusted for the length of the term and differences in transportation costs. A party shall not be required to enter into a replacement transaction(s) in order to determine the Market Value. Any extension(s) of the term of a transaction to which parties are not bound as of the Early Termination Date (including, but not limited to "evergreen provisions") shall not be considered in determining Contract Values and Market Values. For the avoidance of doubt, any option pursuant to which one party has the right to extend the term of a transaction shall be considered in determining Contract Values and Market Values. The rate of interest used in calculating net present value shall be determined by the Non-Defaulting Party in a commercially reasonable manner.

Early Termination Damages Do Not Apply:

10.3.1. As of the Early Termination Date, the Non-Defaulting Party shall determine, in good faith and in a commercially reasonable manner, the amount owed (whether or not then due) by each party with respect to all Gas delivered and received between the parties under Terminated Transactions and Excluded Transactions on and before the Early Termination Date and all other applicable charges relating to such deliveries and receipts (including without limitation any amounts owed under Section 3.2), for which payment has not yet been made by the party that owes such payment under this Contract.

The parties have selected either "Other Agreement Setoffs Apply" or "Other Agreement Setoffs Do Not Apply" as indicated on the Base Contract.

Other Agreement Setoffs Apply:

10.3.2. The Non-Defaulting Party shall net or aggregate, as appropriate, any and all amounts owing between the parties under Section 10.3.1, so that all such amounts are netted or aggregated to a single liquidated amount payable by one party to the other (the "Net Settlement Amount"). At its sole option and without prior Notice to the Defaulting Party, the Non-Defaulting Party may setoff (i) any Net Settlement Amount owed to the Non-Defaulting Party against any margin or other collateral held by it in connection with any Credit Support Obligation relating to the Contract; or (ii) any Net Settlement Amount payable to the Defaulting Party against any amount(s) payable by the Defaulting Party to the Non-Defaulting Party under any other agreement or arrangement between the parties.

Other Agreement Setoffs Do Not Apply:

10.3.2. The Non-Defaulting Party shall net or aggregate, as appropriate, any and all amounts owing between the parties under Section 10.3.1, so that all such amounts are netted or aggregated to a single liquidated amount payable by one party to the other (the "Net Settlement Amount"). At its sole option and without prior Notice to the Defaulting Party, the Non-Defaulting Party may setoff any Net Settlement Amount owed to the Non-Defaulting Party against any margin or other collateral held by it in connection with any Credit Support Obligation relating to the Contract.

10.3.3. If any obligation that is to be included in any netting, aggregation or setoff pursuant to Section 10.3.2 is unascertained, the Non-Defaulting Party may in good faith estimate that obligation and net, aggregate or setoff, as applicable, in respect of the estimate, subject to the Non-Defaulting Party accounting to the Defaulting Party when the obligation is ascertained. Any amount not then due which is included in any netting, aggregation or setoff pursuant to Section 10.3.2 shall be discounted to net present value in a commercially reasonable manner determined by the Non-Defaulting Party.

10.4. As soon as practicable after a liquidation, Notice shall be given by the Non-Defaulting Party to the Defaulting Party of the Net Settlement Amount, and whether the Net Settlement Amount is due to or due from the Non-Defaulting Party. The Notice shall include a written statement explaining in reasonable detail the calculation of such amount, provided that failure to give such Notice shall not affect the validity or enforceability of the liquidation or give rise to any claim by the Defaulting Party against the Non-Defaulting Party. The Net Settlement Amount shall be paid by the close of business on the second Business Day following such Notice, which date shall not be earlier than the Early Termination Date. Interest on any unpaid portion of the Net Settlement Amount shall accrue from the date due until the

date of payment at a rate equal to the lower of (i) the then-effective prime rate of interest published under "Money Rates" by The Wall Street Journal, plus two percent per annum; or (ii) the maximum applicable lawful interest rate.

10.5. The parties agree that the transactions hereunder constitute a "forward contract" within the meaning of the United States Bankruptcy Code and that Buyer and Seller are each "forward contract merchants" within the meaning of the United States Bankruptcy Code.

10.6. The Non-Defaulting Party's remedies under this Section 10 are the sole and exclusive remedies of the Non-Defaulting Party with respect to the occurrence of any Early Termination Date. Each party reserves to itself all other rights, setoffs, counterclaims and other defenses that it is or may be entitled to arising from the Contract.

10.7. With respect to this Section 10, if the parties have executed a separate netting agreement with close-out netting provisions, the terms and conditions therein shall prevail to the extent inconsistent herewith.

SECTION 11. FORCE MAJEURE

11.1. Except with regard to a party's obligation to make payment(s) due under Section 7, Section 10.4, and Imbalance Charges under Section 4, neither party shall be liable to the other for failure to perform a Firm obligation, to the extent such failure was caused by Force Majeure. The term "Force Majeure" as employed herein means any cause not reasonably within the control of the party claiming suspension, as further defined in Section 11.2.

11.2. Force Majeure shall include, but not be limited to, the following: (i) physical events such as acts of God, landslides, lightning, earthquakes, fires, storms or storm warnings, such as hurricanes, which result in evacuation of the affected area; floods, washouts, explosions, breakage or accident or necessity of repairs to machinery or equipment or lines of pipe; (ii) weather related events affecting an entire geographic region, such as low temperatures which cause freezing or failure of wells or lines of pipe; (iii) interruption and/or curtailment of Firm transportation and/or storage by transporters; (iv) acts of others such as strikes, lockouts or other industrial disturbances, riots, sabotage, insurrections or wars; and (v) governmental actions such as necessity for compliance with any court order, law, statute, ordinance, regulation, or policy having the effect of law promulgated by a governmental authority having jurisdiction. Seller and Buyer shall make reasonable efforts to avoid the adverse impacts of a Force Majeure and to resolve the event or occurrence once it has occurred in order to resume performance.

11.3. Neither party shall be entitled to the benefit of the provisions of Force Majeure to the extent performance is affected by any or all of the following circumstances: (i) the curtailment of interruptible or secondary Firm transportation unless primary in-path Firm transportation is also curtailed; (ii) the party claiming excuse failed to remedy the condition and to resume the performance of such covenants or obligations with reasonable dispatch; or (iii) economic hardship, to include, without limitation, Seller's ability to sell Gas at a higher or more advantageous price than the Contract Price, Buyer's ability to purchase Gas at a lower or more advantageous price than the Contract Price, or a regulatory agency disallowing, in whole or in part, the pass-through of costs resulting from this Agreement; (iv) the loss of Buyer's market(s) or Buyer's inability to use or resell Gas purchased hereunder, except, in either case, as provided in Section 11.2; or (v) the loss of failure of Seller's gas supply or depletion of reserves, except, in either case, as provided in Section 11.2. The party claiming Force Majeure shall not be excused from its responsibility for Imbalance Charges.

11.4. Notwithstanding anything to the contrary herein, the parties agree that the settlement of strikes, lockouts or other industrial disturbances shall be within the sole discretion of the party experiencing such disturbance.

11.5. The party whose performance is prevented by Force Majeure must provide Notice to the other party. Initial Notice may be given orally; however, written Notice with reasonably full particulars of the event or occurrence is required as soon as reasonably possible. Upon providing written Notice of Force Majeure to the other party, the affected party will be relieved of its obligation, from the onset of the Force Majeure event, to make or accept delivery of Gas, as applicable, to the extent and for the duration of Force Majeure, and neither party shall be deemed to have failed in such obligations to the other during such occurrence or event.

11.6. Notwithstanding Sections 11.2 and 11.3, the parties may agree to alternative Force Majeure provisions in a Transaction Confirmation executed in writing by both parties.

SECTION 12. TERM

This Contract may be terminated on 30 Day's written Notice, but shall remain in effect until the expiration of the latest Delivery Period of any transaction(s). The rights of either party pursuant to Section 7.6 and Section 10, the obligations to make payment hereunder, and the obligation of either party to indemnify the other, pursuant hereto shall survive the termination of the Base Contract or any transaction.

SECTION 13. LIMITATIONS

FOR BREACH OF ANY PROVISION FOR WHICH AN EXPRESS REMEDY OR MEASURE OF DAMAGES IS PROVIDED, SUCH EXPRESS REMEDY OR MEASURE OF DAMAGES SHALL BE THE SOLE AND EXCLUSIVE REMEDY. A PARTY'S LIABILITY HEREUNDER SHALL BE LIMITED AS SET FORTH IN SUCH PROVISION, AND ALL OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED. IF NO REMEDY OR MEASURE OF DAMAGES IS EXPRESSLY PROVIDED HEREIN OR IN A TRANSACTION, A PARTY'S LIABILITY SHALL BE LIMITED TO DIRECT ACTUAL DAMAGES ONLY. SUCH DIRECT ACTUAL DAMAGES SHALL BE THE SOLE AND EXCLUSIVE REMEDY, AND ALL OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED. UNLESS EXPRESSLY HEREIN PROVIDED, NEITHER PARTY SHALL BE LIABLE FOR CONSEQUENTIAL, INCIDENTAL, PUNITIVE, EXEMPLARY OR INDIRECT DAMAGES, LOST PROFITS OR OTHER BUSINESS INTERRUPTION DAMAGES, BY STATUTE, IN TORT OR CONTRACT, UNDER ANY INDEMNITY PROVISION OR OTHERWISE. IT IS THE INTENT OF THE PARTIES THAT THE LIMITATIONS HEREIN IMPOSED ON REMEDIES AND THE MEASURE OF DAMAGES BE WITHOUT REGARD TO THE CAUSE OR CAUSES RELATED THERETO, INCLUDING THE NEGLIGENCE OF ANY PARTY, WHETHER SUCH NEGLIGENCE BE SOLE, JOINT OR CONCURRENT, OR ACTIVE OR PASSIVE.

TO THE EXTENT ANY DAMAGES REQUIRED TO BE PAID HEREUNDER ARE LIQUIDATED, THE PARTIES ACKNOWLEDGE THAT THE DAMAGES ARE DIFFICULT OR IMPOSSIBLE TO DETERMINE, OR OTHERWISE OBTAINING AN ADEQUATE REMEDY IS INCONVENIENT AND THE DAMAGES CALCULATED HEREUNDER CONSTITUTE A REASONABLE APPROXIMATION OF THE HARM OR LOSS.

SECTION 14. MISCELLANEOUS

14.1. This Contract shall be binding upon and inure to the benefit of the successors, assigns, personal representatives, and heirs of the respective parties hereto, and the covenants, conditions, rights and obligations of this Contract shall run for the full term of this Contract. No assignment of this Contract, in whole or in part, will be made without the prior written consent of the non-assigning party (and shall not relieve the assigning party from liability hereunder), which consent will not be unreasonably withheld or delayed; provided, either party may (i) transfer, sell, pledge, encumber, or assign this Contract or the accounts, revenues, or proceeds hereof in connection with any financing or other financial arrangements, or (ii) transfer its interest to any parent or affiliate by assignment, merger or otherwise without the prior approval of the other party. Upon any such assignment, transfer and assumption, the transferor shall remain principally liable for and shall not be relieved of or discharged from any obligations hereunder.

