UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

SUN REFINING AND MARKETING CO.

v. Civil Action No. 91-0501

FCF ENTERPRISES, INC.

SUN REFINING AND MARKETING CO.

v. Civil Action No. 92-0132

CARL C. FERRUCCI and
FRANCES FERRUCCI

MEMORANDUM AND ORDER

ERNEST C. TORRES, United States District Judge.

Sun Refining and Marketing Company ("Sun") brought these actions against FCF Enterprises, Inc. ("FCF") to:

1. terminate the franchise agreements between Sun and FCF in accordance with the Petroleum Marketing Practices Act ("PMPA");

2. obtain damages under the Lanham Act for trademark infringement based on FCF's alleged sale of misbranded gasoline; and,

3. recover from FCF and/or its principals, Carl and Frances Ferrucci, for petroleum products sold to FCF, payment for which was allegedly guaranteed by the Ferruccis. Both FCF and the Ferruccis counterclaimed, alleging inter alia that Sun unfairly and improperly terminated the franchise agreements in violation of the PMPA and Sun's obligation to act in good faith.

The cases were consolidated and tried before a jury. The jury awarded Sun nominal damages on its trademark infringement claim and determined that Sun's termination of the franchise agreements was proper under the PMPA. In addition, the jury returned a verdict in the amount of $202,189.91 against both FCF and the Ferruccis for the petroleum products sold and delivered.

Sun now seeks to recover its attorney's fees from FCF pursuant to section 1117 of the Lanham Act and the provisions of the franchise agreements. The defendants, on the other hand, have moved to prevent Sun from recovering prejudgment interest under the Rhode Island prejudgment interest statute. After reviewing the motion pursuant to 28 U.S.C. § 636, a Magistrate Judge has recommended that the defendant's motion be granted and Sun has objected to that recommendation.

Discussion

I. Attorney's Fees

A. The Lanham Act

Even though Sun prevailed on its trademark infringement claim, it is not entitled to attorney's fees under the Lanham Act for two reasons. First, Sun's claim is unsupported by any argument or citation to applicable case law. Therefore the claim is deemed to have been waived. See United States v. Delgado Munoz, 36 F.3d 1229

(1st Cir. 1994)("Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived."); Rivera-Gomez v. de Castro, 843 F.2d 631, 635 (1st Cir. 1988)(a litigant in district court must spell out its arguments squarely and distinctly).

Second, the Lanham Act provides that: "The court in exceptional cases may award reasonable attorney fees to the prevailing party." 15 U.S.C. § 1117(a) (emphasis added). An exceptional case is one in which the infringement was "malicious, fraudulent, deliberate, or willful." Schroeder v. Lotito, 747 F.2d 801, 802 (1st Cir. 1984). Here, after Sun ceased delivering gasoline to FCF, the defendants made reasonable efforts to alert customers that the gasoline they were purchasing was not Sun's. Therefore, there is no basis for finding that FCF acted deliberately or fraudulently. In addition, the fact that the jury awarded only nominal damages for trademark infringement militates against characterizing this case as "exceptional" within the meaning of section 1117. Hindu Incense v. Meadows, 692 F.2d 1048, 1052 (6th Cir. 1982).

B. The Franchise Agreements

The franchise agreements between Sun and FCF require FCF to reimburse Sun for court costs and attorney's fees incurred by Sun "relating to litigation undertaken . . . to successfully enforce,

terminate, or nonrenew this franchise, or to collect money . . . due by Dealer to Company" or "by reason of violation of law by Dealer." The defendants argue that this portion of the franchise agreement is pre-empted by the PMPA which, they say, limits a franchisee's liability for attorney's fees to situations in which the franchisee brings a frivolous suit.

