STATE OF MICHIGAN
WAYNE COUNTY CIRCUIT COURT

HASSEN HARP, Individual, Plaintiff, - vs - EQUILON ENTERPRISES, L.L.C., d/b/a/ SHELL OIL PRODUCTS, et al. Defendants.	**CASE NO. 10-006229-CZ** **RESPONSE TO DEFENDANT EQUILON'S MOTION FOR SUMMARY DISPOSITION AND REQUEST FOR JUDGMENT UNDER MCR 2.116(I)(2)** - Honorable Robert J. Colombo, Jr. -

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RESPONSE TO DEFENDANT EQUILON'S MOTION FOR SUMMARY DISPOSITION AND REQUEST FOR JUDGMENT UNDER MCR 2.116(I)(2)

FACTUAL BACKGROUND

The Plaintiff leased the Shell-branded gas station and convenience store business (the "Business") which is the subject of this litigation from the Defendant Equilon Enterprises, LLC ("Equilon") in September 1994. The Plaintiff remained a lessee-retailer until purchasing the Land[1] and the Business from Equilon in 2004.

During the Plaintiff's lease tenure, Knight Enterprises, Inc. ("Knight" and, at times, "Knight Enterprises") submitted a Special Land Use proposal to the Township of Canton to construct a gas station business on an adjoining parcel of land in 2002. Equilon, which was notified of the Knight Special Land Use proposal, and who could have prevented its approval had it chosen to do so, did **nothing** to challenge/contest approval—including notify the Plaintiff. Instead, Equilon offered to sell the Land and Business to the Plaintiff, who did not receive notice, the month before Knight commenced visible construction of the gas station.

Prior to selling the Land and the Business to the Plaintiff, Equilon made repeated guarantees and representations to the Plaintiff regarding:

- Equilon's continued application of "Market Area Pricing," discussed *infra* II (b) pp. 5-9. This guarantee was reduced to writing in the Amendment to Retail Sales Agreement.
- The viability of a ten-year 192,000 per month minimum fuel purchase quota imposed by Equilon as a condition of the sale to the Plaintiff.
- The sale of fuel to the Plaintiff at "Rack Price"[2] or below. This assurance was reduced to writing in a written amendment on the face of the Amendment to Retail Sales Agreement (referred to herein, at times, as the "Plaintiff's fuel supply contract.")
- The value of the Land and the Business.

These guarantees and representations, all of which were false, were intended to:

1. Induce the Plaintiff to pay Equilon $1,374,000.00 for the Land and Business. A value Equilon knew was dependant on Market Area Pricing—something it intended to discontinue despite its contractual obligations.
2. Sign a ten-year fuel supply contract whereby the Plaintiff would be required to purchase 192,000 gallons of fuel per month from Equilon.

Due to page constraints, the factual basis upon which the foregoing rests is set forth below in pertinent detail.

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[1] Capitalized terms used herein have the same meaning ascribed to them in the Plaintiff's Complaint

[2] The term "Rack Price" is a trade term and is defined *infra* p.6, n.4.

ARGUMENT

I. ALL OF THE PLAINTIFF'S CLAIMS ARE TIMELY

A. A Six-Year Period Of Limitation Applies To Breach Of Contract/Breach Of The Duty Of Good Faith And Fair Dealing, Fraud, And Fraudulent Concealment Claims

Fraud claims are subject to a six-year period of limitation. MCL 600.5813; *Badon v. General Motors Corp.*, 188 Mich. App. 430, 435, 470 N.W.2d. 436 (1991).

A breach of contract/breach of the duty of good of good faith and fair dealing claim is also subject to a six-year period of limitation. MCL 600.5807(8).

B. Accrual Of A Cause Of Action Under Michigan Law

While MCL 600.5827 provides that a "claim accrues at the time the wrong upon which the claim is based was done regardless of the time when the damage results," the Michigan Supreme Court has repeatedly held that the wrong is done when the Plaintiff is harmed rather then when the defendant acted. *Boyle v. General Motors Corporation*, 468 Mich. 226, 231, 661 N.W.2d 557, 669, (2003); *Stephens v. Dixon*, 449 Mich. 531, 534-535, 536 N.W.2d 755 (1955).

C. The Plaintiff's Fraud Claim And Breach Of The Duty Of Good Faith And Fair Dealing Claim

1. The Sale And Purchase Agreement, Retail Sales Agreement, And Amendment To Retail Sales Agreement

The Sale and Purchase Agreement between the Plaintiff and Equilon was fully executed by August 20, 2004. (**Exhibit - 1**). The Retail Sales Agreement between the Plaintiff and Equilon was signed by both parties in September of 2004 and made effective as of October 27, 2004. (**Exhibit - 2**). The Amendment to Retail Sales Agreement was signed by both parties in September of 2004 and made effective as of October 27, 2004. (**Exhibit - 3**). The Plaintiff commenced this action on June 2, 2010. Accordingly, the Plaintiff's claims against Equilon arising under these agreements are within the six-year period of limitations as of the dates they were signed as well as their effective dates without resort to when the Plaintiff was harmed.

2. The Retail Facility Lease Agreements (the "Lease Agreements")

The Plaintiff entered into successive Lease Agreements[3] with Equilon, dated October 1, 2000 (**Exhibit - 4**) and April 1, 2004 (**Exhibit - 5**), respectively (each, a "Lease Agreement").

[3] As discussed *infra* IV, pp. 21-23, the "Mutual" Termination and Release (the "Release") Equilon relies on does not apply to the 2004 Lease Agreement, the Sale and Purchase Agreement, the Retail Sales Agreement, or the

As previously noted by this Court, Knight obtained a Certificate of Occupancy for its Citgo gas station on November 1, 2004. (**Exhibit - 6)**. Knight Enterprises opened the Citgo gas station for business in or about January of 2005. (**Exhibit - 7**). Accordingly, the Plaintiff was not harmed, and his claims under the Lease Agreements did not accrue, until November of 2004.

Since the Plaintiff commenced this action on June 2, 2010, the Plaintiff is within the six-year limitations period on the breach of the duty of good faith and fair dealing claims against Equilon arising under the Lease Agreements. It is of no consequence for Equilon to argue that the Plaintiff should have filed this lawsuit sooner; the Plaintiff is within every right afforded by law to wait until the very last day before a period of limitations expires to file a lawsuit.

For the foregoing reasons, Equilon's Motion for Summary Disposition regarding the statute of limitations under MCR 2.116(7) should be denied in its entirety.

