

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF PUERTO RICO

3 ANTONIO RIVERA, et al.,

4
5 Plaintiffs,

6
7 v.

8 CARIBBEAN PETROLEUM
9 CORPORATION,

10
11 Defendant.

Civil No. 08-1087 (JAF)

12 **OPINION AND ORDER**

13 Plaintiffs, Antonio Rivera, Marta Garatón, and the conjugal
14 partnership between them, bring this action against Defendant,
15 Caribbean Petroleum Corporation, alleging violations of the Petroleum
16 Marketing Practices Act ("PMPA"), 15 U.S.C. §§ 2801-2841. (Docket
17 Nos. 1; 2-3.) Defendant moves for summary judgment under Federal Rule
18 of Civil Procedure 56(c) (Docket No. 21); Plaintiffs oppose. (Docket
19 No. 32.)

20 **I.**

21 **Factual and Procedural Synopsis**

22 We derive the following facts from the parties' motions,
23 statements of uncontested material facts, and exhibits. (Docket
24 Nos. 21; 22; 23; 31; 32.) Plaintiffs are a husband and wife who
25 operate gasoline stations in Puerto Rico. Rivera has been working in
26 the industry for over thirty years as a franchisee for various
27 petroleum companies. (Docket No. 22-2.) Defendant is a petroleum

1 corporation with its principal place of business in Bayamón, Puerto
2 Rico. Defendant markets petroleum under the "GULF" trademark and acts
3 as a franchisor. In 1998, Defendant entered into a fifteen-year lease
4 with Canóvanas Urban Development, Inc. ("CUDI") for a plot of land in
5 Canóvanas, Puerto Rico. As a condition of the lease, Defendant agreed
6 to construct a gasoline service station on the property. (Docket
7 No. 22-5.) The lease established a graduated rental scheme whereby
8 Defendant would pay CUDI \$10,000 per month for the first five years,
9 \$12,000 per month in the succeeding five years, and \$14,000 in the
10 final five years. (Id.)

11 Defendant built the gas station as promised and then sublet the
12 station to a franchisee under a trial franchise agreement at a rent
13 of \$6,000 per month. (Docket No. 22-5 at 4.) That franchisee did not
14 perform satisfactorily and, in 2000, Defendant began looking for
15 another franchisee to operate the station.

16 In October 2000, Defendant offered Plaintiffs the opportunity to
17 run the Canóvanas gas station rent-free. (Docket No. 22-5 at 4.)
18 Defendant concedes that it entered into an oral franchise agreement,
19 as defined by the PMPA, with Plaintiffs. (Docket No. 23 at 9.)
20 Plaintiffs agree that an oral contract governed their franchise
21 relationship. (Docket No. 22-3 at 55-56.) Plaintiffs took possession
22 of the Canóvanas gas station in October 2000 and have continued to
23 run the station through the present day.

1 Defendant insists that it had been trying to renegotiate its
2 rental payments under its lease with CUDI since 2003. In 2006, having
3 recently completed a bankruptcy reorganization, Defendant decided
4 that the rental payments for the Canóvanas station were
5 unsustainable. Defendant made its last rental payment in January 2006
6 and, in the words of its supervisor of retail sales, "still hoped
7 that CUDI would then reconsider and lower the monthly payments."
8 (Docket No. 22-5 at 6.) Instead, CUDI began eviction proceedings on
9 April 20, 2006. (Docket No. 22-5 at 3.) Defendant consented to a
10 judgment of eviction on May 24, 2006. (Docket No. 22-6 at 9.) On the
11 following day, Defendant notified Plaintiffs by mail of the loss of
12 the lease and gave Plaintiffs thirty days to vacate the property.
13 (Docket No. 22-7.)

14 Plaintiffs, however, remained on the property and eventually
15 purchased it from CUDI. On June 25, 2007, Plaintiffs filed a claim in
16 the Commonwealth Court of First Instance alleging wrongful
17 termination of the franchise under the PMPA. (Docket No. 2-3.)
18 Defendant removed the case to this court on January 18, 2008.
19 (Docket No. 1.)

