



STATE OF NEW YORK
SUPREME COURT CHAMBERS
ALBANY COUNTY COURT HOUSE
ALBANY, NEW YORK 12207
(518) 487-5140

JOSEPH C. TERESI
JUSTICE

MICHAEL J. CONNOLLY
LAW CLERK

August 23 2006

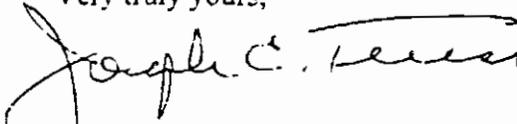
Hon. Eliot Spitzer
Attorney General of the State of New York
Winthrop H. Thurlow, Esq
Assistant Attorney General
Attorney for Petitioner
615 Erie Boulevard West, Suite 102
Syracuse, New York 13204-2465

Re: People v. Wever Petroleum, Inc., RJ1 NO.: 01-06-085469; INDEX NO.: 2710-06

Dear Counselor:

Enclosed please find the original Decision and Order, with respect to the above referenced matter.

Very truly yours,


JOSEPH C. TERESI

JCT/cw
Encl

cc: Michael D. DiFabio, Esq.
DiFabio, Tommaney and Legnard, P.C.
Attorney for Respondent
4 Automation Lane - Suite 100
Albany, New York 12205-1680



STATE OF NEW YORK
COUNTY OF ALBANY

SUPREME COURT

PEOPLE OF THE STATE OF NEW YORK,
by Eliot Spitzer, Attorney General of the
State of New York,

Petitioner,

DECISION and ORDER
INDEX NO.: 2710-06
RJI NO.: 01-06-085469

-against-

WEVER PETROLEUM, INC.,

Respondent.

Albany County Supreme Court All Purpose Term June 23, 2006
Assigned to Justice Joseph C. Teresi

APPEARANCES:

Hon. Eliot Spitzer
Attorney General of the State of New York
Winthrop H. Thurlow, Esq
Assistant Attorney General
Attorney for Petitioner
615 Erie Boulevard West, Suite 102
Syracuse, New York 13204-2465

Michael D. DiFabio, Esq.
DiFabio, Tommaney and Legnard, P.C.
Attorney for Respondent
4 Automation Lane - Suite 100
Albany, New York 12205-1680

TERESI, J.:

Petitioner commenced this proceeding seeking an order (1) permanently enjoining Respondent from repeatedly selling any consumer goods or services for an amount which represents an unconscionably excessive price during any abnormal disruption of the market for

such goods, pursuant to N.Y. Gen. Bus. Law § 396-r and N.Y. Executive Law § 63(12)(also known as price gouging). Petitioner further seeks an order directing the respondent to remit any excess profits, which resulted from the alleged price gouging, to the State; to pay a civil penalty for each violation of alleged price gouging, pursuant to N.Y. Gen. Bus. Law § 396-r(4), and petitioner's costs, in the amount of \$2,000, pursuant to CPLR § 8303(a)(6). The respondent opposes the motion with an answer.

After a full review of the record this Court will grant petitioner's petition requesting an injunction, pursuant to N.Y. GBL § 396-r(4), award costs in the amount of \$2,000, pursuant to CPLR § 8303(a)(6) and penalties against the respondent in the amount of \$2,500.00, pursuant to N.Y. GBL § 396-r(4). This Court, for disgorgement and restitution purposes, is unable to determine the specified incidents of alleged price gouging or the individual consumers that were harmed and therefore is unable to determine an appropriate amount for remittance to the State or restitution to the consumers. Therefore, this Court will deny petitioner's petition in respect to the request for disgorgement of excess profits and restitution for consumers.

The action was commenced on or about August 20, 2006, by the petitioner seeking to enjoin the respondent from alleged price gouging. The respondent is a New York corporation in the business of selling retail gasoline at 166 Main Street, Schaghticoke, Rensselaer County, New York. The respondent is an ExxonMobil station, meaning it sells exclusively Exxonmobil products, including exclusive purchase of gasoline from ExxonMobil at the Port of Albany. The petitioner contends that during the period after Hurricane Katrina (which devastated the Gulf Coast region of the United States and had a substantial effect on this nation's oil supply on August 29, 2005), that the respondent charged consumers an unconscionably excessive price for

gasoline, which violates New York's price gouging statute. In addition, petitioner contends that repeated violations of the price gouging statute violates N.Y. Executive law § 63(12) which prohibits repeated illegalities. The respondent contends that the prices charged during that time period were not unconscionably excessive and were charged in response to its supplier's price schedule.

