Chapter 20 • PETROLEUM MARKETING
2015 Annual Report[1]

It was not a robust year in 2015 for reported decisions involving the Petroleum Marketing Practices Act (PMPA).[2] The limited number of reported decisions was matched by the narrow scope of the PMPA issues that courts addressed in those cases. The reported decisions involved: the propriety of franchise terminations and related notices; franchisor compliance with the statutory requirement to make a bona fide offer to sell, or to grant a franchisee an opportunity to exercise a right of first refusal on an offer to purchase, franchise premises; the scope and reach of the U.S. Supreme Court's 2010 decision in *Mac's Shell*;[3] and questions concerning the preemptive effects of the PMPA.

I. Termination Notices and Adequacy of Grounds Supporting Termination

In *Scarsdale Central Service Inc. v. Cumberland Farms, Inc.*, the U.S. District Court for the Southern District of New York rejected the plaintiff franchisee's claims seeking an injunction to prevent the franchisor from evicting the franchisee from the station premises and terminating the franchise relationship, and to compel the franchisor to comply with the PMPA requirement to make a bona fide offer to sell, or to grant a franchisee an opportunity to exercise a right of first refusal on an offer to purchase, the franchise premises. The court granted the defendants' motion for summary judgment, finding that the franchisor terminated the franchise agreement in accordance with the PMPA.[4]

The plaintiff franchisee leased a Gulf-branded station from Cumberland. In October 2012, Cumberland entered into negotiations to sell the station premises to 880 CPA, which had made an unsolicited offer to buy.[5] Cumberland notified plaintiff of the negotiations and informed the plaintiff not only that it "had thirty days to submit an offer to purchase[,]" but also that plaintiff retained its right of first refusal under the PMPA should 880 CPA make an offer.[6] When 880 CPA's bid was higher than plaintiff's, Cumberland notified plaintiff of its right of first refusal.[7]

On October 11, 2013, plaintiff brought suit against Cumberland and Gulf Oil, seeking to enjoin defendants' sale of the premises, to enjoin defendants from evicting the plaintiff, to prevent defendants from terminating the franchise relationship, and to order defendants to honor plaintiff's right of first refusal, among other things.[8] Defendants counterclaimed, seeking a declaration that Cumberland satisfied the nonrenewal requirements of the PMPA, 15 U.S.C. §§ 2802, 2804.[9] Previously, the court had granted

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[2]*See* 15 U.S.C. §§ 2801-2841 (2012).

[3]Mac's Shell Serv., Inc. v. Shell Oil Prods., 559 U.S. 175 (2010).

[4]Scarsdale Cent. Serv. Inc. v. Cumberland Farms, Inc., No. 13-CV-8730 (NSR), 2015 WL 678761, at *6-8 (S.D.N.Y. Feb. 13, 2015).

[5]*Id.* at *1.

[6]*Id.* at *2.

[7]*Id.*

[8]*Id.* at *1, *3.

[9]*Scarsdale*, 2015 WL 678761, at *1, *8.

defendants' motion for a preliminary injunction due to plaintiff franchisee's "continued occupancy of the [p]remises and wrongful act of selling gasoline under the Gulf Oil trademark[.]"[10]Defendants then moved for summary judgment on their counterclaims and for dismissal plaintiff's claims.[11]

The PMPA requires franchisors to give at least ninety days' notice prior to the termination or nonrenewal date.[12] The grounds for termination or nonrenewal must be made "in good faith and in the normal course of business . . . to sell [the] premises" in order to protect against discriminatory and arbitrary nonrenewal.[13] Additionally, as here, when the premises were leased to a franchisee, the franchisor must offer a right of first refusal or make "a bona fide offer to sell, transfer, or assign to the franchisee [the] franchisor's interest in such premises."[14]

Plaintiff accepted that the decision to sell the premises was made in the ordinary course of business, but challenged that it was made in good faith and asserted that defendant did not make any bona fide offer.[15] Plaintiff claimed defendants' oral representations that the agreement would be renewed evidenced bad faith.[16] The court rejected plaintiff's argument, holding that although representations to plaintiff may have been premature, defendants ceased any assurances and notified plaintiff in writing of negotiations with 880 CPA as soon as discussions advanced and terms crystalized.[17] Further, it was acceptable for defendants to state two different purposes for termination because "[d]efendants had every right to exercise their business judgment to terminate on whatever permissible grounds existed."[18]

