UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF IOWA

IN RE:)		
	)	Chapter 11
IOWA OIL COMPANY,)		
	)	Bankruptcy No. 03-00418-D
Debtor.)		
	)	
IOWA OIL COMPANY)		
	)	Adversary No. 03-9057-D
Plaintiff,)		
	)	
vs.)		
	)	CITGO PETROLEUM CORPORATION)
	)	
Defendant.)		

ORDER RE: MOTION FOR SUMMARY JUDGMENT

The above-captioned matter came on for hearing on November 4, 2003 on Plaintiff's Motion For Summary Judgment. Plaintiff/Debtor Iowa Oil Company ("Debtor") was represented by Paul Fitzsimmons and Douglas Henry. Defendant Citgo Petroleum Corporation ("Citgo") was represented by Vincent Schmeltz. Secured creditor American Trust and Savings Bank (the "Bank") was represented by Chad Leitch. After oral argument, the Court took the matter under advisement. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B), (E) & (F).

FACTS

Debtor owns and operates several convenience stores in Iowa, Wisconsin, and Illinois. Debtor is a franchisee of Citgo. The two companies have been conducting business with one another since 1977. Debtor and Citgo entered into a Distributor Franchise Agreement (the "Agreement") on August 31, 1992. Under the Agreement, Debtor is allowed to market Citgo merchandise using the Citgo trademark. Citgo provided merchandise to Debtor on credit. Debtor's credit line with Citgo has been $1,450,000 since 1997. Of this amount $1,100,000 is merchandise credit and $350,000 constitutes the amount Citgo would pay in state excise taxes on Debtor's behalf and which Debtor was to pay back upon collection from consumers.

An important component of the relationship between Debtor and Citgo concerns the methodology of handling credit cards receipts. Pursuant to the agreement, Citgo collected all credit card receipts from the sale of merchandise at Debtor's convenience stores. Paragraph 10 of the Agreement states in part,

> [Debtor] expressly agrees that CITGO shall have the right but not the obligation to apply the proceeds of credit card invoices or any other credits which may be owing to [Debtor] toward the payment of any indebtedness owed by [Debtor] to CITGO. [Debtor] grants to CITGO a security interest in all credit card invoices and proceeds from CITGO, and agrees to execute documents reasonably necessary to perfect such security interest.

Citgo's security interest in the credit card invoices and proceeds has not been perfected. The Bank has a perfected security interest in a large portion of Debtor's assets including inventory, equipment, and accounts.

The terms of payment provided that Debtor would pay for all merchandise from Citgo within 12 days of delivery and Debtor would receive a one percent discount for making timely payments. The amount of credit Citgo would extend to Debtor was calculated based on Debtor's ability to pay within the twelve day cycle. Citgo considered Debtor's average purchases from Citgo over a 12-day period and the average amount of credit card receivables held by Citgo in determining Debtor's ability to pay.

Citgo computes the amount owed by Debtor on a daily basis. After computing this amount, Citgo subtracts the amount of credit card invoices and proceeds it currently holds to arrive at a total balance owed by Debtor. Through an electronic funds transfer system Citgo is able to withdraw or deposit funds directly into Debtor's bank account. Citgo provides Debtor with three days notice of any drafts it makes on Debtor's bank account.

During 2002, several electronic transfers drawn upon Debtor's bank account were returned for insufficient funds. On several occasions, Debtor cured the default by making a wire transfer of funds to Citgo. The record indicates that Debtor's credit account increased dramatically in September and October, 2002, but Debtor's Secretary and Treasurer, John
Noel, assured Citgo that Debtor was planning to liquidate some property and those funds would be used to pay Citgo. In November, Citgo concluded that Debtor was not going to be able to pay the outstanding debt. On November 7, 2002, Citgo informed Debtor that it could no longer obtain gasoline from Citgo terminals and all credit card proceeds collected by Citgo would be applied to Debtor's outstanding trade balance instead of being paid over to Debtor.

Citgo asserts that it "inadvertently" overextended $1,255,673.62 in credit to Debtor beyond that allowed according to the ability-to-pay formula. Citgo maintains that this over-extension of credit was allowed based on Debtor's promises to keep the credit account in balance.

Debtor filed its Chapter 11 bankruptcy petition on February 13, 2003. Debtor owed Citgo $1,255,673.62 on that date. As of October 23, 2003, Citgo has withheld $1,236,270.23 in credit card receipts from Debtor. Of that amount, $526,308.80 represents the funds withheld pre-petition and $719,961.43 is the amount that has been withheld post- petition. Citgo has not sought or been granted relief from the automatic stay in this case. Debtor seeks to have all the credit card receipts held by Citgo paid over to Debtor pursuant to 11 U.S.C. § 543(b).

