SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF MONROE

United Refining Company, Petitioner,	:	
	:	Index No. 09-13534
v.	:	
	:	Hon. Evelyn Frazee
Andrew M. Cuomo, Attorney General of the State of New York, Respondent.	:	

MEMORANDUM IN OPPOSITION TO UNITED REFINING COMPANY'S MOTION TO QUASH AND IN SUPPORT OF THE ATTORNEY GENERAL'S MOTION TO COMPEL RESPONSES TO INVESTIGATORY SUBPOENAS

The State of New York, by Attorney General Andrew M. Cuomo, respectfully submits this memorandum in opposition to United Refining Company's ("URC") motion to quash and/or modify the Subpoena *Duces Tecum* and *Ad Testificandum,* and in support of the Attorney General's motion for an order compelling URC to comply fully with the Attorney General's September 15, 2009 subpoena, as well as this Office's requests made pursuant to its prior subpoenas, served under N.Y. Gen. Bus. L. § 343 and N.Y. Exec. L. § 63(12), within 30 days from service of notice of entry of this Court's order, or on such other date as the Court may direct. The Attorney General also respectfully requests that the Court immediately lift the Temporary Restraining Order, and grant the Attorney General costs.

PRELIMINARY STATEMENT

The Attorney General is investigating the pricing of gasoline sold at retail to Western New Yorkers. The Attorney General has direct evidence that URC may be engaged in illegal price fixing of gasoline. This evidence was responsive to document requests the Attorney General served on URC, but URC did not produce it as it should have. Once the Attorney General obtained this evidence, this Office was compelled to thoroughly investigate further. In

so doing, the Attorney General has sought only relevant evidence, and has attempted to minimize the burdens on URC. Although this Office is not obligated to reveal to subpoenaed parties the details of its investigation, and revealing the evidence against URC would highly prejudice the investigation, URC's claims that this Office never indicated that URC was suspected of wrongdoing are false. Furthermore, while the Attorney General's investigation began in 2008, the evidence currently in this Office's possession indicates that any price collusion may not be limited to that year.

Unfortunately, URC's responses to this Office's requests have been grossly deficient, and have included a claim by the company to have no emails in 2008 for individuals that URC stated control the retail pricing of gasoline. This deficiency is alarming – especially because URC received a subpoena from this office in November 2008 and had a duty to preserve documents from that point forward. URC later claimed never to have accepted service of the November 2008 subpoena, an absurd claim given the representations made by its attorney, the confidentiality agreement its attorney signed governing documents produced pursuant to the subpoena, and its actual production of documents pursuant to the subpoena. Solely to put an end to URC's silly delaying tactics, this Office immediately personally served an additional subpoena on the company in July 2009 to eliminate the issue – the three subpoenas repeatedly referred to in URC's papers are in substance two sets of subpoenas.

URC's obstructionist behavior is interfering with this Office's ability to investigate potential law violations and to obtain prompt relief for New Yorkers paying gas prices potentially inflated by unlawful collusion. This Office imposed short deadlines (that URC fails to mention were for the most part extended) to stop URC's delays and to stop any price fixing as quickly as possible. URC's claims of abuse, intimidation, and harassment are preposterous – the

facts set forth here and in the Affirmation of Sarah M. Hubbard ("Hubbard Aff.") expose their frivolity. Moreover, URC completely misstates the legal standard applicable to its motion.

In addition to denying URC's motion to quash the subpoenas, the court should grant the Attorney General's cross-motion to compel, and grant the Attorney General costs incurred in connection with URC's motion. The Attorney General is wholly entitled to quickly receive the materials it seeks from URC. In these difficult economic times, delays in investigating and combating a potential unlawful act so damaging to New Yorkers' financial bottom line cannot be tolerated.

STATEMENT OF FACTS

The facts relevant to this proceeding are set forth fully in the accompanying Affirmation of Assistant Attorney General, Sarah M. Hubbard, ("Hubbard Aff.") and are summarized below.

A. Investigation into Western New York Gas Prices

The Attorney General's investigation began in late 2008 after the Attorney General received complaints about unusually high gasoline prices in Western New York, relative to other areas of the state and the rest of the nation. The Attorney General issued subpoenas for testimony and documents to a number of firms in the retail gasoline industry in Western New York, including URC, to investigate whether retail gasoline competitors were engaging in price fixing and / or other anticompetitive conduct, or whether there was a different explanation for the price differential. Hubbard Aff. Paragraph ("¶") 2.