"Plaintiff also argue[d] for the first time [at] summary judgment that [d]efendants did not satisfy the separate statutory requirement of either (a) a right of first refusal or (b) a bona fide offer to sell . . . ."[19] The agreement between defendants and 880 CPA provided that defendants would dispose of all personal property, including equipment necessary for fuel sales, and that defendants would absorb remediation costs.[20] According to plaintiff, this provision would gut its business, such that any right of first refusal would not protect its interests, making the right inapplicable.[21] The court held that even if there was no "right of first refusal" here, there was a bona fide offer to sell the premises.[22] In rejecting *Roberts* and adopting the holding in *Atlantic Avenue* and *Tobias v. Shell Oil Co.*, the court held that "the franchisor need not offer the franchisee those items of property on the premises that pose a threat of future pollution and liability."[23] Here, given the possible liability for environmental contamination, the provision was not a creature of

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[10]*Id.* at *1.
[11]*Id.*
[12]15 U.S.C. § 2802(a), (b)(2).
[13]*Scarsdale*, 2015 WL 678761, at *5; 15 U.S.C. § 2802(b)(3)(D)(i)(III).
[14]*Scarsdale*, 2015 WL 678761, at *5; 15 U.S.C. § 2802(b)(3)(D)(i)(I).
[15]*Scarsdale*, 2015 WL 678761, at *5.
[16]*Id.*
[17]*Id.* at *6.
[18]*Id.*
[19]*Id.*
[20]*Scarsdale*, 2015 WL 678761, at *6.
[21]*Id.*
[22]*Id.* at *7.
[23]*Id.* (citing Roberts v. Amoco Oil Co., 740 F.2d 602, 607 (8th Cir. 1984) (finding that a bona fide offer to sell leased marketing premises under the PMPA must include gasoline tanks, storage tanks, and other equipment); quoting Atl. Ave. Oil & Gas Ltd. v. Texaco Refining & Mktg., Inc., 699 F. Supp. 27, 31 (E.D.N.Y. 1988); citing Tobias v. Shell Oil Co., 782 F.2d 1172, 1174 (4th Cir. 1986)).

bad faith to put the plaintiff out of business.[24] Additionally, plaintiff had opportunities to clarify the provision's application to above ground equipment but did not do so.[25] Therefore, the court held defendants' termination was not wrongful.[26]

In *Amphora Oil & Gas Corp. v. Cumberland Farms, Inc.*, the U.S. District Court for the Eastern District of New York denied plaintiff's motion for a preliminary injunction, finding defendants did not violate the PMPA when it terminated the plaintiff franchisee's lease.[27]

Beginning September 10, 2003, Defendant Cumberland Farms, Inc. and its affiliate Gulf Oil Limited Partnership (Cumberland Gulf) leased property that was utilized as a gas station and convenience store.[28] On April 5, 2004, Plaintiff Amphora Oil & Gas Corp. (Amphora) and Cumberland Gulf entered into a Retail Motor Fuel Outlet Lease (the Sublease) and other related agreements which collectively were a franchise agreement.[29] Attached to the Sublease was a "Notice of Underlying Lease," which informed Amphora the Sublease was subject to the Master Lease, and in the event the Master Lease expired, the Sublease and franchise agreement would also end.[30] According to the court, the Sublease was due to expire on September 9, 2015, despite plaintiff's contention that it was "automatically renewed."[31]

On December 8, 2014, Cumberland Gulf sent a letter to its landlord informing that it "did not intend to renew its Master Lease and therefore it would expire on December 31, 2015."[32] Cumberland Gulf then sent a letter to Amphora (Termination Notice), stating the agreements between the parties would expire on September 9, 2015, but according to the PMPA, it had the right to extend the underlying lease on the condition that it provided Cumberland Gulf with an unconditional release from liability executed by it and Zanghi.[33] Although Amphora informed Cumberland Gulf of its intention to extend the lease, the new landlord, Parkway Realty, refused to sign an unconditional release.[34] Specifically, Parkway Realty refused to substitute Amphora for Cumberland Gulf because Amphora was a small operator with few resources, and it would not be able to ensure the same level of protection.[35] Parkway Realty subsequently entered into a new lease for the gas station with Bolla Operating L.I. Corp. (Bolla).[36]

