**UNITED STATES BANKRUPTCY COURT**
**SOUTHERN DISTRICT OF MISSISSIPPI**

**IN RE:**

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| **STINSON PETROLEUM COMPANY, INC.,** | **CASE NO. 09-51663-NPO** |
| **DEBTOR.** | **CHAPTER 11** |

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| **BP PRODUCTS NORTH AMERICA INC.** | **PLAINTIFF** |
| **VS.** | **ADV. PROC. NO. 09-05073-NPO** |
| **STINSON PETROLEUM COMPANY, INC.** | **DEFENDANT** |

# ORDER DENYING MOTION FOR A PRELIMINARY INJUNCTION, TEMPORARY RESTRAINING ORDER, AND IMMEDIATE RELIEF FROM AUTOMATIC STAY AND GRANTING OTHER RELIEF

On October 23, 2009, there came on for hearing (the "Hearing") the Motion for a Preliminary Injunction, Temporary Restraining Order, and Immediate Relief from Automatic Stay (the "Motion") (Adv. Dkt. No. 1) contained within the Complaint (defined herein) filed by BP Products North America, Inc. ("BP"), in the above-styled adversary proceeding (the "Adversary"). The Debtor did not file a response to the Motion. At the Hearing, Julie Ratliff and Jeffery P. Reynolds of Jeffery P. Reynolds, P.A., and Gilbert R. Saydah, Jr. of Kelley Drye & Warren, LLP represented BP. Craig M. Geno and Melanie T. Vardaman of Harris Jernigan & Geno, PLLC, represented the Defendant/Debtor, Stinson Petroleum Company, Inc. (the "Debtor"). At the conclusion of the Hearing, the Court directed the parties to submit briefs addressing 11 U.S.C. § 365, a provision that BP did not cite in its Motion. BP filed the BP Products North America Inc.'s Supplemental Brief in

Support of Its Motion for a Preliminary Injunction, Temporary Restraining Order, and Immediate Relief from the Automatic Stay ("BP Brief") (Adv. Dkt. No. 18), on October 27, 2009, and the Debtor filed the Response to BP Products North America, Inc.'s Supplemental Brief in Support of Its Motion for a Preliminary Injunction, Temporary Restraining Order, and Immediate Relief from the Automatic Stay ("Debtor Brief") (Adv. Dkt. No. 22) on October 29, 2009. BP filed the BP Products North America, Inc.'s Reply to Debtor Stinson Petroleum Company, Inc.'s Response to Supplemental Brief ("BP Reply Brief") (Adv. Dkt. No. 26) on November 2, 2009. The Debtor filed the Debtor's Motion to Strike [or, in the alternative] Response to BP Products North America, Inc.'s Reply to Debtor Stinson Petroleum Company, Inc.'s Response to Supplemental Brief[1] ("Motion to Strike" or "Debtor Reply Brief") (Adv. Dkt. No. 27) on November 6, 2009. The Court, being fully advised in the premises, finds that the Motion should be denied for the reasons specified herein. However, the Court finds that other relief should be granted.

**Jurisdiction**

This Court has jurisdiction over the parties to and the subject matter of this Adversary pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (G). Notice of the Hearing was proper under the circumstances.

**Facts**

1. The Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy

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[1] The Debtor moved to strike the BP Reply Brief on the ground that its filing was not authorized or directed by the Court. In the alternative, the Debtor requested that the Court accept its Debtor Reply Brief, contained within its Motion to Strike, as a response to the BP Reply Brief. The Court hereby denies the Debtor's Motion to Strike but grants the alternative relief requested.

Code on August 4, 2009. (Case No. 09-51663-NPO, Dkt. No. 1).

2. BP commenced this Adversary on October 16, 2009, by filing BP Products North America Inc.'s Complaint for a Preliminary and Permanent Injunction, Temporary Restraining Order, and Relief from the Automatic Stay (the "Complaint") (Adv. Dkt. No. 1).

3. The issues raised by BP in the Adversary relate to the Branded Jobber Contract (the "BJC") entered into between BP and the Debtor on March 23, 2007. (Complaint Ex. A; BP Hearing Ex. A). Under the BJC, BP supplies branded fuel products to the Debtor for resale to the public at retail service stations approved to use BP's registered trademarks, including "BP" and AMOCO" (the "BP Trademarks"). (Complaint ¶ 6). BP and the Debtor agree that the BJC is an "executory contract" within the meaning of 11 U.S.C.§ 365.[2] (BP Brief ¶¶ 1, 7-9; Debtor Brief ¶ 1).

4. Regarding the procedural status of the BJC in the bankruptcy case at the present time, the parties further agree that the Debtor has not yet moved for approval of the assumption or rejection of the BJC under § 365(a). Moreover, the time for filing such a motion has not expired under § 365(d), which grants the Debtor until "any time before the confirmation of a plan" to assume or reject the BJC. 11 U.S.C. § 365(d)(2). Also, BP has not moved to compel the Debtor to assume or reject the BJC within a shorter period of time.