B. The Attorney General's Subpoenas

The Attorney General served subpoenas on URC and its wholly-owned retail gasoline subsidiary, Kwik Fill, in November 2008, and re-served the same subpoenas on URC in July 2009 after URC's counsel claimed that URC had not "officially accepted service" of the

November subpoenas. Hubbard Aff. ¶ 17.[1] The subpoenas called for the testimony of a witness and demanded six categories of documents, including communications, agreements, or arrangements between URC and any competitor in the sale or distribution of gasoline products in Western New York and documents concerning the pricing of gasoline, among other documents. Hubbard Aff. ¶4, Exhibit ("Ex.") D. The Attorney General served subpoenas on other firms in the industry calling for the exact same materials. See Hubbard Aff. ¶ 4. The deadlines set forth in the November subpoenas were immediately extended as this Office agreed to speak to witnesses informally, rather than under oath, and to defer production of documents until further notice.

C. The Attorney General Narrowed its Document Requests in an Effort to Accommodate URC

The process of trying to secure subpoena compliance from URC was both time-consuming and unsuccessful. This Office negotiated the scope of the requests, interviewed representatives of URC in lieu of taking sworn testimony, permitted URC to produce discrete sets of data instead of responding to the document requests in the subpoena, allowed URC to produce documents far after set deadlines, waived requests for certain data when URC's information technology personnel informed the Office that production of electronic materials would be expensive, and otherwise sought the materials the Office needed to pursue its investigation, while trying to limit the burdens on URC. Hubbard Aff. ¶¶ 8-13.

After speaking informally to industry participants, this Office narrowed its document subpoena and issued primarily data requests on December 11, 2008. See Hubbard Aff. ¶ 9, Ex. G. On January 15, 2009, after the deadline set by this Office, URC produced three bankers

[1] The Attorney General properly served subpoenas on URC in November 2008 but re-served them in July 2009 to ensure that URC and its counsel would not continue to avoid and delay responding to the Attorney General's requests pursuant to the subpoenas. Hubbard Aff. ¶ 19.

boxes of computer data print outs, with two boxes comprised of profit and loss statements printed directly from the company's marketing system. Hubbard Aff. ¶ 10, Ex. I. The remaining box contained more data printed directly from its computer system, and URC subsequently complained that producing the data electronically as requested would be too burdensome. Hubbard Aff. ¶ 11. Again, to accommodate URC, this Office did not seek electronic production at that time, even though the data could not be analyzed by economist's computer models in the paper form produced. In contrast, every other subpoenaed party from whom data was requested in electronic form promptly produced it without dispute. Hubbard Aff. ¶11.

On February 2, 2009, this Office made an additional request to industry participants to follow up on its investigation:

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

In response, URC's attorney sent a letter nine days later stating that there were no agreements or arrangements between URC and any competitors regarding retail gasoline pricing and that no documents showing any such agreements or arrangements existed. Hubbard Aff. ¶¶ 12-13, and Ex. L. In contrast, nearly every other subpoenaed party produced communications in response to that request. A diligent search would reveal some communications covered by our request that may be appropriate for business reasons, particularly where a vertically integrated company like URC has wholesale customers who are also its competitors at the retail level.

In sum, in response to the Attorney General's requests, URC produced a grand total of three boxes of hard copy documents consisting mostly of hard copy print outs of profit and loss statements and pricing data. Because the Office found no evidence of wrongdoing by URC at

that time, the Office gave URC the benefit of the doubt and did not request additional materials in the ensuing months. Thus, the burden placed on URC by the Office was minimal.

