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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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Ervco, Inc., et al.,

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No. cv-04-0452-PHX-ROS

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Plaintiff,

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ORDER

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vs.

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Texaco Refining and Marketing, Inc.,

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Defendant.

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Pending before the Court is Counterclaimant Equilon’s Motion for Summary Judgment on its Counterclaim (Doc. 211). For the reasons stated herein, Equilon’s Motion shall be granted.

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BACKGROUND

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In December 1991, Daniel J. Ervin entered into a franchise relationship with Texaco Refining and Marketing Inc. (“Texaco”) to lease and operate a Texaco-branded gas station in Phoenix, Arizona. The parties regularly renewed the franchise agreement every third year.

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In 1998, Texaco and Shell Oil Company combined their retail marketing and refining assets into a limited liability company called Equilon Enterprises. As part of this venture, they assigned their franchise agreements to Equilon. The franchise agreement, now between Ervin and Equilon, continued to be regularly renewed until December 2003.

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On December 5, 2003, Equilon notified Ervin that it was not renewing his franchise because Equilon had decided to sell the property. On December 11, 2003, Equilon offered

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1 to sell the property to Ervin for \$658,000.00, which Ervin rejected. Pursuant to the non-
2 renewal notice, Ervin was to vacate the property on March 6, 2004. Ervin refused, and filed
3 suit against Equilon and Texaco for breach of contract, tortious interference, and violation
4 of the Petroleum Marketing Practices Act (“PMPA”).

5 Equilon filed a counterclaim seeking, among other things, liquidated damages for
6 Ervin’s holdover tenancy. The governing franchise agreement states in relevant part:

7 In addition to Lessor’s rights under Article 20(b), Lessor will be entitled to
8 compensation, as liquidated damages and not as a penalty, in the amount of
9 \$300.00 per day from Lessee from the date of termination or nonrenewal of
this Lease until the date of final removal of Lessee’s property and restoration
of the Premises by Lessor or Lessee, as the case may be.

10 Ervin asserts that, under this agreement, Equilon is entitled to liquidated damages in the
11 amount of \$300.00 per day from the date of non-renewal until Ervin vacated the premises.

12 The Court granted summary judgment on Ervin’s claim but has not yet ruled on
13 Equilon’s counterclaims. In its counterclaim, Equilon alleges that it has the right to recover
14 liquidated damages in the amount of \$300.00 per day for each day that Ervin remained on
15 the property (in total, \$130,309.30 for 309 days) after December 4, 2003. In the alternative,
16 Equilon asks that Ervin be required to pay rent for his holdover tenancy at the rate he was
17 paying to rent the property initially. Equilon also asks for payment for motor fuel delivered
18 to Ervin, totaling \$30,860.46, plus interest at the rate of 10% per annum.

19 In this Court’s March 31, 2008 Order, it ruled: “Equilon’s offer to sell the property
20 to Ervin did not have to be bona fide in order for Equilon to seek liquidated damages under
21 the governing contract. See Boyers v. Texaco Refining & Mktg., Inc., 848 F.2d 809, 811
22 (8th Cir. 1988) (holding that franchisee was liable to franchisor for holdover tenancy under
23 the property lease regardless of whether franchisor violated the PMPA).” (Doc. 208). At
24 that time, the Court reserved judgment on “the merits of Equilon’s claim for such damages.”

25 ANALYSIS

26 A. Standard of Review

27 A court must grant summary judgment if the pleadings and supporting documents,
28 viewed in the light most favorable to the non-moving party, "show that there is no

1 genuine issue as to any material fact and that the moving party is entitled to a judgment as
2 a matter of law." Fed. R. Civ. P. 56(c); see Celotex Corp. v. Catrett, 477 U.S. 317, 322-
3 23 (1986). Substantive law determines which facts are material, and "[o]nly disputes over
4 facts that might affect the outcome of the suit under the governing law will properly
5 preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S.
6 242, 248 (1986). In addition, the dispute must be genuine; that is, "the evidence is such
7 that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477
8 U.S. at 248.