II. EQUILON BREACHED ITS DUTY OF GOOD FAITH AND FAIR DEALING UNDER THE RETAIL SALES AGREEMENT AND THE LEASE AGREEMENTS

The Plaintiff alleged that Equilon owed him a duty of good faith and fair dealing under the Retail Sales Agreement (this is referred to as the "Fuel Supply Agreement" and the "Brand Covenant" in the Plaintiff's Complaint at ¶¶ 126) and the Lease Agreements. (*See* the **Plaintiff's Complaint at ¶¶ 188**). The Plaintiff further alleged that Equilon breached its duty of good faith and fair dealing under these agreements. (*See* the **Plaintiff's Complaint at ¶¶ 189-196**).

A. Michigan Recognizes A Cause Of Action For Breach Of The Duty Of Good Faith And Fair Dealing When One Party Reserves The Right To Govern The Manner Of Its Performance

Michigan does not recognize an independent cause of action for breach of the implied duty of good faith and fair dealing. *Belle Isle Grill Corp. v City of Detroit*, 256 Mich. App. 463, 476, 666 N.W.2d 271 (2003). However, Michigan recognizes a dependent cause of action for breach of the implied duty of good faith and fair dealing when a party to a contract reserves the discretion to govern the manner of its performance under that contract and then fails to perform honestly and in good faith. *Ferrell v. Vic Tanny Int'l, Inc*., 137 Mich. App. 238, 357 N.W.2d 669, 672 (1984); *Sims v. Buena Vista School Dist.*, 138 Mich. App. 426, 431, 360 N.W.2d 211 (1984); *Burkhardt v. City National Bank of Detroit*, 57 Mich. App. 649, 226 N.W.2d 678, 680

Amendment to Retail Sales Agreement. To the extent Equilon argues its application to the 2000 Lease Agreement, the Release is void and unenforceable as a matter of law.

(1975); *Hubbard Chevrolet Co. v. General Motors Corp.,* 873 F.2d 873, 876 (5th Cir. 1989) (interpreting Michigan law).

Where a party to a contract makes the manner of performance a matter of its own discretion, it must exercise that discretion honestly and in good faith. *Ferrell*, at 243.

As the Fifth Circuit explained in summarizing Michigan law:

> The implied covenant of good faith and fair dealing essentially serves to supply limits on the parties' conduct when their contract defers decision on a particular term, omits terms or provides ambiguous terms.

Hubbard Chevrolet Co. v. GMC, 873 F.2d 873, 876–877 (5th Cir. 1989), *cert denied,* 493 U.S. 978 (1989); *see also Stephenson v. Allstate Ins. Co*, 141 F Supp 2d 784 (E.D. Mich. 2001), *aff'd,* 328 F.3d 822 (6th Cir. 2003).

When a party to a contract reserves the discretion to govern the manner of its performance and then fails to exercise that discretion honestly and in good faith, a cause of action for breach of the implied duty of good faith and fair dealing will lie.

Equilon reserved the discretion to govern its performance under crucial provisions in the Retail Sales Agreement and under each Lease Agreement. These provisions were essential to the combined value of the Land and Business. As discussed below, Equilon's subsequent bad-faith and unfair dealing in performing under these provisions is the **epicenter** of the Plaintiff's losses.

B. The Retail Sales Agreement:

- Equilon Reserved The Sole Discretion To Apply Market Area Pricing

1. Market Area Pricing And Price Administration Districts

During the Plaintiff's lease tenure, the Plaintiff purchased Shell-branded fuel directly from Equilon. Equilon supplied the Plaintiff with fuel pursuant to its "Market Area Pricing" apparatus (also known as "Price Administrative District" or "PAD" in the retail fuel industry). (**Exhibits - 8, 9 at p. 3**).

Market Area Pricing meant that Equilon would supply/sell the Plaintiff fuel at a price that was based on market factors in the Plaintiff's market area, including the "street" or "pump" price of fuel and the prices set by Equilon's primary competitor British Petroleum, the price-leader in the region. (**Exhibit - 9 at p. 3**). This was done at Equilon's discretion and was intended to keep Equilon's Shell-branded retail fuel outlets competitive. (**Exhibits - 8, 9 at p.**

3). At times, this required Equilon to sell fuel to the Plaintiff below the Rack Price,[4] a practice known as "**price inversion**."

Equilon engaged in "**price inversion**" to keep Shell-branded fuel competitive in the retail fuel market. This served the dual purpose of inflating fuel sales as well as inflating the combined value of Equilon's land and hard asset holdings (e.g., buildings, goodwill, etc.) The gravamen of this practice, as will be discussed below, was that Equilon did not intend to continue Market Area Pricing once it rid itself of its land and hard asset holdings even though it might be contractually obligated to do so (as in the Plaintiff's case). Absent Market Area Pricing, the (artificially) inflated value Equilon created in these assets would collapse.

2. Equilon's Unique Ability To Apply Market Area Pricing

It is critical for this Court to understand how Equilon could accomplish Market Area Pricing in the direct supply of fuel to its retailers, while a "jobber" (i.e., a middleman or indirect supplier) could not. This is important because in addition to itself failing to continue Market Area Pricing with the Plaintiff, Equilon assigned/sold the Plaintiff's fuel supply contract to True North Energy in 2005, a "jobber" Equilon **knew** did not engage in Market Area Pricing **because True North was partly owned by Equilon**. (**Exhibit - 9 at p. 4**).

Equilon, a subsidiary of Shell Oil Company,[5] is a vertically integrated supplier of fuel (i.e., it engages in the production, refinement, distribution, and sale of retail fuel to end users). It has owned and operated, either directly or through its parent or affiliates, oil refineries, distribution terminals, and supply trucks. Equilon purchased fuel according in large part to the commodity spot price of petroleum, which fluctuated daily based on market forces. This preceded downstream overhead and transportation markups Equilon applied at various stages throughout the distribution channel.

Equilon would purchase, refine, and distribute fuel from its distribution terminals. As a vertically integrated supplier, Equilon purchased fuel from its distribution terminals at a Rack Price **it set** and then sold that fuel to retailers directly (this was direct supply from a retailer's

[4] "Rack" price was determined by the commodity spot price of petroleum, transportation costs, overhead, and the supplier's desired profit.

[5] Shell Oil Company is the United States subsidiary of Royal Dutch Shell, PLC, a producer, refiners, and marketer of fuel.

perspective) or to the "jobbers" who supplied the retailers (this was indirect supply from a retailer's perspective). (**Exhibit - 9 at pp. 2-4**).

