

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
FRANKFORT DIVISION  
CIVIL ACTION NO. \_\_\_\_\_

**Electronically Filed**

MARATHON PETROLEUM COMPANY LLC  
and SPEEDWAY SUPERAMERICA LLC

PLAINTIFFS

v.

GREGORY D. STUMBO, in his  
Official Capacity as the  
Attorney General of Kentucky

Serve:

Gregory D. Stumbo  
Attorney General  
Capitol Building, Suite 116  
Frankfort, Kentucky 40601

and

HONORABLE ERNIE FLETCHER,  
In his official capacity as Governor  
of the Commonwealth of Kentucky

DEFENDANTS

Serve:

Gregory D. Stumbo  
Attorney General  
Capitol Building, Suite 116  
Frankfort, Kentucky 40601

\* \* \* \* \*

**COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF**

Marathon Petroleum Company LLC and Speedway SuperAmerica LLC  
(collectively "Marathon"), for their Complaint for Declaratory and Injunctive Relief  
against Gregory D. Stumbo, in his official capacity as the Attorney General of Kentucky

(the “Attorney General”) and Governor Ernie Fletcher, in his official capacity as the Governor of Kentucky (the “Governor”), (collectively, the “Defendants”), states as follows:

### NATURE OF THE CONTROVERSY

1. This is an action for a declaratory judgment pursuant to 28 U.S.C. § 2201 and Fed. R. Civ. P. 57 to determine the constitutionality of Kentucky’s price-gouging statutes, codified at KRS §§ 367.372, 367.374, 367.376 and 367.378 (hereinafter, KRS § 367.372, *et seq.*), and Executive Order No. 2005-943 issued by the Governor on August 31, 2005.

2. In the instant action, Marathon raises three constitutional claims for adjudication:

**First**, KRS § 367.372, *et seq.* is unconstitutional as applied to Marathon under the Due Process Clause of the 14<sup>th</sup> Amendment to the U.S. Constitution and Section 2 of the Kentucky Constitution because (a) the statute does not define the period of time during which emergency price controls remain in effect, nor direct the Governor to impose a limit on the duration of the emergency declaration, thereby affording unlimited enforcement power to the Attorney General for an indefinite period of time; (b) the statute’s “grossly excessive” standard fails to give Marathon and other gasoline sellers fair notice of how to calculate permissible price increases during the period of emergency, resulting in arbitrary and discriminatory enforcement of the statute; and (c) the Attorney General has improperly utilized profit margins as a rough proxy for “grossly excessive” price increases without sufficient advance notice to Marathon and other gasoline sellers.

**Second**, the Governor's August 31, 2005 Order implementing KRS § 367.372, *et seq.* is unconstitutional and void *ab initio* because it fails to set forth a date certain for its termination or renewal and thereby establishes emergency price controls of indefinite duration, constituting (a) an invalid exercise of absolute and arbitrary government power in violation of Ky. Const. Section 2; and (b) an invalid exercise of the General Assembly's law making power by the Executive Branch.

**Third**, KRS § 367.372, *et seq.* violates the Commerce Clause of the United States Constitution by unreasonably impeding the flow of interstate commerce, prohibiting the flow of interstate goods, and thereby unconstitutionally limiting competition and discriminating against interstate commerce.

### **PARTIES**

3. Plaintiff Marathon Petroleum Company LLC is a Delaware limited liability company with its principal place of business located in Findlay, Ohio. Marathon's members are Marathon Oil Company, an Ohio corporation with its principal place of business located in Houston, Texas, and Marathon Domestic LLC, a Delaware limited liability company with its principal place of business located in Findlay, Ohio.

