IN THE SUPREME COURT OF OHIO

DONALD J. CASSERLIE, et al.,	:	
	:	
Appellants,	:	Case No. 2007-1408
	:	
vs.	:	
	:	On Appeal from the Cuyahoga
	:	County Court of Appeals
SHELL OIL COMPANY, et al.	:	Eighth Appellate District
Appellees.	:	

REPLY BRIEF OF APPELLANTS DONALD J. CASSERLIE, et al.

ROBERT E. SWEENEY CO., L.P.A.
Bernard Goldfarb (#0007719)
(COUNSEL OF RECORD)
Sean Kelly (#0075442)
Suite 1500 Illuminating Building
55 Public Square
Cleveland, Ohio 44113
Tel. 216-696-0606
Fax. 216-696-0732

THE O'QUINN LAW FIRM
Anthony E. Farah
Tex. Bar No. 24007172
N.Y. Registration No. 4488789
2300 Lyric Centre
440 Louisiana
Houston, Texas 77002
Tel. 713-223-1000
Fax. 713-222-6903

COUNSEL FOR PLAINTIFFS-APPELLANTS

BAKER & HOSTETLER, LLP
Thomas R. Lucchesi, Esq. (COUNSEL OF RECORD) (0025790)
Lora M. Reece, Esq (0075593)
1900 East 9th Street, Suite 3200
Cleveland, Ohio 44114-3485

BAKER BOTTS LLP
J. Michael Baldwin, Esq.
910 Louisiana
Houston, Texas 77002-4995

COUNSEL FOR DEFENDANTS-APPELLEES

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

I. INTRODUCTION

Shell's brief is a remarkable work of myopic advocacy, and misdirection.[1] Shell cannot prevail by resorting to the plain language of the statute involved in the proposition of law relevant here. This Court must only determine whether the definition of good faith under the UCC, which incorporates an "honesty in fact" component, requires a subjective inquiry. An affirmative determination that "honesty" denotes a subjective test mandates reversal of the decisions below.

To avoid this result, Shell argues that Appellants' case theories have shifted, that the floodgates of litigation will open, that the objective commercial reasonableness test alone applies, that Appellants have no evidence of Shell's intent, and that the caselaw is completely in Shell's favor. Shell's arguments are unavailing.

By way of background, this case has been in litigation for nearly 10 years. Appellants, who are Shell-branded service station dealers, bring a breach of contract action, alleging that Shell has set its wholesale gasoline price ("DTW") to them in a manner calculated to drive Appellants out of business. If true, Appellants argue, this is a breach of the open price term in their contracts because the law requires an open price to be set in good faith. Good faith, in turn, has an objective component (commercial reasonableness) and a subjective component (honesty in fact). A price calculated to drive a contractual partner out of business is not honest and is, therefore, a breach of contract.

---

[1] Appellants herein are Shell Oil Company, Equilon Enterprises, LLC, Lyden Oil Company and True North Energy, LLC and their associated entities. Appellants are referred to collectively as "Shell" herein unless individually identified.

Courts from around the country, this Court's previous holdings, and common sense, dictate that an "honesty in fact" requirement denotes a subjective inquiry. This Court should reverse the decisions below, and remand this case for trial.

II. ARGUMENT

A. Appellants' case has been clear and consistent throughout nearly 10 years of litigation – Shell pushed Appellants out of business using bad faith pricing tactics.

Shell wrongly contends that, over nearly 10 years of litigation, Appellants' claims have been "ever-shifting." This is not true. Rather, from the outset, Appellants claimed that Shell intended to force them out of business using bad-faith pricing, and other tactics. Shell takes a statement from Appellants' counsel out of context and twists it to suit Shell's misdirection routine herein.

Prices Shell charged to jobbers – service station dealers who purchased Shell gasoline at the rack – are only relevant to a small part of Appellants' claims. These "JTP" prices – in addition to other prices from other sellers to other purchasers – were evidence that Shell's price to Appellants was not set in good faith. In fact, Appellants economist, Dr. Taub, researched the relevant market and determined that a price within the range of Appellants' competition would have been approximately rack price plus 2 to 3 cents. Shell Supp. 87. Dr. Taub concluded that Shell charged Appellants considerably more than that. *Id.* Even True North's president, Lyden, admitted to charging far-in-excess of Taub's calculated good faith price – "rack-plus" 7 cents. On this basis alone should summary judgment have been denied and these conflicting facts sent to a jury for determination.[2]

An even more compelling reason existed for the trial court to deny summary judgment in this case. As set forth in Appellants' Merit Brief, and emphasized below, a good faith price must also be an honest one. A court determining honesty must employ a subjective inquiry. A subjective intent to push a contractual partner out of business – using a seller's unilateral power to set price to a captive buyer – is not honest.

