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APPENDIX

KENNYNICK, LLC, ET AL. *v.* STANDARD PETROLEUM COMPANY*

Superior Court, Judicial District of Hartford, Complex Litigation Docket

Docket No. X03-CV-09-5042760-S

Memorandum filed October 22, 2021

Proceedings

Memorandum of decision in named plaintiff's action for breach of contract. *Judgment in part for named plaintiff.*

John J. Morgan, for the named plaintiff.

Nicholas P. Vegliante and *Joseph J. Arcata III*, for the defendant.

SCHUMAN, J. The named plaintiff, Kennynick, LLC (Kennynick, or the plaintiff), a retail gasoline dealer, has filed this class action against the defendant, Standard Petroleum Company (Standard, or the defendant), alleging that Standard, a wholesale distributor, overcharged the plaintiff for gasoline. A bench trial of the named plaintiff's claims took place over six days between July 29 and August 5, 2021. The parties completed filing briefs on August 30, 2021.

This opinion constitutes the memorandum of decision only in the named plaintiff's case. The court does not discuss any class issues. It will be up to the parties to decide in the first instance, based on this decision, whether and to what extent to pursue further class action proceedings.

BACKGROUND

The plaintiff filed this suit in the Stamford-Norwalk Judicial District in 2009. The court, *Heller*, *J.*, granted class action status on July 1, 2016. (Docket Entry #163.01, #186.00.) There is no obvious explanation for the delay between the filing of the case and the litigation of the class action motion. As noted later in this opinion, there is no indication of any activity in this case for roughly the five years between June, 2009, and June, 2014.

In 2018, the Supreme Court affirmed the class certification in a companion case that has now been withdrawn. *Standard Petroleum Co.* v. *Faugno Acquisition, LLC*, 330 Conn. 40, 191 A.3d 147 (2018). During the appeal, the case was transferred to the Complex Litigation Docket in Hartford. The court originally set trial for December, 2019, but then had to continue the trial several times due at least partly to the COVID-19 pandemic.

The operative, third amended complaint (complaint [Docket Entry #227.00]) is in six counts: breach of contract, unjust enrichment, violations of the Connecticut Petroleum Franchise Act (CPFA), violations of the Connecticut Unfair Trade Practices Act (CUTPA), violations of the Uniform Commercial Code (UCC), and misrepresentation. The gravamen of the action is that Standard failed to pass on to Kennynick certain federal tax credits and overcharged Kennynick for the state gross receipt tax. The court does not discuss count two, alleging unjust enrichment, because that count relates only to the class action component of the case, and count four, alleging UCC violations, because that count does not apply to the contract between the parties.

I

THE CONTRACT

Many of the basic facts are undisputed. On January

28, 1999, Standard, acting through George McCloskey, its principal officer, entered into a thirty-eight paragraph "Dealer Supply Contract" with Kennynick, acting through its manager, Monty Blakeman, for the sale and purchase of gasoline. (Plaintiff's Exhibit (Pl. Ex.) 3.) Paragraph three of the contract governed pricing. It provided essentially for a "rack cost plus" structure. Specifically, Kennynick would pay Standard's "Texaco Cost"—i.e., Standard's wholesale price before taxes, or what is known as the "rack price"—plus (1) overhead or a profit margin and (2) taxes.[1] The original contract contained a formula for determining the overhead or profit margin based on the number of gallons sold per month. Paragraph three then contained the phrase "+ ALL APPLICABLE TAXES." The parties crossed this phrase out and initialed it. (Pl. Ex. 3, p. 2.) The undisputed testimony was that McCloskey crossed this phrase out at Blakeman's request based on Blakeman's concern that, because paragraph four also provided for Standard to charge for taxes, there was a risk of double taxation. Paragraph four stated: "Unless otherwise specified, prices include taxes, duties, fees or other charges which [Standard] may be required to collect or pay pursuant to any present or future laws, orders and regulations of any governmental authority." (Pl. Ex. 3, p. 2.)[2]

On October 30, 2003, the parties amended the contract, effective November 1, 2003. Instead of adding a cost for overhead that varied based on the number of gallons sold per month, the parties agreed to amend paragraph three so that it would use a uniform figure of 3.5 cents per gallon as the overhead and profit. (Pl. Ex. 4.)[3] The amendment provided that "[a]ll terms and conditions of the present 'Dealer Contract' to remain in full force and effect as if restated herein," except for this revision to the pricing structure in paragraph three. (Pl. Ex. 4.) In addition, the amendment extended the term of the original contract by three years from February 1, 2005, to February 1, 2008. (Pl. Ex. 4.) Because this case concerns sales made from January 1, 2005, to slightly after February 1, 2008, the new terms in the amended contract, rather than the superseded terms in the original contract, govern the issues.[4]

II

THE STATUTORY BACKGROUND

A

The Federal Fuel Tax and Ethanol Credit (VEETC)

