

NO. 2008-45789

STATE OF TEXAS,
Plaintiff,

v.

PETROLEUM WHOLESALE, L.P.
D/B/A SUNMART and PWI GP L.L.C.,
Defendants.

§
§
§
§
§
§
§

IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

____ JUDICIAL DISTRICT

**PLAINTIFF'S ORIGINAL PETITION AND APPLICATION
FOR TEMPORARY AND PERMANENT INJUNCTION**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, the STATE OF TEXAS, Plaintiff, acting by and through Attorney General of Texas GREG ABBOTT (hereinafter "Attorney General"), complaining of PETROLEUM WHOLESALE, L.P., doing business as SUNMART, and PWI GP L.L.C. (hereinafter "Defendants") and would respectfully show the court as follows:

I. DISCOVERY CONTROL PLAN

1. Discovery shall be conducted under a LEVEL 2 discovery control plan pursuant to Rule 190.3 of the Texas Rules of Civil Procedure.

II. PLAINTIFF

2. This suit is brought in the name of the State of Texas by its Attorney General and his Consumer Protection and Public Health Division in the public interest and under the authority granted to him by the Constitution, and statutes and laws of the State of Texas, including the Deceptive Trade Practices-Consumer Protection Act, TEX. BUS. COM. CODE ANN. §17.41 *et seq.* (the "DTPA").

3. The State brings this suit upon the ground that Defendants have engaged in false, deceptive,

and misleading acts and practices in the course of trade and commerce as defined in, and declared unlawful by, DTPA §§17.46(a) and 17.46(b).

III. DEFENDANTS

4. Defendant, PETROLEUM WHOLESale, L.P., doing business as SUNMART, is a Texas limited partnership whose presently headquartered at 2189 Lake Woodlands Drive, The Woodlands, Montgomery County, Texas 77380. Defendant may be served with process by serving its registered agent for service of process, Stuart W. Lapp, at 2204 Timberloch Place, Suite 270, The Woodlands, Texas 77380.

5. Defendant, PWI GP L.L.C., is a Texas limited liability company whose principal office is located at 2189 Lake Woodlands Drive, The Woodlands, Texas 77380, Montgomery County, Texas. Defendant may be served with process by serving its registered agent for service of process, Stuart W. Lapp, at 2204 Timberloch Place, Suite 270, The Woodlands, Texas 77380. PWI GP L.L.C. is the General Partner in the limited partnership.

IV. VENUE

6. Venue of this suit lies in Harris County, Texas, for the following reasons:
- A. Under TEX. BUS. COM. CODE ANN. §17.47(b), venue is proper in Harris County, Texas because Defendants have done business in Harris County and the transactions occurred in Harris County, Texas; and
 - B. Under Tex. Civ. Prac. & Rem. Code Ann. § 15.002(a)(1), venue is proper insofar as all or a substantial part of the events or omissions giving rise to the claims alleged herein occurred in Harris County, Texas.

V. PUBLIC INTEREST

7. Because Plaintiff State of Texas has reason to believe that Defendants have engaged in the unlawful practices set forth below, Plaintiff State of Texas has reason to believe Defendants have, by means of these unlawful acts and practices, caused damage to and acquired money from persons of this State and caused adverse effects to legitimate business enterprises which lawfully conduct trade and commerce in the State. Therefore, the Consumer Protection and Public Health Division believes and is of the opinion that these proceedings are in the public interest.

VI. TRADE AND COMMERCE

8. Defendants have, at all times described below, engaged in conduct that constitutes “trade” and “commerce” as those terms defined by DTPA §17.45(6).

VII. ACTS OF AGENTS

9. Whenever in this petition it is alleged that Defendants did any act, it is meant that:

- A. Defendants performed or participated in the act; or
- B. Defendants’ officers, agents, or employees performed or participated in the act on behalf of and under the authority of the Defendants.

VIII. NATURE OF DEFENDANTS’ OPERATION AND FACTUAL ALLEGATIONS

10. Defendant PETROLEUM WHOLESALE, L.P., doing business as SUNMART, is a large “full service petroleum company offering retail convenience store products, branded and wholesale gasoline, on and off-road diesel, lubricants and common carrier transportation services.”¹ Petroleum

¹ Petroleum Wholesale, About Us, <http://www.petroleumwholesale.com/sunmart.web/about.html>.

Wholesale services more than 350 retail locations throughout ten states, including Texas.² SUNMART Travel centers & Convenience Stores sell retail convenience store products, branded and wholesale gasoline, among other items.³ SUNMART locations exist throughout Texas, Oklahoma, Kansas, Colorado, Utah and Arizona.⁴ According to the Texas Department of Agriculture, PETROLEUM WHOLESAL, L.P., operates eighty-six (86) stations licensed to sell gasoline in Texas under the name SUNMART.⁵ These stations are located throughout twenty-six (26) counties, with the majority in the Houston area, and combined operate a total of over 1,700 fuel pumps.⁶ The Defendant PWI GP L.L.C. is the General Partner in the limited partnership.

