

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

IN RE: MOTOR FUEL TEMPERATURE)	
SALES PRACTICES LITIGATION)	
)	
This Document Relates To:)	MDL No. 1840
)	Case No. 07-1840-KHV
)	
<u>Wilson, et al. v. Ampride, Inc., et al.,</u>)	
Case No. 06-2582-KHV,)	
)	
and)	
)	
<u>American Fiber & Cabling, LLC, et al. v. BP Products</u>)	
<u>North America Inc., et al.,</u>)	
Case No. 07-2053-KHV.)	
)	

MEMORANDUM AND ORDER

This matter is before the Court on Defendants’ Motion For Summary Judgment Dismissing Plaintiffs’ Requests For Injunctive Relief (Doc. #2725) filed November 1, 2011.¹ Defendants argue that they are entitled to summary judgment on plaintiffs’ requests for injunctive relief for three reasons: (1) Kansas law prohibits the injunctive relief that plaintiffs request, (2) Rule 19, Fed. R. Civ. P., bars plaintiffs’ requests for injunctive relief because Kansas is a required party whose joinder is not feasible and (3) under Burford v. Sun Oil Co., 319 U.S. 315 (1943), the Court should abstain from exercising jurisdiction over plaintiffs’ requests for injunctive relief. For the following reasons, the Court overrules defendants’ motion.

Summary Judgment Standards

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show no genuine issue as to any material

¹ Defendants have requested oral argument on this motion. Because oral argument will not materially assist the determination of this motion, and will ultimately delay its resolution, the Court denies the request. See D. Kan. Rule 7.2.

fact and that the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Vitkus v. Beatrice Co., 11 F.3d 1535, 1538-39 (10th Cir. 1993). A factual dispute is “material” only if it “might affect the outcome of the suit under the governing law.” Liberty Lobby, 477 U.S. at 248. A “genuine” factual dispute requires more than a mere scintilla of evidence. Id. at 252.

The moving party bears the initial burden of showing the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Hicks v. City of Watonga, 942 F.2d 737, 743 (10th Cir. 1991). Once the moving party meets its burden, the burden shifts to the nonmoving party to demonstrate that genuine issues remain for trial as to those dispositive matters for which it carries the burden of proof. Applied Genetics Int’l, Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990); see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986); Bacchus Indus., Inc. v. Arvin Indus., Inc., 939 F.2d 887, 891 (10th Cir. 1991). The nonmoving party may not rest on its pleadings but must set forth specific facts. Applied Genetics, 912 F.2d at 1241.

The Court views the record in the light most favorable to the nonmoving party. Deepwater Invs., Ltd. v. Jackson Hole Ski Corp., 938 F.2d 1105, 1110 (10th Cir. 1991). It may grant summary judgment if the nonmoving party’s evidence is merely colorable or is not significantly probative. Liberty Lobby, 477 U.S. at 250-51. In a response to a motion for summary judgment, a party cannot rely on ignorance of facts, on speculation, or on suspicion, and may not escape summary judgment in the mere hope that something will turn up at trial. Conaway v. Smith, 853 F.2d 789, 794 (10th Cir. 1988). The heart of the inquiry is “whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter

of law.” Liberty Lobby, 477 U.S. at 251-52.

Factual Background

The parties spend much of the briefing on this motion addressing whether Kansas law requires, permits or prohibits ATC at retail. For the most part, they simply rehash arguments they made in their briefs on Defendants’ Motion For Summary Judgment On Plaintiffs’ KCPA And Unjust Enrichment Claims (Doc. #2705) filed November 1, 2011, which the Court overruled on April 2, 2012. Memorandum And Order (Doc. #4228). Those briefs incorporated by reference much of the briefs on this motion. Because the Court has already addressed the parties’ arguments on this issue, and sees no need to further address them here, the Court disregards any facts that relate only to the matters the Court addressed in its previous order.

Both parties’ purported statements of fact contain legal arguments and conclusions, specifically with respect to the statutory and regulatory framework that governs the sale of motor fuel at retail in Kansas. These are not “facts” for purposes of summary judgment. Sprint Commc’ns Co. v. Vonage Holdings Corp., 500 F. Supp.2d 1290, 1303-04 (D. Kan. 2007) (attorney argument, commentary and legal conclusions not facts admissible in evidence under Rule 56(e), Fed. R. Civ. P.). The Court also disregards any fact that is immaterial or is not properly supported by the record. See Fed. R. Civ. P. 56(c), (e); D. Kan. Rule 56.1; Law v. Nat’l Collegiate Athletic Ass’n, 902 F. Supp. 1394, 1398 (D. Kan. 1995).

