

Miracle Carnival Company, Inc. (“Wonderland”), appeared at the pretrial conference through counsel, Robert A. Horn, Thomas V. Bender, George A. Barton, Joseph A. Kronawitter, J. Brett Milbourn, Robert G. Harken, and Amii N. Castle. The following defendants appeared at the pretrial conference through counsel, as designated below:

BP Products North America Inc. (“BP”) appeared through Sean Morris and Michael F. Saunders; Timothy Morehead, BP’s in-house counsel, also attended.

Casey’s General Stores, Inc. (“Casey’s”) appeared through counsel Martin M. Loring and Michael E. Norton; Mr. Loring also serves as Liaison Counsel for defendants in this MDL proceeding.

ConocoPhillips Company (“COP”) appeared through Joseph W. Bell and William F. Ford, Jr.; John P. DeGeeter, COP’s in-house counsel, also attended.

7-Eleven, Inc. (“7-Eleven”), Circle K Stores, Inc. (“Circle K”), Flying J, Inc. (“Flying J”)¹, Kum& Go, L.C. (“Kum& Go”), and QuikTrip Corporation (“QuikTrip”) appeared through Tristan L. Duncan, A. Bradley Bodamer, and James P. Muehlberger.

Sam’s West, Inc. (“Sam’s West”) appeared through Naomi G. Beer, Brian L. Duffy, and Kurt D. Williams.

Equilon Enterprises LLC d/b/a Shell Oil Products US (SOPUS) appeared through David M. Harris and Sandra B. Gallini.

Valero Marketing and Supply Company (“Valero”) appeared through James F. Bennett and Patrick J. Whalen.

Petro Stopping Centers, Inc., LP (“Petro”)² appeared through Justin J. Wolosz and Tyson

¹ Flying J, Inc. was subsequently dismissed from this case.

² Petro was named as a defendant in *Wilson* but not in *Am. Fiber*. The court declined to certify any class with respect to Petro, and on November 16, 2011 the parties filed a Stipulation of Dismissal [doc. 3028],

H. Ketchum.

Costco Wholesale Corporation (“Costco”), which is named as a defendant in *Wilson*, and which has reached an MDL settlement with plaintiffs that is pending approval by the court, appeared through Gregory L. Musil and Purvi G. Patel

2. NATURE OF THE CASE.

This is a class action case alleging claims under the Kansas Consumer Protection Act (“KCPA”), and civil conspiracy, all arising from the retail sale of gasoline and diesel fuel in Kansas.

3. PRELIMINARY MATTERS.

a. Subject Matter Jurisdiction. Subject matter jurisdiction is invoked under 28 U.S.C. § 1332, and is disputed on various grounds, summarized by defendants as follows:

Defendants contend that the Kansas class representatives lack standing with respect to some defendants because they lack proof of purchase of any fuel at the time of the filing of their complaints. Therefore, they cannot demonstrate injury-in-fact or traceability, which are two key elements for standing. The court declined to certify classes on Cook’s claims against Casey’s, Chevron USA, Inc. (“Chevron”), The Kroger Co. (“Kroger”),³ and 7-Eleven, and the claims of Wilson and Wonderland against Petro, because the class representatives lacked standing to assert some or all of their claims against those defendants. In the Pretrial Order, all claims of plaintiff Cook against Casey’s, BP and 7-Eleven were dismissed without prejudice.⁴ A further review of

which dismissed Petro from the *Wilson* case. As Petro is no longer a defendant in either of these Kansas cases, this pretrial order does not address claims, defenses, or other subjects with respect to Petro.

³ Plaintiffs in *Am. Fiber* dismissed, without prejudice, all claims against Kroger. See Stipulation dated June 2, 2011 (doc. 43 in *Am. Fiber*).

⁴ Additionally, no class was certified against BP, Casey’s, or 7-Eleven in *Am. Fiber*, the case in which Cook is a plaintiff.

the class representatives' deposition testimony, sworn interrogatory answers, and receipts for their purchases of motor fuel reveals that Wilson lacks standing to pursue claims against any defendant, that Wonderland lacks standing to pursue claims against Circle K.

BP, COP, Kum & Go, SOPUS, Circle K, and Valero do not own, operate, or control any retail motor fuel stations in Kansas. These defendants therefore contend that plaintiffs' request for an award of prospective injunctive relief against these defendants is moot, and plaintiffs either never had or no longer have standing to seek such relief from them.

Circle K likewise maintains that it does not own or operate any retail motor fuel stations in Kansas and therefore does not sell gasoline or diesel fuel at retail in Kansas. Even the franchisees of Circle K that operate convenience stores in Kansas do not sell Circle K branded fuel, and any franchisee's fuel operations are separate from Circle K's franchise relationship. Circle K cannot be liable for the conduct of independently owned and operated franchisee convenience stores, because Circle K does not control or have the right to control the franchisees' sale or pricing of fuel by the gallon in Kansas, and Circle K does not hold out the franchisees as its agents for motor fuel sales.

Kum & Go ceased its retail motor fuel operations in Kansas over four years ago. Since that time, it has neither sold retail motor fuel in Kansas nor owned, operated or otherwise maintained any retail motor fuel dispensing device or retail motor fuel stations in Kansas. Kum & Go contends that plaintiffs' request for an award of prospective injunctive relief against Kum & Go is moot, and plaintiffs do not have standing to seek such relief from Kum & Go. Furthermore, certain defendants⁵ contend this court lacks Article III subject matter jurisdiction because this court certified class actions for determining "liability" and "injunctive relief." Both:

⁵7-Eleven, Circle K, , Kum & Go, QuikTrip, Casey's, Sam's West, and Valero.

(1) the questions presented by the claims; and (2) the relief sought by the classes directly implicate issues and powers that are committed to Congress in the Constitution. Accordingly, the Political Question Doctrine precludes subject matter jurisdiction over the questions presented in the “liability” and “injunctive relief” class actions.” By Order dated December 3, 2009, this court denied “Certain Defendants’ Motion to Dismiss for Lack of Subject Matter Jurisdiction Or, In the Alternative, For Summary Judgment, Under the Political-Question Doctrine.” Since the issuance of that Order, however, circuit court decisions upon which this court relied to reject the Political Question Doctrine as a basis for dismissal have been overturned or vacated, and new decisions have been issued which merit reconsideration of the issue.

b. Personal Jurisdiction. The court’s personal jurisdiction over the parties is not disputed.

c. Venue. The parties stipulate that venue properly rests with this court.

d. Governing Law. Subject to the court’s determination of the law that applies to the case, the parties agree that plaintiffs assert their KCPA claim and a civil conspiracy claim under Kansas state law. But defendants contend federal doctrines also apply to the claims and/or defenses, as explained below, and that plaintiffs’ requests for injunctive relief is governed by federal law.

4. STIPULATIONS.

a. The Stipulations of the parties will be filed separately from this Pretrial Order.

5. FACTUAL CONTENTIONS.

a. Plaintiffs’ Contentions. Plaintiffs and thousands of other Kansas consumers buy motor fuel (gas and diesel) in Kansas from defendants, either directly or from branded stations that defendants control or appear to control. Plaintiffs buy motor fuel for the energy it can

provide. When defendants advertise and sell motor fuel to plaintiffs and other Kansas consumers, defendants do not inform consumers that temperature affects the energy content (and therefore the value) of the motor fuel being sold to them. When defendants advertise and sell motor fuel to plaintiffs and other Kansas consumers, defendants do not inform consumers of the temperature of the motor fuel being sold to them, which deprives consumers of the ability to make an accurate price comparison. When defendants sell motor fuel to plaintiffs and other Kansas consumers, defendants do not correct the volume of fuel being sold to account for the effect of temperature on energy content and value. When defendants sell motor fuel to plaintiffs and other Kansas consumers, defendants do not correct the price of fuel being sold to account for the effect of temperature on energy content and value. When defendants sell motor fuel to plaintiffs and other Kansas consumers, defendants simply provide a volumetric measurement of motor fuel for a stated price (e.g., a non temperature-adjusted volume), irrespective of the temperature, energy content, and value of the motor fuel.

Because defendants omit material facts related to the energy content and value of motor fuel, plaintiffs and consumers purchase motor fuel at retail with the understanding that they are receiving a fungible product that is of a standard, uniform, and consistent quality in terms of the amount of fuel (energy) it provides. That is because Defendants sell motor fuel in Kansas by the gallon without reference to, and without accounting for, temperature. Thus, although plaintiffs may receive a uniform amount of liquid, they do not receive a standard, consistent amount of fuel (energy) when they purchase motor fuel from defendants because that motor fuel is of varying temperature.

Temperature is a material fact to a motor fuel transaction because motor fuel expands when heated. A given volume of motor fuel at a higher temperature has less mass and thus less

energy than the same motor fuel at a cooler temperature occupying that same volume, e.g., a gallon of gas. A consumer who buys a gallon of fuel at a warmer temperature unknowingly receives less fuel (fewer molecules and less mass) than a consumer who purchases a gallon of that same fuel at a cooler temperature. Because of the effect temperature has on a given volume of motor fuel, the warmer fuel has lower quality and less value than the colder fuel. This inconsistency in quality and value is inherent in every retail motor fuel transaction because the temperature of motor fuel being sold at retail in Kansas fluctuates by the hour, by the day, and from station to station.

Defendants' deceptive sales practices directly affect consumers' pecuniary interests because their practices result in inaccurate, inconsistent, unfair and non-transparent fuel sales. Because defendants solicit consumers to buy motor fuel and then sell consumers fuel without informing consumers of its temperature or of the fact that temperature affects the energy content of a gallon, defendants' retail fuel sales deprive consumers of the ability to make accurate value comparisons. Defendants' retail motor fuel sales lack transparency.

That lack of transparency is not present when defendants sell fuel to each other, at wholesale, where they engage in temperature adjustment. But Defendants do not temperature-adjust their retail motor fuel sales, nor do they provide consumers with the critical information that would make non-temperature-adjusted retail motor fuel sales more transparent. Consumers cannot obtain that information without incurring a significant burden associated with search and equipment costs that would negate any value resulting from such information. Because consumers cannot make accurate value comparisons, Plaintiffs and consumers are deprived of economic buying power for every dollar they pay for fuel.

In addition to being non-transparent and deceptive, selling motor fuel that is above 60

degrees Fahrenheit without accounting for the effect of temperature is also unfair and unconscionable. As noted, a volume of hot motor fuel has less mass, energy content and value than the same volume of cold motor fuel. To remedy the inconsistency, unfairness and inequity that can result from failing to temperature adjust, decades ago the petroleum industry adopted 60 degrees Fahrenheit as the industry standard reference temperature for motor fuel sales. When defendants buy motor fuel at wholesale, they account for temperature variation by measuring fuel in terms of a standardized gallon defined as 231 cubic inches of fuel at 60 degrees Fahrenheit (e.g., a temperature-adjusted basis). Thus, when defendants purchase “hot” motor fuel (i.e., motor fuel above 60 degrees Fahrenheit), the amount they ultimately pay, or the volume they ultimately receive, reflects the cost and value associated with motor fuel that is above 60 degrees Fahrenheit. But defendants then sell that same motor fuel at retail, to consumers, on a non-temperature-adjusted basis, without accounting for the reduced energy content and value of the motor fuel.