Section 4081 of the Internal Revenue Code, codified at 26 U.S.C. § 4081, imposes a federal fuel tax of 18.3 cents per gallon on the "removal of taxable fuel from any refinery" or "any terminal."[5] The statute adds a tax of 0.1 cent per gallon for the Leaking Underground Storage Tank Trust Fund, so that the total tax is 18.4 cents per gallon. 26 U.S.C. § 4081 (a) (1), (a) (2) (A) (i)

and (a) (2) (B). In 2004, Congress enacted § 6426 of the Internal Revenue Code, which is codified at 26 U.S.C. § 6426 and allows a "credit . . . against the tax imposed by section 4081" of 5.1 cents per gallon for sales of an "alcohol fuel mixture" before January 1, 2009. 26 U.S.C. § 6426 (a) (1), (b) (1) and (b) (2) (A) (i). (Pl. Exs. 34, 37.) This credit is known as the "volumetric ethanol excise tax credit," or the "VEETC." *Standard Petroleum Co.* v. *Faugno Acquisition, LLC*, supra, 330 Conn. 44 n.5. There is no dispute that the companies from which Standard purchased gasoline, such as Motiva, Texaco, or Shell, not only had the initial responsibility to remit the federal fuel tax to the federal government and could also take the VEETC when applicable, but also that they passed on both the tax and the credit to wholesalers such as Standard. (Pl. Ex. 25, p. 3500.)

B

The State Gross Receipts Tax (GRT)

Pursuant to General Statutes § 12-587 (b) (1), the state of Connecticut has imposed a gross receipts tax on "any company which is engaged in the refining or distribution, or both, of petroleum products and which distributes such products in this state . . . ." The tax is on the company's "gross earnings derived from the first sale of petroleum products within this state." The tax rate varied during the relevant time period from 5.8 percent to 7 percent. General Statutes § 12-587 (b) (1) (Pl. Ex. 31.) Under state regulations, " 'Gross earnings' mean and include gross receipts from the initial sale of petroleum products, but do not include the amount of state or federal excise taxes on gasoline or special fuel." Regs., Conn. State Agencies § 12-602-1a (Pl. Ex. 32.)

III

COUNT ONE: BREACH OF CONTRACT

A

The VEETC

Count one alleges breach of contract. The critical paragraph of count one concerning the VEETC alleges the following: "By charging the class members with written contracts 18.4 cents for motor fuels which included 10% alcohol during the time periods set forth in paragraphs 4 and 5 above, the defendant overcharged the plaintiff and class members 5.1 cents or 4.3 cents per gallon and misrepresented the amount of federal tax it was required to collect or pay." (Complaint, count one, para. 35.)[6] The plaintiff argues that the contract called for Standard to pass through to Kennynick not only the federal fuel tax, but also the VEETC, and that Standard did not do the latter.[7]

Standard does not dispute that it did not consistently pass through the VEETC until July 15, 2007, when it changed its practice with Kennynick to ensure a VEETC

pass-through of five cents per gallon. Even then, Standard did not pass through the full VEETC credit of 5.1 cents per gallon. In any case, Standard has two principal arguments why it had no obligation to pass through the VEETC at all. First, Standard asserts that, in 1999, when the parties first negotiated their contract, the VEETC did not exist and thus the parties could not have contemplated passing it through. The court rejects this argument. The contract called for Standard to assess "taxes, duties, fees or other charges which [Standard] may be required to collect or pay pursuant to any present or *future* laws, orders and regulations of any governmental authority." (Emphasis added.) (Pl. Ex. 3, p. 2.) Thus, the contract envisioned future changes in the law concerning taxes such as the 2004 enactment of the VEETC.

Standard's better argument is that the VEETC is a credit, not a tax, and thus the contract, which does not expressly mention credits, did not require Standard to pass it through. There are several responses. First, there is good authority that a tax credit is part of the concept of a "tax" and in effect reduces the tax rate. In the class action appeal, our Supreme Court described the effect of the VEETC as follows: "The federal tax credit *reduced the federal tax* on gasoline that includes ten percent alcohol, which is the gasoline/alcohol mixture used in Connecticut. The federal tax credit *reduced the tax rate* from 18.4 cents per gallon to 13.3 cents per gallon from January 1, 2005 through December 31, 2008, and to 13.9 cents per gallon from January 1, 2009 through December 31, 2011, when the federal tax credit expired." (Emphasis added.) *Standard Petroleum Co.* v. *Faugno Acquisition, LLC*, supra, 330 Conn. 45 n.5. Similarly, a Special Notice from the state Department of Revenue Services entitled "Effect for Petroleum Products Gross Earnings Tax Purposes of Federal Excise Tax Rate Change on 10% Gasohol" described the VEETC as "reducing the federal excise tax rate." It added: "While the federal excise tax rate on 10% gasohol is 18.4 [cents] per gallon (under Section 4081 (a) (2) (A) and (B)), an alcohol fuel mixture credit is allowed against the tax imposed under Section 4801 equal to 5.1 [cents] per gallon (under Section 6426 (b) (1) and (2) (A)), so that the *net federal excise tax rate* on 10% gasohol is 13.3 [cents] per gallon." (Emphasis added.) (Pl. Ex. 28a, p. 1.) While these state actors perhaps are not the final authority on the definition of a federal tax credit, they do present persuasive commentary on the meaning of "tax" in the contract at issue.[8]