Citgo has not filed a financing statement perfecting a security interest in Debtor's assets. The Bank does possess a perfected security interest in Debtor's accounts. The Bank stipulated in oral argument that it wished to have the credit card receipts paid over to Debtor. The Bank stated that it would allow Debtor to use those proceeds in the reorganization and would continue to accept interest-only payments on Debtor's outstanding debt.

Subsequent to Citgo's refusal to supply gasoline to Debtor, Debtor has sold non-Citgo brand gasoline at its convenience stores. Citgo asserts that Debtor's continued use of Citgo's name and trademark is a willful violation of the Lanham Act. Due to the alleged violation, Citgo claims that it is entitled to injunctive relief, Debtor's profits from wrongfully using the trademark, and the costs associated with maintaining this action. Debtor maintains that it did not violate the Lanham Act because it was authorized to use the Citgo name and trademark.

STATEMENT OF THE ISSUES

Debtor initiated this adversary proceeding by filing a turnover complaint against Citgo. Debtor demands that Citgo pay over credit card receipts collected by Citgo and owed to Debtor. Citgo asserts that it is not obligated to pay over the funds. Citgo filed a counterclaim alleging that Debtor has violated the Lanham Act, 15 U.S.C. § 1051 *et seq*. Debtor denies any violation. Both parties move for summary judgment as to Debtor's turnover complaint. Additionally, Citgo filed a motion for summary judgment on its Lanham Act counterclaim. All three motions are before the Court.

SUMMARY JUDGMENT

The Eighth Circuit recognizes "that summary judgment is a drastic remedy and must be exercised with extreme care." Wabun-Inini v. Sessions, 900 F.2d 1234, 1238 (8th Cir. 1990). The Eighth Circuit has also recognized that the "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of

every action.'" Wabun-Inini, 900 F.2d at 1238 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986)). In considering a motion for summary judgment, the Court must determine whether the record, viewed in a light most favorable to the nonmoving party, shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. In re Cochrane, 124 F.3d 978, 981-82 (8th Cir. 1997).

SETOFF

A creditor's right of setoff against a debtor in bankruptcy is allowed only to the extent provided by 11 U.S.C. § 553. The applicable portions of that section provide:

> (a) Except as otherwise provided in this section and in sections 362 and 363 of this title, this title
>
> does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case, except to the extent that -- ...
>
> (3) the debt owed to the debtor by such creditor was incurred by such creditor --
>
> (A) after 90 days before the date of the filing of the petition;
>
> (B) while the debtor was insolvent; and
>
> (C) for the purpose of obtaining a right of setoff against the debtor.

11 U.S.C. § 553(a). A "debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of filing of the petition." 11 U.S.C. § 553 (c). The burden rests upon the creditor to establish that a debtor is solvent. 2 Collier Bankruptcy Manual § 553.02[5][ii] (3d ed. 2003).

The applicability of setoff in bankruptcy is limited to "very narrow circumstances." In re Am. Cent. Airlines, 60 B.R. 587, 589 (Bankr. N.D. Iowa 1986) (Connelly, J.); In re B & L Oil Co., 782 F.2d 155, 157 (10th Cir. 1986) (citing 4 Collier on Bankruptcy § 553.03 (15th ed. 1981)). The right of setoff is permissive, not mandatory, and its application rests squarely within

the Court's discretion. In re Cascade Roads, Inc., 34 F.3d 756, 763 (9th Cir. 1994).

"[P]re-petition claims against the debtor cannot be setoff against post-petition debts to the debtor." Lee v. Schweiker, 739 F.2d 870, 875 (10th Cir. 1984). This is because the debt owed to the debtor-in-possession and the debt owed to the creditor by debtor lack mutuality. In American Central Airlines,60 B.R. at 590, this Court stated, "The requirement of mutuality is of particular significance after the filing of a petition in bankruptcy. Because of the distinction between debtor and debtor-in-possession under the Bankruptcy Code, the majority of courts have concluded that the requisite element of mutuality of parties is lacking whenever a creditor attempts to offset a pre-petition debt against a post-petition claim."