20 II.

21 Summary Judgment under Rule 56(c)

22 We grant a motion for summary judgment "if the pleadings, the
23 discovery and disclosure materials on file, and any affidavits show
24 that there is no genuine issue as to any material fact and the movant

1 is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c).
2 A factual dispute is “genuine” if it could be resolved in favor of
3 either party and “material” if it potentially affects the outcome of
4 the case. Calero-Cerezo v. DOJ, 355 F.3d 6, 19 (1st Cir. 2004).

5 The movant carries the burden of establishing that there is no
6 genuine issue as to any material fact. Celotex Corp. v. Catrett, 477
7 U.S. 317, 325 (1986). In evaluating a motion for summary judgment,
8 we view the record in the light most favorable to the non-movant.
9 Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). “Once the
10 moving party has made a preliminary showing that no genuine issue of
11 material fact exists, the nonmovant must ‘produce specific facts, in
12 suitable evidentiary form, to establish the presence of a trialworthy
13 issue.’” Clifford v. Barnhart, 449 F.3d 276, 280 (1st Cir. 2006)
14 (quoting Triangle Trading Co. v. Robroy Indus., Inc., 200 F.3d 1, 2
15 (1st Cir. 1999)). The non-movant “may not rely merely on allegations
16 or denials in its own pleading; rather, its response must . . . set
17 out specific facts showing a genuine issue for trial.” Fed. R. Civ.
18 P. 56(e) (2).

19 III.

20 Analysis

21 Plaintiffs argue that Defendant’s eviction for nonpayment of
22 rent cannot be a valid lease “expiration” as contemplated by the
23 statute. (Docket No. 32 at 10.) Plaintiffs also aver that Defendant
24 did not comply with provisions of the PMPA requiring it to include in

1 the termination notice offers to assign any purchase option for the
2 underlying land or rights to equipment and improvements on the land.
3 (Docket No. 2-3 at 15.) Defendant argues that its termination of
4 Plaintiffs' franchise was valid under the PMPA because its eviction
5 by CUDI was an "expiration of the underlying lease" for which
6 termination would be reasonable pursuant to 15 U.S.C. § 2802(c)(4).
7 (Docket No. 23 at 15-19.) With regard to the assignment offers,
8 Defendant first argues that its notice of termination was valid
9 because the PMPA does not require assignment offers to be contained
10 within the termination notice. (Docket No. 23 at 20.) Second,
11 Defendant argues that it had no purchase option for the land and that
12 it never received a request from Plaintiffs, as mandated by the PMPA,
13 for the assignment of improvements and equipment on the land. (Id.)

14 **A. Eviction as "expiration"**

15 The issue before us appears to be one of first impression in
16 this circuit: whether a franchisor's eviction for nonpayment of rent
17 qualifies as a "loss of the franchisor's right to grant possession of
18 the leased marketing premises through expiration of an underlying
19 lease." 15 U.S.C. § 2802(c)(4). The PMPA prohibits the termination
20 of a petroleum franchise agreement unless said termination is
21 premised upon one of five enumerated reasons. § 2802(a), (b)(2). One
22 of these reasons is the "occurrence of an event which is relevant to
23 the franchise relationship and as a result of which termination of
24 the franchise relationship . . . is reasonable." § 2802(b)(2)(c).

1 The PMPA then offers a list of situations that qualify as such events
2 "relevant to the franchise relationship." § 2802(c). Any termination
3 that conforms to one of these situations is "conclusively presumed to
4 be reasonable as a matter of law." Desfosses v. Wallace Energy, Inc.,
5 836 F.2d 22, 26 (1st Cir. 1987). But the First Circuit, citing the
6 legislative history of the PMPA, cautions that this list is not
7 exclusive; rather, the PMPA allows courts to uphold franchise
8 terminations that do not perfectly conform to an event enumerated in
9 § 2802 yet are nonetheless reasonable. Id. at 27.