Because motor fuel sold at retail in Kansas can exceed 100 degrees Fahrenheit, and is warmer than 60 degrees Fahrenheit on average, defendants’ refusal to account for temperature in their retail sales practices is unfair and unconscionable. That conclusion is heightened by the fact that some motor fuel retailers brought suit against oil companies years ago seeking the same relief Plaintiffs now demand: the ability to purchase motor fuel on a temperature-adjusted basis. The unconscionability of defendants’ conduct is further demonstrated by the fact that some defendants have retail motor fuel operations in Canada, where motor fuel is colder than 60 degrees Fahrenheit on average. In Canada, more than 90% of motor fuel retailers voluntarily adopted temperature compensation (“ATC”) technology at their retail stations. Defendants that voluntarily adopted ATC in Canada did so to increase profits.

Temperature correction is the most fair and equitable method of selling motor fuel, and it ensures that consumers are receiving fair value for their fuel dollar, regardless of the temperature at the time of the sale. Temperature correction also provides consistency and transparency in retail motor fuel transactions, allowing consumers to make more informed price and value comparisons. Selling fuel adjusted to the volume at 60 degrees Fahrenheit throughout the entire distribution system, including to retail consumers, is the most equitable way fuel can be sold without the seller gaining a competitive advantage. Because it is the most fair and equitable method to sell petroleum products, temperature correction has been adopted in virtually all aspects of petroleum trade except for retail motor fuel transactions.

But Defendants have not implemented technology that would adjust consumer motor fuel sales to account for the effect of temperature in Kansas, and have actively fought efforts to mandate temperature correction of retail motor fuel transactions. Indeed, some Defendants are members of one or more petroleum trade associations. Through that conduit, Defendants and their co-conspirators planned and conspired to perpetuate and insulate their current unfair, deceptive and unconscionable retail motor fuel sales practices by preventing adoption of ATC technology in the United States. To achieve that goal, the conspiracy Defendants disseminated false and misleading information, exerted undue pressure, and threatened to boycott ATC pump manufacturers. Because of those efforts, Kansas consumers still purchase motor fuel on a non-temperature-adjusted basis.

b. Defendants' Contentions.

Since the invention of the automobile approximately 100 years ago, retailers have sold gasoline in the continental United States by the gallon. In accordance with law and customary practice, retailers post a price for a gallon of gasoline or diesel fuel, deliver a gallon, and charge customers a total price for the gallons received by multiplying the price per gallon times the number of gallons sold. Plaintiffs and class members receive exactly what is advertised on the sign and the dispenser: motor fuel sold "by the gallon." Both dictionaries and Kansas law define a "gallon" as a volume of liquid measuring 231 cubic inches, without reference to temperature.

Plaintiffs claim that selling gasoline and diesel fuel by the gallon, without reference to temperature, as it has always been sold, is wrongful. Because gasoline expands and contracts by approximately 1% for every 15 degree Fahrenheit change in temperature, plaintiffs claim the size of the gallons sold in Kansas must vary accordingly. In other words, plaintiffs claim Kansas should abandon the use of the gallon for retail fuel sales and adopt the use of temperature adjusted gallons, or disclose the temperature of the motor fuel being sold on the theory it would allow consumers to make more accurate cost comparisons.

Plaintiffs have sued a variety of different defendants. Some defendants in this case are retailers of gasoline and diesel fuel, ranging from owners of grocery stores to convenience stores. Other defendants in this case are refiners that do not even sell gasoline or diesel fuel at retail in Kansas and cannot be held liable based on the claims asserted. Like all retailers in Kansas and in the continental United States, those defendants who sell gasoline and diesel fuel at retail, do so by the gallon without reference to temperature. There is nothing wrongful about this practice. To the contrary, the law in Kansas specifically permits, and indeed requires, gasoline and diesel fuel be sold by the gallon without reference to temperature.

Specifically, the Kansas Department of Agriculture is charged with ensuring fairness in the market place and preventing deceptive practices with respect to the measurement and sale of gasoline and diesel fuel. It has certified to the public and retailers alike that the existing method of selling motor fuel by the gallon is a lawful and non-deceptive method of sale and complies with all applicable Kansas weights and measures laws for the dispensing, measuring, pricing, and advertising of retail motor fuel in gallon units, without reference to temperature. It has never required retailers adjust the price for warmer fuel in order to comply with the law. Indeed, the price for fuel already is set at prices based on highly competitive market conditions. It has never required retailers post the temperature of the fuel in order to avoid “unfair sales.” It has, however, required retailers sell motor fuel by the gallon. In fact, the Kansas Department of Agriculture prohibits the sale of gasoline or diesel fuel in temperature adjusted gallons. Moreover, the Department regulates and inspects all retail fuel dispensers of gasoline and diesel fuel in Kansas, such that any failure to dispense motor fuel in gallons or attempts to modify the unit price during the course of a transaction would expose the retailer to possible criminal and/or civil penalties. Likewise, applicable statutes and the American Society of Testing and Materials (“ASTM”) standards, govern the quality of the motor fuel being sold. There is no allegation that any defendant violated ASTM standards. In short, Kansas retailers are specifically authorized and required to sell fuel as they have for nearly a century--by the gallon without reference to temperature.

Notwithstanding the law and the plain meaning of the term “gallon,” plaintiffs allege it was deceptive or unconscionable to sell fuel by the gallon without adjustment or disclosures based on temperature. Plaintiffs contend defendants willfully omitted to disclose material facts, and that they engaged in unconscionable acts or practices by failing to adjust for temperature in

the retail sale of motor fuel. Defendants deny they have omitted, concealed, suppressed, or otherwise failed to state any material fact. Defendants deny the temperature of motor fuel, or information related to its temperature, is material to consumer purchasers of such fuel in Kansas. Defendants further deny they have any duty to disclose such information or that such failure to do so was willful.

Moreover, there is nothing deceptive or unconscionable about the longstanding, legally prescribed, and universal retail practice of selling fuel by the gallon. Rather, retail stations advertise and sell motor fuel by volume in Kansas as well as in all other states, and do not advertise or sell by energy content, miles per gallon, weight or any other measure. Plaintiffs and class members do not expect to buy a pound of gasoline or British Thermal Units (“BTUs”). Instead, they expect to buy a gallon and a gallon means a particular volume – the amount of liquid it takes to fill a container measuring 231 cubic inches, which is what they currently receive. Thus, plaintiffs and class members have not been deceived by the current statutorily prescribed method of sale, and defendants have not concealed, suppressed, or omitted any material fact in selling fuel in this manner.

Plaintiffs admit that with each retail purchase of motor fuel, the consumer agrees to pay a price per gallon of fuel, and such agreement constitutes a contract between the buyer and the seller. Motor fuel retailers charge a price the market will bear, based on highly competitive local market conditions, and for most sales the retailer’s posted price supplies the term of the sale. The terms of the agreement are memorialized in writing through the receipt available to plaintiffs and class members at the point of sale. Defendants’ method of selling fuel does not breach any agreement or other legal duty, as it fully complies with all Kansas laws and customs regarding the quantity and quality of the fuel sold.

Plaintiffs' lawsuit seeks to force the State of Kansas to change its existing law, and to force Kansas motor fuel retailers to change their long-standing practice, regarding the retail sale of fuel. While plaintiffs claim such a change would benefit consumers, it would actually increase prices for consumers. If retailers were required to implement and maintain, and regulators were required to inspect, a new system of selling fuel that adjusts measurements based on temperature, the cost of delivering fuel to consumers would go up, with a corresponding increase in consumer prices. Thus, consumers would ultimately pay more for fuel if temperature compensation is implemented. Even one of the named plaintiffs, as a class representative, does not favor automatic temperature correction if it would cause the price of fuel to increase.

Also, consumers would receive no financial benefit from requiring the use of temperature adjustment at retail. Consumers would not pay less for a gallon of fuel, nor would they receive larger gallons of fuel without paying more for them. Furthermore, with respect to those defendants who sell motor fuel at retail in Kansas, their own sales records indicate they have regularly sold fewer volumetric (gross) gallons at retail than they purchase of net gallons at wholesale, and the average temperature of the motor fuel they sell in Kansas is very near or below 60 degrees Fahrenheit. These facts belie plaintiffs' claims of, deception, unconscionability, and materiality.

The national weights and measures standards adopted by the State of Kansas were derived from Congress' Constitutional power to "fix the standard of weights and measures." Congress created, and delegated authority to, the National Institute of Standards and Technology ("NIST") (*see* 15 U.S.C. § 272(a) & (b)(10)), which sponsors and partners with the National Conference on Weights and Measures ("NCWM"), a group comprised of weights and measures officials across the country to consider and develop national weights and measures standards.

The NCWM is the primary mechanism used by the NIST to fulfill its statutory responsibility of promoting national uniformity in weights and measures.

These weights and measures governmental agencies have considered and rejected the question whether consumers would benefit from temperature adjustment. In 2009, at its 94th Annual Meeting, the NCWM's voting members, the governmental officials, voted to approve the Law and Regulations Committee's recommendation to withdraw proposals to amend its standards to either permit or require a temperature compensated method of sale for retail motor fuel transactions. The rejection of temperature compensation by the NCWM, and any other governmental entities, was predicated on careful study of the costs and corresponding lack of benefits to consumers of such temperature compensation.

Because temperature compensation has been considered and rejected by the relevant policy organizations and the Kansas Department of Agriculture, plaintiffs incorrectly assert such rejection is the result of a conspiracy. Put simply, defendants have not committed any unlawful act or conspired or entered into any agreement with any other person or entity to commit an unlawful act. Those defendants that provided information to legislators or regulators about the costs and benefits of automatic temperature compensation had the Constitutional right to do so and cannot be liable for exercising those rights. Any lobbying against adoption of a temperature-related standard for the sale of retail motor fuel before Congress and/or any federal or state governmental entity, including the NCWM at the local, regional, or national conferences, constitutes petitioning activity, which is immune from liability under the First Amendment of the United States Constitution. Further, defendants did not conspire to pressure any pump manufacturer to abandon efforts to market retail ATC equipment.

Finally, BP, Valero, SOPUS and COP (the "Refiner Defendants") do not even own or

operate any retail stations in Kansas, and therefore do not sell gasoline or diesel fuel at retail in Kansas. Rather, these defendants sell branded gasoline in Kansas only to independent wholesale purchasers, known as marketers or jobbers, who then resell the fuel to independent retailers or to the public at retail stations the marketers operate. The Refiner Defendants are therefore not engaged in the retail sales practices about which plaintiffs complain. Moreover, these defendants cannot be liable for the conduct of independently owned and operated retail stations, because they do not control or have the right to control the retailers' sale or pricing of the fuel by the gallon in Kansas, and they do not hold out the independent retail stations as the refiners' agents. Further, Circle K likewise does not own or operate any retail motor fuel stations in Kansas and therefore does not sell gasoline or diesel fuel at retail in Kansas. Even the franchisees of Circle K that operate convenience stores in Kansas do not sell Circle K branded fuel, and any franchisee's fuel operations are separate from Circle K's franchise relationship. Circle K cannot be liable for the conduct of independently owned and operated franchisee convenience stores, because Circle K does not control or have the right to control the franchisees' sale or pricing of fuel by the gallon in Kansas, and Circle K does not hold out the franchisees as its agents for motor fuel sales.

