

collusion among sellers of retail gasoline to fix prices in that region. The investigation first arose from numerous complaints about the unusually high gasoline prices in Western New York during the fall of 2008 by gas stations in the Buffalo area. Prices during that time were as much as 38 cents per gallon higher than prices in nearby areas. (See the January 27, 2009, article entitled “Schumer, Higgins urge federal probe of gas prices,” annexed as **Exhibit B**.) Prices continue to be high relative to nearby areas. (See the Historical Price Charts for September 2009, annexed as **Exhibit C**.) URC is among a number of firms in the retail gasoline industry that received subpoenas *duces tecum* and subpoenas *ad testificandum* at the end of 2008 and in 2009 in connection with the investigation.

3. As set forth below, URC had been able to minimize the demands of prior subpoenas served by the Attorney General in this investigation, and the Attorney General had demanded very little of URC. It was not until the Attorney General received evidence indicating that URC may be engaged in illegal price fixing of gasoline from a third party in July of 2009 that this Office sought further materials from URC in order to investigate whether unlawful price fixing had occurred and is still occurring. The evidence received by the Attorney General was responsive to one of the Attorney General’s prior subpoena requests and should have been produced by URC. Consequently, the Attorney General requested that URC produce emails sent or received in 2008 by ten URC employees whom this Office believes are involved in, or responsible for, retail gasoline pricing and therefore likely to have information as to whether price fixing may have occurred. While URC produced emails for two individuals, URC informed this Office that emails did not exist for at least 5 of the 10 individuals from whom documents were requested, notwithstanding that those documents should have been preserved as of the time URC had notice of the Attorney General’s investigation and received the subpoena in

November 2008. As a result, the Attorney General served the September 15, 2009, Subpoena *Duces Tecum* and Subpoena *Ad Testificandum* at issue in this proceeding in order to determine (a) whether URC engaged in, or is currently engaging in, any anticompetitive conduct that resulted in harm to consumers in Western New York and (b) to determine whether URC negligently or willfully destroyed documents and / or did not perform adequate searches for materials responsive to the Attorney General's prior subpoenas. The Attorney General asks the Court to deny URC's motion to quash in its entirety and to grant the Attorney General's motion to compel.

Prior Subpoenas Served on URC and Kwik Fill

4. The Attorney General served an investigatory Subpoena *Duces Tecum* on URC, on November 26, 2008, and one on Kwik Fill, a wholly-owned subsidiary of URC, on November 25, 2008. Kwik Fill is a gasoline retailer. Copies of the Subpoenas *Duces Tecum* served on URC and Kwik Fill are annexed as **Exhibit D**. The subpoenas required the production of six categories of documents including communications, agreements, or arrangements between URC and any competitor in the sale or distribution of gasoline products. They also called for documents concerning the pricing of gasoline products by URC and its competitors, agreements with customers regarding the retail pricing of gasoline, communications with suppliers regarding the retail pricing of gasoline, and documents sufficient to show URC's revenue and profits. The Attorney General served identical subpoenas to a number of other firms in the industry.

5. In addition to the subpoenas *duces tecum*, the Attorney General served subpoenas *ad testificandum* on Kwik Fill and URC on November 25 and 26, respectively, in 2008. These subpoenas called for sworn testimony of witnesses regarding the subject matter of the subpoenas. See Exhibit B.

6. On December 2, 2008, Peter Abdella of Harter Secrest & Emery LLP, counsel for URC, sent a letter to Darcy M. Goddard, Assistant Attorney General, stating that URC “is amenable to accept service” of the Kwik Fill and URC Subpoenas “subject to certain conditions and given appropriate time.” A copy of Mr. Abdella’s December 2, 2008, letter is annexed as **Exhibit E**.

7. On December 8, 2008, the Attorney General and Mr. Abdella executed a Confidentiality Agreement that applied to all documents and information provided to the Attorney General by URC and Kwik Fill “in connection with OAG’s subpoenas duces tecum dated November 25, 2008, and November 26, 2008.” A copy of the Confidentiality Agreement is annexed as **Exhibit F**.