Second, Standard, as stated, explicitly passed through a five cent VEETC beginning July 15, 2007, and now strenuously argues that various credits it gave Kennynick before that date of one to five cents in effect represented at least a partial pass-through of the VEETC. It is true that McCloskey testified that Standard was not obligated to pass on the VEETC, and, in fact, Standard did not always do so prior to July, 2007. None-

theless, Standard's conduct in generally, if not invariably, passing or attempting to pass through the VEETC reveals its belief that the contract required it to do so because "[t]he meaning of the terms of a contract can also be shown by the conduct of the parties to the contract." *Ruscito* v. *F-Dyne Electronics Co.*, 177 Conn. 149, 170, 411 A.2d 1371 (1979); see also *Old Colony Trust Co.* v. *Omaha*, 230 U.S. 100, 118, 33 S. Ct. 967, 57 L. Ed. 1410 (1913) ("[g]enerally speaking, the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence"); *In re Chateaugay Corp.*, 139 B.R. 598, 611 (Bankr. S.D.N.Y. 1992) ("[w]here there is doubt as to the meaning of a contract, the court should consider the interpretation placed upon it by the parties, as evidenced by their course of performance").[9]

Thus, the court construes the contract to require Standard to pass through the VEETC. Standard admits that it did not pass through the full 5.1 cent credit during the relevant time period. Therefore, Standard is liable for breach of contract and the court must discuss damages.

B

Damages on the VEETC Claim

It is the plaintiff's burden to prove damages. See *Expressway Associates II* v. *Friendly Ice Cream Corp. of Connecticut*, 218 Conn. 474, 476, 590 A.2d 431 (1991). As part of that burden, the plaintiff must prove that it did not receive the VEETC for part or all of the contract period. Kennynick presented an analysis in which its witness, Michael J. Fox, concluded that "the Ethanol Tax Credit was not applied to Kennynick until at least July 15, 2007," and that therefore Standard is liable for 5.1 cents on every gallon of gasoline it sold Kennynick up until that date. (Pl. Ex. 10, pp. 3-5.)

The court finds that the plaintiff did not prove this proposition. The court instead credits the testimony of Standard's officer, McCloskey, on cross-examination that, during the period before July 15, 2007, he passed through to Kennynick "the credit 50 to 60 percent of the time." McCloskey noted that these amounts ranged from one cent to five cents. (8/2/21 a.m. Transcript [Tr.], pp. 31–32.) Although McCloskey felt that he was not obligated to pass the VEETC through, these actions were not just "voluntary discounts" or "voluntary price reductions" as argued by the plaintiff. (Pl. Mem. in Opp. to Def. Posttrial Brief [Docket Entry #276.00], p. 6; Pl. Mem. in Opp. to Motion to Strike [Docket Entry #277.00], p. 2.) Rather, these credits came in response to the VEETC that Standard received from its suppliers and, at least sometime prior to July, 2007, responded to a specific request of Kennynick for the VEETC. (8/2/21 a.m. Tr., pp. 85–86.) Thus, it is fair to conclude

that, to the extent Kennynick received credits of one to five cents from Standard before July 15, 2007, Kennynick did not prove damages from the loss of the VEETC.[10]

Based on this discussion, the court accepts the alternative VEETC damages analysis of Standard's accountant, Ramy Peress. Peress initially assumed that Standard should have passed along a full 5.1 cent per gallon tax credit on every delivery to Kennynick during this time period. (Def. Exs. 412, 424.) Peress then properly deducted the actual amount—ranging from zero to five cents per gallon—that Standard did pass through. The difference represented Kennynick's VEETC damages. Because Peress factored this difference between the actual credit that Kennynick received and the full credit that it should have received into his cumulative analysis of all damages that Kennynick incurred, the court will defer recognition of the precise amount of damages until the court discusses damages for the GRT errors.

C

GRT Liability and Damages

Paragraph 36 of the complaint's first count alleges that Standard "overcharged . . . for GRT." (Complaint, count one, para. 36.) Standard admits that it erroneously calculated the state GRT, but it contends that there was no net damage to Kennynick.

As stated, the GRT should be calculated based on the "first sale of petroleum products within this state." General Statutes § 12-587 (b) (1). Thus, the proper method of determining the tax is to multiply the GRT tax rate times the rack price, which represents the price at the first sale.

Standard admits erroneously calculating the GRT by adding its overhead or profit of 3.5 cents per gallon to the rack price before multiplying by the GRT tax rate. Fox's report claimed that this process result represented a "GRT overcharge on the profit markup" for the entire contract period. (Pl. Ex. 10, p. 5.) Standard's rebate sheets reveal, however, that, at least after July 15, 2007, Standard both deducted five cents for the VEETC and then added its overhead or profit of 3.5 cents, all before calculating the GRT tax. Standard then added the federal excise tax of 18.4 cents, as well as other state taxes, to this sum. (Pl. Ex. 16-2, p. 8; Def. Ex. 425, p. 5.) The reality was that, in many cases, there was an undercharge for the GRT. Specifically, an undercharge occurred because, when Standard deducted 5 cents for the VEETC and then added 3.5 cents for overhead, it reduced by 1.5 cents the base price by which it calculated the GRT. Standard thereby assessed the GRT against a lower base figure than it should have done. In fact, not only was there no GRT overcharge to Kennynick on any delivery after July 15, 2007, but there was also no overcharge on any delivery

before that date when Standard included a five or four cent per gallon reduction—both of which exceeded the 3.5 cents overhead charge—in the rack price.

Fox ultimately admitted these facts. (8/23/21 p.m. Tr., pp. 53, 58.) Because Peress based his damages analysis on these principles, the court accepts his damages analysis on the GRT claim.