11. Defendants routinely offer various grades of gasoline and diesel fuel for sale to the general public at prices which are advertised on pumps as well as signs posted at its gas stations. Defendants sell and price its gasoline and diesel fuel products by the gallon. Defendants' gasoline and diesel products are sold and dispensed to consumers via pump devices which measure the number of gallons and fractional parts of a gallon of fuel. Defendants operate and maintain approximately 1,700 gasoline/diesel pump devices located in approximately 86 stations in Texas. Each gasoline pump generally dispenses several grades of gasoline [i.e., Premium, Mid-Grade and Regular Unleaded]. Defendants use these pumps to sell millions of gallons of gas and diesel products in

² *Id.*

³ Petroleum Wholesale, Sunmart, <http://www.petroleumwholesale.com/sunmart.web/store.html>.

⁴ *Id.*

⁵ Texas Department of Agriculture, "Operation Spotlight", <http://www.agr.state.tx.us>.

⁶ *Id.*

Texas each year. Defendants generate hundreds of millions of dollars in annual revenues⁷ primarily from the sale of gasoline and diesel fuel.

12. Defendants represent to consumers that its gasoline and diesel products can be purchased at a stated price per gallon. Defendants expressly represent to consumers that when they purchase a gallon [or fractional part of a gallon] of gas or diesel that they actually receive a gallon of gas or diesel. In fact, most of Defendants' pumps dispense less than a full gallon [or fractional part of a gallon] of gas or diesel to consumers, despite the fact that consumers pay Defendants for a full gallon of gas or diesel. A majority of Defendants' pumps are maintained and calibrated so that they dispense less gas or diesel than they represent through their advertising. A majority of Defendants' pumps are maintained and calibrated so that they charge more money to consumers for a gallon of gas or diesel than they represent through their advertised price. The majority of Defendants' pumps are maintained and calibrated to consistently shortchange consumers out of gas and money.

13. On July 18-20, 2008, all of Defendants' known pump devices and stations in Texas were inspected by the Texas Department of Agriculture. Of the 1,701 pump devices inspected, 985 [or 58%] were found to be dispensing less than a full or true gallon of gas and/or diesel. The Texas Department of Agriculture inspected 86 stations operated by Defendants. More than ½ of these stations had 60% or more of their pumps calibrated to the detriment of the consumer [i.e., they were delivering less than a full or true gallon of gas or diesel]. Fifteen of these stations [or 17%] had 100% of their pumps calibrated to the detriment of the consumer [i.e., all the pumps were delivering

⁷ Petroleum Wholesale, L.P. had revenues of 289.7 million dollars in 2007.

http://www.hoovers.com/Petroleum-Wholesale-Limited-Partnership/--HD__fhsfkrfxc,src__dbi--/free-co-dnb_factsheet.xhtml.

less than a full or true gallon of gas or diesel]. When Defendants found out about the mass inspections, they hastily dispatched licensed technicians to recalibrate pump devices that had not yet been inspected in an effort to conceal their deception and to prevent said pumps from being shut down by the Department of Agriculture. Defendants also placed “out of order” signs on pumps in an effort to prevent them from being inspected, telling State inspectors that the pumps were “out of order” or “out of gas”. When State inspectors inspected these pumps anyway, they found them to be operational and to contain gas. These pumps were also found to be shortchanging consumers on gas. Defendants profited handsomely as a result of shortchanging consumers out of gas and money.

IX. VIOLATIONS OF THE DTPA

14. Defendants, in the course and conduct of trade and commerce, have directly and indirectly engaged in false, misleading and deceptive acts and practices declared to be unlawful by the DTPA §17.46(a) and DTPA §17.46(b), by engaging in the following conduct:

- A. Causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services, in violation of DTPA, §17.46(b)(2);
- B. Causing confusion or misunderstanding as to affiliation, connection, or association with, or certification by, another, in violation of DTPA, §17.46(b)(3);
- C. Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have, or that a person has a sponsorship, approval, status, affiliation, or connection which he does not have, in violation of DTPA, §17.46(b)(5);
- D. Representing that goods or services are of a particular standard, quality, or grade, or

that goods are of a particular style or model, if they are of another, in violation of DTPA, §17.46(b)(7);

E. Advertising goods or services with intent not to sell them as advertised, in violation of DTPA, §17.46(b)(9);

F. Failing to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction which the consumer would not have entered had the information been disclosed, in violation of DTPA, §17.46(b)(24);

G. Engaging in false, misleading and deceptive acts and practices in the course of trade and commerce, in violation of DTPA, §17.46(a).

X. DISGORGEMENT

15. Defendants' assets are subject to the equitable remedy of disgorgement, which is the forced relinquishment of all benefits that would be unjust for Defendants to retain, including all ill-gotten gains and benefits or profits that result from Defendants putting fraudulently converted property to a profitable use. Defendants should be ordered to disgorge all monies fraudulently taken from individuals and businesses together with all of the proceeds, profits, income, interest and accessions thereto. Such disgorgement should be for the benefit of victimized consumers and the State of Texas.

