IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GETTY PETROLEUM MARKETING, INC., Plaintiff	Civil Action No. 07-CV-340
vs.	
SHIPLEY FUELS MARKETING, LLC, Defendant	

O R D E R

NOW, this 27th day of September, 2007, upon consideration of plaintiff's Motion for Preliminary Injunction filed February 2, 2007, together with Plaintiff's Brief in Support of Motion for Preliminary Injunction; upon consideration of Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Preliminary Injunction, which memorandum was filed February 8, 2007; after hearing and closing arguments held February 12, 2007; upon consideration of the testimony, exhibits and oral stipulations presented at the hearing; upon consideration of Plaintiff's Proposed Findings of Fact and Conclusions of Law and Defendant's Proposed Findings of Fact and Conclusions of Law, each filed February 8, 2007; upon consideration of Defendant's Supplemental Proposed Findings of Fact and Conclusions of Law filed February 14, 2007; and for the reasons expressed in the accompanying Opinion,

IT IS ORDERED that plaintiff's Motion for Preliminary Injunction is denied.

BY THE COURT:

/s/ James Knoll Gardner
James Knoll Gardner
United States District Judge

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GETTY PETROLEUM MARKETING, INC.,	)	
	)	Civil Action
Plaintiff	)	No. 07-CV-340
	)	
vs.	)	
	)	
SHIPLEY FUELS MARKETING, LLC,	)	
	)	
Defendant	)	

* * *

APPEARANCES:

HENRY H. JANSEN, ESQUIRE, and
JAMES A. WILLHITE, JR., ESQUIRE
On behalf of Plaintiff

JOHN F. O'CONNOR, ESQUIRE,
MICHAEL J. BARATZ, ESQUIRE,
THOMAS M. BARBA, ESQUIRE, and
DOUGLAS S. KANTOR, ESQUIRE
On behalf of Defendant

* * *

O P I N I O N

JAMES KNOLL GARDNER,
United States District Judge

This matter is before the Court on the Motion for Preliminary Injunction filed February 2, 2007 on behalf of plaintiff Getty Petroleum Marketing Inc.[1] By Order dated February 5, 2007, I scheduled a hearing on plaintiff's motion for preliminary injunction. On February 12, 2007 I conducted a hearing on plaintiff's motion. At the hearing, plaintiff

[1] On February 8, 2007, defendant Shipley Fuels Marketing, LLC filed Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Preliminary Injunction.

presented the testimony of two witnesses: Vincent J. DeLaurentis, President and Chief Operating Officer of Getty Petroleum Marketing, Inc.; and Christopher Gannon, the Wholesale Manager of the Company. Defendant Shipley Fuels Marketing, LLC presented the testimony of Lloyd Ralph Midgett, President of defendant company. By agreement of counsel, 32 plaintiff exhibits and two defense exhibits were admitted into evidence.

For the reasons expressed below, I deny plaintiff's Motion for Preliminary Injunction.

BACKGROUND

Plaintiff Getty Petroleum Marketing, Inc. is a franchisor and wholesaler of motor fuel. Defendant Shipley Ruels Marketing, LLC is a franchisee of plaintiff and a wholesale distributor and retail seller of motor fuel. Plaintiff's and defendant's predecessors-in-interest entered into a Distributor PMPA[2] Motor Fuels Franchise Agreement ("Agreement") on November 3, 1994. The Agreement established a franchise for the sale and distribution of Mobil brand gasoline. Both plaintiff and defendant became the operative parties after a series of assignments.

Plaintiff filed a motion for a preliminary injunction in order to change the brand of the products it sells to

[2] PMPA is the Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801 to 2841.

defendant and the brand name and trademarks under which the products are sold to consumers. The plaintiff seeks to change the brand of the petroleum products distributed by defendant from Mobil to LUKOIL. Plaintiff also seeks to have the products distributed to defendant’s retail service stations sold under the LUKOIL trademarks. Plaintiff contends that the parties’ Agreement contemplates a substitution of products and re-branding of the franchisee.

Defendant opposes the proposed substitution of LUKOIL for Mobil products and the substitution of the associated trademarks. Defendant argues that the Agreement was and is an agreement for the distribution of Mobil brand gasoline. Defendant asserts that plaintiff’s decision to discontinue sale of Mobil brand products and its loss of the rights over Mobil’s trademarks is a repudiation of the parties’ Agreement.

SUMMARY OF DECISION

In order to determine the likelihood of success on the merits, I construed the parties’ respective rights embodied in their Agreement. In this diversity case, I applied the Pennsylvania common law of contracts as modified by Pennsylvania’s Uniform Commercial Code to the Agreement.

The Agreement confers two principal bundles of rights upon the franchisee. The first are purchase rights for petroleum products for distribution and resale from the franchisor. The second are rights related to the use of the franchisor’s trademark, trade dress, trade insignia and trade name. These rights are interrelated and flow from the thrust of the Agreement, the distribution and sale of gasoline under the franchisor’s trademarks.

I found that the Agreement was clear and unambiguous in numerous aspects. The franchisor had a clear right to assign the Agreement. I found that “Mobil products” were defined in the Agreement as Mobil brand gasoline. I also concluded that in most instances, plaintiff Getty was properly substituted for Mobil because “Mobil” refers generically to the role of the franchisor.

I concluded that the Agreement contained a latent ambiguity regarding the right to discontinue the sale of the Mobil products specified in the Agreement. After considering the relevant parol evidence, I found that plaintiff had a right to discontinue any and all petroleum products and offer substitute products.

However, I also concluded that defendant had a clear and absolute right to object to any substitute products offered by plaintiff. I held that the waiver provision unambiguously preserved defendant’s right to object at any time. I found that defendant had objected to all substitute products.

I held that no products remain subject to the Agreement because all original products had been discontinued by plaintiff and defendant had objected to all substitutes. I also found that the provisions of the Agreement regarding trademark, product and brand name changes clearly permitted the franchisor to alter the trademarks, products and brand names of only those Mobil products or substitute products which are part of the Agreement. Because no products currently remain subject to the Agreement, plaintiff cannot alter any trademarks, products and brand names.

Next, I concluded that the Agreement was ambiguous with regard to the unique contingent circumstances presented in this case. Plaintiff contends that the franchise agreement continues notwithstanding the fact that no products or trademarks are subject to the franchise. Plaintiff asserts that the Agreement prohibits defendant from selling any petroleum other than fuel it acquires from plaintiff during the remaining term of the Agreement. Defendant opposed plaintiff’s construction of the Agreement and argues that the Agreement was terminated as a result of plaintiff’s loss of the right to sell Mobil brand motor fuel under the Mobil brand and trademarks.

Applying the doctrine of necessary implication and reviewing the relevant parol evidence, including the parties’ course of performance, I construed the Agreement as containing an implied contingent condition. I held that the sale of petroleum from plaintiff to defendant was a necessary precondition to the existence of the Agreement. Where no products are subject to the

Agreement, I held the Agreement becomes a nullity. Thus, I concluded that plaintiff was not likely to succeed on the merits.

I also found that plaintiff could not demonstrate that it would be irreparably harmed without preliminary injunctive relief. I rejected plaintiff’s argument that damages would be difficult or impossible to measure because it is launching a new brand. I concluded that the history of the parties’ dealings over the first twelve years of the contract as well as a consideration of the success of similarly situated distributors and retail outlets that have converted to LUKOIL will provide an adequate basis for calculating the monetary damages to defendant. I also found that the goodwill associated with plaintiff’s trademarks and brand image could not be injured by defendant’s non-use.

Concerning irreparable harm to defendant, I concluded that plaintiff failed to establish that defendant will not be harmed, or only slightly harmed, if a preliminary injunction were granted.

Regarding the balance of hardships, I found that the balance of harms weighs in favor of defendant. Defendant had converted its service stations to its own proprietary brand “Tom’s” prior to the commencement of the instant action. Thus, the cost associated with converting the stations to LUKOIL and then re-branding the stations after a successful defense by defendant would be greater than the costs of maintaining the status quo.

Lastly, I held that neither party had shown that the public interest would be affected by the grant or denial of preliminary relief. Although the public policy of Pennsylvania favors competition in the markets for distribution and retail sale of gasoline, this lawsuit will have little effect on the regional market as a whole. Even if plaintiff is correct that competition between integrated refiners (as opposed to competition from independent service stations) is in the greater public interest, that interest will not be significantly injured by the amount of time it will take to resolve the within matter.

JURISDICTION

This Court has subject matter jurisdiction of this action based upon diversity of citizenship. 28 U.S.C. § 1332. Plaintiff Getty Petroleum Marketing Inc. is a corporation organized and existing under the laws of the State of Maryland and has its principal place of business in New York. Defendant Shipley Fuels Marketing, LLC is a Pennsylvania limited liability company with its principal place of business in Pennsylvania. Thus, plaintiff and defendant are citizens of different states.

The amount in controversy exceeds $75,000 exclusive of interest and costs.[3]

VENUE

Venue is in this action appropriate pursuant to 28 U.S.C. § 1391(a)(1), (a)(2) and (c) because a substantial part of the events giving rise to plaintiff's claims occurred within this district; part of the property that is the subject of this action is situated within this district; and defendant regularly does business within this district.[4]

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[3] Plaintiff's Complaint seeks only injunctive relief. However, plaintiff's Complaint alleges an amount in controversy that meets or exceeds $75,000 exclusive of interest and costs. It is well-established law that when the only relief sought is declaratory or injunctive relief, the amount in controversy is measured by the value of the object of the litigation. Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 347, 97 S.Ct. 2434, 2443, 53 L.Ed.2d 383, 397 (1977).

Plaintiff seeks the enforcement of a franchise distribution agreement for the purchase and distribution of motor fuel at twenty three service stations supplied by defendant, eleven of which defendant wholly owns, operates and controls. The franchise agreement commenced on December 30, 1994 and ends on December 29, 2009.

Although the price of motor fuel over the next two years and ten months is highly speculative and the price of fuel will drastically affect the potential loss of profits suffered by plaintiff, it cannot be said to a legal certainty that these losses will not exceed the requisite jurisdictional amount. Moreover, as evidenced by the averments contained within plaintiff's moving papers regarding the past financial dealings between the parties, including rebates paid by plaintiff to defendant in the amount of $230,687.16 and so-called incentive payments of $157,379.55, the substantial nature of the financial dealings between these two business entities is apparent.

Accordingly, plaintiff's allegations that its damages will meet or exceed the jurisdictional amount in combination with the nature of the agreement, a franchise including twenty-three service stations engaged in the sale of motor fuel, are sufficient to satisfy the amount in controversy jurisdictional requirement of diversity actions.