Once a debtor has filed a bankruptcy petition, a creditor must seek relief from the automatic stay in order to exercise its rights of set off as provided in § 553. 11. U.S.C. § 362(a)(7); In re Hiler, 99 B.R. 238, 243 (Bankr. D.N.J. 1989). However, "[a] party does not violate the automatic stay by raising the existence of a right of setoff as a defense in a turnover proceeding under section 542." 2 Collier Bankruptcy Manual § 553.05 [1][b] (3d ed. 2003); In re Corland Corp., 967 F.2d 1069, 1077 (5th Cir. 1992).

While determining a creditor's right of setoff versus the rights of a secured party, the Eighth Circuit stated that "Article 9 governs the priority between [the] right to setoff and a perfected security interest." In re Apex Oil Co., 975 F.2d 1365, 1368 (8th Cir 1992). The Apex Oil court continued, "Indeed, we can imagine few situations which fit more snugly within Article 9's domain than a priority dispute between an account debtor and a secured party." Id. A perfected security agreement has priority over an unrecorded security agreement. Iowa Code § 554.9322.

Citgo has no right to the credit card proceeds at issue through its rights of setoff. All proceeds collected post- petition by Citgo are nonmutual. Am. Cent. Airlines, 60 B.R. at 590. There is no right to setoff debts that lack mutuality. While all the credit card receipts collected pre- petition represent a mutual debt between Debtor and Citgo, § 553(a)(3) specifically prohibits a creditor from retaining the funds collected through setoff on and after 90 days prior to the filing of the bankruptcy petition. The purpose of this section is to discourage creditors from withholding payments to a financially distressed company resulting in an increased probability that the debtor must seek protection in bankruptcy. In re Elcona Homes Corp., 863 F.2d 483, 484 (7th Cir. 1988) ("An important purpose of bankruptcy law is to prevent individual creditors from starting a 'run' on the debtor by assuring that they will be treated equally if the debtor is precipitated into bankruptcy, rather than being given

either preferential treatment for having jumped the gun or disadvantageous treatment for having hung back."). Under § 553(a)(3), Citgo is only entitled to retain the credit card receipts collected prior to November 15, 2002, the 90 day prepetition date.

Citgo's setoff rights to the credit card receipts collected prior to November 15, 2002 are in direct conflict with the Bank's perfected security interest in Debtor's account receivables. "In essence, the right of setoff 'elevates an unsecured claim to secured status, to the extent that the debtor has a mutual, pre-petition claim against the creditor.'" In re Communication Dynamics, Inc., 2003 WL 22345713, at *2 (Bankr. D. Del 2003) (quoting In re Univ. Med. Ctr., 973 F.2d 1065, 1079 (3d Cir. 1992)). The Court must resolve this conflict according to Iowa law.

Iowa Code § 554.9201 allows the security interest created in favor of Citgo to be effective between Citgo and Debtor. However, since the Bank has a competing security interest in Debtor's accounts, this Court must look to Iowa Code § 554.9322 to resolve this conflict. That section provides that the security interest which is first perfected by the filing of a financing statement shall have priority over later filed security interests and unperfected security interests. The only exception contained within Article 9 to give a secured party a priority of setoff is found in § 554.9340. However, that section applies to financial institutions and is therefore not available to benefit Citgo.

Citgo must turn over all credit card receipts withheld from Debtor as the Bank's security interest in those accounts is superior to Citgo's and the Bank demands that the credit card receipts be paid over to Debtor. Had Citgo filed a financing statement when this security interest was first created, a different priority scheme would be created but a goal of Article 9 is to discourage the creation of secret liens. Under well-established legal principles, the Bank's perfected security interest prevails over Citgo's unperfected security interest.

RECOUPMENT

The doctrine of recoupment "allows a [creditor] to reduce the amount of a [debtor's] claim by asserting a claim against the [debtor] which arose out of the same transaction to arrive at a just and proper liability on [debtor's] claim." In re Holfold, 896 F.2d 176, 178 (5th Cir. 1990) (citing Collier on Bankruptcy § 553.03 (15th ed. 1984)); In re NWFX, 864 F.2d. 593, 597 (8th Cir. 1989). "Although the modern counterclaim doctrine has replaced common law recoupment in most areas of the law, recoupment remains a distinct doctrine in bankruptcy cases." In re Peterson Distrib., Inc., 82 F.3d 956, 959 (10th

Cir. 1996) (citing In re Davidovich, 901 F.2d 1533, 1537 (10th Cir. 1990)). The Davidovich court stated,

> In the modern bankruptcy setting, this rule [of recoupment] has evolved to permit a creditor to offset a claim that "arises from the same transaction as the debtor's claim," without reliance on the setoff provisions and limitations of section 553, because the creditor's claim in this circumstance is "essentially a defense to the debtor's claim against the creditor rather than a mutual obligation, and application of the limitations on setoff in bankruptcy would be inequitable."