14.2. If any provision in this Contract is determined to be invalid, void or unenforceable by any court having jurisdiction, such determination shall not invalidate, void, or make unenforceable any other provision, agreement or covenant of this Contract.

14.3. No waiver of any breach of this Contract shall be held to be a waiver of any other or subsequent breach.

14.4. This Contract sets forth all understandings between the parties respecting each transaction subject hereto, and any prior contracts, understandings and representations, whether oral or written, relating to such transactions are merged into and superseded by this Contract and any effective transaction(s). This Contract may be amended only by a writing executed by both parties.

14.5. The interpretation and performance of this Contract shall be governed by the laws of the jurisdiction as indicated on the Base Contract, excluding, however, any conflict of laws rule which would apply the law of another jurisdiction.

14.6. This Contract and all provisions herein will be subject to all applicable and valid statutes, rules, orders and regulations of any governmental authority having jurisdiction over the parties, their facilities, or Gas supply, this Contract or transaction or any provisions thereof.

14.7. There is no third party beneficiary to this Contract.

14.8. Each party to this Contract represents and warrants that it has full and complete authority to enter into and perform this Contract. Each person who executes this Contract on behalf of either party represents and warrants that it has full and complete authority to do so and that such party will be bound thereby.

14.9. The headings and subheadings contained in this Contract are used solely for convenience and do not constitute a part of this Contract between the parties and shall not be used to construe or interpret the provisions of this Contract.

14.10. Unless the parties have elected on the Base Contract not to make this Section 14.10 applicable to this Contract, neither party shall disclose directly or indirectly without the prior written consent of the other party the terms of any transaction to a third party (other than the employees, lenders, royalty owners, counsel, accountants and other agents of the party or prospective purchasers of all or substantially all of a party's assets or of any rights under this Contract, provided such persons shall have agreed to keep such terms confidential) except (i) in order to comply with any applicable law, order, regulation or exchange rule, (ii) to the extent necessary for the enforcement of this Contract, (iii) to the extent necessary to implement any transaction, or (iv) to the extent such information is delivered to such third party for the sole purpose of calculating a published index. Each party shall notify the other party of any proceeding of which it is aware which may result in disclosure of the terms of any transaction (other than as permitted hereunder) and use reasonable efforts to prevent or limit the disclosure. The existence of this Contract is not subject to this confidentiality obligation. Subject to Section 13, the parties shall be entitled to all remedies available at law or in equity to enforce, or seek relief in connection with this confidentiality obligation. The terms of any transaction hereunder shall be kept confidential by the parties hereto for one year from the expiration of the transaction.

In the event that disclosure is required by a governmental body or applicable law, the party subject to such requirement may disclose the material terms of this Contract to the extent so required, but shall promptly notify the other party, prior to disclosure, and shall cooperate (consistent with the disclosing party's legal obligations) with the other party's efforts to obtain protective orders or similar restraints with respect to such disclosure at the expense of the other party.

14.11. The parties may agree to dispute resolution procedures in Special Provisions attached to the Base Contract or in a Transaction Confirmation executed in writing by both parties.

DISCLAIMER: The purposes of this Contract are to facilitate trade, avoid misunderstandings and make more definite the terms of contracts of purchase and sale of natural gas. Further, NAEBS does not mandate the use of this Contract by any party. NAEBS DISCLAIMS AND EXCLUDES, AND ANY USER OF THIS CONTRACT ACKNOWLEDGES AND AGREES TO NAEBS'S DISCLAIMER OF, ANY AND ALL WARRANTIES, CONDITIONS OR REPRESENTATIONS, EXPRESS OR IMPLIED, ORAL OR WRITTEN, WITH RESPECT TO THIS CONTRACT OR ANY PART THEREOF, INCLUDING ANY AND ALL IMPLIED WARRANTIES OR CONDITIONS OF TITLE, NON-INFRINGEMENT, MERCHANTABILITY, OR FITNESS OR SUITABILITY FOR ANY PARTICULAR PURPOSE (WHETHER OR NOT NAEBS KNOWS, HAS REASON TO KNOW, HAS BEEN ADVISED, OR IS OTHERWISE IN FACT AWARE OF ANY SUCH PURPOSE), WHETHER ALLEGED TO ARISE BY LAW, BY REASON OF CUSTOM OR USAGE IN THE TRADE, OR BY COURSE OF DEALING. EACH USER OF THIS CONTRACT ALSO AGREES THAT UNDER NO CIRCUMSTANCES WILL NAEBS BE LIABLE FOR ANY DIRECT, SPECIAL, INCIDENTAL, EXEMPLARY, PUNITIVE OR CONSEQUENTIAL DAMAGES ARISING OUT OF ANY USE OF THIS CONTRACT.

**TRANSACTION CONFIRMATION
FOR IMMEDIATE DELIVERY**

EXHIBIT A

Letterhead/Logo	Date: _____ Transaction Confirmation #: _____	
This Transaction Confirmation is subject to the Base Contract between Seller and Buyer dated _____. The terms of this Transaction Confirmation are binding unless disputed in writing within 2 Business Days of receipt unless otherwise specified in the Base Contract.		
SELLER: National Gas Distributors P. O. Box 58051, 1314 D Rector Road Fayetteville, NC 28305 Attn: Paul Lewis Phone: 910-484-9184 Fax: 910-484-9109 Base Contract No. _____ Transporter: _____ Transporter Contract Number: _____	BUYER: _____ _____ Attn: _____ Phone: _____ Fax: _____ Base Contract No. _____ Transporter: _____ Transporter Contract Number: _____	
Contract Price: \$ _____ /MMBtu or _____		
Delivery Period: Begin: _____ End: _____		
Performance Obligation and Contract Quantity: (Select One)		
Firm (Fixed Quantity): _____ MMBtus/day <input type="checkbox"/> EFP	Firm (Variable Quantity): _____ MMBtus/day Minimum _____ MMBtus/day Maximum subject to Section 4.2. At election of <input type="checkbox"/> Buyer or <input type="checkbox"/> Seller	Interruptible: Up to _____ MMBtus/day
Delivery Point(s): _____ (If a pooling point is used, list a specific geographic and pipeline location):		
Special Conditions:		
Seller: National Gas Distributors, LLC By: _____ Title: President Date: _____	Buyer: _____ By: _____ Title: _____ Date: _____	

Miller, Bob

From: HPCBBALL@aol.com
Sent: Friday, August 12, 2005 2:07 PM
To: bobmiller@smithfieldfoods.com
Subject: Writter

Bob,
To confirm our recent telephone conversation - this is to confirm a \$6.60 cap for all volumes for all the NC plants.

Thanks!

Paul Lawing, Jr.
910-484-9164 Office
910-484-9109 Fax
910-988-2320 Cell

Through march '06

8/12/2005

EXHIBIT B

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
WILSON DIVISION**

In re:))		
NATIONAL GAS DISTRIBUTORS, LLC,))		Case No. 06-00166-8-ATS
Debtor.))		Chapter 11
<hr/>		
RICHARD M. HUTSON, II, TRUSTEE FOR) NATIONAL AS DISTRIBUTORS, LLC,) f/k/a Paul Lawing, Jr., LLC,))		Adversary Proc. No. 06-00267-8-ATS
Plaintiff,))		
v.))		
THE SMITHFIELD PACKING COMPANY,) INCORPORATED,))		
Defendant.))		
<hr/>		

AUTHENTICATION DECLARATION OF ROBERT E. MILLER

Robert E. Miller, pursuant to 28 U.S.C. § 1746, in support of the Motion (the “Motion”) of The Smithfield Packing Company, Incorporated: (A) To Dismiss The Trustee’s Complaint For Failure To State A Claim Under Federal Rule Of Bankruptcy Procedure 7012, or, in The Alternative, (B) For Summary Judgment Under Federal Rule Of Bankruptcy Procedure 7056, hereby declares:

1. I am Energy Manager for Smithfield Foods, Inc. In that capacity, I have the corporate authority to contract on behalf of The Smithfield Packing Company, Incorporated and Stadler’s Country Hams, Inc., n/k/a The Smithfield Packing Company, Incorporated (together, “Smithfield”), wholly owned subsidiaries of Smithfield Foods, Inc., for the purchase of natural gas by these entities. I have personal knowledge of the

matters set forth in this Declaration and could competently testify thereto if called upon do to so.

2. I submit this Declaration in support of the Motion to authenticate a certain Base Contract and certain email exchanges by and between Smithfield and National Gas Distributors, LLC (“NGD”) for the sale of natural gas by NGD to Smithfield’s facilities located in Kinston, North Carolina; Wilson, North Carolina; Elon, North Carolina; and Tar Heel, North Carolina (together, the “Facilities”).

3. Smithfield purchased natural gas from NGD for the Facilities pursuant to a series of forward contracts. The series of forward contracts between Smithfield and NGD were governed by the terms and conditions set forth in that certain Base Contract for Sale and Purchase of Natural Gas (the “Base Contract”). An authentic, true, and correct copy of the Base Contract is attached hereto as Exhibit B-1.

4. The sale and purchase of natural gas for the Facilities was effectuated and confirmed by emails between Smithfield and the Debtor. Attached hereto as Exhibit B-2 is an authentic, true, and correct copy of an email exchange dated April 2, 2004, which effectuated and confirmed the sale of natural gas for the period of April, 2004 through March, 2005 at a capped price of \$5.70 per dekatherm, plus basis (gas transport costs). Attached hereto as Exhibit B-3 is an authentic, true, and correct copy of an email exchange dated February 25, 2005, which effectuated and confirmed the sale of natural gas for the period of April, 2005 through October, 2005, at a capped price of \$5.75 per dekatherm, plus basis. Attached hereto as Exhibit B-4 is an authentic, true, and correct copy of an email exchange dated August 12, 2005, which effectuated and confirmed the

sale of natural gas for the period of November, 2005 through March, 2006 at a capped price of \$6.60 per dekatherm.

5. The Base Contract attached hereto as Exhibit B-1 and the email exchanges attached hereto as Exhibit B-2, Exhibit B-3, and Exhibit B-4 have been produced from the files of Smithfield as kept in the ordinary course of Smithfield's regularly conducted business activities.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on February 15, 2007.

/s/ Robert E. Miller
Robert E. Miller

V4439088.1

EXHIBIT B-1

Base Contract for Sale and Purchase of Natural Gas

This Base Contract is entered into as of the following date: _____ The parties to this Base Contract are the following:

National Gas Distributors, LLC
 P.O. Box 82081, 13140 Rawford Road
 Fayetteville, NC 28305
 Duns Number: _____
 Contract Number: _____
 U.S. Federal Tax ID Number: 80-232930

and **Smithfield Foods Inc - Tar Heel**
 Highway 87 North
 Tar Heel, NC 28592
 Duns Number: 02005738
 Contract Number: _____
 U.S. Federal Tax ID Number: 54-032930

Address:
National Gas Distributors, LLC
 Attn: Paul Levinge
 Phone: 910-484-9184 Fax: 910-484-9109

Smithfield Foods, Inc
 Attn: Bob Miller
 Phone: 757-557-8128 Fax: 757-557-8138

Confession of Sale:

Attn: _____
 Phone: _____ Fax: _____

Attn: _____
 Phone: _____ Fax: _____

Interbank Payments:
National Gas Distributors, LLC
 Attn: Paul Levinge
 P.O. Box 82081
 Phone: 910-484-9184 Fax: 910-484-9109

Smithfield Foods, Inc
 Attn: Bob Miller
 P.O. Box 8004, Smithfield VA 24581
 Phone: 757-557-8128 Fax: 757-557-8138

Wire Transfer for ACH Payments (if available):
 BANK: Bank of America - Fayetteville
 ABA: 263101161
 ACCT: 8781487927
 Other Details: _____

BANK: _____
 ABA: _____
 ACCT: _____
 Other Details: _____

This Base Contract incorporates by reference for all purposes the General Terms and Conditions for Sale and Purchase of Natural Gas published by the North American Energy Standards Board. The parties hereby agree to the Standard provisions of the General Terms and Conditions. If the parties fail to check a box, the standard default provisions shall apply.