The Attorney General’s Efforts to Accommodate URC

8. The Attorney General accommodated URC’s requests to narrow the scope and burden of the subpoenas *duces tecum* and subpoenas *ad testificandum*. For example, a colleague and I interviewed employees of URC on an informal basis in lieu of taking witness statements under oath. On December 9, 2008, a colleague and I traveled to Buffalo, New York, to interview John Wagner, URC’s General Counsel. Although this Office preferred not to interview the General Counsel as a fact witness, URC insisted that Mr. Wagner was the most knowledgeable person on these issues. Because Mr. Wagner lacked knowledge of how retail pricing was determined and conducted at URC (which was unsurprising, given that Mr. Wagner does not have pricing responsibilities), I also interviewed by telephone, Ashton Ditka, URC’s Senior Vice President of Marketing, on December 17, 2008. These informal interviews took place in lieu of requiring representatives of URC to give witness statements under oath. The interview with Mr. Ditka lasted about one hour and was conducted by phone, and the interview of Mr. Wagner

lasted a few hours and took place in Buffalo so that Mr. Wagner would not have to travel to New York City. Thus, these interviews were not burdensome for URC.

9. Similarly, the documents requested by this Office pursuant to the subpoenas did not require much time or effort on the part of URC. After discussions between our Office and Mr. Abdella, this Office agreed to narrow the subpoena *duces tecum* to discrete categories of data and information as set forth in my letter to Mr. Abdella dated December 11, 2008.¹ This letter is annexed as **Exhibit G**. These data requests aimed to investigate whether a legitimate non-collusive reason existed for the unusually high gas prices in Western New York. URC responded with a letter from Mr. Abdella, dated December 15, 2008, agreeing to provide documents in response to certain requests but not to others. A copy of Mr. Abdella's December 15, 2008, letter to me is annexed as **Exhibit H**.

10. On January 16, 2009, the Attorney General received three boxes of hard copy documents from URC in response to my letter dated December 11, 2008. A copy of Mr. Abdella's transmittal letter accompanying URC's production is annexed as **Exhibit I**. The vast majority of documents that URC provided to this Office consisted of hard copy print outs of profit and loss reports and pricing data generated from URC's monthly marketing system. URC also produced a list of URC's retail locations in New York and competitor pricing surveys.

11. This Office later asked URC to provide its price survey data in an electronic format so that it could be analyzed properly by economists. URC stated, through their information technology manager, that providing the data electronically would be too burdensome and costly, thus URC did not comply with this Office's request. A copy of the email correspondence related to this Office's request that data be produced electronically is annexed as

¹ In my letter dated December 11, 2008, I stated that the Attorney General would deem production of the materials requested to constitute compliance with the subpoena, "without waiving the right to seek additional information at a later time."

Exhibit J. Other subpoenaed parties produced data electronically on a timely basis and did not indicate to this Office that it was burdensome to do so.

12. On February 2, 2009, I sent a letter to Mr. Abdella requesting documents responsive to Paragraph 1 of the November 26, 2008, Subpoena *Duces Tecum* served on URC.

The request called for:

“All documents concerning communications, agreements, or arrangements between United Refining and any competitor in the sale or distribution of gasoline products, including communications concerning gasoline pricing, sale, supply, marketing, advertising, distribution, output, territories, customers or markets.”

A copy of my February 2, 2009, letter to Mr. Abdella is annexed as **Exhibit K.** The Attorney General’s Office requested these documents from URC and numerous other firms in the industry in order to determine whether any inappropriate communications, agreements or arrangements concerning retail gasoline pricing existed among competitors in the industry. Other subpoenaed parties worked diligently to comply with this request and submitted responsive documents to the Attorney General.

13. Eleven days later, on February 13, 2009, I received a letter from Mr. Abdella dated February 11, 2009, stating that, “In both Mr. Wagner’s interview on December 9, 2008, and Mr. Ditka’s interview on December 17, 2008, these URC representatives advised you clearly that there were no agreements or arrangements between URC and any competitors on retail gasoline pricing. There are no documents showing any such agreements or arrangements.” A copy of Mr. Abdella’s February 11, 2009, letter is annexed as **Exhibit L.** The Attorney General gave URC the benefit of the doubt and did not request or demand any further information or documents from URC in the ensuing months.

Evidence of Potential Wrongdoing Received by the Attorney General in July 2009 and the Attorney General’s Efforts to Investigate

14. In July of 2009, the Attorney General received evidence from a third party indicating that URC may have unlawfully fixed the prices of retail gasoline in Western New York. Consequently, on July 14, 2009, I informed Mr. Abdella, by email, that the Attorney General's investigation into gas pricing in Western New York is ongoing. I also requested a list of individuals that work for URC and its affiliates and subsidiaries who are involved in any way in retail pricing and an organizational chart. A copy of my July 14, 2009, email to Mr. Abdella is annexed as **Exhibit M**.