Kum & Go entirely shut down its retail motor fuel operations in Kansas over four years ago. Kum & Go does not sell motor fuel at retail in Kansas and has divested itself of all interest in any retail motor fuel stations in Kansas. Furthermore, there is no record evidence that Kum & Go has plans to sell motor fuel at retail in Kansas in the future. As such, Plaintiffs' request for an award of prospective injunctive relief against Kum & Go is moot and there is no basis upon which to grant injunctive relief against Kum & Go.

6. THEORIES OF RECOVERY.

a. List of Plaintiffs' Theories of Recovery. Plaintiffs assert they are entitled to prevail upon the following theories of recovery:

(1) By omitting material facts and refusing to account for temperature in their sales practices, defendants' conduct was deceptive and unconscionable under the KCPA (*Wilson* Complaint, Count 3; *Cook* Complaint, Count 1); and

(2) Some defendants engaged in a civil conspiracy (*Wilson* Complaint, Count 1; *Cook* Complaint, Count 2).

b. Essential Elements of Plaintiffs' Claim for Violation of the KCPA, Specifically, Under K.S.A. § 50-626(b)(3). Subject to the court's determination of the law that applies to this case, plaintiffs believe that, in order to prevail on this theory of recovery, they have the burden of proving the following essential elements:

(1) Plaintiffs were consumers as defined by the KCPA;

(2) Defendants were suppliers as defined by the KCPA;

Defendants willfully failed to state a material fact, or willfully concealed, suppressed, or omitted a material fact in the sale of motor fuel to plaintiffs; Specifically, plaintiffs contend that defendants willfully failed to state the following material facts, or willfully concealed, suppressed, or omitted the following material facts in the sale of motor fuel to plaintiffs:

a) The temperature of motor fuel;

b) Temperature affects the energy, quality, and value content of motor fuel;

c) Temperature affects the quantity of motor fuel in a volumetrically measured gallon of motor fuel;

d) The energy, quality, and value of motor fuel decreases when that temperature of the motor fuel increases;

e) The quantity of motor fuel in a volumetrically measured gallon of motor fuel decreases when the temperature of that motor fuel increases;

- f) The standard U.S. petroleum gallon in the U.S. domestic petroleum industry is 231 cubic inches at 60 degrees Fahrenheit;
- g) What the price of a gallon of motor fuel sold at retail would be if it were adjusted to be the equivalent of a standard U.S. petroleum gallon (i.e., a gallon at 60 degrees Fahrenheit);
- h) Each gallon of the same kind of motor fuel with the same price does not have the same energy, quality or value if the temperature of each gallon is not the same;
- i) Each gallon of the same kind of motor fuel with the same price does not have the same quantity of motor fuel if the temperature of each gallon is not the same;
- j) Each gallon of motor fuel is not fungible or freely interchangeable with other gallon units of that same motor fuel if the temperature of each gallon is not the same;
- j) Gallons of the same fuel are not fungible and freely interchangeable with gallons of that same motor fuel when different gallons have different temperatures; and,

(3) Plaintiffs and the class members have been aggrieved by defendants' willful failure to disclose a material fact, or by defendants' willful concealment, suppression, or omission of a material fact in the sale of motor fuel.

c. Essential Elements of Plaintiffs' Claim for Violation of the KCPA, Specifically, Under K.S.A. § 50-627. Subject to the court's determination of the law that applies to this case, plaintiffs believe that, in order to prevail on this theory of recovery, they have the burden of proving the following essential elements:

- (1) Plaintiffs were consumers as defined by the KCPA;
- (2) Defendants were suppliers as defined by the KCPA;
- (3) Defendants committed acts or omissions determined to be unconscionable by the Court;
- (4) Plaintiffs and the class members have been aggrieved by defendants' unconscionable conduct.

In making the determination of element 3 above, Plaintiffs submit that guidance as to whether Defendants' conduct was unconscionable can be found in the factors set forth in K.S.A. § 50-627(b), as well as the ten factors discussed by the Kansas Supreme Court in *State ex rel. Stovall v. DVM Enterprises, Inc.*, 275 Kan. 243, 251 (2003). Here, Plaintiffs submit that Defendants have engaged in several acts that are unconscionable: Defendants induced plaintiffs to purchase motor fuel in which such transaction was excessively one-sided in favor of defendants; defendants exploited consumers' lack of knowledge related to the effect that temperature has on energy content of motor fuel; defendants failed to disclose material information; defendants denied consumers their basic rights and remedies as buyers of consumers goods, such as the ability to make an adequate price comparison, and defendants held unequal bargaining power in the sale of motor fuel to consumers. With respect to the alleged failure to disclose material facts, plaintiffs contend that defendants omitted the following material facts in the sale of motor fuel to plaintiffs:

- a) The temperature of motor fuel;
- b) The temperature of motor fuel when that motor fuel exceeds 60 degrees Fahrenheit;
- c) Temperature affects the energy, quality, and value content of motor fuel;
- d) Temperature affects the quantity of motor fuel in a volumetrically measured gallon of motor fuel;
- e) The energy, quality, and value of motor fuel decreases when that temperature of the motor fuel increases;
- f) The quantity of motor fuel in a volumetrically measured gallon of motor fuel decreases when the temperature of that motor fuel increases;
- g) The standard U.S. petroleum gallon in the U.S. domestic petroleum industry is 231 cubic inches at 60 degrees Fahrenheit;
- h) What the price of a gallon of motor fuel sold at retail would be if it were adjusted to

be the equivalent of a standard U.S. petroleum gallon (i.e., a gallon at 60 degrees Fahrenheit);

i) Each gallon of the same kind of motor fuel with the same price does not have the same energy, quality or value if the temperature of each gallon is not the same;

j) Each gallon of the same kind of motor fuel with the same price does not have the same quantity of motor fuel if the temperature of each gallon is not the same;

k) Each gallon of motor fuel is not fungible or freely interchangeable with other gallon units of that same motor fuel if the temperature of each gallon is not the same;

l) Gallons of the same fuel are not fungible and freely interchangeable with gallons of that same motor fuel when different gallons have different temperatures;

m. Each volumetric gallon of motor fuel sold above 60 degrees Fahrenheit contains less energy than consumers would receive if defendants sold such fuel on a temperature compensated basis; and

n) Each volumetric gallon of motor fuel sold above 60 degrees Fahrenheit contains less motor fuel than consumers would receive if defendants sold such fuel on a temperature compensated basis.

Defendants disagree with plaintiffs' formulation of the third element of this claim; according to defendants, the third element as stated immediately above does not comport with the KCPA's definition of "unconscionable." Specifically, to prove that defendants engaged in an unconscionable act or practice, plaintiffs must prove both that the defendant engaged in deceptive bargaining conduct, and that the parties had unequal bargaining power, in the sale of motor fuel to plaintiffs. *Louisburg Bldg. & Dev. Co., L.L.C. v. Albright*, 252 P.3d 597, 619 (Kan. Ct. App. 2011) ("Unconscionable behavior generally requires both deceptive conduct as well as unequal bargaining power amongst the parties") (citing *State ex rel. Stovall v. ConfiMed.com*, 38 P.3d 707, 713 (Kan. 2002)). The Kansas Supreme Court has set out 10 factors that are hallmarks of unconscionability, they are:

(1) The use of printed form or boilerplate contracts drawn skillfully by the party in the strongest economic position, which establish industry wide standards offered on a take it or leave it basis to the party in a weaker economic position;

(2) a significant cost-price disparity or excessive price; (3) a denial of basic rights and remedies to a buyer of consumer goods; (4) the inclusion of penalty clauses; (5) the circumstances surrounding the execution of the contract, including its commercial setting, its purpose and actual effect; (6) the hiding of clauses which are disadvantageous to one party in a mass of fine print trivia or in places which are inconspicuous to the party signing the contract; (7) phrasing clauses in language that is incomprehensible to a layman or that divert his attention from the problems raised by them or the rights given up through them; (8) an overall imbalance in the obligations and rights imposed by the bargain; (9) exploitation of the underprivileged, unsophisticated, uneducated and the illiterate; and (10) inequality of bargaining or economic power.

See Willie v. Southwestern Bel Tel. Co., 549 P.2d 903, 906-07 (Kan. 1976) (citations omitted).). Plaintiffs contend that these factors are non-exclusive. See K.S.A. § 50-627(b) (“the court shall consider circumstances . . . *such as, but not limited to the following*” (emphasis added)).

In addition, certain defendants⁶ believe, and plaintiffs do not agree, that to establish that defendants’ conduct was unconscionable, plaintiffs must prove that defendants actually had a duty to disclose any alleged undisclosed material facts to plaintiffs at the time of the sale of gasoline or diesel and that defendants conduct was “so outrageous and unfair in its wording or its application that it shocks the conscience or offends the sensibilities of the court, or is against public policy.” *Adams v. John Deere Company*, 13 Kan.App.2d 489, 492 (1989); *Oesterle v. Altria Management Co., LLC*, Case No. 09-4010-JAR, 2009 WL 2043492 at *3, (D. Kan. July 14, 2009) (“**In addition [to the ten statutory factors set out in *Willie v. Southwestern Bel Tel. Co.*, 549 P.2d 903, 906-07 (Kan. 1976) (citations omitted)(the court must find that the contract provision is so outrageous and unfair in its wording or its allocation that it shocks the conscience.)**”); *SMD Investments Ltd. v. Raytheon Aircraft Co.*, Case No. 05-2134-KHV, 2006 WL 580968 at *8 (D. Kan. March 8, 2006); *see also Louisburg Bldg. & Dev. Co., L.L.C. v.*

⁶ These defendants include 7-Eleven, Circle K, Kum & Go, and QuikTrip.

Albright, 252 P.3d 597, 619 (Kan. Ct. App. 2011).⁷

Further, defendants contend that they have the right to a jury trial on this claim. *Inter-Asset Finanz AG v. Refco, Inc.*, No. 92 C 7833, 1993 WL 311772, at *4 (N.D. Ill. Aug. 12, 1993) (holding that a defendant was entitled to a jury trial pursuant to the Seventh Amendment for a claim brought in federal court under the Illinois consumer protection act, which state courts had held did not contain the right to a jury trial), citing *Simler v. Conner*, 372 U.S. 221, 222 (1963) (holding “the right to a jury trial in the federal courts is to be determined as a matter of federal law in diversity as well as other actions”), and *Curtis v. Loether*, 415 U.S. 189, 194 (1974) (“The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law”).

d. Essential Elements of Plaintiffs’ Civil Conspiracy Claim. Subject to the court’s determination of the law that applies to this case, plaintiffs believe that, in order to prevail on this theory of recovery, they have the burden of proving the following essential elements:

- (1) Two or more of the defendants, directly or through the trade associations of which they are members;
- (2) An object or purpose to be accomplished;
- (3) A meeting of the minds in the object, purpose or course of action;
- (4) One or more unlawful overt acts by defendants;

⁷ Plaintiffs object to this addition of more legal argument. The parties submitted an edited proposed version of the Pretrial Order to the Court on February 29, 2012. During the March 1, 2012 status conference the Court directed the parties to make certain specific edits to the February 29th version of the Pretrial Order in an effort to shorten and streamline the Order. Plaintiffs did not understand the Court’s instructions during the March 1st status conference to allow the parties to add even more content to the Pretrial Order by raising wholly-new arguments and issues not previously contained in the Pretrial Order.

