

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

ALAN ENTERPRIZES LLC,

Plaintiff,

v.

Civil Action No. 14-C-503-2

MAC'S CONVENIENCE STORES LLC,
d/b/a Circle K, JOYCE SALMON,
and LOUIS DIAB,

Defendants.

AMENDED COMPLAINT

COMES NOW plaintiff Alan Enterprizes LLC, by and through its counsel, and for its cause of action against Defendants, states to this Honorable Court the following:

Parties

1. Plaintiff ALAN ENTERPRIZES LLC is a West Virginia limited liability company duly authorized to conduct business in the State of West Virginia.

2. Defendant MAC'S CONVENIENCE STORES LLC (hereafter "MAC'S") is a Delaware corporation with its principal place of business in Columbus, Indiana, and is duly authorized to do business in the State of West Virginia using the trade name Circle K. MAC'S buys gasoline directly from major oil companies and then distributes the gasoline to the public through multiple retail gasoline station operations branded Circle K, including a retail gasoline station that it owns and operates in Bridgeport, West Virginia.

3. At all material times Defendant Joyce Salmon (hereinafter "Salmon") was the manager of the MAC'S retail gasoline station located at 328 E. Main Street Bridgeport, West Virginia.

4. Defendant Louis Diab (hereinafter "Diab") is the Fuel Director for the Great Lakes Division of MAC'S in Akron, Ohio, which Division includes MAC'S Bridgeport station.

Jurisdiction and Venue

5. The court has jurisdiction over this matter pursuant to W. Va. Code § 47-11A-9, known as the Unfair Practices Act.

6. Venue is proper under W. Va. Code §47-11A-9 because the events giving rise to this action occurred in this County.

General Allegations

7. Plaintiff Alan Enterprizes LLC operates three retail gasoline stations in Bridgeport, West Virginia, located at the following addresses:

- 20 South Wedge Street
- 50 Genesis Blvd & Conference Center Drive
- 100 Grande Meadows & Saltwell Road

8. Since October 2011, Defendant MAC'S has owned and operated the retail gasoline station located at 328 E. Main Street Bridgeport, West Virginia.

9. Ten (10) retail gasoline stations supply the vehicular traffic market in the relevant geographic area of Bridgeport, West Virginia.

10. It is common practice for retail gasoline station owners and managers to conduct daily surveys of the retail gasoline prices charged by competitors for the purpose of competitive pricing at their own stations and in order to determine the market price for gasoline in the community. Plaintiff has engaged in this activity.

11. Since October, 2011, the MAC'S Bridgeport retail gasoline station's posted street price has almost invariably offered the lowest retail gasoline price in the market for gasoline in Bridgeport, West Virginia.

12. At all material times Salmon, as the MAC'S Bridgeport retail gasoline station manager, conducted daily surveys of the local retail gasoline prices charged by competitors and conveys this information to the upper management of MAC'S for the purpose of setting gasoline prices at MAC'S Bridgeport retail gasoline station. Upon receipt from MAC'S Great Lakes Division of the price to be charged at that time, Salmon causes the price to be posted at MAC'S Bridgeport station.

13. Diab, as the Fuel Director of MAC'S Great Lakes Division, had and continues to have the responsibility for setting and approving the retail fuel prices at MAC'S Bridgeport station. In addition, Diab directly or indirectly instructed Salmon to post the price at MAC'S Bridgeport station.

14. W. Va. Code §47-11A-4 provides for personal responsibility for individuals participating in a violation of the West Virginia Unfair Practices Act by stating that "any person who, either as director, officer or agent of any firm or corporation...violating the provisions of this Article, assists or aids, directly or indirectly, in such violation shall be responsible therefor equally with the...corporation for whom or which he acts."

15. Since MAC'S began operating its Bridgeport retail gasoline station in 2011, it has been the low price leader in the relevant Bridgeport market, often by wide margins over other stations. To facilitate achieving the position of low price leader, Defendants have been selling gasoline at prices below the actual cost incurred by MAC'S, as defined by W. Va. Code §47-11A-6.

16. As a direct and proximate result of Defendants' selling gasoline below cost, Plaintiff has been forced to lower the price of its gasoline sold to the public, sometimes even below its own cost of doing business in order to remain competitive, which has threatened Plaintiff's survival in the marketplace.

15. As a direct and proximate result of Defendants' selling gasoline below cost, Plaintiff's daily gasoline sales volume has decreased, and Plaintiff has lost gasoline sales revenue in an amount in excess of \$1,000,000.

Unfair Practices Act Violation

16. Section 47-11A-2 of the West Virginia Unfair Practices Act provides as follows:

"It shall be unlawful for any person, partnership, firm, corporation, joint-stock company, or other association engaged in business as a retailer or wholesaler within this State, to sell, offer for sale, or advertise for sale any article, product or item of merchandise at less than the cost thereof to the vendor...for the purposes of unfairly diverting trade from or otherwise injuring one or more competitors, and destroying competition."

17. The purpose of the West Virginia Unfair Practices Act is "...to foster and encourage competition by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented." W. Va. Code § 47-11A-14.

18. The West Virginia legislature has found that "the sale of goods at less than the cost thereof results in economic maladjustments and...is an unfair trade practice." W. Va. Code § 47-11A-1.

19. Plaintiff is informed and believes and thereon alleges that Defendants have and will continue to sell fuel at below cost in violation of W. Va. Code §47-11A-2.