15. In response to my July 14, 2009, request, Mr. Abdella replied on July 16th that: "I spoke with my client about your request. We feel that we have already provided significant information to you about these issues, including Ashton Ditka's interview in which he identified the other individuals involved in retail pricing and who reports to whom." A copy of Mr. Abdella's July 16, 2009, email is annexed as **Exhibit N**. Shortly thereafter, I had a telephone conversation with Mr. Abdella. I informed him that the Attorney General's Office had received evidence from a third party that should have been produced by URC in response to this Office's prior requests to URC and that indicated that URC had not conducted an adequate search.

16. On July 23, 2009, I asked Mr. Abdella when I could expect to receive the list of employees and an organizational chart. On July 24, 2009, Mr. Abdella repeated the names of four employees who were mentioned in Mr. Ditka's December 17, 2008, interview. Mr. Abdella's colleague, Jeffrey A. Wadsworth, provided an organizational chart on August 10, 2009, nearly four weeks after I had requested the chart. A copy of this correspondence is annexed as **Exhibit O**.

17. In a phone conversation I had with Mr. Abdella in July 2009, Mr. Abdella claimed that he never formally accepted service of the Attorney General's November 25 and 26,

2008, subpoenas addressed to URC and Quik Fill, despite the fact that (1) Mr. Abdella stated in his December 2, 2008, letter that URC is “amenable to accept service,” (2) Mr. Abdella executed a Confidentiality Agreement on December 8, 2008, which was made “in connection with OAG’s subpoenas duces tecum dated November 25, 2008, and November 26, 2008,” and (3) URC produced documents pursuant to the subpoena. See Paragraphs 6 and 7 above. This Office believes this claim was a transparent attempt to avoid complying with this Office’s requests.

18. Because Mr. Abdella claimed to have never accepted service of the November 2008 subpoenas, and in an effort to promptly put an end to Mr. Abdella’s dilatory game, the Attorney General personally served a Subpoena *Ad Testificandum* and a Subpoena *Duces Tecum* on URC on July 29, 2009. The subpoena *duces tecum* demanded precisely the same documents from URC as those demanded in the November 2008 subpoenas but also called for “all communications sent or received by each United Refining Co. employee in 2008 who is involved in any way in the retail pricing of gasoline products” as well as 2008 and 2009 organizational charts. These two additional requests are not new requests, but are narrower categories of the documents called for by Paragraphs 1 and 3 of the November 2008 subpoena. A copy of the July 29, 2009, Subpoena *Duces Tecum* is annexed as **Exhibit P**.

19. The November 25 and 26, 2008 subpoenas were properly served on URC and its subsidiary, Kwik Fill. In any event, the Attorney General served the July 29, 2009, subpoenas personally to ensure that URC and its counsel would not continue to avoid the Attorney General’s requests pursuant to the subpoena.

20. On August 19, 2009, I requested, pursuant to the subpoena *duces tecum*, all emails sent or received in the calendar year 2008 by ten named URC employees. A copy of my August 19, 2009, email is annexed as **Exhibit Q**. The ten individuals named in my email are

employees of URC whom this Office believes are responsible for, or involved in, retail gasoline pricing and thus would likely have evidence relevant to the Attorney General's investigation.

21. On September 10, 2009, this Office received a letter from Mr. Wadsworth enclosing 95 pages of emails belonging to two of the ten individuals for whom emails had been requested. According to Mr. Wadsworth's letter, emails for nine of the ten individuals identified in my August 19 request had been reviewed, and "only four of these nine individuals possess any sent or received emails from the 2008 time frame." In addition, no emails from the 2008 time frame were retrievable in a back-up format for any of the individuals on the Kwik Fill side of the business, according to Mr. Wadsworth, due to a "significant lapse in its back-up tape files in 2008" when the company changed email systems. The Kwik Fill side of the business is URC's retail gasoline business and thus, may have the most relevant documents. A copy of Mr. Wadsworth's September 10, 2009, letter is annexed as **Exhibit R**. The vast majority of emails produced by URC (86 of 95 pages) belonged to one employee and were dated January 2008 through October 2008. URC produced nine pages of emails belonging to another employee dated January 2008 through March 2008. URC also promised to review and/or produce emails from three other employees, but this Office has not yet received these emails from URC.

22. The Attorney General's Office was alarmed by the fact that URC did not have in its possession emails for five, or perhaps six, of the employees for which emails were requested, given that URC received subpoenas in November of 2008. The employees for whom this Office requested emails are the ones most likely to have information about any price fixing conspiracy since they are involved in, or responsible for, retail pricing of gasoline in Western New York. Because the November subpoenas called for all documents concerning URC's pricing of gasoline products (among other materials), URC had a duty to preserve the electronic and hard

copy documents of those employees. This Office also was troubled by URC's failure to produce the evidence that the Attorney General received from a third party in July 2009 since the evidence was responsive to the Attorney General's February 2, 2008, document demand for "all documents concerning communications, agreements, or arrangements between United Refining and any competitor, including all communications concerning gasoline pricing ..." See Exhibit K.