Contrary to Shell's misstatements, the record was replete with evidence of Shell's intent to push Appellants out of business.[3] Appellants detailed the evidence Shell's intent to push the lessee-dealers out of business in their Merit Brief. While Appellants will not repeat citation to this evidence here, its existence was certainly enough to demonstrate a genuine issue of material fact and preclude summary judgment. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (Ohio 1997).

Because an underhanded attempt to push a contractual partner out of business is dishonest, and dishonesty requires a subjective inquiry under the U.C.C., the trial court should have denied Shell's motion for summary judgment. Shell's alarmist comments that to require a seller to be subjectively honest will spawn "endless litigation" is sheer nonsense.

---

[2] This evidence demonstrates that Shell's price for gasoline to Appellants was not commercially reasonable. To be a good faith price, an open price must be both commercially reasonable and honest in fact. R.C. 1302.01(2).

[3] The proof, the adage goes, is "in the pudding." Because this case has been in litigation for nearly 10 years, Shell's intent to push Appellants out of business is not only evident, but also realized. Of the more than 40 lessee-dealers who instigated this action, less than 5 remain in business as lessee-dealers.

B. **A subjective inquiry does not open the floodgates of litigation – regardless of the legislative history, the statute works. Very little open price contracts fall outside of the "normal case." This is one of the few.**

Shell contends that should a seller's subjective motives be subject to review by courts, "endless litigation" will ensue. As an initial matter, the comments to the U.C.C. contemplate that a posted price will normally satisfy the good faith requirement. Thus Shell relies on Official Comment 3 to U.C.C. § 2-305, which states in part that "in the normal case a 'posted price' or a future seller's or buyer's 'given price,' 'price in effect,' market price' or the like satisfies the good faith requirement." *See* U.C.C. § 2-305 cmt. 3. This, however, is not the normal case envisioned in Comment 3, because Shell does not intend to set prices in accord with real market conditions. Moreover, the evidence showed that Shell's intent behind its pricing practices is to drive Appellants out of business.

To begin with, Shell's DTW price is not a standard "posted price." This is not a price available to the public – it is a series of prices paid only by lessee-dealers such as Appellants, on a pad by pad basis. *See* Appellee's Br. at 5-6. The DTW price lacks the economic characteristics of a valid posted market price. First, the DTW is not a price that is publicly announced or published and available to market participants. It is available only to the Shell dealers that are required to purchase at that price. Second, Shell's DTW is not even a market price, as (1) Shell dealers cannot shop for Shell gasoline prices better than Shell's DTW price (Supp. 113); (2) Shell does not offer its DTW price to anyone other than its captive dealers (Supp. 217); (3) Shell's DTW price is, therefore, not subject to market discipline that is necessary to ensure that its DTW reflects competition in the market price (*Cf. Verizon Communications, Inc. v. F.C.C.*, 535 U.S. 467, 122 S.Ct. 1646

(2002) ("[M]any economists have declared that ... the prices that would result without regulation but under pure or perfect competition would be the 'ideal' prices" (citations omitted)); and (4) Shell's DTW prices were higher than the true competitive market prices (Shell Supp. 87).

An even more important distinction, however, is that this case *is not the "normal case."* As a matter of logic, it is not the normal case where Appellants have discovered and introduced evidence that Shell set its prices at levels calculated to drive Appellants out of business.

Indeed, the Fifth Circuit addressed and rejected Shell's very argument in *Mathis v. Exxon Corp.*, 302 F.3d 448, 455 (5th Cir. 2002).[4] According to the Fifth Circuit, "a lack of subjective good faith takes a challenge outside the bounds of what is normal." *Id.* at 457. The *Mathis* court relied upon other opinions, none of which is directly affected by *HRN*.