When Equilon directly supplied retailers, it set a Marketer Tank Wagon price (the "MTW Price"). This is essentially a trade term for the price at which Equilon would sell fuel to a retailer. Equilon could set its MTW Price higher or **lower** than "Rack Price." **This is because Equilon, a vertically integrated supplier of fuel, set the Rack Price**. **And since Rack Price already contained a built-in profit/mark-up to Equilon, Equilon could offset by reducing its MTW price**. A "jobber" could not set its MTW Price below Rack Price, which is the price the **jobber** typically paid for fuel, without losing money, as the jobber did not have a profit already built-in to the Rack Price. This is why a "jobber" would **not** engage in Market Area Pricing, but Equilon would.

3. Market Area Pricing Was An Explicit Bargained-For Provision Between The Plaintiff And Equilon

Prior to executing the Retail Sales Agreement to buy fuel from Equilon, which was an express condition of the Sale and Purchase Agreement, Equilon's mandatory 192,000-gallon minimum fuel purchase quota was a source of considerable **discontent** between the Plaintiff and Equilon as it represented a 65,000-gallon per month average increase from the Plaintiff's Retail Sales Agreement with Equilon in 2000.[6] (**Exhibit - 10**).

While Equilon owned the Land and the Business, it had an incentive to ensure a competitively priced supply of fuel to the Plaintiff to inflate or to at least preserve the market value of the Land and Business. The Plaintiff was concerned that once he purchased the Land and Business from Equilon and thereby assumed the risk of loss in the market value of these assets, Equilon would have a disincentive to continue Market Area Pricing, a practice which, as aforementioned, might require Equilon to offset some of the profit it built in to its Rack Price by selling fuel at a lower MTW Price. (**Exhibit - 8**).

The Plaintiff realized that the $1,374,000.00 sale price and value was dependent on Market Area Pricing and refused to purchase the Land and Business or enter into the Retail Sales

[6]During a conversation with Lori Van Ryan when the Plaintiff expressed his reservation regarding the 192,000-gallon requirement, Ms. Van Ryan told the Plaintiff he could either "take it or leave it," and that the Plaintiff should have a "serious conversation with himself about what he wants."

Agreement unless Equilon explicitly guaranteed that it would continue Market Area Pricing. (**Exhibit - 8**).

Equilon representative Lori Van Ryan verbally assured the Plaintiff that Equilon would **continue** to supply the Plaintiff with fuel pursuant to Market Area Pricing. (**Exhibit - 8**).

This assurance was reduced to writing in an Amendment to Retail Sales Agreement (**Exhibit - 3**); however, Equilon **reserved** the **sole** discretion to apply Market Area Pricing:

> 1. Article 3 "Prices and Terms of Payment" is replaced in its entirety by the following:
>
> (a) [Omitted].
>
> (b) If Seller determines, in its **sole** discretion, that market conditions warrant the use of **market area pricing**, upon notification to Retailer and for so long as such market conditions exist, Retailer shall pay Seller's price in effect for Retailer's Station in the geographic market or trading area established by Seller at the time of Seller's delivery to Retailer. Retailer represents and warrants that the Products purchased at such prices will in fact be delivered only to Retailer's Station in the designated market or trade area.

(**Exhibit - 3**)

> 4. Equilon Assured The Plaintiff That He Could Satisfy The Retail Sales Agreement Through Market Area Pricing And A Competitively-Priced Supply Of Fuel

In addition to the explicit guarantee to continue Market Area Pricing, Equilon made assurances to the Plaintiff regarding the viability of its 192,000-gallon/per month quota by promising to sell its fuel at a "fair price" and to keep the Plaintiff "competitive" throughout the ten-year Retail Sales Agreement. (**Exhibit - 8**).

These assurances were reduced to **writing** in a written amendment made on the face of the Amendment to Retail Sales Agreement when Lori Van Ryan, at Equilon's direction, included the term "Shell's Terminal Rack Price" next to the "marketer tank wagon price." (**Exhibit - 3**). The Amendment to Retail Sales Agreement initially provided that the Plaintiff would pay Equilon the MTW Price of fuel (which, as aforementioned, could be higher or lower than the Rack Price). (**Exhibit - 3**). Ms. Van Ryan's insertion of the term "Shell's Terminal Rack Price" guaranteed the Plaintiff that he would never pay above Equilon's Rack Price for fuel plus the fixed .02-cent mark-up and freight cost—which was commonly known as a "Rack Plus" price. (**Exhibits – 3, 9 at p. 4**).

The Plaintiff required this guarantee because he was concerned that once he purchased the Land and Business from Equilon and bound himself to a ten-year fuel supply contract, Equilon would have an incentive to set its MTW Price above Rack Price to increase its profits by this double mark-up. (**Exhibit - 8**). The Plaintiff knew this would materially his ability to profitably operate the Business and to sell fuel at Equilon's 192,000-gallon per/month quota. (**Exhibit - 8**).

5. The Parties' Intent

Equilon understood the Plaintiff's underlying cost of fuel would directly affect his ability to profitably operate the Business. The Plaintiff, who operated gas station businesses since 1987, understood this as well. That is why he required Equilon to guarantee the continued application of Market Area Pricing and its sale of fuel at Rack Price or below. These were **not** boilerplate provisions in the Retail Sales Agreement and the Amendments thereto—they were expressly bargained for and agreed to by the parties. Equilon knew the Plaintiff was relying on these guarantees when he executed the Retail Sales Agreement and paid Equilon $1,374,000.00 for the Land and Business—a value the parties understood depended on Market Area Pricing.

The parties understood that these guarantees were so **essential** to the Plaintiff's reasonable expectations under the Sale and Purchase Agreement and the Retail Sales Agreement that Equilon representative Lori Van Ryan actually telephoned her superiors at Equilon's Houston office to obtain permission to write it in the Amendment to Retail Sales Agreement while the Plaintiff was present. (**Exhibit - 8**).

On the basis of Equilon's explicit guarantees regarding the continued application of Market Area Pricing and an MTW Price that would be at or below Rack Price, the Plaintiff signed the Retail Sales Agreement and paid Equilon $1,374,000.00 for the Land and Business.

6. Equilon Aborted Its Contractual Duty To Apply Market Area Pricing Thereby Breaching Its Duty Of Good Faith And Fair Dealing To Apply Market Area Pricing

Equilon immediately aborted its contractual duty to continue Market Area Pricing once the Plaintiff was induced to purchase the Land and Business for $1,374,000.00 and to sign the ten-year Retail Sales Agreement. (**Exhibit - 8**). Consequently, the Plaintiff's fuel sale volume plummeted.

