

MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 47

THE PEOPLE OF THE STATE OF NEW YORK
By ERIC T. SCHNEIDERMAN, Attorney General
of the State of New York,

By: Jerry Garguilo, J.S.C.
Dated: October 18, 2013

Petitioner,

Index No. 13-11907
Mot. Seq. #001 - MotD; CDISPSUBJ

- against -

Return Date: 5/23/13
Adjourned: 7/24/13

AGIP GAS, LLC, d/b/a USA PETROLEUM,

Respondent.

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In this proceeding, the petitioner seeks the entry of an order and judgment (i) permanently enjoining the 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, (ii) directing the respondent to disgorge to New York State the amount of the excess profit it generated by price gouging, (iii) directing the respondent to pay a civil penalty for each violation of General Business Law § 396-r, and (iv) directing the respondent to pay the petitioner the sum of \$2,000.00 in costs pursuant to CPLR 8303 (a) (6).

The petitioner initiated this proceeding pursuant to Executive Law § 63 (12) and General Business Law § 396-r, under which the attorney general is authorized to seek redress on behalf of consumers against merchants who are alleged to have charged excessive prices for essential consumer goods and services during periods of abnormal disruption of the market, such as those following hurricanes and winter storms.

According to the petition, the respondent, which operates a retail gasoline filling station at 11 East Main Street, East Islip, New York, engaged in price gouging by illegally inflating the retail price of its gasoline in the aftermath of Hurricane Sandy, which hit the New York metropolitan area on October 29, 2012. On November 5, in response to a consumer complaint, the office of the attorney general sent a letter to the respondent requesting information on the prices it paid its suppliers and charged its consumers for its lowest grade of gasoline between October 22 and November 5. Based on the information provided by the respondent, it appears that on October 25, the respondent received a delivery of regular unleaded gasoline, for which it paid \$2.705 per gallon, and that on the same day, it

charged a retail price of \$3.779 per gallon, representing a markup of \$1.074 per gallon; it also appears that from November 3 through November 5, the respondent received multiple deliveries of regular unleaded gasoline, for which it paid \$3.145 per gallon, and that over those same days, it charged a retail price of \$4.599 per gallon, representing a markup of \$1.454 per gallon.

The petitioner alleges two causes of action in its petition: the first, that the respondent violated General Business Law § 396-r by charging “unconscionably excessive” prices for its gasoline in the days following the “abnormal disruption of the market” caused by Hurricane Sandy, and the second, that the respondent violated Executive Law § 63 (12) by its repeated and persistent illegal acts in violation of General Business Law § 396-r.

General Business Law § 396-r, entitled “Price gouging,” provides as follows:

1. Legislative findings and declaration. The legislature hereby finds that during periods of abnormal disruption of the market caused by strikes, power failures, severe shortages or other extraordinary adverse circumstances, some parties within the chain of distribution of consumer goods have taken unfair advantage of consumers by charging grossly excessive prices for essential consumer goods and services.

In order to prevent any party within the chain of distribution of any consumer goods from taking unfair advantage of consumers during abnormal disruptions of the market, the legislature declares that the public interest requires that such conduct be prohibited and made subject to civil penalties.

2. During 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. For purposes of this section, the phrase “abnormal disruption of the market” shall 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. For the purposes of this section, the term consumer goods and services shall mean those used, bought or rendered primarily for personal, family or household purposes. This prohibition shall apply to all parties within the chain of distribution, including any manufacturer, supplier, wholesaler, distributor or retail seller of consumer goods or services or both sold by one party to another when the product sold was located in the state prior to the sale. Consumer goods and services shall also include any repairs made by any party within the chain of distribution of consumer goods on an emergency basis as a result of such abnormal disruption of the market.

3. Whether a price is unconscionably excessive is a question of law for the court.

(a) The court's determination that a violation of this section has occurred shall be based on any of the following factors: (i) that the amount of the excess in price is unconscionably extreme; or (ii) that there was an exercise of unfair leverage or unconscionable means; or (iii) a combination of both factors in subparagraphs (i) and (ii) of this paragraph.

(b) In any proceeding commenced pursuant to subdivision four of this section, prima facie proof that a violation of this section has occurred shall include evidence that

(i) 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 defendant in the usual course of business immediately prior to the onset of the abnormal disruption of the market or

(ii) 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 area. A defendant may rebut a prima facie case with evidence that additional costs not within the control of the defendant were imposed on the defendant for the goods or services.

4. Where a violation of this section is alleged to have occurred, the attorney general may apply in the name of the People of the State of New York to the supreme court of the State of New York within the judicial district in which such violations are alleged to have occurred, on notice of five days, for an order enjoining or restraining commission or continuance of the alleged unlawful acts. In any such proceeding, the court shall impose a civil penalty in an amount not to exceed twenty-five thousand dollars and, where appropriate, order restitution to aggrieved consumers.

Executive Law § 63 (12) provides:

Whenever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business, the attorney general may apply, in the name of the people of the state of New York, to the supreme court of the state of New York, on notice of five days, for an order enjoining the continuance of such business activity or of any fraudulent or illegal acts, directing restitution and damages and, in an appropriate case, cancelling any certificate filed under and by virtue of the provisions of * * * section one hundred thirty of the general business law, and the court may award the relief applied for or so much thereof as it may deem proper. The word "fraud" or "fraudulent" as used herein shall include any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual provisions. The term "persistent fraud" or "illegality" as used herein shall include continuance or carrying on of any fraudulent or illegal act or conduct. The term "repeated" as used herein shall include repetition of any separate and distinct fraudulent or illegal act, or conduct which

affects more than one person.

