IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT IN AND FOR PINELLAS COUNTY, FLORIDA.

CASE NO.: 05-007822-CI-11

ALFRED WILLIAMS, on behalf of himself and all others similarly situated,

Plaintiff,

vs.

HERITAGE OPERATING, L.P., d/b/a HERITAGE PROPANE, a Delaware Limited Partnership, as successor in interest to PEOPLES GAS COMPANY,

Defendant.
_____/

ORDER FINDING LIABILITY OF HERITAGE OPERATING, LP ON BREACH OF CONTRACT CLAIM OF THE PLAINTIFF CLASS

THIS CAUSE, a bifurcated trial on the issue of liability, came before the Court on December 10, 2012, and December 11, 2012. The Court having heard the witnesses' testimony, argument of counsel and considering the memorandums filed by the parties, and otherwise being fully advised in the premises, hereby finds and orders as follows:

1. Plaintiff, ALFRED WILLIAMS, "Class Representative" entered into a standard General Sales Agreement ("GSA") with Heritage's predecessor, Peoples Gas Company ("Peoples Gas") on April 29, 1996. The GSA was a front and back preprinted form, the front page contained a handwritten description of equipment to be installed, work to be performed and the costs associated. The back of the GSA contained a pre-printed boilerplate language, which the

pertinent parts provided: that the title and property in the LP Gas tank and equipment would remain in the Company, that the Consumer would be responsible for all costs associated with removing tanks and equipment, that the Consumer would exclusively purchase and use the LP gas from the Company and that the "Company has the right to alter its schedule of charges for LP gas and service at any time without notice." The GSA is silent as to any charge for the rental of the LP gas tank ("tank rent").

2. On December 2, 2009, the Second District Court of Appeal reversed and remanded this Court's prior Summary Judgment ruling in favor of Defendant and stated "Because we cannot say as a matter of law that the contract provision at issue allows for the charge of a gas tank rental fee, we reverse the final summary judgment and remand for further proceedings." "The issue is whether "service" encompasses tank rental."

3. On October 22, 2010, a Class was certified as follows: "All customers who entered into contracts with Peoples Gas for LP Gas Service in Florida, which contracts are silent as to any "Tank Rental" who has been, and are being charged, such "Tank Rental" by the Defendant, HERITAGE OPERATING, L.P. d/b/a HERITAGE PROPANE."

4. In 2005, Defendant began to charge some of its customers in Pinellas County tank rent, who had not previously been charged tank rent. Plaintiff was one of those customers who was first charged tank rent in 2005.

5. In 2008, Defendant sent a notice to all customers (a "statement backer") modifying the terms of the parties' agreements to specifically include

tank rent, effective November 1, 2008. The statement specifically provided that "in addition to tank rental and propane charges, we may charge our Customers various charges as applicable . . ." and concluded "Your election to continue gas service with the Company after November 1, 2008, shall constitute your acceptance of the proposed amendment."

6. The Court finds that the language of the original form GSA: "Company reserves the right to alter its schedule of charges for LP Gas and Service, with or without notice" does not permit the company, without notice to and acceptance by the customer, to charge a fee for tank rent. The Court specifically finds that "tank rent" is not a "service" as that term is commonly used or reasonably read in plain terms and referenced in the GSA. Additionally, no other provision in the GSA allows Defendant to charge customers tank rent.

7. The Court finds the GSA silent as to tank rent, and the term "service" does not contemplate tank rent. Even if the term "service" is considered to be ambiguous, as the Defendant now argues, the conclusion would nevertheless be that the Defendant could not charge tank rent. The evidence at trial was undisputed that the GSA was a contract of adhesion. Ambiguities in adhesion contracts are construed against the drafter. See *Pasteur Health Plan, Inc. v. Salazar*, 658 So. 2d 543, 545 (Fla. 3d DCA 1995); *Antillean Marine Shipping Corp. v. LaUniversal De Seguros C. Por A.*, 359 So.2d 516, 517 (Fla. 3d DCA 1978). Here, it is undisputed that the drafter was Peoples Gas, Heritage's predecessor in interest. Even if the contract was not

an adhesion contract, as the drafter, any ambiguities would be construed against Heritage.

8. Defendant argues that by paying the tank rent charge Plaintiff agreed to the charge and waived any claim for breach of contract. However, the "Voluntary Payment Doctrine", § 725.04, Florida Statutes, permits a party to a contract who has received a demand for payment in excess of the amount due under the contract to pay the amount demanded and without waiving claims for breach of contract. Payment by a party to a contract in excess of the sum due under the contract does not modify the contract to include the new amount, *Lord v. Die Polder*, 113 So. 2d 440, 442 (Fla. 2nd DCA 1959.)