As of the October 27, 2004 effective date of the Retail Sales Agreement, the Plaintiff had purchased an average of 211,430 gallons of fuel per month during 2004. (**Exhibit - 11**).[7] The very next month, the Plaintiff's fuel purchases plummeted to 181,297. December fuel purchases were 182,871 gallons. (**Exhibit - 11**). **All of this occurred before Knight Enterprises opened its Citgo gas station for business in January of 2005.** (**Exhibits - 7, 11**).

Thus, while Equilon might argue, quite correctly, that Knight Enterprises has contributed to a decline in the Plaintiff's fuel sale volume since 2005, this does not account for the entirety of the decline.

7. Equilon Assigned The Plaintiff's Fuel Supply Contract To An Indirect Supplier Of Fuel That Does Not Engage In Market Area Pricing

In or about 2005, Equilon assigned the Plaintiff's fuel supply contract to True North Energy, an indirect supplier of fuel who it knew does **not** engage in Market Area Pricing. (**Exhibit - 9 at p. 4**). The following year, the Plaintiff, who sold approximately 2,457,615 gallons of fuel in 2004, and 1,439,493 gallons of fuel in 2005, sold only 1,113,719 gallons of fuel in 2006. (**Exhibit - 12**).

This decline is a product of three factors:

i. Equilon's failure to continue Market Area Pricing.

ii. Equilon's assignment of the Plaintiff's fuel supply contract to a jobber who does not engage in Market Area Pricing.

iii. The Knight Gas Station (whose zoning approval Equilon did not contest).

Equilon may have reserved the sole discretion to apply Market Area Pricing, but it did not apply this discretion honestly or in good faith.

8. The Collapsed Value of the Plaintiff's Land And Business

An appraisal of the Land and Business by Integra Realty Resources dated June 22, 2004 determined that the market value of the Land and Business was $2,450,000.00.

> Based on the analyses and conclusions in the accompanying report, and subject to the definitions, assumptions, and limiting conditions expressed in this report, it is our opinion that the "Going Concern" Market Value of the Fee Simple estate of the subject, as of July 21, 2004, is:
>
> **TWO MILLION FOUR HUNDRED FIFTY THOUSAND DOLLARS**
> **$2,450,000**

[7] The Plaintiff obtained this exhibit from True North Energy.

(**Exhibit - 13**)

This appraisal accounted for the competing gas station being built by Knight Enterprises. Equilon **admits** this. (*See* **Defendant Equilon's Motion at p. 5**).

By 2010, the market value of the Plaintiff's Land and Business was worth a fraction of its 2004 appraised value. An appraisal by Barnes & Associates, LLC dated February 19, 2010 reveals:

> In our opinion, the "as is" fee simple market value of the real estate, as of February 19, 2010, subject to the general assumptions and limiting conditions, set forth, was:
>
> **ONE MILLION DOLLARS**
> **$1,000,000**
>
> In our opinion, the "as is" liquidation value of the real estate, as of February 19, 2010, subject to the general assumptions and limiting conditions, set forth, was:
>
> **SEVEN HUNDRED THOUSAND DOLLARS**
> **$700,000**

(**Exhibit - 14**)

The appraised value of the Plaintiff's Land and Business plunged $1,450,000.00 over a six-year period even though the June 2004 appraisal accounted for the Knight gas station. Admittedly, macroeconomic factors may have contributed to this cataclysmic devaluation, but not the entirety of it. The Plaintiff's depressed fuel purchase volume in November and December of 2004, is **direct** evidence that Equilon's failure to apply Market Area Pricing, as contractually required to, contributed to the devaluation of the Plaintiff's Land and Business.

Equilon cannot argue that it sold the Plaintiff the Land and Business at a "discount" to the June 2004 appraised value, as Equilon did **not** sell the Plaintiff a true "fee simple" estate. Equilon reserved a brand covenant/restriction on the Plaintiff's estate—namely that the Plaintiff only sell fuel branded and supplied by Equilon. This was a material and valuable reservation, which Equilon retained. The Plaintiff could not have realized a true fee simple estate, and hence the full value of the Land and Business, until he completed the Retail Sales Agreement term and Equilon's brand covenant/restriction was removed.

The collapsed value of the Plaintiff's Land and Business, which stems largely from Equilon's failure to continue Market Area Pricing, has subject the Plaintiff to financial collapse and has rendered him unable satisfy the minimum fuel purchase quota Equilon imposed under

the Retail Sales Agreement. Because of this, the Plaintiff will **never** realize the full value of the property he paid Equilon $1,374,00.00 for and spent years laboring in.

In their Motion, Equilon describes this as *caveat emptor* (i.e., let the buyer beware). Equilon is mistaken. The Plaintiff bargained for Market Area Pricing and an MTW Price that would be at or below Equilon's Rack Price, Equilon contractually agreed to this. Equilon deprived the Plaintiff of the benefit of his bargain by discontinuing Market Area Pricing and by assigning his fuel supply contract to a "jobber" who it knew did not engage in Market Area Pricing. Absent these guarantees the Plaintiff would not have purchased the Land and Business from Equilon as he realized the $1,374,000.00 sale price and value was dependent on Market Area Pricing. This was not *caveat emptor*; this was a direct breach the duty of good faith and fair dealing inherent in Equilon's self-reserved discretion to apply Market Area Pricing under the Retail Sales Agreement.

In any event, Equilon's Motion for Summary Disposition regarding the Plaintiff's breach of the duty of good faith and fair dealing claim vis-à-vis the Retail Sales Agreement should be denied on all grounds because:

1. As discussed *supra* I, pp. 3-4, the Plaintiff's claims are timely. Accordingly, Equilon's Motion under MCR 2.116(C)(7) is in error.

2. As discussed *infra* IV, pp. 21-23 the "Mutual" Termination and Release does not apply to the Sale and Purchase Agreement, to the Retail Sales Agreement, or to the Amendment to Retail Sales Agreement and to the extent that Equilon argues it applies to either of the Lease Agreements it is void and unenforceable as a matter of law. Accordingly, the Defendant's Motion under MCR 2.116(C)(7) is in error.

3. Michigan recognizes a cause of action for a breach of the duty of good faith and fair dealing when a party to a contract reserves the discretion to govern the manner of its performance. The Plaintiff's Complaint alleges a breach of this duty. Accordingly, the Defendant's Motion under MCR 2.116(C)(8) is in error.

