

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION at FRANKFORT
CIVIL ACTION NO. 3-07-CV-00030**

Electronically Filed

**COMMONWEALTH OF KENTUCKY, EX REL.
GREGORY D. STUMBO, ATTORNEY GENERAL**

PLAINTIFF

v.

**MARATHON PETROLEUM COMPANY, LLC;
MARATHON OIL CORPORATION; and
SPEEDWAY SUPERAMERICA, LLC**

DEFENDANTS

* * * * *

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR REMAND

The Commonwealth of Kentucky, *ex rel.* Attorney General Gregory D. Stumbo, states the following in reply to Defendants' Response to Motion for Remand.

I. INTRODUCTION

Defendants have failed to meet their burden of establishing subject matter jurisdiction. Defendants have not cited a single case where a federal court retained jurisdiction over a case brought by a state Attorney General based on diversity. As is set forth in more detail below, the case law is overwhelmingly in support of the proposition that the Commonwealth of Kentucky is the real party in interest in an action brought by the Attorney General to enforce consumer protection statutes. Moreover, *Ex Parte Young* has no application to the case where the Attorney General is the plaintiff; it merely provides a narrow exception to 11th Amendment immunity for suits against the state

seeking prospective injunctive relief. *See Ex Parte Young* 209 U.S. 123 (1908). Using the doctrine to provide subject matter jurisdiction for the case at bar would be an unwarranted and unprecedented expansion of the case law. Therefore, there is no diversity jurisdiction and the case must be remanded.

II. ARGUMENT

A. The Court does not have subject matter jurisdiction over the case.

Defendants' tortured attempts to transform the Commonwealth's enforcement action into an action between citizens of diverse citizenship ignore the applicable case law. The argument that the Commonwealth is not the real party in interest pursuing its claim for enforcement and restitution under the state's Consumer Protection Act has been repeatedly rejected by the federal courts. Defendants' citation of *Ex Parte Young*, is a transparent attempt to bootstrap their unconstitutionality defense into federal subject matter jurisdiction, which is clearly impermissible under settled law. *See id.* Both arguments must fail.

B. The Commonwealth is the real party in interest in this case.

In this case, the Plaintiff is the Commonwealth of Kentucky, represented by the Attorney General as relator (seeking civil penalties to be paid into the state treasury) and chief law enforcement officer of the state. The fact that the consumer protection laws provide for a remedy of restitution to affected consumers as well as penalties and injunctive relief does not deprive the case of its character as an enforcement action on behalf of the state, affecting the state's treasury and vindicating the state's interest in the 'economic well-being of its citizens'. *Hood ex rel. Mississippi v. Microsoft*, 428 F. Supp.2d 537, 545 (S.D. Miss. 2006), *appeal dismissed*, 2006 WL 4404868.

The reported federal cases where an Attorney General is seeking restitution and penalties under a consumer protection or antitrust act have all resulted in remand.¹ *See, e.g., West Virginia ex rel. McGraw v. Minnesota Mining and Manufacturing Company*, 354 F. Supp. 2d 660 (S.D.W.V. 2005) (no diversity jurisdiction where Attorney General sought restitution and civil penalties against defendants under common law and consumer protection act); *Hood ex rel. Mississippi v. Microsoft*, 428 F. Supp.2d 537, *supra*, (court rejected argument based on *Levi Strauss* case, *infra*, and found that state seeking restitution on behalf of consumers pursued ‘quasi-sovereign’ interest in well-being of its citizens, therefore no diversity); *Harvey v. Blockbuster*, 384 F.Supp.2d 749, 755-56 (D. N.J. 2005) (remanding case and rejecting defendant’s argument that its citizenship was diverse from that of unnamed N.J. citizens who might benefit from Attorney General’s suit under state’s Consumer Fraud Act); *Wisconsin v. Abbot Laboratories*, 341 F.Supp. 2d 1057 (W.D. Wisc. 2004) (remanding state’s case despite defendant’s argument state claims on behalf of private parties were subject to diversity jurisdiction); *Missouri ex rel. Webster v. Best Buy Co.*, 715 F. Supp. 1455, 1457-58 (E.D. Mo. 1989) (state was “true party in interest” in action to recover restitution for consumers under Missouri Merchandising Practices Act); *Kansas ex rel. Stovall v. Home Cable Inc.*, 35 F. Supp. 2d 783 (D. Kan. 1998) (state of Kansas was real party in interest, not Attorney General personally or the citizens on whose behalf restitution was sought, therefore, there was no diversity jurisdiction in action under the Kansas Consumer Protection Act)².

¹ All of the reported cases discovered by Plaintiff’s research have resulted in remands, and the Defendant has cited no case where the federal court has retained jurisdiction in such an action.