The following facts are either uncontroverted, deemed admitted or where controverted, viewed in the light most favorable to plaintiffs, the non-movants.

Plaintiffs have only two remaining claims – one for willfully concealing, suppressing, omitting or failing to state a material fact in connection with a consumer transaction, Kan. Stat. Ann.

§ 50-626(b)(3), and another for unconscionable acts and/or practices, id. § 50-627. Both claims arise under the Kansas Consumer Protection Act (“KCPA”), Kan. Stat. Ann. § 50-623 et seq.

Plaintiffs request the following injunctive relief:

An order prohibiting and enjoining defendants from engaging in the following practices and acts:

Selling motor fuel in the State of Kansas at temperatures in excess of 60 degrees Fahrenheit at prices not adjusted to account for temperature expansion;

Selling motor fuel in the State of Kansas at temperatures in excess of 60 degrees Fahrenheit without adjusting the volume to account for temperature expansion;

Failing to disclose what the price of a gallon of motor fuel sold at retail in the State of Kansas would be if it were adjusted to be the equivalent of a standard U.S. petroleum gallon (i.e., a gallon at 60 degrees Fahrenheit);

Failing to disclose the temperature of motor fuel sold at retail in the State of Kansas; and

Failing to disclose that the energy, quality and value of motor fuel sold at retail in the State of Kansas decreases when the temperature of the motor fuel increases.

An order directing defendants to:

Install and maintain ATC-equipped motor fuel dispensers at all retail locations it owns, franchises, or that sell its branded motor fuel in the State of Kansas in a manner the court deems just and proper;

Disclose the temperature of motor fuel sold at all retail locations it owns, franchises, or that sell its branded motor fuel in the State of Kansas in a manner the court deems just and proper; and/or

Disclose, in a manner the court deems just and proper, at all retail locations it owns, franchises, or that sell its branded motor fuel in the State of Kansas that the energy, quality, and value of motor fuel sold at retail decreases when the temperature of the motor fuel increases.

Amended Pretrial Order (Doc. #3809) filed March 20, 2012 at 43-44.²

The Kansas Division of Weights and Measures is charged with enforcing Kansas weights and measures laws, which govern the retail sale of motor fuel in Kansas. This includes the provisions of the National Institute of Standards and Technology (“NIST”) Handbooks 44 and 130, to the extent that Kansas has adopted them by statute or regulation. The current Director of the Kansas Division of Weights and Measures, Timothy Tyson, interprets Kansas law to prohibit ATC at retail. As recently as 2007, however, the Division took the position that Kansas law permitted ATC at retail. Kansas law has not changed since 2007. The parties dispute what weight, if any, the Court should give Tyson’s interpretation of Kansas law.

They also dispute whether Kansas would have to specifically approve an ATC-equipped retail motor fuel dispenser before defendants could use it to sell motor fuel at retail in Kansas, and whether any ATC device has received a certificate of conformance that would allow defendants to use it in Kansas. The California Division of Measurement Standards operates the California Type Evaluation Program (“CTEP”), which is an authorized National Type Evaluation Program (“NTEP”) laboratory. CTEP has issued a certificate of conformance (Certificate of Approval No. 5510(a)-07) for an ATC-equipped retail motor fuel dispenser developed by Gilbarco Veeder-Root. The certificate states that the device complies with the applicable technical requirements of the

² Defendants object to this laundry list of injunctive relief on grounds that plaintiffs have not preserved their request for these specific forms of injunctive relief in the pleadings. Defendants do not, however, argue that failure to plead specific requests for injunctive relief somehow limits the Court’s power to craft an appropriate equitable remedy. See Lemon v. Kurtzman, 411 U.S. 192, 200 (1973) (“In shaping equity decrees, the trial court is vested with discretionary power”) (citing Swann v. Charlotte-Mecklenburg Bd. Of Educ., 402 U.S. 1, 15 n.10 (1971)); see also Brunswick Corp. v. Spirit Reel Co., 832 F.2d 513, 525 (10th Cir. 1987) (trial court has broad discretion to grant or deny injunction).