9. Accordingly, the Court finds that Defendant has breached the terms of the GSA by charging "tank rent" to any customer without prior notice to and acceptance by the customer of the modification.

10. The Plaintiff argues that the GSA could not be modified by the 2008 "statement backer" because the original form GSA included language which prevented the termination absent the occurrence of one of the listed conditions. The GSA provided six ways in which the customer could breach the contract, in which the company would terminate the contract; but was silent if the company breached the contract. The GSA is silent as to the duration of the Defendant's duty to provide LP gas, as long as one of the six conditions to terminate did not occur. As the testimony of Gary Braun and William Tate established at trial, that Heritage would provide LP Gas as long as the customer paid for it.

However, where a contract is simply silent as to a particular matter, that is, its language neither expressly nor by reasonable implication indicates that the parties intended to contract with respect to the matter, the court should not under the guise of construction, impose contractual rights and duties on the parties which they themselves omitted. *Gulf Cities Gas Corp. v. Tangelo Park Service Company*, 253 So. 2d 744, 748 (Fla. 4th DCA 1971). When the writing is silent on the point in controversy, courts are reluctant to add terms by implication, for there is a clear danger that, in so doing, the court will remake the contract. *Azalea Park Utilities v. Knox-Florida Development*, 127 So. 2d 121, 123 (Fla. 2d DCA 1961). Where one interpretation would lead to an agreement which is fair and equitable, while another interpretation would result in an unfair and inequitable agreement, the former must be selected. *Hunt v. First National Bank of Tampa*, 381 So. 2d 1194, 1197 (Fla. 2d DCA 1980).

For Defendants to unilaterally modify the GSA, this would render the agreement to be unenforceable; and any subsequent modification would require consent and a meeting of the minds of the parties to the contract.

11. Since the GSA is silent as to a tank rental charge, the Court finds that it is not reasonable for a customer to expect or demand free use and maintenance of a company owned tank in perpetuity. Therefore, the Court must determine what the parties would have included in the GSA had they anticipated an occurrence which in fact was overlooked until the 2008 "backer statement".

Any damages available to the class will stop as of November 1, 2008, for any prospective class member that continued to utilize LP Gas service through the Defendant. The Court considers the modification language contained in the 2008 "statement backer" to be a fair and equitable interpretation or modification of the GSA, even without additional or new consideration.

12. Further, the Court has found, and entered an Agreed Order, that the claim of any class member who first paid tank rent prior to November 22, 2000, is barred by the applicable statute of limitations and may not recover. These will be referred to as "Barred" class members.

13. GSAs with "tank rent," "tank rental," or similar language written on the face of the GSA are not "silent as to tank rent" and are not part of the Certified Class. These will be referred to as "Tank Rent Specified" members of the Notice Class.

14. GSAs of some members of the Notice Class have been found to be originated in the name of a builder or contractor ("Builder GSAs") or have been shown to be unsigned ("Unsigned GSAs"), or the customer file contains no GSA. The Court reserves ruling as to whether and under what circumstances these GSAs, or empty files without a GSA are enforceable and part of the Certified Class.

15. The Court further finds that some members of the group receiving notice of the class action ("Notice Class") have other (non-Peoples Gas) sales agreements. By the express description of the Certified Class, these members

of the Notice Class are not members of the Certified Class. These will be referred to as the "Excluded" members of the Notice Class.

16. The Court, having found potential liability to some class members in this bifurcated proceeding will now direct the parties to move forward in determining what, if any amounts are owed to members of the class ("Damages Phase").

17. The Court holds that other subgroups may be identified and contested during the Damages Phase and does not by this order or otherwise limit the subgroups that may be determined as files are reviewed.

18. Defendant has raised the affirmative defenses of Waiver, Estoppel, Acquiescence and Modification, but the Court finds that addressing these defenses at this time is premature. Therefore, the Court will address these affirmative defenses during the Damages Phase of the lawsuit.

ORDERED in St. Petersburg, Pinellas County, Florida this 2nd day of January, 2013.

Original Signed

JAN 02 2013

Pamela A.M. Campbell
Circuit Judge

PAMELA A.M. CAMPBELL
Circuit Court Judge

Copies furnished to:

JEFFREY M. LIGGIO, ESQ., 1615 Forum Place, Ste. 3-B, West Palm Beach, FL 33401
SCOTT T. JOHNI, ESQ., 105 South Edison Avenue, Tampa, FL 33606
KENT G. WHITTEMORE, ESQ., 100 Second Avenue South, Suite 304, St. Petersburg, FL 33701
EDDIE G. GODWIN, ESQ.,100 South Ashley Drive, Suite 1700, Tampa, FL 33602
R. CHARLES WILKIN, III, ESQ., Glass Wilkin, 1515 S. Utica, Suite 250, Tulsa, OK 74101