[4] There are twenty-three service stations at issue in this controversy. As identified in plaintiff's Motion for Preliminary Injunction, three of the twenty three are located within the territorial boundaries of the United States District Court for the Eastern District of Pennsylvania.

PLAINTIFF'S COMPLAINT

Plaintiff Getty Petroleum Marketing Inc. filed its Complaint in this court on January 26, 2007. According to its Complaint, plaintiff is a franchisor and wholesale seller of motor fuel. The Complaint alleges that defendant Shipley Fuels Marketing, LLC is a franchisee of plaintiff and a wholesale distributor and retail seller of motor fuel.[5]

Plaintiff's Complaint asserts a claim for injunctive relief based upon a breach of contract.

The Complaint alleges that through the parties' predecessors in interest, plaintiff and defendant entered into a Distributor PMPA Motor Fuels Franchise Agreement on November 3, 1994. Plaintiff contends that this Agreement established a franchise relationship between plaintiff and defendant for the wholesale distribution of motor fuels to service stations for a term of fifteen years commencing December 30, 1994 and terminating December 29, 2009.[6]

Plaintiff alleges that Getty Petroleum Marketing Inc. became the franchisor under the Agreement as a result of a series of assignments. Mobil Oil Corporation (the original franchisor) assigned its interest in the Agreement to TOSCO Corporation, which became ConocoPhillips Company after a merger.

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[5] Complaint, paragraphs 5, 6 and 8.

[6] Complaint, paragraph 5.

ConocoPhillips Company, as successor by merger to the Agreement, assigned its interest in the Agreement to Getty Petroleum Marketing Inc.[7]

In addition to its rights as assignee under the Agreement, plaintiff alleges that Getty Petroleum Marketing Inc. held a sublicense from ConocoPhillips Company for use of the "Mobil" brand trademark, trade dress and related trade names. This sublicense allegedly expired on February 28, 2007.[8]

Plaintiff's Complaint avers that it is also a licensee of OAO LUKOIL, a corporation engaged in the business of refining of crude oil to produce motor fuel. Plaintiff avers it is a franchisor of retail LUKOIL branded motor fuel service stations and wholesale distribution of LUKOIL branded motor fuel in Pennsylvania. Plaintiff further contends it possesses a license for the LUKOIL trade name, trade dress and trademark for use at LUKOIL branded service stations.[9] Moreover, plaintiff contends that LUKOIL brand motor fuel products are of substantially equivalent quality as Mobil brand motor fuel products.[10]

Plaintiff asserts that Shipley Fuels Marketing, LLC became the franchisee under the Agreement as a result of a series

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7 Complaint, paragraph 8.

8 Id.

9 Complaint, paragraph 9.

10 Complaint, paragraph 20.

of assignments. Plaintiff alleges that Shipley Oil Company, Inc. (the original franchisee) assigned its interest as "Distributor" under the Agreement to Shipley Stores, Inc., which then assigned its interest to Shipley Stores, LLC. Shipley Stores, LLC subsequently assigned its interest under the Agreement to Shipley Fuels Marketing, LLC.[11]

Plaintiff contends that under the terms of the Agreement, defendant agreed to purchase minimum quantities of motor fuel from the franchisor for resale at approved service stations.[12] Plaintiff's Complaint avers that pursuant to the Agreement, Shipley Fuels Marketing, LLC picks up Mobil brand motor fuels at three distribution terminals and delivers that Mobil brand motor fuel to twenty-two approved stations in Pennsylvania and one station in Maryland. Plaintiff alleges that Shipley Fuels Marketing, LLC operates eleven of the twenty-two service stations located in Pennsylvania.[13]

Plaintiff's Complaint avers that pursuant to the parties' franchise Agreement, plaintiff has a right to discontinue the sale of all Mobil motor fuel products[14] and terminate the use of any associates trademarks, trade dresses and

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[11] Complaint, paragraph 6.

[12] Complaint, paragraph 10.

[13] Complaint, paragraph 7.

[14] Complaint, paragraph 17.

trade names.[15] Plaintiff contends the terms of the Agreement allow the franchisor to substitute the brand of motor fuel offered to the franchisee[16] and also permit the franchisor to change brand names and trademarks used in connection with the retail sale of the associated motor fuel.[17]

Plaintiff also avers that it possesses a right to enter all twenty-three service stations supplied by defendant[18] to effectuate the brand conversion process. Plaintiff avers it provided written notice to defendant on October 19, 2006 of the franchise brand change[19] and again on November 15, 2006.[20]

Plaintiff's Complaint contends that defendant plans, and is making arrangements, to provide one or more alternate brands of motor or un-branded motor fuel at its service stations in violation of the franchise Agreement.[21] Plaintiff further contends that defendant has denied plaintiff access to defendant's service stations for the purpose of re-branding in violation of the Agreement.[22] Finally, plaintiff claims that all

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[15] Complaint, paragraph 18.

[16] Complaint, paragraphs 17 and 19.

[17] Complaint, paragraphs 18 and 19.

[18] Complaint, paragraph 22.

[19] Complaint, paragraph 21.

[20] Complaint, paragraph 24.

[21] Complaint, paragraph 25.

[22] Complaint, paragraph 24.

other conditions precedent imposed upon plaintiff under the Agreement and ancillary agreements have been performed or have otherwise occurred.[23]

Plaintiff’s Complaint demands judgment against defendant enjoining it until December 29, 2009 from: (1) supplying or delivering, or arranging to supply or deliver, un-branded motor fuel products, or any brand of motor fuel products other than LUKOIL brand motor fuel products purchased from plaintiff to any of its twenty-three approved stations[24]; (2) hindering or interfering with the replacement of Mobil trademark, trade dress, trade insignia and trade name at any of its twenty-three approved stations with LUKOIL trademark, trade insignia, trade dress and trade name[25]; (3) operating its eleven wholly owned service stations for the purpose of retail motor fuel and petroleum product sales, except under the LUKOIL trademark, trade insignia, trade dress and trade name[26]; and (4) displaying, or requiring, requesting, aiding or assisting others to display, at any of its twenty-three approved stations

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[23] Complaint, paragraph 26.

[24] Complaint, paragraph a.

[25] Complaint, paragraph b.

[26] Complaint, paragraph c.

any brand, trademark or trade name other than LUKOIL.[27]

Plaintiff's Complaint also seeks injunctive relief requiring defendant to (5) remove or cover, and requiring its dealers to remove or cover, all Mobil trademarks, trade dresses, trade insignia and trade names at its twenty three stations.[28] Plaintiff also seeks (6) legal fees and costs.[29]

PROCEDURAL POSTURE

Plaintiff filed its Complaint on January 26, 2007. Plaintiff subsequently filed its Motion for Preliminary Injunction on February 2, 2007 and served the motion upon defendant that same day. On February 3, 2007, plaintiff served defendant with a copy of its Complaint. By my Order dated February 5, 2007 I scheduled plaintiff's Motion for Preliminary Injunction for hearing on February 12, 2007 and directed plaintiff to immediately serve my scheduling Order upon defendant. On February 12, 2007 I held a hearing on plaintiff's Motion for Preliminary Injunction.

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[27] Complaint, paragraph d.

I note that plaintiff's Motion for Preliminary Injunction seeks more limited relief than the relief requested in plaintiff's Complaint. Specifically, plaintiff's motion seeks relief corresponding to requests one, three, four and five as identified herein. However, at the hearing conducted on February 12, 2007, for the purposes of its motion for preliminary injunction, plaintiff indicated that it only seeks injunctive relief prohibiting Shipley from purchasing motor fuel other than LUKOIL brand from Getty.

[28] Complaint, paragraph e.

[29] Complaint, paragraph f.

FINDINGS OF FACT

Based upon the pleadings and record papers; and the testimony, exhibits, and oral stipulations of counsel presented at the hearing held on February 12, 2007, the pertinent facts are as follows.

Parties

1. Plaintiff Getty Petroleum Marking Inc. ("Getty") is a corporation organized and existing under the laws of the State of Maryland and is authorized to conduct business within Pennsylvania. Getty's principal place of business is in New York.

2. Getty is a wholly owned subsidiary of LUKOIL Oil Company, a corporation of the Russian Federation engaged in the refining of crude oil to produce motor fuel.

3. Defendant Shipley Fuels marketing, LLC ("Shipley") is a Pennsylvania limited liability company with its principal place of business at 415 Norway Street, York, Pennsylvania, and none of whose members are citizens of Maryland or New York.

4. Shipley is the successor-in-interest of Shipley Oil Company, Inc.

5. Shipley currently owns and operates twenty-six motor fuel service stations, and acts as a distributor for

approximately eighty other independently owned service stations (independent dealers) in the south central Pennsylvania area.

Franchise Agreement

6. On November 3, 1994 Shipley Oil Company, Inc. (defendant’s predecessor-in-interest) entered into a Distributor PMPA Motor Fuels Franchise Agreement with Mobil Oil Corporation (“Mobil”). This Agreement established a wholesale distributorship franchise between Mobil as franchisor and Shipley as franchisee.

7. The Agreement provides for the wholesale distribution and sale of Mobil brand motor fuels through franchisee’s service stations (as approved by the franchisor) for a period of fifteen years commencing December 30, 1994 and terminating December 29, 2009.

8. Pursuant to the Agreement, Shipley picks up Mobil brand motor fuels at three terminals and delivers that Mobil brand motor fuel to twenty-two approved stations in Pennsylvania and one approved station in Maryland.

9. Shipley is the owner-operator of eleven of the twenty three approved stations subject to the parties’ franchise Agreement.

10. The twelve independent service stations supplied by Shipley are not parties to this case.

11. During the term of the Agreement Shipley utilized its proprietary “Tom’s” mark at its service stations to identify its on-premises convenience stores in addition to the Mobil trademark, trade dress and trade name, which served to identify the brand of the service stations.

Assignments and Licenses

12. As a result of a Federal Trade Commission investigation prompted by the proposed merger between Exxon Corporation and Mobil Oil Corporation, pursuant to a Consent Order, Mobil divested itself of certain retail assets in Pennsylvania and Maryland.

13. Specifically, Mobil Oil Corporation assigned its interest in the Agreement with Shipley to TOSCO Corporation, which later merged into ConocoPhillips Company.

14. On May 19, 2004 Getty purchased certain Mobil-branded assets from ConocoPhillips Company, including the franchise and supply contracts for 779 retail outlets in New Jersey and Pennsylvania.

15. Pursuant to this May 19, 2004 transaction, Getty became the franchisor of retail Mobil branded motor fuel service stations in Pennsylvania as an assignee of ConocoPhillips Company.