10 Section 2802(c)(4) sanctions termination of a petroleum
11 franchise where the franchisor has lost "the right to grant
12 possession of the leased marketing premises through expiration of an
13 underlying lease." The First Circuit broadly interprets the term
14 "expiration" to encompass losses of the lease that are voluntary or
15 involuntary. Veracka v. Shell Oil Co., 655 F.2d 445, 447-48 (1st Cir.
16 1981). In Veracka, the First Circuit rejected the argument that
17 § 2802(c)(4) applied only where the expiration of the underlying
18 lease was outside of the franchisor's control. Id. The Veracka court
19 analyzed the legislative history and found that while the purpose of
20 the PMPA was to correct a disparity in bargaining power between
21 franchisors and franchisees, "the exceptions are also broad,
22 reflecting an intent to allow reasonable business judgments by the
23 franchisor." Id.; accord Desfosses, 836 F.2d at 25 ("Congress was
24 also aware of the franchisors' need for adequate flexibility to

1 respond to changing market conditions and consumer preferences”).
2 The Veracka court found that Congress’ chief concern was with a
3 franchisor terminating the franchise relationship solely to take
4 control of the franchise itself, “appropriating the benefit of the
5 goodwill that the franchisee had developed.” 655 F.2d at 449. Thus,
6 the First Circuit held that the voluntary loss of a lease was an
7 “expiration” under § 2802(c)(4) where there was an arm’s length
8 relationship between lessee and lessor and where there was a
9 substantive change in control of the premises. Id.

10 The Veracka decision has influenced the interpretation of
11 “expiration” under § 2802(c)(4) in several other circuits. See
12 Mustang Mktg., Inc. v. Chevron Prod. Co., 406 F.3d 600, 608 (9th Cir.
13 2005) (rejecting literal interpretation of “expiration of the
14 underlying lease” and instead scrutinizing “franchisor’s subjective
15 intent, its continuing control over the marketing premises, and its
16 actual or eventual right to continued possession”); PDV Midwest
17 Refining, L.L.C. v. Armada Oil & Gas Co., 305 F.3d 498 (6th Cir.
18 2002) (holding that voluntary loss of a lease is reasonable grounds
19 for terminating a franchise agreement); Hutchens v. Eli Roberts Oil
20 Co., 838 F.2d 1138, 1142 (11th Cir. 1988) (voluntary cancellation of
21 an underlying lease in mid-term was an “expiration” under
22 § 2802(c)(4) because “the cause of the lease’s termination is not
23 important Rather, we must be satisfied that the termination
24 represents an arms length transaction in which the franchisor

1 actually gives up control of the premises."); Russo v. Texaco, Inc.,
2 808 F.2d 221 (2d Cir. 1986) (applying the Veracka court's "voluntary
3 loss" of an underlying lease to the PMPA's "loss" of franchisor's
4 right to grant the use of a trademark under § 2802(c)(6)).

5 Plaintiffs' primary argument is that an eviction for non-payment
6 of rent is not an "expiration of the underlying lease" for purposes
7 of § 2802(c)(4). (Docket No. 32.) We are unaware of any precedent in
8 the First Circuit addressing whether a franchisor's eviction is an
9 appropriate "loss of the right to grant possession" under
10 § 2802(c)(4). Following Veracka and its progeny, we find no error in
11 a "voluntary loss" where there was an arm's length relationship
12 between the parties to the lease and where the franchisor truly ceded
13 control of the premises. That Defendant was evicted because it
14 stopped paying rent does not affect our analysis. Neither the PMPA
15 nor the cases interpreting it places any importance on the actual
16 cause of the underlying lease's expiration. Instead, just as in
17 Veracka, we evaluate the nature of the lessor and lessee's
18 relationship and the franchisor's intent in terminating the
19 franchise. 655 F.3d at 449. In the case before us, there is no
20 evidence that the relationship between Defendant and CUDI was
21 anything but at arm's length. This was not a situation in which the
22 franchisor lost the lease only to be rid of the franchisee and take
23 the property for itself. In fact, Plaintiffs never left the premises
24 and eventually bought the property from the lessor, CUDI.

1 Furthermore, Defendant's strategic breach of its lease with CUDI
2 was the sort of reasonable business decision that could justify a
3 franchise termination under the PMPA. See Veracka, 655 F.2d at 448;
4 Desfosses, 836 F.2d at 25. Defendant, having recently emerged from
5 bankruptcy, was paying an exorbitant rent on a property for which it
6 received no monthly rent from the franchisee. Rivera even concedes
7 that Defendant had "a very bad deal [b]ecause that was an
8 exaggerated amount of rent." (Docket No. 22-3 at 4.) In such a
9 situation, it may be more reasonable for Defendant to breach the
10 lease and risk liability for any resulting damages than to add
11 another shovel-load to a deepening money pit.