Davidovich, 901 F.2d at 1537 (quoting Schweiker, 739 F.2d at 875).

Like setoff, recoupment is to be narrowly construed. Peterson Distrib., Inc., 82 F.3d at 959. "The doctrine of recoupment is an equitable remedy that allows the offset of mutual debts when the respective obligations originate from the same transaction or occurrence." Communications Dynamics, Inc., 2003 WL 22345713, at *4.

In application, the Court must determine whether the mutual debts between Citgo and Debtor arose from the same transaction. Hiler, 99 B.R. at 241; In re Saffold, Adv. No. 89-0198, slip op. at 4 (Bankr. N.D. Iowa Aug 27, 1990) (Melloy, J.). Most cases in which a creditor was allowed the right of recoupment against a debtor in bankruptcy involve situations in which the creditor made an overpayment to the debtor. Am. Cent. Airlines, 60 B.R. at 591 ("Courts in other jurisdictions which have allowed recoupment typically involve a single contract which provides for advance payments based on estimates of what ultimately would be owed."); B & L Oil, 782 F.2d at 157; In re Public Serv. Co., 107 B.R. 441, 445-46 (Bankr. D.N.H. 1989); Waldschmidt v. CBS, Inc., 14 B.R. 309, 314 (M.D. Tenn. 1981); In re Midwest Serv. and Supply Co., 44 B.R. 262, 265 (D. Utah 1983); In re Yonkers Hamilton Sanitarium, Inc., 22 B.R. 427, 433 (Bankr. S.D.N.Y. 1982). "Recoupment is often applied where the claims arise from a contract which calls for advance payments based on estimates of what will be owed, with the actual amount owed determined later." In re Centergas, Inc., 172 B.R. 845, 849 (Bankr. N.D. Tex. 1994)(citing Univ. Med. Ctr., 973 F.2d 1065 (3d Cir. 1992)).

This Court previously stated that "[c]redit card transactions and debt from the purchase of goods do not arise from the same transaction." In re Iowa Oil Co., No. 03-00418, slip op. at 9 (Bankr. N.D. Iowa May 21, 2003). In the May 21, 2003 order in this case, this Court chose to adopt the legal reasoning given in Centergas and Peterson Distributing in so far as both opinions pertain to the doctrine of recoupment. Id. at 10. The facts in Centergas are more similar here than in the Court's prior opinion. In Centergas, there was a franchise agreement between Conoco, Inc. and the debtor whereby Conoco would extend

credit to the debtor for merchandise purchased from Conoco. Conoco collected all the credit card receipts from the sale of goods at the debtor's store. Centergas, 172 B.R. at 847. As here, Conoco could automatically withdraw funds on the debtor's bank account. Id. After several failed transfers due to the debtor's lack of funds, Conoco refused to extend the debtor more credit and choose to retain all credit card proceeds under the offset provision in the franchise agreement. Id. The Centergas court ordered Conoco to refund the debtor all proceeds collected in the 90 days prior to the bankruptcy filing. Id. at 854. This Court finds no reason to reject the reasoning in its May 21, 2003 order, and will again follow Centergas and Peterson Distributing.

In its brief, Citgo attempts to distinguish the facts of Centergas and Peterson Distributing from those currently before the Court. Citgo asserts that a dispositive difference between the above mentioned cases and the present matter is that Conoco did not apply credit card proceeds to future sales of product. Peterson Distrib., 82 F.3d at 962-63; Centergas, 172 B.R. at 851-52. The Court disagrees with Citgo's assertion for two reasons.

First, the fact that Conoco did not apply credit card proceeds to future sales is not dispositive. In Peterson Distributing, the franchisor argued that the credit card receipts are "in-kind" payments for Conoco's products. Peterson Distrib., 82 F.3d at 962. The dispositive fact was that the credit card receipts were not in-kind payments. The fact that Conoco did not apply credit card receipts to past debts instead of future sales was merely strong evidence that the receipts were not in-kind payments. Id.

Second, Citgo did not apply credit card proceeds to future sales. Citgo in the present case collected credit card proceeds and applied the funds against a debt already owed by Debtor. Like the franchisor Conoco in Centergas and Peterson Distributing, Citgo refused to extend the franchisee further

credit, began withholding credit card receipts, and did not apply the proceeds to future sales. No factual distinction exists between those cases and the present case.