5. The Debtor and BP agree on very little else. BP contends that the Debtor is violating the licensing provisions of the BJC by selling and supplying non-BP gasoline at BP-branded service stations. (Complaint ¶¶ 44-53). BP further contends that the sales by the Debtor of "generic gasoline" to the public as "genuine BP fuel" violates: (a) the Lanham Act, 15 U.S.C. § 1125(a)

[2] Hereinafter, all code sections refer to the Bankruptcy Code found at Title 11 of the United States Code, unless specifically noted otherwise.

(Complaint ¶¶ 31-35); (b) the Mississippi Consumer Protection Act, Miss. Code Ann. § 75-24-5 (Complaint ¶¶ 36-39); and (c) common-law trademark infringement and unfair competition. (Complaint ¶¶ 40-43). BP also claims that the immediate termination of the BJC would comply with the provisions of the Petroleum Marketing Practices Act, 15 U.S.C. § 2802. (BP Brief ¶ 20).

6. The Debtor acknowledges that at some point during this bankruptcy case, it began selling non-BP fuel at the BP-branded retail service stations. (Debtor Brief ¶ 3). However, the Debtor argues that its actions were not willful violations of the BJC or of any applicable law because BP refused to supply the Debtor with any fuel products after the Debtor filed for bankruptcy. (Debtor Brief ¶ 3). BP disputes the Debtor's version of these events and maintains that it agreed to supply the Debtor with fuel on "pre-Pay" or "COD" terms after the Debtor filed for bankruptcy on the condition that the Debtor pay BP $135,000 for fuel that the Debtor already had purchased postpetition. The Debtor claims, however, that BP conditioned its future supply of fuel products on payment by the Debtor of prepetition debt.

7. The dispute between the Debtor and BP also concerns BP's retention of certain credit card receivables in the amount of $175,000, which BP contends it is entitled to offset for unpaid fuel. At this point, there is a dispute about whether the credit card receivables, or BP's claim against the Debtor, arose prepetition, postpetition, or some combination of both. (Debtor Reply Brief at 2).

8. In its Motion, BP seeks an order from this Court lifting the automatic stay under § 362 to allow BP immediately to terminate the BJC. (Complaint ¶ 64). BP also seeks an order enjoining the Debtor from further violating the BJC and from selling non-BP products at the service stations using BP Trademarks. (Complaint ¶ 65). In addition, BP seeks an order requiring BP to remove all BP Trademarks, signs, logos, designs, insignias, and any other trade dress from the retail

service stations. (Complaint ¶ 67).

## Discussion

In a chapter 11 case, § 365 authorizes the trustee, subject to the Court's approval, to assume or reject an executory contract at any time before the confirmation of the plan, unless on request of any party to the contract, the court specifies the time for assumption or rejection. Under § 1107(a), a debtor-in-possession (as in the case at bar) performs the same functions as a trustee, including the right to seek assumption or rejection of an executory contract. If a debtor-in-possession assumes an executory contract, the liabilities incurred in performing the contract are treated as administrative expenses under § 503(b)(1)(A). If the executory contract is rejected, the contract is deemed breached on the date "immediately before the date of the filing of the petition," 11 U.S.C. § 365(g), and the non-debtor party has a prepetition, general unsecured claim for breach of contract damages.

The issue presented before the Court is whether BP may seek relief against the Debtor before the Debtor has assumed or rejected the BJC under § 365. The Debtor contends that BP's request for relief from the automatic stay is premature, pending the assumption or rejection of the BJC. According to the Debtor, rather than complying with § 365:

> BP is asking this Court to bypass § 365 and make a determination that: 1) the Debtor breached the BJC; 2) the Debtor is incapable of curing the breach of any alleged default under the BJC; and 3) determine that BP is entitled to injunctive and declaratory relief as requested in its Complaint, all without complying with the applicable provisions of the Bankruptcy Code. Further, BP is asking this Court to provide this relief without any notice to any creditors of the Debtor's estate, including the Official Committee of Unsecured Creditors, of which BP is a member.

(Debtor Brief ¶ 5).