Amphora then filed suit against defendants claiming it would be wrongfully displaced. Specifically, Amphora sought: (1) declaratory judgment that Parkway Realty wrongfully refused to recognize Amphora's rights under the PMPA, (2) declaratory judgment that Cumberland Gulf undermined Amphora's right to maintain its business in violation of the PMPA, (3) a permanent injunction preventing Cumberland Gulf from terminating the agreements until a final determination of the case, and (4) damages under

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[24]*Scarsdale*, 2015 WL 678761, at *7, *8.
[25]*Scarsdale*, 2015 WL 678761, at *8.
[26]*Id.*
[27]Amphora Oil & Gas Corp. v. Cumberland Farms, Inc., No. 15-CV-4638(ADS)(AYS), 2015 WL 6143730, at *15 (E.D.N.Y. Oct. 19, 2015).
[28]*Id.* at *2.
[29]*Id.* at *2, *3.
[30]*Id.* at *3.
[31]*Id.* In rejecting Plaintiff's contention, the court looked to the plain language of the Sublease and the parties' previous execution of lease renewal documents. *Id.*
[32]*Amphora*, 2015 WL 6143730, at *15.
[33]*Id.*
[34]*Id.* at *5-6 (in late 2014 or early 2015, Zanghi sold the premises to the new landlord and defendant in this case, 750 Motor Parkway Realty LLC (Parkway Realty)).
[35]*Id.* at *6.
[36]*Id.* at *7.

the PMPA.[37] Amphora then sought preliminary relief to prevent Cumberland from terminating the lease, and the court issued a temporary injunction effective until October 30, 2015.[38]

During the pendency of the motion, Amphora filed an amended complaint.[39] In the complaint, Amphora alleged that Parkway Realty should have given Cumberland Gulf notice and an opportunity to exercise a preferential right to the new lease, which Cumberland was then required to offer to Amphora.[40]

The PMPA authorizes franchisors to terminate a franchise relationship for "[t]he occurrence of an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable . . . ."[41] According to 15 U.S.C. § 2804(c)(4), this event can include the expiration of the underlying lease, given certain conditions are met. Franchisees are entitled to seek expiration of the underlying lease against franchisors for failure to comply with the requirements of 15 U.S.C. § 2802.[42]

In analyzing the motion for preliminary injunction, the court first noted that Amphora's franchise was clearly terminated.[43] Next, the court addressed the merits of Amphora's claim that it had a right to assume any options that Cumberland Gulf held under the Master Lease, so that Parkway Realty's unwillingness to consent to the assignment was a violation of the PMPA.[44] According to the court, the PMPA only requires franchisors to offer to assign an option to its franchisees, which Cumberland Gulf clearly did in its December 2014 termination letter.[45] Further, 15 U.S.C. § 2802(c)(4) allowed Cumberland to condition an assignment on receiving an unconditional release of future liability.[46] The fact that the PMPA allows for an unconditional release implicitly contemplated that Parkway Realty could decline the release.[47] The court went on to note that plaintiff's "failure" to secure an unconditional release was not the type of statutory "failure" that prevents franchisors from terminating a franchise relationship.[48] Finally, the court rejected plaintiff's contention that Parkway Realty wrongfully entered into the Bolla Lease.[49] As a preliminary matter, any preferential right would belong only to Cumberland Gulf. Additionally, the PMPA only requires an option to extend the underlying lease or purchase the marketing premises; here, the Bolla Lease was neither of these.[50] In determining the neither party violated the PMPA, the court denied plaintiff's motion for preliminary injunction.[51]

In *Getty Properties Corp. v. ATKR, LLC*, the Supreme Court of Connecticut declined to address the defendant's PMPA claims, concluding that they were inadequately briefed.[52] Plaintiffs Getty Properties Corporation and NECG Holdings

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[37] *Amphora*, 2015 WL 6143730, at *7.
[38] *Id.*
[39] *Id.*
[40] *Id.* at *8.
[41] *Id.* at *9 (quoting 15 U.S.C. § 2802(b)(2)(C)).
[42] *Amphora*, 2015 WL 6143730, at **9-10 (citing 15 U.S.C. §§ 2804, 2804(c)).
[43] *Id.* at *11.
[44] *Id.*
[45] *Id.* at *12.
[46] *Id.* at *11.
[47] *Amphora*, 2015 WL 6143730, at *12.
[48] *Id.* at *13.
[49] *Id.* at *14.
[50] *Id.*
[51] *Id.* at *15.
[52] Getty Props. Corp. v. ATKR, LLC, 107 A.3d 387, 413 (Conn. 2015).