4. The Defendants' Motion under MCR 2.116(10) is in error because there are genuine questions of material fact which remain, including:

   - Whether Equilon exercised its discretion to apply Market Area Pricing honestly and in good faith.

   - Whether Equilon's failure to continue Market Area Pricing is a breach of the duty of good faith and fair dealing under the Retail Sales Agreement insofar as Equilon reserved the sole discretion to apply Market Area Pricing if market conditions warranted so.

- Whether and to what extent the Plaintiff's fuel purchases (and consequently fuel sale volume) plummeted because of Equilon's failure to continue Market Area Pricing.

- Whether Equilon's assignment of the Plaintiff's fuel supply agreement to a "jobber" who it knew does not engage in Market Area Pricing is a breach of the duty of good faith and fair dealing insofar as Equilon was required to supply the Plaintiff with fuel pursuant to Market Area Pricing in its honest and good-faith discretion.

For the foregoing reasons, Equilon's Motion for Summary Disposition regarding the Plaintiff's breach of the duty of good faith and fair dealing claim vis-à-vis the Retail Sales Agreement claim (Count Three) should be denied.

C. The Lease Agreements:

- **Equilon Reserved A General Right To Use The Premises During The Plaintiff's Lease Tenure**

The Plaintiff entered into successive three-year Lease Agreements with Equilon (the latter of which expired March 31, 2007) to operate a "motor fuel dispensing station" whereby Equilon reserved a general right to use and access the Land and Business so long as it did not materially interfere with the Plaintiff's lease.

Part II Article 2(b) of each Lease Agreement provides:

> **Lessor reserves the right to make use of the Premises so long as such use does not materially interfere with the authorized use of the Premises then being made by Lessee. Without limiting the generality of the foregoing**, Lessor's use of the Premises may include (1) the erection of additional buildings or Alterations of the Premises, in accordance with Article 9, to operate a car wash, convenience store, fast food facility, laundry, or any other business or (2) the installation of pay telephones, Automated Teller Machines, and other financial services, advertising signs and outdoor billboards, wireless radio signal devices and related equipment and facilities, video display terminals, computers, vending and other similar equipment. Lessor reserves the right to any fee, income, rentals or other revenue generated by such use or associated facilities.

(Exhibits - 4, 5)

1. Equilon's Continuing Use

Equilon maintained a car wash operation on the Premises[8] for the entirety of the Plaintiff's lease tenure. Equilon reserved the right to access the Premises to maintain the car

[8] The term "Premises" shall have the same meaning ascribed to it in the Lease Agreements.

wash and to perform any repairs thereon, using car wash revenues to subsidize its cost. Further, Equilon reserved 50% of the net revenue generated by the car wash.

Equilon maintained a continuing presence in the Plaintiff's convenience store operation by obligating the Plaintiff (at the Plaintiff's expense) to participate in recurrent promotions and to "invest" in periodic imaging improvements, which the Plaintiff did. (**Exhibit - 8**).

2. The Knight Special Land Use Proposal

As the landowner of record in 2002, Equilon received notice of a Special Land Use proposal by Knight Enterprises to construct a gas station business on an adjoining parcel of land, and to create a lane behind the Plaintiff's Business to divert traffic from the Plaintiff's corner at Lotz Road to the Knight gas station. (**Exhibit - 15**). Equilon notice of this proposal but did not contest its approval nor alert the Plaintiff to its pendency. **Equilon did nothing**. Had Equilon taken any step to protect the Plaintiff's interest, it would have prevented Knight Enterprises from building a gas station next door to the Plaintiff's Business.

3. Equilon's Failure To Act Was A Material Interference With The Plaintiff's Use[9]

This Court has seen the Pleadings regarding the Plaintiff's claims against the Township, which Pleadings are hereby incorporated. The Pleadings evidence by documentary proof, transcriptions, and discovery admissions that:

i. Notice of the Special Land Use proposal was procedurally and substantively deficient.

ii. Multiple members of the Township Planning Commission warned against Special Land Use approval—citing the destructive impact on the Plaintiff's Business.

iii. The Special Land Use was substantively deficient, as it did not meet the statutory criteria for approval:

- The Special Land Use, admittedly, would not provide "an overriding and compelling benefit" to the Township.
- The Special Land Use was incompatible with the Township Master Plan.

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[9] The Special Land Use proposal was patently deficient for the reasons stated in the Plaintiff's Motion for Summary Disposition against the Township Defendants and the Plaintiff's Response to the Defendant Township's Motion for Summary Disposition (as well as the supplementary pleadings thereto), which pleadings are hereby incorporated.

- To date, the Knight gas station is the only independently existing gas station in the entire Township of Canton that is not located at a corner or an intersection.
- Less than three months after approving the Knight Special Land Use (which was located in a C-3, Regional Commercial District), the Township amended its Zoning Ordinance by removing gas stations from the list of special land uses in C-3, Regional Commercial Districts (this amounted to an outright ban on the construction of new gas stations in that district).
- The Special Land Use did not enhance the surrounding environment.

iv. The Special Land Use proceedings were procedurally deficient, as approval was not based on an adequate record or findings of fact.

v. At least one party, a Township Planning Commissioner, had an undisclosed conflict of interest in Special Land Use approval.

Equilon was the Plaintiff's lessor, franchisor, and fuel supplier. The Plaintiff paid Equilon rent and royalties from his fuel and convenience store sales. The Plaintiff paid Equilon 50% of the net revenue generated by the car wash. The Plaintiff participated in Equilon's promotions and made the required imaging "investments" and maintained the general appearance of the property. Simply, the Business was the Plaintiff's livelihood. Equilon acted in bad-faith under the Lease Agreement when it permitted Knight Enterprises, whose approval to operate a gas station as a Special Land Use on an adjacent parcel violated multiple state and federal laws (including the Township's Zoning Ordinance), to obtain a Special Land Use absent any challenge or notice to the Plaintiff.

4. Equilon's Failure To Act Derived From Its Bad-Faith And Unfair Dealing

A letter written by True North Energy representative Joseph Celusta[10] reveals that Equilon planned to dump the Land and Business onto the Plaintiff before Knight Enterprises opened its gas station.

> We found the documentation we were looking for, notification pertaining to the zoning change and the building variance for Mr. Harp's adjacent property purchased by Knight industries. **During the time, this hearing was held Mr. Harp was in the process of purchasing his property from Shell Oil Company (coincidence?)**

(**Exhibit - 16**)

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[10] True North Energy is a partnership between Equilon and Lynden Company.