Specifically, both parties agree that prior to August 25, 2005, Exxonmobil (Wever's supplier) was charging a base price of \$1.90 per gallon for regular 87 octane fuel. However, consumers at Wever's ExxonMobile station in Schaghticoke were paying \$2.73 for that gasoline, a price "mark-up" (the difference between the price charged by the supplier and the price charged to consumers) of \$0.83 per gallon. On August 29, 2005, Hurricane Katrina struck the United States Gulf Coast region devastating the area in a variety of ways, but specifically the nation's oil and gasoline suppliers. As a result of the Hurricane many refineries, drilling operations and pipelines were flooded or disabled creating a disruption in the normal production of oil.

On August 31, 2005, two days after the Hurricane, Exxonmobile charged a base price of \$2.17 per gallon for regular 87 octane fuel. The respondent thereby charged its consumers \$3.14 per gallon, representing a price mark-up of \$0.97 per gallon, a difference of a \$0.14 per gallon mark-up from pre-Hurricane to post Hurricane. On September 1, 2005, Wever did not receive an additional delivery of gas but raised its morning retail price to \$3.25 per gallon and again raised its afternoon retail price to \$3.60 per gallon, a mark-up of \$1.08 and \$1.43, respectively. From September 2, 2005 to September 9, 2005, Exxonmobil charged \$2.57 per gallon for regular 87 octane gasoline and steadily dropped its prices to \$2.31 per gallon. In response, Wever's station steadily dropped its retail prices but maintained a price mark-up of over \$1.00 per gallon for

regular 87 octane fuel. Therefore, during the time period after Hurricane Katrina, Wever's mark-up price ranged from \$0.97 to \$1.43 per gallon, as compared to the pre-Hurricane Katrina mark-up price of \$0.83 per gallon.

N.Y. General Business Law § 396-r(2) provides that,

[d]uring any abnormal disruption of the market for consumer goods and services vital and necessary for the health, safety and welfare of consumers, no party within the chain of distribution of such consumer goods or services or both shall sell or offer to sell any such goods or services or both for an amount which represents an unconscionably excessive price.

The Legislature has further defined 'abnormal disruption of the market' to mean

any change in the market, whether actual or imminently threatened, resulting from stress of weather, convulsion of nature, failure or shortage of electric power or other source of energy, strike, civil disorder, war, military action, national or local emergency, or other cause of an abnormal disruption of the market which results in the declaration of a state of emergency by the governor. N.Y. Gen. Bus. Law § 396-r.

This Court finds that the devastation caused by Hurricane Katrina in late August 2005 was the stress of weather and a convulsion of nature that resulted in a national emergency and caused an abnormal disruption in the gasoline markets of this nation. This Court further finds that a declaration from the Governor of the State of New York is unnecessary to invoke the price gouging statute, in this case, and in fact is only one of a variety of instances where price gouging is invoked, as dictated by the statute. Therefore, any party in the distribution chain of gasoline, at the time of the abnormal disruption, was prohibited from selling gas for an amount that is unconscionably excessive to consumers. "Whether a price is unconscionably excessive is a question of law for the court." N.Y. Gen. Bus. Law § 396-r(3). The statute further provides that

evidence to support an unconscionably excessive price includes whether

(a) the amount charged represents a gross disparity between the price of the goods or services which were the subject of the transaction and their value measured by the price at which such consumer goods or services were sold or offered for sale by the merchant in the usual course of business immediately prior to the onset of the abnormal disruption of the market or (b) the amount charged grossly exceeded the price at which the same or similar goods or services were readily obtainable by other consumers in the trade areas, and, in addition, that (c) the amount charged by the merchant was not attributable to additional costs imposed by its suppliers, shall constitute prima facie proof of a violation of this section in any proceeding commenced by the attorney general pursuant to subdivision four hereof. N.Y. Gen. Bus. Law § 396-1(3).

In other words, “[a] showing of a gross disparity in prices, coupled with proof that the disparity is not attributable to supplier costs, raises a presumption that the merchant used the leverage provided by the market disruption to extract a higher price. The use of such leverage is what defines price gouging, not some arbitrarily drawn line of excessiveness.” People v. Two Wheel Corp. d/b/a Honda-Yamaha of Mineola, et. al., 71 N.Y.2d 693, 698 (1988).