Corporations were the owners of property on which defendants operated retail gasoline service stations.[53] Getty Properties entered into a master lease with Getty Marketing, which subsequently entered into subleases with defendants.[54] The subleases were subject to the master lease and stated that they would automatically terminate upon the termination of the master lease.[55] Getty Marketing filed for bankruptcy, and the bankruptcy court ultimately deemed the master lease between Getty Marketing and Getty Properties terminated.[56] When defendants refused to vacate the premises, plaintiffs commenced summary process actions.[57]

After a bench trial which rendered judgment of immediate possession for plaintiffs, defendants appealed, claiming, among other things, that the court failed to dismiss the action as premature pursuant to the PMPA.[58] Specifically, defendants asserted that the action was "premature" because they had a right of first refusal and that 15 U.S.C. § 2806(a) preempted the summary process action.[59] Additionally, defendants invoked the "prior pending action" doctrine, referring to the action filed in the District Court of the District of Connecticut.[60] In affirming the judgment, the court refused to address the PMPA claims, holding that they were inadequately briefed.[61]

II. No Wrongful Termination When Franchisee Failed to Pay Rent and Failed to Operate Station

In *Hillmen, Inc. v. Lukoil N.A., LLC*, the U.S. District Court for the Eastern District of Pennsylvania held that a franchisee's claim for wrongful termination under the PMPA failed because the franchisor rightfully terminated the franchise agreement for failure to pay rent and for failure to operate for seven consecutive days.[62]

Pursuant to the franchise agreement, Defendant Lukoil (Lukoil) delivered motor fuel to Plaintiff Hillmen (Hillmen) on Tuesday, February 19, 2013, around 11:50 PM, and debited Hillmen's account three days after.[63] When Hillmen's check bounced, it claimed that payment was not due until Monday, February 25, 2013.[64] Subsequently, Hillmen failed to pay for the next delivery made on February 22.[65] As a result of Hillmen's nonpayment, Lukoil sent Hillmen a termination letter with notification that the franchise would be terminated effective April 9, 2013.[66] Hillmen then filed a complaint against Lukoil alleging wrongful termination under the PMPA and sought a preliminary injunction.[67] The court rejected Hillmen's motion, and Lukoil filed a motion for summary judgment.[68]

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[53] *Id.* at 390.
[54] *Id.* at 391-92.
[55] *Id.*
[56] *Id.* at 396.
[57] *Getty*, 107 A.3d at 397-98.
[58] *Id.* at 398-99.
[59] *Id.* at 413.
[60] *Id.* at 413, n.13.
[61] *Id.*
[62] Hillmen, Inc. v. Lukoil N.A., LLC, No. 13-4239, 2015 WL 3947960, at *7 (E.D. Pa. June 26, 2015).
[63] *Id.* at *2.
[64] *Id.* at *2-3.
[65] *Id.* at *4.
[66] *Id.* at *4-5.
[67] *Hillmen*, 2015 WL 3947960, at *1.
[68] *Id.*

Hillmen admitted that it did not purchase or sell gasoline for seven consecutive days and that this failure was a PMPA violation; however, Hillmen argued that its failure to pay for fuel and operate the premises was a result of Lukoil's wrongful conduct.[69] Specifically, Hillmen alleged that by increasing its rent, the cost of petroleum, and making improper debits, Lukoil caused Hillmen to violate the PMPA.[70] According to Hillmen, these "failures" excused its nonperformance.[71]

The court rejected Hillmen's arguments, reasoning that 15 U.S.C. § 2801(13), which has been considered as "'merely a legislated excuse for nonperformance,'" did not include a franchisee's lack of funds to pay invoices because this is not "beyond the franchisee's reasonable control."[72] Additionally, the court held that Lukoil's actions were within the scope of Lukoil's allowable business discretion and expressly agreed to by Hillmen.[73] Finally, the court determined Lukoil's debits were consistent with the terms of the credit policy and the parties' past practices.[74] Because Hillmen's "failures" were not attributable to "'a cause beyond the control of the franchisee,'" the court granted summary judgment for Lukoil on Hillmen's PMPA claims.[75]