Equilon would have challenged Knight Enterprises' Special Land Use proposal had it intended to retain ownership of the Land and Business. Equilon offered to sell the Land and Business to the Plaintiff the month **before** visible construction of the Knight gas station commenced. (**Exhibits - 8, 17**). On the basis of the foregoing, a reasonable trier of fact could determine that Equilon's failure to contest the Special Land Use proposal and failure to notify the Plaintiff was a material interference with the Plaintiff's use of the Premises.

By its complete failure to act, Equilon materially interfered with the Plaintiff's lease and violated the duty of good faith and fair dealing inherent in its self-reserved general right of use of the Premises.

In any event, Equilon's Motion for Summary Disposition regarding the Plaintiff's breach of the duty of good faith and fair dealing claim vis-à-vis the Lease Agreements should be denied on all grounds because:

1. As discussed *supra* I, pp. 3-4, the Plaintiff's claims are timely. Accordingly, Equilon's Motion under MCR 2.116(C)(7) is in error.

2. As discussed *infra* IV, pp. 21-23 the "Mutual" Termination and Release does not apply to the 2004 Lease Agreement and to the extent Equilon argues it applies to the 2000 Lease Agreement it is void and unenforceable as a matter of law. Accordingly, the Defendant's Motion under MCR 2.116(C)(7) is in error.

3. Michigan recognizes a cause of action for a breach of the duty of good faith and fair dealing when a party to a contract reserves the discretion to govern the manner of its performance. The Plaintiff's Complaint alleges a breach of this duty. Accordingly, the Defendant's Motion under MCR 2.116(C)(8) is in error.

4. The Defendants' Motion under MCR 2.116(10) is in error because there are genuine questions of material fact which remain, including:

   - Whether Equilon's failure to challenge/contest the Knight Special Land Use Proposal was a material interference with the Plaintiff's use of the Premises.
   - Whether Equilon's failure to notify the Plaintiff regarding the Knight Special Land Use Proposal was a material interference with the Plaintiff's use of the Premises.
   - Whether Equilon's failure to challenge/contest the Knight Special Land Use Proposal was a breach of the duty of good faith and fair dealing under the Lease Agreements insofar as Equilon reserved a general right of use of the Premises.
   - Whether Equilon's failure to notify the Plaintiff regarding the Knight Special Land Use Proposal was a breach of the duty of

good faith and fair dealing under the Lease Agreements insofar as Equilon reserved a general right of use of the Premises.

- Whether Equilon's failure to act was intended to prevent the Plaintiff from learning about the Knight gas station prior to offering to sell the Land and Business to the Plaintiff and whether this constitutes a material interference and/or a breach of the duty of good faith and fair dealing insofar as Equilon reserved the general right to access and use the Premises.

III. EQUILON FRAUDULENTLY INDUCED THE PLAINTIFF TO ENTER INTO THE SALE AND PURCHASE AGREEMENT AND THE RETAIL SALES AGREEMENT

Under Michigan law, a cause of action for fraud requires a showing of the following:

1. the defendant made a material representation;
2. the representation was false;
3. the defendant knew it was false when it was made or made it recklessly, without knowledge of its truth and as a positive assertion;
4. the representation was made with the intention to induce reliance by the plaintiff;
5. the plaintiff acted in reliance upon it; and
6. the plaintiff suffered injury.

Hord v. Environment Institute of Michigan, 463 Mich. 399, 404, 617 N.W.2d 543 (2000).

A. The Plaintiff Alleged Fraud In His Complaint

The Plaintiff alleged the following:

- The Defendant Sellers provided Plaintiff with a sale and purchase agreement to purchase the Land and Business for ONE MILLION THREE HUNDRED SEVENTY-FOUR THOUSAND DOLLARS ($1,374,000.00). (*See* the **Plaintiff's Complaint at ¶ 168**).
- The Defendant Sellers represented the value of the Land and Business to be ONE MILLION THREE HUNDRED SEVENTY-FOUR THOUSAND DOLLARS ($1,374,000.00). (*See* the **Plaintiff's Complaint at ¶ 169**).
- The Defendant Seller's representations were purposefully made and were intended to induce Plaintiff to pay to pay ONE MILLION THREE HUNDRED SEVENTY-FOUR THOUSAND DOLLARS ($1,374,000.00) for the Land and Business, **significantly more** than the Defendant Sellers knew the Land and Business were worth. (*See* the **Plaintiff's Complaint at ¶ 170**).
- The Defendant Seller's representations regarding the value of the Land and Business were material. (*See* the **Plaintiff's Complaint at ¶ 171**).

- The Defendant Seller's representations regarding the value of the Land and Business were false in fact, and known to be false by the Defendant Sellers. (*See* the **Plaintiff's Complaint at ¶ 172**).

- The Defendant Sellers acted with oppression, fraud, and malice with the specific purpose and intent to induce Plaintiff to purchase the Land and Business for significantly more than they were worth. (*See* the **Plaintiff's Complaint at ¶ 175**).

- In or about June 2004, Plaintiff agreed to purchase the Land and Business for ONE MILLION THREE HUNDRED SEVENTY-FOUR THOUSAND DOLLARS ($1,374,000.00) and tendered the non-refundable ONE HUNDRED THIRTY-SEVEN THOUSAND FOUR HUNDRED DOLLAR ($137,400.00) earnest money deposit. Plaintiff further tendered the EIGHTY-FIVE THOUSAND DOLLARS ($85,000.00), which was held in escrow for the "site image improvements." (*See* the **Plaintiff's Complaint at ¶ 125**).

- The Purchase Agreement was made subject to a Brand Covenant/Retail Sales Agreement, which made the sale and purchase to Plaintiff contingent upon Plaintiff executing an agreement to purchase fuel from the Defendant Sellers for ten (10) years (the "Fuel Supply Agreement"). (*See* the **Plaintiff's Complaint at ¶ 126**).

- On or about October 27, 2004, Plaintiff executed the Fuel Supply Agreement with the Defendant Sellers. (*See* the **Plaintiff's Complaint at ¶ 128**).

- As a result of the Defendants' conduct, Plaintiff's Business continues to plummet. (*See* the **Plaintiff's Complaint at ¶ 153**).

- As a result of the Defendants' conduct, Plaintiff will be subject to a three-cent penalty (.03) on every gallon of gas below the minimum fuel purchase requirement provided for in the Fuel Supply Agreement. (*See* the **Plaintiff's Complaint at ¶ 154**).