16. Getty also became a sub-licensee of ConocoPhillips Company for the Mobil trademark, trade dress and trade name displayed at each service station.

17. All of Getty's predecessors-in-interest (franchisors) provided Shipley with Mobil brand motor fuel and the right to use the Mobil trademark, trade dress and trade name.

18. From May 19, 2004 until on or about February 28, 2007, Getty provided Shipley with Mobil brand motor fuels and allowed Shipley to operate its distributorship and associated service stations utilizing the Mobil trademark, trade dress and trade name.

19. Getty terminated its licensing agreement with ConocoPhillips Company for use of the Mobil trademark, trade dress and trade name effective February 28, 2007.

20. After February 28, 2007 Getty no longer possessed the right to use the Mobil trademark, trade dress or trade name and no longer provided Mobil petroleum products to its franchisees.

Substitution of LUKOIL Brand

21. Getty currently holds a license from LUKOIL Oil Company to market motor fuel under the LUKOIL brand, which license includes the right to use the LUKOIL trademark, trade dress and trade name at LUKOIL-branded service stations.

22. In February 2005 Getty began re-branding the Mobil outlets it had acquired to the LUKOIL refiner brand.

23. On October 19, 2006 Getty sent a letter to Shipley indicating its intention to re-brand Shipley's service stations to LUKOIL and to begin surveying the stations in anticipation of the conversion. This letter also stated that Shipley stations needed to remove all Mobil branding and marks no later than February 15, 2007.[30]

24. Shipley actively negotiated with Getty concerning the substitution of the LUKOIL brand after October 19, 2006.

25. On November 10, 2006 Getty sent a second letter to Shipley which advised Shipley that Getty was commencing the next phase of re-branding and included a schedule which specified construction start dates.[31]

26. On November 13, 2006 Shipley responded to Getty by e-mail stating it would not permit Getty's contractors to enter its station properties to prepare for re-branding as LUKOIL and that it had "not made the decision to change the brand of [its] stores....In the event [it] would decide to brand one or more

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[30] See Plaintiff's Exhibit 5 from the hearing on plaintiff's Motion for Preliminary Injunction conducted on February 12, 2007 before The Honorable James Knoll Gardner, United States District Judge ("Plaintiff's PI Exhibit 5").

[31] Plaintiff's PI Exhibit 9.

locations to LUK[OIL], it will be done with detailed communication to [its] specifications and timeline."[32]

27. On November 15, 2006 executives from Getty and Shipley met to discuss the re-branding of Shipley service stations to LUKOIL. At this meeting Getty stated that it possessed the right under the Agreement to compel Shipley to convert to LUKOIL. In contrast, Shipley stated that it believed that it did not have to accept the LUKOIL re-branding and that Getty's refusal to provide Mobil-branded products cancelled their Agreement.

28. On November 29, 2006 Getty sent a letter to Shipley informing Shipley that Getty's license for the Mobil brand would terminate effective February 28, 2007. The letter specifically stated, "[As of February 28, 2007], Getty will cease supplying Mobil branded motor fuel and products and will no longer be permitted to grant you or your Operated Outlets or your Franchise Outlets that right to use Mobil marks and proprietary card system."[33]

29. Shipley did not foreclose the option of entering into an arrangement with Getty to substitute LUKOIL or un-branded gasoline for Mobil. The parties continued actively negotiating until January 16, 2007.

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[32] Plaintiff's PI Exhibit 10.

[33] Plaintiff's PI Exhibit 20.

30. On January 16, 2007 Shipley indicated by telephone that it rejected the LUKOIL substitution from Getty and that it would not re-brand its wholesale franchise or any of its twenty three-service stations to LUKOIL. Shipley also stated that it believed Getty had repudiated the contract by its termination of the Mobil brand.

31. On January 17, 2007 Getty sent a letter to Shipley demanding that Shipley adhere to the terms of the Agreement. The letter stated that Getty had the right to re-brand, Shipley had failed to object to the LUKOIL substitution and, even if Shipley had objected, Getty could "discontinue without liability, the sale of any Mobil products."[34]

32. On January 19, 2007 Shipley responded to Getty by letter. Shipley's letter disputed that Getty had a right to substitute brands under the Agreement and stated "the entirety of the agreement...[was] grounded upon the premise that the brand will be Mobil....Such powers would be a clear breach of the central tenets of the agreement."[35]

33. Shipley has never purchased or accepted delivery of any LUKOIL petroleum products.

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[34] Plaintiff's PI Exhibit 28.

[35] Id.

34. Shipley never objected to the substitution of LUKOIL products for Mobil products based upon quality differences between the LUKOIL and Mobil products.

35. In January 2007 Shipley began the process of removing the Mobil brand signs from its service stations and replacing them with its proprietary “Tom’s” brand. Shipley has spent approximately $450,000 on this effort.

36. Since October 19, 2006 Getty has spent approximately $59,000 to re-brand Shipley’s twenty-three franchisor-approved service stations.

Terms of the Agreement

The Distribution PMPA Motor Fuels Franchise Agreement dated November 3, 1994 was executed by Mobil Oil Corporation and Shipley Oil Company, Inc. On June 1, 2002 Shipley Stores, Inc. executed a Sale, Transfer or Assignment of Lease/Agreement, in which Shipley Stores, Inc. transferred its rights and obligations in the franchise Agreement to Shipley Stores, LLC.

The franchise Agreement and assignment document were each introduced into evidence at the February 12, 2007 injunction hearing as Plaintiff’s Exhibit PI-1.

The pertinent portions of the franchise Agreement between Getty Petroleum Marketing, Inc. (as successor-in-interest to Mobil Oil Corporation) and Shipley Fuels Marketing, LLC (as successor-in-interest to Shipley Stores, LLC) which are applicable to this litigation and referred to in the within Opinion, are compiled in Appendix I, which is attached to this Opinion and incorporated here.

STANDARD OF REVIEW

Preliminary injunctive relief is an extraordinary remedy that should be granted only in limited circumstances. Kos Pharmaceuticals, Inc. v. Andrx Corporation, 369 F.3d 700, 708 (3d Cir. 2004). A primary goal of preliminary injunction analysis is to maintain the status quo, defined as the last, peaceable, non-contested status of the parties. Accordingly, a party seeking a mandatory preliminary injunction that will alter the status quo bears a particularly heavy burden in demonstrating its necessity. Acierno v. New Castle County, 40 F.3d 645, 653 (3d Cir. 1994).

In considering a motion for a preliminary injunction, a district court must weigh the following familiar four factors: (1) the likelihood that the moving party will succeed on the merits; (2) the extent to which the moving party will suffer irreparable harm without injunctive relief; (3) the extent to which the non-moving party will suffer irreparable harm if the injunction is issued; and (4) the public interest.

In order to grant preliminary injunctive relief, the district court must be convinced that the factors favor the granting of a preliminary injunction. Shire US Inc. v. Barr

Laboratories, Inc., 329 F.3d 348, 352 (3d Cir. 2003). However, a district court may not grant injunctive relief where the moving party has failed to satisfy the first two requirements, regardless of what the equities appear to require. Adams v. Freedom Forge Corporation, 204 F.3d 475, 484 (3d Cir. 2000).

In order to demonstrate irreparable harm, the moving party must show that the potential harm cannot be redressed by a legal or equitable remedy following a trial. A preliminary injunction must be the only means of protecting the moving party. If monetary damages will adequately compensate the moving party, a preliminary injunction should not be issued. See Campbell Soup Company v. ConAgra, Inc., 977 F.2d 86, 91 (3d Cir. 1992).

DISCUSSION

Likelihood of SuccesS

Plaintiff's likelihood of success on the merits in this action turns on whether the parties' franchise Agreement grants plaintiff, as the assigned franchisor, the ability to foist the LUKOIL re-branding program upon defendant, an unwilling franchisee. This re-brand consists of both substituted petroleum products and substituted trademarks, trade names, trade dresses and trade insignia. Both parties contend that the terms of their Agreement are clear and unambiguous.

Plaintiff's Contentions

Plaintiff contends that the unambiguous terms of the Agreement authorize plaintiff to change the products and brand name under which the products are sold. Plaintiff refers to paragraph 15.3 of the Agreement, which authorizes the assignment of the franchise, for the proposition that the Agreement contemplates that the identity of the franchisor might change and that the franchise brand might change during the duration of the contract.

Plaintiff contends that paragraph 2.9 reinforces its construction of the Agreement. Plaintiff argues that paragraph 2.9 gives the franchisor the "right to discontinue, without liability, the sale of any or all of the Mobil products covered by this Agreement" and "to substitute another product of substantially the same quality for the one discontinued, unless Distributor objects to receiving said substituted product in writing upon notice of such substitution."

Plaintiff claims that it made the decision to re-brand in good faith and has offered a substitute product of substantially the same quality to which defendant has failed to timely object. Plaintiff asserts that defendant did not object to the LUKOIL product substitution until January 19, 2007, when it first sent a formal written letter.

Plaintiff also contends that the substitutions contemplated by paragraph 2.9 specifically apply to inter-brand changes and not intra-band changes. Plaintiff argues that its interpretation of the Agreement is reinforced by paragraphs 2.1 and 3.5. Plaintiff asserts paragraph 2.1 authorizes the franchisor to “at any time, on written notice, change the grade, specifications, characteristics, delivery package, brand name, or other distinctive designation of any Mobil product, and such product as so changed shall remain subject to this Agreement.”

Plaintiff further avers that paragraph 3.5 authorizes the franchisor to “at any time change the trademark, service mark, brand name or logo, or any design, color or color scheme, used in connection with the packaging, sale or distribution of any of the Mobil products covered by this Agreement.”

Plaintiff also takes the position that paragraph 2.9 cannot be viewed as an early termination provision. Plaintiff asserts that even if defendant did timely object to the LUKOIL substitution, paragraph 2.9 requires that the “Agreement shall be amended to exclude [the] substituted product.” Plaintiff contends that the import of this language is that a discontinuation of a product, or of all products, would not terminate the franchise relationship. Under its construction of the Agreement, plaintiff argues that defendant is effectively a dedicated marketing outlet for the franchisor.

Thus, plaintiff contends that even if defendant objected to all substituted products, and if all Mobil products originally made a part of the agreement were discontinued, the franchise continues for the full fifteen year term, albeit without either Mobil or LUKOIL brand products. Accordingly, plaintiff construes the Agreement to specifically prohibit defendant from selling unauthorized brands of motor fuel and from displaying unauthorized brands at its stations.

