IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CITGO PETROLEUM CORPORATION,

Plaintiff,

v.

RANGER ENTERPRISES, INC.,

Defendant.

ORDER

07-cv-657-bbc

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This is a civil dispute regarding the demise of a petroleum franchise agreement between plaintiff Citgo Petroleum Corporation and its former franchisee, defendant Ranger Enterprises, Inc. Plaintiff alleges that defendant breached the parties' agreement when it failed to purchase certain fuel allotments and debranded before the termination of the parties franchise agreement. Defendant counterclaims that plaintiff breached when it failed to supply all of the required fuel shipments in 2005.

On March 27, 2009, plaintiff moved for summary judgment on (1) plaintiff's two breach of contract claims; (2) defendant's affirmative defenses; (3) plaintiff's opposition to defendant's third amended counterclaim; (4) plaintiff's request for attorney's fees; and (5) a request that certain damages sought by defendant are unavailable as a matter of law.

Although both parties have fully briefed the motion for summary judgment, plaintiff has brought a motion seeking a protective order from additional discovery related to defendant's alleged damages.

In brief, plaintiff contends that defendant is seeking damages for counterclaims that this court already dismissed. Specifically, defendant contends that it is entitled to consequential damages as a result of plaintiff's breach of certain fuel supply commitments in 2005, which led to defendant's decision to debrand and resulted in lost profits, lost business opportunities and lost customers. According to plaintiff, this claim is a rewording of defendant's wrongful non-renewal of a franchise agreement counterclaim, which was dismissed as time barred under the Petroleum Marketing Practices Act, 15 U.S.C. § 2801. Order, dkt. #43. Therefore, plaintiff seeks an order staying or denying discovery on this issue as unnecessary and outside the scope of this litigation. Plaintiff also requests that the court strike the expert reports filed by defendant on this matter and award it attorney fees and costs related to bringing this motion as well as any discovery conducted on this matter.

Defendant opposes plaintiff's motion on the grounds that it is not barred by any orders issued by this court, that the damages sought are allowable under Oklahoma law as consequential damages for breach of contract and that plaintiff has not been prejudiced by defendant's damages request because it can offer rebuttal reports.

"Under the law of the case doctrine, a court generally should not reopen issues decided in earlier stages of the same litigation." United States v. Harris, 531 F.3d 507, 513 (7th Cir. 2008). A court may reconsider a ruling "if there is a compelling reason, such as a change in, or clarification of, law that makes clear that the earlier ruling was erroneous." Santamarina v. Sears, Roebuck & Co., 466 F.3d 570, 572 (7th Cir. 2006).

In an order dated, August 27, 2008, I dismissed defendant's counterclaims for wrongful non-renewal under the Petroleum Marketing Practices Act as well as a claim for brand damage; however, I did not dismiss plaintiff's counterclaim in which it alleges that plaintiff had breached certain fuel supply obligations under the franchise agreement. Dkt. #43. Subsequently, defendant filed a motion for leave to file a second amended counterclaim in which it reasserted its wrongful-non-renewal counterclaims and three new brand damage claims. Once again I dismissed the wrongful non-renewal counterclaims on the ground that they were pre-empted and dismissed the brand damage claims as well. I allowed defendant to proceed on its fuel supply counterclaim. Dkt. #58. Defendant sought leave to file an appeal of this court's denial of its second amended counterclaim under 28 U.S.C. § 1292 and Fed. R. Civ. P. 54. I denied both requests but allowed defendant to file a new amended counterclaim with new factual allegations regarding the fuel supply breach counterclaim. Dkt. #92. On March 13, 2009, defendant filed a third amended counterclaim that contained only its breach of contract counterclaim. Therefore, it is law

of the case the defendant is barred from seeking any damages as a result of the wrongful non-renewal of the parties franchise agreement. Morever, defendant has offered no new argument that this ruling was erroneous.

Recognizing this, defendant argues that its counterclaim for damages as result of losing the ability to sell and operate under plaintiff's brand is not related to the termination of the parties' franchise agreement. Instead, defendant argues, these damages are foreseeable consequences of plaintiff's 2005 breach of certain fuel supply obligations between the parties.