California Code of Regulations for Weighing and Measuring Devices, which requires compliance with Handbook 44.³

Defendants currently do not use ATC at retail. They also do not disclose the temperature of, or the affect of temperature on, the motor fuel they sell. The Division of Weights and Measures does not require retailers to post notices disclosing the temperature of motor fuel sold or the affect of temperature on that fuel. If a retailer of motor fuel in Kansas put a misleading sticker or label on a pump, the Division would ask the retailer to remove it unless the federal government required it. In conjunction with a settlement agreement with plaintiffs, Costco has begun posting on its pumps in Kansas labels that disclose how temperature affects motor fuel. Tyson testified that the statements in these labels are true. He also testified that he was not aware of anything that would prevent a retailer from posting the temperature of the motor fuel which they sell.

The parties dispute the degree to which the Division of Weights and Measures would be burdened if ATC were implemented at retail in Kansas. Plaintiffs contend that short of requiring ATC-equipped retail motor fuel devices, requiring retailers to disclose motor fuel temperature and/or how temperature affects motor fuel could substantially enhance the fairness of retail motor fuel transactions.

Analysis

As noted above, defendants argue that they are entitled to summary judgment on plaintiffs'

³ Plaintiffs contend that this device could be used in Kansas. Defendants contend that no ATC device has been approved for use in the sale of motor fuel at retail in Kansas because (1) Kansas has not approved the device, (2) Gilbarco Veeder-Root has not sold the CTEP-approved device to any gas station in the United States and (3) Gilbarco could not sell the device in the United States before making certain modifications to it. Neither party, however, addresses the fact that the CTEP certificate of conformance has been withdrawn. See *Cotsoradis Depo.* at 25-26. It is unclear what affect, if any, this development has on the parties' positions.

requests for injunctive relief for three reasons: (1) Kansas law prohibits the injunctive relief that plaintiffs request, (2) Rule 19 bars plaintiffs' requests for injunctive relief because Kansas is a required party whose joinder is not feasible and (3) under Burford, the Court should abstain from exercising jurisdiction over plaintiffs' requests for injunctive relief.

I. Kansas Law On ATC At Retail

In its order on Defendants' Motion For Summary Judgment On Plaintiffs' KCPA And Unjust Enrichment Claims (Doc. #2705), the Court addressed the parties' arguments with respect to whether Kansas law requires, permits or prohibits the use of ATC-equipped retail motor fuel devices. Memorandum And Order (Doc. #4228) at 8-18. It held that Kansas law authorizes the sale of motor fuel at retail in gross gallons, that is, without accounting for temperature. Id. at 17-18. It declined to find as a matter of law, however, that Kansas law categorically prohibits the use of ATC-equipped retail motor fuel devices. The Court finds no reason to address the matter any further here. If plaintiffs prevail at trial, the parties will have a chance to address what forms of injunctive relief are appropriate given the confines of the statutory and regulatory framework that governs the retail sale of motor fuel.⁴

II. Rule 19

Rule 19 requires a two-step analysis before dismissing a claim for failure to join an indispensable party. Davis ex rel. Davis v. United States, 343 F.3d 1282, 1288 (10th Cir. 2003) ("Davis II"). First, the Court must determine whether the absent person is a "required party," and if so, whether the required person may be joined.

⁴ This includes defendants' due process concerns, which they raised for the first time in their reply. See Cook v. Olathe Med. Ctr., Inc., 773 F. Supp.2d 990, 994 n.4 (D. Kan. 2011) (declining to consider arguments raised for first time in reply brief).

A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a)(1). Second, if a required party cannot be joined, the Court must determine whether, "in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b). Rule 19 provides the following non-exclusive list of factors to guide the Court's decision whether to proceed without the required party:

(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

(2) the extent to which any prejudice could be lessened or avoided by:

(A) protective provisions in the judgment;

(B) shaping the relief; or

(C) other measures;

(3) whether a judgment rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Fed. R. Civ. P. 19(b); see Davis II, 343 F.3d at 1288.

Defendants argue that Kansas is a required party because without joining Kansas, (1) the Court cannot require defendants to use ATC-equipped retail motor fuel devices or post disclosures regarding the temperature of, or affect of temperature on, motor fuel, Fed. R. Civ. P. 19(a)(1)(A), and (2) Kansas' ability to protect its interests would be impaired, Fed. R. Civ. P. 19(a)(1)(B).

A. Kansas As Required Party Under Rule 19

1. Court Can Accord Complete Relief Without Kansas As A Party

Defendants argue that Kansas would have to make regulatory changes before they could comply with an injunction that requires them to implement ATC-equipped retail motor fuel dispensers or disclose the temperature of, or the affect of temperature on, the motor fuel they sell. Defendants argue that an injunction aimed solely at them would be insufficient. Defendants cite Tyson's testimony in support. They state that the Kansas Division of Weights and Measures would require the removal of any disclosure of the temperature of, or affect of temperature on, the motor fuel defendants sell. Tyson's testimony, however, does not support defendants' position.