Defense Contentions

Initially, defendant argues that plaintiff cannot receive preliminary injunctive relief because its Complaint is deficient. Defendant contends that the Complaint is likely to be dismissed at the outset because it does not allege any counts and fails to allege sufficient facts to support a breach of contract claim.

Defendant also vehemently opposes plaintiff’s construction of the contract. Defendant asserts that the Agreement is clear and unambiguous, and defendant offers an alternative construction of the Agreement. Under defendant’s construction, it is plaintiff, not defendant, who has repudiated the Agreement.

Defendant frames the Agreement as conferring two separate bundles of rights. The first right is the right to use the Mobil brand name and related trademarks. The second right is the ability to purchase and distribute Mobil products. Defendant asserts that plaintiff’s loss of the right to use the Mobil brand and its inability to provide any Mobil products is a repudiation of the Agreement.

Defendant argues that the essential benefit for which it bargained was the Mobil brand. Defendant avers that this construction of the Agreement is reinforced by paragraph 1.1, which states that purchasing “Mobil products from Mobil sale or distribution under Mobil’s trademarks” is the express purpose of the Agreement. Defendant also points to paragraph 1.3, which acknowledges the substantial investment Mobil has made in developing its trademarks and the goodwill associated with the brand throughout the country. Thus, defendant contends the Mobil brand and its associated trademarks, trade names and insignia were integral to the Agreement.

Defendant takes the position that the assignment provisions of the Agreement require plaintiff to adhere to the Agreement’s terms and do not authorize the LUKOIL substitution. Paragraph 15.3 permits assignment and expressly states that “[s]uch assignment shall not affect [Defendant’s] rights and obligations under this Agreement in any way.” Defendant argues that under this provision an assignee must furnish defendant with Mobil products and the ability to utilize the Mobil brand name and trademarks.

Defendant asserts that plaintiff’s reliance on paragraph 3.5 of the Agreement is misplaced. Although conceding that paragraph 3.5 permits the franchisor to change the trademarks and brand names associated with Mobil products, defendant avers that it is only the Mobil brand name and related trademarks which may be changed. Because the Mobil brand name and trademarks have not been changed by Mobil itself, defendant contends that the substitution of the LUKOIL brand name and trademarks is not permitted under the Agreement. Defendant also avers that the Mobil brand name is still in use in the retail gasoline market.

Defendant contends that plaintiff’s voluntary loss of its sublicense to utilize the Mobil brand name and associated trademarks does not affect its rights under the Agreement. Defendant avers it entered into the Agreement for use of the Mobil brand. Defendant argues that plaintiff’s decision to end the sublicense for use of the Mobil brand triggers the termination or non-renewal provisions of paragraph 3.6 of the Agreement, or, alternatively, is a repudiation of the contract.

Defendant further asserts that even if the Agreement could be construed to authorize the LUKOIL substitution with respect to brand name and trademarks, it still has a right to receive Mobil products. Defendant avers that Mobil has not discontinued the sale of any Mobil products defined in the

Agreement. Because Mobil has not stopped selling any of the Mobil products, defendant argues that the discontinuance provision in paragraph 2.9 does not apply to the circumstances of this case. Thus, defendant contends plaintiff must provide the specific Mobil products covered by the Agreement.

However, even if the LUKOIL substitution is considered a product discontinuance, defendant contends that it has timely and sufficiently objected to the substitution of LUKOIL petroleum products. Paragraph 2.9 states that "[u]pon objection, this Agreement shall be amended to exclude said substituted product".

Defendant argues that the history of the parties' negotiations regarding the LUKOIL substitution indicate that defendant's objections to the substitution were made known to plaintiff in a timely manner. Moreover, defendant asserts that even if its written notice was in some way deficient, the waiver provision of the Agreement (paragraph 16.6) permits objection at any time when a time period is not otherwise specified in the Agreement.

Defendant also contends that it is not required to accept any substitute product, even if the product is of substantially the same quality. Defendant construes paragraph 2.9 of the Agreement to permit objection for any reason, and after such objection, the Agreement shall be amended to exclude the substituted product. Moreover, defendant alleges that it would be able to show that both the LUKOIL petroleum products and trademarks are not of substantially the same quality as Mobil brand products.

Defendant concedes that paragraph 2.9 is not in itself an early termination provision. However, defendant avers that plaintiff's failure to provide Mobil gasoline combined with the inability of the parties to agree to a substitute product results in termination of the Agreement. Defendant asserts that paragraph 13.3 of the Agreement authorizes defendant to terminate the Agreement when plaintiff is unable to supply sufficient product and when defendant "objects to its allocated amounts".

Applicable Law

There is no dispute in this action that the substantive law of the Commonwealth of Pennsylvania governs the parties' franchise agreement notwithstanding the choice of law clause in Section 16.8 of Agreement (selecting the substantive law of New York to govern the Agreement). Pursuant to the Petroleum Practice Marketing Act, the substantive law of the franchisee's principal place of business determines the law governing the construction of the franchise agreement. <u>See</u> 15 U.S.C. § 2805(f)(2). Defendant maintains its principal place of business within Pennsylvania. Thus, notwithstanding the choice of law clause, Pennsylvania law applies to the Agreement.

Under the Pennsylvania common law of contracts, “[t]he intent of the parties to a written contract is deemed to be in the writing itself, and when the words are clear and unambiguous the intent is to be gleaned exclusively from the express language of the agreement”. Delaware County v. Delaware County Prison Employees Independent Union, 552 Pa. 184, 189, 713 A.2d 1135, 1137 (1998)(internal citation omitted). “[T]he focus of interpretation is upon the terms of the agreement as *manifestly expressed*, rather than as, perhaps, silently intended.” Steuart v. McChesney, 498 Pa. 45, 49, 444 A.2d 659, 661 (1982)(emphasis in original).

Parol Evidence

In order to construe the meaning of a contract under the common law, the court must make a threshold determination whether the contract contains an ambiguity. Steuart, supra. The court interprets, as a matter of law, the terms of the contract insofar as they are clear. The court also determines the existence of any ambiguity. If an ambiguity is found, “the resolution of conflicting parol evidence relevant to what the parties intended by the ambiguous provision is for the trier of fact.” Hutchison v. Sunbeam Coal Corporation, 513 Pa. 192, 201, 519 A.2d 385, 390 (1986).

Pennsylvania law defines a contract as “ambiguous if it is reasonably susceptible of different constructions and capable of being understood in more than one sense." Kripp v. Kripp, 578 Pa. 82, 91, 849 A.2d 1159, 1163 (2004). To determine the existence of ambiguity, the court may consider "the words of the contract, the alternative meaning suggested by counsel, and the nature of the objective evidence to be offered in support of that meaning." Mellon Bank, N.A. v. Aetna Business Credit, Inc., 619 F.2d 1001, 1011 (3d Cir. 1980). As a general matter, "parol evidence is admissible to explain or clarify or resolve" the ambiguity. Insurance Adjustment Bureau v. Allstate Insurance Company, 588 Pa. 470, 481, 905 A.2d 462, 468 (2006)(internal citations omitted).

Pennsylvania law recognizes both patent and latent ambiguities. A patent ambiguity is created by the language of the instrument and appears on its face. Insurance Adjustment Bureau, supra. A latent ambiguity arises from "extraneous or collateral facts which make the meaning of a written agreement uncertain although the language thereof, on its face, appears clear and unambiguous." Bohler-Uddeholm America, Inc. v. Ellwood Group, Inc., 247 F.3d 79, 93 (3d Cir. 2001)(Becker, C.J.) (reviewing Pennsylvania contract law).

A latent ambiguity may also arise "through silence or indefiniteness of expression." Crown, Cork & Seal Company, Inc. v. Employers Insurance of Wausau, Civ.A.No. 99-4904, 2002 WL 31164702, at *2 n.1 (E.D.Pa. September 27, 2002)(Waldman, J.).

Finally, a latent ambiguity may arise “when the plain meaning interpretation of the contract would lead to an absurd and unreasonable outcome.” Bohler-Uddeholm America, Inc., 247 F.3d at 96.

As noted by the United States Court of Appeals for the Third Circuit, an inherent tension exists in Pennsylvania contract jurisprudence regarding latent ambiguities. When examining a contract containing facially clear and unambiguous language, a court “must both interpret the language without using extrinsic evidence, and also examine extrinsic evidence to determine whether there is a latent ambiguity.” Bohler-Uddeholm America, Inc., 247 F.3d at 94.

To resolve this tension, the Third Circuit held that courts may examine only certain forms of extrinsic evidence to establish latent ambiguities. A claim of latent ambiguity must be based on a “contractual hook”, meaning that “the proffered extrinsic evidence must support an alternative meaning of a specific term or terms contained in the contract, rather than simply support a general claim that the parties meant something other than what the contract says on its face.” Bohler-Uddeholm America, Inc., 247 F.3d at 96. Thus, the latent ambiguity inquiry focuses on a specific linguistic point of reference and not on the parties’ underlying expectations.

Moreover, the alternative meaning for the contractual hook must be reasonable. The interpretation of the alternative meaning "cannot contradict the standard meaning of a term when the parties could have easily used another term to convey this contradictory meaning." Bohler-Uddeholm America, Inc., supra.

Doctrine of Necessary Implication

The Supreme Court of Pennsylvania has also held that the court may supply implied terms when an agreement is silent. Known as the doctrine of necessary implication, the law implies an agreement by the parties to a contract

> to do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made and to refrain from doing anything that would destroy or injure the other party's right to receive the fruits of the contract.

Murphy v. Duquesne University of the Holy Ghost, 565 Pa. 571, 600 n.11, 777 A.2d 418, 434 n.11 (2001)(internal citation omitted). Thus, the doctrine shares a common genesis with the duty of good faith and fair dealing.[36] Murphy, supra.

The Supreme Court of Pennsylvania has made it clear that the doctrine of necessary implication applies in limited circumstances.

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[36] The duty of good faith and fair dealing duty applies to all contracts in Pennsylvania regardless of whether they are also subject to the Uniform Commercial Code. Northview Motors, Inc. v. Chrysler Motors Corporation, 227 F.3d 78, 91 (3d Cir. 2000)(construing Pennsylvania contract law). The Uniform Commercial Code also imposes a separate statutory duty of good faith. 13 Pa.C.S.A. § 1203.

> The court should first attempt to interpret the contract, that is, to determine the meaning attributed by the parties to their expressions of agreement through the use of standard rules of interpretation. Depending on the evidence, however, the court may find it necessary to supply a term which is reasonable under the circumstances to rectify the parties omission.

Banks Engineering Company v. Polons, 561 Pa. 638, 644 n.4, 752 A.2d 883, 886 n.4 (2000).