D. New Evidence of Potential Price Fixing and Request for 2008 Emails

In July 2009, the Attorney General received evidence indicating that URC may have engaged in unlawful price fixing of retail gasoline in Western New York.[2] Hubbard Aff. ¶ 14. As a result, the Office first requested, on July 14, 2009, that URC provide a list of all URC employees involved in retail pricing and an URC organizational chart. See Ex. M to Hubbard Aff. In response, URC stated, "We feel that we have already provided significant information to you about these issues…" Ex. N to Hubbard Aff. It took nearly a month for URC to finally provide its organizational chart, a document that is regularly requested of subpoenaed parties and generally produced promptly. Hubbard Aff. ¶ 16, Ex. O. On August 19, 2009, this Office requested that URC produce all 2008 emails sent or received by ten URC employees. Hubbard Aff. ¶ 20. These employees are individuals whom this Office believes are involved in, or responsible for, retail gasoline pricing, based on this Office's investigation, interviews of URC representatives and its understanding of URC's corporate organization. Hubbard Aff. ¶ 20, Ex. Q. The Attorney General requested the emails without regard to subject matter. 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 be engaged in price fixing, and the

[2] Although the Attorney General believes that revealing the details of this evidence to URC would severely impair its investigation, the Office would gladly provide it to the Court for confidential *in camera* review.

Attorney General cannot assume that a possible participant in a conspiracy, which are by their nature hidden, will turn over evidence of its conduct. Hubbard Aff. ¶ 26.

Instead of providing all of the emails requested, URC produced a mere ninety five pages of emails for two of the ten employees, not hundreds of pages as stated in Abdella Aff. at ¶ 21. Hubbard Aff. ¶ 21. In a letter to the Attorney General, URC's counsel explained that there were no emails from the 2008 time period for at least five of the ten employees from whom emails had been requested.[3] Hubbard Aff. ¶ 21, Ex. R.

E. The September 15, 2009 Subpoena *Duces Tecum* and *Ad Testificandum*

This Office was alarmed that URC did not have any 2008 emails for these URC employees given that the company had notice of the Attorney General's investigation and had received subpoenas in late November 2008. Accordingly, the Attorney General now must determine whether URC made any effort to preserve, or in fact destroyed, the documents of employees who were involved in, or responsible for, retail gasoline pricing in Western New York. This Office also is concerned, based on the newly received evidence, that URC may be engaged in an ongoing conspiracy to fix prices and may not have adequately searched for documents responsive to this Office's requests pursuant to the Attorney General's prior subpoenas.

As a result, the Attorney General issued a Subpoena *Duces Tecum* and *Ad Testificandum* to URC on September 15, 2009, to investigate (a) whether there is any ongoing collusion by URC and / or its competitors to fix the retail prices of gasoline, (b) whether URC adequately searched for the documents requested pursuant to the prior subpoenas, and (c) whether URC

[3] URC had not yet reviewed the emails of one employee to see if the employee had emails from the 2008 time frame. Hubbard Aff. ¶ 21, Ex. R. URC's counsel also said that no emails from the 2008 time frame are retrievable in a back-up format for any individuals on the Kwik Fill side of the business due to a significant lapse in its back-up tape files that occurred when it switched to a new email system. Id.

negligently or willfully destroyed evidence pertinent to the Attorney General's investigation in violation of Penal Law 215.40. Hubbard Aff. ¶ 24. This new subpoena calls for the sworn testimony of a URC employee on the subject of whether URC conducted adequate searches and preserved or destroyed relevant documents. It also demands documents from ten URC employees who this Office believes are most likely to be participants in or have information about any price fixing conspiracy. Hubbard Aff. ¶¶ 24, 26-29.

Contrary to URC's suggestions in its memorandum of law, this Office willingly reduced the scope and delayed the time to comply with this latest subpoena. This Office discussed with URC's counsel ways in which the subpoena could be narrowed. In these discussions, 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. This Office agreed that URC's information technology consultant could be interviewed by telephone in lieu of giving sworn testimony. This Office agreed to defer the production of hard drives and hard disks as called for by the subpoena, reserving our right to those materials if we discovered that the missing 2008 emails could be harvested from them. 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. Hubbard Aff. ¶ 31. In addition, this Office set forth new, albeit prompt, deadlines for a rolling production of documents to encourage URC to provide at least some documents quickly and not delay production, to encourage URC to propose reasonable deadlines so that our investigation 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 we normally expect subpoena recipients to do. Instead, URC's counsel asked that this Office

"not enforce" the subpoena *duces tecum* and withdraw it altogether. Hubbard Aff. ¶ 32, Exs. S, T.