4. Marathon Petroleum Company LLC is an oil refining, marketing and transportation company. Marathon owns and operates a gasoline distribution terminal located at 3920 Kramers Lane, Louisville, Kentucky 40216 (the "Kramers Lane Terminal"). From its Kramers Lane Terminal, Marathon supplies gasoline to wholesalers and retailers of gasoline in Jefferson, Oldham and Bullitt Counties in Kentucky, as well as Clark and Floyd Counties in Indiana (the "Louisville Metropolitan Area"), and markets in the States of Michigan, Ohio and Tennessee. Plaintiff Speedway SuperAmerica LLC, a

Delaware corporation, is a wholly owned subsidiary of Marathon Petroleum Company which owns and operates 137 Speedway stores in Kentucky which sell gasoline at retail.

5. Defendant Gregory D. Stumbo is the duly elected Attorney General of Kentucky. In that capacity, Defendant exercises the powers granted to him by statute, including enforcement power under Kentucky's price-gouging statutes KRS § 367.372, *et seq.*

6. The Defendant, Ernie Fletcher, is the duly elected Governor of the Commonwealth of Kentucky. The Governor is vested with the supreme executive power of the Commonwealth pursuant to Kentucky Constitution, Section 69. Pursuant to Kentucky Constitution Section 81, the Governor has the duty to take care that the laws be faithfully executed. Pursuant to KRS § 367.372, *et seq.*, the Governor has the statutory authority to trigger emergency price controls. The Governor is named in this action in his official capacity as Governor of the Commonwealth and head of the Executive Branch of government.

#### **JURISDICTION AND VENUE**

7. This Court has jurisdiction of this matter pursuant to 28 U.S.C. §1331 because this civil action raises federal questions concerning federal constitutionality of a state statute under the Constitution and laws of the United States. The Court has supplemental jurisdiction of any pendent state law claims pursuant to 28 U.S.C. § 1367. This Court also has jurisdiction of this matter pursuant to 28 U.S.C. § 1332 and 28 U.S.C. § 2201 because this is an action for declaration of rights between citizens of different states and the amount in controversy exceeds \$75,000 exclusive of interest and costs.

8. Venue is proper in the Eastern District of Kentucky pursuant to 28 U.S.C. §1391(a) because a substantial part of the events giving rise to this action occurred in this District and the Defendants reside in this District.

### **THE CONTROVERSY**

9. On July 13, 2004, KRS 367.372, *et seq.* became effective as an amendment to the Kentucky Consumer Protection Act. The new provisions were codified under Sales and Rentals during a State of Emergency, and they permit the Governor to implement price controls on the sale of certain goods and services during a period of emergency declared by the Department of Homeland Security (“DHS”) or by the Governor pursuant to KRS 39A.100. The stated purpose of the statute is to prohibit “grossly excessive” price increases during a period of emergency affecting the lives, welfare or property of citizens.

10. On August 30, 2005, Governor Ernie Fletcher issued Executive Order No. 2005-927, which declared a state of emergency “beginning August 29, 2005 and continuing ... until terminated by subsequent Order or by operation of law.”

11. Executive Order No. 2005-927 cited the potential for weather effects of Hurricane Katrina to reach Kentucky as the basis for the emergency, but gave no specific termination date for the period of emergency. A copy of Executive Order No. 2005-927 is attached hereto as Exhibit 1.

12. To date, the Governor has not issued a subsequent order terminating (or extending) Executive Order No. 2005-927, nor is there any statutorily defined period for terminating the emergency “by operation of law.”

13. On August 31, 2005, Governor Fletcher issued Executive Order No. 2005-943, which acknowledged Executive Order No. 2005-927 and explicitly implemented the

price-gouging statute “as to the sale of gasoline in Kentucky.” A copy of Executive Order No. 2005-943 is attached hereto as Exhibit 2.

14. Executive Order No. 2005-943 stated that it would be in effect “for the duration of the State of Emergency [declared on August 30, 2005], and shall be subject to renewal thereafter, subject to the applicable law.”

15. To date, the Governor has not issued a subsequent order terminating (or extending) Executive Order No. 2005-943, nor has there been any communication from the Division of Emergency Management indicating that the price-gouging order has either been terminated or extended.