On principles of consistency, Citgo argues that this Court should follow the case law as stated in In re Warin Oil Co., No. 88-2431-CJ, slip op. (Bankr. S.D. Iowa Sept. 29, 1989) (Jackwig, J.), instead of Centergas and Peterson Distributing. Citgo relied heavily on Judge Jackwig's opinion in Warin Oil in its brief and during oral argument. In Warin Oil, the court found on substantially similar

facts as those now presented that credit card receipt collection and the extension of credit by a franchisor to a franchisee constituted one integrated transaction. Id. at 7. In finding that the mutual debts constitute one transaction the court placed significant weight on the fact that Conoco's obligation to pay over credit card receipts and the debtor's obligation to pay for delivered product arose from a single contract.
Id.

Simply put, the legal analysis in Warin Oil cannot be reconciled with Centergas, Peterson Distributing, or this Court's May 21, 2003 order. Because Warin Oil was decided by a bankruptcy court within the Eighth Circuit, this Court gives considerable deference to its conclusions, however, such rulings are not binding precedent in the Northern District of Iowa. Because Warin Oil is inconsistent with every Circuit Court case examining the issue of recoupment, this Court respectfully declines to follow its result.

Warin Oil is likewise inconsistent with this Court's own legal findings in American Central Airlines. In American Central Airlines, 60 B.R. at 591, this Court allowed the U.S. Department of Transporation ("DOT") to recoup amounts that the debtor airline owed to it for two reasons. First, the DOT overpaid the airline government subsidies. Overpayments are the quintessential case in which recoupment has been allowed. Second, this Court deemed the contract between the DOT and the airline to be executory because both parties continued to fulfill its obligation under the contract even after the filing of the bankruptcy petition. Neither of these two significant facts are present here.

Citgo did not make an overpayment to Debtor. The credit card proceeds and the debt obligation owed by Debtor to Citgo did not arise out of the same transaction. They are mutual debts and the terms of both obligations are contained within
one contract, but those two factors are insufficient to establish the "single transaction" requirement of recoupment. Citgo is not entitled to recoup amounts it owes to Debtor.

Citgo argues that it should be able to recoup gasoline tax paid on Debtor's behalf. Citgo contends that allowing Debtor to retain the gas tax collected from consumers without reimbursing Citgo would unjustly enrich other creditors.
Citgo has not cited any bankruptcy case law in support of this proposition. If the Court were to adopt Citgo's unjust enrichment rationale, a creditor would be able to recover the cost of the goods sold from the bankruptcy estate to prevent unjust enrichment of other creditors every time a supplier extended trade credit to a debtor who sold products to consumers. This is not existing law. The act of paying a third party on Debtor's behalf is no different than

extending a cash loan to Debtor who then uses the funds to pay another creditor. Citgo simply extended too much credit to Debtor without obtaining a perfected security interest in Debtor's assets. Citgo is not entitled to recoup any of the amounts owed by Debtor.

LANHAM ACT VIOLATION

Citgo asserts that Debtor has violated the Lanham Act, 15 U.S.C. § 1051 et seq., by selling non-Citgo branded gasoline under the Citgo name. "The Lanham Act prohibits the unauthorized use of a registered trademark when selling a good or service if using the trademark is likely to mislead or deceive consumers." Thelen Oil Co. v. Fina Oil & Chem. Co., 962 F.2d 821, 822 (8th Cir. 1992); 15 U.S.C. §§ 1114, 1125(a). Section 1114(1)(a) states,

> Any person who shall, without the consent of the registrant, use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake or to deceive... shall be liable in a civil
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> action by the registrant for the remedies hereinafter provided.

15 U.S.C. § 1114(1)(a).

It is undisputed that the Citgo name and "Tri-mark" logo are registered trademarks with the United States Patent Office. It is also undisputed that Debtor sold non-Citgo gasoline while using the Citgo name and logo and continues to do so. In Thelen Oil, 962 F.2d at 822, the Eighth Circuit stated, "The sale of the non-Fina gasoline under the Fina name would likely produce customer confusion." Just as in Thelen Oil, Debtor's use of the Citgo name and logo in connection with the sale of non-Citgo gasoline would likely cause customer confusion. The only element of a Lanham Act violation at issue is whether Citgo consented to the use of it's trademark. The Thelen Oil court found that the issue of consent is an issue of fact. Id.