XI. TRIAL BY JURY

16. Plaintiff herein requests a jury trial and tenders the jury fee to the Harris County District Clerk's office pursuant to TEX. R. CIV. P. 216 and TEX. GOVT. CODE ANN. §51.604

XII. APPLICATION FOR TEMPORARY AND PERMANENT INJUNCTION

17. Because Defendants have engaged in the unlawful acts and practices described above, Defendants have violated and may continue to violate the law as alleged in this Petition. Unless restrained by this Honorable court, Defendants will continue to violate the laws of the STATE OF TEXAS and cause injury, loss and damage to the State of Texas and to the general public. Therefore, Plaintiff requests a Temporary Injunction and Permanent Injunction as indicated below.

XIII. PRAYER

18. WHEREFORE, Plaintiff prays that Defendants be cited according to law to appear and answer herein; that after due notice and hearing a TEMPORARY INJUNCTION be issued; and upon final hearing a PERMANENT INJUNCTION be issued, restraining and enjoining Defendants, Defendants' successors, assigns, officers, agents, servants, employees and attorneys and any other person in active concert or participation with Defendants from engaging in the following acts or practices:

- A. Transferring, concealing, destroying, or removing from the jurisdiction of this Court any books, records, documents, or other written or computer generated materials relating to the business of Defendants currently or hereafter in Defendants' possession, custody or control except in response to further orders or subpoenas in this cause;
- B. Dispensing or delivering less gasoline or diesel fuel than represented in any of Defendants' advertising, including advertising placed on or at any pump device or on any signs posted at Defendants' stations or stores;

- C. Charging consumers more than the advertised price for any gallon or fractional part of a gallon of gasoline or diesel fuel;
- D. Representing, expressly or by implication, that a gallon or fractional part of a gallon of gasoline or diesel fuel will be dispensed or delivered to a consumer when in fact a lesser quantity is being delivered or dispensed;
- E. Failing to maintain all gasoline and diesel pump devices so that they are properly calibrated to deliver or dispense a full gallon or fractional part of a gallon of gasoline or diesel fuel;
- F. Calibrating any gasoline or diesel pump device to deliver less gasoline or diesel fuel than expressly or impliedly represented or advertised;
- G. Allowing unlicensed technicians to calibrate or repair any fuel pump device;
- H. Allowing anyone other than a third party licensed technician to calibrate or repair any fuel pump device;
- I. Utilizing any employee or agent of Defendants to calibrate or repair any fuel pump device, whether or not any such employee or agent is licensed or registered to do so;
- J. Placing any “out of order” sign on any pump device for the purpose of hindering State inspectors from inspecting said pump device; and
- K. Informing any State inspector that a pump device is not in working order or is out of fuel for the purpose of preventing or hindering State inspectors from inspecting said pump device.

19. In addition, Plaintiff STATE OF TEXAS respectfully prays that this Court will:

- A. Order Defendants to restore all money or other property taken from identifiable persons by means of unlawful acts or practices, or, in the alternative, award judgment for damages in an amount within the jurisdictional limits of this court to compensate for such losses;
- B. Adjudge against each Defendant civil penalties in favor of Plaintiff STATE OF TEXAS in an amount up to \$250,000 as allowed by law under the DTPA, TEX. BUS. & COM. CODE §17.47(c)(2), due to Defendants committing acts and practices that were calculated to acquire or deprive money or other property from consumers who were 65 years of age or older when the act or practice occurred;
- C. Adjudge against each Defendant civil penalties in favor of Plaintiff, STATE OF TEXAS, in an amount up to \$20,000 per violation as allowed by law pursuant to the DTPA TEX. BUS. & COM. CODE §17.47(c)(1);
- D. Order Defendants to pay Plaintiff STATE OF TEXAS attorney fees and costs of court pursuant to TEX. GOVT. CODE §402.006(c);
- E. Order the disgorgement of all sums taken from consumers by means of Deceptive Trade Practices, together with all proceeds, interest, income, profits and accessions thereto;
- F. Grant leave to the Plaintiff to conduct telephonic, oral and other depositions prior to the Defendants' answer date and any Temporary Injunction hearing; and
- G. Grant all other relief to which the Plaintiff State of Texas may show itself entitled.

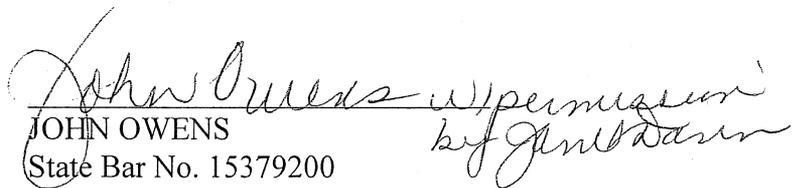
Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

JEFF ROSE
Deputy First Assistant Attorney General

PAUL CARMONA
Chief, Consumer Protection & Public Health Division

 *John Owens* *with permission*
by *Janet Dann*

JOHN OWENS
State Bar No. 15379200

JANET DANN
State Bar No. 00792091

L. SUSAN HERRERA
State Bar No. 09530160
Assistant Attorneys General
Consumer Protection & Public Health Division
808 Travis, Suite 300
Houston, Texas 77002
(713) 223-5886
(713) 223-5821 (fax)

ATTORNEYS FOR THE STATE OF TEXAS