Lukoil went on to argue that Hillmen's remaining state law claims for breach of contract, violation of the Uniform Commercial Code (UCC), and fraud were preempted by the PMPA.[76] In applying the "intimately intertwined" test from *Kehm Oil Co. v. Texaco, Inc.*, the court found that Hillmen's UCC claim was not preempted because it was premised upon Lukoil's improper setting of petroleum prices.[77] To the extent that other claims were not preempted, the court granted summary judgment in favor of Lukoil.[78]

Similarly, in *Wynn v. Lukoil N.A., LLC*, Plaintiff Darryl Wynn (Wynn), a gas station franchisee, sought a preliminary injunction enjoining Defendant Lukoil (Lukoil), franchisor, from terminating its franchise agreement in violation of the PMPA.[79] The U.S. District Court for the Eastern District of Pennsylvania denied Wynn's motion for preliminary injunction. Wynn operated a gas station franchise for Lukoil for more than eighteen years.[80] However, beginning in 2012, Wynn began missing regular payments.[81] In April 2013, Lukoil entered into its First Repayment Agreement with Wynn, which stated that Wynn would pay an initial $20,000 and then monthly installments of $5,000 until the $50,703.70 debt was paid in full.[82] Wynn's financial situation did not improve, and in August 2014, the parties entered into the Second Repayment Agreement in which Wynn released any and all claims against Lukoil.[83] After August 2014, Wynn failed to sell any gasoline or obtain fuel deliveries, and as a result, Lukoil sent Notice of

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[69] *Id.* at *8.
[70] *Id.*
[71] *Id.*
[72] *Hillmen*, 2015 WL 3947960, at *8 (internal citations omitted).
[73] *Id.* at *9.
[74] *Id.*
[75] *Id.*
[76] *Id.*; *see* 15 U.S.C. § 2806(a)(1).
[77] *Hillmen*, 2015 WL 3947960, at *10; Kehm Oil Co. v. Texaco, Inc., 537 F.3d 290 (3d Cir. 2008).
[78] *Hillmen*, 2015 WL 3947960, at *10.
[79] Wynn v. Lukoil N.A., LLC, No. 15-166, 2015 WL 1954275, at *1-2 (E.D. Pa. Apr. 29, 2015).
[80] *Id.* at *1.
[81] *Id.*
[82] *Id.*
[83] *Id.*

Termination on October 2, 2014, to be effective October 14, 2014.[84] Wynn did not contest the amount that he owed Lukoil, but instead argued that the manner in which Lukoil negotiated payments created an impossible financial situation.[85]

The PMPA, which sets a lower threshold than permitted by the Federal Rules of Civil Procedure, requires that a plaintiff seeking a preliminary injunction show: (1) the franchise agreement has been terminated or not renewed; (2) there are "'sufficiently serious questions going to the merits to make such questions a fair ground for litigation'"; and (3) if the injunction is denied, the hardships on plaintiff would exceed the hardships the franchisor would face if the injunction would be granted.[86] As to the second factor, the court noted that 15 U.S.C. § 2804(a) allows a franchisor to give less than ninety-days' notice before termination if it would otherwise "not be reasonable."[87] Here, Wynn went long periods of time not selling fuel, and despite this, Lukoil attempted to continue the franchise through two separate Repayment Agreements.[88] Similar to *Hillmen*, Wynn failed to show a "serious question[]" going to the merits of the case.[89]

In looking at the last factor, the court found that denial of the injunction would only continue the status quo, while also allowing Lukoil to proceed with eviction.[90] Furthermore, although Wynn suffered financial hardships, Lukoil continued to lose profits and rent with no assurance of payment. Therefore, Wynn failed to show he would suffer a greater hardship, and the court denied his motion for preliminary injunction.[91]

After denying Wynn's preliminary injunction, the court granted Lukoil's motion for summary judgment and dismissed the complaint.[92] In readdressing the facts, the court found that Lukoil properly and appropriately terminated the franchise agreement according to the PMPA.[93] Specifically, Lukoil terminated the agreement for proper grounds—Wynn admittedly failed to sell fuel for seven consecutive days.[94] In citing its decision in *Hillmen,* the court reiterated that 15 U.S.C. § 2802(c)(9)(A) included this as an "event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise is reasonable."[95] Further, Wynn failed to offer any evidence showing that Lukoil caused him to violate the agreement.[96] Any underlying reasons for Wynn's debt were immaterial to excuse him from violating the franchise agreement.[97]