The PMPA provides that, in an action brought by a franchisee, "the court may, in its discretion, direct that reasonable attorney and expert witness fees be paid by the franchisee if the court finds that such action is frivolous." 15 U.S.C. § 2805(d)(3). The statute further provides that:

> To the extent that any provision of this title applies to the termination . . . of any franchise, or to the nonrenewal . . . of any franchise relationship, no State . . . may adopt, enforce, or continue in effect . . . any provision of law or regulation (including any remedy or penalty applicable to any violation thereof) with respect to termination . . . , unless such provision of such law or regulation is the same as the applicable provision of this chapter.

15 U.S.C. § 2806(a).[1]

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[1]FCF actually relies on 15 U.S.C. § 2824(a), a more broadly phrased preemption provision of the PMPA dealing with octane disclosure. The cases cited by FCF, however, Huth v. B.P. Oil, Inc., 555 F.Supp. 191, 194 (D.Md. 1983), and Mobil Oil Corp. V. Karbowski, 667 F.Supp. 927 (D.Conn. 1987), discuss § 2806(a), the preemption provision dealing with franchise terminations and nonrenewals. To the extent any preemption provision applies here, the appropriate section is 2806, since the complaint

This provision has been construed to preempt not only state laws dealing with the termination of the franchise relationship but also state common law claims specifically addressing the termination or nonrenewal of such a relationship. See, Huth v. B.P. Oil, Inc., 555 F.Supp. at 193-94 (D.Md. 1983). However, the First Circuit has stated that, in enacting § 2806(a): "[Congress] did not intend 'to preempt all state provisions involving the substantive aspects of petroleum-products franchises.'" Esso Standard Oil Co. v. Dept. of Consumer Affairs, 793 F.2d 431 (1st Cir. 1986)(quoting Lasko v. Consumers Petroleum, Inc., 547 F.Supp. 211, 216 (D.Conn. 1981)).

In this case, termination of FCF's franchise was only one of the issues litigated. Therefore, although the PMPA governs any award of attorney's fees with respect to that issue,[2] it does not pre-empt the attorney's fees provisions of the franchise agreements regarding other facets of the litigation.

FCF's position with respect to the franchise termination cannot be characterized as frivolous. For one thing, it was Sun, not FCF, that initiated the litigation. Although FCF's counterclaim for affirmative relief was dubious, under the

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alleged that the franchise portion of the PMPA provides jurisdiction, and there was no issue at trial concerning octane disclosure.

[2] See Thelen Oil Co., Inc. v. Fina Oil and Chemical Co., 962 F.2d 821, 823 (8th Cir. 1992).

circumstances, a failure to defend against Sun's claim would have put FCF out of business. Moreover, Sun's claim was predicated primarily on allegations of trademark infringement and, as already noted, FCF had, at least, a colorable defense to that claim. Therefore, Sun is not entitled to attorney's fees relating to the franchise termination claims.

However, recovery of attorney's fees attributable to Sun's claim for goods sold and delivered is a nag of a contrasting hue. That was a state law claim for breach of contract, separate and distinct from the termination claim. Therefore, the attorney's fees provision contained in the franchise agreement[3] is not pre-empted and, under that provision, Sun is entitled to recover attorney's fees referable to its breach of contract claim.[4]

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[3]Defendants argue that the franchise agreements cannot provide the basis for an award of attorney's fees because they are is void either as unconscionable or as contracts of adhesion. The Court addressed and rejected these arguments at trial.

Defendants also urge the Court to deny fees on the grounds that an award under a contractual provision like the one at issue would be inequitable. The PMPA fee provisions counterbalance the onesidedness of a contractual fee provision such as this in cases of termination or nonrenewal. The remaining fee provision is no different or more onerous than the fee provisions frequently found in promissory notes and other contracts. The Court, therefore, declines Defendants' invitation to find enforcement of the contractual fee provisions inequitable.