D

Fox's Posttrial Affidavit and Standard's Motion to Strike

With the court's permission, the plaintiff submitted a posttrial affidavit and supplemental chart of Fox responding to Peress' damages analysis, which Standard had disclosed only shortly before trial. (Entry # 274.00.) Fox explained in his affidavit that he multiplied the rack price for all sales of gasoline times 1 percent (or 0.01) in order to represent the discount that Standard routinely received from Motiva for making timely payments. Because Standard did not pass this 1 percent discount on to Kennynick, Fox added the result of this computation to the damages that Kennynick should receive, even under Peress' analysis. This additional amount of $77,350.81, when added to Peress' figure of $37,637.72 for the total VEETC and GRT damages, yields a revised damages total of $114,988.53.

Standard moves to strike the affidavit because it "attempts to assert and quantify a completely new and unpled claim for damages based on a completely new and previously undisclosed theory of liability." (Def. Objection and Motion to Strike Fox Affidavit [Docket Entry #273.00], p. 1.) Standard argues that the complaint alleges only tax overcharges and that the plaintiff specifically disclaimed any other basis for damages.

The court agrees with this argument. The somewhat undeveloped theory of the plaintiff based on this new evidence is that Standard breached its contract by failing to charge Kennynick the true Texaco or rack price for the gasoline. This theory is not dependent on Peress' analysis but, rather, is based on facts that the plaintiff knew or should have known from the outset of the lawsuit in 2009. (See, e.g., Pl. Ex. 25 [March 12, 2005 invoice from Motiva showing 1 percent discount], p. 3501.) The complaint, however, did not allege a breach of contract or any other violations stemming from the failure to charge the correct rack price. Rather, as quoted in part previously, the substantive allegations of the complaint allege discrepancies only in the treatment of the VEETC and the GRT. (Complaint, count one, paras. 35, 36; count three, paras. 40, 41; count six, paras. 39, 41.) Thus, with respect to the plaintiff's new theory, the plaintiff did not give the defendant the fair notice in the complaint to which the defendant is entitled. See *Moore* v. *Sergi*, 38 Conn. App. 829, 841, 664 A.2d 795 (1995) ("[i]t is fundamental in our law that

the right of a plaintiff to recover is limited to the allegations in his complaint"). Indeed, as the defendant points out, the plaintiff's counsel during Fox's 2021 deposition stated that the issue of "rebates below the rack" is "beyond the scope of this lawsuit," and that "rack be considered to be Standard's cost and the equivalent of the first sale in the state of Connecticut for purposes of calculating gross receipts."[11] For these reasons, the court, while denying Standard's motion to strike Fox's affidavit, considers the substance of the affidavit immaterial to this case.

E

Breach of Contract Damages: Conclusion

The court finds that Peress correctly calculated the damages by taking into account all of the factors discussed above. The court accepts his conclusion that, between January 1, 2005, and March 5, 2008, Standard overcharged Kennynick $37,637.72 as a result of the incorrect application of the VEETC and the GRT. (Def. Ex. 424, p. 27.) Accordingly, the court assesses damages on the breach of contract count of $37,637.72.

IV

COUNT THREE: CONNECTICUT PETROLEUM FRANCHISE ACT (CPFA)

The CPFA, codified at General Statutes §§ 42-133j to 42-133n, creates legislative "standards . . . governing the relationship between suppliers and distributors of gasoline and petroleum products and the dealers within the state who sell those products to the public." General Statutes § 42-133j (a). The purpose of the act is "to promote the public interest and public welfare, to avoid undue control of the dealer by suppliers, to foster and keep alive vigorous and healthy competition for the benefit of the public by prohibiting practices through which fair and honest competition is destroyed or prevented, to promote the public safety, to prevent deterioration of facilities for servicing motor vehicles on the highways of the state, to prevent dealers from unnecessarily going out of business thereby resulting in unemployment with loss of tax revenue to the state and its resultant undesirable consequences, and to offset evident abuses within the petroleum industry as a result of inequitable economic power . . . ." General Statutes § 42-133j (a);[12] see also *Aldin Associates Ltd. Partnership* v. *Hess Corp.*, Docket No. CV-10-6016873-S, 2019 WL 413581, *9 (Conn. Super. January 7, 2019) ("there is no indication in the legislative history of the CPFA that the legislature intended to turn every contract dispute between a gas franchisee and gas franchisor into a claim under the CPFA").

Count three of the complaint alleges that Standard violated the CFPA in three ways: it "failed to deal in good faith with the class members" in violation of § 42-133*l* (f) (6); it "sold gasoline to the class members for

more than a fair and reasonable price" in violation of § 42-133*l* (f) (7); and it "treated certain class members differently from others" in violation of § 42-133*l* (f) (9).[13] In its briefs, the plaintiff merely mentions the claim that Standard sold gasoline for "more than a fair and reasonable price" but does not analyze or otherwise brief it. Accordingly, the court considers that claim abandoned. See *Merchant* v. *State Ethics Commission*, 53 Conn. App. 808, 818, 733 A.2d 287 (1999). The court considers the remaining claims insofar as they might affect the plaintiff individually, and not with respect to any class allegations.