20. Under § 47-11A-6 of the West Virginia Unfair Practices Act, cost "shall mean bona fide cost and shall mean (i) the invoice cost of the article, product or item of merchandise to

the retailer or the replacement cost thereof to the retailer within thirty days prior to the date of sale, offer for sale or advertisement for sale, as the case may be, in the quantity last purchased, whichever is lower, from either of which there shall be deducted all trade discounts, except customary discounts for cash, and (ii) to either of which shall be added the following items of expense:

- Freight charges not otherwise included in the cost of the article, product or merchandise, but which freight charges shall not be construed as including cartage to retail outlet if done or paid for by the retailer;
- A markup to cover, in part, the cost of doing business, which markup, in the absence of proof of a lesser cost, shall be seven percent of the aggregate of invoice cost or replacement cost (whichever is used), less trade discounts as aforesaid, and plus said freight charges."

21. By selling gasoline at below the cost incurred by MAC'S, Defendants have unfairly increased the market share controlled by MAC'S, thereby diverting trade from Plaintiff.

22. Defendants have engaged in the aforementioned action of selling gasoline at below its cost for the purpose of unfairly diverting trade from Plaintiff's stations and driving Plaintiff out of the business for retail gasoline sales in Bridgeport, West Virginia.

23. If Plaintiff is forced to exit the market for retail gasoline sales in Bridgeport, West Virginia, as a result of Circle K's below-cost gasoline pricing behavior, Circle K will subsequently wield pricing power in the relevant geographic market for retail gasoline sales, thereby destroying competition.

24. Defendants' sales of gasoline at prices below cost, combined with Defendants' intent to inflict irreparable economic injury to Plaintiff, entitles Plaintiff to treble damages, costs and attorneys' fees in bringing this action against Defendants, and each of them, as provided for by §47-11A-4 and §47-11A-9, and also entitles Plaintiff to an injunction prohibiting

Defendants' from continuing to sell gasoline below the cost incurred by MAC'S, as provided for by §47-11A-9.

Prayer for Relief

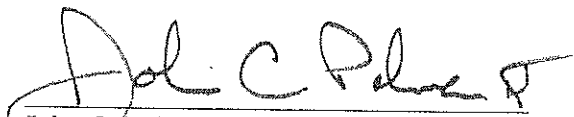
Plaintiff demands judgment against Defendants, and each of them, as follows:

1. A preliminary injunction and a permanent injunction enjoining Defendants, and each of them, from offering to sell or selling gasoline below cost in violation of the West Virginia Unfair Practices Act;
2. An award of the actual damages suffered by Alan Enterprizes LLC in the amount to be determined at trial, to be trebled as provided by law;
3. An award to Alan Enterprizes LLC of its reasonable attorneys' fees and costs of suit; and
4. Such other relief as this Honorable Court may deem just and proper.

PLAINTIFF DEMANDS A TRIAL BY JURY ON ALL ISSUES TRIABLE OF RIGHT BY JURY.

ALAN ENTERPRIZES, a limited liability company

By Counsel



John C. Palmer (WV State Bar ID No. 2801)

Keith J. George (WV State Bar ID No. 5102)

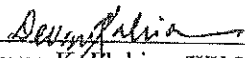
ROBINSON & MCELWEE PLLC

Post Office Box 1791

Charleston, West Virginia 25301

Tel.: (304) 344-5800

Fax: (304) 344-9566


Devan K. Blahive (WV State Bar ID No. 12539)
ROBINSON & MCELWEE PLLC
140 West Main Street, Suite 300
Clarksburg, WV 26301
Tel.: (304) 622-5022
Fax: (304) 622-5065

Counsel for Plaintiff Alan Enterprizes LLC

VERIFICATION

STATE OF WEST VIRGINIA,
COUNTY OF HARRISON, to-wit:

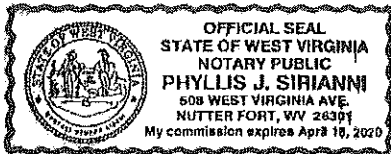
Joe DeFazio, being first duly sworn, upon his oath, says that he is a Member of Alan Enterprizes, a West Virginia limited liability company; that he has read the foregoing Complaint and knows the contents thereof; and that the facts and allegations therein contained are true, except so far as they are therein stated to be upon information and belief, and that so far as they are in stated to be upon information and belief, he believes them to be true.

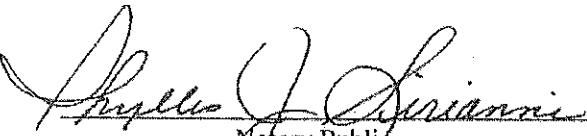


Joe DeFazio

Taken, subscribed and sworn to before me this 30th day of June, 2015.

My commission expires April 15, 2020.





Notary Public

within and for Harrison County, West Virginia

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

ALAN ENTERPRIZES, LLC

Plaintiff,

v.

Civil Action No.: 14.C-503-2

Judge Bedell

MAC'S CONVENIENCE STORES LLC,

d/b/a Circle K and JOYCE SALMON,

Defendants.

CERTIFICATE OF SERVICE

I, John C. Palmer IV, counsel for the Plaintiff, hereby certify that on August 4, 2015, I served copies of the **Amended Complaint** upon counsel for the Defendants by U.S. Mail, postage prepaid, in an envelope addressed to:

Zach Chaffee-McClure, Esquire
Shook, Hardy & Bacon LLP
2555 Grand Boulevard
Kansas City, Missouri 64108

Kyle T. Turnbull, Esquire
Flaherty Sensabaugh Bonasso PLLC
48 Donley Street, Suite 501
Morgantown, West Virginia 26501

Michael Bonasso, Esquire
Flaherty Sensabaugh Bonasso, PLLC
200 Capitol Street
Charleston, West Virginia 25301



John C. Palmer IV (WV State Bar ID No. 2801)