(5) Injury as the proximate result thereof.

It is plaintiffs' understanding that the only issue in the upcoming May 2012 trial is the issue of liability, with the court to subsequently determine a schedule to decide the scope of injunctive relief and individual damages:

The court intends to bifurcate the trials on liability and damages, with liability tried first. If liability is established in the first trial, then the court will proceed to decide whether to grant injunctive relief and, if appropriate, damages. On the other hand, if liability is not established, there will be no need to address injunctive relief or damages.

Scheduling Order No. 4 (doc. 1729 at 9).

However, to the extent the court deems it relevant to the liability trial, plaintiffs understand the elements to obtain injunctive relief are as follows:

(6) As to plaintiffs' claim for violation of the KCPA, an injunction is appropriate if plaintiffs are successful in demonstrating that defendant(s) violated, is violating, or is likely to violate the KCPA.⁸

Defendants disagree, i.e., according to defendants, neither the KCPA nor Kansas case law eliminates the requirements that plaintiffs prove: (a) likelihood of irreparable harm; (b) the threatened injury to plaintiffs outweighs whatever damage the proposed injunction may cause the opposing party; and (c) the injunction, if issued, will not adversely affect the public interest; all as required by federal law.

⁸ K.S.A. § 50-634(a)(2)

7. **DEFENSES**⁹.

a. **List of Defendants' Affirmative Defenses.** Defendants assert the following defenses and affirmative defenses as they apply to the first phase trial:

Affirmative defenses applicable to ALL of plaintiffs' certified causes of action (asserted by all defendants unless otherwise indicated):¹⁰

(1) [First Affirmative Defense – Specific Authorization] Plaintiffs' and class members' claims are barred because Kansas statutes and related regulations specifically permit and indeed require defendants' method of sale of retail motor fuel.

(2) [Second Affirmative Defense – Illegality] Plaintiffs' and class members' claims are barred because plaintiffs' claims seek an illegal method of sale of retail motor fuel.

(3) [Third Affirmative Defense – Joinder] Plaintiffs' and class members' claims for injunctive relief are barred by their failure to join the State of Kansas, because the State is a required party whose joinder is infeasible, and is indispensable to this litigation.

(4) [Fourth Affirmative Defense – Abstention] The court should abstain from exercising jurisdiction over plaintiffs' requests for injunctive relief under the *Burford* doctrine.

⁹ In the original Pretrial Order entered by the Court, in addition to affirmative defenses, defendants listed general defenses specifying defendants' contention regarding plaintiffs' failure of proof. In order to streamline the Pretrial Order these general defenses have been removed. By removing these general defenses, defendants are not waiving these defenses or issues for trial.

¹⁰ Plaintiffs dismissed during the pretrial conference the remaining claims in their complaints that were not certified. Doc. 2558 at 58-59.. Plaintiffs subsequently requested the dismissal of their certified claims for unjust enrichment and affirmative misrepresentations under the KCPA, as well as dismissal of Wonderland as a party. Doc. 3751. Therefore, those claims are not addressed here. Additionally, plaintiffs take the position that Valero has not previously raised the affirmative defense of justiciability, that Casey's, Shell, and Valero have not previously raised the affirmative defense of preemption, and that Casey's has not previously raised the defense of *Noerr-Pennington*. As such, plaintiffs contend these defendants have not properly preserved these affirmative defenses, and plaintiffs do not believe these defendants can assert these affirmative defenses at trial. Plaintiffs' objections are noted for the record but overruled, as the court finds all of the above-referenced "defenses" implicate subject matter jurisdiction.

(5) [Fifth Affirmative Defense – Preemption] Plaintiffs’ and class members’ claims are barred, in whole or in part, by the Supremacy Clause of the United States Constitution, article VI, § 2, because those claims are preempted and/or precluded by federal law, including, but not limited to, the United States Constitution, article I, § 8 [5], which gives Congress the power to fix the standard of weights and measures, 15 U.S.C. § 272 et seq., and the system created by Congress, whereby federal regulators and state legislators and regulators set weights and measures standards.

(6) [Sixth Affirmative Defense – Justiciability/Political Question] Plaintiffs’ and class members’ claims are barred, in whole or in part, because the claims are not justiciable as a case or controversy, in particular because plaintiffs’ claims amount to political questions for which this court lacks subject matter jurisdiction.

(7) [Seventh Affirmative Defense – Constitutional Defenses – Due Process] Plaintiffs’ and class members’ claims would violate the due process and takings provisions of the U.S. and Kansas constitutions. *See, e.g.*, U.S. CONST. amends. V, XIV. These provisions (1) protect Defendants from unanticipated liability, without adequate advance notice, particularly in light of the settled custom and practice to the contrary; (2) protect Defendants from large or disproportionate liability, particularly in light of the settled custom and practice to the contrary; (3) protect Defendants from retroactive liability for conduct that was legal and even required at the time; and (4) protect Defendants’ reliance interests arising from their compliance with federal and state law that required or authorized the practice at issue, including decisions by the NCWM and resulting state law as well as from state certification of compliance with state law and regulations by affixing of the seal to each dispenser acknowledging compliance, accuracy, and nondeception.

(8) [Eighth Affirmative Defense – Impossibility/Impracticability]¹¹ Plaintiffs’ and class members’ claims are barred, in whole or in part, by the doctrines of impracticability and/or impossibility because their claims seek a retail method of sale of gasoline or diesel that is impractical or impossible due to the absence of commercially available equipment on the market that would post dispensed temperatures of gasoline or diesel. ¹²

(9) [Ninth Affirmative Defense – Voluntary Payment Doctrine]¹³] Plaintiffs’ and class members’ claims are barred, in whole or in part, by the voluntary payment doctrine because plaintiffs are estopped from maintaining any action to recover payments they made for gasoline because plaintiffs paid for gasoline or diesel voluntarily and with full knowledge of all the facts concerning the gasoline or diesel they purchased. *See MacGregor v. Millar*, 203 P.2d 137, 139 (1949); *Salling v. Budget Rent-A-Car Syst., Inc.*, No. 10-3998, 2012 WL 638511 (6th Cir. Feb 29, 2012); *Spivey v. Adaptive Marketing LLC*, 622 F.3d 816, (7th Cir. 2010) (J. O’Connor, sitting by designation). ¹⁴

11 This defense is only asserted by certain defendants 7-Eleven, Circle K, Kum & Go, and QuikTrip and is alleged in and preserved by the answers filed by these defendants. See Doc. 32, Third Defense; Doc. 34, Third Defense; Doc. 56, Third Defense; Doc. 55, Third Defense; and Doc. 30, Third Defense.

12 Plaintiffs object to this addition of a new affirmative defense not previously set forth or disclosed in the Pretrial Order that was submitted and filed five months ago. The parties submitted an edited proposed version of the Pretrial Order to the Court on February 29, 2012 that also did not include this defense. During the March 1, 2012 status conference the Court directed the parties to make certain specific edits to the February 29th version of the Pretrial Order in an effort to shorten and streamline the Order. Plaintiffs did not understand the Court’s instructions during the March 1st status conference to allow the parties to raise wholly-new affirmative defenses that were not previously contained in the original Pretrial Order submitted in October, 2011, or to the edited proposed version of the Pretrial Order submitted on February 29, 2012.

13 This defense is only asserted by certain defendants 7-Eleven, Circle K, Kum & Go, and QuikTrip and is alleged in and preserved by the answers filed by these defendants. See Doc. 32, Twenty-Third Defense; Doc. 34, Twenty-Third Defense; Doc. 56, Twenty-Third Defense; Doc. 55, Twenty-Third Defense; and Doc. 30, Twenty-Third Defense.

14 Plaintiffs object to this addition of a new affirmative defense not previously set forth or disclosed in the Pretrial Order that was submitted and filed five months ago. The parties submitted an edited proposed version of the Pretrial Order to the Court on February 29, 2012 that also did not include this defense. During the March 1, 2012 status conference the Court directed the parties to make certain specific edits to the February 29th version of the Pretrial Order in an effort to shorten and streamline the Order. Plaintiffs did not understand the Court’s instructions during the March 1st status conference to allow the parties to raise wholly-new affirmative defenses that were not previously contained in the original Pretrial Order submitted in October, 2011, or to the edited proposed version of

b. Defenses and Affirmative Defenses applicable to Plaintiffs' Claim for Violation of the KCPA:

(1) [First Affirmative Defense – Specific Authorization] Defendants have not engaged in any deceptive conduct prohibited by the KCPA because Kansas law specifically authorizes and indeed requires the retail sale of motor fuel on a volumetric basis without regard to temperature.

[Second Affirmative Defense – Illegality] Defendants have not engaged in any deceptive conduct prohibited by the KCPA because selling retail motor fuel with ATC is prohibited by Kansas law.

c. Defenses and Affirmative Defenses Applicable to Plaintiffs' Civil Conspiracy Claim:

(1) [Fourth Affirmative Defense – *Noerr-Pennington* Doctrine] Plaintiffs cannot establish any independent unlawful overt act in furtherance of the alleged conspiracy, because any efforts by defendants to petition the government are immune from liability under the First Amendment.

d. Essential Elements of Defendants' First Affirmative Defense (i.e., Specific Authorization). Subject to the court's determination of the law that applies to this case, defendants believe that, in order to prevail on this affirmative defense, they have the burden of proving the following essential elements:

(1) Kansas law specifically authorizes and indeed requires the retail sale of motor fuel on a volumetric basis without regard to temperature.

See Gonzales v. Assocs. Fin. Serv. Co. of Kan., Inc., 967 P.2d 312, 328 (Kan. 1998);

K.S.A. § 83-202; Kan. Admin Reg. § 99-25-1; NIST Handbook 44, App’x B-3, C-3.

e. Essential Elements of Defendants’ Second Affirmative Defense (i.e., Illegality). Subject to the court’s determination of the law that applies to this case, defendants believe that, in order to prevail on this affirmative defense, they have the burden of proving the following essential elements:

(1) Kansas law requires retail sales by a “gallon” that is a volumetric unit equal to 231 cubic inches without reference to temperature; and

(2) Kansas law requires that retail motor fuel dispensers advertise, price, and deliver fuel in gallon units.

See K.S.A. § 83-202; Kan. Admin Reg. § 99-25-1; NIST Handbook 44, App’x B-3, C-3.

In the alternative, defendants believe they may prevail on this affirmative defense by proving the following essential elements:

(3) A retail motor fuel dispenser cannot be used in Kansas unless a National Type Evaluation Program (“NTEP”)-certificate of conformance has been obtained for the dispenser; and

(4) No retail motor fuel dispenser using ATC has received an NTEP certificate of conformance.