23. The sum total of materials produced by URC thus far in this investigation consists of: (a) three boxes of hard copy documents (b) two pages of organizational charts, and (c) 95 pages of emails, produced in hard copy format.

The September 15, 2009 Subpoena is Necessary to Investigate Possible Price Collusion and Obstruction of Justice by URC

24. On September 15, 2009, the Attorney General served a Subpoena *Duces Tecum* and *Ad Testificandum* on URC. The subpoena demands that an individual designated by URC testify under oath regarding the document searches conducted in response to all subpoenas *duces tecum* served on URC in connection with the Attorney General's investigation, URC's document retention and destruction policies, and the changes made to URC's email system that caused the "significant lapse in the company's back-up tape files" in 2008. The subpoena also calls for the emails and email attachments sent or received in the calendar year 2009 for ten URC employees and all other employees who are the most likely to have information about any price fixing conspiracy, i.e., those involved in, or responsible for retail gasoline pricing. The subpoena further calls for the telephone records, calendars and / or business diaries, and electronic hard drives and hard disks for the same individuals. This Office sent the subpoena accompanied by a letter from me to Mr. Wadsworth requesting that Mr. Wadsworth confirm acceptance of service

of the subpoena on behalf of URC. A copy of my letter dated September 15, 2009, and the subpoena are annexed as **Exhibit A**.

25. The Attorney General has the authority to investigate potential wrongdoing by URC under New York law, including N.Y. Gen. Bus. Law § 343 and N.Y. Exec. Law §63(12), which confer express investigatory authority on the Attorney General. The scope of the subpoena is completely reasonable considering the gravity of the potential violations of law and the potential harm to consumers in Western New York.

26. The Affirmations submitted in support of URC's Motion to Quash question the scope and reason for the document demands in the subpoena. This Office requested 2009 emails and email attachments from employees who would might be involved in, or have information about, any price fixing conspiracy. Based on this Office's investigation, the Attorney General has reason to assume that unlawful conduct may have taken place in 2009 as well as in 2008. This Office requested similar documents, i.e. documents concerning communications with competitors regarding gasoline pricing, in my February 2, 2009, letter to Mr. Abdella pursuant to the prior subpoenas. *See Exhibit K*. In response, Mr. Abdella sent me a letter nine days later stating that no such documents existed. *See Exhibit L*. Either URC and its counsel were able to do a search of all potentially relevant documents in nine days time (and can do so again in response to the September 15, 2009 subpoena) or the search, if performed at all, was inadequate. Accordingly, this Office cannot assume that URC or its counsel will search through emails for documents responsive to certain subject matters because: (1) URC failed to produce evidence to this Office's February 2, 2009, request, evidence that was received by the Attorney General from a third party, (2) emails are missing from 2008 despite the fact that URC was under subpoena as of late November 2008, and (3) the content of the evidence indicates that URC may have

engaged in, or currently may be engaging in, price fixing. Therefore, the Attorney General demanded the emails without regard to subject matter.

27. The subpoena also calls for the 2009 emails in order to determine whether there were any discussions related to the Attorney General's investigation, much of which took place in 2009. Such emails may reveal whether any efforts were made to search for documents responsive to the prior subpoenas and whether there were any efforts to impede the investigation by destroying evidence.

28. The production of the 2009 emails for the individuals who are responsible for, or involved in, retail gasoline pricing (and thus most likely to possess information of any price fixing conspiracy) should not present a burden on URC since there is no requirement to review the emails for subject matter other than privilege. The burden will be on the Attorney General's Office to review these emails.

29. The Affirmations submitted in connection with URC's Motion to Quash further question why the subpoena demands telephone records, appointment books, diaries and calendars of the URC employees who are involved in, or responsible for, retail gasoline pricing, i.e., the people most likely to possess information about any price fixing conspiracy. The Attorney General demanded these documents to ascertain whether these employees met and/or communicated with their retail gasoline competitors. Such documents are typically called for in subpoenas served in connection with price fixing investigations. *See, e.g.,* Department of Justice, Antitrust Division Grand Jury Manual, Chapter III, Part II, *available at* <http://www.usdoj.gov/atr/public/guidelines/206782.htm>.