The Superior Court of Pennsylvania has refined the narrow circumstances to which the doctrine of necessary implication will apply. "A court may imply a missing term in a parties' contract only when it is necessary to prevent injustice and it is *abundantly clear* that the parties intended to be bound by such term." Solomon v. United States Healthcare System of Pennsylvania, 797 A.2d 346, 350 (Pa.Super. 2002)(internal citation omitted) (emphasis in original).

In other words, "[a] court should only imply a term into a contract where it is clear that the parties contemplated it or that it is necessary to imply it to carry out the parties['] intentions." Glassmere Fuel Service, Inc. v. Clear, 900 A.2d 398, 403 (Pa.Super. 2006)(internal citation omitted).

Uniform Commercial Code

Pennsylvania has adopted a version of the Uniform Commercial Code ("UCC") which preempts and supplements certain common law contract principles. 13 Pa.C.S.A. §§ 1101-9710. However, there appears to be a split of authority regarding whether the Code applies to a distribution-based franchise agreement.

Certain United States District Courts in Pennsylvania, including this District, have held that Pennsylvania has not definitively decided whether the Uniform Commercial Code applies to distribution-based franchise agreements. See Hoff Supply Company v. Allen-Bradley Company, Inc., 768 F.Supp. 132, 134 (M.D.Pa. 2000); Stanley A. Klopp, Inc. v. John Deere Company, 510 F.Supp. 807, 809 (E.D.Pa. 1981) (Huyett, J.), aff'd, 676 F.2d 688 (3d Cir. 1982).

However, several courts within this District have held that "[d]istributor agreements involving goods are governed by Article 2 of the Uniform Commercial Code." Triple Crown America, Inc. v. Biosynth AG, Civ.A.No. 96-7476, 1999 U.S. Dist. LEXIS 7056, at *2 (E.D.Pa. May 14, 1999)(Waldman, J.); see also Eastern Dental Corporation v. Isaac Masel Company, 502 F.Supp. 1354, 1363 (E.D.Pa. 1980)(Luongo, J.).

Moreover, in Artman v. International Harvester Company, 355 F.Supp. 482, 486 (W.D.Pa. 1973), the United States District

Court for the Western District of Pennsylvania stated that "Pennsylvania courts have repeatedly held that dealership or distribution franchises fall within the sales section of the Uniform Commercial Code."

Thus, Pennsylvania federal courts appear to be reaching contradictory conclusions regarding the application of Pennsylvania's Uniform Commercial Code to franchise agreements. Therefore, I consider the issue the independently.

In order for a transaction to be regulated under Article 2 of the Uniform Commercial Code as adopted in Pennsylvania, a sale of goods is required. 13 Pa.C.S.A. § 2102. When an agreement is a mixed sale of goods and services contract, a court must determine the type of transaction which predominates in order to decide whether the Code applies. Advent Systems Limited v. Unisys Corporation, 925 F.3d 670, 676 (3d Cir. 1991).

Pennsylvania courts have long held that the Uniform Commercial Code applies to goods distribution agreements. Weilersbacher v. Pittsburgh Brewing Company, 421 Pa. 118, 121 218 A.2d 806, 808 (1966). More specifically, however, in AM/PM Franchise Association v. Atlantic Richfield Company, 526 Pa. 110, 115-116, 584 A.2d 915, 918 (1990), the Supreme Court of Pennsylvania applied the Uniform Commercial Code to a series of petroleum distribution-based franchise agreements (comprised of a premises lease, a lessee dealer gasoline agreement and a minimarket agreement). Thus, the Court applied the UCC to mixed goods and services franchise agreements based on the distribution and re-sale of petroleum products.

Accordingly, because the Supreme Court of Pennsylvania has considered the application of Pennsylvania's Uniform Commercial Code to analogous franchise agreements, I apply the UCC to the Agreement in this case. Although I recognize that the Pennsylvania Supreme Court summarily applied the UCC to the agreements without significant discussion of the application, the Court's holding was that the UCC applied to mixed goods and services petroleum franchise agreements. Furthermore, even a cursory review of the Agreement in this case reveals that the essence of the contract is the sale of goods, specifically petroleum products, and not services.

The purpose of the Uniform Commercial Code is to "simplify, clarify and modernize the law governing commercial transactions", "permit the continued expansion of commercial practices through custom, usage and agreement of the parties" and "make uniform law among the various jurisdictions". 13 Pa.C.S.A. § 1102(b).

However, the UCC does not entirely preempt the common law of contracts. Specifically, the UCC contains a savings clause which states, "[u]nless displaced by the particular provisions of [the Code], the principles of law and equity...shall supplement its provisions." 13 Pa.C.S.A. § 1103.

The most significant change to the common law for the purpose of construing the Agreement in this case was the change to the parol evidence rule. Section 2202 of the UCC governs the Code's treatment of parol and extrinsic evidence. The section states:

> Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:
>
> (1) by course of dealing or usage of trade...or by course of performance...; and
>
> (2) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

13 Pa.C.S.A. § 2202.

Section 2202 permits the following principles to be considered in construing agreements: (1) a writing which is final on some matters may not include all matters agreed upon; (2) the language used in a written agreement has the meaning which arises out of the commercial context in which it was used; (3) parol evidence may be considered even if the court has not determined that the language used in the written agreement is ambiguous and (4) the course of actual performance by the parties is the best indication of what they intended the writing to mean. Sundlun v. Shoemaker, 421 Pa.Super. 353, 360-361, 617 A.2d 1330, 1334 (Pa.Super. 1992); 13 Pa.C.S.A. § 2202, Uniform Commercial Code Comment 1-2; see also 1 Pa.C.S.A. § 1939 (authorizing the use of comments and reports to construe and apply Pennsylvania statutes).

Interpretation of Franchise Agreement

Amidst this tableau of contract principles, I must construe the parties' Agreement. The discussion which follows is a construction of the Agreement based on the facts and circumstances presented at this early stage in this proceeding before the parties have engaged in discovery. Where there are ambiguities and I have found parol evidence informative or necessary to construe the Agreement, I incorporate it into this analysis consistent with the Pennsylvania common law and Uniform Commercial Code.

At the outset, I find that the Agreement clearly distinguishes between "Mobil products" and "Mobil". The term "Mobil products" is defined in paragraph 1.1 as "MOBIL brand motor fuel", which are the petroleum products sold and distributed by Mobil Oil Corporation, the original franchisor, and now by its successor. The preamble to the Agreement makes clear that the term “Mobil” used alone refers to Mobil Oil Corporation. As a general matter where the term “Mobil” is used in Agreement, it refers generically to the role of the franchisor.

However, the contract is ambiguous in certain instances regarding whether “Mobil” refers to the franchisor generically or Mobil Corporation specifically. I find that the substitution does not apply to every instance in the Agreement where the term “Mobil” is used. In paragraph 1.1, defendant “agrees to purchase MOBIL products from Mobil for sale or distribution under Mobil’s trademarks”.

Paragraph 1.3 of the Agreement acknowledges the substantial investments Mobil made in developing its brand image, including the goodwill associated with its service stations and trademarks based on its high product and service quality standards. In these two instances, I find that “Mobil” refers specifically to the original franchisor Mobil Oil Corporation based on the commercial context in which the Agreement was formed.

The Agreement’s assignment provision is clear and unambiguous. Assignment of the Agreement by Mobil to a franchisor-assignee is authorized by paragraph 15.3. However, the section continues, “[s]uch assignment shall not affect Distributor’s rights and obligations under this Agreement in any way." Accordingly, defendant's rights and obligations were not changed by the assignments of this Agreement from Mobil to TOSCO, TOSCO to ConocoPhillips, and finally ConocoPhillips to plaintiff Getty.

Within the franchise relationship, the Agreement principally confers two separate bundles of rights upon the franchisee. The first are purchase rights for petroleum products for distribution and resale from the franchisor. The second are rights related to the use of the franchisor's trademark, trade dress, trade insignia and trade name. These rights are interrelated and flow from the thrust of the Agreement, the distribution and sale of gasoline under the franchisor's trademarks.

Regarding the substitution of products, the parties dispute largely involves the interpretation of paragraph 2.9 as it relates to product discontinuance. This paragraph contains some ambiguities. The paragraph states that "Mobil reserves the right to discontinue, without liability, the sale of the Mobil products covered by this Agreement".

Even objections by defendant to substitute products "shall not limit in any way Mobil's right to discontinue, without liability, the sale of any or all Mobil products covered by this Agreement". Paragraph 2.9. Although "Mobil" is specified as the party which controls any discontinuation, this usage is ambiguous. Moreover, the term “discontinue” is not defined and is also somewhat ambiguous.

In the context of this paragraph there is an ambiguity concerning whether plaintiff Getty is properly substituted for “Mobil.” Defendant has offered evidence which suggests the existence of a latent ambiguity regarding discontinuation. This ambiguity arises because of the unusual situation regarding the assignments.

It appears that the Mobil products specified in the Agreement are still being offered on the open market by the successor-in-interest to Mobil Oil Corporation. However, the products will no longer be offered for sale to Shipley by Getty, the present franchisor. The Agreement does not specify whether discontinuation is controlled by the assignee under circumstances in which the original franchisor retains control of the Mobil products subject to the Agreement.

As noted, the term “discontinue” is not defined in the Agreement, and I have received no evidence of a specific trade usage of the term. Accordingly, I attribute the ordinary meaning to the term, which is “to cause to cease; to cease from (an action or habit); to break off, put a stop to, give up”, or alternatively, “to dismiss or abandon.” The Compact Oxford English Dictionary 443 (2d ed. 1991).

Applying this definition to paragraph 2.9, the proper construction of “Mobil” in this context is that it refers generically to the role of the franchisor. Thus, I find that plaintiff is properly substituted for “Mobil” in this paragraph. The substitution is proper because Mobil in this context concerns the right of the franchisor to give up or cease to offer for sale the Mobil products defined elsewhere in the Agreement. This is a generic right of a franchisor which plaintiff Getty may exercise as assignee of the contract.

Accordingly, plaintiff is doing precisely that which it is authorized to do under the Agreement; it is ceasing to offer Mobil products for sale to defendant just as the original franchisor may have elected to do. There is nothing about this right which is specific to Mobil Oil Corporation.

Paragraph 2.9 is clear regarding defendant’s right to object to any substitution of petroleum products. Upon notice of a substitution by plaintiff, defendant could object in writing to the substitution, and the Agreement would be amended to exclude the substituted product. Because the Agreement is silent with regard to the reason for objection, I find that the Agreement permits defendant to object to the substituted product for any reason, even if the product is of substantially the same quality.

