

N 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

MAC'S CONVENIENCE STORES, LLC, JOYCE SAMMON, AND LOUIS DIAB'S
ANSWER TO THE AMENDED COMPLAINT AND COUNTERCLAIM

For their Answer to the Amended Complaint (hereinafter, simply "Complaint"), Defendants Mac's Convenience Stores LLC, d/b/a/ Circle K ("Mac's"), Joyce Sammon, incorrectly named as "Joyce Salmon," and Louis Diab state as follows. All allegations not specifically admitted herein are expressly denied.

FIRST DEFENSE

Defendants, not being fully advised of all the circumstances surrounding the allegations set forth in the Plaintiff's Complaint, reserve unto themselves the affirmative defense that the Complaint fails or may fail to state a claim against them upon which relief may be granted and, therefore, should be dismissed pursuant to Rule 12(b)(6) of the *West Virginia Rules of Civil Procedure*.

SECOND DEFENSE

In response to the specific claims alleged in the Plaintiff's Complaint, Defendants aver as follows:

1. Defendants are without sufficient knowledge or information to form a belief as to the truth of the allegations of Paragraph 1 of the Complaint and, therefore, demand strict proof thereof.
2. In response to Paragraph 2 of the Complaint, Defendants admit that Mac's is a Delaware corporation and that it is authorized to do business in West Virginia as Circle K. Defendants admit that Mac's owns a retail gasoline station in Bridgeport, West Virginia. The remaining allegations in Paragraph 2 of the Complaint are denied.
3. Defendants admit Joyce Sammon was the manager of the Mac's retail gasoline station located at 328 E. Main Street Bridgeport, West Virginia for a time. The remaining allegations in Paragraph 3 of the Complaint are denied.
4. Defendants admit Louis Diab is the Fuel Director for the Mac's region that includes Bridgeport, West Virginia. The remaining allegations in Paragraph 4 of the Complaint are denied.
5. The allegations in Paragraph 5 of the Complaint constitute legal averments to which no response is required. To the extent any response is required to the allegations set forth in Paragraph 5 of the Complaint, Defendants deny the same and demand strict proof thereof.
6. Venue is admitted by Defendants. The remaining allegations in Paragraph 6 of the Complaint are denied.
7. Defendants are without sufficient knowledge or information to form a belief as to the truth of the allegations of Paragraph 7 of the Complaint and, therefore, demand strict proof thereof.

8. In response to Paragraph 8 of the Complaint, Defendants admit that Mac's has, since October 2011, owned a retail gasoline station at 328 E. Main Street in Bridgeport, West Virginia. The remaining allegations in Paragraph 8 of the Complaint are denied.
9. Defendants are without sufficient knowledge or information to form a belief as to the truth of the allegations of Paragraph 9 of the Complaint and, therefore, deny the same and demand strict proof thereof.
10. Defendants are without sufficient knowledge or information to form a belief as to the truth of the allegations of Paragraph 10 of the Complaint and, therefore, demand strict proof thereof.
11. Defendants deny the allegations contained in Paragraph 11 of the Complaint and demand strict proof thereof.
12. Defendants deny the allegations contained in Paragraph 12 of the Complaint and demand strict proof thereof.
13. Defendants deny the allegations contained in Paragraph 13 of the Complaint and demand strict proof thereof.
14. The allegations in Paragraph 14 of the Complaint constitute legal averments to which no response is required. To the extent any response is required to the allegations set forth in Paragraph 14 of the Complaint, Defendants deny the same and demand strict proof thereof.
15. Defendants deny the allegations contained in the first Paragraph 15 of the Complaint and demand strict proof thereof.

16. In response to the first Paragraph 16 of the Complaint, Defendants admit that Plaintiff has sold gasoline below cost but deny that Plaintiff's below-cost sales were the result of any conduct by Defendants. Defendants deny the remaining allegations contained in the first Paragraph 16 of the Complaint and demand strict proof thereof.
15. Defendants deny the allegations contained in the second Paragraph 15 of the Complaint and demand strict proof thereof.
16. The allegations in the second Paragraph 16 of the Complaint constitute legal averments to which no response is required. To the extent any response is required to the allegations set forth in the second Paragraph 16 of the Complaint, Defendants deny the same and demand strict proof thereof.
17. The allegations in Paragraph 17 of the Complaint constitute legal averments to which no response is required. To the extent any response is required to the allegations set forth in Paragraph 17 of the Complaint, Defendants deny the same and demand strict proof thereof.
18. The allegations in Paragraph 18 of the Complaint constitute legal averments to which no response is required. To the extent any response is required to the allegations set forth in Paragraph 18 of the Complaint, Defendants deny the same and demand strict proof thereof.
19. Defendants deny the allegations contained in Paragraph 19 of the Complaint and demand strict proof thereof.
20. The allegations in Paragraph 20 of the Complaint constitute legal averments to which no response is required. To the extent any response is required to the

allegations set forth in Paragraph 20 of the Complaint, Defendants deny the same and demand strict proof thereof.