<p>Section 1.2 <input checked="" type="checkbox"/> Order (default) Transaction Procedure <input type="checkbox"/> Written</p> <p>Section 2.6 <input checked="" type="checkbox"/> 2 Business Days after receipt (default) Contract Description <input type="checkbox"/> Business Days after receipt</p> <p>Section 2.8 <input type="checkbox"/> Seller (default) Contracting Party <input type="checkbox"/> Buyer</p> <p>Section 3.2 <input checked="" type="checkbox"/> Cost Standard (default) Performance Obligation <input type="checkbox"/> Spot Price Standard</p> <p>Note: The following Spot Price Publication applies to both of the immediately preceding.</p> <p>Section 2.28 <input checked="" type="checkbox"/> Gas Daily Midpoint (default) Spot Price Publication <input type="checkbox"/> _____</p> <p>Section 6 <input checked="" type="checkbox"/> Buyer Pays At and After Delivery Point (default) Taxes <input type="checkbox"/> Seller Pays Before and At Delivery Point</p> <p><input type="checkbox"/> Special Provisions Number of sheets attached: _____ <input type="checkbox"/> Addendum(s): _____</p>	<p>Section 7.1 <input type="checkbox"/> 15th Day of Month following month of delivery (default) Payment Date <input checked="" type="checkbox"/> Net 15th Day of Month following month of delivery</p> <p>Section 7.2 <input type="checkbox"/> Wire transfer (default) Method of Payment <input checked="" type="checkbox"/> Automated Clearinghouse Credit (ACH) <input checked="" type="checkbox"/> Check</p> <p>Section 7.7 <input checked="" type="checkbox"/> Netting Applies (default) Netting <input type="checkbox"/> Netting does not apply</p> <p>Section 10.3.1 <input checked="" type="checkbox"/> Early Termination Damages Apply (default) Early Termination Damages <input type="checkbox"/> Early Termination Damages Do Not Apply</p> <p>Section 10.3.2 <input checked="" type="checkbox"/> Other Agreement Setoffs Apply (default) Other Agreement Setoffs <input type="checkbox"/> Other Agreement Setoffs Do Not Apply</p> <p>Section 14.5 Choice Of Law <u>North Carolina</u></p> <p>Section 14.10 <input checked="" type="checkbox"/> Confidentiality applies (default) Confidentiality <input type="checkbox"/> Confidentiality does not apply</p>
---	---

IN WITNESS WHEREOF, the parties hereto have executed this Base Contract in duplicate.

National Gas Distributors, LLC
 Party Name
 By: [Signature]
 Name: Paul Levinge, Jr.
 Title: President

Smithfield Foods, Inc (Tar Heel location)
 Party Name
 By: [Signature]
 Name: Bob Miller
 Title: Energy Manager

General Terms and Conditions Base Contract for Sale and Purchase of Natural Gas

SECTION 1. PURPOSE AND PROCEDURES

1.1. These General Terms and Conditions are intended to facilitate purchase and sale transactions of Gas on a Firm or interruptible basis. "Buyer" refers to the party receiving Gas and "Seller" refers to the party delivering Gas. The entire agreement between the parties shall be the Contract as defined in Section 2.7.

The parties have selected either the "Oral Transaction Procedure" or the "Written Transaction Procedure" as indicated on the Base Contract.

Oral Transaction Procedure:

1.2. The parties will use the following Transaction Confirmation procedure. Any Gas purchase and sale transaction may be effectuated in an EDI transmission or telephonic conversation with the offer and acceptance constituting the agreement of the parties. The parties shall be legally bound from the time they so agree to transaction terms and may each rely thereon. Any such transaction shall be considered a "writing" and to have been "signed". Notwithstanding the foregoing sentence, the parties agree that Confirming Party shall, and the other party may, confirm a telephonic transaction by sending the other party a Transaction Confirmation by facsimile, EDI or mutually agreeable electronic means within three Business Days of a transaction covered by this Section 1.2 (Oral Transaction Procedure) provided that the failure to send a Transaction Confirmation shall not invalidate the oral agreement of the parties. Confirming Party adopts its confirming letterhead, or the file, as its signature on any Transaction Confirmation as the identification and authentication of Confirming Party. If the Transaction Confirmation contains any provisions other than those relating to the commercial terms of the transaction (i.e., price, quantity, performance obligation, delivery point, period of delivery and/or transportation conditions), which modify or supplement the Base Contract or General Terms and Conditions of this Contract (e.g., arbitration or additional representations and warranties), such provisions shall not be deemed to be accepted pursuant to Section 1.3 but must be expressly agreed to by both parties; provided that the foregoing shall not invalidate any transaction agreed to by the parties.

Written Transaction Procedure:

1.2. The parties will use the following Transaction Confirmation procedure. Should the parties enter into an agreement regarding a Gas purchase and sale transaction for a particular Delivery Period, the Confirming Party shall, and the other party may, record that agreement on a Transaction Confirmation and communicate such Transaction Confirmation by facsimile, EDI or mutually agreeable electronic means to the other party by the close of the Business Day following the date of agreement. The parties acknowledge that their agreement will not be binding until the exchange of nonconflicting Transaction Confirmations or the passage of the Confirm Deadline without objection from the receiving party, as provided in Section 1.3.

1.3. If the sending party's Transaction Confirmation is materially different from the receiving party's understanding of the agreement referred to in Section 1.2, and the receiving party shall notify the sending party via facsimile, EDI or mutually agreeable electronic means by the Confirm Deadline, unless such receiving party has previously sent a Transaction Confirmation to the sending party. The failure of the receiving party to so notify the sending party in writing by the Confirm Deadline constitutes the receiving party's agreement to the terms of the transaction described in the sending party's Transaction Confirmation. If there are any material differences between the parties' Transaction Confirmations governing the same transaction, then neither Transaction Confirmation shall be binding until, or unless such differences are resolved including the use of any evidence that clearly resolves the differences in the Transaction Confirmations. In the event of a conflict, among the terms of (i) a binding Transaction Confirmation pursuant to Section 1.2, (ii) the oral agreement of the parties which may be evidenced by a recorded conversation, where the parties have selected the Oral Transaction Procedure of the Base Contract, (iii) the Base Contract and (iv) these General Terms and Conditions, the terms of the documents shall govern in the priority listed in this sentence.

1.4. The parties agree that each party may electronically record all telephone conversations with respect to this Contract between their respective employees, without any special or further notice to the other party. Each party shall obtain any necessary consent of its agents and employees to such recording. Where the parties have selected the Oral Transaction Procedure in Section 1.2 of the Base Contract, the parties agree not to contest the validity or enforceability of telephonic recordings entered into in accordance with the requirements of this Base Contract. However, nothing herein shall be construed as a waiver of any objection to the admissibility of such evidence.

SECTION 2. DEFINITIONS

The terms set forth below shall have the meaning ascribed to them below. Other terms are also defined elsewhere in the Contract and shall have the meanings ascribed to them herein.

2.1. "Alternative Damages" shall mean such damages, expressed in dollars or dollars per MMBtu, as the parties shall agree upon in the Transaction Confirmation. In the event either Seller or Buyer fails to perform a Firm obligation to deliver Gas in the case of Seller or to receive Gas in the case of Buyer.

2.2. "Base Contract" shall mean a contract executed by the parties that incorporates these General Terms and Conditions by reference; that specifies the agreed selections of provisions contained herein; and that sets forth other information required herein and any Special Provisions and addendum(s) as identified on page one.

2.3. "British thermal unit" or "Btu" shall mean the International BTU, which is also called the Btu (IT).

- 2.4. "Business Day" shall mean any day except Saturday, Sunday or Federal Reserve Bank holidays.
- 2.5. "Confirm Deadline" shall mean 5:00 p.m. in the receiving party's time zone on the second Business Day following the Day a Transaction Confirmation is received or, if applicable, on the Business Day agreed to by the parties in the Base Contract; provided, if the Transaction Confirmation is time stamped after 5:00 p.m. in the receiving party's time zone, it shall be deemed received at the opening of the next Business Day.
- 2.6. "Confirming Party" shall mean the party designated in the Base Contract to prepare and forward Transaction Confirmations to the other party.
- 2.7. "Contract" shall mean the legal binding relationship established by (i) the Base Contract, (ii) any and all binding Transaction Confirmations and (iii) where the parties have selected the Oral Transaction Procedure in Section 1.2 of the Base Contract, any and all transactions that the parties have entered into through an EDI transmission or by telephone, but that have not been confirmed in a binding Transaction Confirmation.
- 2.8. "Contract Price" shall mean the amount expressed in U.S. Dollars per MMBtu to be paid by Buyer to Seller for the purchase of Gas as agreed to by the parties in a transaction.
- 2.9. "Contract Quantity" shall mean the quantity of Gas to be delivered and taken as agreed to by the parties in a transaction.
- 2.10. "Cover Standard", as referred to in Section 3.2, shall mean that if there is an unexcused failure to take or deliver any quantity of Gas pursuant to this Contract, then the performing party shall use commercially reasonable efforts to (i) if Buyer is the performing party, obtain Gas, (or an alternate fuel if elected by Buyer and replacement Gas is not available); or (ii) if Seller is the performing party, sell Gas. In either case, the price reasonable for the delivery or production area, as applicable, consistent with the amount of notice provided by the nonperforming party; the immediacy of the Buyer's Gas consumption needs or Seller's Gas sales requirements, as applicable; the quantity involved; and the anticipated length of failure by the nonperforming party.
- 2.11. "Credit Support Obligation(s)" shall mean any obligation(s) to provide or establish credit support for, or on behalf of, a party to this Contract such as an irrevocable standby letter of credit, a margin agreement, a prepayment, a security interest in an asset, a performance bond, guaranty, or other good and sufficient security of a continuing nature.
- 2.12. "Day" shall mean a period of 24 consecutive hours, coextensive with a "day" as defined by the Receiving Transporter in a particular transaction.
- 2.13. "Delivery Period" shall be the period during which deliveries are to be made as agreed to by the parties in a transaction.
- 2.14. "Delivery Point(s)" shall mean such point(s) as are agreed to by the parties in a transaction.
- 2.15. "EDI" shall mean an electronic data interchange pursuant to an agreement entered into by the parties, specifically relating to the communication of Transaction Confirmations under this Contract.
- 2.16. "EFP" shall mean the purchase, sale or exchange of natural Gas at the "physical" side of an exchange for physical transaction involving gas futures contracts. EFP shall incorporate the meaning and remedies of "Firm", provided that a party's excuse for nonperformance of its obligations to deliver or receive Gas will be governed by the rules of the relevant futures exchange regulated under the Commodity Exchange Act.
- 2.17. "Firm" shall mean that either party may interrupt its performance without liability only to the extent that such performance is prevented for reasons of Force Majeure; provided, however, that during Force Majeure interruptions, the party involving Force Majeure may be responsible for any Imbalance Charges as set forth in Section 4.3 related to its interruption after the nomination is made to the Transporter and until the change in deliveries and/or receipts is confirmed by the Transporter.
- 2.18. "Gas" shall mean any mixture of hydrocarbons and noncombustible gases in a gaseous state consisting primarily of methane.
- 2.19. "Imbalance Charges" shall mean any fees, penalties, costs or charges (in cash or in kind) assessed by a Transporter for failure to satisfy the Transporter's balance and/or nomination requirements.
- 2.20. "Interruptible" shall mean that either party may interrupt its performance at any time for any reason, whether or not caused by an event of Force Majeure, with no liability, except such interrupting party may be responsible for any Imbalance Charges as set forth in Section 4.3 related to its interruption after the nomination is made to the Transporter and until the change in deliveries and/or receipts is confirmed by the Transporter.
- 2.21. "MMBtu" shall mean one million British thermal units, which is equivalent to one dekatherm.
- 2.22. "Month" shall mean the period beginning on the first Day of the calendar month and ending immediately prior to the commencement of the first Day of the next calendar month.
- 2.23. "Payment Date" shall mean a date, as indicated on the Base Contract, on or before which payment is due Seller for Gas received by Buyer in the previous Month.
- 2.24. "Receiving Transporter" shall mean the Transporter receiving Gas at a Delivery Point, or absent such receiving Transporter, the Transporter delivering Gas at a Delivery Point.
- 2.25. "Scheduled Gas" shall mean the quantity of Gas confirmed by Transporter(s) for movement, transportation or management.
- 2.26. "Spot Price" as referred to in Section 3.2 shall mean the price listed in the publication indicated on the Base Contract, under the listing applicable to the geographic location closest in proximity to the Delivery Point(s) for the relevant Day; provided, if there is no single price published for such location for such Day, but there is published a range of prices, then the Spot Price shall be the average