In connection with any such application, the attorney general is authorized to take proof and make a determination of the relevant facts and to issue subpoenas in accordance with the civil practice law and rules. Such authorization shall not abate or terminate by reason of any action or proceeding brought by the attorney general under this section.

As a threshold matter, there can be little argument that Hurricane Sandy created “an abnormal disruption of the market” for gasoline in the New York metropolitan area, that gasoline falls within the definition of “consumer goods” that are vital and necessary for the health, safety, and welfare of consumers and used primarily for personal, family or household purposes, and that the respondent is a “party within the chain of distribution” of such goods (*see* General Business Law § 396-r [2]; *see also* *People v My Serv. Ctr.*, 14 Misc 3d 1217[A], 836 NYS2d 487 [2007]; *People v Wever Petroleum*, 14 Misc 3d 491, 827 NYS2d 813 [2006]).

In accordance with those observations, and based on the evidence presented by the petitioner, the court finds such a gross disparity between the price at which gasoline was sold by the respondent on October 25 and the price at which it was sold from November 3 through November 5 as to establish prima facie proof that the price increase was unconscionably excessive and, hence, that the respondent violated General Business Law § 396-r (*see* General Business Law § 396-r [3] [a], [b] [i]). To the extent the respondent claims that the petitioner’s calculations of its markups are inaccurate because they fail to properly account for taxes, its claim is unpersuasive. In particular, the respondent argues that its gross purchase price for the regular unleaded gasoline which it received on October 25 was actually \$3.30 per gallon, not \$2.705 per gallon, and that its gross purchase price for the regular unleaded gasoline which it received from November 3 through November 5 was \$3.74 per gallon, not \$3.145 per gallon. Even using those figures, it remains that the retail price charged by the respondent on October 25 was \$3.779, which reflects a markup of \$0.479 per gallon, and that the retail price charged by the respondent from November 3 through November 5 was \$4.599, which reflects a markup of \$0.859 per gallon—an increase in markup of nearly 80%. The respondent also argues that the retail price of the gasoline should be adjusted to reflect State sales tax of \$0.10 or \$0.11 per gallon which it is required to collect from consumers at the pump, *i.e.*, that the retail price used as the basis for comparison should be net of those taxes. But that argument—irrespective of the dubious logic which it employs—does not avail the respondent either; if the markup immediately prior to Hurricane Sandy was only \$0.379 and the markup from November 3 through November 5 was only \$0.749, this would reflect an (even greater) increase in markup of nearly 100%. Thus, notwithstanding the sharp increase in the price which the respondent was evidently required to pay its supplier following Hurricane Sandy, it appears that the concomitant increase in its retail price far exceeded what was required for the respondent to maintain its profit margin (*see* *People v Wever Petroleum, supra*).

The court further finds that the respondent failed to rebut the petitioner’s prima facie case (*see* General Business Law § 396-r [3] [b] [ii]). The respondent asserts, in relevant part, that the increased prices which it charged its customers from November 3 through November 5 were reasonable because of the additional burdens and costs, including man-hours, which it incurred relating to gas lines, security concerns, crowd and traffic flow, uncertainty with respect to the delivery of replacement inventory, and

other "soft costs" due to emergency conditions. Additionally, the respondent asserts that any increased leverage on its part was the result of New York's failure to earlier mandate odd/even gasoline rationing, as was done in New Jersey, and that such failure and other failures to reduce consumer anxiety led to the "topping off" phenomenon and contributed to the gas lines and supply issues which, in turn, increased the respondent's costs. Without more, however, the court is constrained to find such assertions insufficient to raise a triable issue of fact, particularly as the respondent failed to demonstrate the extent to which those burdens and costs justified the price increase (*see People v Two Wheel Corp.*, 71 NY2d 693, 530 NYS2d 46 [1988]; *People v Beach Boys Equip. Co.*, 273 AD2d 850, 709 NYS2d 729 [2000]).

Accordingly, the court finds as a matter of law that the price increase was "unconscionably excessive" in violation of General Business Law § 396-r and, further, that such conduct constituted "repeated * * * illegal acts" in violation of Executive Law § 63 (12).

Notwithstanding the violation of those sections, the petitioner is not entitled to injunctive relief, having failed to demonstrate that illegal acts are presently occurring or that additional illegal acts are threatened and imminent (*see Elow v Svenningsen*, 58 AD3d 674, 873 NYS2d 319 [2009]). Although both General Business Law § 396-r (4) and Executive Law § 63 (12) provide that the petitioner may apply for injunctive relief, neither authorizes the granting of such relief merely upon a showing that the respondent has violated its provisions.

The petitioner's further request for disgorgement of profits obtained by the respondent through its illegal acts is denied as well. While General Business Law § 396-r (4) and Executive Law § 63 (12) authorize the granting of restitution to aggrieved consumers—relief which the petitioner has not requested—they make no provision for disgorgement of profits to the State. Even had the petitioner sought restitution, the court would be inclined to deny the request in light of the petitioner's failure to submit affidavits from consumers or to identify any consumers allegedly harmed by the price gouging (*see People v Wever Petroleum, supra*).

However, since General Business Law § 396-r (4) mandates the imposition of a civil penalty not to exceed \$25,000.00 for its violation, the court hereby imposes against the respondent a civil penalty in the amount of \$10,000.00.

Finally, since CPLR 8303 (a) (6) provides that a court may award to the petitioner in a proceeding brought pursuant to Executive Law § 63 (12) an allowance not exceeding \$2,000.00 against each respondent, the court, in its discretion, hereby awards the petitioner an allowance in the amount of \$2,000.00.

Submit judgment.

10/18/13


J.S.C.