See Keith v. Volpe, 118 F.3d 1386, 1393 (9th Cir. 1997); *Bomhoff v. Nelnet Loan Servs., Inc.*, 109 P.3d 1241, 1248 (Kan. 2005); *Dill v. Barnett Funeral Home, Inc.*, 2004 WL 292124, *7 (Kan. Ct. App. Feb. 13, 2004); *Security Ben. Life Ins. Corp. v. Fleming Companies, Inc.*, 908 P.2d 1315, 1323 (Kan. Ct. App. 1995).

f. Essential Elements of Defendants’ Third Affirmative Defense (i.e., Joinder). Subject to the court’s determination of the law that applies to this case, defendants believe that,

in order to prevail on this affirmative defense, they have the burden of proving the following essential elements:

(1) The State of Kansas is a required party in any action seeking plaintiffs' two forms of requested injunctive relief, because (i) the court cannot afford complete relief without joining Kansas; or (ii) proceeding in Kansas's absence would impair the State's ability to protect its interests or leave defendants subject to multiple, inconsistent obligations;

(2) Kansas cannot be joined due to its sovereign immunity; and

(3) Kansas is indispensable to this litigation.

See Davis ex rel. Davis v. U.S., 343 F.3d 1282, 1288-89 (10th Cir. 2003); Fed. R. Civ. P. 19.

g. Essential Elements of Defendants' Fourth Affirmative Defense (i.e., Abstention). Subject to the court's determination of the law that applies to this case, defendants believe that, in order to prevail on this affirmative defense, they have the burden of proving the following essential elements:

(1) Timely and adequate state court review of the relevant Kansas regulations is available;

(2) This court is sitting in equity when considering plaintiffs' requests for equitable relief; and

(3) This court's exercise of jurisdiction over plaintiffs' claims for injunctive relief would disrupt Kansas's efforts to establish a coherent policy with respect to a matter of substantial public concern.

See New Orleans Public Service, Inc. v. Council of City of New Orleans, 491 U.S. 350,

361 (1989).

h. Essential Elements of Defendants' Fifth Affirmative Defense (i.e., Preemption). Subject to the court's determination of the law that applies to this case, defendants believe that, in order to prevail on this affirmative defense, they have the burden of proving the following essential elements:

- (1) Plaintiffs' claims are based on state law;
- (2) Congress has created a system for setting weights and measures standards; and
- (3) The remedies sought by plaintiffs would interfere with the methods by which the federal scheme was designed to reach the objectives of Congress.

See Int'l Paper Co. v. Ouellette, 479 U.S. 481 (1987); *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970); *Perry v State of Florida*, 373 US 379 (1963); *North Carolina, ex rel. Cooper v. Tennessee Valley Authority*, 615 F.3d 291 (4th Cir. 2010); *Cook Family Foods, Ltd. v. Voss*, 781 F. Supp. 1458 (C.D. Cal. 1991).

i. Essential Elements of Defendants' Sixth Affirmative Defense (i.e., Justiciability/Political Question Doctrine). Subject to the court's determination of the law that applies to this case, 7-Eleven, Circle K, , Kum& Go, QuikTrip, Casey's, Sam's West, and Valero believe that, in order to prevail on this affirmative defense, they have the burden of proving the following essential elements:

- (1) Whether or not these defendants have a legal duty to measure, dispense, price and/or advertise retail gasoline and diesel by the gallon or by a temperature compensated gallon is a judgment exclusively and textually committed to Congress in the Federal Constitution in Art. I sec. 8 c. 5.

(2) Congress created a system for setting weights and measures standards applicable to the retail sale of motor fuel, including implementation of any liquid measuring devices for measuring, dispensing, pricing, and advertising retail gasoline and diesel. 15 U.S.C. § 272 et seq.

(3) Congress delegated to the Department of Commerce and the NIST, the authority to devise a standard-setting scheme whereby federal regulators and state legislators and regulators create the standards applicable to the retail sale of gasoline and diesel, including the duties with which these defendants must comply.

(4) A duty to “temperature compensate” is a necessary predicate to liability for all of plaintiffs’ claims.

(5) Any judicially created duty “to temperature compensate” would usurp the standard setting function committed to Congress in art I sec.8 cl. 5, in that it would (1) lack judicially discoverable and manageable standards; (2) involve an initial policy determination of a kind clearly for non-judicial discretion; (3) involve an undertaking that would express lack of respect due Congress and the standard-setting scheme it devised; (4) cannot be made without conflicting with a decision already made by the political entities charged with making the decision whether or not to mandate a temperature compensated standard as the more fair and equitable standard to a gallon standard for the retail sale of fuel; and (5) risk embarrassment from multifarious pronouncements by various governmental departments on the question regarding the standards by which gasoline and diesel should be sold at retail.

(6) Any injunctive relief imposed by the court would directly conflict with the regulatory scheme devised by Congress to govern measuring, dispensing, pricing and advertising retail gasoline and diesel at the pump.

See American Electric Power Company v. Connecticut, 131 S.Ct. 2527 (2011); *Vieth v. Jubelirer*, 541 U.S. 267 (2004); *Gilligan v Morgan*, 413 U.S. 1 (1973); *Baker v. Carr*, 369 U.S. 186 (1962); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849); *O'Connor v. U.S.*, 72 Fed.Appx. 768 (10th Cir. 2003); *Custer County Action Ass'n v. Garvey*, 256 F.3d 1024, 1031 (10th Cir. 2001); *Glover Const. Co., v. Andrus*, 591 F.2d 554, 561 (10th Cir. 1979); *Chavez v. Freshpict Foods, Inc.*, 456 F.2d 890 (10th Cir. 1972); *Native Village of Kivalina v. ExxonMobil*, 663 F. Supp. 2d 683 (N.D. Cal. 2009); *Comer v. Murphy Oil USA, Inc.*, No. 1:05CV436 2007 WL 6942285 (S. D. Miss. Aug 30, 2007), *vacated*, 585 F.3d 855 (5th Cir. 2009), *reh'g en banc granted*, 598 F.3d 208 (5th Cir. 2010), *appeal dismissed district court opinion reinstated*, 607 F.3d 1049 (5th Cir. 2010); *California v. Gen. Motors Corp.*, No. 06-5755, 2007 WL 2726871 (N.D. Cal. September 17, 2007).

j. Essential Elements of Defendants' Seventh Affirmative Defense (i.e., Constitutional Defenses – Due Process). Subject to the court's determination of the law that applies to this case, Defendants believe that, in order to prevail on this affirmative defense, they have the burden of proving any of the following essential elements:

(1) Any finding of liability against Defendants for the manner in which they sell motor fuel, and any award of injunctive relief, damages, and/or civil penalties based on such a finding would constitute unanticipated liability, without adequate advance notice, particularly in light of the settled custom and practice with respect to

motor fuel sales;

(2) Any award of injunctive relief, damages, and/or civil penalties against Defendants would constitute excessively large or disproportionate liability, particularly in light of the settled, specifically authorized custom and practice with respect to motor fuel sales;

(3) Defendants' alleged conduct was legal at the time such that any finding of liability, which would support a monetary damages award, would constitute impermissible retroactive liability;

(4) Defendants justifiably relied on and complied with federal and state law that authorized the practice at issue, including but not limited to, reasonable reliance upon (i) NCWM decisions and resulting state law rejecting temperature compensated sales as a permissible method of sale and/or (ii) state certification of compliance with state law by affixing a weights and measures seal to each dispenser acknowledging compliance, accuracy, and nondeception; and/or

(5) Any statutory damages award or civil penalties under the KCPA is wholly disproportionate to defendants' violation of the statute and obviously unreasonable, in light of (i) the public interest, (ii) the opportunities for committing the violation, (iii) the need for deterrence, and (iv) the actual damages suffered by plaintiffs and class members.

See Philip Morris USA v. Williams, 549 U.S. 346, 353-55 (2007); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574-79 (1996); *E. Enters. v. Apfel*, 524 U.S. 498 (1998)

(plurality opinion) (imposition of large, unanticipated, and disproportionate liability based on past conduct violates the Constitution as a deprivation of due process or a regulatory taking); *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 130 S. Ct. 2592, 2601 (2010) (plurality opinion) (discussing circumstances in which a judicial taking might arise: “It would be absurd to allow a State to do by judicial decree what the Taking Clause forbids it to do by legislative fiat.”); *Tenn. Valley Auth.*, 615 F.3d at 305-06 (4th Cir. 2010) (holding that courts must not “upset the *reliance interests*” created by statutes and regulations in favor of “nebulous” claims for damages and injunctive relief); *Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 587 (6th Cir. 2007) (quoting *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 67 (1919)); *Capitol Records, Inc. v. Thomas-Rasset*, 799 F.Supp.2d 999, 1004, 1009-1011 (D. Minn. 2011); *Gall v. Am. Heritage Life Ins. Co.*, 3 F. Supp. 2d 1344, 1350 (S.D. Ala. 1998) (“serious due process concerns” were raised by judicial ruling that “a business practice that has been accepted as a legitimate method ... in at least 42 states of this country and approved in their statutes and by their regulatory agencies” constituted a fraud).

k. Essential Elements of Certain Defendants’ Eighth Affirmative Defense (i.e., Impossibility/Impracticability).¹⁵ Subject to the court’s determination of the law that applies to this case, certain defendants believe, in order to prevail on this affirmative defense, they have the burden of proving that the automatic disclosure of temperature is impractical or impossible due

¹⁵ This defense is only asserted by certain defendants 7-Eleven, Circle K, Kum & Go, and QuikTrip and is alleged in and preserved by the answers filed by these defendants. See Doc. 32, Third Defense; Doc. 34, Third Defense; Doc. 56, Third Defense; Doc. 55, Third Defense; and Doc. 30, Third Defense.

to the absence of commercially available equipment on the market that would post dispensed temperatures of gasoline or diesel.¹⁶

l. Essential Elements of Certain Defendants' Ninth Affirmative Defense (i.e., Voluntary Payment Doctrine).¹⁷] Subject to the court's determination of the law that applies to the case, certain defendants believe, in order to prevail on this affirmative defense, they have the burden of proving that plaintiffs are estopped from maintaining any action to recover payments they made for gasoline or diesel because plaintiffs paid for gasoline or diesel voluntarily and with full knowledge of all the facts concerning the gasoline they purchased. *See MacGregor v. Millar*, 203 P.2d 137, 139 (1949); *Salling v. Budget Rent-A-Car Syst., Inc.*, No. 10-3998, 2012 WL 638511 (6th Cir. Feb 29, 2012); *Spivey v. Adaptive Marketing LLC*, 622 F.3d 816, (7th Cir. 2010)(J. O'Connor, sitting by designation).¹⁸

m. Essential Elements of Defendants' Eighth Affirmative Defense (i.e., Noerr-Pennington Doctrine/"Petitioning Immunity"). Subject to the court's determination of the law

¹⁶ Plaintiffs object to this addition of a new affirmative defense not previously set forth or disclosed in the Pretrial Order that was submitted and filed five months ago. The parties submitted an edited proposed version of the Pretrial Order to the Court on February 29, 2012 that also did not include this defense. During the March 1, 2012 status conference the Court directed the parties to make certain specific edits to the February 29th version of the Pretrial Order in an effort to shorten and streamline the Order. Plaintiffs did not understand the Court's instructions during the March 1st status conference to allow the parties to raise wholly-new affirmative defenses that were not previously contained in the original Pretrial Order submitted in October, 2011, or to the edited proposed version of the Pretrial Order submitted on February 29, 2012.