16. On or about April 21, 2006, the Attorney General issued a Subpoena and Investigative Demand to Marathon Ashland Petroleum, LLC (the “April 21, 2006 ID”), entitled *In re gasoline price investigation*, seeking information regarding the volume and cost of the fuel delivered to Marathon’s petroleum storage facilities, every price charged, the quantity sold, and the reason for any price changes, as well as documents relating to the purchase of sale of regular unleaded gasoline, both inside and outside of the Commonwealth of Kentucky, provided the sales related to Marathon’s participation in the Kentucky fuel market. A copy of the Attorney General’s April 21, 2006 ID is attached hereto as Exhibit 3.

17. The Attorney General’s April 21, 2006 ID centered on allegations that Marathon had violated KRS § 367.170 prohibiting “[u]nfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce...” KRS § 367.170(1).

18. The April 21, 2006 ID did not purport to relate to any investigation of alleged violations of the price-gouging statute, KRS § 367.372, *et seq.*

19. Almost a year after Hurricane Katrina struck the Gulf Coast, on or about August 8, 2006, the Attorney General issued a Subpoena and Investigative Demand to Speedway SuperAmerica, Inc. (the “August 8, 2006 ID”), entitled *In re gasoline price investigation*, seeking information regarding every price charged, the quantity sold, and the reason for any price changes, as well as documents relating to the purchase of sale of gasoline, both inside and outside of the Commonwealth of Kentucky, provided the sales related to Marathon’s participation in the Kentucky fuel market between August 2005 through August 2006. A copy of the Attorney General’s August 8, 2006 ID is attached hereto as Exhibit 4.

20. At the time the Attorney General’s Office issued the August 8, 2006 ID, it had no information that Speedway as a chain violated the Kentucky Consumer Protection Act (the “KCPA”), including but not limited to KRS § 367.170 or § 367.372, *et seq.* A true and correct copy of transcript of a press conference held by the Kentucky Attorney General’s office discussing these issues is attached hereto as Exhibit 5.

21. The August 8, 2006 ID did not purport to relate to any investigation of alleged violations of the price-gouging statute, KRS § 367.372, *et seq.*

22. KRS § 367.372 defines “state of emergency” for purposes of the statute to encompass those weather and war related events typically associated with emergencies, in addition to a catch-all clause that incorporates “any other event for which a state of emergency has been proclaimed by the President of the United States or declared by the Governor. It shall also include the duration of a Condition Red as declared by the DHS under the Homeland Security Advisory System.”

23. KRS § 367.374 permits the Governor to implement the price-gouging provisions only when DHS declares a Condition Red or when the Governor declares a state of emergency under KRS § 39A.100. It also limits the implementation of the statute to “the duration of the declaration [of a state of emergency] and the area for which the declaration was issued.” KRS § 367.374(1)(a). Subsection (2) enables the Governor to extend the statute for a period of up to thirty days “if necessary to protect the lives, property, or welfare of the citizens.”

24. KRS § 367.372, *et seq.* does not contemplate an open-ended or indefinite period for the continuation of emergency price controls, as in this instance where the Governor’s implementing order does not contain an end date for the state of emergency and there has been no subsequent order or other communication declaring an end to the state of emergency.

25. KRS § 367.374(1)(b) states, in relevant part, that “no person shall sell . . . or offer to sell . . . , regardless of whether an actual sale . . . occurs, a good . . . listed in this paragraph [which includes gasoline] . . . for a price which is grossly in excess of the price prior to the declaration and unrelated to any increased cost to the seller.”

26. KRS § 367.374(1)(c) provides a safe harbor for price increases that are “attributable to an additional cost imposed by a supplier of a good or other costs of providing the good . . . including an additional cost for labor or materials used to provide a service.”

27. KRS § 367.374(3) states that where a good was being sold at a reduced price in the 30 days prior to the implementation of the statute, the determination of whether

a price increase is grossly excessive is based on the price at which the seller “usually sells” the good in the relevant market.