21. Defendants deny the allegations contained in Paragraph 21 of the Complaint and demand strict proof thereof.

22. Defendants deny the allegations contained in Paragraph 22 of the Complaint and demand strict proof thereof.

23. Defendants deny the allegations contained in Paragraph 23 of the Complaint and demand strict proof thereof.

24. Defendants deny the allegations contained in Paragraph 24 of the Complaint and demand strict proof thereof.

25. Defendants deny that Plaintiff is entitled to judgment or to recover any other relief or damages of any kind or nature as requested in the paragraphs numbered (1) through (4), in the "Prayer for Relief" at the end of the Complaint, and demand strict proof thereof.

26. Defendants deny any allegations not expressly admitted herein.

THIRD DEFENSE

Defendants, not being fully advised of all the circumstances surrounding the allegations set forth in the Complaint, specifically deny that they violated any provision of the West Virginia Unfair Practices Act. Any alleged violations are unintentional, the result of bona fide error of fact, and/or based on a good-faith belief that the alleged misconduct was lawful and, therefore, liability may not be imposed.

FOURTH DEFENSE

Defendants, not being fully advised of all the circumstances surrounding the allegations set forth in the Plaintiff's Complaint, reserve unto themselves the affirmative defenses that any and all of Defendants' conduct was reasonable, lawful, pro-competitive, constitutes bona fide business practices, and was carried out based on legitimate business and economic justifications and in furtherance of Defendants' legitimate business interests.

FIFTH DEFENSE

Defendants, not being fully advised of all the circumstances surrounding the allegations set forth in the Plaintiff's Complaint, reserve unto themselves the affirmative defense that all or a portion of the claims contained in Plaintiff's Complaint may be barred by the applicable statute of limitations, statute of repose and/or the doctrine of laches.

SIXTH DEFENSE

Defendants, not being fully advised of all the circumstances surrounding the allegations set forth in the Plaintiff's Complaint, raise all defenses available to the extent the West Virginia Unfair Practices Act may be enforced in contravention of the Sherman Act, the Clayton Act, the Robinson-Patman Act, or any other federal law.

SEVENTH DEFENSE

Defendants, not being fully advised of all the circumstances surrounding the allegations set forth in the Plaintiff's Complaint, reserve unto themselves the affirmative defense that Defendants' alleged conduct and practices were not intended to have, did not have, and were not likely to have any adverse impact or effects on competition

EIGHTH DEFENSE

Defendants, not being fully advised of all the circumstances surrounding the allegations set forth in the Plaintiff's Complaint, reserve unto themselves the affirmative defense that they breached no duty at law owed to Plaintiff.

NINTH DEFENSE

Defendants, not being fully advised of all the circumstances surrounding the allegations set forth in the Plaintiff's Complaint, raise and preserve any and all defenses available under the West Virginia Unfair Practices Act. Specifically, but without limitation, Defendants may not be held liable because all prices alleged were set in an endeavor in good faith to meet the legal prices of competitors.

TENTH DEFENSE

Defendants, not being fully advised of all the circumstances surrounding the allegations set forth in the Plaintiff's Complaint, reserve unto themselves the affirmative defense that Plaintiff lacks standing to bring claims, and may not recover any relief, in the absence of any actual injury.

ELEVENTH DEFENSE

Defendants, not being fully advised of all the circumstances surrounding the allegations set forth in the Plaintiff's Complaint, reserve unto themselves the affirmative defense that Defendants' alleged conduct and practices were performed without anticompetitive intent or purpose.

TWELFTH DEFENSE

Defendants, not being fully advised of all the circumstances surrounding the allegations set forth in the Plaintiff's Complaint, reserve unto themselves the affirmative

defense that Plaintiff's recovery is barred by Plaintiff's bad faith, unclean hands, and/or failure to act equitably.

THIRTEENTH DEFENSE

Defendants, not being fully advised of all the circumstances surrounding the allegations set forth in the Plaintiff's Complaint, reserve unto themselves the affirmative defense that Plaintiff's recovery is barred by Plaintiff's waiver and/or acquiescence in the allegedly wrongful conduct.

FOURTEENTH DEFENSE

Defendants, not being fully advised of all the circumstances surrounding the allegations set forth in the Plaintiff's Complaint, reserve unto themselves the affirmative defense that Plaintiff's damages, if any, should be reduced due to Plaintiff's failure to mitigate damages.

FIFTEENTH DEFENSE

Defendants, not being fully advised of all the circumstances surrounding the allegations set forth in the Plaintiff's Complaint, reserve unto themselves the affirmative defense that any injury alleged is the result of Plaintiff's own conduct and/or the conduct of third parties other than Defendants; Defendants are entitled to an offset or reduction in damages, if any, attributable to the actions of Plaintiff and/or any third parties.