of such high and low prices. If no price or range of prices is published for such Day, then the Spot Price shall be the average of the following: (i) the price (determined as stated above) for the first Day for which a price or range of prices is published that next precedes the relevant Day; and (ii) the price (determined as stated above) for the first Day for which a price or range of prices is published that next follows the relevant Day.

2.27. "Transaction Confirmation" shall mean a document, similar to the form of Exhibit A, setting forth the terms of a transaction formed pursuant to Section 1 for a particular Delivery Period.

2.28. "Termination Option" shall mean the option of either party to terminate a transaction in the event that the other party fails to perform a Firm obligation to deliver Gas in the case of Seller or to receive Gas in the case of Buyer for a designated number of days during a period as specified on the applicable Transaction Confirmation.

2.29. "Transporter(s)" shall mean all Gas pipeline or pipeline companies, or local distribution companies, acting in the capacity of a transporter, transporting Gas for Seller or Buyer upstream or downstream, respectively, of the Delivery Point pursuant to a particular transaction.

SECTION 3. PERFORMANCE OBLIGATION

3.1. Seller agrees to sell and deliver, and Buyer agrees to receive and purchase, the Contract Quantity for a particular transaction in accordance with the terms of the Contract. Sales and purchases will be on a Firm or interruptible basis, as agreed to by the parties in a transaction.

The parties have selected either the "Cover Standard" or the "Spot Price Standard" as indicated on the Base Contract.

Cover Standard:

3.2. The sole and exclusive remedy of the parties in the event of a breach of a Firm obligation to deliver or receive Gas shall be recovery of the following: (i) in the event of a breach by Seller on any Day(s), payment by Seller to Buyer in an amount equal to the positive difference, if any, between the purchase price paid by Buyer utilizing the Cover Standard and the Contract Price, adjusted for commercially reasonable differences in transportation costs to or from the Delivery Point(s), multiplied by the difference between the Contract Quantity and the quantity actually delivered by Seller for such Day(s); or (ii) in the event of a breach by Buyer on any Day(s), payment by Buyer to Seller in the amount equal to the positive difference, if any, between the Contract Price and the price received by Seller utilizing the Cover Standard for the resale of such Gas, adjusted for commercially reasonable differences in transportation costs to or from the Delivery Point(s), multiplied by the difference between the Contract Quantity and the quantity actually delivered by Buyer for such Day(s); or (iii) in the event that Buyer has used commercially reasonable efforts to replace the Gas if Seller has used commercially reasonable efforts to sell the Gas to a third party, and no such replacement or sale is available, then the sole and exclusive remedy of the performing party shall be any unfavorable difference between the Contract Price and the Spot Price, adjusted for such transportation to the applicable Delivery Point, multiplied by the difference between the Contract Quantity and the quantity actually delivered by Seller and received by Buyer for such Day(s). Imbalance Charges shall not be recovered under this Section 3.2, but Seller and/or Buyer shall be responsible for Imbalance Charges, if any, as provided in Section 4.3. The amount of such unfavorable difference shall be payable five Business Days after presentation of the performing party's invoice, which shall set forth the basis upon which such amount was calculated.

Spot Price Standard:

3.2. The sole and exclusive remedy of the parties in the event of a breach of a Firm obligation to deliver or receive Gas shall be recovery of the following: (i) in the event of a breach by Seller on any Day(s), payment by Seller to Buyer in an amount equal to the difference between the Contract Quantity and the actual quantity delivered by Seller and received by Buyer for such Day(s), multiplied by the positive difference, if any, obtained by subtracting the Contract Price from the Spot Price; or (ii) in the event of a breach by Buyer on any Day(s), payment by Buyer to Seller in an amount equal to the difference between the Contract Quantity and the actual quantity delivered by Seller and received by Buyer for such Day(s), multiplied by the positive difference, if any, obtained by subtracting the applicable Spot Price from the Contract Price. Imbalance Charges shall not be recovered under this Section 3.2. Seller and/or Buyer shall be responsible for Imbalance Charges, if any, as provided in Section 4.3. The amount of such unfavorable difference shall be payable five Business Days after presentation of the performing party's invoice, which shall set forth the basis upon which such amount was calculated.

3.3. Notwithstanding Section 3.2, the parties may agree to Alternative Damages in a Transaction Confirmation executed in writing by both parties.

3.4. In addition to Sections 3.2 and 3.3, the parties may provide for a Termination Option in a Transaction Confirmation executed in writing by both parties. The Transaction Confirmation containing the Termination Option will designate the length of nonperformance triggering the Termination Option and the procedures for exercise thereof, how damages for nonperformance will be compensated, and how liquidation costs will be calculated.

SECTION 4. TRANSPORTATION, NOMINATIONS, AND IMBALANCES

4.1. Seller shall have the sole responsibility for transporting the Gas to the Delivery Point(s). Buyer shall have the sole responsibility for transporting the Gas from the Delivery Point(s).

4.2. The parties shall coordinate their nomination activities, giving sufficient time to meet the deadlines of the affected Transporter(s). Each party shall give the other party timely prior Notice, sufficient to meet the requirements of all Transporter(s) involved in the transaction, of the quantities of Gas to be delivered and purchased each Day. Should either party become aware that actual deliveries at the Delivery Point(s) are greater or lesser than the Scheduled Gas, such party shall promptly notify the other party.

4.3. The parties shall use commercially reasonable efforts to avoid imposition of any Imbalance Charges. If Buyer or Seller receives an invoice from a Transporter that includes Imbalance Charges, the parties shall determine the validity as well as the cause of such Imbalance Charges. If the Imbalance Charges were incurred as a result of Buyer's receipt of quantities of Gas greater than or less than the Scheduled Gas, then Buyer shall pay for such Imbalance Charges or reimburse Seller for such Imbalance Charges paid by Seller. If the Imbalance Charges were incurred as a result of Seller's delivery of quantities of Gas greater than or less than the Scheduled Gas, then Seller shall pay for such Imbalance Charges or reimburse Buyer for such Imbalance Charges paid by Buyer.

SECTION 5. QUALITY AND MEASUREMENT

All Gas delivered by Seller shall meet the pressure, quality and heat content requirements of the Receiving Transporter. The unit of quantity measurement for purposes of this Contract shall be one MMBtu dry. Measurement of Gas quantities hereunder shall be in accordance with the established procedures of the Receiving Transporter.

SECTION 6. TAXES

The parties have selected either "Buyer Pays At and After Delivery Point" or "Seller Pays Before and At Delivery Point" as indicated on the Base Contract.

Buyer Pays At and After Delivery Point:

Seller shall pay or cause to be paid all taxes, fees, levies, penalties, licenses or charges imposed by any government authority ("Taxes") on or with respect to the Gas prior to the Delivery Point(s). Buyer shall pay or cause to be paid all Taxes on or with respect to the Gas at the Delivery Point(s) and all Taxes after the Delivery Point(s). If a party is required to remit or pay Taxes that are the other party's responsibility hereunder, the party responsible for such Taxes shall promptly reimburse the other party for such Taxes. Any party entitled to an exemption from any such Taxes or charges shall furnish the other party any necessary documentation thereof.

Seller Pays Before and At Delivery Point:

Seller shall pay or cause to be paid all taxes, fees, levies, penalties, licenses or charges imposed by any government authority ("Taxes") on or with respect to the Gas prior to the Delivery Point(s) and all Taxes of the Delivery Point(s). Buyer shall pay or cause to be paid all Taxes on or with respect to the Gas after the Delivery Point(s). If a party is required to remit or pay Taxes that are the other party's responsibility hereunder, the party responsible for such Taxes shall promptly reimburse the other party for such Taxes. Any party entitled to an exemption from any such Taxes or charges shall furnish the other party any necessary documentation thereof.

SECTION 7. BILLING, PAYMENT, AND AUDIT

7.1. Seller shall invoice Buyer for Gas delivered and received in the preceding Month and for any other applicable charges, providing supporting documentation acceptable in industry practice to support the amount charged. If the actual quantity delivered is not known by the billing date, billing will be prepared based on the quantity of Scheduled Gas. The billed quantity will then be adjusted to the actual quantity on the following Month's billing or as soon thereafter as actual delivery information is available.

7.2. Buyer shall remit the amount due under Section 7.1 in the manner specified in the Base Contract, in immediately available funds, on or before the later of the Payment Date or 10 Days after receipt of the invoice by Buyer, provided that if the Payment Date is not a Business Day, payment is due on the next Business Day following that date. In the event any payments are due Buyer hereunder, payment to Buyer shall be made in accordance with this Section 7.2.

7.3. In the event payments become due pursuant to Sections 3.2 or 3.3, the performing party may submit an invoice to the nonperforming party for an accelerated payment setting forth the basis upon which the invoiced amount was calculated. Payment from the nonperforming party will be due five Business Days after receipt of invoice.