Furthermore, at no time did this Office threaten "criminal prosecution rather than continue good faith discussions with URC," as URC falsely claims in its Memorandum of Law. URC MOL, at 9. This Office never "threatened" URC – the language in the subpoena to which URC refers is standard language included in the vast majority of Antitrust Bureau subpoenas to put subpoenaed parties on notice of the consequences of subpoena non-compliance. Moreover, this Office did engage in good faith discussions with URC. In fact, we sent an email to URC's counsel proposing modifications the day before URC served their motion to quash. Hubbard Aff. 32, Ex. T. Rather than propose new deadlines or negotiate the scope of the subpoena further, URC moved this Court to quash the subpoena.

ARGUMENT

POINT I

THE SUBPOENA IS WITHIN THE ATTORNEY GENERAL'S BROAD INVESTIGATORY AUTHORITY

By statute, the Attorney General is authorized to serve investigatory subpoenas in connection with possible antitrust violations. N.Y. Gen. Bus. L. § 343. These subpoenas may include document requests. *See Grandview Dairy Inc. v. Lefkowitz*, 76 A.D. 2d 776, 429 N.Y.S.2d 189 (1st Dep't 1980). Failure to comply with a subpoena request is itself a misdemeanor. N.Y. Gen. Bus. L. § 343. A second, independent source of authority for the Subpoena is N.Y. Exec. L. § 63(12), which authorizes the Attorney General to investigate "persistent fraud or illegality." *See, e.g., La Belle Creole Int'l S.A. v. Attorney General*, 10 N.Y.2d 192, 219 N.Y.S. 2d 1 (N.Y. 1961).

"The Attorney-General has been given broad investigatory responsibilities to carry out his vital role to protect the public safety and welfare." *LaRossa, Axenfeld & Mitchell v. Robert Abrams*, 62 N.Y.2d 583, 589, 468 N.E.2d 19, 21, 479 N.Y.S.2d 181, 183 (N.Y. 1984); *see also id.* (noting "this State's strong public policy in favor of promoting and protecting free competition [and therefore] in maintaining the Attorney-General's investigatory powers free from unnecessary hindrances.") Accordingly, "all that the Attorney General need show in support of his subpoena in the face of a motion to quash is his authority, the relevance of the items sought, and some factual basis for his investigation." *In re American Dental Coop., Inc.*, 127 A.D.2d 274, 280, 514 N.Y.S.2d 228, 232 (1st Dep't 1987) (quoted in *People of the State of New York v. Thain*, 24 Misc. 3d 377, 874 N.Y.S.2d 896 (N.Y. Co. 2009)).

Equally important, the Attorney General enjoys a presumption of good faith in discharge of his investigatory responsibilities. *Anheuser-Busch, Inc. v. Robert Abrams*, 71 N.Y.2d 327, 332, 520 N.E.2d 535, 537, 525 N.Y.S.2d 816, 818 (N.Y. 1988). Thus, it is sufficient to show a "reasonable relationship to the subject matter under investigation and the public interest to be served." *American Dental*, 127 A.D.2d at 279, 514 N.Y.S.2d at 232. There is no "probable cause" requirement; nor must the Attorney General "disclose the details of the pending investigation" or "pinpoint exactly what the subpoenaed materials [are] expected to reveal." *Id.* (quoted in *Pavillion Agency, Inc. v. Spitzer*, 9 Misc 3d 626, 631, 802 N.Y.S.2d 879 (Sup. Ct. 2005) and in *Matter of Hogan v. Cuomo*, 2008 N.Y. Misc. LEXIS 7428 (Sup. Ct. 2008)). To do so would stymie the investigation at the outset. *American Dental*, 172 A.D.2d at 284, 514 N.Y.S.2d at 234 ("An investigation would be stymied at the outset if law enforcement officials had to pinpoint exactly what the subpoenaed materials were expected to reveal.")

Here, the Attorney General's Subpoena is amply supported. First, the Attorney General has the authority, under § 343, to issue a subpoena in connection with an antitrust investigation. *American Dental,* 127 A.D.2d at 279, 514 N.Y.S.2d at 232. Second, the information sought – *e.g.*, details of price fixing agreements, including communications by those employees of URC involved in the retail pricing of gasoline – is plainly relevant to this investigation. *See, e.g., In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig.,* 906 F.2d 432, 447 (9th Cir. 1990) ("'If the effect of the information exchange were to raise the level [of] prices, one could infer that the motive was price fixing.'") (quoting Richard Posner, *Information and Antitrust: Reflections on the Gypsum and Engineers Decisions,* 67 Geo. L. J. 1187, 1199 (1979)). Third, there is "some factual basis for his investigation," *American Dental,* 127 A.D.2d at 279, 514 N.Y.S.2d at 232, including the evidence the Attorney General obtained that URC may be engaged in price fixing, and the inexplicably high gas prices in Western New York that appear to lack any other explanation. URC cannot seriously dispute that the "information sought bears a reasonable relationship to the subject matter under investigation and the public interest to be served." *American Dental,* 127 A.D.2d at 279, 514 N.Y.S.2d at 232. The very communications that URC has failed to produce are relevant to establishing and assessing the activities of URC potentially in furtherance of an unlawful conspiracy.