9 The party opposing summary judgment "may not rest upon the mere allegations or
10 denials of [the party's] pleading, but . . . must set forth specific facts showing that there is
11 a genuine issue for trial." Fed. R. Civ. P. 56(e); see Matsushita Elec. Indus. Co., Ltd. v.
12 Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). There is no issue for trial unless there
13 is sufficient evidence favoring the non-moving party; "[i]f the evidence is merely
14 colorable, or is not significantly probative, summary judgment may be granted."
15 Anderson, 477 U.S. at 249-50 (citations omitted). However, "[c]redibility determinations,
16 the weighing of the evidence, and the drawing of legitimate inferences from the facts are
17 jury functions, not those of a judge." Id. at 255. Therefore, "[t]he evidence of the non-
18 movant is to be believed, and all justifiable inferences are to be drawn in his favor" at the
19 summary judgment stage. Id.

20 In Arizona, whether a contractual stipulation constitutes liquidated damages or an
21 unenforceable penalty "is a question of law for the court." Pima Sav. & Loan Ass'n v.
22 Rampello, 812 P.2d 1115, 1118 (Ariz. App. 1991).

23 B. Choice of Law

24 "[F]ranchise agreements governed by the PMPA are interpreted according to state
25 contract law." Han v. Mobil Oil Corp., 73 F.3d 872, 876 (9th Cir. 1995). Ervin entered
26 into a franchise relationship to lease and operate a Texaco-branded gas station in Phoenix,
27 Arizona. Neither party contests that Arizona contract law should govern interpretation of
28 the agreement.

1 C. Liquidated Damages

2 Contractual provisions providing for liquidated damages are considered
3 enforceable where they have a certain reasonable relationship to the harms caused. They
4 are unenforceable where they constitute merely “[p]unishment of a promisor for having
5 broken his promise.” Pima Sav. & Loan, 812 P.2d at 1118.

6 [A]n agreement made in advance of a breach is a penalty unless both of two
7 conditions are met. First, the amount fixed in the contract must be a
8 reasonable forecast of just compensation for the harm that is caused by any
breach. Second, the harm that is caused by any breach must be one that is
incapable or very difficult of accurate estimation.’

9 Id. (citing Larson-Hegstrom & Associates, Inc. v. Jeffries, 701 P.2d 587, 591 (Ariz. App.
10 1985). The reasonableness of the amount fixed is determined against “the loss anticipated
11 at the time of the making of the contract, even though it may not approximate the actual
12 loss.” Id. (citing Restatement (Second) of Contracts § 356, cmt *b* (1981)). Similarly,
13 “[t]he difficulties of proof of loss are to be determined at the time the contract is made
14 and not at the time of the breach.” Id. “When liquidated damages are specified in a
15 contract, the terms of the contract generally control.” Roscoe-Gill v. Newman, 937 P.2d
16 673, 675 (Ariz. App. 1996).

17 Equilon argues that the damages caused by breach were uncertain when the
18 contract was made due to the uncertainty inherent in the real estate market. It writes:

19 Ervin’s holdover could have lasted a day, a month, six months or a year, as
20 in this case. During the same period of time, the Arizona real estate market
21 fluctuated up to record highs and then down, the red hot Phoenix real estate
22 market in 2003, 2004 and 2005 cooled off significantly and the economy
has slowed. There was no way that Equilon could have predicted in 2000
what the state of the real estate market or economy would have been in
these years or today.

23 The general uncertainty of the real estate market as justification for liquidated damages
24 comports with Arizona case law. In Pima, the court noted that “real property is not a
25 liquid asset easily converted into cash. Who knew how long it would take to dispose of it
26 and what it would sell for in the marketplace?” Pima Sav. & Loan, 812 P.2d at 1118; see
27 also Larson-Hegstrom, 701 P.2d at 592 (stating that “[c]ompensation associated with real
28 estate contracts is by its nature difficult to estimate since what is being compensated is the

1 presentation of a ready, willing and able buyer . . .”). Therefore, it is reasonable to
2 conclude that, at the time the contract was made, Equilon could not have determined its
3 loss from a holdover tenancy with any precision.