On the lack of good faith claim, the court credits the testimony of Standard accountant Peress on direct examination and principal officer McCloskey on cross-examination that Standard did not intend to harm Kennynick by not passing the VEETC through at the outset or by making errors in the calculation of the GRT. Further, the court finds that the errors in this case occurred as a result of (1) a contract that was poorly written in general, (2) the omission in the contract of any express mention of tax credits, and (3) the fact that the law concerning the VEETC changed in the middle of the contract term. With regard to the GRT, to the extent that the errors in calculation benefited Kennynick, they show good faith rather than bad faith. In sum, there was a breach of contract by Standard but no evidence of the sort of predatory conduct contemplated by the CPFA. The court concludes that the plaintiff did not prove bad faith by Standard.

There was also no discrimination under the CPFA. The only specific example that the plaintiff cited at trial involved three customers—E.L.L.S., LLC, Naples One, LLC, and Sole, LLC (referred to as the "Lenny/Sohail dealers" at trial). (Pl. Ex. 21; Def. Exs. 440, 442.) Although the tax clauses in the contracts with these customers read similarly to the tax clause in the Kennynick contract, the key difference was that McCloskey verbally but specifically agreed during contract negotiations to give the Lenny/Sohail dealers the VEETC discount, whereas McCloskey did not make and, in 2003 before the enactment of the VEETC, could not have made that promise to Kennynick. (8/2/21 a.m. Tr., pp. 84–85.)[14] This type of distinction means that Kennynick and the Lenny/Sohail dealers entered into contracts with Standard at "materially different times," which satisfies an express exception to the discrimination prohibition under the CPFA. See General Statutes § 42-133*l* (f) (9) (B); see footnote 13 of this opinion.[15]

Further, the E.L.L.S., LLC, and Sole, LLC contracts with Standard took effect in April, 2008, after the contract terminated with Kennynick in March, 2008. (Pl. Ex. 21, sec. 2; Def. Ex. 442, sec. 2.) Only the contract with Naples One, LLC, which took effect on March 15, 2007, ran at the same time as Kennynick's contract.

(Def. Ex. 440, sec. 2.) During this time period, Standard almost always gave Kennynick a VEETC of five cents per gallon. (Def. Ex. 412.)[16] The plaintiff does not point to any evidence showing that Naples One, LLC, received a better credit during this time period. Thus, the plaintiff failed to prove any discrimination that violated the CPFA.[17]

V

COUNT FOUR: CUTPA

The court finds no CUTPA liability for essentially the same reasons that it finds no liability under the CPFA. CUTPA does not apply to a breach of contract case unless there are aggravating circumstances. See *Lydall, Inc.* v. *Ruschmeyer*, 282 Conn. 209, 248, 919 A.2d 421 (2007). "There must be some nexus with a public interest, some violation of a concept of what is fair, some immoral, unethical, oppressive or unscrupulous business practice or some practice that offends public policy." (Internal quotation marks omitted.) *Gaynor* v. *Hi-Tech Homes*, 149 Conn. App. 267, 276, 89 A.3d 373 (2014). Here, as shown, Standard did not violate the CPFA. Further, there is no federal or state statute or regulation that required Standard to pass through the VEETC or to collect the GRT from Kennynick. Standard's decisions on these matters were solely a matter of interpreting a contract. Further, as discussed, the contract was unclear and thus was subject to various interpretations. Standard's miscalculation of the GRT was an honest mistake that it now admits fully and that it has shown routinely benefited Kennynick after July 15, 2007. At no time did Standard exhibit any offensive, dishonest, or unscrupulous behavior that would justify CUTPA liability.[18]

VI

COUNT SIX: MISREPRESENTATION

The plaintiff bases its misrepresentation count on the claim that Standard's "invoices" were incorrect with regard to the federal tax and GRT that Standard was required to collect or pay. (Complaint, count 6, paras. 39, 41.) In the absence of allegations of fraud, the court assumes that the plaintiff alleges negligent misrepresentation. An action for negligent misrepresentation requires the plaintiff to prove that "[the defendant] made a misrepresentation of fact, that [the defendant] knew or should have known that it was false, that the plaintiff reasonably relied upon the misrepresentation, and that the [plaintiff] suffered pecuniary harm as a result thereof." *Glazer* v. *Dress Barn, Inc.*, 274 Conn. 33, 73, 873 A.2d 929 (2005).

Initially, the testimony established that Kennynick never paid the amounts billed on the actual invoices. Rather, Standard created the invoices only to have a "paper trail" upon delivery of the gasoline. Kennynick instead paid bills based on the rebate worksheets and

the credit that resulted in subtracting the rebate worksheet price from the invoice price. (7/30/21 p.m. Tr., pp. 132, 134, 140–46.) Thus, there was no real reliance by Kennynick on the invoices.