POINT II

THE LEGAL AUTHORITY CITED BY URC IS INAPPLICABLE TO THE ATTORNEY GENERAL'S § 343 SUBPOENAS

URC's Memorandum of Law suggests, incorrectly, that the scope of the Attorney General's investigatory power is limited by the same legal principles that apply to discovery in civil litigation. URC cites cases involving civil actions as well as CPLR 3101(a)(4) for the notion that (1) URC is entitled to know the circumstances or reasons discovery is required and

(2) that courts should limit discovery where the burden on a non-party outweighs any potential benefit to the party seeking discovery. *See* URC MOL at 3.

The purpose of the Donnelly Act § 343 – to empower the Attorney General to investigate matters of public concern – is not that of civil discovery, and a § 343 subpoena is not civil discovery under the CPLR. The CPLR applies to "civil judicial proceedings" under section 101, and a civil judicial proceeding is defined under section 105(d) as "an independent application to a court for relief." All civil judicial proceedings must be prosecuted as an action under section 103(b), which under section 105(b) includes special proceedings. The disclosure provisions of Article 31 of the CPLR apply to "actions" under section 3101(a). A Donnelly Act subpoena is not an action and URC is not a "non-party" to any action under CPLR 3101(a)(4), as suggested by URC's Memorandum of Law.

Hence, Rule 3101 of the N.Y. CPLR, which requires "full disclosure of all matter material and necessary in the prosecution or defense of an action," is entirely inapplicable here. N.Y. CPLR 3101(a) (emphasis added). Thus, "full disclosure" as contemplated by the rule is not required. In fact, the Attorney General has no duty to "pinpoint exactly what the subpoenaed materials [are] expected to reveal." *American Dental,* 127 A.D.2d at 234, 514 N.Y.S.2d at 283. While the Attorney General's Office did not fully disclose, and had no duty to disclose, the details of the evidence it received indicating that URC may be engaged in illegal price fixing, this Office informed Mr. Wadsworth, URC's counsel, in two phone conversations, that the Attorney General's Office had received such evidence. Hubbard Aff. ¶ 30 We also informed Mr. Wadsworth that we were extremely concerned that there were no emails for the 2008 time period for certain individuals who were responsible for, or involved in, retail gasoline pricing, given the fact that the company had been served a subpoena in November 2008 and should have

preserved documents. Id. Thus, URC's contention that this Office "refused to inform URC of the scope or purpose of its investigation" is completely false. *See* URC's MOL at 9.

As the authorities cited above demonstrate, the principles governing a Donnelly Act subpoena are not those associated with civil discovery. *See New York v. D'Amato*, 12 A.D.2d 439, 443, 211 N.Y.S.2d 877, 880 (1st Dep't 1961) ("a [§ 343] subpoena has never been treated as an invitation to a game of hare and hounds, in which the witness must testify only if cornered at the end of the chase") (internal citation, quotes omitted, bracketed language added). If Courts were to adopt the standard set forth by URC, they would effectively nullify the Attorney General's authority to investigate. Instead, Courts have held that, "the validity of a subpoena, particularly in an antitrust investigation, turns on whether the material sought is relevant to the subject matter under investigation. 'Only where the futility of the process to uncover anything legitimate is inevitable or obvious must there be a halt upon the threshold.'" *American Dental*, 127 A.D.2d at 282, 514 N.Y.S.2d at 234, quoting *Matter of Edge Ho Holding Corp.*, 256 NY 374, 382 (NY Ct. of App. 1931).