² Indeed, the presence of the state as sovereign (seeking injunctive relief and civil penalties) in the case would defeat complete diversity and preclude federal subject matter jurisdiction. So, too, would relief for consumers who purchased motor fuels in Kentucky but who are citizens of the states the Marathon Defendants claim to reside in for diversity purposes, like college students living temporarily and buying gas

As the cited cases demonstrate, the state is the real party in interest where it seeks restitution to individual consumers as well as enforcement of consumer protection or antitrust laws. Most courts review the question by examining the state's interest in the lawsuit as a whole. *See, e.g., Hood ex rel. Mississippi*, 428 F.Supp at 546, *supra* and cases cited therein. The only such case that has apparently reviewed diversity for each claim on behalf of private parties as well as the claims for relief that would inure to the benefit of the state is the *Levi Strauss* case cited by Defendants. *See Connecticut v. Levi Strauss & Co.*, 471 F. Supp. 363 (D. Conn. 1979).

The Defendants state that this “is the exact scenario presented in the *Levi Strauss* case.” Memorandum in Opposition to Remand at 5. If so, then this case must be remanded to state court, as *Levi Strauss* was. The court in *Levi Strauss* found that although there could be diversity as to the individual claims for consumer restitution, each claim was too small to satisfy the jurisdictional amount. *Connecticut v. Levi Strauss & Co.*, 471 F.Supp. 363, 371 (“Each individual from whom Connecticut seeks a refund has a claim of no more than a few dollars; no one seeks anything close to the \$10,000 required of each claimant.”) As in *Levi Strauss*, in this action, the individual claims are too small to satisfy the jurisdictional amount, now \$75,000.³ *See* 28 USC §1332(a). As the *Levi Strauss* case was remanded to state court, it does not stand for the proposition

in Kentucky.

³ It is highly unlikely that any consumer had overcharges in excess of the jurisdictional amount on gas during the two months cited in the complaint. Certainly Defendants have not carried their burden to demonstrate subject matter jurisdiction on this point. Moreover the suit by the Attorney General is not a class action. *See Harvey v. Blockbuster*, 384 F. Supp at 754 (parens patriae suits brought by Attorneys General not class actions for purposes of determining diversity jurisdiction).

that the state is not the real party in interest where consumer restitution is sought.⁴ *Id* at 372.

Moreover, Defendants argue based on *Tosco Corp v. Communities for a Better Environment*, that the policy behind diversity jurisdiction is designed to protect out of state litigants from local prejudice. Even if this were true, it would not alter the lack of federal subject matter jurisdiction in this case. Federal subject matter jurisdiction is to be strictly construed, not expanded as a matter of a policy. *See, e.g. Alexander v. Electronic Data Sys. Corp.*, 13 F.3d 940, 949 (6th Cir. 1994). Furthermore, *Tosco* does not support the Defendants' position. The sentence directly after the one they quote states: "Plaintiff, as a major employer and business operator in California, is not the type of litigant that diversity jurisdiction was designed to protect." *Tosco Corp. v. Communities for a Better Environment* 236 F.3d 495, 502 (9th Cir. 2001). Similarly, the Marathon defendants have a substantial presence in Kentucky.⁵

C. Defendants' efforts to create diversity jurisdiction based on a defense that implicates federal law must fail.

1. Defendants' argument attempts to circumvent the well-settled doctrine that a defense does not create federal question jurisdiction.

It is well settled that removal to federal court of a state law cause of action cannot be justified based on a defense that raises a federal question. *See Hughes-Bechtol, Inc. v. West Virginia Board of Regents*, 737 F.2d 540 (6th Cir. 1984), *cert. den.*, 469 U.S. 1018.

⁴ The fact that the best authority the Defendants are able to cite in support of their argument that diversity jurisdiction exists is a case that was remanded for lack of diversity jurisdiction is an indication of the weakness of their argument.

⁵ Indeed, the court found that *Tosco* was a citizen of California, where the court found its operations, though less than 50% were predominant, compared to other states. *Id.* Under the *Tosco* test, a factual inquiry would be required to determine whether Marathon Petroleum Co. and Speedway should be considered citizens of Kentucky. (Defendants have merely generally alleged that the LLCs' members are not citizens of Kentucky, without providing information on where those business entities have their principal place of business or predominant activities.) However, because the Commonwealth cannot be considered a citizen of any state for diversity purposes, the court need not reach this issue.

“It is settled that a suit arises under the constitution only if the plaintiff’s own cause of action is based thereupon, and it is not enough that plaintiff alleges some anticipated defense to his cause of action which can be raised under the constitution.” *Id.* at 544 (holding no diversity jurisdiction and no federal question jurisdiction based on case between the West Virginia Board of Regents and an out-of-state litigant).

Apparently recognizing that a defense of unconstitutionality does not transform a state law claim into a federal question, Defendants attempt an unprecedented expansion of the *Ex Parte Young* exception to 11th Amendment immunity into a grant of federal subject matter jurisdiction. *Ex Parte Young* creates a narrow exception to 11th Amendment immunity for the purpose of seeking prospective injunctive relief in federal court—it does not create diversity jurisdiction in a state enforcement action. *See Nuclear Engineering Co. v. Scott*, 660 F.2d 241, 251 (7th Cir. 1981); *Ex Parte Young*, 209 U.S. 123 (1908).