Debtor contends that it did in fact have consent to use the Citgo name and logo. Debtor's rights and duties regarding the use of Citgo's trademark are contained within the Agreement. Paragraph 6(a) of the Agreement states, "[i]f [Debtor] elects to sell product(s) not purchased or acquired under this Agreement, [Debtor] shall not allow nor permit the use of CITGO's brand names, trademarks, trade dress, and all other forms of CITGO identification, in connection with the resale of such product(s)." Under paragraph 6(b) of the Agreement, using the Citgo name and logo in connection with non-Citgo products in violation of paragraph 6(a) is grounds for

termination of the Agreement. Despite the above language, Debtor contends that it still had consent to use the Citgo name and logo under the Agreement because it had a duty to cover or mitigate damages stemming from Citgo's refusal to supply more product and Citgo did not terminate the agreement in accordance with the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. § 2801 et seq. The PMPA is incorporated into the Agreement.

In passing the PMPA, "Congress sought to reduce the disparity of bargaining power between the franchisee and the franchisor and to prevent the harsh consequences of sudden and unreasonable termination." Simmons v. Mobil Oil Corp., 29 F.3d 505, 509 (9th Cir. 1994); see 123 Cong. Rec. 10386 (1977) (remarks of Rep. Mikva). To the extent that the Act is applicable in this case, the PMPA requires that a franchisor provide written notice to a franchisee at least 90 days prior to termination of a franchise agreement. 15 U.S.C. § 2804.
The written notification must state the date of termination and the reason for the action. Id. Citgo has never provided Debtor with a written notice of termination. If Citgo's actions amount to franchise termination, then Citgo's actions were in violation of the PMPA. However, although Citgo may have breached the Agreement or violated the PMPA, this does not relieve Debtor from following the provisions of the Lanham Act.

Debtor's argument that Citgo could not terminate the Agreement without providing 90 days written notice as required by the PMPA is compelling. Citgo's refusal to supply more gasoline to Debtor did not terminate the Agreement. Nothing in the PMPA provides that a franchisor must provide 90 days written notice to a franchisee asking it to stop using the franchisor's registered trademarks. The Agreement itself specifically denies consent to use Citgo's name and logo in connection with the sale of non-Citgo product.

This Court is willing to accept, for the purposes of this opinion, that Debtor acted properly in obtaining an alternative supply of gas in order to mitigate the damages arising from Citgo's failure to supply product. However, to remain in compliance with the Agreement, Debtor was required to remove or cover all of Citgo's registered trademarks at Debtor's gas stations. To satisfy the Lanham Act, Debtor may have only needed to post signs at the pumps indicating that consumers were not purchasing Citgo gasoline. If Citgo was acting in violation of the Agreement or the PMPA, Debtor may have been entitled to recover costs associated with de- branding the gas stations in an action against Citgo.
However, the issue hee is a violation of the Lanham Act and not a final hearing on whether Citgo violated the agreement or the PMPA. Other factors would enter into such an ultimate conclusion and, therefore, any statements made here are not to be considered conclusive on any such issue.

Debtor used and continues to use the Citgo name and logo at its gas stations without the consent of Citgo. This action likely causes customer confusion. Thus, Debtor has acted and continues to act in violation of the Lanham Act. The Lanham Act, 15 U.S.C. § 1117, provides the remedies available to an injured party and include "defendant's profits, any damages sustained by the plaintiff, and the costs of the action.
Attorney fees are only allowed in "exceptional cases." Id. Unless the parties agree upon an appropriate measure of damages, an additional hearing will be necessary to make this determination. Citgo is entitled to injunctive relief immediately under 15 U.S.C. § 1125(c) to prevent the continued unauthorized use of its name and trademark by Debtor.

WHEREFORE, for all the reasons set out herein, the Court enters the following orders:

1. Debtor's Motion for Summary Judgment on Debtor's Claim for Turnover is GRANTED.

2. Citgo's Cross Motion for Summary Judgment on Debtor's Claim for Turnover is DENIED.

3. Citgo shall pay over all credit card receipts collected by Citgo for sales at Debtor's store locations in the amount of $1,236,270.23 plus any receipts collected since October 23, 2003.

4. Citgo's Motion for Summary Judgment on its Counterclaim under the Lanham Act is GRANTED.

5. Citgo is entitled to immediate injunctive relief preventing Debtor from selling non-Citgo gasoline under the Citgo's registered name and trademark.

6. The Court will allow Citgo to file an application for damages after which an evidentiary hearing will be set to determine the award of exact damages, if any.

SO ORDERED this 12th day of December, 2003.

_____ PAUL J. KILBURG
Chief Bankruptcy Judge