The only somewhat relevant legal authority URC cites is *D'Alimonte v. Kuriansky*, 144 A.D.2d 737, 535 N.Y.S.2d 151 (3d Dep't 1988), in which a document subpoena issued by the Attorney General against a company that was not the subject of the investigation was quashed because "it set no limitation as to time or client." *D'Alimonte* is easily distinguishable from the circumstances here where the subpoena recipient is itself being investigated, where the documents demanded by the subpoena are limited to January 1, 2008 to the present, or in the case of emails, to the calendar year 2009, and the "client" is limited to employees who are responsible for, or involved in, setting the retail price of gasoline. In addition, the materials

sought by the subpoena are not beyond the scope of the Attorney General's price fixing investigation. *See* Point III, *infra.*

POINT III

URC'S MOTION TO QUASH SHOULD BE DENIED AND URC SHOULD BE COMPELLED TO FULLY COMPLY WITH THE SUBPOENAS

A. The Materials Sought by the Subpoena are Relevant to the Price Fixing Investigation.

Reflecting the Attorney General's broad investigatory authority and discretion, only the rarest of circumstances will justify quashing a subpoena or declining to enforce it. The Court of Appeals has held "[a]n application to quash a subpoena should be granted '[only] where the futility of the process to uncover anything legitimate is inevitable or obvious' or where the information sought is 'utterly irrelevant to any proper inquiry.'" *Anheuser Bush, Inc.*, 71 N.Y.2d 327, 332 (citations omitted), quoted in *Matter of Hogan v. Cuomo*, 2008 N.Y. Misc. LEXIS 7428 (Sup. Ct. 2008). Because this Office has obtained evidence that URC may be engaged in illegal price fixing, it cannot be said that "the futility of the process to uncover anything legitimate is inevitable or obvious." Clearly the inquiry into whether URC is conspiring with competitors to fix the price of gasoline at retail is a proper one.

The evidence sought by the subpoenas is far from "utterly irrelevant" to that proper inquiry. The email and phone records for those individuals most likely to be participants in or have information about any price fixing conspiracy are clearly relevant to the investigation because price fixing conspiracies are effectuated through communications. Similarly, the calendars and appointment books belonging to those same individuals are undoubtedly relevant to determining whether employees met with URC's retail gasoline competitors.

Furthermore, the hard disks utilized by those same individuals are necessary to attempt to obtain the 2008 emails that URC claims do not exist, as emails can often be harvested from hard disks. Moreover, this Office agreed to defer the production of hard disks until it was able to speak to an individual with knowledge of URC's information technology system, to determine whether the emails exist in another form or location, and to get an understanding of how a company of URC's size and sophistication allowed emails to be destroyed after having received a subpoena from the New York Attorney General. See Hubbard Aff. ¶¶ 21-22. For this reason, the testimony of the information technology expert is relevant to this investigation. To accommodate URC and its information technology expert, this Office agreed to a phone interview of the expert in lieu of testimony under oath, despite its strong preference for the latter. See *Id.*

The subpoena's time frame is also relevant to the Attorney General's investigation. The subpoena instructs that the time period applicable to the document demands is January 1, 2008, to the present unless otherwise noted. See Ex. A, annexed to Hubbard Aff (Instruction 10). (The emails called for by the subpoena are for calendar year 2009 since the 2008 emails had already been requested by the Attorney General pursuant to the prior subpoenas.) The 2008 to 2009 time frame is relevant for several reasons. First, while the high gasoline prices were most pronounced during the volatile market of summer and fall 2008, in which Western New York gas prices declined at one of the slowest rates in the nation after the steep spike in prices, there is no reason to believe that any collusive activity was confined to that time period. Rather, collusive activity would have the greatest ability to impact prices (and become the most transparent) during a period of steep decline in wholesale gasoline prices as competing retailers agree not to reduce prices in the face of drastically decreasing costs. In fact, gasoline prices in Western New York

during that volatile period averaged as much as 38 cents higher per gallon than surrounding areas. Hubbard Aff. ¶ 2, Ex. B. Gas prices in Western New York remain higher than would be expected to this day (see Ex. C to Hubbard Aff.), and the nature of the evidence indicates that price collusion may be ongoing in the region. Second, the 2009 time frame is necessary to determine whether there was an effort to obstruct the Attorney General's investigation since the investigation took place in 2008 and 2009 and is still ongoing. Here, URC's claim that "the documents Respondent seeks all concern *past* events" (URC MOL, at 6) is entirely baseless, and again false, as this Office has informed URC that the misconduct may be ongoing. Hubbard Aff. ¶ 14, 30. URC's attempts to define the subject matter and time frame of the Attorney General's investigation would inappropriately impair the Attorney General's efforts to root out misconduct.

