

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
CIVIL ACTION NO. 3:07-CV-00030-KKC
*Electronically Filed***

COMMONWEALTH OF KENTUCKY, EX REL.)
GREGORY D. STUMBO, ATTORNEY GENERAL,)
)
Plaintiff,)
)
VS.)
)
MARATHON PETROLEUM COMPANY LLC,)
MARATHON OIL CORPORATION AND)
SPEEDWAY SUPERAMERICA LLC,)
)
Defendants.)
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**DEFENDANTS’ RESPONSE MEMORANDUM IN OPPOSITION TO
PLAINTIFF’S MOTION TO REMAND**

INTRODUCTION

On May 10, 2007, the Attorney General filed suit in Franklin Circuit Court on behalf of certain citizens of the Commonwealth against Marathon Petroleum Company LLC, Marathon Oil Corporation and Speedway SuperAmerica LLC (“Marathon”) alleging violations of the Kentucky Consumer Protection Act, KRS 367.170, and violations of the state’s anti-price gouging statute, KRS 367.372.

On May 14, 2007, Marathon filed a Notice of Removal, moving the case to federal court. In the notice, Marathon invoked the court’s diversity jurisdiction pursuant to 28 U.S.C. §1332, due to the parties’ diversity and the requisite amount in controversy. On May 18, 2007, the Attorney General filed a Motion to Remand, alleging that his only interest in the case was as a representative for the Commonwealth of Kentucky; and thus diversity jurisdiction did not exist in the case. Because this Motion rests upon a fundamental misunderstanding of the nature of the

claims brought against Marathon and the interests it seeks to protect, the Attorney General's Motion must be denied.

ARGUMENT

A. The Court has federal subject matter jurisdiction based on diversity pursuant to 28 U.S.C. § 1332(a).

Claims originally filed in state court may be removed to federal court by a defendant if the action would meet the jurisdictional requirements for federal court at the time of the action's initiation. 28 U.S.C. § 1441(a). When as here, the defendant seeks to implicate the court's diversity jurisdiction, such an action is proper when there is complete diversity between the parties and the amount in controversy exceeds \$75,000. 28 U.S.C. § 1332(a). Here, the amount in controversy is not in dispute, and the citizenship of the citizens of the Commonwealth of Kentucky on whose behalf the Attorney General has filed suit and Marathon is diverse; thus implicating the federal courts' jurisdiction and justifying Marathon's decision to remove.

B. The discrete set of citizens on whose behalf the Attorney General brought this action are the true parties in interest for purposes of determining diversity jurisdiction.

The Attorney General, however, claims that Marathon has failed to meet its burden of establishing the facts necessary to support federal subject matter jurisdiction based upon diversity. He claims that as the named party in the action, he is not the proper individual to consider on the question of diversity, but rather he is simply a stand-in for the state as the "real party in interest." He argues that in bringing claims under the Consumer Protection Act and KRS 367.370, the named party was involved in no capacity other than as "chief law enforcement officer for the Commonwealth." Thus, according to the Attorney General, "the citizenship of Attorney General Stumbo in his individual capacity is wholly irrelevant to this action." Motion for Remand p. 3.

The Attorney General's argument in his Motion to Remand then is simple. As Attorney General, he claims that for purposes of this case, he is nothing but an arm of the Commonwealth of Kentucky. And were this true, the principle that a state is not a citizen for purposes of diversity jurisdiction would likely make his remand motion successful. *See Hughes-Bechtol, Inc. v. West Virginia Bd. of Regents*, 737 F.2d 540, 543 (6th Cir. 1984).

However, the Attorney General ignores that in this case he is not simply litigating on behalf of a sovereign entity, but rather is utilizing his role as a representative for a discrete set of citizens within the Commonwealth. In such cases, the principle that states are not citizens for purposes of diversity is meaningless, as the actual litigants in the case are the citizens of the Commonwealth. As such, their citizenship, rather than that of the state, becomes the deciding factor in determining diversity for federal jurisdiction.