¹⁷ This defense is only asserted by certain defendants 7-Eleven, Circle K, Kum & Go, and QuikTrip and is alleged in and preserved by the answers filed by these defendants. See Doc. 32, Twenty-Third Defense; Doc. 34, Twenty-Third Defense; Doc. 56, Twenty-Third Defense; Doc. 55, Twenty-Third Defense; and Doc. 30, Twenty-Third Defense.

¹⁸ Plaintiffs object to this addition of a new affirmative defense not previously set forth or disclosed in the Pretrial Order that was submitted and filed five months ago. The parties submitted an edited proposed version of the Pretrial Order to the Court on February 29, 2012 that also did not include this defense. During the March 1, 2012 status conference the Court directed the parties to make certain specific edits to the February 29th version of the Pretrial Order in an effort to shorten and streamline the Order. Plaintiffs did not understand the Court's instructions during the March 1st status conference to allow the parties to raise wholly-new affirmative defenses that were not previously contained in the original Pretrial Order submitted in October, 2011, or to the edited proposed version of the Pretrial Order submitted on February 29, 2012.

that applies to this case, defendants believe that, in order to prevail on this affirmative defense, they have the burden of proving the following essential elements:

(1) Defendants' alleged advocating against the use of ATC at retail before legislators and regulators constitutes lobbying of public officials about weights and measures standards; and

(2) Defendants' lobbying activities fall under the protection of the First Amendment right to petition.

See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965); *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 208 F.3d 885, 889 (10th Cir. 2000); *Tal v Hogan*, 453 R.3d 1244 (10th Cir. 2006); *Greater Rockford Energy & Tech. Corp. v. Shell Oil Co.*, 998 F.2d 391, 396-97 (7th Cir. 1993); *Sessions Tank Liners, Inc. v. Joor Mfg., Inc.*, 17 F.3d 295, 299-300 (9th Cir. 1994).

Plaintiffs contend some of the "affirmative defenses" set forth by defendants are not true affirmative defenses under this court's decision in *Renfro v Spartan Computer Services*, Case No. 16-2284-KHV, 2007 WL 28245 (D. Kan. Jan. 3, 2007); plaintiffs object to their inclusion in the pretrial order. Plaintiffs' objections are wholly lacking in specificity and therefore are overruled.

8. FACTUAL ISSUES.

One or more of the parties believe the following material issues will need to be resolved at trial by the trier of fact if summary judgment is not granted:

- a.** Whether defendants' conduct constitutes a deceptive practice;
- b.** Whether temperature is a material fact to a motor fuel transaction;

c. Whether defendants have willfully omitted material facts regarding the motor fuel sold by defendants to plaintiffs and Class members;

d. Whether BP, Circle K, Kum & Go, QuikTrip and SOPUS, directly or in combination with or through non-parties to the Kansas case, including Chevron, Exxon, Kroger, Love's Travel Stops, Marathon Petroleum, Murphy Oil, The Pantry, Pilot Travel Centers, Racetrac Petroleum, Sheetz, Sinclair Oil, Speedway SuperAmerica, Sunoco, TravelCenters/Petro Stopping Centers, WaWa, the American Petroleum Institute, the Petroleum Marketers Association of America, NATSO, Inc., the California Independent Oil Marketers Association, the Society of Independent Gasoline Marketers of America, the National Association of Convenience Stores and the Petroleum Marketers and Convenience Store Association of Kansas, have engaged in a civil conspiracy.

e. Whether plaintiffs are consumers for purposes of the KCPA.

f. Whether defendants are suppliers for purposes of the KCPA.

g. Has each plaintiff established standing to sue each defendant, including proof of purchase from each defendant, injury in fact, causation, and redressability?

h. Would a change in the manner motor fuel is sold at retail require changes to Kansas regulations, procedures, and cost money?

i. Do the Refiner Defendants (i.e., BP, COP, SOPUS, and Valero), or Circle K or Kum& Go, sell motor fuel in the State of Kansas at retail?

j. Do the Refiner Defendants or Circle K control, or have the right to control, the sales practices of independently owned and operated branded retail stations that allegedly have caused harm to plaintiffs?

k. Do the Refiner Defendants or Circle K hold out independently owned and operated retail stations as their agents?

l. Do plaintiffs or class members rely on the appearance of branded retail stations or the presence of the Refiner Defendants' or Circle K's trademarks and signs to decide whether to purchase fuel at those stations?

m. Has any defendant suppressed, concealed, or omitted any material information, which it had a duty to disclose, with respect to the temperature of the motor fuel it sells at retail, and/or the effect of temperature on the energy content of the motor fuel, in the State of Kansas?

n. If any defendant suppressed, concealed, or omitted any material information with respect to the temperature of the motor fuel it sells at retail and/or the effect of temperature on the energy content of the motor fuel, in the State of Kansas, did any defendant do so with the designed purpose or intent to cause injury to consumers, i.e., was it willful?

o. If any defendant willfully suppressed, concealed, or omitted any material information with respect to the temperature of the motor fuel it sells at retail and/or the effect of temperature on the energy content of the motor fuel, in the State of Kansas, did this conduct proximately cause plaintiffs any injury or harm.

p. If any plaintiff was injured or harmed by any defendant's willful suppression, concealment, or omission of any material information with respect to the temperature of the motor fuel it sells at retail and/or the effect of temperature on the energy content of the motor fuel, in the State of Kansas, have the named plaintiffs and each class member suffered the same injury or harm proximately caused by any defendant's conduct?

q. Have any Kansas Weights and Measures Officials and/or manufacturers who sell motor fuel equipment in the State of Kansas been unlawfully pressured by any defendant?

r. Did any plaintiff that is an individual, husband and wife, sole proprietor, or family partnership, purchase any motor fuel from each defendant for personal, family, household, business, or agricultural purposes?

s. Did any defendant sell more motor fuel in Kansas at temperatures at or above 67.5 (the allowable tolerance) degrees Fahrenheit than it sold at temperatures below 60.0 degrees Fahrenheit, such that if plaintiffs' allegations regarding the alleged effect of temperature expansion on motor fuel sales are true, plaintiffs or the class suffered any overall injury or harm through the alleged effect?

t. Did any defendant sell more motor fuel in Kansas at temperatures at or above 60.0 degrees Fahrenheit than it sold at temperatures below 60.0 degrees Fahrenheit, such that if plaintiffs' allegations regarding the alleged effect of temperature expansion on motor fuel sales are true, plaintiffs or the class suffered any overall injury or harm through the alleged effect?

u. Did BP, COP, Kum& Go, QuikTrip, and/or SOPUS reach a meeting of the minds as to a course of conduct that was an unlawful attempt to obstruct and/or resist implementation and installment of ATC devices on retail motor fuel dispensers in Kansas?

v. Did BP, COP, Kum& Go, QuikTrip, and/or SOPUS take one or more unlawful overt acts to further an unlawful attempt to obstruct and/or resist implementation and installment of ATC devices on retail motor fuel dispensers in Kansas?

w. Did any plaintiff, or the class as a whole, suffer any harm as a proximate result of BP, COP, Kum& Go, QuikTrip, and/or SOPUS taking one or more unlawful overt acts to further an unlawful attempt to obstruct and/or resist implementation and installment of ATC devices on retail motor fuel dispensers in Kansas?

x. Do motor fuel retailers in Kansas commit deceptive or unconscionable acts or omissions by selling motor fuel without adjusting price or volume to account for temperature?

y. If motor fuel retailers in Kansas commit deceptive or unconscionable acts or omissions by selling motor fuel without adjusting price or volume to account for temperature, did this conduct proximately cause plaintiffs any injury or harm?

z. If any plaintiff was injured or harmed by motor fuel retailers in Kansas committing deceptive or unconscionable acts or omissions by selling motor fuel without adjusting price or volume to account for temperature, have the named plaintiffs and each class member suffered the same injury or harm proximately caused by any defendant's conduct?

aa. Do motor fuel retailers in Kansas commit deceptive or unconscionable acts or omissions by selling motor fuel without disclosing the temperature of the fuel or the effect the temperature allegedly has upon the fuel?

9. LEGAL ISSUES.

One or more of the parties believe the following are the significant legal or evidentiary issues that will need to be resolved by the court in this case, whether on summary judgment motion or at trial:

a. Whether defendants' practice of selling motor fuel in retail sales to Kansas class members on non-temperature basis is an unconscionable practice.

b. Whether defendants' failure to disclose material facts to consumers, such as the temperature of the fuel being sold and the fact that temperature affects the energy of motor fuel, is unconscionable under the KCPA.

c. Whether ATC devices are specifically prohibited under Kansas law.

d. Does Kansas law, including through the adoption of Handbook 44, require and/or specifically permit that motor fuel be sold at retail on a volumetric basis without regard for temperature? Conversely, does Kansas law prohibit the use of an ATC device at retail?

e. Does Kansas law require and/or specifically permit that the price of motor fuel at retail be advertised and posted per volumetric gallon units?

f. Can plaintiffs sustain claims for violations of the KCPA if defendants' conduct was required and/or specifically permitted by Kansas law?

g. Can plaintiffs recover civil penalties under the KCPA without proving the actual damages caused by defendants' alleged violations of the statute?

h. Is defendants' membership and participation in various trade groups and associations, as well as any associated lobbying or petitioning by those groups and associations, conduct that is protected by the First Amendment such that plaintiffs' conspiracy claim is barred by the defendants' First Amendment rights to petition government?

i. Is the State of Kansas an indispensable party to this litigation, in light of the fact that its Weights and Measures Division within the Department of Agriculture is charged with enforcing laws and regulations regarding the sale of motor fuel at retail that might conflict with relief sought by plaintiffs here, that is, the (1) retrofitting or installation of ATC devices at retail and/or (2) disclosure of the temperature of motor fuel sold at retail and the effect of temperature on the energy content of that fuel?

j. Can the Refiner Defendants or Circle K be held liable for sales of branded motor fuel by independently owned and operated retail stations in the State of Kansas?

k. Can plaintiffs prevail on their claims for prospective injunctive relief against Kum & Go where Kum & Go ceased all retail motor fuel operations in the State of Kansas by January 2008 and there is no evidence that Kum & Go intends to resume operations in Kansas?

l. Do the Political Question or *Burford* Doctrines prohibit the court from exercising jurisdiction over this matter?

m. Should the court decertify the Rule 23(b)(2) classes in this case in light of, among other reasons, the Supreme Court's recent decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011)?

n. Should the court decertify the classes, because a class-action trial of this case would violate Kansas substantive law, Fed. R. Civ. P. 23, and the United States Constitution?

o. To prevail on their claims for prospective injunctive relief pursuant to the KCPA must the plaintiffs prove personal injury causally linked to any defendant's conduct, and class-wide injury through common proof that any defendant's conduct has a widespread impact on class members and has caused economic injury-in-fact to class members?

10. DAMAGES.

a. Plaintiffs' Damages. In the event of a judgment in favor of plaintiffs on the issue of liability in Phase I, plaintiffs claim they are entitled to individual damages and/or statutory penalties, and plaintiffs and the class claim they are entitled to attorneys' fees pursuant to the KCPA (specifically, under K.S.A. § 50-634(e)), to be decided in Phase II.

b. Defendants' Damages. Defendants have no affirmative claims for damages. But all defendants reserve the right to seek recovery of attorneys' fees pursuant to the KCPA (specifically, under K.S.A. § 50-634 (e)(1) and (2)).