Thus, although the parties dispute the timing of the objection, they do not dispute that defendant has objected to the substitution of LUKOIL petroleum products. Plaintiff's arguments regarding qualatitive reasons for objections are immaterial. Accordingly, because defendant objected to the substitution of LUKOIL products for Mobil, the Mobil and LUKOIL products are all excluded from the Agreement.

With regard to plaintiff's argument concerning the timeliness of objection, the waiver provision of the Agreement unambiguously preserves defendant's ability to object. Paragraph 16.6 provides that "[u]nless a specific time requirement is set forth in this Agreement, no failure or delay...in exercising any...rights under this Agreement shall operate as a waiver of such rights."

No time for objection is specified anywhere in the Agreement. Accordingly, insofar as plaintiff has contended that defendant's objection to the LUKOIL product substitution was untimely, plaintiff's argument is without merit.

Thus, applying this construction to the Agreement with regard to purchase rights for petroleum products for distribution and resale from the franchisor, defendant Shipley has no duty to purchase any products from plaintiff because all products which were the subject of the Agreement have been discontinued and no substitutions have been accepted. By the same token, plaintiff has no duty to supply any products. The Agreement is silent and, therefore, ambiguous with regard to the continuation of the Agreement in the event of this contingency.[37]

Re-Branding

I now shift focus to the rights related to the use of the franchisor's trademark, trade dress, trade insignia and trade name. Paragraph 3.5 is clear and unambiguous regarding the substitution of the Mobil brand name and trademarks. It reserves the right upon the franchisor to "at any time change any trademark, service mark, brand name or logo, or any design, color or color scheme, used in connection with the packaging, sale or distribution of any of the Mobil products covered by this Agreement".

This provision does not allow plaintiff to foist the LUKOIL mark upon plaintiff because the allowable changes are specifically limited to those used in connection with the Mobil products covered by the Agreement. Because no products are now a part of the Agreement as a result of defendant's objections, there are no trademarks to be altered.

Paragraph 2.1 is also clear and gives the franchisor the ability to change grade, delivery and packaging of any Mobil

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[37] The Force Majeure contingencies contained in paragraph 13.1 do not apply here because they refer to circumstances in which the franchisor's failure to perform was "beyond its reasonable control" as determined by the franchisor when acting in good faith and in the ordinary course of business. Plaintiff Getty voluntarily terminated its license to utilize the Mobil brand name. This situation was clearly not beyond its reasonable control.

product. This refers to a broader array of changes that can be implemented to the Mobil products generally, including those offered under the Agreement. Paragraph 2.1 and 3.5 are complementary. They maintain the franchisor's control of its product lines, packaging, brand names and service marks. However, both provisions are tied to the "Mobil products" which are part of the Agreement.

The distinction plaintiff draws between paragraphs 2.1 and 3.5 regarding intra-brand and inter-brand packaging and trademark alterations is inapposite. The trademark substitution provision in paragraph 3.5 is one related to packaging for sale of the products. It is a clause that maintains the franchisor's control over its trademark and brand image.

However, the changes which plaintiff Getty may effect relate solely to the Mobil products covered by the Agreement. Similarly, 2.1, which allows changes to the products themselves in addition to their packaging, states that after changes are instituted, "such product as so changed shall remain subject to this Agreement." Neither clause relates to products which have been rightfully excluded from the Agreement.

Termination of Franchise Agreement

The remaining obligations under the contract are ambiguous. The Agreement is silent on what obligations persist in the event of a contingency where no petroleum products or associated trademarks are subject to the agreement. Plaintiff clearly had a right to discontinue the sale of all Mobil products and offer a substitute products and trademarks. However, defendant had a right to object to all substitutes. Neither party has presented significant evidence regarding the intent of the parties in the event that no Mobil brand gasoline would be supplied by the franchisor.

A reasonable construction offered by defendant Shipley is that the contract has been terminated because no petroleum products remain subject to this Agreement. However, plaintiff has offered a construction of the Agreement which provides that the Agreement continues notwithstanding defendant's rejection of all products. In plaintiff's view, the Agreement remains in effect and prohibits defendant from operating its service stations and distribution network for the remaining term of the contract unless and until it reaches an agreement with plaintiff for substituted products and associated trademarks.[38]

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[38] Plaintiff cites two principal cases in support of its position. It first cites Akshayraj v. Getty Petroleum Marketing Inc., No. 06-2002, at 13 (D.N.J. August 11, 2006)(Hillman, J.), an unpublished opinion by the United States District Court for the District of New Jersey which it attached to its motion. In that case the Court denied a franchisee's motion for preliminary injunction under the Petroleum Marketing Practices Act after concluding that the Agreement at issue contained a clause permitting the franchisor to re-brand. Id. at ¶16.

Second, plaintiff cites Unified Dealer Group v. Tosco Corporation, 16 F.Supp.2d 1137, 1142-1143 (N.D.Cal. 1998), aff'd, 216 F.3d 1085 (9th Cir. 2000). In that case the court found that the Petroleum Marketing Practices Act allowed a franchisor to refuse to renew a PMPA franchise because the franchisee would not consent to re-brand its service stations.

(footnote 38 continued):

Although the resolution of ambiguities is generally left to the trier of fact, I must resolve this ambiguity created by silence in the face of this contingency for the purposes of the preliminary injunction. It appears clear from the evidence that the parties intended that the Agreement would exist only so long as the franchisor could provide Mobil brand petroleum products (or substitute products later incorporated into the Agreement).

The sale and distribution of Mobil brand gasoline is the essence of the parties' Agreement. It was the benefit bargained for by defendant Shipley. When no petroleum products are being supplied by plaintiff to defendant, there is no remaining Agreement.

This construction is reinforced by the parties course of performance. Every assignee of the Agreement prior to plaintiff Getty provided defendant Shipley with both Mobil brand petroleum products and Mobil trademarks. Moreover, the recitals

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(Continuation of footnote 38):

Neither case cited by plaintiff mandates a different result in the within matter. The agreement in Akshayraj contained a explicit clause permitting re-branding. No such clause exists in Getty's Agreement with Shipley in this case.

Unified Dealer Group is also inapposite. In this case the Court held that a franchisor could condition renewal of a PMPA franchise agreement on a mandatory re-brand. Because the franchisee refused to re-brand, the Court upheld the franchisor's non-renewal of the franchise agreement. The Court also held that unless the parties had specifically agreed to a re-branding provision within the agreement, the franchisor could not change the franchisee until the term of the agreement expired. Thus, neither case supports plaintiff's argument that it can re-brand during the term of the agreement when the language of the agreement does not grant it that right.

contained within paragraph 1.1 and 1.3 support the application of the doctrine of necessary implication by referring to the unique goodwill associated with Mobil brand gasoline and its associated trademarks. Thus, I find that an implied contingency has been triggered which terminates the Agreement.

Sufficiency of Complaint

Defendant's argument that a preliminary injunction is not appropriate because the Complaint has not alleged sufficient facts and does not include any counts is without merit. Plaintiff has alleged sufficient facts to support a breach of contract claim. Rule 8(a) of the Federal Rules of Civil Procedure only requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a). Plaintiff has alleged the existence of an agreement, including it essential terms, a breach of duty on the part of the defendant (failure to adhere to the contract's terms) and damages. See Abdulhay v. Bethlehem Medical Arts, L.P., 425 F.Supp.2d 646, 659 (E.D.Pa. 2006).

Plaintiff's Complaint also complies with Rule 10(b) of the Federal Rules of Civil Procedure. Rule 10(b) requires only that "[e]ach claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth." Plaintiff's sole claim is for breach of contract based upon a single transaction. Accordingly, it need not separate its claim into multiple counts.

Irreparable Harm to Plaintiff

The second factor which plaintiff Getty must establish to be entitled to a preliminary injunction is that it will be irreparably harmed if an injunction is denied. Plaintiff contends that defendant's failure to accept LUKOIL brand products and trademarks will cause it irreparable harm.

Getty alleges that defendant's refusal harms plaintiff's goodwill as a franchisor and deprives it of the profits and business advantage conferred through an exclusive business right. Plaintiff argues that defendant's refusal to display the substituted LUKOIL marks and its intention to sell un-branded motor fuel is fundamentally at odds with the franchise relationship and is destructive to the LUKOIL franchise.

Plaintiff's Contentions

Plaintiff asserts it has an exclusive property right to determine the brand to be displayed at stations operated by its franchisees. Plaintiff alleges that denying the preliminary injunction would jeopardize the goodwill which plaintiff has developed in the LUKOIL trademark as a result of its substantial investment in the mark.

Plaintiff claims that the LUKOIL brand is a new entrant into the retail gasoline market. In order to gain acceptance and build customer loyalty, plaintiff alleges that it must display the LUKOIL brand quickly and in numerous locations. Plaintiff contends that if it does not receive a preliminary injunction, other franchisees may conclude they can ignore their franchise agreements and impede re-branding efforts resulting in irreparable harm to goodwill of the LUKOIL mark.

Plaintiff also avers that it does not have an adequate remedy at law for defendant's alleged breach. Plaintiff contends that the effect of preventing twenty-three service stations from re-branding to LUKOIL cannot be quantified with any certainty because the brand is a new entrant into the market and the distribution system is in the process of being established.

Plaintiff argues that because the brand is new, there is no history of performance against which monetary damages might be measured. Also plaintiff asserts that the critical opportunity for brand launching with a maximum number of service stations will have passed by the time this case reaches its conclusion.

Plaintiff also argues that it need not fulfill the traditional prerequisites for preliminary injunctive relief because the Agreement contains an access license pursuant to which plaintiff may enter the premises of defendant and re-brand its stations. Plaintiff argues that this irrevocable license is a servitude on property which plaintiff may enforce even though it owns no land which will benefit from enforcement of the servitude.

Defense Contentions

Defendant argues that plaintiff has failed to show any injury or show any threat of irreparable harm. Defendant asserts that even if plaintiff does have a viable claim for breach of contract, plaintiff cannot demonstrate that it will be entitled to a remedy other than money damages.

Defendant avers that plaintiff has failed to satisfy the Third Circuit's criteria for preliminary injunctive relief in a breach of contract case. Defendant contends that any injuries to plaintiff are monetary and could be proved with certainty at trial. Defendant asserts that plaintiff has not offered evidence to the contrary. Defendant claims that the franchisor's benefit under the Agreement has always been the payment of money in exchange for petroleum products.

Defendant alleges that the parties' franchise relationship during the prior twelve-year period, as well as the liquidated damages provision provided in paragraph 2.10 of the Agreement, each provide a basis for later damage determinations if there were in fact a breach. Moreover, defendant asserts that plaintiff has submitted no evidence indicating that defendant would be unable to pay a money damages award or that plaintiff would not otherwise be able to collect a judgment.