28. KRS § 367.374 similarly designates “the price at which a good . . . was generally available in the area” as the relevant one for sellers who enter the market only after implementation of the statute.

29. Pursuant to KRS § 367.376, the Division of Emergency Management (“the Division”) is statutorily required to “immediately notify the public and those registered with the Division for the purpose of receiving notice” when the statute is implemented, renewed or terminated. In fulfilling this statutory duty to notify the public, the Division is commanded to use “any means available,” but the statute identifies the Division’s website, news media and electronic mail as appropriate means for providing notice.

30. KRS § 367.378 delineates the possible penalties for violations of the price-gouging statute. The first “willful violation” is subject to a civil penalty of no more than \$5,000, while each subsequent violation is punishable by a penalty of no more than \$10,000.

31. Pursuant to § 367.374(1)(b), in addition to the penalties set forth in the price-gouging provisions, the Attorney General may enforce the other penalty provisions of the KCPA, including actual and punitive damages and disgorgement of profits for any acts determined to be “unfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce” under the KCPA. *See* KRS § 367.170; KRS § 367.220.

32. Since the KCPA defines “unfair” as “unconscionable,” a price increase determined to be “grossly excessive” under the price-gouging statute could also be deemed

“unconscionable” subjecting the seller to substantial, additional monetary penalties for violations of KRS § 367.170.

**FIRST CLAIM FOR RELIEF**  
**Declaration of Rights regarding constitutionality of KRS § 367.372, et seq.**  
**as applied to Marathon**

33. Marathon restates and incorporates herein by reference the allegations in paragraphs 1-32 of the Complaint.

34. There is an actual and justiciable case or controversy between the parties regarding the language and application of KRS § 367.372, *et seq.* because the Attorney General has taken investigatory and enforcement action against Marathon pursuant to the price-gouging statute and the underlying Executive Order which implemented the statute.

35. Based on the absence of an express statutory time limit for the application of KRS § 367.372, *et seq.*, Marathon was not given notice of the period of time during which the price-gouging statute remains in effect and may be enforced against sellers of gasoline.

36. As applied to Marathon, the Kentucky price-gouging statute is void for vagueness under the Due Process Clause of the 14<sup>th</sup> Amendment to the U.S. Constitution and Section 2 of the Kentucky Constitution.

37. Based on the absence of a definition of “grossly in excess,” Marathon was not given notice of what level of price increase would violate the price-gouging statute. Further, the statute fails to adequately define the period prior to the declaration which will supply the base price against which future increases will be compared. Therefore, as applied to Marathon, the Kentucky price-gouging statute is void for vagueness under the Due Process Clause of the 14<sup>th</sup> Amendment to the U.S. Constitution and Section 2 of the Kentucky Constitution.

38. The Attorney General's enforcement of the price-gouging statute against sellers based on allegations of "grossly excessive, increased profits," rather than grossly excessive price increases as required by statute, violates Marathon's right to due process and constitutes an arbitrary, capricious, and clearly erroneous exercise of the Attorney General's enforcement power under the statute.

39. Marathon is entitled to a declaration of rights that, as applied to Marathon, the price-gouging provisions are unconstitutional and otherwise unenforceable as they have been applied to Marathon by the Attorney General.

### **SECOND CLAIM FOR RELIEF**

#### **Declaration of Rights regarding constitutionality of Executive Order No. 2005-943**

40. Marathon restates and incorporates herein by reference the allegations in paragraphs 1-39 of the Complaint.

41. There is an actual and justiciable case or controversy between the parties regarding the language and application of the Governor's Executive Order No. 2005-943 because the Attorney General has purported to take enforcement action under the price-gouging statutes against Marathon predicated upon the validity of that Order.