11. NON-MONETARY RELIEF REQUESTED.

It is plaintiffs' understanding that the only issue to be determined in the upcoming May 2012 Phase I trial is liability, with the court to subsequently determine a schedule to decide the scope of injunctive relief and the individual Plaintiffs' damages in Phase II. In Phase II, plaintiffs currently intend to seek the following non-monetary relief during the injunctive relief phase of this case.

Declaratory Relief

A declaration that the following practices and acts are unlawful and violative of the KCPA:

- (1) Selling motor fuel in the State of Kansas at temperatures in excess of 60 degrees Fahrenheit at prices not adjusted to account for temperature expansion;
- (2) Selling motor fuel in the State of Kansas at temperatures in excess of 60 degrees Fahrenheit without adjusting the volume to account for temperature expansion;
- (3) Failing to disclose what the price of a gallon of motor fuel sold at retail in the State of Kansas would be if it were adjusted to be the equivalent of a standard U.S. petroleum gallon (i.e., a gallon at 60 degrees Fahrenheit);
- (4) Failing to disclose the temperature of motor fuel sold at retail in the State of Kansas; and
- (5) Failing to disclose that the energy, quality, and value of motor fuel sold at retail in the State of Kansas decreases when the temperature of the motor fuel increases.

Injunctive Relief

An order prohibiting and enjoining defendants from engaging in the following practices and acts:

(6) Selling motor fuel in the State of Kansas at temperatures in excess of 60 degrees Fahrenheit at prices not adjusted to account for temperature expansion;

(7) Selling motor fuel in the State of Kansas at temperatures in excess of 60 degrees Fahrenheit without adjusting the volume to account for temperature expansion;

(8) Failing to disclose what the price of a gallon of motor fuel sold at retail in the State of Kansas would be if it were adjusted to be the equivalent of a standard U.S. petroleum gallon (i.e., a gallon at 60 degrees Fahrenheit);

(9) Failing to disclose the temperature of motor fuel sold at retail in the State of Kansas; and

(10) Failing to disclose that the energy, quality and value of motor fuel sold at retail in the State of Kansas decreases when the temperature of the motor fuel increases.

An order directing defendants to:

(11) Install and maintain ATC-equipped motor fuel dispensers at all retail locations it owns, franchises, or that sell its branded motor fuel in the State of Kansas in a manner the court deems just and proper;

(12) Disclose the temperature of motor fuel sold at all retail locations it owns, franchises, or that sell its branded motor fuel in the State of Kansas in a manner the court deems just and proper; and/or

(13) Disclose, in a manner the court deems just and proper, at all retail locations it owns, franchises, or that sell its branded motor fuel in the State of Kansas that the energy, quality, and value of motor fuel sold at retail decreases when the temperature of the motor fuel increases.

Defendants object to plaintiffs' description of non-monetary relief sought on the grounds that it has not been properly preserved in the pleadings. According to defendants, in the *Wilson* complaint, the only non-monetary relief requested is an injunction "requiring the Defendants' to retrofit and install temperature-correction devices." Defendants acknowledge the *Cook* complaint contains a broader request for relief that is comparable to what plaintiffs seek in this pretrial order. In any event, defendants assert that the non-monetary relief in each case should be limited to what was pleaded in that case.

12. AMENDMENTS TO PLEADINGS.

Soon after the initial pretrial conference, the court granted plaintiffs' motion to amend their complaints to substitute SOPUS in place of Shell Oil Company.

During the pretrial conference, the parties stipulated to the dismissal of some of plaintiffs' previously pleaded claims. Specifically, plaintiffs dismissed, without prejudice, the following parties and claims:

In Am. Fiber:

- Plaintiffs' claims for breach of the duty of good faith and fair dealing (Count III), fraudulent misrepresentation (Count V), and negligent misrepresentation (Count VI), as to all defendants.
- Plaintiffs' claims for civil conspiracy (Count II) as against Valero.
- All of plaintiffs' claims (Counts I-VI) asserted against BP, Casey's, and 7-Eleven.

In *Wilson*:

- Plaintiffs' claims for breach of duty of good faith and fair dealing (Count II), as to all defendants.
- Plaintiffs' claims for civil conspiracy (Count I) asserted against Casey's, 7-Eleven, Valero, and Sam's West.
- All of plaintiffs' claims (Counts I-IV) asserted against Petro.

All of the claims mentioned in this paragraph therefore were dismissed without prejudice in the Pretrial Order.

13. DISCOVERY.

Under the scheduling order and any amendments, all discovery was to have been completed by October 11, 2011. Discovery is complete, except the parties have agreed to engage in limited discovery related to the authentication of documents when the parties are further along in their trial preparation and have a more reasonable and accurate analysis of potential trial exhibits, and also have agreed to certain non-party discovery from Shell Canada, Ltd.

Unopposed discovery may continue after the deadline for completion of discovery so long as it does not delay the briefing of or ruling on dispositive motions, or other pretrial preparations. Under these circumstances, the parties may conduct discovery beyond the deadline for completion of discovery if all parties are in agreement to do so, but the court will not be available to resolve any disputes that arise during the course of this extended discovery.

14. WITNESSES AND EXHIBITS.

a. Final Witness and Exhibit Disclosures Under Rule 26(a)(3). The parties' final witness and exhibit disclosures pursuant to Fed. R. Civ. P. 26(a)(3)(A) shall be filed no later than 30 days before trial. The parties' disclosures shall separately identify the witnesses and exhibits

reasonably expected to be used at trial, versus those that will be used only if the need arises. With regard to each witness disclosed under Fed. R. Civ. P. 26(a)(3)(A)(i), the disclosures also shall set forth the subject matter of the expected testimony and a brief synopsis of the substance of the facts to which the witness is expected to testify. Witnesses expected to testify as experts shall be so designated. Witnesses and exhibits disclosed by one party may be called or offered by any other party. Witnesses and exhibits not so disclosed and exchanged as required by the court's order shall not be permitted to testify or be received in evidence, respectively, except by agreement of counsel or upon order of the court. The parties should bear in mind that seldom should anything be included in the final Rule 26(a)(3)(A) disclosures that has not previously appeared in the initial Rule 26(a)(1) disclosures or a timely Rule 26(e) supplement thereto; otherwise, the witness or exhibit probably will be excluded at trial. *See* Fed. R. Civ. P. 37(c)(1).

b. Objections. The parties shall file any objections under Fed. R. Civ. P. 26(a)(3)(B) no later than 14 days before trial. The court shall deem waived any objection not timely asserted, unless excused by the court for good cause shown.

c. Marking and Exchange of Exhibits. All exhibits shall be marked no later than 14 days before trial. The parties shall exchange copies of exhibits at or before the time they are marked. The parties shall also prepare lists of their expected exhibits, in the form attached to this pretrial order, for use by the courtroom deputy clerk and the court reporter. In marking their exhibits, the parties shall use pre-assigned ranges of numbered exhibits. Exhibit Nos. 1-10,000 shall be reserved for plaintiffs; Exhibit Nos. 10,001-20,000 shall be reserved for defendants; Exhibits 20,001 and higher shall be reserved for any third party. Each exhibit that the parties expect to offer shall be marked with an exhibit sticker, placed in a three-ring notebook, and tabbed with a numbered tab that corresponds to the exhibit number. The parties shall prepare

exhibit books in accordance with the requirements of the judge who will preside over trial. The parties will also provide electronic versions of all exhibits if the court so desires and requests. The parties shall contact the judge's courtroom deputy clerk to determine that judge's specific requirements.

d. Designations of Deposition Testimony.

(1) **Written Depositions.** Consistent with Fed. R. Civ. P.

26(a)(3)(A)(ii), any deposition testimony sought to be offered by a party other than to impeach a testifying witness shall be designated by page and line in a pleading filed no later than 21 days before trial. Any counter-designation in accordance with Fed. R. Civ. P. 32(a)(6), and any objections to the designations made by the offering party, shall be filed no later than 14 days before trial. Any objections to counter-designations shall be filed no later than 5 business days before trial. Before filing any objections, the parties shall have conferred in good faith to resolve the dispute among themselves. No later than 3 business days before trial, to facilitate the court's ruling on any objections to designations or counter-designations, the party seeking to offer the deposition testimony shall provide the trial judge a copy of each deposition transcript at issue. Each such transcript shall be marked with different colored highlighting. Red highlighting shall be used to identify the testimony that plaintiffs have designated, blue highlighting shall be used for defendants, yellow highlighting shall be used for any third party, and green highlighting shall be used to identify the objections to any designated testimony. After receiving and reviewing these highlighted transcripts, the court will issue its rulings regarding any objections. The parties shall then file the portions of the depositions to be used at trial in accordance with D. Kan. Rule 32.1.

(2) **Videotaped Depositions.** The paragraph immediately above applies to videotaped depositions as well as written deposition transcripts. After the court issues its rulings on the objections to testimony to be presented by videotape or DVD, the court will set a deadline for the parties to submit the videotape or DVD edited to reflect the designations and the court's rulings on objections.

15. MOTIONS.

a. Pending Motions. The parties believe that the following pending motions impact the two Kansas cases:

(1) Defendants' Submission in Response to the Court's Order Regarding a Proposed Trial Plan (doc. 1734).

(2) Plaintiffs' Motion for Attorneys' Fees re Costco Settlement(doc. 1820)¹⁹.

(3) Costco's Motion for Leave to File Surreply (doc. 2084).²⁰

(4) Defendants' Motion for Summary Judgment on Plaintiffs' KCPA and Unjust Enrichment Claims (doc. 2705).

(5) Refiner Defendants' Motion for Summary Judgment Regarding Sales by Retail Stations Not Owned or Operated by Defendants (doc. 2714).

(6) Defendants' Motion for Summary Judgment on the Grounds that Plaintiffs Lack Standing (doc. 2732).

(7) Motion for Partial Summary Judgment Dismissing Plaintiffs' Requests for Injunctive Relief (doc. 2725).

¹⁹ Plaintiffs do not believe the Costco motions are relevant to the Kansas trial.

²⁰ Plaintiffs do not believe the Costco motions are relevant to the Kansas trial.

(8) Motion for Summary Judgment on Plaintiffs' Conspiracy Claims (doc. 2711).

(9) Defendant Kum & Go, LCs' Partial Motion to Dismiss or, in the alternative, Motion for Summary Judgment on Plaintiffs' Claim for Injunctive Relief (doc. 2398).

(10) Defendant Circle K Stores Inc.'s Motion for Summary Judgment Due to No Retail Sales in Kansas (doc. 2418).

(11) Plaintiffs' Motion to Strike or, in the Alternative, for Leave to File a Sur-Reply in Response to Defendants Circle K Stores, Inc.'s Reply and Sealed Reply to Response to Defendants Circle K Stores, Inc.'s Motion for Summary Judgment Due to No Retail Sales in Kansas (doc. 3200).

b. Additional Pretrial Motions. After the pretrial conference, defendants indicated they planned to file the following motions:

- (1) Motions to Sever for Separate Trial.
- (2) Motion to Take Judicial Notice of Certain Facts.
- (3) Motion for Final Approval of Costco Amended Settlement.