If the court interprets the complaint liberally, it could construe the allegation of "invoices" to refer to the rebate worksheets. But the tax charges on the rebate worksheet do not neatly fall into the category of a "misrepresentation of fact . . . ." *Glazer* v. *Dress Barn, Inc.*, supra, 274 Conn. 73. Rather, Standard's statement that Kennynick owed certain amounts for the federal tax and for the GRT in reality represented Standard's opinion about what the contract, which was vague and confusing, allowed or required it to pass through. Such an opinion cannot normally form the basis of an action for misrepresentation of fact. See *Yurevich* v. *Sikorsky Aircraft Division, United Technologies Corp.*, 51 F. Supp. 2d 144, 152 (D. Conn. 1999) ("The misrepresentation must consist of a statement of a material past or present fact. . . . Statements of opinion . . . are not actionable." (Internal quotation marks omitted.)); *Benedict* v. *Dickens' Heirs*, 119 Conn. 541, 547, 177 A. 715 (1935) ("[r]epresentations as to value are ordinarily matters of opinion and not actionable"). Therefore, the court finds for Standard on the misrepresentation count.[19]

VII

STANDARD'S SPECIAL DEFENSES OF WAIVER, VOLUNTARY PAYMENT AND EQUITABLE ESTOPPEL

The defendant alleges in its special defenses that, "[d]espite having full knowledge of the tax charges included in the invoices submitted to it by the defendant, and despite its belief that the invoices submitted to it by the defendant were incorrect, the plaintiff nevertheless voluntarily paid the defendant's said invoices." (Defendant's Amended Answer and Special Defenses [Docket Entry #231.00], First Special Defense, para. 4.) Based on this allegation and others, the defendant raises the defenses of waiver, voluntary payment, and equitable estoppel.

Waiver involves the "intentional relinquishment of a known right." (Internal quotation marks omitted.) *Sablosky* v. *Sablosky*, 72 Conn. App. 408, 414, 805 A.2d 745 (2002). The voluntary payment doctrine, which the court previously recognized as a valid defense in Connecticut (Order re Motion to Strike [Docket Entry #242.86]), provides that "[a] party cannot recover money voluntarily paid with a full knowledge of all the facts, although no obligation to make such payment existed." *Morris* v. *New Haven*, 78 Conn. 673, 675, 63 A. 123 (1906). These defenses, as alleged and defined, require proof of intentional acts based on full knowledge of the tax charges included in Standard's invoices.

Standard did not supply this proof. The only evidence comes from Christine Beard, who took over the business in 2007 when her father, Blakeman, became ill. Beard testified credibly that she never understood Standard's invoicing and that the "math never came out." Beard paid the invoices despite not fully understanding them. (8/3/21 a.m. Tr., pp. 14, 17–18.) The court finds that Beard was not a sophisticated businessperson who could make a fully informed decision to pay invoices that she knew with certainty were wrong. Further, there is no testimony as to business practices in 2006, prior to Beard's involvement, when the invoices did not disclose the VEETC at all. Thus, Standard has not met its burden to prove that Kennynick intentionally waived its claims or that it had full knowledge of all of the facts before making its payments.

The defendant bases its equitable estoppel defense on the same facts. (Defendant's Amended Answer and Special Defenses, Seventh Special Defense.) The defendant's reliance on this defense is misplaced. Although there are several distinct elements to the defense, ultimately equitable estoppel rests on the "misleading conduct of one party to the prejudice of the other . . . [and] conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert . . . ." (Internal quotation marks omitted.) *TD Bank, N.A.* v. *M.J. Holdings, LLC*, 143 Conn. App. 322, 338, 71 A.3d 541 (2013).[20] The court finds nothing misleading or false about Kennynick's payment of its bills. Both parties here acted in good faith in the face of a confusing contract and equally confusing invoices. The court denies the defendant's special defenses.

VIII

PREJUDGMENT INTEREST

The plaintiff seeks an award of prejudgment interest. General Statutes § 37-3a permits the court to award prejudgment interest for the "detention of . . . money [that is] . . . wrongful." *Northrop* v. *Allstate Ins. Co.*, 247 Conn. 242, 255, 720 A.2d 879 (1998).[21] However, the plaintiff need not prove wrongfulness "above and beyond proof of the underlying legal claim. . . . In other words, the wrongful detention standard of § 37-3a is satisfied by proof of the underlying legal claim, a requirement that is met once the plaintiff obtains a judgment in his favor on that claim." (Citation omitted; internal quotation marks omitted.) *DiLieto* v. *County Obstetrics & Gynecology Group, P.C.*, 310 Conn. 38, 52, 74 A.3d 1212 (2013). The primary purpose of § 37-3a "is not to punish persons who have detained money owed to others in bad faith but, rather, to compensate parties that have been deprived of the use of their money." *Sosin* v. *Sosin*, 300 Conn. 205, 230, 14 A.3d 307 (2011).

Under these standards, the plaintiff is entitled to prejudgment interest for the wrongful detention of the $37,637.72 that the court has determined the defendant owed the plaintiff under their contract.

The remaining issues are the interest rate and the date from which the interest should run. The court agrees with the plaintiff that "a fair, just and reasonable interest rate is 5 percent annual compound interest." (Pl. Proposed Findings of Fact, para. 139.) In this case, the damages accrued on a delivery-by-delivery basis over the contract period, which ended on March 5, 2008. The defendant adds, however, that the plaintiff should not recover for the almost five year period between June 1, 2009, and May 27, 2014, when the docket sheet reflects no activity in the case. The court has no explanation for this period of dormancy, which took place well before the undersigned's tenure in the case. The court will assume, perhaps favorably to the plaintiff, that the plaintiff is only 50 percent responsible for the delay. The court accordingly will add two and one-half years to the date from which interest should run. Thus, prejudgment interest should run from September 5, 2010.