BP counters that the Debtor need not assume or reject the BJC in order for BP to enforce its

terms. In support of its contention, BP cites an unpublished opinion[3] of the Fifth Circuit Court of Appeals, In re Mirant Corp., 197 Fed. Appx. 285 (5th Cir. 2006). Claiming that injunctive relief is proper at this state of the proceedings, BP reasons as follows:

> Just like Mirant, in this case, the Debtor is obtaining postpetition benefits by using BP's trademarks and credit card processing system, but has wrongly refused to perform its obligations under the BJC. Just as the debtor in Mirant was ordered to perform under the agreement prior to its assumption or rejection, the Debtor should be required to perform under the terms of the BJC, debrand the BP sites where it sold or supplied non-BP fuel, and live with the consequences of its decision to fraudulently sell generic gasoline as BP fuel. Because the Debtor can be compelled to comply with the terms of the BJC prior to moving to assume or reject the BJC, the time remaining for the Debtor to move the Court to assume or reject the BJC is irrelevant.

(BP Brief ¶ 12 (footnote omitted)).

An analysis of the status of an executory contract prior to its assumption or rejection must begin with the United States Supreme Court's decision in NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984). The Bildisco Court held that the filing of a petition in bankruptcy renders the executory contract unenforceable against the debtor until it is formally accepted by the debtor. Id. at 532. As a result, the Court held that the NLRB was precluded from enforcing the terms of the collective bargaining agreement by charging the debtor with unfair labor practices. Id.

Significantly, the United States Supreme Court in Bildisco discussed executory contracts in general terms, and, therefore, that decision is not limited to collective bargaining agreements. Generally, after Bildisco, the non-debtor party to an executory contract or unexpired lease cannot require the debtor to adhere to the terms of an executory contract or lease, prior to its assumption.

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[3] BP failed to disclose in the BP Brief that the *per curiam* opinion in Mirant was unpublished, and thus, BP improperly cited the decision as binding precedent. *See* Mirant, 197 Fed. Appx. at 287 n.1; 5 Cir. R. 47.5.

*See* Douglas W. Bordewieck, The Postpetition, Pre-Rejection, Pre-Assumption Status of an Executory Contract, 59 Am. Bankr. L.J. 197, 200 (1985); *see also* In re El Paso Refinery, 200 B.R. 37, 43 (W.D. Tex. 1998) (until assumed or rejected, bankruptcy estate enjoys privileged position).

The contrary is generally true for the non-debtor party. Courts have held that the non-debtor party must continue to perform under the executory contract during the period of time from the moment of filing until the date the executory contract is assumed or rejected. Id.; *see* In re National Steel Corp., 316 B.R. 287, 305 (Bankr. N.D. Ill. 2004) (creditor could not enforce terms of executory contract against debtor prior to assumption); In re Pittsburgh-Canfield Corp., 283 B.R. 231, 238 (Bankr. N.D. Ohio 2002) (until executory contract has been rejected, non-debtor must continue to perform). For example, in In re Shoppers Paradise, Inc., 8 B. R. 271, 279 (Bankr. S.D.N.Y. 1980), the court required a lessee to pay postpetition rent to the debtor/lessor under a prepetition lease that had not yet been assumed or rejected. Indeed, a non-debtor party's refusal to perform may result in the debtor obtaining injunctive relief. *See* Data-Link Systems, Inc.v.Whitcomb & Keller Mortgage Co.(In re Whitcomb & Keller Mortgage Co.), 715 F.2d 375 (7th Cir. 1983) (bankruptcy court properly issued restraining order against creditor that ceased providing computer services prior to debtor's assumption or rejection of executory contract).

BP cites Mirant for a position contrary to the general authorities discussed above. As a preliminary matter, Mirant is an unpublished opinion and as such, does not constitute binding precedent except under limited exceptions that are not present here. *See* Mirant, 197 Fed. Appx. at 287 n.1; 5 Cir. R. 47.5. More importantly, such an interpretation of Mirant is misguided. First and foremost, the debtor in Mirant had filed a motion to reject. Mirant, 197 Fed. Appx. at 288. Consequently, § 365 had been implicated, notice had been provided as required, and there had been

an opportunity for a hearing. Here, no motion under § 365 has been filed to approve the assumption or rejection of BJC. Therefore, no notice or opportunity for a hearing has been afforded to creditors or other parties in interest.

Second, in Mirant, the Fifth Circuit observed that the debtor was deriving significant benefits from the agreement in question. Id. at 295. Pending the second motion to reject, the debtor continued to operate plants on land owned by the non-debtor party, to distribute electricity along the non-debtor party's lines, and to access certain facilities per the easement agreements. Id. The Debtor in this proceeding, however, is not receiving any fuel from BP under the BJC. On the other hand, the Debtor does derive some partial benefit from the BJC by continuing to use the BP credit card processing system and BP's trademarks.

Third, the second motion to reject was considered after plan confirmation in Mirant. Id. Before ordering performance of the contract pending the second motion to reject, "Mirant has been directly or indirectly ordered to perform under [the agreement] at least four times." Id. Here, this Adversary was filed more than ten (10) weeks after the bankruptcy case was commenced, and no order has been entered concerning the BJC.