4 Ervin does not argue that the amount of damages provided for by the contract is
5 punitive. The liquidated damages amount of \$300 per day is less than the daily rent Ervin
6 was contracted to pay for the property (which came to \$339 per day). Thus, the
7 liquidated damages provision meets both the incalculability and the reasonability criteria.

8 Ervin, however, argues that Equilon cannot collect liquidated damages because it
9 has not affirmatively proven that any loss actually occurred. It cites a comment to the
10 Restatement (Second) of Contracts which states: “If, to take an extreme case, it is clear
11 that no loss at all has occurred, a provision fixing a substantial sum as damages is
12 unenforceable.” § 356, cmt. b (1981). They cite as well to Nohe v. Roblyn Dev. Corp.,
13 686 A.2d 383, 384 (N.J. Super. Ct. App. Div. 1997), which holds that, in New Jersey,
14 liquidated damages could not be recovered where there were no damages.

15 Arizona is (fortunately) not New Jersey. Arizona courts have not adopted the
16 Restatement’s position on this matter. And, in fact, the very New Jersey case that Ervin
17 cites recognizes that “our Supreme Court’s construction of the relevant *Restatement*
18 (Second) provisions, § 356(1) and § 374(2), does not accord with some other courts. See,
19 e.g., Pima Sav. & Loan Ass’n v. Rampello, 812 P.2d 115 (Ariz. App. 1991).” Nohe, 686
20 A.2d at 385. In fact, Arizona precedent has implicitly contradicted the position that actual
21 damages must be shown. In Pima, the court did not require proof of actual damages and
22 explicitly stated that “the question is whether the stipulated amount was . . . reasonable at
23 the time of the contract and not whether it was reasonable with the benefit of hindsight.”
24 168 Ariz. at 1118.¹

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26 ¹ Even were Ervin’s formulation of the law to be accurate, there is evidence that
27 Equilon has, in fact, suffered difficult-to-quantify harm due to fluctuations in the real estate
28 market during the time period in question. However, given the law as it stands, it is
unnecessary to make detailed findings to that effect.

1 Arizona courts have found that a lack of showing of damages can weigh on the
2 reasonableness determination when examining liquidated damages. See, e.g., Marshall v.
3 Patzman, 306 P.2d 287, 289 (Ariz. 1957) (holding that the liquidated damages at issue
4 were unconscionable because “[t]here isn’t any showing that Patzman has suffered any
5 damage whatever as a result of the breach by Marshall.”). However, given their
6 relationship to the rent asked for and the risks of damage from an unauthorized holdover
7 tenancy, the liquidated damages provision at issue in this case remains reasonable.

8 Ervin also argues that Equilon is not entitled to liquidated damages because of its
9 failure to comply with the PMPA in its termination/nonrenewal – in particular, through
10 failing to provide “Ervin with a *bona fide* offer to purchase the property, [sic] before it is
11 entitled to liquidated damages.” “The PMPA is intended to protect gas station franchise
12 owners from arbitrary termination or nonrenewal of their franchises with large oil
13 corporations and gasoline distributors, and to remedy the disparity in bargaining power
14 between parties to gasoline franchise contracts.” BP W. Coast Prods. LLC v. May, 447
15 F.3d 658, 662 (9th Cir. 2006) (quoting DuFresne’s Auto Serv., Inc. v. Shell Oil Co., 992
16 F.2d 920, 925 (9th Cir. 1993)). To this end, a franchisor can decline to renew a franchise
17 agreement and decide to sell the subject property only if such determination is “made by
18 the franchisor in good faith and in the normal course of business.” 15 U.S.C. §
19 2802(b)(3)(A)(i). And, before selling the property, a franchisor must make “a bona fide
20 offer to sell, transfer, or assign to the franchisee such franchisor’s interest in such
21 premises.” 15 U.S.C. § 2802(b)(3)(E)(iii)(I).