2. Defendants’ argument has been decisively rejected by the federal courts.

Defendants cite no case law in support of their proposition that *Ex Parte Young*, which provides a narrow exception to the states’ immunity to suit under the 11th Amendment, confers federal subject matter jurisdiction for a state enforcement action where defendant raises a defense of unconstitutionality. Defendants choose to state that their proposition is ‘axiomatic,’ rather than addressing the case law on the subject. This is because their argument has been decisively rejected by the federal courts. *See, e.g., Nuclear Engineering Co. v. Scott*, 660 F.2d at 251; *Eure v. NVF Co.* 481 F.Supp. 639, 641 (D.C.N.C., 1979) (“The rationale of [*Ex Parte Young*] permitted the enjoining of unconstitutional acts by state officials, but it has no application to diversity

jurisdiction.”); *National Market Reports, Inc. v. Brown* 443 F.Supp. 1301, 1305 (D.C.W.Va. 1978); *Missouri ex rel. Webster v. Best Buy*, 715 F.Supp. at 1458; *but see Mouton v. Sinclair Oil & Gas Co.* 410 F.2d 717 (5th Cir. 1969), cert. den., 398 U.S. 957 (finding diversity and federal question jurisdiction against Louisiana Collector of Revenue attempting to collect tax the Fifth Circuit had ruled unconstitutional one year earlier).

The *Ex Parte Young* doctrine is completely inapplicable to an attempt to create diversity jurisdiction against a state official.

Although the [*Ex Parte Young*] Court held that, when acting unconstitutionally in a federal sense, a state officer cannot invoke the Eleventh Amendment's protection, the case had nothing to do with the scope of the statutory grant of diversity jurisdiction.... [i]t is uniformly recognized that even an express waiver of sovereign immunity or a consent to suit cannot subject a state or its “alter ego” to jurisdiction under s 1332.”

National Market Reports, Inc. v. Brown 443 F.Supp. at 1305.

Defendants’ argument may be rooted in a case which the courts have severely limited or criticized. In 1921, the Sixth Circuit held that it had diversity jurisdiction between an out of state litigant and a local Ohio prosecutor. In dicta, the court stated that a state officer alleged in good faith to be acting unconstitutionally would be considered a citizen for diversity purposes. *Ohio ex Rel. Seney v. Swift & Co.*, 270 F. 141, 146. (6th Cir. 1921), cert. den., 257 U.S. 633, *appeal dismissed*, 260 U.S. 146 (1922). Although in *Swift* the court did find diversity jurisdiction applied between the purported relator and the out-of-state litigant, the case is easily distinguishable in that the purported relator was a county prosecutor, not the attorney general:

The complaint is signed, ‘Allen J. Seney, Prosecuting Attorney of Lucas County, Ohio.... He does not allege that any law authorizes him to cause the state to sue

or be sued....Ordinarily, the state sues by the Attorney General, and even he should point out his authority to implead the state.

Ohio ex. Rel. Seney v. Swift & Co, 270 F. at 147-48.

The Eastern District of Michigan stated “The decision in *Swift* must be limited to the precise facts and circumstances in that case....” *Olsen v. Doerfler*, 225 F.Supp. 540, 543 (E.D. Mich. 1963). The *Olsen* court notes that the prosecuting attorney did not allege any law authorizing him to bring suit on behalf of the state, and that the *Swift* court noted that on the facts presented, it was “too clear for doubt” that Ohio’s laws could not be applied as attempted in the suit. *Id.*

The prosecutor in *Swift* admitted he had no proof of any intent to sell the pork carcasses he contended were covered by Ohio law within the state, whereas the defendant offered proof that the carcasses were being shipped to Chicago for processing. *Ohio ex. Rel. Seney v. Swift & Co*, 270 F. at 145. The court concluded “Upon this statement of facts, it is too clear for doubt that these Ohio laws could have no application...” *Id.*⁶ In contrast to *Swift*, it is clear that Kentucky’s gas price gouging law and consumer protection acts can be applied to Marathon’s sale of motor fuels in Kentucky. In addition, the case at bar was brought by the Attorney General as chief law enforcement officer of the state pursuant to express constitutional and statutory authority, and not by a local prosecutor who failed to plead any authority allowing him to sue on behalf of the state. Thus, the *Swift* analysis is inapposite. Marathon’s attempt to transform its legal defenses into federal subject matter jurisdiction must fail.

⁶ Thus, the *Swift* case could be read as providing a similar standard to that applied in *West Virginia ex rel. McGraw v. Minnesota Mining and Mfg. Co.* 354 F.Supp.2d at 666-67 (rejecting defendants’ claim that Attorney General’s lack of authority to bring action requires treatment of Attorney General as private citizen; under fraudulent joinder analysis, as long as plaintiff demonstrated ‘glimmer of hope’ that court would find he had authority to proceed, no diversity jurisdiction in federal court).

III. CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests the Court remand this action to Franklin Circuit Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND NOTICE OF ELECTRONIC FILING

I hereby certify that on June 19, 2007, I electronically filed the foregoing Memorandum with the clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following:

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