Finally, the subpoena seeks the testimony of an individual authorized by URC to speak to the adequacy of the search conducted in response to requests made pursuant to the initial subpoenas. Such testimony is clearly relevant to determine whether the documents that this Office requested to understand the extent of URC's possible price fixing do in fact exist, despite URC's claims. Further, such testimony is relevant to determine whether URC has obstructed this investigation. The Attorney General has reason to be believe that such obstruction may have taken place, based on the evidence produced by a third party that should have been produced by URC and based on URC's apparent destruction of emails after receipt of the November 2008 subpoenas. This Office explained our reasons for needing such a witness to Mr. Wadsworth. Hubbard Aff. ¶ 30. Again, to accommodate URC, and in contrast to the inaccuracies set forth in URC's papers, we asked URC to provide a name of a person and time when they could testify, and informed Mr. Wadsworth that we would apply for permission to travel to Buffalo. See Hubbard Aff, ¶¶ 30-31, Ex. T.

Not only should URC's motion to quash the subpoenas be denied, but the Court should compel URC to respond quickly and fully to the subpoenas. The materials sought without question bear a "reasonable relationship to the subject matter under investigation and the public interest to be served," *American Dental*, 127 A.D.2d at 279, 514 N.Y.S.2d at 232, and URC's motion to quash is wholly without basis.

B. URC's Burden and Time Objections Are Frivolous

URC cannot be heard to complain that the Subpoena is unduly burdensome. "Relevancy, and not quantity, is the test of the validity of a subpoena." *American Dental*, 127 A.D.2d at 234, 514 N.Y.S.2d at 282-83 (citation, quotes and brackets omitted). As stated above, the information sought is highly relevant to the Attorney General's investigation.

Until now, the Attorney General has sought very few materials from URC, and URC has provided very little. As set forth extensively in the Hubbard Affirmation, the burden on URC to date has been minimal. Hubbard Aff. ¶¶ 8-13, 23. While URC's Memorandum of Law claims that the company complied fully with <u>two</u> prior subpoenas "which sought extensive and detailed records concerning URC's gasoline pricing" and that "URC produced these records" (URC MOL at 1), these contentions are entirely misleading. First, this Office served and re-served one set of subpoenas on URC. Hubbard Aff. ¶¶ 17-18. Thus, URC was obligated to respond to one set of subpoenas, not two. Second, this Office accommodated URC's requests to narrow the scope of the subpoenas. Hubbard Aff. 8-13. Third, URC provided very few records (Hubbard Aff. ¶ 23) and even these few records were not produced on a timely basis. URC produced a grand total of three boxes of hard copy documents consisting mostly of hard copy print outs of profit and loss statements and pricing data. Id. The burden on URC in this investigation has been minimal.

The September 15, 2009, subpoena that is the subject of these motions was crafted to obtain the information that this Office needs to investigate whether URC is engaged in the serious crime of price fixing, and was necessarily broader than prior requests due to the utter deficiencies of URC's prior responses. This Office was willing to negotiate with URC on the terms of the subpoena, but was not willing to compromise its investigation or be manipulated by further dilatory and obstructionist tactics.

The short time frame of the requests was necessitated by the extreme delays caused by URC's prior insufficient disclosures and by the desire to provide remedies for New Yorkers who are impacted heavily by increased gas prices. With every day that any collusion causes artificially high gas prices, New Yorkers suffer significant monetary harm. Gas prices are a fundamental part of every family's budget, and a cost factored into nearly every product purchased by New York consumers. That URC may have concealed evidence of price fixing from this Office and delayed the progress of this investigation for many months, if proven, will have caused tremendous monetary harm. Short deadlines were needed to promptly remedy any unlawful conduct.