One such decision is *Allapattah Servs., Inc. v. Exxon Corp.*, 61 F.Supp.2d 1308 (S.D. Fla. 1999), *aff'd*, 333 F.3d 1248 (11th Cir. 2003). In *Allapattah*, the oil company (like Shell does here) argued that "its 'price in effect' is, by definition, a price set in good faith." The district court squarely rejected that argument: "Because the parties' dispute is not over the actual amount of the price *** but rather over the manner in which the wholesale price was calculated ***, the instant case is not the 'normal' case." *Id.* at 1322.

---

4 *Mathis* was premised on Texas law. The Texas Supreme Court, in what Appellants claim is a wrongly-decided and result-oriented opinion, disavowed *Mathis* in *HRN, Inc. v. Shell Oil Co.*, 144 S.W.3d 429 (Tex. 2004). At least one other court disagrees with the Texas Supreme Court's reasoning in *HRN*. *See Bob's Shell, Inc. v. O'Connell Oil Assoc., Inc.*, 2005 U.S. Dist. LEXIS 21318 (D. Mass. August 31, 2005).

Similarly, the Ninth Circuit in *Nanakuli Paving & Rock Co. v. Shell Oil Co.*, 664 F.2d 772 (9th Cir. 1981), validated an allegation that a seller failed its good-faith obligation under U.C.C. § 2-305(2) by failing to follow typical industry procedures in the way it changed its prices. Like *Allapattah*, that decision is inconsistent with Shell's position that a price in effect is automatically a price fixed in good faith under the U.C.C.

Thus, Shell's DTW price is not a posted price and this is not a normal case. In fact, Shell's entire discussion is a red herring – a feint designed to draw this Court's attention away from the real issue: that the definition of good faith requirement of "honesty in fact" mandates a subjective inquiry.

C. The two-pronged inquiry – objective and subjective -- must prevail in a § 2-305 analysis.

Only through myopic advocacy and misdirection can Shell convince this Court that the phrase "honesty in fact" does not denote a subjective element. Shell's position defines common sense and reason. Indeed, even one of Shell's chief authorities, *Wayman v. Amoco Oil Co.* 923 F.Supp. 1322 (D. Kan 1996) recognizes that an attempt to push a contractual partner out of business would violate U.C.C. § 2-305. The *Wayman* court validated the oil company's pricing scheme because the plaintiffs therein failed to present any evidence of dishonest purpose in pricing, thus failing to take their case outside of the "normal case." *Id.* at 1349. The *Wayman* court said as much: "If there was evidence that Amoco had, for example, engaged in discriminatory pricing or tried to run plaintiffs out of business, then the court's decision might be different." *Id.*

Accordingly, where there is evidence of dishonest purpose – like pushing a contractual partner out of business – a breach of contract based on § 2-305 occurs. The evidence Appellants presented demonstrating Shell's intent to push Appellants out of business should have precluded summary judgment.

Other courts have held that such evidence precludes summary judgment and presents a triable issue. In *Bob's Shell*, the district court agreed with Appellants' argument when it held that "section 2-305's purpose of preventing price discrimination should bar a supplier from trying to drive its dealers out of business, not merely remove the good faith presumption. This would appear to be true in particular where the dealers compete with the suppliers own retailers." [5] *Bob's Shell, Inc. v. O'Connell Oil Assoc., Inc.*, 2005 U.S. Dist. LEXIS 21318 (D. Mass. August 31, 2005) The *Bob's Shell* court noted that it was not alone and relying on established precedent citing *Nanakuli Paving & Rock Co. v. Shell Oil Co.*, 664 F.2d 772, 779 (9th Cir.1981); *Wilson v. Amerada Hess Corp.*, 168 N.J. 236, 773 A.2d 1121, 1131 (N.J.2001); *Wayman v. Amoco Oil Co.*, 923 F.Supp. 1322, 1349 (D.Kan.1996), *aff'd* 145 F.3d 1347, 1350 (10th Cir.1998).

Shell's argument does nothing to detract from the foregoing opinions which hold that a seller' subjective intent to push its buyer out of business is a breach of good faith. Instead, Shell directs this Court's attention away from the definition of honesty in fact, and toward a line of wrongly-decided and/or distinguishable cases.