IX

ATTORNEY'S FEES

Paragraph 27 of the contract provides that "[p]arties shall pay and reimburse the other for all legal fees and expenses from enforcing any of the provisions of this contract." (Pl. Ex. 3, para. 27.) The court finds that the plaintiff has partially prevailed on the primary claim in the complaint and, therefore, to that extent, has a right to reimbursement from the defendant of the plaintiff's attorney's fees. The court requests that, based on this finding, the parties attempt to resolve the amount of the attorney's fees obligation on their own. If the parties cannot do so, they should agree on a timetable and a procedure for submitting the matter to the court for resolution.

X

CONCLUSION

Judgment shall enter for the plaintiff on count one in the amount of $37,637.72 plus prejudgment interest and attorney's fees as discussed in this memorandum of decision. Judgment shall enter for the defendant on counts three, five, and six.

It is so ordered.

* Affirmed. *Kennynick, LLC* v. *Standard Petroleum Co.*, 222 Conn. App. 234, A.3d (2023).

[1] Although there was some debate on the meaning of "Texaco Cost," even the plaintiff's expert stated in his report that, "[a]s used in the Supply Contract, 'Texaco Cost' is the same as the Rack or Terminal price." (Pl. Ex. 10, p. 3.) The court adopts this position.

[2] Standard was not required to "collect" taxes from Kennynick, but it was contractually required to "pay" taxes to Motiva, its principal supplier for this contract. (See, e.g., Pl. Ex. 25, p. 3500; Pl. Proposed Findings [Docket

Entry #274.00], para. 65.)

The contract actually set up a more complicated and somewhat confusing pricing structure. It provided or assumed that Standard would charge Kennynick a much higher "posted price" (also known as an invoice, listed, or DTW price) and then give Kennynick a "rebate based on the difference between the Standard Petroleum posted price and its Texaco Cost as follows . . . ." (Pl. Ex. 3, p. 1.) Immediately after this phrase, the contract set out the formula for determining overhead followed by the crossed-out phrase "+ ALL APPLICABLE TAXES." (Pl. Ex. 3, p. 2.)

In retrospect, the use of the phrase "Texaco Cost as follows" was confusing and ill-advised. The contract would have been much clearer had the parties used a phrase such as "Texaco Cost plus" and then listed the additional items.

[3] Once again, the parties used the confusing phrase "Texaco/Shell cost as follows . . ." followed by a line showing a markup of 3.5 cents per gallon for all types of gasoline purchased. But the contract then misplaced the decimal point and stated the markup as ".0035 Cents." (Pl. Ex. 4.) There was no dispute that the parties intended the contract to read "3.5 Cents."

[4] The evidence reveals that sales took place through March 5, 2008. (Def. Ex. 424, p. 27.)

[5] All United States Code and Connecticut General Statutes citations are to the statutes applicable during the contract period.

[6] The VEETC credit went down to 4.5 cents per gallon (although not 4.3 cents as alleged) effective January 1, 2009, which is after the relevant time period for this trial. See 26 U.S.C. § 6426 (b) (2) (A) (ii). Thus, only the 5.1 cent credit is relevant for present purposes.

[7] Kennynick's brief adds a statutory claim based on General Statutes § 12-458 (a) (4) that it did not allege in the complaint. (Pl. Proposed Findings [Docket Entry #274.00], para. 79C.) Because the plaintiff failed to comply with the rule requiring it to allege statutory claims in the complaint, the court does not consider this claim. See Practice Book § 10-3 (a).

[8] Standard relies on *Sunoco*, *Inc*. v. *United States*, 908 F.3d 710 (Fed. Cir. 2018), cert. denied, U.S. , 140 S. Ct. 46, 205 L. Ed. 2d 35 (2019), which purportedly distinguished between the "alcohol fuel mixture credit"—the VEETC—and a "reduced excise-tax rate for alcohol fuel mixtures" that Congress repealed in the same act that enacted the credit. Id., 712–13. Standard relies on the following statement from the Congressional committee report: the "Mixture Credit 'provide[s] a benefit equivalent to the reduced tax rates, which are being repealed under the provision.' " Id., 713. This statement, however, literally suggests more of an equivalency between a tax and a credit than a clear difference.

[9] To the extent that the Dealer Supply Contract was one for the sale of goods within the scope of article 2 of the UCC, the same rule applies. See General Statutes § 42a-2-202 ("[t]erms . . . set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms . . . may be explained or supplemented (a) by course of performance . . ."; see also General Statutes § 42a-1-303 (a) (defining "course of performance"); General Statutes § 42a-2-106 (1) (defining "contract for sale").

[10] The court therefore rejects the plaintiff's suggestion that the reduction in damages arising from Standard's passing through the VEETC represented an "unpleaded special defense" of offset or recoupment. (Pl. Mem. in Opp. to Motion to Strike, p. 2.) This case is not one in which Standard is seeking to offset Kennynick's damages because of some other "equitable reason" arising out of the same transaction. See *Loricco* v. *Pantani*, 67 Conn. App. 681, 686, 789 A.2d 514 (2002). Rather, the case involves the straightforward concept that, to the extent Standard passed through the VEETC, Kennynick did not prove damages from not receiving it.

[11] The full statement of the plaintiff's counsel during Fox's deposition on January 27, 2021, was as follows: "Just to help move this along . . . I have asked Mr. Fox to assume that, for purposes of calculating damages, that Standard's cost was, in fact, rack. We all know that Standard likely received rebates below the rack.