When a court seeks to determine whether diversity jurisdiction exists in a particular case, it must "disregard nominal or formal parties and rest jurisdiction only upon the citizenship of the real parties to the controversy." *See Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 461 (1980). In order to make this determination, courts should look to what the actual interests are that are being served by the litigation, not simply the names on the pleadings, or the interests asserted by the parties in the process. *Id.* This means making a determination as to whom the "substantive right sought to be enforced" belongs. *District of Columbia ex rel. Am. Combustion Inc. v. Transamerica Ins. Co.*, 797 F.2d 1041, 1048 (D.C. Cir. 1986). For purposes of determining diversity jurisdiction then, the court is not required to simply rest on the assurances of the parties as to who they represent in the action, but must actually look at the character of the litigation in determining what entity's citizenship must be considered. *See Corfield v. Dallas Glen Hills LP*, 355 F.3d 853, 857 (5th Cir. 2003).

In the case of enforcement actions brought by a public official, the actual character of the litigation changes the calculus used to determine whether diversity jurisdiction is present in the case. When a claim is brought essentially on behalf of private citizens, in order to recoup losses suffered by those citizens for particularized actions by the corporation, then the actual real party in interest for purposes of diversity jurisdiction are the citizens of that state. *Connecticut v. Levi Straus Co.*, 471 F. Supp. 363, 371 (D. Conn., 1979). In these actions, the officer of the Commonwealth is not simply trying to enforce a statute or act as an arm of the Commonwealth, but rather is utilizing his role as an advocate for a particularized group of its citizens. Accordingly, the actual party is not the state or even the individual official, but is actually the group of citizens that are being represented by the public official. It is thus their citizenship that must be considered in determining whether diversity jurisdiction exists. *Id.*

In this case, the Attorney General is clearly trying to recoup losses that he alleges various Kentuckians suffered due to Marathon's alleged conduct. In his Complaint, he claims that Marathon violated the Kentucky Consumer Protection Act and KRS 367.370 by charging its Kentucky customers prices in excess of those in place prior to the declaration of emergency by Governor Fletcher. Compl. p. 7. The Complaint states that "consumers have been damaged by paying excessive amounts for motor fuels during the period of emergency." *Id.* In order to remedy this alleged violation, the Attorney General initiated proceedings under the Consumer Protection Act, which makes clear that the court may order restoration of property to "any person in interest." K.R.S. 367.200. The use of the word restoration showcases the Attorney General's desire to recoup funds for its citizens, an act that implicates its role as an advocate for a particularized population of citizens, not the sovereign power of the state. It is very clear that the heart of the Attorney General's petition is an action on behalf of a discrete set of individual citizens, those who allegedly were charged gas prices at an excess rate by Marathon in the period

of time following Hurricanes Katrina and Rita. Such a scenario is the exact type of situation in which the Attorney General stands in for the allegedly injured citizens as the actual parties in interest in this case.

This was the exact scenario presented in the *Levi Strauss* case. There, the State of Connecticut brought a series of claims against Levi Strauss for alleged overcharges incurred by its citizens when the corporation's products were purchased. 471 F. Supp. at 370. The court recognized that at its core, the Attorney General was not suing to enforce a punishment or to validate any fundamental interest of the sovereign, but rather was seeking to recoup losses suffered by a circumscribed group of its citizens. *Id.* Thus, the real party in interest was not the sovereign itself, but the citizens of Connecticut who had purchased Levi Strauss products at prices that were alleged to be too high. The court held, "a state's role in suing on behalf of particular citizens sufficiently dispenses with its sovereign capacity not only to bar access to the Supreme Court's original jurisdiction but also to gain access to the district courts' diversity jurisdiction." *Id.* at 371.

This result also conforms with the policy rationales behind diversity jurisdiction. When the Attorney General of a state seeks to take an action on behalf of a discrete set of the state's citizens against a foreign corporation, a federal forum is the most fair method of adjudicating the case. In this case, the Attorney General is claiming that Kentucky citizens that purchased fuel from Marathon in the wake of Hurricanes Katrina and Rita were charged prices in excess of what was legal at the time of the declaration of emergency. This is precisely the type of situation in which an out-of-state litigant can be prejudiced by being forced to litigate in a state forum. *Lively v. Wild Oats Mkts., Inc.*, 456 F.3d 933, 940 (9th Cir. 2006). "The purpose of diversity jurisdiction is to provide a 'federal forum for out-of-state litigants where they are free from prejudice in favor of a local litigant.'" *Tosco Corp. v. Cmtys. for a Better Env't.*, 236 F.3d 495,

502 (9th Cir. 2001) citing to *J. A. Olson Co. v. City of Winona*, 818 F.2d 401, 404 (5th Cir. 1987). This case is exactly such a situation; and due to its initiation by the Attorney General on behalf of a discrete set of Kentuckians, the most fair forum for its litigation is within the federal court system.