D. Shell's "authorities" are either wrongly-decided or distinguishable.

The most telling weakness of Shell's position is that it spends its entire brief discussing commercial reasonableness and discrimination, while completely ignoring the plain language of the statute. Rather than concentrate on the statutory language, Shell misplaces its reliance on a small series of cases, most of which are distinguishable. None

---

5 Appellants adduced evidence that they compete with True North, their supplier.

of those cases involves a claim like the Appellants'. For example, some cases deal with claims that the price was too high given the franchisor's costs.[6] Such claims are the type protected by the statute's use of a good-faith standard rather than a reasonableness standard. Other cases involve claims that prices should be lowered to make it easier for dealers to compete with those in other distribution channels.[7] Standing alone, obviously, such allegations cannot establish bad faith on the part of the franchisor. And another case, *Richard Short Oil Co. v. Texaco, Inc.*, 799 F.2d 415 (8th Cir. 1986), justified summary judgment for the defendant on the plaintiff's failure to introduce "sufficient bad motive evidence." *Id.* at 422.[8] In this case, however, as summarized above, although the trial court generally denied discovery on the relevant factual questions, Appellants nevertheless have introduced more than enough "bad motive evidence" to justify a jury trial. Finally, *Ajir v. Exxon Corp.*, No. C93-20830, 1995 WL 261412 (N.D. Cal. May 2, 1995), *aff'd mem.*, 185 F.3d 865 (table) (9th Cir. 1999), does not apply either. *Ajir*

---

6 *E.g., Havird Oil Co. v. Marathon Oil Co.*, 149 F.3d 283, 290-91 (4th Cir. 1998); *TCP Indus., Inc. v. Uniroyal, Inc.*, 661 F.2d 542 (6th Cir. 1981); *USX Corp. v. Int'l Minerals & Chems. Corp.*, No. 86 C 2254, 1989 WL 10851 (N.D. Ill. Feb. 8, 1989).

7 *E.g., Adams v. G.J. Creel & Sons, Inc.*, 465 S.E.2d 84, 85 (S.C. 1995); *Mikeron, Inc. v. Exxon Co., U.S.A.*, 268 F. Supp. 2d 268, 276 (D. Md. 2003); *Schwartz v. Sun Oil Co.*, No. 96-72862 (E.D. Mich. Dec. 9, 1999), *rev'd in part and aff'd in part*, 276 F.3d 900 (6th Cir. 2002).

8 In several instances, the cases are so far removed from the present allegations that it is difficult to be sure exactly what allegations were involved. For example, in *T.A.M., Inc. v. Gulf Oil Corp.*, 553 F. Supp. 499 (E.D. Pa. 1982), the court states in a conclusory way that there is "no evidence that the prices * * * were arrived at in any way other than good faith." *Id.* at 509. The court does not explain precisely what allegations of bad faith were involved; it certainly does not suggest that the plaintiffs in that case attempted to prove that Gulf set prices in an effort to destroy their businesses. Similarly, *Exxon Corp. v. Superior Court of Santa Clara County*, 60 Cal. Rptr. 2d 195 (Ct. App. 1997), dismisses a claim for "price overcharging" in a brief passage at the end of a lengthy opinion primarily directed to a variety of other claims. *Id.* at 205. It is not at all clear that the claim involves either breach of contract or the UCC.

involved franchisees' allegations that Exxon's DTW prices were higher than the relevant market and jobber prices. The court held in part that "different prices for different classes of purchasers," without more, is not evidence of bad faith. But, it continued, the franchisees "[did] not provide any other evidence." *Id.* at **4-5. Appellants did.

Finally, the *HRN* case is wrongly decided, an example of result-oriented jurisprudence. It has been rejected in other cases. *HRN* should be rejected; it should not be the law of Ohio.

III. CONCLUSION

For the reasons set forth above, and in Appellant's merit brief, the Court should reverse the decisions below.

Respectfully submitted,

SEAN KELLY
(COUNSEL OF RECORD)

Bernard Goldfarb
Anthony E. Farah
ATTORNEYS FOR PLAINTIFFS-APPELLANTS

CERTIFICATE OF SERVICE

A copy of the foregoing Reply Brief of Appellants Donald J. Casserlie, *et al.* has been served, via U.S. Certified mail, postage prepaid, this 31st day of March, 2008, upon:

Thomas R. Lucchesi, Esq.
Lora M. Reece, Esq
Baker & Hostetler, LLP
1900 East 9th Street, Suite 3200
Cleveland, Ohio 44114-3485

J Michael Baldwin, Esq.
BAKER BOTTS LLP
910 Louisiana
Houston, Texas 77002-4995

Ms. Patty Lyden
LYDEN OIL COMPANY
5565 Airport Highway
Toledo, Ohio 43615

SEAN S. KELLY