In addition, both plaintiffs and defendants intend to file motions in limine.

The dispositive motion deadline, as established in the scheduling order and any amendments, was **November 1, 2011**.

Consistent with the scheduling order filed earlier in this case, the arguments and authorities section of briefs or memoranda submitted in connection with all further motions or other pretrial matters shall not exceed 30 pages, absent an order of the court.

c. Motions Regarding Expert Testimony. All motions to exclude testimony of expert witnesses pursuant to Fed. R. Evid. 702-705, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), or similar case law, were due to be filed by filed by **November 1, 2011**. Briefing on all such motions has been completed. At this time the court does not believe it is necessary to schedule any hearings on the *Daubert* motions that remain pending. Plaintiffs' Motion In Limine To Strike All Or A Portion Of The Report And Testimony Of Kevin Murphy (Doc. #2754) filed November 1, 2011 was withdrawn without prejudice to renewal before or during trial. Order, Doc. # 3735.

d. Motions in Limine. All motions in limine, other than those challenging the propriety of an expert witness, shall be filed no later than 14 days before trial. Briefs in opposition to such motions shall be filed within the time period required by D. Kan. Rule 6.1(d)(1), or at least 5 business days before trial, whichever is earlier. Reply briefs in support of motions in limine shall not be allowed without leave of court.

16. TRIAL.

a. This case is set for trial on the court's docket beginning on **May 7, 2012, at 9:30 a.m.** This is a special (i.e., "No. 1") trial setting.

b. The parties agree that, although the court will make the ultimate decision whether to grant injunctive relief, and also decide whether defendants' conduct was unconscionable, some of the issues at the upcoming trial on liability must be decided by a jury.

c. Estimated trial time is 4-5 weeks.

d. Trial will be in Kansas City, Kansas, or such other place in the District of Kansas where the case may first be reached for trial.

e. Not all of the parties are willing to consent to the trial of this case being presided over by a U.S. Magistrate Judge, even on a backup basis if the assigned U.S. District Judge determines that his or her schedule will be unable to accommodate any trial date stated above.

f. **Because** of constraints on the judiciary's budget for the compensation of jurors, in any case in which the court is not notified of a settlement at least 1 full business day prior to the scheduled trial date, the costs of jury fees and expenses will be assessed to the parties, or any of them, as the court may order. *See* D. Kan. Rule 40.3.

17. SETTLEMENT.

a. **Status of Settlement Efforts (Good Faith Settlement Efforts Conducted to Date).** The parties have attempted on multiple occasions to resolve the litigation, both on a global basis as well as with certain defendants or sub-groups of defendants. Some of those discussions have been confidential and cannot be disclosed other than in camera.

As directed in this court's Scheduling Order No. 3 (doc. 1429), the parties, with the assistance of a privately-retained mediator Gary V. McGowan, engaged in settlement negotiations starting in July 2010. The Kansas parties participated in this process as a part of the effort to determine if the entire MDL could be settled. Over the next several months, the parties' representatives met with Mr. McGowan in face-to-face settlement meetings on or about July 27, August 2, and September 13, 2010 in Chicago, Illinois. The September 13, 2010 session lasted an entire day, and involved active negotiations between plaintiffs and defendants' counsel. In addition, the parties conducted a number of unilateral and bilateral telephone conferences with Mr. McGowan for the purpose of discussing settlement.

b. **Most Recent Exchange of Good Faith Written Proposals.** Plaintiffs presented their most recent written proposals on October 12, 2010, in response to issues discussed at the

September 13, 2010 mediation. These proposals were made separately to each individual MDL defendant, as it then appeared unlikely a settlement agreement could be reached globally with all MDL defendants.

Before defendants responded to the plaintiffs' individual proposals, this court issued Scheduling Order No 4 (doc. 1729). In accordance with that order, all defendants, including the Kansas defendants, responded to plaintiffs' settlement proposals by the end of November 2010. In that order, this court also appointed Mr. McGowan as a mediator for the MDL and required the parties, via their respective Liaison Counsel, to provide a report on the prospects for settlement to Mr. McGowan by December 3, 2010, which was done. The separate written proposals made in October 2010 have not resulted in meaningful progress toward settlement.

The Kansas parties have not conducted settlement negotiations specific to the Kansas cases although they understand some dialogue maybe occurring between the MDL plaintiffs and selected defendants directed at resolving those defendants' involvement in the entire MDL.

With respect to the Costco settlement issues, plaintiffs and Costco engaged mediator Dennis Gillen on February 4, 2011 to try to resolve the outstanding issue of attorneys' fees and costs associated with the class settlement. Plaintiffs and Costco were unable to reach a settlement. Plaintiffs' motion for attorneys' fees with regard to the Costco settlement (doc. 1820) has been fully briefed and is pending before the court.

c. Future Settlement or Mediation Prospects. Defendants do not believe they hold a uniform position toward settlement given the various differences in their businesses and operations. Plaintiffs at one point suggested each defendant be ordered to engage in separate confidential mediations, but defendants declined that option. The parties are willing to engage in

any reasonable alternative dispute resolution process, but it appears unlikely this can be done on a global basis, and many if not all defendants are not interested in individual negotiations.

d. Mediation and/or Other Method of Alternative Dispute Resolution. Neither mediation nor any other form of ADR is ordered, at least at this time.

18. FURTHER PROCEEDINGS AND FILINGS.

a. Status and/or Limine Conference. Status conferences have been scheduled for the following dates and times:

b. March 1, 2012, 1:00 p.m.

c. April 2, 2012, 1:00 p.m.

d. April 13, 2012, 1:00 p.m.

e. April 27, 2012, 9:00 a.m.

f. May 4, 2012, 9:00 a.m.

g. Trial Briefs. A party desiring to submit a trial brief shall comply with the requirements of D. Kan. Rule 7.6. The court does not require trial briefs but finds them helpful if the parties anticipate that unique or difficult issues will arise during trial.

h. Voir Dire. Proposed voir dire questions only need to be submitted to address particularly unusual areas of questioning, or questions that are likely to result in objections by the opposing party.

i. Jury Instructions.

(1) Requests for proposed jury instructions shall be submitted in compliance with Fed. R. Civ. P. 51 and D. Kan. Rule 51.1. Under D. Kan. Rule 51.1, the parties and the attorneys have the joint responsibility to attempt to submit one agreed set of preliminary and final instructions that specifically focuses on the parties' factual

contentions, the controverted essential elements of any claims or defenses, and any other instructions unique to this case. In the event of disagreement, each party shall submit its own proposed instructions with a brief explanation, including legal authority as to why its proposed instruction is appropriate, or why its opponent's proposed instruction is inappropriate, or both. Counsel are encouraged to contact the trial judge's law clerk or courtroom deputy to determine her standard or stock instructions, e.g., concerning the jury's deliberations, the evaluation of witnesses' credibility, etc.; it is not necessary to submit such proposed jury instructions to the court.

(2) Proposed jury instructions shall be filed no later than 5 business days before trial. Objections to any proposed instructions shall be filed no later than 1 business day before trial.

(3) In addition to filing the proposed jury instructions, the parties shall submit their proposed instructions as an attachment to an Internet e-mail sent to the e-mail address of the assigned trial judge listed in paragraph II(E)(2)(c) of the *Administrative Procedures for Filing, Signing, and Verifying Pleadings and Papers by Electronic Means in Civil Cases*.

j. Proposed Findings of Fact and Conclusions of Law. To the extent this case is tried to the court sitting without a jury, in order to better focus the presentation of evidence, the parties shall file preliminary sets of proposed findings of fact and conclusions of law no later than 5 business days before trial. In most cases, the trial judge will order the parties to file final sets of proposed findings after the trial transcript has been prepared.

19. OTHER.

a. Conventionally Filed Documents. The following documents shall be served by mail and by fax or hand-delivery on the same date they are filed with the court if they are filed conventionally (i.e., not filed electronically): final witness and exhibit disclosures and objections; deposition designations, counter-designations, and objections; motions in limine and briefs in support of or in opposition to such motions; trial briefs; proposed voir dire questions and objections; proposed jury instructions and objections; and proposed findings of fact and conclusions of law. In addition, a party filing a trial brief conventionally shall deliver an extra copy to the trial judge's chambers at the time of filing.

b. Miscellaneous.**(1) Defendants' Statement.**

Defendants' Seventh Amendment rights would be violated if two different juries are empanelled in different phases of this case to decide the same issue, including in individual damages claims by class members. *See In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1302-03 (7th Cir. 1995) ("the judge must not divide the issues between separate trials in such a way that the same issues are reexamined by different juries. . . . The right to a jury in federal civil cases, conferred by the Seventh Amendment, is a right to have jurable issues determined by the first jury impaneled to hear them . . . and not reexamined by another finder of fact.").

(2) Plaintiffs' Statement.

Plaintiffs believe the trial plan briefing (docs. 1734, 1750, and 1761) adequately sets forth the issues related to defendants' trial plan concerns. Plaintiffs stand ready to discuss these issues with the court.

c. Possible Adjustment of Deadlines by Trial Judge. With regard to pleadings filed shortly before or during trial (e.g., motions in limine, trial briefs, proposed jury instructions, etc.), this pretrial order reflects the deadlines the court applies as a norm in most cases. However, the parties should keep in mind that, as a practical matter, complete standardization of the court's pretrial orders is neither feasible nor desirable. Depending on the judge who will preside over trial, and what adjustments may be appropriate given the complexity of a particular case, different deadlines and settings may be ordered. Therefore, from the pretrial conference up to the date of trial, the parties must comply with any orders that might be entered by the trial judge, as well as that judge's trial guidelines and/or exhibit instructions as posted on the court's Internet website:

<http://www.ksd.uscourts.gov/flex/?fc=11>).

IT IS SO ORDERED.

Dated this 20th day of March, 2012, at Kansas City, Kansas.

s/ Kathryn H. Vratil
KATHRYN H. VRATIL
United States District Judge

SUMMARY OF DEADLINES AND SETTINGS	
Event	Deadline/Setting
Dispositive motions and motions challenging admissibility of expert testimony	November 1, 2011
Responses to dispositive motions and <i>Daubert</i> motions	December 2, 2011
Reply briefs in support of dispositive motions and <i>Daubert</i> motions	December 30, 2011
Motion Hearing	January 30, 2012, at 9:30 a.m.
Trial	May 7, 2012, at 9:30 a.m.
Final witness & exhibit disclosures	30 days before trial
Objections to final witness & exhibit disclosures	14 days before trial
Exhibits marked	14 days before trial
Deposition testimony designated	21 days before trial
Objections to deposition designations, along with any counter-designations	14 days before trial
Objections to counter-designations of deposition testimony	5 business days before trial
Submission of disputed deposition designations to trial judge	3 business days before trial
Motions in limine	14 days before trial
Briefs in opposition to motions in limine	5 business days before trial, unless due earlier under D. Kan. Rule 6.1(d)(1)
Proposed jury instructions	5 business days before trial
Objections to proposed jury instructions	1 business day before trial

SUMMARY OF DEADLINES AND SETTINGS	
Preliminary sets of proposed findings of fact and conclusions	5 business days before trial

No.	Description	I.D.	Off.	Adm.	Deposition or Witness