42. Marathon is entitled to a declaration of rights that the Governor's Executive Order violates Ky. Const. Section 2 because it does not set forth a date for its termination and is therefore an unconstitutional exercise of absolute and arbitrary Executive Power. In the alternative, Marathon is entitled to a declaration that the Executive Order, and any enforcement authority thereunder, has expired by operation of law.

43. Pursuant to Ky. Const. Section 29, the General Assembly exclusively exercises the law making power.

44. There is an actual and justiciable case or controversy between the parties regarding the Governor's exercise of his Executive Power by issuing Executive Order No. 2005-943.

45. Marathon is entitled to a declaration of rights that the Governor's August 31, 2005 Order invoking KRS § 367.372, *et seq.* violates the separation of powers doctrine set forth in Ky. Const. §§ 27 and 28 by failing to contain language for the termination of the emergency, as KRS § 367.374(2) mandates a renewal of the emergency time period, if necessary.

46. Marathon is entitled to a declaration of rights that the Governor's August 30 and 31, 2005 Executive Orders invoking KRS § 367.372, *et seq.* is an unconstitutional exercise of the law making power by effectively instituting permanent price controls, which can only be done by the General Assembly. Therefore, the Governor's Executive Order No. 2005-943 violates the separation of powers doctrine and is void *ab initio*.

**THIRD CLAIM FOR RELIEF**  
**Violation of the Dormant Commerce Clause**

47. Marathon restates and incorporates herein by reference the allegations in paragraphs 1-46 of the Complaint.

48. There is an actual and justiciable case or controversy between the parties regarding the validity of KRS § 367.372, *et seq.* because the Attorney General has taken enforcement action under the statutes.

49. Pursuant to Article I, Section 8, Cl. 3 of the United States Constitution, Congress has the exclusive authority to regulate interstate commerce and a state may not

regulate in a manner that either discriminates against non-citizens of the state or unreasonably burdens interstate commerce.

50. The sale of gasoline through Marathon's retailers and the wholesale market for petroleum is within the scope of the Commerce Clause.

51. KRS § 367.372, *et seq.* violates the Commerce Clause by attempting to regulate commerce between the states in the market for gasoline in a manner which unreasonably burdens interstate commerce.

52. The Plaintiff is entitled to a declaration of rights that KRS § 367.372 is unconstitutional and that the Governor's Order implementing the price-gouging provisions are null, void and unenforceable, as they prohibit the flow of interstate goods, thereby limiting competition.

**FOURTH CLAIM FOR RELIEF**  
**Injunctive relief**

53. Marathon restates and incorporates herein by reference the allegations in paragraphs 1-52 of the Complaint.

54. Marathon is entitled to an injunction prohibiting the Attorney General from enforcing KRS § 367.372, *et seq.* and his Subpoenas and Investigative Demands dated April 21, 2005 and August 8, 2005

**PRAYER FOR RELIEF**

WHEREFORE, the Plaintiffs Marathon Petroleum Company LLC and Speedway SuperAmerica LLC respectfully request the following relief:

- a) A declaration of rights that KRS § 367.372, *et seq.* is unconstitutional as applied to Marathon;

- b) A declaration of rights that Governor Fletcher's Executive Order No. 2005-943 is unconstitutional and void *ab initio*, or has expired by operation of law.
- c) An injunction prohibiting the Attorney General from enforcing KRS § 367.372, *et seq.* and requiring the Attorney General to terminate its investigation of Marathon;
- d) Reasonable costs, including attorney's fees; and
- e) All other relief to which the Plaintiffs may be entitled.

Respectfully submitted,

/s/ Charles S. Cassis  
Charles S. Cassis  
Peter M. Cummins  
Tanya Y. Bowman  
FROST BROWN TODD LLC  
400 W. Market Street, 32<sup>nd</sup> Floor  
Louisville, KY 40202-3363  
(502) 589-5400 – phone  
(502) 589-1087 – facsimile

***Attorneys for Plaintiffs Marathon Petroleum  
Company LLC and Speedway SuperAmerica LLC***