Next, the court held that while the PMPA usually requires a franchisor provide ninety days' notice to terminate the relationship, Lukoil's notice was reasonable under

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[84]*Wynn*, 2015 WL 1954275, at *1.
[85]*Id.* at *2.
[86]*Id.*; 15 U.S.C. § 2805(b)(2) (2015).
[87]*Wynn*, 2015 WL 1954275, at *3; 15 U.S.C. § 2804(b)(1).
[88]*Wynn*, 2015 WL 1954275, at *3.
[89]*Id*; 15 U.S.C. § 2805(b)(2)(A)(ii).
[90]*Wynn*, 2015 WL 1954275, at *3.
[91]*Id.* at *4. Although it ultimately decided the issue, the court noted that the plaintiff's motion was untimely because it was filed more than thirty days after the termination took effect, as required by 15 U.S.C. § 2805(b)(1). *Id.* at *2.
[92]Wynn v. Lukoil N.A., LLC, No.15-166, 2015 WL 5093051, at *8 (E.D. Pa. Aug. 28, 2015).
[93]*Id.* at *3, *8.
[94]*Id.* at *4.
[95]*Id.* (citing Hillmen v. Lukoil N.A., LLC, No. 13-4239, 2015 WL 3947960, at *7 (E.D. Pa. 2015)).
[96]*Id.*
[97]*Wynn*, 2015 WL 5093051, at *4.

the circumstances.[98] According to 15 U.S.C. §§ 2804(a) and (b)(1)(A), a franchisor can give less notice if providing ninety days would be "unreasonable." In recognizing past case law, the court held that monetary default which causes a franchisee to stop operations for seven consecutive days is considered "reasonable."[99] Additionally, the court noted that Wynn's failure to pay his deliveries on time as well as failure to keep and sell adequate fuel reserves provided Lukoil even more leeway to provide shorter notice.[100] Given Wynn's experience as a businessman, along with Lukoil's notifications, Wynn could not credibly claim that he was surprised by the termination.[101]

In addition to finding proper termination of the franchise agreement, the court dismissed Wynn's related state law claims. First, the court declined to exercise supplemental jurisdiction over a tortious interference claim because Wynn sued under the PMPA, invoking federal jurisdiction.[102] Second, the court denied Wynn's duress excuse because Lukoil could have terminated the agreement earlier, but instead chose to give Wynn an opportunity to salvage the relationship.[103] Thus, the Repayment Agreements were not "wrongful threats."[104] Further, the Repayment Agreements were valid because they did not renew the relationship, and Wynn was rightfully compensated.[105]

III. NO WRONGFUL TERMINATION WHEN FRANCHISEE FAILED TO TIMELY PAY FOR FUEL DELIVERIES

In *MS & BP, LLC v. Big Apple Petroleum, LLC*, the U.S. District Court for the Eastern District of New York denied the plaintiff's motion for preliminary injunction where plaintiff clearly failed to pay for its fuel deliveries in violation of the franchise agreement.[106] Plaintiff, MS & BP, LLC (MS & BP), a gas station operator, entered into both a supply and lease agreement with Big Apple Petroleum, LLC (Big Apple), an Exxon/Mobil fuel distributor.[107] Big Apple's affiliated company and wholesaler, Capitol Petroleum Group (CPG), delivered the fuel and billed MS & BP on behalf of Big Apple.[108] According to the terms of the agreements, MS & BP was required to maintain sufficient funds to make payments via Electronic Funds Transfer (EFT).[109]

Beginning around September 2013, MS & BP's EFT payments repeatedly bounced, and on January 22, 2014, Big Apple sent MS & BP a letter demanding $30,000 security deposit for its failure to maintain adequate funds.[110] MS & BP paid the amount, but payments continued to bounce, and on June 17, 2014, Big Apple issued and served a Notice of Termination effective September 15, 2014.[111] According to Big Apple's notice, it was terminating for failure to timely and repeatedly pay.[112] MS & BP then sought a