Here, this Court has considered that the price of the gasoline at Wever Petroleum’s ExxonMobile station in Schaghticoke, New York, immediately before Hurricane Katrina was \$2.73 per gallon of regular 87 octane fuel, with a mark-up of \$0.83 per gallon. In contrast, the price of gasoline at Wever Petroleum’s ExxonMobile Station immediately following Hurricane Katrina was \$3.14, \$3.25, \$3.60 per gallon for regular 87 octane fuel, this pricing scheme has a mark-up of \$0.97, \$1.08, \$1.43, respectively. Therefore, in considering the amount of the mark-up and the percentages associated with the prices charged by Exxonmobile and those charged by Wever Petroleum before and after Hurricane Katrina, this Court finds that a there exists a gross

disparity between a \$0.83 per gallon mark-up pre-Hurricane Katrina and a \$0.97, \$1.08 or \$1.43 per gallon mark-up post Hurricane Katrina. Further, this Court finds that the respondent's claims, even if true, that its increase in retail price was the result of a supplier increase, failed to rebut the inference that the price increases were attributable to respondents' use of the leverage provided by the market disruption and were therefore unconscionably excessive. While Wever did raise prices in accordance with an increase in Exxonmobile's base cost, Wever's increase far exceeded the needed increase for Wever to maintain a similar pre-Hurricane profit or to generate the required revenue to purchase gasoline from Exxonmobile the next business day and were unconscionably excessive.

Therefore, after a full review of the record this Court, in its discretion will grant petitioner's petition requesting an injunction enjoining Respondent, its successors, agents or assigns from selling or offering to sell any consumer goods or services for an amount which represents an unconscionably excessive price during any abnormal disruption of the market for such goods. In accordance with N.Y. Gen. Bus. Law § 396-r(4) this Court "shall impose a civil penalty in an amount not to exceed ten thousand dollars". In this case the Court shall impose a civil penalty against respondents in the amount of \$2,500.00 for price gouging.

As previously stated, this Court, is unable to determine specific instances of price gouging and as such denies petitioner's petition requesting disgorgement and restitution for consumers. Generally, restitution for consumers awarded in price gouging cases is awarded to consumers whom have submitted affidavits in support of the State's petition or whom were specifically identified to the Court as alleged to have suffered harm from the price gouging. People v. Vacco, 176 Misc.2d 960 (Clinton Cty. 1998); People v. Two Wheel Corp. d/b/a

Honda-Yamaha of Mineola, et. al., 71 N.Y.2d 693, 698 (1988). In this case, the petitioner's have failed to provide this Court any information as to how many consumers suffered harm as a result of the respondents price gouging and no affidavits were provided in support of the petition. Therefore, without any information whatsoever regarding the number of consumers who suffered harm, this Court, in its discretion will not award restitution.

Lastly, CPLR § 8303(a)(6) provides that a court, in its discretion, may award to the plaintiff, in actions brought by the Attorney General, costs (not exceeding \$2,000) for actions brought under N.Y. Executive Law § 63(12). Here, the petitioner brought this action under both N.Y. Gen. Bus. Law § 396-r and N.Y. Exe. Law § 63(12) and this Court finds that the respondent committed a number of distinct and separate illegal acts which affected more than one person, therefore violating Executive Law § 63(12). Therefore, this Court, in its discretion will award the petitioner a sum of \$2,000 for costs.

All papers, including this Decision and Order, are being returned to the attorney for the Petitioner. The signing of this Decision and Order shall not constitute entry or filing under CPLR § 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

SO ORDERED!

Dated: August 23 2006
Albany, New York


JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Petition, dated April 19, 2006, with Attached Verified Petition, dated April 20, 2006, with Attached Affirmation Winthrop H. Thurlow, Esq., with Attached Exhibits 1-6.
2. Verified Answer to Petition, dated June 1, 2006.
3. Affidavit of Michael D. Difabio In Opposition, dated June 2, 2006, with Attached Exhibits A - C.
4. Affidavit of Ralph Bombardiere, dated June 2, 2006, with Attached Exhibits A-E.
5. Affidavit of Virginia M. Abello In Opposition, dated May 31, 2006, with Attached Exhibits A - D.
6. Affidavit of Michael Alonzo In Opposition, dated June 1, 2006, with Attached Exhibits A - K.
7. Reply Affirmation of Winthrop H. Thurlow, Esq., dated June 21, 2006, with Attached Exhibit A.