7.4. If the invoiced party, in good faith, disputes the amount of any such invoice or any part thereof, such invoiced party will pay such amount as it decedes to be correct, provided, however, if the invoiced party disputes the amount due, it must provide supporting documentation acceptable in industry practice to support the amount paid or disputed. In the event the parties are unable to resolve such dispute, either party may pursue any remedy available at law or in equity to enforce its rights pursuant to this Section.

7.5. If the invoiced party fails to remit the full amount payable when due, interest on the unpaid portion shall accrue from the date due until the date of payment at a rate equal to the lower of (i) the then effective prime rate of interest published under "Money Rates" by The Wall Street Journal, plus two percent per annum; or (ii) the maximum applicable lawful interest rate.

7.6. A party shall have the right, at its own expense, upon reasonable Notice and at reasonable times, to examine and audit and to obtain copies of this relevant portion of the books, records, and telephone recordings of the other party only to the extent reasonably necessary to verify the accuracy of any statement, charge, payment, or computation made under the Contract. This right to examine, audit, and to obtain copies shall not be available with respect to proprietary information not directly relevant to transactions under this Contract. All invoices and billings shall be conclusively presumed final and accurate and all associated claims for under- or overpayments shall be deemed waived unless such invoices or billings are objected to in writing, with adequate explanation and/or documentation, within two years after the Month of Gas delivery. All retroactive adjustments under Section 7 shall be paid in full by the party owing payment within 30 Days of Notice and substantiation of such inaccuracy.

7.7. Unless the parties have elected on the Base Contract not to make this Section 7.7 applicable to this Contract, the parties shall net all undisputed amounts due and owing, and/or past due, arising under the Contract such that the party owing the greater amount shall make a single payment of the net amount to the other party in accordance with Section 7; provided that no payment required to be made pursuant to the terms of any Credit Support Obligation or pursuant to Section 7.3 shall be subject to netting under this Section. If the parties have executed a separate netting agreement, the terms and conditions therein shall prevail to the extent inconsistent herewith.

SECTION 8. TITLE, WARRANTY, AND INDEMNITY

8.1. Unless otherwise specifically agreed, title to the Gas shall pass from Seller to Buyer at the Delivery Point(s). Seller shall have responsibility for and assume any liability with respect to the Gas prior to its delivery to Buyer at the specified Delivery Point(s). Buyer shall have responsibility for and any liability with respect to said Gas after its delivery to Buyer at the Delivery Point(s).

8.2. Seller warrants that it will have the right to convey and will transfer good and merchantable title to all Gas sold hereunder and delivered by it to Buyer, free and clear of all liens, encumbrances, and claims. EXCEPT AS PROVIDED IN THIS SECTION 8.2 AND IN SECTION 14.8, ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR OF FITNESS FOR ANY PARTICULAR PURPOSE, ARE DISCLAIMED.

8.3. Seller agrees to indemnify Buyer and to hold it harmless from all losses, liabilities or claims including reasonable attorneys' fees and costs of court ("Claims"), from any and all persons, arising from or out of claims of title, personal injury or property damage from said Gas or other charges thereon which attach before title passes to Buyer. Buyer agrees to indemnify Seller and save it harmless from all Claims, from any and all persons, arising from or out of claims regarding payment, personal injury or property damage from said Gas or other charges thereon which attach after title passes to Buyer.

8.4. Notwithstanding the other provisions of this Section 8, as between Seller and Buyer, Seller will be liable for all Claims to the extent that such arise from the failure of Gas delivered by Seller to meet the quality requirements of Section 6.

SECTION 9. NOTICES

9.1. All Transaction Confirmations, invoices, payments and other communications made pursuant to this Base Contract ("Notices") shall be made to the addresses specified in writing by the respective parties from time to time.

9.2. All Notices required hereunder may be sent by facsimile or mutually acceptable electronic means, a nationally recognized overnight courier service, first class mail or hand delivered.

9.3. Notices shall be given when received on a Business Day by the addressee. In the absence of proof of the actual receipt date, the following presumptions will apply. Notices sent by facsimile shall be deemed to have been received upon the sending party's receipt of its facsimile machine's confirmation of successful transmission. If the day on which such facsimile is received is not a Business Day or is after five p.m. on a Business Day, then such facsimile shall be deemed to have been received on the next following Business Day. Notices by overnight mail or courier shall be deemed to have been received on the next Business Day after it was sent or such earlier date as is confirmed by the receiving party. Notice via first class mail shall be considered delivered two Business Days after mailing.

SECTION 10. FINANCIAL RESPONSIBILITY

10.1. If either party ("X") has reasonable grounds for insecurity regarding the performance of any obligation under this Contract (whether or not then due) by the other party ("Y") (including, without limitation, the occurrence of a material change in the creditworthiness of Y), X may demand Adequate Assurance of Performance. Adequate Assurance of Performance shall mean sufficient security in the form, amount and for the term reasonably acceptable to X, including, but not limited to, a readily revocable letter of credit, a prepayment, a security interest in an asset or a performance bond or guaranty (including the issue of any such security).

10.2. In the event (which an "Event of Default") either party (the "Defaulting Party") or its guarantor shall: (i) make an assignment or any general arrangement for the benefit of creditors; (ii) file a petition or otherwise commence, authorize, or acquiesce in the commencement of a proceeding or case under any bankruptcy or similar law for the protection of creditors or have such petition filed or proceeding commenced against it; (iii) otherwise become bankrupt or insolvent (however evidenced) and be unable to pay its debts as they fall due; (iv) have a receiver, provisional liquidator, conservator, custodian, trustee or other similar officer appointed with respect to it or substantially all of its assets; (v) fail to perform any obligation to the other party with respect to any credit support obligations relating to the Contract; (vi) fail to give Adequate Assurance of Performance under Section 10.1 within 48 hours but at least one Business Day of a written request by the other party; or (vii) not have paid any amount due the other party hereunder on or before the second Business Day following written Notice that such payment is due; then the other party (the "Non-Defaulting Party") shall have the right, at its sole election, to immediately withhold and/or suspend deliveries or payments upon Notice and/or to terminate and liquidate the transactions under the Contract, in the manner provided in Section 10.3, in addition to any and all other remedies available hereunder.

10.3. If an Event of Default has occurred and is continuing, the Non-Defaulting Party shall have the right, by Notice to the Defaulting Party, to designate a Day, no earlier than the Day such Notice is given and no later than 20 Days after such Notice is given, as an early termination date (the "Early Termination Date") for the liquidation and termination pursuant to Section 10.3.1 of all transactions under the Contract, each a "Terminated Transaction". On the Early Termination Date, all transactions will terminate, other than those transactions, if any, that may not be liquidated and terminated under applicable law or that are, in the reasonable opinion of the Non-Defaulting Party, commercially impracticable to liquidate and terminate ("Excluded Transactions"), which Excluded Transactions must be liquidated and terminated as soon thereafter as is reasonably practicable, and upon termination shall be a Terminated Transaction and be valued consistent with Section 10.3.1 below. With respect to each Excluded Transaction, its actual termination date shall be the Early Termination Date for purposes of Section 10.3.1.

The parties have selected either "Early Termination Damages Apply" or "Early Termination Damages Do Not Apply" as indicated on the Base Contract.

Early Termination Damages Apply:

10.3.1. As of the Early Termination Date, the Non-Defaulting Party shall determine, in good faith and in a commercially reasonable manner, (i) the amount owed (whether or not then due) by each party with respect to all Gas delivered and received between the parties under Terminated Transactions and Excluded Transactions on and before the Early Termination Date and all other applicable charges relating to such deliveries and receipts (including without limitation any amounts owed under Section 3.2), for which payment has not yet been made by the party that owes such payment under this Contract and (ii) the Market Value, as defined below, of each Terminated Transaction. The Non-Defaulting Party shall (x) liquidate and accelerate each Terminated Transaction at its Market Value, so that each amount equal to the difference between such Market Value and the Contract Value, as defined below, of each Terminated Transaction(s) shall be due to the Buyer under the Terminated Transaction(s) if such Market Value exceeds the Contract Value and to the Seller if the opposite is the case; and (y) where appropriate, discount each amount then due under clause (x) above to present value in a commercially reasonable manner as of the Early Termination Date (to take account of the period between the date of liquidation and the date on which such amount would have otherwise been due pursuant to the relevant Terminated Transactions).

For purposes of this Section 10.3.1, "Contract Value" means the amount of Gas remaining to be delivered or purchased under a transaction multiplied by the Contract Price, and "Market Value" means the amount of Gas remaining to be delivered or purchased under a transaction multiplied by the market price for a similar transaction at the Delivery Point determined by the Non-Defaulting Party in a commercially reasonable manner. To ascertain the Market Value, the Non-Defaulting Party may consider, among other values, any or all of the settlement prices of NYMEX Gas futures contracts, quotations from leading dealers in energy swap contracts of physical Gas trading markets, similar sales or purchases and any other bona fide third-party offers, all adjusted for length of the term and differences in transportation costs. A party shall not be required to enter into a replacement transaction(s) in order to determine the Market Value. Any extension(s) of the term of a transaction to which parties are not bound as of the Early Termination Date (including, but not limited to "evergreen provisions") shall not be considered in determining Contract Values and Market Values. For the avoidance of doubt, any option pursuant to which one party has the right to assume the term of a transaction shall be considered in determining Contract Values and Market Values. The rate of interest used in calculating net present value shall be determined by the Non-Defaulting Party in a commercially reasonable manner.

Early Termination Damages Do Not Apply:

10.3.1. As of the Early Termination Date, the Non-Defaulting Party shall determine, in good faith and in a commercially reasonable manner, the amount owed (whether or not then due) by each party with respect to all Gas delivered and received between the parties under Terminated Transactions and Excluded Transactions on and before the Early Termination Date and all other applicable charges relating to such deliveries and receipts (including without limitation any amounts owed under Section 3.2), for which payment has not yet been made by the party that owes such payment under this Contract.

The parties have selected either "Other Agreement Setoffs Apply" or "Other Agreement Setoffs Do Not Apply" as indicated on the Base Contract.

Other Agreement Setoffs Apply:

10.3.2. The Non-Defaulting Party shall net or aggregate, as appropriate, any and all amounts owing between the parties under Section 10.3.1, so that all such amounts are netted or aggregated to a single liquidated amount payable by one party to the other (the "Net Settlement Amount"). At its sole option and without prior Notice to the Defaulting Party, the Non-Defaulting Party may setoff (i) any Net Settlement Amount owed to the Non-Defaulting Party against any margin or other collateral held by it in connection with any Credit Support Obligation relating to this Contract; or (ii) any Net Settlement Amount payable to the Defaulting Party against any amount(s) payable by the Defaulting Party to the Non-Defaulting Party under any other agreement or arrangement between the parties.

Other Agreement Setoffs Do Not Apply:

10.3.2. The Non-Defaulting Party shall net or aggregate, as appropriate, any and all amounts owing between the parties under Section 10.3.1, so that all such amounts are netted or aggregated to a single liquidated amount payable by one party to the other (the "Net Settlement Amount"). At its sole option and without prior Notice to the Defaulting Party, the Non-Defaulting Party may setoff any Net Settlement Amount owed to the Non-Defaulting Party against any margin or other collateral held by it in connection with any Credit Support Obligation relating to the Contract.