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[98] *Id.* at *4-5.
[99] *Id.* at *5.
[100] *Id.*
[101] *Id.*
[102] *Wynn*, 2015 WL 5093051, at *6.
[103] *Id.* at *7.
[104] *Id.*
[105] *Id.*
[106] MS & BP, LLC v. Big Apple Petroleum, LLC, No. 14-CV-5675 (RRM)(RER), 2015 WL 2185038, at *12 (E.D.N.Y. May 8, 2015).
[107] *Id.* at *1.
[108] *Id.*
[109] *Id.* at *2.
[110] *Id.* at *3.
[111] *MS & BP, LLC*, 2015 WL 2185038, at *3-4.
[112] *Id.* at *4.

preliminary injunction enjoining Big Apple from terminating the agreements and ordering it to engage in good faith negotiations and renew the agreements.[113] Specifically, MS & BP argued: (1) Big Apple never clarified what constituted "late payment;" (2) there could be no late payments after the security deposit because the purpose was to offset any bounced payments; (3) Big Apple's acceptance of untimely payments constituted a waiver; (4) there were inconsistencies in the times of payment; and (5) Big Apple acted in bad faith, providing MS & BP opportunity to cancel under 15 U.S.C. § 2802(c)(9).[114] As an initial matter, the court noted that Big Apple's notice was timely because it gave notice ninety days before the effective termination and had actual or constructive notice of the events giving rise to the termination within 120 days prior.[115] In following the Second Circuit's "continuing violation theory," the court held it irrelevant whether or not defendant had knowledge of an ongoing violation before the period began.[116]

Rejecting plaintiff's first argument, the court held that the terms of the agreements clearly stated payment was due at the time of delivery and rent was due on the fifteenth.[117] Further, the trade practices between the parties revealed CPG typically initiated payment on the third business day.[118] Thus, payment obligations were clear.[119] Second, looking at the terms of the agreement, defendant was able to obtain a security deposit as a remedy for plaintiff's indebtedness, and there was nothing requiring defendant to use the payment to offset future untimely payments.[120]

Third, in looking at the express terms of the agreement, continuing to accept late payments did not operate to waive defendant's rights to terminate.[121] Fourth, the court noted that neither CPG nor any of its affiliates exercised control over the processing of cash-less payment receipts that were credited to plaintiff's account, and therefore defendant did not create the conditions that led to the alleged breach.[122] Finally, the court rejected the plaintiff's collusion argument because defendant did not seek to terminate the franchise based on failure to order fuel for seven days, but instead for failure to timely pay for fuel deliveries.[123] Plaintiff failed to demonstrate serious questions going to the merits as required by 15 U.S.C. § 2805(b).[124]

IV. BONA FIDE OFFER TO SELL

In *Transbay Auto Service, Inc. v. Chevron USA Inc.*, the Ninth Circuit vacated the trial court's decision which held that defendant did not make a bona fide offer to sell as required by the PMPA.[125] In this case, Chevron and Transbay entered into a service station franchise relationship in 2001, and in 2008, Chevron informed Transbay of its

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[113] *Id.* at *7.
[114] *Id.* at *8.
[115] *Id.*; 15 U.S.C. §§ 2805(a), 2802(b)(2)(A)(i), (C)(i).
[116] *MS & BP, LLC*, 2015 WL 2185038, at *6.
[117] *Id.* at *9.
[118] *Id.*
[119] *Id.*
[120] *Id.* at *10.
[121] *MS & BP, LLC*, 2015 WL 2185038, at *10.
[122] *Id.* at *11.
[123] *Id.* at *12.
[124] *Id.*
[125] Transbay Auto Serv., Inc. v. Chevron USA Inc., 807 F.3d 1113, 1118, 1121-22 (9th Cir. 2015).

intent to sell the property.[126] Transbay accepted Chevron's offer to buy the unbranded station for $2.375 million, but in 2009, it filed suit, alleging that Chevron's failure to make a bona fide offer to sell the property violated the PMPA.[127] The district court denied Chevron's motion for summary judgment, and the trial court returned a verdict in favor of Transbay.[128] Subsequently, Chevron filed a motion for a new trial based on the district court's exclusion of an appraisal of the premises.[129] The appeals court ultimately remanded the case for a new trial, holding that the appraisal should have been admitted into evidence.[130]