Fourth, the debtor in Mirant contended that it received no benefit from the agreement and should not have to pay anything. At least at this point, it does not appear that the Debtor is claiming that it should not be required to pay BP, but only that its obligation to do so may be subject to setoffs/counterclaims. Moreover, the Debtor asserts that it is willing to pay for fuel if only BP would agree to sell it.

Finally, there was no allegation in Mirant that the non-debtor was refusing to perform. Here, it is undisputed that BP has refused, and continues to refuse, to perform its obligations under the

BJC, although BP claims its position is justified. (Complaint ¶ 22; Debtor Brief ¶ 3).

Thus, Mirant stands for the proposition that a court may compel a debtor to perform its obligations to an executory contract pending a ruling on the debtor's motion to assume or reject when the debtor was deriving significant benefits from the agreement, and the non-debtor continued to perform.[4] Moreover, Mirant does not stand for the proposition that a debtor may be compelled to perform under an executory contract when no motion to assume or reject is pending. Any other interpretation of Mirant is far too great a stretch. Accordingly, the Motion should be denied in the absence of a pending § 365 motion.

BP argues for the first time in the BP Brief that its request for injunctive relief is mandated by 28 U.S.C. § 959(b). That statutes provides:

> (a) Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property. Such actions shall be subject to the general equity power of such court so far as the same may be necessary to the ends of justice, but this shall not deprive a litigant of his right to trial by jury.
>
> (b) Except as provided in section 1166 of title 11, a trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

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[4] The Bankruptcy Code specifies that two types of agreements must be performed, even prior to assumption or rejection. Section 365(d)(3) provides that the trustee shall perform, subject to certain limitations, all obligations arising from and after the order for relief under any unexpired lease of nonresidential real property until the lease is assumed or rejected. Similarly, but with significant differences, § 365(d)(5) requires performance by the trustee in chapter 11 cases, again subject to certain limitations, of all obligations under an unexpired lease of personal property from or after 60 days after the order for relief until such lease is assumed or rejected. Had Congress intended for all trustees to perform under all executory contracts prior to assumption or rejection, it would not have included these two narrow provisions.

28 U.S.C. § 959. BP contends that Section 959(b) evinces a congressional intent that "bankruptcy is not a free ticket to disregard state laws applicable outside of bankruptcy." (BP Brief ¶ 14).

The Debtor, in response, points out that the purported infringement of BP's trademarks, resulting in alleged violations of state and federal laws, was the direct result of BP's own postpetition conduct, and it is within BP's control to cure the Debtor's alleged breach of the BJC and remedy its "infringement" of the BP Trademarks by supplying BP fuel to the Debtor's BP-branded service stations. (Debtor Brief ¶¶ 27-28). According to the Debtor, the actions that BP complains about were necessary to preserve the assets of the bankruptcy estate.

Given the current posture of this case, this Court concludes that allowing BP to terminate the BJC and debrand the retail service stations at this time would significantly interfere with the Debtor's successful reorganization. BP's witness at the Hearing, Ray Smith, admitted upon cross-examination that it would not be a good exercise of the Debtor's business judgment to "close" the locations at issue. To doom the reorganization of the Debtor, to the detriment of all its creditors without benefit of the procedures and remedies provided for executory contracts under § 365, is not the intent of 29 U.S.C. § 959. Moreover, that statute subjects enforcement of actions against debtors-in-possession "to the general equity power" of the bankruptcy court "so far as the same may be necessary to the ends of justice." 29 U.S.C. § 959(a).

Nevertheless, BP has raised issues regarding the Debtor's actions, which must be addressed, but in the proper procedural context. Therefore, the Debtor should be compelled to file a motion either to assume or reject, or to assume and assign, the BJC within ten (10) days of the date of this Order. Such motion should be heard on an expedited basis. By ordering this relief, 29 U.S.C. § 959 issues may be properly addressed.

## Conclusion

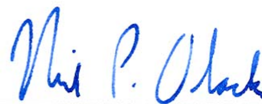
Accordingly, the Motion should be denied. The Court expresses no opinion on whether injunctive relief would have been granted if a motion under § 365 had been filed. The Court cannot reach that issue because of the present posture of this case. However, the Debtor should be compelled either to assume or reject, or to assume and assign, the BJC on an expedited basis.

IT IS, THEREFORE, ORDERED that the Debtor's Motion to Strike hereby is denied, but the Debtor's request to submit the Debtor Reply Brief hereby is granted.

IT IS FURTHER ORDERED that the Motion hereby is denied.

IT IS FURTHER ORDERED that the Debtor hereby is compelled to file a motion either to assume or reject, or to assume and assign, the BJC within ten (10) days of the date of this Order and that said motion shall be heard on an expedited basis.

SO ORDERED.



Neil P. Olack
United States Bankruptcy Judge
Dated: November 6, 2009