Tyson testified that he would require a motor fuel retailer to remove misleading disclosures not required by the federal government. Tyson Depo. at 297. He also testified that the labels Costco has begun posting on its pumps in Kansas, which disclose the affect of temperature on motor fuel, are true, id. at 297-98, that is, not misleading. He did not testify that the Division of Weights and Measures would require Costco to remove the labels, and stated that he was not aware of anything that would prevent a retailer from posting the temperature of motor fuel it sells. See id. at 296-99.

If Costco can post labels on its pumps that disclose the affect of temperature on motor fuel, and if nothing prevents a retailer from posting the temperature of motor fuel it sells, the Court could require defendants to disclose this information without requiring action by the Kansas Division of Weights and Measures. The Court could therefore accord complete relief without Kansas as a party. Moreover, as in the Costco settlement, the Court could order defendants to take all reasonable steps to seek regulatory approval of implementing ATC.

2. Kansas' Interest In The Litigation

Defendants argue that Kansas has an interest in the litigation because it could affect how motor fuel is sold at retail in Kansas. Plaintiffs counter that because Kansas has not affirmatively claimed an interest in this litigation, it cannot be a required party under Rule 19(a)(1)(B). It appears, however, that Rule 19 does not require a party to formally assert a claim with respect to an interest it may have in the litigation. Rather a person who “claims an interest relating to the subject of the action” is someone with a “claimed interest,” that is, someone who claims to have an interest that is related to the litigation, and which claimed interest is not patently frivolous. See Citizen Potawatomi Nation v. Norton, 248 F.3d 993, 998 (10th Cir. 2001); Davis v. United States, 192 F.3d 951, 958 (10th Cir. 1999) (“Davis I”). Thus Kansas appears to have an interest in this litigation because it regulates the retail sale of motor fuel, and this litigation could affect how motor fuel is sold at retail in the state.

Whether state interests would be impaired or impeded by this litigation without an ability by Kansas to protect the interests is unclear. Nevertheless, assuming that Kansas is a required party whose interests could be impaired or impeded if the litigation proceeds without it, and whose joinder is not feasible, defendants have not shown that “in equity and good conscience,” the Court should dismiss the case rather than allow it to proceed among the existing parties.

B. Action Should Proceed Among Existing Parties

Defendants argue that Kansas cannot be joined as a party because it is immune from suit under the Eleventh Amendment of the U.S. Constitution. Plaintiffs do not disagree. When a “person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed.”

Fed. R. Civ. P. 19(b). Under Rule 19, the Court should consider (1) the extent to which a judgment rendered in Kansas' absence might prejudice it or the existing parties and (2) the extent to which any prejudice could be lessened or avoided by (A) protective provisions in the judgment, (B) shaping the relief or (C) other measures. Fed. R. Civ. P. 19(b). The United States Supreme Court has described these factors as representing four distinct interests: (1) plaintiffs' interest in having a forum to bring their claims; (2) defendants' interest in avoiding multiple litigation, inconsistent relief or sole responsibility for a liability they share with another; (3) the interest of the outsider whom it would have been desirable to join; and (4) the interest of the courts and the public in complete, consistent, and efficient settlement of controversies. Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 109-11 (1968); see also Davis II, 343 F.3d at 1290.

Defendants argue that issuing injunctive relief in Kansas' absence will prejudice Kansas because any such relief will require Kansas to take regulatory action. They also rely on the "strong policy favoring dismissal when a court cannot join [an absent party] because of sovereign immunity." Citizen Potawatomi Nation, 248 F.3d at 1001. Citizen Potawatomi Nation, however, is narrower than defendants suggest. Noting that absent parties would suffer substantial prejudice if the action proceeded without them and that the Court had no way to lessen the prejudice, the Tenth Circuit treated the presumption as just one of several factors that favored dismissal. Id.; see also Davis I, 192 F.3d at 960-61 (infeasible joinder of required party because of sovereign immunity does not require dismissal under Rule 19). Here, the other two factors the Tenth Circuit considered – prejudice and the court's ability to mitigate it – weigh in favor of letting the litigation proceed.

As noted above, defendants have not shown that all forms of injunctive relief which plaintiffs seek would require Kansas to take regulatory action. Without any action by the Kansas Division

of Weights and Measures, Costco has already begun disclosing the affect of temperature on the motor fuel it sells at retail. Thus Kansas will not necessarily be prejudiced and the Court could mitigate or eliminate any potential prejudice to Kansas by carefully crafting a remedy that avoids stepping on the toes of the Kansas Division of Weights and Measures.