V. Reliance on PMPA for Interpretation of State Franchise Law

In *Fabbro v. DRX Urgent Care, LLC*, the Court of Appeals for the Third Circuit referenced the PMPA analysis from *Mac's Shell Service* to New Jersey's franchise statute and affirmed the district court's dismissal of the franchisees' claims.[131] Here, two franchisees operating "Doctors Express" medical facilities brought claims alleging "constructive termination" of the franchises.[132]

The court discussed *Mac's Shell Service, Inc. v. Shell Oil Products*, where the U.S. Supreme Court held that there can be no claim for constructive termination under the Petroleum Marketing Practices Act when the franchise continued to operate. [133] Although the court determined *Mac's Shell* was not controlling, it noted the distinction "is without a difference." The court found that even to the extent the New Jersey Supreme Court would follow *Maintainco, Inc. v. Mitsubishi Caterpillar Forklift America, Inc.*, which contained a more expansive interpretation of constructive termination under the New Jersey Franchise Practices Act (NJFPA), plaintiffs still did not state a valid claim.[134] Specifically, the court found no breach of contract or implied covenant, and it was not defendant's intent to cease doing business with plaintiffs to the benefit of another dealer.[135] Thus, the court determined the decision to terminate was made in good faith and in the normal course of business.[136]

VI. PMPA Preemption

In *Lukoil N.A. LLC v. Turnersville Petroleum Inc.*, the U.S. District Court for the District of New Jersey held that defendant's counterclaims were not preempted by the PMPA.[137] Plaintiff Lukoil North America LLC (LNA) terminated its franchise agreement with Defendant Turnersville Petroleum Inc. for defendant's default and brought suit against defendant for continuing to sell its oil and gas.[138] In answering plaintiff's

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[126] *Id.* at 1116.
[127] *Id.* at 1116-17.
[128] *Id.* at 1117-18.
[129] *Id.* at 1118.
[130] *Transbay Auto Serv., Inc.*, 807 F.3d at 1122.
[131] Fabbro v. DRX Urgent Care, LLC, 616 F. App'x 485, 490 (3d Cir. 2015).
[132] *Id.* at 487, 489.
[133] *Id.* at 489 (citing Mac's Shell Serv., Inc. v. Shell Oil Prods., 559 U.S. 175 (2010)).
[134] *Id.* at 489-90 (citing Maintainco, Inc., v. Mitsubishi Caterpillar Forklift Am., Inc., 975 A.2d 510 (N.J. Super. Ct. App. Div. 2009)).
[135] *Id.* at 490.
[136] *Fabbro*, 616 F. App'x at 490.
[137] Lukoil N.A. LLC v. Turnersville Petroleum Inc., No. 14-3810 (RMB/AMD), 2015 WL 1735369, at *1 (D.N.J. Apr. 16, 2015).
[138] *Id.*

complaint, defendant counterclaimed, asserting breach of contract, violation of the UCC, breach of duty of good faith and fair dealing, and violations of the NJFPA.[139] Plaintiff moved to dismiss defendant's counterclaims on the theory that they were preempted by the PMPA.[140]

In following the Third Circuit, the court emphasized that the PMPA only preempts state laws that "limit the permissible substantive reasons that a petroleum franchisor can terminate a franchisee."[141] According to plaintiff, defendants claims were "intimately intertwined" with plaintiff's termination because the "very genesis of Turnersville's counterclaims is that LNA allegedly set prices unreasonably, such that Turnersville was unable to perform under the Franchise Agreement[.]"[142] In rejecting this argument, the court found that defendant sought independent damages from events that happened prior to the termination of the franchise relationship.[143] As stated in *O'Shea v. Amoco Oil Co.*, the PMPA does not reference "any legislative intent to preempt the general common law of contract, even to the extent that it may become involved in a PMPA action."[144] Therefore, just because the franchise agreement was terminated did not mean all counterclaims were automatically preempted by the PMPA.[145]

[139] *Id.* at *1-2.
[140] *Id.* at *2.
[141] *Id.* at *3 (citing Kehm Oil Co. v. Texaco, Inc., 537 F.3d 290, 298 (3d Cir. 2008)).
[142] *Lukoil*, 2015 WL 1735369, at *4.
[143] *Id.* at *5.
[144] *Id.* (citing O'Shea v. Amoco Oil Co., 886 F.2d 584, 593 (3d Cir. 1989).
[145] *Id.*