"The [Petroleum Marketing Practices Act] was designed to . . . provid[e] a single, uniform set of rules governing the termination of petroleum franchises and nonrenewal of petroleum franchise relationships." Dersch Energies, Inc. v. Shell Oil Co., 314 F.3d 846, 855 (7th Cir. 2002) (citing 15 U.S.C. §§ 2801-2806). "The [Act] prohibits franchisors from terminating a franchise or discontinuing a franchise relationship, 15 U.S.C. § 2802(a), unless the franchisor does so pursuant to one of the grounds enumerated in the Act, 15 U.S.C. §§ 2802(b)(2)-(3) or 2803(c), and meets the notification requirements contained in 15 U.S.C. § 2804." Id. As discussed in previous orders, dkt. ## 43 and 58, the Act provides the exclusive remedy for these disputes. Because defendant failed to assert a claim under the Act its counterclaims are now barred by the statue of limitations. 15 U.S.C. § 2805(a)(parties have one year from termination of franchise agreement to file claim); 15 U.S.C. §

2806(a)(1)(Act preempts state law claims for wrongful non-renewal claims).

Although defendant re-characterizes its counterclaims as breach of contract claims, I agree with plaintiff that defendant's damages calculations related to the loss of plaintiff's brand are inextricably linked to the termination of the franchise agreement. Defendant's claim for $187 million in damages is focused almost exclusively on its inability to sell, market or use plaintiff's brand. The expert reports of Gordon Rausser and Mark Siebert submitted by defendant to support its claims for damages are devoted almost entirely to unrealized profits and business opportunities resulting from defendant's termination as plaintiff's franchisee. Rauser Exp. Rpt., dkt #137, at 12-13, 14-21 and 25-27; Siebert Exp. Rpt., dkt. #145-2, at 5-9. Defendant contends that it chose not to open new business ventures with plaintiff because it was not sure that it wanted to continue in the franchise relationship. Rauser Exp. Rpt., dkt #137, at 23-27; Dft.'s Br., dkt #153, at 4. In addition, defendant decided not to renew its franchise agreement because it alleges that plaintiff became both an unreliable fuel supplier and had caused significant damage to the brand. Dft.'s Third Amd. Counterclaim, dkt. #93, at 6-7, ¶¶ 18-20, at 11, ¶35; Dft.'s Br., dkt. #153, at 11.

All of these allegations are linked to the parties' franchise agreement and indicate that defendant intends to argue that plaintiff wrongfully brought an end to their relationship. It is too late to do so. Defendant's exclusive remedy for the wrongful termination of the

parties' franchise agreement was the Petroleum Marketing Practices Act. Any claim for damages as a result of the loss of plaintiff's brand are barred. Accordingly, I will grant plaintiff's request for a protective order to bar further discovery regarding defendant's loss of the right to use plaintiff's brand. However, I will deny plaintiff's request to sanction defendant by dismissing its counterclaim for post-contract damages. This is not a proper sanction for defendant's actions.

In addition, I will grant plaintiff's request to strike the April 24, 2009 expert report of Mark Seibert and the supplemental expert report of Gordon Rauser because the reports are devoted entirely to opinions regarding damages from the loss of plaintiff's brand. With respect to the initial expert report of Gordon Rauser, I will grant plaintiff's request to strike the report except as to Rauser's opinion that defendant paid $300,904 more in fuel costs as a result of plaintiff's inability to supply all the gasoline defendant needed. Dkt. #137, at 21-24. This last opinion is within the scope of allowable discovery on defendant's counterclaim.

Last, I will grant plaintiff's request for the costs of bringing this motion because defendant has attempted once again to litigate the wrongful termination and brand damages claims despite the fact that these claims have been dismissed on multiple occasions. However, I will stay a decision on whether plaintiff is entitled to any costs or fees associated with discovery regarding defendant's damages as result of the loss of plaintiff's brand because plaintiff has offered no example of an additional discovery or work it has actually conducted

aside from preparing this motion.

ORDER

IT IS ORDERED that:

1. Plaintiff Citgo Petroleum Corporation's request for a protective order to bar further discovery regarding defendant's loss of the right to use plaintiff's brand, dkt. #145, is GRANTED.

2. Plaintiff's motion to strike the following expert reports, dkt. #145, is GRANTED:

- the April 24, 2009 expert report of Dr. Gordon Rauser, except Rouser's opinion that defendant paid $300,904 more in fuel costs as a result of plaintiff's inability to supply all the gasoline defendant needed, dkt. #137, at 21-24;
- the April 24, 2009 expert report of Mark Seibert; and
- the May 8, 2009 supplemental expert report of Gordon Rauser.

3. Plaintiff's request for the costs and attorney's fees, dkt. #145, is GRANTED with respect to the cost and fees of bringing this motion and STAYED with respect to its request for costs and attorney fees associated with discovery regarding defendant's damages resulting allegedly from the loss of plaintiff's brand.

Entered this 23rd day of June, 2009.

BY THE COURT:

/s/

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BARBARA B. CRABB
District Judge