[4]Even if the PMPA did preempt the contract claim, Sun would still be entitled to attorney's fees under the PMPA for

The measure of Sun's recovery is governed by Rhode Island law. See In re Sure Snap Corp., 983 F.2d 1015, 1017 (11th Cir. 1993). The Rhode Island Supreme Court has held that in determining a fair and reasonable fee, the court must consider the amount at issue, the questions of law involved and whether they are unique or novel, the hours worked and the diligence displayed, the result obtained, and the experience, standing and ability of the attorney who rendered the services.[5] Colonial Plumbing & Heating Co. v. Contemporary Construction Co., 464 A.2d 741 (R.I. 1983)(quoting Palumbo v. U.S. Rubber Co., 229 A.2d 620 (R.I. 1967)). In accordance with accepted Rhode Island practice Sun's counsel has submitted affidavits and detailed time records regarding the time devoted to this case together with affidavits establishing that the hourly fees it seeks are reasonable. Those records and affidavits are unchallenged and the Court's review of them indicates that the times and amounts are reasonable.

Unfortunately, Sun's documentation does not apportion

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prosecuting this claim, because FCF's defense was frivolous in the extreme. FCF's arrearage was obvious to it and was a topic of discussion with Sun fairly early on. FCF had clearly bought and resold fuel for which it owed Sun money before delivery of fuel was stopped and the franchises were terminated. This portion of the litigation could have and should have been resolved without a trial.

[5]Although the franchises themselves provide for payment of attorney's fees "incurred," Sun acknowledges with its submissions that the fee must also be reasonable.

counsel's time among the various claims to which it relates. However, based on a review of counsel's entries, the nature of Sun's various claims and the Court's intimate involvement with this case from its inception, the Court is satisfied that it has sufficient information to make a fair and accurate apportionment. Specifically, the Court finds that twenty percent (20%) of the time devoted to this case by Sun's counsel (i.e.,$17,271.66) is attributable to the breach of contract claim.

II. Pre-judgment Interest

The defendants' motion to preclude an award of prejudgment interest was referred to the Magistrate Judge for determination pursuant to 28 U.S.C. § 636(b)(1)(A). However, because an award or denial of prejudgment interest becomes part of a final judgment, the Court will treat the Magistrate Judge's decision that prejudgment interest should not be awarded as a recommendation pursuant to 28 U.S.C. § 636(b)(1)(C) and will review it de novo.

Rhode Island's prejudgment interest statute directs that interest at the rate of 12% per year be added to civil judgments but states that it is not applicable "to any contractual obligation where interest is already provided." R.I. Gen. Laws § 9-21-10. In this case, Sun obtained a judgment for FCF's failure to pay for goods sold and delivered as required by the franchise agreements, which specifically provide for the accrual of interest on unpaid obligations. However, Sun did not present any evidence regarding

the amount of interest accrued. Nor did it present any evidence from which the jury could calculate interest.[6] Since the amount of interest to be awarded was an element of damages under the contract, and presented a question of fact, such lack of evidence precludes an award of interest. See Eden v. Amoco, 741 F.Supp. 1192 (D.Md. 1990)(finding that interest is an element of damages to be determined by the factfinder on a claim brought under the PMPA).

Conclusion

For all of the foregoing reasons, it is hereby ORDERED that Sun's motion for costs and attorney's fees is GRANTED and that Sun is awarded attorney's fees in the amount of $17,271.66.

The Magistrate Judge's recommendation regarding prejudgmentinterest is accepted and the Defendants' Motion to Deny Prejudgment Interest is hereby GRANTED.

IT IS SO ORDERED,

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[6]In one section the franchise agreements provide that upon termination all unpaid accounts shall bear interest at the rates established by Sun's credit terms with the dealer. In a section called terms of payment, however, the agreements also provide that all unpaid accounts owing to Sun by the dealer shall bear interest at rates established by the company or by law. That section also indicates that the company has the option to establish credit terms and that if so established, they become part of the franchise.

Ambiguities exist concerning how it is determined whether one uses a rate established by the company or one established by law, and exactly what law is referenced. Moreover, the existence vel non of established credit terms is apparently subject to dispute.

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Ernest C. Torres
United States District Judge
Date: , 1995