22 However, as noted above, this Court has already ruled on the issue of whether it
23 must find that a bona fide offer was given. See Order, March 31, 2008 (Doc. 208). Ervin
24 argues that it is not foreclosed by issue preclusion as that doctrine “forecloses litigation
25 only of those issues of fact or law that were necessarily decided by a valid and final
26 judgment between the parties, whether on the same or a different claim.” Segal v. Am.
27 Tel. & Tele. Co., Inc., 606 F.2d 842, 845 (9th Cir. 1979). However, Ervin merely copies
28 his earlier briefs, rejected by the Court in its earlier order, and provides no basis for

1 reconsideration of the earlier decision. Thus, the Court will not consider whether or not
2 there was a bona fide offer as a precondition to Equilon's claim for liquidated damages.

3 Ervin does not contest the substance of the contractual provision or the length of
4 the holdover. Accordingly, Equilon is entitled to liquidated damages under the contract in
5 the amount of \$130,309.30.

6 D. Delivered Motor Fuel

7 Equilon argues that Ervin must pay for four shipments of delivered motor fuel,
8 costing \$2,685.73, \$4,252.50, \$10,565.31, and \$13,356.92. Ervin argues that all evidence
9 demonstrating this debt is unenforceable because "Equilon did not disclose any evidence
10 in support of its alleged amounts due for fuel deliveries until December 9, 2005, almost a
11 year after the close of discovery." Ervin also argues that Matt Hampton, from whom
12 Equilon submitted an affidavit on this matter, is incompetent to testify as to the cost of
13 this unpaid fuel because (1) while Hampton states that he relies on personal review of
14 "Mr. Ervin's franchise agreements, EFT statements, fuel invoices and other relevant
15 documents relating to Mr. Ervin's franchise as part of [his] normal course of business
16 duties and activities," he does not state that "he has any personal knowledge of who
17 prepared the EFT statements on which he relied for his conclusions, or how they were
18 prepared," and (2) Equilon's Response to Ervin's Trial Memorandum on Issues Raised in
19 Counterclaim states the method of calculating damages differently than does Hampton,
20 demonstrating his lack of personal knowledge.

21 Equilon's disclosure was prompt. Even leaving aside that Ervin has admitted the
22 fact of the unpaid-for deliveries and therefore had knowledge of them as the party
23 receiving delivery, Equilon disclosed its claim prior to the close of discovery on
24 December 15, 2004. To its Application for Preliminary Injunction, filed March 15, 2004,
25 Equilon attached an affidavit from Hampton stating that Ervin "did not pay for product
26 delivered in February and March 2004." (Doc. 5.) On June 1, 2004, they disclosed in
27 their Initial Disclosure Statement that "Mr. Hampton has information about . . . Mr.
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1 Ervin's failure to pay for gasoline deliveries made to him in February and March 2004."

2 This is sufficient to ground knowledge of the claim prior to the discovery cut-off.

3 On the question of admissibility, the Federal Rule of Evidence 803(6) provides an
4 exception to the hearsay rule for

5 [a] memorandum, report, record, or data compilation in any form, of acts,
6 events, conditions, opinions, or diagnoses, made at or near the time by, or
7 from information transmitted by, a person with knowledge, if kept in the
8 course of a regularly conducted business activity, and if it was the regular
practice of that business activity to make the memorandum, report, record
or data compilation, all as shown by the testimony of the custodian or other
qualified witness

9 This exception is not limited to records created by the business presenting them in court.

10 The Ninth Circuit has held that "records a business receives from others are admissible
11 under [FRE 803(6)] when those records are kept in the regular course of that business,
12 relied upon by that business, and where that business has a substantial interest in the
13 accuracy of the records." MRT Constr. v. Hardrives, Inc., 158 F.3d 478, 483 (9th Cir.
14 1998). Electronic Fund Transfer ("EFT") statements prepared or kept by Equilon in the
15 normal course of business as part of their financial records fall squarely within this
16 exception.