Defendants argue that without Kansas as a party they could be subject to inconsistent mandates – Kansas law, which they argue prohibits the use of ATC at retail, and an injunction that requires them to install ATC equipment at retail. Whether Kansas law prohibits ATC at retail is an open question. If called upon to craft an appropriate remedy, the Court will not require defendants to violate the law.

For these reasons, and given plaintiffs’ interest in having a forum to bring their claims, the Court, in equity and good conscience, will allow the litigation to proceed among the existing parties.

III. Burford Abstention

Under Burford v. Sun Oil Co., 319 U.S. 315 (1943), defendants argue that the Court should abstain from exercising jurisdiction over plaintiffs’ claims to the extent they seek injunctive relief. They argue that any injunction that requires defendants to install ATC-equipped retail motor fuel devices or to disclose the temperature of, or effect of temperature on, motor fuel sold at retail would disrupt Kansas’ efforts to establish a coherent policy regarding the retail sale of motor fuel.

The Court has a “virtually unflagging obligation” to exercise the jurisdiction given it. Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 716 (1996) (quoting Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 821 (1976)). Although this obligation is not absolute, declining to exercise jurisdiction under Burford is appropriate in a “narrow range” of “extraordinary circumstances.” Quackenbush, 517 U.S. at 726. The Burford doctrine provides that

[w]here timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are “difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar”; or (2) where the “exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.”

New Orleans Pub. Serv., Inc. v. Council of City of New Orleans, 491 U.S. 350, 361 (1989) (“NOPSI”) (quoting Colo. River, 424 U.S. at 821); see also Quackenbush, 517 U.S. at 726-27; Todd v. DSN Dealer Serv. Network, Inc., 861 F. Supp. 1531, 1538-39 (D. Kan. 1994) (quoting Todd v. Richmond, 844 F. Supp. 1422, 1427 (D. Kan. 1994)). Although Burford is concerned with protecting complex state administrative processes from undue federal interference, it does not require abstention whenever there exists such a process, or even in all cases where there is a potential conflict with state regulatory law or policy. NOPSI, 491 U.S. at 361; Colo. River, 424 U.S. at 815-16).

Defendants argue that the Kansas Judicial Review and Civil Enforcement of Agency Actions Act (“KJRA”), Kan Stat. Ann. § 77-601 et seq., provides the proper mechanism for plaintiffs to seek review of the regulations that (in defendants’ view) prohibit ATC at retail. This argument, however, misconstrues the nature of the case. Plaintiffs are consumers who purchased motor fuel at retail in Kansas from defendants who own, operate or control retail motor fuel stations in Kansas. Plaintiffs’ claims arise under the Kansas Consumer Protection Act (“KCPA”), Kan. Stat. Ann. § 50-623, et seq., for willful nondisclosure in violation of Section 50-626(b)(3) and unconscionable acts and/or practices in violation of Section 50-627. They do not ask the Court to enjoin the enforcement of an order by a state agency, e.g. Burford, 319 U.S. 315, or to address complex issues of state law that are the subject of ongoing regulatory proceedings, e.g. insurance company liquidation or insolvency

cases, see Grimes v. Crown Life Ins. Co., 857 F.2d 699, 704 (10th Cir. 1988); Hartung v. Sebelius, 40 F. Supp.2d 1257, 1261 (D. Kan. 1999); Todd, 861 F. Supp. at 1543. Thus, adjudicating plaintiffs' claims does not require the Court to "interfere with the proceedings or orders of state administrative agencies." NOPSI, 491 U.S. at 361.

The Court understands that Kansas has established a framework for regulating the sale of motor fuel at retail. As noted above, however, the Court may craft appropriate relief that does not interfere with that statutory and regulatory framework. Defendants' concern about a potential conflict with state regulatory law or policy does not justify the Court forgoing its "virtually unflagging obligation" to exercise the jurisdiction given it. NOPSI, 491 U.S. at 359, 361; Quackenbush, 517 U.S. at 716.

IT IS THEREFORE ORDERED that Defendants' Motion For Summary Judgment Dismissing Plaintiffs' Requests For Injunctive Relief (Doc. #2725) filed November 1, 2011 be and hereby is **OVERRULED**.

Dated this 4th day of April, 2012 at Kansas City, Kansas.

s/ Kathryn H. Vratil
KATHRYN H. VRATIL
United States District Judge