B. The Plaintiff Has Met The Burden Of Proof For Fraud

1. <u>Equilon Made Material Representations to the Plaintiff</u>

Equilon made the following material representations to the Plaintiff regarding the value of the Land and Business and the continued application of Market Area Pricing:

- Equilon guaranteed that it would continue Market Area Pricing under the Retail Sales Agreement. This guarantee was subsequently reduced to writing in the Amendment to Retail Sales Agreement. (**Exhibits - 3, 8**).

- Equilon assured that the Business would support a fuel purchase volume of 192,000 gallons per month over the life of the ten-year Retail Sales Agreement. (**Exhibits - 3, 8**).

- Equilon guaranteed that it would supply the Plaintiff with fuel at an MTW Price that would be at or below Rack Price. (**Exhibits - 3, 8**).

- Equilon set the non-negotiable sale price of $1,374,000.00 and represented to the Plaintiff that the Land and Business were worth at least $1,374,000.00. (**Exhibit - 8**).

2. Equilon's Material Representations Were False

The following evidences the falsity of Equilon's representations:

- Equilon did not continue Market Area Pricing with the Plaintiff despite its verbal assurances and contractual obligation to do so. (**Exhibit - 8**).
- Equilon assigned the Plaintiff's fuel supply contract to a "jobber" who does not engage in Market Area Pricing in 2005. (**Exhibit - 9**).
- Equilon knew that the Land and Business would not be worth $1,374,000.00 absent Market Area Pricing, which Equilon did not intend to continue, and in fact did not continue, once it sold the Land and Business to the Plaintiff. The February 2010 appraisal evidences the collapsed value. (**Exhibit - 14**).
- The Plaintiff's Business has been unable to support a fuel purchase volume of 192,000 gallons per month despite the Plaintiff's best efforts. (**Exhibit - 8**).

3. Equilon's Material Representations Were False When Made

Equilon knowledge of the falsity of its representations is evidenced by:

- Its planned failure to discontinue Market Area Pricing. This is supported by the Plaintiff's affidavit (**Exhibit - 8**) and 30,000-gallon per month decrease in the Plaintiff's November and December 2004 fuel purchases. (**Exhibit - 11**).
- Equilon's sale/assignment of the Plaintiff's fuel supply contract to a jobber who does not engage in Market Area Pricing in 2005. (**Exhibit - 9**).
- Equilon's planned failure to apply Market Area Pricing ensured that the Plaintiff's fuel sales would plummet. Further, Equilon knew the $1,374,000.00 price was dependent on Market Area Pricing and was aware this value would collapse.
- Equilon's knowledge that the Plaintiff would be unable to satisfy the 192,000-gallon per month minimum fuel purchase quota Equilon assured the Plaintiff he could meet is supported by:
  - i. Its knowledge that Knight Enterprises was building a gas station on an adjoining parcel of land.
  - ii. Its planned failure to apply Market Area Pricing.
  - iii. Its planned assignment/sale of the Plaintiff's fuel supply contract to a "jobber" who it knew did not engage in Market Area Pricing.
- Equilon deliberately applied Market Area Pricing when it owned the Land and Business to inflate the Plaintiff's fuel sale volume by "**price inversion**"—this artificially inflated the combined value of the Land and

Business as well as the Plaintiff's fuel supply contract, which depended on Market Area Pricing. Joseph Celusta of True North Energy (who could not engage in Market Area Pricing) would later attest that True North received "**less than half of what we negotiated to purchase.**" (**Exhibit - 16**).

4. Equilon's Representations Were Intended to Induce the Plaintiff's Reliance

Equilon's representations were made to:

- Induce the Plaintiff to pay $1,374,000.00 for the Land and Business—a price and value the Plaintiff and Equilon both knew relied on Market Area Pricing.
- Induce the Plaintiff to enter into a ten-year Retail Sales Agreements whereby the Plaintiff would be required to purchase a minimum of 192,000 gallons of fuel per month from Equilon.

5. The Plaintiff's Reliance

On the basis of Equilon's guarantees and representations as aforementioned, the Plaintiff paid Equilon $1,374,000.00 for the Land and Business and entered into the ten-year Retail Sales Agreement. (**Exhibit - 8**).

6. The Plaintiff's Injury

Because of Equilon's fraud, including its planned failure to honor its contractual duty to continue Market Area Pricing, the Plaintiff has been injured by the a cataclysmic devaluation of the Land and Business he paid Equilon $1,374,000.00 for. The Plaintiff has been further injured by continuing operating losses from the Business and will be subject to a .03-cent/per gallon penalty on any deficiency in fuel purchase requirements under the Retail Sales Agreement (which is substantial) upon expiry of the ten-year term.

In any event, Equilon's Motion for Summary Disposition regarding the Plaintiff's claim for fraud should be denied on all grounds because:

1. As discussed *supra* I, pp. 3-4, the Plaintiff's claims are timely. Accordingly, Equilon's Motion under MCR 2.116(C)(7) is in error.
2. As discussed *infra* IV, pp. 21-23, the "mutual" Release and Termination does not apply to the Sale and Purchase Agreement or the Retail Sales Agreement. Accordingly, the Defendant's Motion under MCR 2.116(C)(7) is in error.
3. The Plaintiff has alleged a cause of action for fraud and has pled with sufficient particularity. Accordingly, the Defendant's Motion under MCR 2.116(C)(8) is in error.

4. The Defendants' Motion under MCR 2.116(10) is in error because there are genuine questions of material fact which remain, including:

   i. Whether Equilon deliberately applied Market Area Pricing during the Plaintiff's lease tenure to artificially inflate the value of the Land and Business and to induce the Plaintiff's reliance thereon.

   ii. Whether Equilon verbally and contractually guaranteed the Plaintiff that it would continue Market Area Pricing to induce the Plaintiff to enter into the Sale and Purchase Agreement and the Retail Sales Agreement.

   iii. Whether Equilon intended to honor its verbal and contractual guarantee to continue Market Area Pricing.

   iii. Whether Equilon knew the true value of the Land and Business was significantly less than $1,374,000.00 in light of its planned failure to apply Market Area Pricing.

For the foregoing reasons, Equilon's Motion for Summary Disposition regarding the Plaintiff's fraud claim (Count One) should be denied.

IV. THE "MUTUAL" TERMINATION AND RELEASE IS UNENFORCEABLE

Michigan courts have long held that to be valid a release must be 'fairly and knowingly' made. *Denton v. Utley*, 350 Mich. 332, 86 N.W.2d 537 (1957); *Binard v. Carrington*, 163 Mich. App. 599; 414 N.W.2d (1987); *Trongo v. Trongo*, 124 Mich. App. 432, 335 N.W.2d 60 (1983).