12 **B. "Notice" Violations**

13 Plaintiffs claim that notification of their franchise's
14 termination was faulty in that it "neither contained nor made any
15 mention of the possible transfer of any property right that
16 [Defendant] could have to the Plaintiff." (Docket No. 2-3 at 15.)
17 Defendant argues that the PMPA did not require it to mention any
18 transfer of property rights in its termination notice (Docket No. 23
19 at 20). In addition, Defendant states that it did not possess any
20 property right to assign in the land, and any rights to the
21 improvements thereon were not properly requested by Plaintiffs.
22 (Id.)

23 Plaintiffs' vague pleading could refer to either of two
24 different notice provisions in the PMPA. One, § 2802(c)(4)(B),

1 requires the franchisor to offer to assign to the franchisee any
2 option held by the franchisor to extend the underlying lease or to
3 buy the property. The franchisor need not make this offer in the
4 notice of termination, but must make it within ninety days following
5 the notice. Id. The second provision is § 2802(c)(4)(C), which
6 requires the franchisor to make a bona-fide offer to sell any
7 improvements or equipment left on the land, following a written
8 request from the franchisee within thirty days' notice of
9 termination.

10 Defendant first argues that, despite the wording of Plaintiffs'
11 complaint, neither of these assignment offers must be made as part of
12 the termination notice; instead, both provisions require franchisor's
13 action during a set period subsequent to the termination notice.
14 (Docket No. 23 at 20.); See § 2802(c)(4)(B), (c)(4)(C). Second,
15 Defendant argues that there was no purchase option in the underlying
16 lease that could be assigned to Plaintiffs. (Docket No. 23 at 20.)
17 In support, Defendant submits its original lease with CUDI, which
18 contains no mention of a purchase option. (Docket No. 22-5 at 9-41.)
19 Finally, Defendant states that Plaintiffs never sent it a written
20 request, as required by the § 2802(c)(4)(C), to purchase any
21 equipment or improvements left on the land by Defendant. (Docket
22 No. 23 at 20.) Plaintiffs have failed to respond to any of the above
23 arguments; nor have they "set out specific facts showing a genuine
24 issue for trial" as required by Rule 56(e)(2). (Docket No. 32.)

1 Lacking any challenge to Defendant's arguments that would give rise
2 to a genuine issue of material fact, we find, as a matter of law,
3 that Defendant has not violated either of these PMPA provisions.¹

4 **IV.**

5 **Conclusion**

6 For the aforementioned reasons, we hereby **GRANT** Defendant's
7 motion for summary judgment (Docket No. 21). We **DISMISS** Plaintiffs'
8 claims under the PMPA (Docket No. 2-3) **WITH PREJUDICE.**

9 **IT IS SO ORDERED.**

10 San Juan, Puerto Rico, this 19th day of October, 2009.

11 s/José Antonio Fusté
12 JOSE ANTONIO FUSTE
13 Chief U.S. District Judge
14

¹ Although Plaintiffs failed to include it in their complaint, they reference an additional claim in their opposition to summary judgment. (Docket No. 32 at 7.) Plaintiffs appear to argue improper notice under § 2802(b)(2)(C), which limits the time frame in which a franchisor could have actual or constructive knowledge of the event that leads to its terminating the franchise. (*Id.*) Generally, courts cannot entertain claims on summary judgment which never appeared in the complaint. Ruiz-Rivera v. Pfizer Pharms., LLC, 521 F.3d 76, 84 (1st Cir. 2008). "The fundamental purpose of our pleadings rules is to protect a defendant's inalienable right to know in advance the nature of the cause of action being asserted against him." *Id.* (internal quotations omitted) (affirming summary judgment where claim was not sufficiently pleaded in amended complaint). Plaintiffs' claim was improperly pleaded and, therefore, we shall not consider it.