"Whether or not they should be calculated for purposes—I don't want to argue about it in this lawsuit. It's beyond the scope of this lawsuit. So, for purposes of Mr. Fox's calculations and for all purposes, I have asked that rack be considered to be Standard's cost and the equivalent of the first sale in the state of Connecticut for purposes of calculating gross receipts.

"With that—I've asked him to do that. Certainly, Standard probably had a lower price, but it's impossible to calculate that." (Dep. of Michael Fox, January 27, 2021 [attached as Ex. B to Def. Obj. to and Motion to Strike Fox Affidavit], p. 402.)

[12] General Statutes § 42-133j (a) provides in full: "The legislature of the state of Connecticut finds and declares that the distribution and sales of gasoline and petroleum products through franchises within the state of Connecticut, including the rights and obligations of suppliers and dealers, vitally affects its general economy. In order to promote the public interest and public welfare, to avoid undue control of the dealer by suppliers, to foster and keep alive vigorous and healthy competition for the benefit of the public by prohibiting practices through which fair and honest competition is destroyed or prevented, to promote the public safety, to prevent deterioration of facilities for servicing motor vehicles on the highways of the state, to prevent dealers from unnecessarily going out of business thereby resulting in unemployment with loss of tax revenue to the state and its resultant undesirable consequences, and to offset evident abuses within the petroleum industry as a result of inequitable economic power, it is necessary to legislate standards pursuant to the exercise of the police power of this state governing the relationship between suppliers and distributors of gasoline and petroleum products and the dealers within the state who sell those products to the public."

[13] These three subdivisions provide as follows: "(f) No franchisor, directly or indirectly, through any officer, agent or employee, shall do any of the following . . . (6) fail to deal in good faith with a franchisee; (7) sell, rent or offer to sell to a franchisee any product or service for more than a fair and reasonable price . . . (9) discriminate between franchisees in the charges offered or made for royalties, goods, services, equipment, rentals, advertising services, or in any other business dealing, unless (A) any such type of discrimination between franchisees would be necessary to allow a particular franchisee to fairly meet competition in the open market, or (B) to the extent that the franchisor satisfies the burden of proving that any classification of or discrimination between franchisees is reasonable, is based on franchises granted at materially different times and such discrimination is reasonably related to such difference in time or on other proper and justifiable distinctions considering the purposes of sections 42-133j to 42-133n, inclusive, and is not arbitrary . . . ." General Statutes § 42-133*l*.

[14] Standard should have written its oral agreement with the Lenny/Sohail dealers into their contracts in order to achieve more clarity and to comply with the contracts' integration clause. (Pl. Exs. 21, 440, 442, sec. 28.)

[15] As quoted in footnote 13 of this opinion, General Statutes § 42-133*l* (f) provides in relevant part: "No franchisor, directly, or indirectly, through any officer, agent or employee, shall do any of the following . . . (9) discriminate between franchisees in the charges offered or made for royalties, goods, services, equipment, rentals, advertising services, or in any other business dealing, unless . . . (B) to the extent that the franchisor satisfies the burden of proving that any classification of or discrimination between franchisees is reasonable, is based on franchises granted at materially different times and such discrimination is reasonably related to such difference in time or on other proper and justifiable distinctions considering the purposes of sections 42-133j to 42-133n, inclusive, and is not arbitrary . . . ."

Under the CPFA, "[f]ranchise" includes various types of contracts between a distributor and a retailer. General Statutes § 42-133k (1) and (2).

[16] McCloskey's cross-examination established that, with reference to the "KennyNick Ethanol Tax Credit Analysis" contained in exhibit 412, the handwritten numbers written into the column to the right of "Gals Del" represented the VEETC in cents that Standard gave Kennynick. From March 2 to December 30, 2007, every entry showed a five cent credit except for three that showed a four cent credit.

[17] Standard also observes that, because the CPFA does not have any statute of limitations, the three year tort statute would apply. See General Statutes § 52-577. The plaintiff commenced this case by making service on January 14, 2009, thus presumably barring any claim of discrimination for deliveries of gasoline before January 14, 2006. (Return of Service [Docket Entry #3].) Kennynick's brief does not dispute this point.

[18] In addition, the three year CUTPA statute of limitations would bar any claim for a delivery before January 14, 2006. See General Statutes § 42-110g (f).

[19] The three year statute of limitations and repose for negligence claims would also bar any claim for a delivery before January 14, 2006. General Statutes § 52-584. The court does not reach the defendant's argument that the economic loss doctrine bars recovery in tort for strictly commercial losses. The court adds that any damages under the misrepresentation count would merely duplicate the damages awarded on the breach of contract

count.

[20] In full, the elements are: "(1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts." (Internal quotation marks omitted.) *TD Bank, N.A.* v. *M.J. Holdings, LLC*, supra, 143 Conn. App. 338.

[21] General Statutes § 37-3a provides in relevant part: "(a) Except as provided in sections 37-3b, 37-3c and 52-192a, interest at the rate of ten per cent a year, and no more, may be recovered and allowed in civil actions or arbitration proceedings under chapter 909, including actions to recover money loaned at a greater rate, as damages for the detention of money after it becomes payable. . . ."