10.3.3. If any obligation that is to be included in any netting, aggregation or setoff pursuant to Section 10.3.2 is unascertained, the Non-Defaulting Party may in good faith estimate that obligation and net, aggregate or setoff, as applicable, in respect of the estimate, subject to the Non-Defaulting Party accounting to the Defaulting Party when the obligation is ascertained. Any amount not then due which is included in any netting, aggregation or setoff pursuant to Section 10.3.2 shall be discounted to net present value in a commercially reasonable manner determined by the Non-Defaulting Party.

10.4. As soon as practicable after a liquidation, Notice shall be given by the Non-Defaulting Party to the Defaulting Party of the Net Settlement Amount, and whether the Net Settlement Amount is due to or due from the Non-Defaulting Party. The Notice shall include a written statement explaining in reasonable detail the calculation of such amount, provided that failure to give such Notice shall not affect the validity or enforceability of the liquidation or give rise to any claim by the Defaulting Party against the Non-Defaulting Party. The Net Settlement Amount shall be paid by the close of business on the second Business Day following such Notice, which date shall not be earlier than the Early Termination Date. Interest on any unpaid portion of the Net Settlement Amount shall accrue from the date due until the

date of payment at a rate equal to the lower of (i) the then-effective prime rate of interest published under "Money Rates" by The Wall Street Journal, plus two percent per annum; or (ii) the maximum applicable lawful interest rate.

10.5. The parties agree that the transactions hereunder constitute a "forward contract" within the meaning of the United States Bankruptcy Code and that Buyer and Seller are each "forward contract merchants" within the meaning of the United States Bankruptcy Code.

10.6. The Non-Defaulting Party's remedies under this Section 10 are the sole and exclusive remedies of the Non-Defaulting Party with respect to the occurrence of any Early Termination Date. Each party reserves to itself all other rights, setoffs, counterclaims and other defenses that it is or may be entitled to arising from the Contract.

10.7. With respect to this Section 10, if the parties have executed a separate netting agreement with close-out netting provisions, the terms and conditions therein shall prevail to the extent inconsistent herewith.

SECTION 11. FORCE MAJEURE

11.1. Except with regard to a party's obligation to make payment(s) due under Section 7, Section 10.4, and Imbalance Charges under Section 4, neither party shall be liable to the other for failure to perform a Firm obligation, to the extent such failure was caused by Force Majeure. The term "Force Majeure" as employed herein means any cause not reasonably within the control of the party claiming suspension, as further defined in Section 11.2.

11.2. Force Majeure shall include, but not be limited to, the following: (i) physical events such as acts of God, landslides, lightning, earthquakes, fires, storms or storm warnings, such as hurricanes, which result in evacuation of the affected area, floods, washouts, explosions, breakage or accident or necessity of repairs to machinery or equipment or lines of pipe; (ii) weather related events affecting an entire geographic region, such as low temperatures which cause freezing or failure of wells or lines of pipe; (iii) transportation and/or curtailment of Firm transportation and/or storage by transporters; (iv) acts of others such as strikes, lockouts or other industrial disturbances, riots, sabotage, insurrections or wars; and (v) governmental actions, such as necessary for compliance with any court order, law, statute, ordinance, regulation, or policy having the effect of law promulgated by a governmental authority having jurisdiction. Seller and Buyer shall make reasonable efforts to avoid the adverse impacts of a Force Majeure and to resume the event or occurrence once it has occurred in order to resume performance.

11.3. Neither party shall be entitled to the benefit of the provisions of Force Majeure to the extent performance is affected by any or all of the following circumstances: (i) the curtailment of interruptible or secondary Firm transportation unless primary in-path Firm transportation is also curtailed; (ii) the party claiming excuse failed to remedy the condition and to resume the performance of such covenants or obligations with reasonable dispatch; or (iii) economic hardship, to include, without limitation, Seller's ability to sell Gas at a higher or more advantageous price than the Contract Price, Buyer's ability to purchase Gas at a lower price or advantageous price than the Contract Price, or a regulatory agency disallowing, in whole or in part, the pass-through of costs resulting from the Agreement; (iv) the loss of Buyer's ability to use or resell Gas purchased hereunder, except, in either case, as provided in Section 11.2; or (v) the loss or failure of Seller's gas supply or depletion of reserves, except, in either case, as provided in Section 11.2. The party claiming Force Majeure shall not be excused from its responsibility for Imbalance Charges.

11.4. Notwithstanding anything to the contrary herein, the parties agree that the settlement of strikes, lockouts or other industrial disturbances shall be within the sole discretion of the party experiencing such disturbance.

11.5. The party whose performance is prevented by Force Majeure must provide notice to the other party. Initial notice may be given orally, however, written Notice with reasonably full particulars of the event or occurrence is required as soon as reasonably possible. Upon providing written Notice of Force Majeure to the other party, the affected party will be relieved of its obligation, from the start of the Force Majeure event, to make or accept delivery of Gas, as applicable, to the extent and for the duration of Force Majeure, and neither party shall be deemed to have waived in such obligations to the other during such occurrence or event.

11.6. Notwithstanding Sections 11.2 and 11.3, the parties may agree to alternative Force Majeure provisions in a Transaction Confirmation executed in writing by both parties.

SECTION 12. TERM

This Contract may be terminated on 30 Day's written Notice, but shall remain in effect until the expiration of the latest Delivery Period of any transaction(s). The rights of either party pursuant to Section 7.6 and Section 10, the obligations to make payment hereunder, and the obligation of either party to indemnify the other, pursuant hereto shall survive the termination of the Base Contract or any transaction.

SECTION 13. LIMITATIONS

FOR BREACH OF ANY PROVISION FOR WHICH AN EXPRESS REMEDY OR MEASURE OF DAMAGES IS PROVIDED, SUCH EXPRESS REMEDY OR MEASURE OF DAMAGES SHALL BE THE SOLE AND EXCLUSIVE REMEDY. A PARTY'S LIABILITY HEREUNDER SHALL BE LIMITED AS SET FORTH IN SUCH PROVISION, AND ALL OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED. IF NO REMEDY OR MEASURE OF DAMAGES IS EXPRESSLY PROVIDED HEREIN OR IN A TRANSACTION, A PARTY'S LIABILITY SHALL BE LIMITED TO DIRECT ACTUAL DAMAGES ONLY. SUCH DIRECT ACTUAL DAMAGES SHALL BE THE SOLE AND EXCLUSIVE REMEDY, AND ALL OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED. UNLESS EXPRESSLY HEREBIN PROVIDED, NEITHER PARTY SHALL BE LIABLE FOR CONSEQUENTIAL, INCIDENTAL, PUNITIVE, EXEMPLARY OR INDIRECT DAMAGES, LOST PROFITS OR OTHER BUSINESS INTERRUPTION DAMAGES, BY STATUTE, IN TORT OR CONTRACT, UNDER ANY INDEMNITY PROVISION OR OTHERWISE. IT IS THE INTENT OF THE PARTIES THAT THE LIMITATIONS HEREBIN IMPOSED ON REMEDIES AND THE MEASURE OF DAMAGES BE WITHOUT REGARD TO THE CAUSE OR CAUSES RELATED THERETO, INCLUDING THE NEGLIGENCE OF ANY PARTY, WHETHER SUCH NEGLIGENCE BE SOLE, JOINT OR CONCURRENT, OR ACTIVE OR PASSIVE.

TO THE EXTENT ANY DAMAGES REQUIRED TO BE PAID HEREUNDER ARE LIQUIDATED, THE PARTIES ACKNOWLEDGE THAT THE DAMAGES ARE DIFFICULT OR IMPOSSIBLE TO DETERMINE, OR OTHERWISE OBTAINING AN ADEQUATE REMEDY IS INCONVENIENT AND THE DAMAGES CALCULATED HEREUNDER CONSTITUTE A REASONABLE APPROXIMATION OF THE HARM OR LOSS.

SECTION 14. MISCELLANEOUS

- 14.1. This Contract shall be binding upon and inure to the benefit of the successors, assigns, personal representatives, and heirs of the respective parties hereto, and the covenants, conditions, rights and obligations of this Contract shall run for the full term of this Contract. No assignment of this Contract, in whole or in part, will be made without the prior written consent of the non-assigning party (and shall not relieve the assigning party from liability hereunder); such consent will not be unreasonably withheld or delayed; provided, either party may (i) transfer, sell, pledge, encumber, or assign this Contract or the accounts, revenues, or proceeds hereof in connection with any financing or other financial arrangements, or (ii) transfer its interest to any parent or affiliate by assignment, merger or otherwise without the prior approval of the other party. Upon any such assignment, transfer and assumption, the transferor shall remain principally liable for and shall not be relieved or discharged from any obligations hereunder.
- 14.2. If any provision in this Contract is determined to be invalid, void or unenforceable by any court having jurisdiction, such determination shall not invalidate, void, or make unenforceable any other provision, agreement or covenant of this Contract.
- 14.3. No waiver of any breach of this Contract shall be held to be a waiver of any other or subsequent breach.
- 14.4. This Contract sets forth all understandings between the parties respecting each transaction subject hereto, and any prior contracts, understandings and representations, whether oral or written, relating to such transactions are merged into and superseded by this Contract and any effective transactions. This Contract may be amended only by a writing executed by both parties.
- 14.5. The interpretation and performance of this Contract shall be governed by the laws of the jurisdiction as indicated on the Base Contract, providing, however, any conflict of laws rule which would apply the law of another jurisdiction.
- 14.6. This Contract and all provisions herein will be subject to all applicable and valid statutes, rules, orders and regulations of any governmental authority having jurisdiction over the parties, their facilities, or Gas supply, this Contract or transactions or any provisions thereof.
- 14.7. There is no third party beneficiary to this Contract.
- 14.8. Each party to this Contract represents and warrants that it has full and complete authority to enter into and perform this Contract. Each person who executes this Contract on behalf of either party represents and warrants that it has full and complete authority to do so and that such party will be bound thereby.
- 14.9. The headings and subheadings contained in this Contract are used solely for convenience and do not constitute a part of this Contract between the parties and shall not be used to construe or interpret the provisions of this Contract.
- 14.10. Unless the parties have elected on the Base Contract not to make this Section 14.10 applicable to this Contract, neither party shall disclose directly or indirectly without the prior written consent of the other party, the terms of any transaction to a third party (other than the employees, leaders, royalty owners, counsel, accountants and other agents of the party, or prospective purchasers of all or substantially all of a party's assets or of any rights under this Contract, provided such persons shall have agreed to keep such terms confidential) except (i) in order to comply with any applicable law, order, regulation or exchange rule, (ii) to the extent necessary for the enforcement of this Contract, (iii) to the extent necessary to implement any transaction, or (iv) to the extent such information is disclosed to such third party for the sole purpose of calculating a published index. Each party shall notify the other party of any proceeding of which it is aware which may result in disclosure of the terms of any transaction (other than as permitted hereunder) and use reasonable efforts to prevent or limit the disclosure. The existence of this Contract is not subject to this confidentiality obligation. Subject to Section 13, the parties shall be entitled to all remedies available at law or in equity to enforce, or seek relief in conjunction with this confidentiality obligation. The terms of any transaction hereunder shall be kept confidential by the parties hereto for one year from the expiration of the transaction.
- In the event that disclosure is required by a governmental body or applicable law, the party subject to such requirement shall disclose the material terms of this Contract to the extent so required, but shall promptly notify the other party, prior to disclosure, and shall cooperate (consistent with the disclosing party's legal obligations) with the other party's efforts to obtain protective orders or similar relief with respect to such disclosure at the expense of the other party.
- 14.11. The parties may agree to dispute resolution procedures in Special Provisions attached to the Base Contract or in a Transaction Confirmation executed in writing by both parties.