Defendant also contends that there is no imminent threat of harm presented. Defendant asserts that plaintiff cannot advance a claim of irreparable harm because Getty has self-inflicted its own harm through its voluntary decision to terminate its license to use the Mobil brand. Thus, defendant argues that any urgent need for relief by plaintiff was brought about by Getty's own business decisions.

Defendant asserts that plaintiff's argument that the LUKOIL trademark will be harmed by non-use is without support or merit. Defendant contends that plaintiff's argument that the non-use of a trademark will somehow injure the mark is illogical because failure to use the mark cannot injure the goodwill associated with it. Defendant also avers that plaintiff's argument that Shipley's failure to display the LUKOIL trademark will injure goodwill is belied by Getty's own assertions that it has established hundreds of LUKOIL brand service stations in the mid-Atlantic region.

Finally, defendant contends that plaintiff's argument concerning its servitude on defendant's property is erroneous. Defendant avers that Getty's license to enter is limited to preserving the integrity of signs, trademarks, service marks or brand names. Defendant Shipley also argues that any contractual right of entry plaintiff possessed terminated upon Getty’s alleged breach of the Agreement.

Absence of Irreparable Harm to Plaintiff

In evaluating a request for a preliminary injunction, the United States Court of Appeals for the Third Circuit has explained that

> [i]n determining whether a remedy in damages for a breach of contract would be adequate the following circumstances are significant: (a) the difficulty of proving damages with reasonable certainty, (b) the difficulty of procuring a suitable substitute performance by means of money awarded as damages, and (c) the likelihood that an award of damages could not be collected.

Instant Air Freight Company v. C.F. Air Freight, Inc., 882 F.2d 797, 802 (3d Cir. 1989)(internal quotation marks and citation omitted).

The Third Circuit as well as numerous courts within this District have awarded preliminary injunctive relief to franchisors when their franchisees have engaged in conduct which might be harmful to the goodwill of the franchise, including harm to its trademarks or brand image. Pappan Enterprises, Inc. v. Hardee’s Food Systems, Inc., 143 F.3d 800 (3d Cir. 1998); Barmasters Bartending School, Inc. v. Authentic Bartending School, Inc., 931 F.Supp. 377 (E.D.Pa. 1996)(Joyner, J.);

Saladworks, Inc. v. No, Civ.A.No. 05-1928, 2005 WL 1592914, at *1 (E.D.Pa. July 5, 2005)(Joyner, J.).

Specifically, where a franchisee attempts to usurp control of a displayed mark and display it after its right has been terminated, the injury may be irreparable. S&R Corproation v. Jiffy Lube International, Inc., 968 F.2d 371, 374, 378 (3d Cir. 1992). However, such injunctions have exclusively been issued to preserve goodwill when the franchisee is displaying the franchisor's trademark without the authorization.

Applying the foregoing to the within matter, plaintiff has not demonstrated it will be irreparably harmed or that money damages will be an inadequate remedy. The principal benefit the Agreement in this case provides plaintiff is money in exchange for its petroleum products in exchange for the right to sell its products and utilize its trademarks and brand name.

The damages that will accrue to plaintiff as a result of the alleged breach of contract appear entirely measurable in monetary terms. Although LUKOIL is a relatively new brand, the history of similar large national new gasoline product campaigns as well as the sales history of the twenty-three service stations involved in this action will provide an ample basis to calculate damages.[39]

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[39] For example, in order to measure damages plaintiff may review the more than twelve-year long history of sales at the affected service stations as well as the sales at comparable service stations which have converted to the LUKOIL mark.

The contract itself sets a minimum amount of petroleum which must be purchased during the term of the Agreement and the method by which price is to be determined. Moreover, to the extent that damages cannot be measured, plaintiff has specifically contracted for liquidated damages.

With regard to plaintiff’s argument concerning the market penetration necessary for new brand acceptance, it appears that any incidental damages in this regard may also be calculated in monetary terms. Although plaintiff may lose the ability to market its products in certain markets during the pendency of the action, Getty should be able to estimate the amount of any economic loss.

Moreover, taking this argument to its logical conclusion, any time a franchisee or retail outlet would fail to comply with a franchisor’s or supplier’s demands during a new product launch, irreparable harm would follow. Plaintiff has pointed to no case or other authority to support this assertion.

Plaintiff has presented inadequate evidence to show that the loss of twenty-three service stations during the LUKOIL product launch would have an irreparable and harmful effect in the context of the forty-five million dollar LUKOIL re-brand campaign involving hundreds of service stations. Plaintiff has also presented no evidence that defendant will somehow injure plaintiff’s trademarks by not utilizing them.

Substitute performance is not a factor in this case because plaintiff may resell its petroleum to other franchisees and recover the full extent of any lost profits. 13 Pa.C.S.A. § 2708. Plaintiff has also presented no evidence that it will have any difficulty collecting a damage award from defendant. Thus, money damages appear fully adequate to compensate plaintiff for any alleged losses.

Plaintiff's arguments concerning the invitation to other franchisees to violate their franchise agreements is without merit. Plaintiff has a remedy at law against these franchisees, namely a breach of contract action similar to the one in the present action. The fact that other franchisees might change their opinion about their contractual rights as a result of the present action does not constitute irreparable harm.

Finally, plaintiff's argument concerning its entry license are erroneous. Paragraph 16.10 of the Agreement authorizes the franchisor to enter the premises of franchisee or its dealers "to take any action to preserve the integrity of Mobil signs, trademarks, service marks or brand names." This clear and unambiguous language does not authorize plaintiff to enter defendant's premises for the purpose of re-branding to LUKOIL.

For all of the foregoing reasons plaintiff Getty has failed to establish that it will be irreparably harmed if a preliminary injunction is not granted.

Irreparable Harm to Defendant

The third factor which the court must consider is the extent to which Shipley as the non-moving party will suffer irreparable harm if a preliminary injunction is issued. For the following reasons, I conclude that plaintiff Getty has failed to establish that defendant Shipley will not be harmed, or only slightly harmed, if a preliminary injunction were granted.

Plaintiff's Contentions

Plaintiff claims re-branding to LUKOIL will not cause any harm to defendant. After February 2007, plaintiff will no longer be able to sell the Mobil products covered by the Agreement or any other fuel other than the LUKOIL brand. Plaintiff contends that there is no reason to believe that the LUKOIL conversion will result in decreased sales volume or profit for defendant. Moreover, plaintiff asserts that the LUKOIL brand is far better known than defendant's proprietary Tom's brand, defendant's proposed substitute re-brand.

Defense Contentions

Defendant argues that it would be irreparably harmed by the granting of a preliminary injunction because the proposed injunctive relief would force it to re-brand from Tom’s to LUKOIL. Defendant contends that it would be severely harmed by being forced to convert to the LUKOIL mark.

Balance of Hardships

As noted earlier, in order to grant preliminary injunctive relief, the district court must be convinced that the factors favor the granting of a preliminary injunction. Shire US Inc. v. Barr Laboratories, Inc., 329 F.3d 348, 352 (3d Cir. 2003). This requires a balancing of the four injunction factors discussed above: (1) the likelihood that the moving party will succeed on the merits; (2) the extent to which the moving party will suffer irreparable harm without injunctive relief; (3) the extent to which the non-moving party will suffer irreparable harm if the injunction is issued; and (4) the public interest.

Balancing factors (2) and (3) requires me to weigh the relative hardships to the parties. That is, I must balance the extent to which the moving party will suffer irreparable harm without injunctive relief (factor (2)), against the extent to which the non-moving party will suffer irreparable harm if the injunction is issued (factor (3)). For the following reasons I conclude, after balancing these two factors, that the balance of harms weighs in defendant’s favor.

Plaintiff claims that it will suffer substantial hardships if defendant does not adhere to its demand to re-brand to LUKOIL. Plaintiff alleges it has spent over forty-five million dollars in promoting and advertising the LUKOIL brand and approximately $59,000.00 on re-branding surveys, engineering, permit fees and dispenser image kits related to defendant's service stations.

Plaintiff asserts that defendant's failure to re-brand will cost plaintiff approximately two-and-a-half cents per gallon in royalty fees paid to the successor of Mobil Oil Corporation for use of its motor fuel. Plaintiff also avers it has carried unamortized loan balances on prior loans to defendant for service station improvements and has paid to defendant rebates and competitive allowances of more than $500,000.00.

Plaintiff also contends that compelling defendant to re-brand would only be requiring defendant to do that which it voluntary agreed when it signed the Agreement. Plaintiff alleges that defendant knew that the franchise Agreement contemplated that the identity of the franchisor might change and another brand might be substituted for Mobil.

Plaintiff asserts that it relied upon the terms of the Agreement, including the ability to re-brand, in making its decision to acquire the Agreement. Plaintiff avers that it relied upon this ability in making its decision to convert to the LUKOIL brand and in investing in its success. Thus, plaintiff argues that the equities weigh in its favor.

Defendant argues that the balance of hardships weighs in its favor because the proposed injunctive relief would force it to re-brand from Tom’s to LUKOIL. Defendant avers that based on plaintiff’s demands, it has spent over $450,000.00 to discontinue use of the Mobil mark at the insistence of plaintiff. Defendant alleges that it re-branded its service stations to Tom’s prior to the commencement of the within action. Defendant claims that it considered the franchise Agreement to be terminated and, accordingly, acted to mitigate its damages.

Defendant contends that it would be severely harmed by being forced to convert to the LUKOIL mark because LUKOIL is a substandard brand as compared to both Mobil and Tom’s. Defendant claims it will be easier for plaintiff Getty to calculate damages because it can rely on either the liquidated damages provision of the franchise Agreement or base its damages on the amount of LUKOIL petroleum which would have been supplied to Shipley.

Many of plaintiff’s arguments concerning the balance of harms are rendered moot by the fact that defendant’s service stations have already re-branded to Tom’s. Plaintiff is not currently in a situation in which it will have to pay royalty fees to Mobil based on defendant’s operation of its service stations, nor is defendant displaying any Mobil brand trademarks. Thus, the sole issue is whether, based on the parties relative expenditures to date and the further costs of re-branding, it would be more or less harmful to the parties to have defendant re-brand from Tom’s to LUKOIL during the pendency of this action.

Maintaining the status quo is paramount in preliminary injunction analysis. Because defendant has already re-branded its service stations and is operating those stations under its own Tom’s mark, the balance of harms weighs in defendant’s favor.