URC's contention that the requests in the subpoena are burdensome is without merit. URC's Memorandum of Law misleadingly contends that this Office is demanding the documents of hundreds of URC employees. URC MOL at 6. This contention is belied by the fact – a fact omitted from URC's papers filed in support of its motion – that this Office requested that URC provide a proposal for narrowing the group of employees from whom documents should be produced by providing job descriptions and the extent to which the categories of employees are involved in, or responsible for, retail gasoline pricing. Hubbard Aff. ¶ 31, Ex. T. There is no conceivable manner by which this Office can know URC's business well enough to state

precisely which employees should provide documents. Thus, the subpoena was drafted broadly to encompass all individuals who may possess information relevant to the Attorney General's price fixing investigation.[4]

Furthermore, URC's complaint that producing emails for a group of employees is burdensome is rather puzzling given that there is technology that can easily harvest emails without interruption to employees. Emails also can be reviewed and produced electronically. In fact, other subpoena recipients in this investigation have been able to produce emails to this Office in a very timely manner. For example, this Office received 6700 pages of emails of one individual electronically a few short days after requesting that they be produced. Moreover, it is easier to remove all emails for an individual than to screen them for subject matter, as the only screening that need be done is for privilege which can be accomplished quickly with word searches. Accordingly, URC's complaint that the subpoena is burdensome is groundless.

URC's baseless motion combined with its false claim that it has not been informed of the basis for the subpoena is a transparent effort to seek information to which URC is not entitled (i.e., details of the confidential evidence received by the Attorney General during the course of its investigation) and to further delay and impede the Attorney General's investigation. Accordingly, URC's motion to quash the subpoena should be denied by this Court.

POINT IV

INJUNCTIVE RELIEF IS WITHOUT BASIS AND WOULD SHUT DOWN THE ATTORNEY GENERAL'S INVESTIGATION OF A POSSIBLE PRICE-FIXER

A. Permanent Injunctive Relief Would Allow Any Anticompetitive Conduct to Continue With Impunity

[4] URC's Memorandum of Law also states, falsely, that there is no discrimination in the subpoena for privileged and confidential documents. The subpoena contains a clear instruction that documents withheld for privilege be described generally in a privilege log. The subpoena does not call for the production of privileged documents. See Instruction 12 of the subpoena, annexed as Ex. A to Hubbard Affirmation.

URC has requested that this Court issue a protective order enjoining the Attorney General from "further harassing URC in regard to the Prior Subpoenas and an injunction prohibiting [the Attorney General] from seeking criminal or other penalties in relation thereto." URC's request for preliminary and permanent injunctive relief should be denied. First of all, there has been no harassing of URC to date, and no need for an order preventing harassment. Second, the standard for preventing the Attorney General's Office from enforcing its subpoenas is set forth above in Points I and II, and is much more stringent than the injunction standard set forth by URC. Even assuming that the standard for injunctive relief applied, URC has completely failed to meet it. URC has no likelihood of success on the merits. As set forth fully above, its motion to quash is legally and factually baseless. Nor can URC show irreparable harm. Any costs that it may incur in complying with this Office's subpoenas do not constitute irreparable harm. *See Main Evaluations, Inc. v. State of New York*, 296 A.D.2d 852, 854, 745 N.Y.S.2d 355, 357 (Monetary harm cannot constitute irreparable harm because they can be compensated with monetary damages). Finally, the balance of the equities in no way favors URC, a company that may be engaged in price fixing, over the Attorney General, who is charged with enforcing the state's antitrust laws and protecting New York consumers from the harm caused by anticompetitive conspiracies.

Most importantly, a permanent injunction could effectively shut down the Attorney General's investigation of URC's conduct and allow URC to possibly unlawfully fix prices with impunity to the detriment of consumers. In arguing that the Court should quash the subpoena in its entirety rather than narrow its scope, (page 4 MOL) URC's intent in filing this motion appears to be to shutdown the investigation and prevent any further evidence of misconduct from coming to light. Such a result would be inequitable indeed.

B. The TRO Should be Immediately Lifted

Because URC's motion to quash is frivolous and designed to delay and impede the Attorney General's investigation into potential price fixing, this Office requests that the TRO the Court granted during the pendency of this motion be lifted immediately.

CONCLUSION

URC has no basis for refusing to provide the subpoenaed information and documents. This Court should deny URC's motion to quash and grant the Attorney General's motion to compel. It should direct URC to comply fully with the Attorney General's September 15, 2009 subpoena, as well as this Office's requests made pursuant to its 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, immediately lift the TRO, and grant the Attorney General costs.

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Respectfully Submitted,

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