C. The Attorney General is without authority to act on behalf of the Commonwealth in an action to enforce a statute which violates the United States Constitution.

The Attorney General is not entitled to a cloak of sovereignty in this action as he seeks to enforce a statute that is unconstitutional. *Dubuc v. Michigan Bd. of Law Examiners*, 342 F.3d 610, 617 (6th Cir. 2003) (citing *Ex Parte Young*, 209 U.S. 123 (1908)). “If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character[.]” *Ex Parte Young*, 209 U.S. at 159-60.

In the instant case, the Attorney General seeks to enforce KRS 367.370, an unconstitutional statute premised on an unconstitutional Executive Order. The statute’s failure to define key terms and its complete absence of an express statutory time limit for application render the statute void for vagueness under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Moreover, the Attorney General’s attempt to enforce this unconstitutional statute based on what he deems to be “grossly excessive, increased *profits*,” rather than *price increases* that are “grossly in excess” of pre-Hurricane Katrina prices, is an arbitrary and capricious exercise of power in violation of Defendants’ Due Process rights. Additionally, the statute violates the Commerce Clause, contained in Article 1, Section 8, Clause 3 of the Constitution, because it regulates commerce between the states in such a manner as to unreasonably burden interstate commerce. *See* Complaint, *Marathon Petroleum Company LLC*,

et al. v. Gregory D. Stumbo, Civil Action No. 3:07-CV-00029. As such, the Attorney General is acting in a manner that conflicts with federal law and, under *Ex Parte Young* doctrine, both official and representative character is, therefore, disregarded. *Id.*

The Attorney General claims in his Motion for Remand that this action is brought on behalf of the State, and therefore he should not be regarded as a private citizen. Motion for Remand p. 3. However, the Attorney General is without authority to enforce an unconstitutional statute in the name of the Commonwealth.

The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional.

Ex Parte Young, 209 U.S. at 159. While the *Ex Parte Young* doctrine was conceived in the context of Eleventh Amendment jurisprudence, it is axiomatic that a state attorney general, once stripped of state authority by the *Ex Parte Young doctrine*, is not then entitled to claim the qualities of a State for jurisdictional purposes.

The Attorney General, attempting to arbitrarily enforce an unconstitutional statute premised on an unconstitutional executive order, has forfeited his ability to claim that he acts on behalf of the Commonwealth. As such, the citizenship of the real party in interest, i.e. the allegedly injured Kentucky consumers, is pertinent to jurisdiction. Therefore, there is complete diversity of citizenship in this action. Accordingly, Defendants have established that this Court has federal subject matter jurisdiction pursuant to 28 U.S.C. § 1332, and Plaintiff's Motion for Remand should be denied.

CONCLUSION

The Attorney General has brought an action against the Marathon seeking to recoup losses allegedly sustained when a discrete set of citizens of the Commonwealth purchased gasoline at a price that was allegedly in violation of the Consumer Protection Act and the anti-price gouging statute in the wake of Hurricanes Katrina and Rita. In so doing, the Attorney General seeks to play the role of the representative of those citizens and litigate on their behalf. Indeed, the Attorney General is without authority to act on behalf of the Commonwealth in this action as he seeks to enforce a statute that violates the U.S. Constitution. So, rather than simply being an arm of the law enforcement powers of Kentucky, he is the representative of a discrete group of its citizens. It is those individuals' citizenship that should be considered in determining whether diversity exists in this case sufficient to invoke the federal courts' jurisdiction. Because such diversity exists, the Attorney General's Motion to Remand must be denied.

Respectfully submitted,

/s/ Charles S. Cassis _____

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CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2007, I electronically filed the foregoing document through the ECF system, which will send a notice of electronic filing to: *Janet M. Graham, Jennifer Black Hans, Dennis G. Howard, II, Todd E. Leatherman, Maryellen Buxton Mynear, Elizabeth Ungar Natter, and Pierce B. Whites.*

/s/ Charles S. Cassis _____

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