17 Further, the Ninth Circuit has found that "[a] witness does not have to be the
18 custodian of documents offered into evidence to establish Rule 803(6)'s foundational
19 requirements." United States v. Childs, 5 F.3d 1328, 1333 (9th Cir. 1993) (citing United
20 States v. Ray, 930 F.2d 1368, 1370 (9th Cir. 1991); Bergen v. F/V St. Patrick, 816 F.2d
21 1345, 1353 (9th Cir. 1987). "The phrase 'other qualified witness' is broadly interpreted
22 to require only that the witness understand the record-keeping system." Ray, 930 F.2d at
23 1370. As Equilon's Area Manager, responsible for overseeing Ervin's franchise,
24 Hampton was responsible for acting "as the point of contact between Equilon and Mr.
25 Ervin involving any issue of non-payment of rent, non-payment of delivered product, . . .
26 and other issues relating to the parties' franchise relationship." Declaration of W.M.
27 Hampton, Ex. B, ¶ 3. Hampton states that he "personally reviewed Mr. Ervin's franchise
28 agreements, EFT statements, fuel invoices and other relevant documents . . . as part of

1 [his] normal course of business duties and activities.” *Id.* at ¶ 4. He is qualified to testify
2 as to records kept by Equilon concerning the fuel deliveries.

3 Finally, Ervin points to Equilon’s Response to Ervin’s Trial Memorandum on
4 Issues Raised in Counterclaim. In that document, Equilon included a number of POS
5 credits included in the damage calculation. Equilon offered “no explanation for why
6 these credits/offsets should be ignored,” they state, continuing “[u]nder the circumstances,
7 it is obvious that Hampton merely recited what he was told to say and did not actually
8 have personal knowledge of the facts.” Equilon replies that Mr. Hampton’s affidavit that
9 the damages total \$30,860.46 is deemed admitted as it was not specifically controverted
10 with “specific admissible evidence or a controverting affidavit” as required by L.R. Civ.
11 56.1(b).

12 Alert readers will note that Ervin’s Response and Ervin’s Reply raise two separate
13 issues for the Court to consider. First, is the question of whether this negates Hampton’s
14 credibility as a witness to testify about damages. The Court does not agree that it
15 demonstrates he is “merely recit[ing] what he is told to say,” or that the evidence is
16 inadmissible as a result. Thus, as Ervin does not contest that the fuel went unpaid for,
17 only that the evidence of that is inadmissible, they are liable for the amount of the unpaid
18 fuel.

19 The second question is whether Hampton’s statement of the damages or Equilon’s
20 initial disclosure statement – quoted in its Response to Ervin’s Trial Memorandum on
21 Issues Raised in Counterclaim (Doc. 206) – is the correct formulation of damages. While
22 admissible evidence would indeed generally be required to contest Equilon’s evidence of
23 damages, parties are often bound by representations they make in litigation, at least where
24 the other party reasonably relied upon the representation. Heckler v. Community Health
25 Servs., 467 U.S. 51, 58 (1984). As the Initial Disclosure Statement was intended to give
26 Ervin fair notice of the claim, such reliance may very well have existed. Before the
27 Court, then, is admissible, uncontroverted evidence that the damages total an amount that
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1 is contrary to the party's own earlier representations, a discrepancy that may be innocent
2 but which goes entirely unexplained.


3 It is not yet clear what the real amount of damages totals or whether Ervin relied
4 on Equilon's earlier accounting of them such that Equilon should be estopped from
5 changing its position. Additional briefing on the issue of damages is required.
6 Accordingly,

7 **IT IS ORDERED** Equilon's Motion is **GRANTED**. Equilon is entitled to
8 \$130,309.30 in liquidated damages. Equilon is also entitled to payment for delivered
9 motor fuel, amount to be determined.

10 **IT IS FURTHER ORDERED** Equilon shall submit a thorough accounting of the
11 amount owed to it for undelivered motor fuel, including any POS credits subtracted from
12 the total no later than **February 23, 2009**. Counterdefendants shall have **15 days** to file a
13 response; Equilon, **10 days** to file a reply.

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15 DATED this 20th day of January, 2009.

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Roslyn O. Silver
United States District Judge