DISCLAIMER: The purpose of this Contract is to facilitate trade, avoid misunderstandings and make more definite the terms of contracts of purchase and sale of natural gas. Further, NAEBS does not mandate the use of this Contract by any party. NAEBS DISCLAIMS AND EXCLUDES, AND ANY USER OF THIS CONTRACT ACKNOWLEDGES AND AGREES TO NAEBS'S DISCLAIMER OF, ANY AND ALL WARRANTIES, CONDITIONS OR REPRESENTATIONS, EXPRESS OR IMPLIED, ORAL OR WRITTEN, WITH RESPECT TO THIS CONTRACT OR ANY PART THEREOF, INCLUDING ANY AND ALL IMPLIED WARRANTIES OR CONDITIONS OF TITLE, NON-INFRINGEMENT, MERCHANTABILITY, OR FITNESS OR SUITABILITY FOR ANY PARTICULAR PURPOSE (WHETHER OR NOT NAEBS KNOWS, HAS REASON TO KNOW, HAS BEEN ADVISED, OR IS OTHERWISE IN FACT AWARE OF ANY SUCH PURPOSE), WHETHER ALLEGED TO ARISE BY LAW, BY REASON OF CUSTOM OR USAGE IN THE TRADE, OR BY COURSE OF DEALING. EACH USER OF THIS CONTRACT ALSO AGREES THAT UNDER NO CIRCUMSTANCES WILL NAEBS BE LIABLE FOR ANY DIRECT, SPECIAL, INCIDENTAL, EXEMPLARY, PUNITIVE OR CONSEQUENTIAL DAMAGES ARISING OUT OF ANY USE OF THIS CONTRACT.

**TRANSACTION CONFIRMATION
FOR IMMEDIATE DELIVERY**

EXHIBIT A

Letterhead/Logo	Date: _____ Transaction Confirmation #: _____	
<p>This Transaction Confirmation is subject to the Base Contract between Seller and Buyer dated _____ The terms of this Transaction Confirmation are binding unless disputed in writing within 2 Business Days of receipt unless otherwise specified in the Base Contract.</p>		
SELLER: National Gas Distributors P. O. Box 88051, 1914 D Ruffolo Road Fayetteville, NC 28305 Attn: Paul Lewis Phone: 910-484-0184 Fax: 910-484-0184 Base Contract No.: _____ Transporter: _____ Transporter Contract Number: _____	BUYER: _____ _____ Attn: _____ Phone: _____ Fax: _____ Base Contract No.: _____ Transporter: _____ Transporter Contract Number: _____	
Contract Price: \$ _____ /MMBtu or _____		
Delivery Period: Begin: _____ End: _____		
Performance Obligation and Contract Quantity: (Select One)		
Firm (Fixed Quantity): _____ MMBtu/day <input type="checkbox"/> FFP	Firm (Variable Quantity): _____ MMBtu/day Minimum _____ MMBtu/day Maximum subject to Section 4.2, at election of <input type="checkbox"/> Buyer or <input type="checkbox"/> Seller	Interruptible: _____ MMBtu/day
Delivery Point(s): _____ (If a pooling point is used, list a specific geographic area, pipeline location):		
Special Conditions: 		
Seller: National Gas Distributors, LLC By: _____ Title: President Date: _____	Buyer: _____ By: _____ Title: _____ Date: _____	

EXHIBIT B-2

From: Miller, Bob [BobMiller@smithfieldfoods.com]
Sent: Friday, April 02, 2004 8:57 AM
To: Whelan, Casey
Subject: FW: Strip

FYI!

Bob Miller
Smithfield Foods, Inc
111 Commerce Street - PO Box 9002
Smithfield, VA 23430 - Zip 23431
Phone: 757-357-8128
Fax: 757-357-8136

---Original Message---

From: HPCBBALL@aol.com [SMTP:HPCBBALL@aol.com]
Sent: Friday, April 02, 2004 9:21 AM
To: bobmiller@smithfieldfoods.com
Subject: Strip

Bob:

Per our telephone conversation this morning:

- 1) I have secured as part of our "general supply needs" \$5.70 gas for the next 12 mos. This can be "colored" Smithfield Foods - in essence capping your price of gas in the event that we run out of nat gas, oil, and all the other petroleum products.
- 2) I am aggressively pushing NCNG to lower your neg t-rate for the long term deal.

Paul Lawing, Jr
National Gas Distributors
910-484-9164 office
910-988-2320 cell
910-484-9109 fax

EXHIBIT B-3

From: HPCBBALL@aol.com
Sent: Friday, February 25, 2005 7:08 PM
To: BobMiller@smithfieldfoods.com
Cc: cwheelan@usenergyservices.com
Subject: Re: Natural Gas - North Carolina Plants

Bob,
Per our telephone conversation, I have \$5.75 gas plus basis for the summer (Apr-Oct) and I am still trying to nail down our Nov-Mar piece. We can color that gas Smithfield if you wish. I will be in and out on Monday and Tuesday of next week. Let's talk on Wednesday.

Paul Lawing, Jr
National Gas Distributors
Phone 910-484-9184
Fax 910-484-9109
Cell 910-988-2320

EXHIBIT B-4

Miller, Bob

From: HPCBALL@aol.com
Sent: Friday, August 12, 2005 2:07 PM
To: bobmiller@smithfieldfoods.com
Subject: Writer

Bob,
To confirm our recent telephone conversation - this is to confirm a \$6.00 cap for all volumes for all the NC plants.

Thanks!

Paul Lawing, Jr.
910-484-9184 Office
910-484-9109 Fax
910-988-2320 Cell

Through mardh '06

8/12/2005

EXHIBIT C

whether or not such interest or lien is provided by or is dependent on a statute and whether or not such interest or lien is made fully effective by statute;

(53A) The term "stockbroker" means person--

(A) with respect to which there is a customer, as defined in section 741 of this title; and

(B) that is engaged in the business of effecting transactions in securities--

(i) for the account of others; or

(ii) with members of the general public, from or for such person's own account;

(53B) The term "swap agreement" means

(A) means—

(i) any agreement, including the terms and conditions incorporated by reference in such agreement, which is

(A) an agreement (including terms and conditions incorporated by reference therein) which is a rate swap agreement, basis swap, forward rate agreement, commodity swap, interest rate option, forward foreign exchange agreement, spot foreign exchange agreement, rate cap agreement, rate floor agreement, rate collar agreement, currency swap agreement, an interest rate swap, option, future, or forward agreement, including a rate floor, rate cap, rate collar, cross-currency rate swap agreement, currency option, any other similar agreement (including, and basis swap;

(II) a spot, same day-tomorrow, tomorrow-next, forward, or other foreign exchange or precious metals agreement;

(III) a currency swap, option, future, or forward agreement;

(IV) an equity index or equity swap, option, future, or forward agreement;

(V) a debt index or debt swap, option, future, or forward agreement;

(VI) a total return, credit spread or credit swap, option, future, or forward agreement;

(VII) a commodity index or a commodity swap, option, future, or forward agreement; or

(VIII) a weather swap, weather derivative, or weather option;

(ii) any agreement or transaction that is similar to any other agreement or transaction referred to in this paragraph and that--

(I) is of a type that has been, is presently, or in the future becomes, the subject of recurrent dealings in the swap markets (including terms and conditions incorporated by reference therein); and

(II) is a forward, swap, future, or option on one or more rates, currencies, commodities, equity securities, or other equity instruments, debt securities or other debt instruments, quantitative measures associated with an occurrence, extent of an occurrence, or contingency associated with a financial, commercial, or economic consequence, or economic or financial indices or measures of economic or financial risk or value;

(iii) any combination of agreements or transactions referred to in this subparagraph;

(iv) any option to enter into any of the foregoing; an agreement or transaction referred to in this subparagraph;

(B) any combination of the foregoing; or

(C) a master agreement for any of the foregoing together with all supplements;

(v) a master agreement that provides for an agreement or transaction referred to in clause (i), (ii), (iii), or (iv), together with all supplements to any such master agreement, and without regard to whether the master agreement contains an agreement or transaction that is not a swap agreement under this paragraph, except that the master agreement shall be considered to be a swap agreement under this paragraph only with respect to each agreement or transaction under the master agreement that is referred to in clause (i), (ii), (iii), or (iv); or

(vi) any security agreement or arrangement or other credit enhancement related to any agreements or transactions referred to in clause (i) through (v), including any guarantee or reimbursement obligation by or to a swap participant or financial participant in connection with any agreement or transaction referred to in any such clause, but not to exceed the damages in connection with any such agreement or transaction, measured in accordance with section 562; and

(B) is applicable for purposes of this title only, and shall not be construed or applied so as to challenge or affect the characterization, definition, or treatment of any swap agreement under any other statute, regulation, or rule, including the Securities Act of 1933, the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, the Trust Indenture Act of 1939, the Investment Company Act of 1940, the Investment

Advisers Act of 1940, the Securities Investor Protection Act of 1970, the Commodity Exchange Act, the Gramm-Leach-Bliley Act, and the Legal Certainty for Bank Products Act of 2000;

(53C) The term "swap participant" means an entity that, at any time before the filing of the petition, has an outstanding swap agreement with the debtor;

(56A) The term "term overriding royalty" means an interest in liquid or gaseous hydrocarbons in place or to be produced from particular real property that entitles the owner thereof to a share of production, or the value thereof, for a term limited by time, quantity, or value realized;

(53D) The term "timeshare plan" means and shall include that interest purchased in any arrangement, plan, scheme, or similar device, but not including exchange programs, whether by membership, agreement, tenancy in common, sale, lease, deed, rental agreement, license, right to use agreement, or by any other means, whereby a purchaser, in exchange for consideration, receives a right to use accommodations, facilities, or recreational sites, whether improved or unimproved, for a specific period of time less than a full year during any given year, but not necessarily for consecutive years, and which extends for a period of more than three years. A "timeshare interest" is that interest purchased in a timeshare plan which grants the purchaser the right to use and occupy accommodations, facilities, or recreational sites, whether improved or unimproved, pursuant to a timeshare plan.