If I were to force defendant to re-brand to LUKOIL at this juncture, defendant, and to some extent plaintiff, would necessarily incur the expense of re-branding to LUKOIL. However, if plaintiff prevails, defendant would then have to re-brand once more and it would likely institute a new claim for damages against plaintiff. If I deny preliminary relief to plaintiff and defendant ultimately prevails, no further expenses would be incurred by either party. Accordingly, given the status quo presented, the balance of harms weighs in defendant’s favor.

<u>The Public Interest</u>

The fourth injunction factor which the court must consider is the public interest.

Plaintiff’s Contentions

Plaintiff contends that issuing an injunction in its favor would serve the public interest in promoting competition within the retail motor fuel market. Plaintiff argues that

Pennsylvania public policy favors competition within the market for the distribution and sale of motor fuel.

Plaintiff asserts that its decision to stop paying royalty fees for use of the Mobil brand and converting to the LUKOIL brand both promotes competition and will lead to lower prices because plaintiff will no longer have to pay licensing fees to a third-party. Plaintiff also claims that requiring defendant to honor its contract will promote the public interest by setting a precedent which will deter similar breaches.

Plaintiff also argues that increased competition and the elimination of oligopolistic pricing behavior in the retail motor fuel market was the express purpose of the Federal Trade Commission Consent Order by which plaintiff acquired the Mobil brand. Plaintiff contends that the Mobil brand was divested in such a way as to encourage former Mobil retail outlets to be re-branded and to promote competition between vertically integrated refiners. Thus, plaintiff asserts that the public interest will be served by issuance of the preliminary injunction.

Defense Contentions

Defendant disagrees. Defendant contends that the matter is essentially a private contract dispute between private parties. Thus, defendant asserts that resolution of this action will have only minimal impact upon the public.

With regard to plaintiff's assertions regarding the Consent Order, defendant contends that re-branding to Tom's gasoline will serve the public interest of promoting competition at least as much as the conversion to LUKOIL. Defendant further asserts that forcing it to re-brand would deprive the motor fuel market of competition from small retailers.

Market Impact

Pennsylvania public policy recognizes "that the distribution and sales of gasoline and petroleum products in the Commonwealth of Pennsylvania, including the rights and obligations of suppliers and dealers, vitally affects its general economy." Moreover, Pennsylvania seeks to promote healthy and vigorous competition within this market in the Commonwealth. Act of Nov. 26, 1975, P.L. 454, No. 126, § 1, 73 P.S. § 202-1.

However, these lofty principles have little to do with the parties' dispute. Defendant correctly points out that this matter is essentially a private dispute between two business entities. Whether defendant ultimately converts to LUKOIL or operates as an independent dealer under the Tom's brand will have little effect upon competition in the retail motor fuel market in the Commonwealth of Pennsylvania.

Thus, although the issuance of an injunction may ultimately serve the public policy goal of greater competition between vertically integrated refiners, the public interest is minuscule at this stage of the litigation. Competition in the entire regional market is unlikely to be seriously affected by the removal of twenty-three stations from plaintiff’s distribution network, especially because the stations remain in the market as competitors. Accordingly, the public interest factor does not weigh in favor of either party.

CONCLUSION

For all the foregoing reasons I deny plaintiff’s motion for preliminary injunction.

APPENDIX I

to the Opinion dated September 26, 2007 in

Getty Petroleum Marketing Inc. v. Shipley Fuels Marketing, LLC

Civil Action No. 07-CV-340

in the United States District Court

for the Eastern District of Pennsylvania

EXCERPTS FROM THE

DISTRIBUTOR PMPA MOTOR FUELS FRACHISE AGREEMENT

dated November 3, 1994 between

Mobil Oil Corporation and Shipley Oil Company, Inc.

Terms of the Agreement

Preamble

The preamble to the Agreement states the following:

Distributor PMPA

Motor Fuels Franchise Agreement

Agreement made this 3[rd] day of November, 1994, by and between Mobile Oil Corporation, a New York corporation having its principal place of business at 3225 Gallows Road, Fairfax, Virginia 22037 (“Mobil”), and Shipley Oil Co., Inc., a

Pennsylvania corporation having its principal place of business at 550 E[.] King Street, York, PA 17405 (“Distributor”).

Mobil and Distributor, for good and valuable consideration, have entered into this Distributor PMPA Motor Fuels Franchise Agreement (“Agreement”) for the wholesale distribution of Mobil gasoline and/or diesel fuel, subject to all the terms and conditions set forth below[.]

* * *

Other applicable parts of the Agreement are as follows:

1.1 Establishment of PMPA Franchise Distributor hereby agrees to purchase MOBIL products from Mobil for sale or distribution under Mobil’s trademarks....Mobil hereby grants Distributor (a) the right to use Mobil’s trademarks in connection with the sale and distribution of MOBIL® brand motor fuel, and (b) the right to grant to other retail service stations and facilities approved by Mobil the right to use Mobil’s trademarks in connection with the sale and distribution of MOBIL brand motor fuel (hereinafter called “Mobil products”)[.]... The grant of the rights set forth in this Paragraph is subject to the detailed provisions of the remaining Articles and Sections of this

Agreement.

* * *

1.3 <u>Acknowledgments</u> Distributor hereby acknowledges that (a) Mobil has made a substantial investment in developing its own numerous marketing premises as retail service stations, (b) Mobil has developed retail service stations throughout the country which are distinguished by design, trademark, decor, promotions and graphics, (c) Mobil has built valuable goodwill throughout the country and has fostered confidence in the motoring public in retail service stations and products bearing Mobil’s trademarks; (d) Mobil has advertised its Mobil products extensively throughout the country, (e) the continued success of Mobil, of Mobil dealers, and of Distributor as a Mobil distributor, as well as all other Mobil distributors, is dependent upon each Mobil distributor and Mobil dealer maintaining the highest standards of service station and/or facility operation, product quality, personal commitment to high performance and customer service, and (f) Distributor’s conduct and the conduct and personal performance of Distributor’s Mobil dealers will impact on Mobil’s efforts to achieve high standards so long as Distributor and Distributor’s Mobil dealers represent the Mobil trademarks and products to the public[.]

* * *

2.1 <u>Products</u>....Mobil may, at any time, on written notice, change the grade, specifications, characteristics, delivery package, brand name, or other distinctive designation of any Mobil product, and such product as so changed shall remain subject to this Agreement[.]

* * *

2.9 <u>Discontinuance of Products</u> Mobil reserves the right to discontinue, without liability, the sale of the Mobil products covered by this Agreement[.] In the event that Mobil discontinues the sale of any Mobil product, Mobil shall have the right, but not the obligation, to substitute another product of substantially the same quality for the one discontinued, unless Distributor objects to receiving said substitute product in writing upon notice of such substitution[.] Upon objection, this Agreement shall be amended to exclude said substituted product[.] Nevertheless, such objection by Distributor shall not limit in any way Mobil's right to discontinue, without liability, the sale of any or all Mobil products covered by this Agreement[.] Mobile will endeavor to provide adequate notification to Distributor of any change/substitution, whenever feasible.

*   *   *

3.4 Product Protection/Quality Assurance (Substitution, Alteration and Misbranding) Distributor agrees that no other petroleum products shall be substituted for Mobil products for sale under Mobil's trademarks, or mixed with Mobil products at any locations owned, operated, controlled or supplied by Distributor[.] Only those Mobil products purchased from Mobil or otherwise approved in writing by Mobil shall be distributed or handled by Distributor through equipment, containers or conveyances bearing Mobil's trademarks[.]...All resale of Mobil products by Distributor and Distributor's Mobil dealer shall be consistent with Mobil's octane certification and product content[.]...

3.5 Change of Trademark and Color Mobil may at any time change any trademark, service mark, brand name or logo, or any design, color or color scheme, used in connection with the packaging, sale or distribution of any of the Mobil products covered by this Agreement[.]

3.6 Termination of Right to Use Trademarks On the effective date of any termination or nonrenewal of this Agreement, however arising, Distributor shall, or shall arrange for Distributor's

Mobil dealer or other retail facilities to, immediately discontinue all use of Mobil's color schemes, trademarks, brand names, logos, slogans, signs, advertising and any other reference to Mobil in connection with the sale and distribution of the Mobil products covered by this Agreement[.]...

* * *

13.1 Contingencies Mobil shall not be liable for loss, damage or demurrage due to any delay or failure in performance of its obligations to sell Mobil product under this Agreement for any reason or cause which Mobil determines is beyond its reasonable control, when acting in good-faith and in the ordinary course of business, which reason or cause shall include, but not be limited to, the following[:]

a) Mobil's compliance with any order, rule, regulation, direction or request of any governmental authority or person purporting to act therefor,

b) When the supply of products or any facility or production, storage, transportation, distribution or delivery contemplated by Mobil is interrupted, unavailable or inadequate, or

c) When, as a result of Mobil’s compliance (voluntary or mandatory) or cooperation with a governmental request, order, recommendation or direction, continued supply of Mobil products under this Agreement would substantially frustrate or substantially interfere with the reasonable profit expectations which Mobil contemplated at the time this Agreement was entered[.]

Mobil shall not be required to remove or remedy any such reason or cause, or remedy any contingency of the nature described herein, if to do so would involve substantial expense or a departure from Mobil’s normal business practice.

* * *

13.3 Distributor’s Right to Terminate Distributor shall have the right to terminate this Agreement, in whole or in part, on notice to Mobil if Distributor objects to its allocated amounts[.] Distributor shall give Mobil ten (10) days prior written notice of any such termination[.]

* * *

15.3 Assignment by Mobil. Mobil may assign this Agreement, franchise and franchise relationship[.] Such assignment shall not affect Distributor’s rights and obligations under this Agreement in any way.

* * *

16.6 Waivers. Unless a specific time requirement is set forth in this Agreement, no failure or delay on the part of Mobil or Distributor in exercising any of their respective rights under this Agreement shall operate as a waiver of such rights. No single or partial exercise of any rights under this Agreement shall preclude any other or further exercise of such rights, or the exercise of any other rights under this Agreement or otherwise under law.

* * *

16.8 Applicable Law. This Agreement shall be governed by and construed in accordance with the internal laws of the State of New York.

* * *

16.10 Rights of Entry. In addition to the rights granted to Mobil under paragraph 3.4, Distributor shall permit Mobil or its authorized agents, contractors or representatives to enter the premises of Distributor or arrange for Mobil or its authorized representatives to enter the premises of Distributor's Mobil dealers to take any action to preserve the integrity of Mobil signs, trademarks, service marks or brand names. Mobil shall not be liable for any interference with Distributor or Distributor's Mobile dealer's business as a result of such entry.

* * *