30. The Affirmations submitted on behalf of URC in this proceeding suggest that the Attorney General's Office has not contended that URC is suspected of wrongdoing (see, e.g.,

Wagner Affirmation, Paragraph 19). The Attorney General's Office has no obligation to accuse a subpoenaed party of wrongdoing in order to seek documents from that party. (*See* the Attorney General's accompanying Memorandum of Law In Opposition to United Refining Company's Motion to Quash, Points II and III.) In any event, my colleague, Geralyn Trujillo, and I informed Mr. Wadsworth on two separate occasions, in phone calls on September 18 and September 22, that a third party produced evidence indicating that URC had engaged in improper, anticompetitive behavior and that such evidence should have been produced by URC. In fact, both my colleague and I stated that this evidence was the reason for our most recent demand for documents. This Office did not divulge the details of the evidence to Mr. Wadsworth because doing so would prejudice our investigation, and in any event, the Attorney General's Office has no duty to divulge the details of evidence obtained in its investigation. The Attorney General's Office is willing to show this evidence to the Honorable Judge Evelyn Frazee for review in an *in camera* setting without the presence of URC representatives or counsel, at Judge Frazee's request.

31. The Affirmations submitted on behalf of URC also suggest that the Attorney General's Office was unwilling to reduce the scope and timing of this latest subpoena. (*See* Wadsworth Affirmation, Paragraphs 19-20; Wagner Affirmation, Paragraph 20). That could not be further from the truth. Because the Attorney General cannot possibly know precisely which employees have relevant information and where relevant information might reside, the Attorney General's Office often drafts subpoenas broadly with the intention of reducing the scope of the subpoena in discussions with counsel for the parties. In fact, this Office discussed with Mr. Wadsworth ways in which the subpoena could be narrowed. In these discussions, this Office agreed that URC could provide a proposal for narrowing the category of URC employees who

are involved in, or responsible for, retail gasoline pricing. This Office agreed that a witness did not have to appear on the date set forth by the subpoena and could appear at a later time. My colleague, Geralyn Trujillo, and I agreed to apply for permission to travel to Buffalo to take the witness statement of the individual designated by URC to testify about the adequacy of URC's searches for documents. This Office agreed that URC's information technology consultant could be interviewed by telephone in lieu of giving sworn testimony, despite this Office's preference for the latter. This Office agreed to defer the production of hard drives and hard disks as called for by the subpoena, reserving the Attorney General's right to seek those materials if the this Office discovered that the missing 2008 emails could be harvested from them. See the copies of the emails to and from Geralyn Trujillo and Jeffrey Wadsworth dated September 18 and 22, 2009, annexed as **Exhibits S and T**. This Office also suggested that the document demands could be narrowed further depending on what is learned from the sworn testimony of an URC representative regarding the adequacy of URC's prior searches and efforts to preserve documents.² See Exhibit S.

32. Subpoenas served by the Attorney General often have quick deadlines to encourage the subpoenaed parties to respond in a timely manner. (For example, the subpoenas served on URC and Kwik Fill on November 25 and 26, 2008 had deadlines of December 4, 2009, and those deadlines were extended.) As I am sure Mr. Wadsworth and Mr. Abdella are aware, deadlines are most often negotiated and renegotiated. In our September 22, 2009, email to Mr. Wadsworth, this Office set forth new, albeit fast, deadlines for the production of documents to encourage URC to provide at least some documents quickly and not delay production, to encourage URC to propose reasonably prompt deadlines so that our investigation

² For example, if this Office learned that URC or its counsel conducted a thorough search for documents in response to this Office's February 2, 2009, request, this Office may be willing to narrow the demand for emails by subject matter.

may proceed in a timely manner, and to encourage URC to provide a witness to testify.

Tellingly, URC's counsel did not once ask for additional time or propose new deadlines for the production of documents, as subpoena recipients often do. Instead, Mr. Wadsworth asked that the Attorney General's Office "not enforce" the subpoena *duces tecum* and that the Office withdraw it altogether. See Exhibits S and T.

33. I respectfully refer the Court to our accompanying Memorandum in Opposition to URC's Motion to Quash and / or Modify the Subpoena and in Support of the Attorney General's Motion to Compel URC to respond to the subpoena. For the reasons set forth herein and in our Memorandum, URC's motion should be denied, and the Attorney General's cross motion should be granted. The Court should direct URC to comply fully with the September 15, 2009, subpoena served by the Attorney General, and with the requests made by the Attorney General pursuant to his prior subpoenas, within 30 days from service of notice of entry of this Court's order, or on such other date as the Court may direct.

Dated: New York, New York
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