(54) The term "transfer" means every—

- (A) the creation of a lien;
- (B) the retention of title as a security interest;
- (C) the foreclosure of a debtor's equity of redemption; or
- (D) each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with—
 - (i) property; or with
 - (ii) an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption;

(54A) ~~the~~ The term "uninsured State member bank" means a State member bank (as defined in section 3 of the Federal Deposit Insurance Act) the deposits of which are not insured by the Federal Deposit Insurance Corporation; ~~and.~~

(55) The term "United States", when used in a geographical sense, includes all locations where the judicial jurisdiction of the United States extends, including territories and possessions of the United States; ~~;~~

§ 102. Rules of construction

In this title--

- (1) "after notice and a hearing", or a similar phrase--
 - (A) means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances; but
 - (B) authorizes an act without an actual hearing if such notice is given properly and if--
 - (i) such a hearing is not requested timely by a party in interest; or
 - (ii) there is insufficient time for a hearing to be commenced before such act must be done, and the court authorizes such act;
- (2) "claim against the debtor" includes claim against property of the debtor;
- (3) "includes" and "including" are not limiting;
- (4) "may not" is prohibitive, and not permissive;
- (5) "or" is not exclusive;
- (6) "order for relief" means entry of an order for relief;
- (7) the singular includes the plural;
- (8) a definition, contained in a section of this title that refers to another section of this title, does not, for the purpose of such reference, affect the meaning of a term used in such other section; and
- (9) "United States trustee" includes a designee of the United States trustee.

§ 103. Applicability of chapters

EXHIBIT D

(B) with respect to an insured credit union (including an insured credit union for which the National Credit Union Administration has been appointed conservator or liquidating agent), the National Credit Union Administration;

(C) with respect to any insured depository institution for which the Resolution Trust Corporation has been appointed conservator or receiver, the Resolution Trust Corporation; and

(D) with respect to any insured depository institution for which the Federal Deposit Insurance Corporation has been appointed conservator or receiver, the Federal Deposit Insurance Corporation;

(22) ~~the~~ The term “financial institution” means--

(A) means—(i) a Federal reserve bank, or an entity (domestic or foreign) that is a commercial or savings bank, industrial savings bank, savings and loan association, trust company, federally-insured credit union, or receiver, liquidating agent, or conservator for such entity and, when any such Federal reserve bank, receiver, liquidating agent, conservator, or entity is acting as agent or custodian for a customer in connection with a securities contract, (as defined in section 741 of this title, the) such customer; or

(ii) in connection with a securities contract, (as defined in section 741 of this title,) an investment company registered under the Investment Company Act of ~~1940, and~~ 1940.

~~(B) includes any person described in subparagraph (A) which operates, or operates as, a multilateral clearing-organization pursuant to section 409 of the Federal Deposit Insurance Corporation Improvement Act of 1991; 22A)~~
The term “financial participant” means--

(A) an entity that, at the time it enters into a securities contract, commodity contract, swap agreement, repurchase agreement, or forward contract, or at the time of the date of the filing of the petition, has one or more agreements or transactions described in paragraph (1), (2), (3), (4), (5), or (6) of section 561(a) with the debtor or any other entity (other than an affiliate) of a total gross dollar value of not less than \$1,000,000,000 in notional or actual principal amount outstanding on any day during the previous 15-month period, or has gross mark-to-market positions of not less than \$100,000,000 (aggregated across counterparties) in one or more such agreements or transactions with the debtor or any other entity (other than an affiliate) on any day during the previous 15-month period; or

(B) a clearing organization (as defined in section 402 of the Federal Deposit Insurance Corporation Improvement Act of 1991).

(23) ~~The term “foreign proceeding” means proceeding, whether a collective judicial or administrative and whether or not under bankruptcy law, in a foreign country in which the debtor’s domicile, residence, principal place of business, or principal assets were located at the commencement of such proceeding, for the purpose of liquidating an estate, adjusting debts by composition, extension, or discharge, or effecting a proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization, or liquidation.~~

~~(24) The term “foreign representative” means duly selected trustee, administrator, or other representative of an estate in a foreign proceeding; a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of such foreign proceeding.~~

(25) The term “forward contract” means--

(A) a contract (other than a commodity contract) for the purchase, sale, or transfer of a commodity, as defined in section 761(8) of this title, or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade, or product or byproduct thereof, with a maturity date more than two days after the date the contract is entered into, including, but not limited to, a repurchase transaction, reverse repurchase transaction, consignment, lease, swap, hedge transaction, deposit, loan, option, allocated transaction, unallocated transaction, or any other similar agreement

(B) any combination thereof or option thereon of agreements or transactions referred to in subparagraphs (A) and (C);

(C) any option to enter into an agreement or transaction referred to in subparagraph (A) or (B);

(D) a master agreement that provides for an agreement or transaction referred to in subparagraph (A), (B), or (C), together with all supplements to any such master agreement, without regard to whether such master agreement provides for an agreement or transaction that is not a forward contract under this paragraph, except that such master agreement shall be considered to be a forward contract under this paragraph only with respect to each agreement or transaction under such master agreement that is referred to in subparagraph (A), (B), or (C); or

(E) any security agreement or arrangement, or other credit enhancement related to any agreement or transaction referred to in subparagraph (A), (B), (C), or (D), including any guarantee or reimbursement obligation by or to a forward contract merchant or financial participant in connection with any agreement or transaction referred to in any such subparagraph, but not to exceed the damages in connection with any such agreement or transaction, measured in accordance with section 562.

(26) The term "forward contract merchant" means a person whose Federal reserve bank, or an entity the business of which consists in whole or in part of entering into forward contracts as or with merchants in a commodity; (as defined in section 761(8) of this title,) or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade.

(27) The term "governmental unit" means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.

(27A) The term "health care business"--

(A) means any public or private entity (without regard to whether that entity is organized for profit or not for profit) that is primarily engaged in offering to the general public facilities and services for--

(i) the diagnosis or treatment of injury, deformity, or disease; and

(ii) surgical, drug treatment, psychiatric, or obstetric care; and

(B) includes--

(i) any--

(I) general or specialized hospital;

(II) ancillary ambulatory, emergency, or surgical treatment facility;

(III) hospice;

(IV) home health agency; and

(V) other health care institution that is similar to an entity referred to in subclause (I), (II), (III), or (IV);

and

(ii) any long-term care facility, including any--

(I) skilled nursing facility;

(II) intermediate care facility;

(III) assisted living facility;

(IV) home for the aged;

(V) domiciliary care facility; and

(VI) health care institution that is related to a facility referred to in subclause (I), (II), (III), (IV), or (V), if that institution is primarily engaged in offering room, board, laundry, or personal assistance with activities of daily living and incidentals to activities of daily living.

(27B) The term "incidental property" means, with respect to a debtor's principal residence--

(A) property commonly conveyed with a principal residence in the area where the real property is located;

(B) all easements, rights, appurtenances, fixtures, rents, royalties, mineral rights, oil or gas rights or profits, water rights, escrow funds, or insurance proceeds; and

(C) all replacements or additions.

(28) The term "indenture" means mortgage, deed of trust, or indenture, under which there is outstanding a security, other than a voting-trust certificate, constituting a claim against the debtor, a claim secured by a lien on any of the debtor's property, or an equity security of the debtor.

(29) The term "indenture trustee" means trustee under an indenture.

(30) The term "individual with regular income" means individual whose income is sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13 of this title, other than a stockbroker or a commodity broker.

(31) The term "insider" includes--

(A) if the debtor is an individual--

(i) relative of the debtor or of a general partner of the debtor;

(ii) partnership in which the debtor is a general partner;

(iii) general partner of the debtor; or

(iv) corporation of which the debtor is a director, officer, or person in control;

(B) if the debtor is a corporation--

EXHIBIT E

(3) For the purposes of this section, a transfer is not made until the debtor has acquired rights in the property transferred.

(f) For the purposes of this section, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition.

(g) For the purposes of this section, the trustee has the burden of proving the avoidability of a transfer under subsection (b) of this section, and the creditor or party in interest against whom recovery or avoidance is sought has the burden of proving the nonavoidability of a transfer under subsection (c) of this section.

(h) The trustee may not avoid a transfer if such transfer was made as a part of an alternative repayment schedule between the debtor and any creditor of the debtor created by an approved nonprofit budgeting and credit counseling agency.

(i) If the trustee avoids under subsection (b) a transfer made between 90 days and 1 year before the date of the filing of the petition, by the debtor to an entity that is not an insider for the benefit of a creditor that is an insider, such transfer shall be considered to be avoided under this section only with respect to the creditor that is an insider.

§ 548. Fraudulent transfers and obligations

(a) (1) The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within ~~one year~~ 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily--

(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(B) (i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii) (I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or

(IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

(2) A transfer of a charitable contribution to a qualified religious or charitable entity or organization shall not be considered to be a transfer covered under paragraph (1)(B) in any case in which--

(A) the amount of that contribution does not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer of the contribution is made; or

(B) the contribution made by a debtor exceeded the percentage amount of gross annual income specified in subparagraph (A), if the transfer was consistent with the practices of the debtor in making charitable contributions.

(b) The trustee of a partnership debtor may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within ~~one year~~ 2 years before the date of the filing of the petition, to a general partner in the debtor, if the debtor was insolvent on the date such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

(c) Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of this title, a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

(d) (1) For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.

(2) In this section--

(A) "value" means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor;

(B) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant or securities clearing agency that receives a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, takes for value to the extent of such payment;

(C) a repo participant or financial participant that receives a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, in connection with a repurchase agreement, takes for value to the extent of such payment; and

(D) a swap participant or financial participant that receives a transfer in connection with a swap agreement takes for value to the extent of such transfer; and

(E) a master netting agreement participant that receives a transfer in connection with a master netting agreement or any individual contract covered thereby takes for value to the extent of such transfer, except that, with respect to a transfer under any individual contract covered thereby, to the extent that such master netting agreement participant otherwise did not take (or is otherwise not deemed to have taken) such transfer for value.

(3) In this section, the term "charitable contribution" means a charitable contribution, as that term is defined in section 170(c) of the Internal Revenue Code of 1986, if that contribution--

(A) is made by a natural person; and

(B) consists of--

(i) a financial instrument (as that term is defined in section 731(c)(2)(C) of the Internal Revenue Code of 1986); or

(ii) cash.

(4) In this section, the term "qualified religious or charitable entity or organization" means--

(A) an entity described in section 170(c)(1) of the Internal Revenue Code of 1986; or

(B) an entity or organization described in section 170(c)(2) of the Internal Revenue Code of 1986.

(e)(1) In addition to any transfer that the trustee may otherwise avoid, the trustee may avoid any transfer of an interest of the debtor in property that was made on or within 10 years before the date of the filing of the petition if--

(A) such transfer was made to a self-settled trust or similar device;

(B) such transfer was by the debtor;

(C) the debtor is a beneficiary of such trust or similar device; and

(D) the debtor made such transfer with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made, indebted.

(2) For the purposes of this subsection, a transfer includes a transfer made in anticipation of any money judgment, settlement, civil penalty, equitable order, or criminal fine incurred by, or which the debtor believed would be incurred by--

(A) any violation of the securities laws (as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47))), any State securities laws, or any regulation or order issued under Federal securities laws of State securities laws; or

(B) fraud, deceit, or manipulation in a fiduciary capacity or in connection with the purchase or sale of any security registered under section 12 of 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78l and 78o(d)) or under section 6 of the Securities Act of 1933 (15 U.S.C. 77f).

§ 549. Postpetition transactions

(a) Except as provided in subsection (b) or (c) of this section, the trustee may avoid a transfer of property of the estate--

(1) that occurs after the commencement of the case; and

(2) (A) that is authorized only under section 303(f) or 542(c) of this title; or