In *Denton v. Utley*, the Michigan Supreme Court discussed the equitable underpinnings regarding the validity of release agreements.

> Equity will strike down **without hesitation** any agreement resulting from oppression, fraud, mutual mistake of the contracting parties, or other evil. The cases rest upon this **great principle**, not upon the minutia urged. It matters not how sweeping are the words involved. **When their content cloaks inequity they shall be vacated and held for naught.** To put it affirmatively, any release, to be sustained, must be 'fairly and knowingly made'.

350 Mich. 332, 86 N.W.2d 537 (1957) (emphasis added).

The "Mutual" Termination and Release between the Plaintiff and Equilon (the "Release") is invalid and unenforceable as a matter of law.

A. The "Mutual" Release Only Applies To The 2000 Lease Agreement

By its plain and unambiguous language, the "mutual" Release Equilon relies on applies only to the:

- Retail Sales Agreement effective October 01, 2000.
- Retail Facility Lease effective October 01, 2000.

(**Exhibit - 18**)

Even if this "mutual" Release were enforceable, which it is not, it does not apply to the June 2004 Lease Agreement, the Sale and Purchase Agreement, or the Retail Sales Agreement (and the Amendments thereto).

B. The "Mutual" Release Lacked Consideration/Mutuality of Obligation

To be valid, a release must be based on adequate or sufficient consideration. *Tate v. Town & Country Lanes, Inc.*, 79 Mich. App. 89, 90, 261 N.W.2d 220 (1977). If not, the release is void and not binding. *Doebler v. Rogge*, 221 Mich. 508, 191 N.W.2d 200 (1922). It is necessary a party do something in addition to that which it was legally bound to do. *Id*. at 511.

The "mutual" Release between the Plaintiff and Equilon was devoid of consideration. It recites standard boilerplate "for good and valuable consideration, Franchisor and Franchisee hereby agree [to release claims against one another] . . . ." However, no consideration by Equilon was ever contemplated nor incorporated into the "mutual" Release. (**Exhibit - 18**). Further, Equilon was not even bound by this purportedly "mutual" Release.

> **Excepted** from this release are claims of Franchisor against Franchisee for indebtedness, reimbursement, or indemnification, or relating to property of Franchisor, which may have been or is now in Franchisee's possession.

(**Exhibit - 18**)

Since Equilon provided no consideration and bore no mutuality of obligation, Equilon cannot rely on this one-sided, unconscionable Release to absolve itself of liability for its fraud, bad-faith, and unfair dealing with the Plaintiff.

B. The Plaintiff's Claim Under The 2000 Lease Agreement Derives From Equilon's Fraud, Bad-Faith, And Unfair Dealing

Where fraud or mistake is alleged, the intent of the parties should be considered. *Theisen v. The Kroger Co,* 107 Mich. App. 580, 583; 309 N.W.2d 676 (1981); *see also Harris v. Lapeer Public School Sys,* 114 Mich. App. 107, 115, 318 N.W.2d 621 (1982) (allegation of mistake raises question of intent, creating a question of fact for the jury).

Where fraud or mistake is alleged, the intent of the parties should be considered. *Binard v. Carrington,* 163 Mich. App. 599, 604, 414 N.W.2d 900 (1987). In determining the intent of the parties, the *Binard* court considered the following factors:

(1) The haste with which the release was obtained

(2) The amount of consideration

- Equilon provided none

(3) The circumstances surrounding the release, including the conduct and intelligence of both the releasor and the release

- Equilon was in a superior bargaining position and threatened to auction off the property if the Plaintiff did not agree to its price and to the enter into the Retail Sales Agreement), and

(4) The actual presence of an issue of liability

- One existed which the Plaintiff was unaware—Equilon's failure to act on the Knight Special Land Use proposal.

C. The Plaintiff Was Unaware That Equilon Failed To Oppose The Knight Special Land Use Proposal

Knowledge is a requirement when determining the validity of a release. The cases put it very simply, and without dependence or reliance upon the language employed in the release or form thereof: A releasor who believes he is without personal injuries, or that he has certain minor injuries only, and who, secure in his belief, executes a general release, will not be bound by it if other and more serious injuries are discovered later. *Denton v. Utley*, 350 Mich. 332, 86 N.W.2d 537 (1957).

As discussed above, the Plaintiff was unaware that Equilon received notice of the Knight Special Land Use proposal in 2002 when he signed the purportedly "mutual" Release. Had he known this, the Plaintiff would not have signed Equilon's purportedly "mutual" Release. (**Exhibit -8**).

V. THE PLAINTIFF WOULD NOT OBJECT TO A DISMISSAL OF THE FRAUDULENT CONCEALMENT CLAIM (COUNT TWO)

VI. THE COURT SHOULD GRANT JUDGMENT UNDER MCR 2.116(I)(2) IN FAVOR OF THE PLAINTIFF ON THE BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING CLAIM UNDER THE RETAIL SALES AGREEMENT

For the reasons contained herein, this Court should rule that as a matter of law Equilon's failure to continue Market Area Pricing and subsequent assignment of the Plaintiff's fuel supply contract to a "jobber" it knew did not engage in Market Area Pricing violated the implied duty of good faith and fair dealing inherent in Equilon's self-reserved discretion to apply Market Area Pricing.

CONCLUSION

For the foregoing reasons, this Court should deny Equilon's Motion for Summary Disposition in its entirety and grant judgment in favor of the Plaintiff pursuant to MCR 2.116(I)(2) on the Plaintiff's breach of the duty of good faith and fair dealing claim under the Retail Sales Agreement. To the extent the Court dismisses any claim besides Fraudulent Concealment (Count Two) or determines the Plaintiff has not adequately pled any of the claims herein asserted, the Plaintiff respectfully requests leave to amend the Complaint.

RESPECTFULLY SUBMITTED this 4th day of DECEMBER 2010

HADOUSCO. |PLLC

/s/ Nemer N. Hadous
Nemer N. Hadous
(AZ: 027529) (CA: 264431)
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ATTORNEY FOR PLAINTIFF
Hassen Harp

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon Equilon's attorneys of record in the above-captioned matter at their respective addresses disclosed on the pleadings on the **3rd** day of **DECEMBER 2010** by:

X Email

Signature: **/s/Nemer Hadous**
Nemer N. Hadous