SIXTEENTH DEFENSE

Defendants, not being fully advised of all the circumstances surrounding the allegations set forth in the Plaintiff's Complaint, reserve unto themselves the affirmative defense that, to the extent Plaintiff seeks any monetary relief beyond actual damages proven, if any, it seeks a recovery that is so grossly excessive and inequitable that it

would violate the Due process Clause of the Fifth and Fourteenth Amendments of the United States Constitution, as well as the West Virginia Constitution and the public policy of the state of West Virginia.

SEVENTEENTH DEFENSE

Defendants, not being fully advised of all the circumstances surrounding the allegations set forth in the Complaint, reserve the right to raise any additional defenses as may be revealed by discovery or investigation in this matter.

WHEREFORE, for the foregoing reasons, these Defendants respectfully request that Plaintiff's Complaint be dismissed with prejudice, and that these Defendants be awarded costs and expenses, including attorney's fees, together with further and other relief the Court deems appropriate.

DEFENDANTS REQUEST A TRIAL BY JURY.

COUNTERCLAIM OF DEFENDANT MAC'S

For its Counterclaim herein, Defendant/Counterclaimant, Mac's alleges as follows:

Count I

(Violation of the West Virginia Unfair Practices Act)

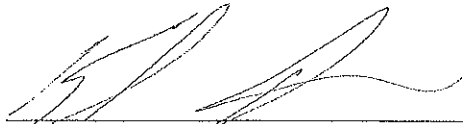
1. Plaintiff is a retailer within the meaning of the West Virginia Unfair Practices Act in that Plaintiff regularly sells motor fuel to the general public.
2. Plaintiff has, as admitted in Paragraph 16 its Complaint, sold motor fuel below cost.

3. Plaintiff's below-cost fuel sales were not made in an endeavor in good faith to meet the legal prices of a competitor.
4. On information and belief, Plaintiff's below-cost fuel sales were for the purposes of unfairly diverting trade from Mac's and/or competitors of Plaintiff, and/or for the purposes of otherwise injuring Mac's and/or competitors of Plaintiff, and/or for the purposes of destroying competition.
5. On information and belief, Plaintiff's below-cost fuel sales have resulted in actual injury to Mac's, in an amount to be determined at trial.

WHEREFORE, Mac's demands judgment against Plaintiff, injunctive relief prohibiting Plaintiff from future below-cost sales, an award of actual damages, trebled by law, setoff of any relief awarded to Plaintiff, and such other relief as the Court deems appropriate.

MAC'S REQUESTS A TRIAL BY JURY ON ITS COUNTERCLAIM.

**MAC'S CONVENIENCE STORES, LLC, d/b/a
CIRCLE K, JOYCE SALMON, AND LOUIS DIAB,
By Counsel**



Michael Bonasso (WVSB #394)
Flaherty Sensabaugh Bonasso PLLC
P.O. Box 3843
Charleston, WV 25338

and

Kyle T. Turnbull (WVSB #12036)
Flaherty Sensabaugh Bonasso PLLC
48 Donley Street, Suite 501
Morgantown, WV 26501
(304) 598-0788
(304) 598-0790 (facsimile)

and

Zach Chaffee-McClure (*Pro Hac Vice*)
Shook, Hardy & Bacon LLP
2555 Grand Blvd.
Kansas City, MO 64108
(816) 474-6550
(816)421-5547 (facsimile)
Counsel for Defendants

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 AND JOYCE SALMON,

DEFENDANTS

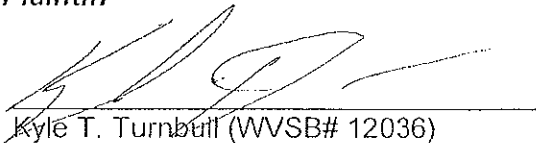
CERTIFICATE OF SERVICE

I, Kyle T. Turnbull, counsel for defendants, Mac's Convenience Stores, LLC, d/b/a Circle K and Joyce Salmon, do hereby certify that on the 18th day of August, 2015, the foregoing "MAC'S CONVENIENCE STORES, LLC, JOYCE SAMMON, AND LOUIS DIAB'S ANSWER TO THE AMENDED COMPLAINT AND COUNTERCLAIM" was served upon the following counsel of record by depositing true copies thereof in the United States Mail, postage prepaid, in envelopes addressed as follows:

John C. Palmer (WVSB #2801)
Keith J. George (WVSB #5102)
ROBINSON & MCELWEE PLLC
P.O. Box 1791
Charleston, WV 25301

and

Stephen D. Annand (WVSB# 150)
Devan K. Flahive (WVSB# 12539)
ROBINSON & MCELWEE PLLC
140 West Main Street, Suite 300
Clarksburg, WV 26301
Counsel for Plaintiff


Kyle T. Turnbull (WVSB# 12036)