

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS

IN RE: MOTOR FUEL TEMPERATURE	)	
SALES PRACTICES LITIGATION	)	MDL No: 1840
	)	D. Kan. Case No. 07-1840-KHV
	)	
This document only relates to:	)	
	)	
<i>Wilson, et al. v. Ampride, et al.</i>	)	
D. Kan. Case No. 06-2582-KHV,	)	
	)	
and	)	
	)	
<i>American Fiber, et al. v. BP Corp., et al.</i>	)	
D. Kan. Case No. 07-2053-KHV.	)	
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**PRETRIAL ORDER**

Pursuant to Fed. R. Civ. P. 16(e), a pretrial conference was held on October 24, 2011 before U.S. Magistrate Judge James P. O’Hara, limited to the two above-captioned District of Kansas cases within this multi-district litigation, i.e., *Wilson, et al. v. Ampride, et al.*, D. Kan. Case No. 06-2582-KHV (“*Wilson*”), and *American Fiber, et al. v. BP Corp., et al.*, D. Kan. Case No. 07-2053-KHV (“*Am. Fiber*”). This pretrial order shall supersede all pleadings and control the subsequent course of these two cases, limited to the issues scheduled for trial on May 7, 2012. This pretrial order shall not be modified except by consent of the parties and the court’s approval, or by order of the court to prevent manifest injustice. *See* Fed. R. Civ. P. 16(d); D. Kan. Rule 16.2(c).

## 1. APPEARANCES.

The plaintiffs, Zachary Wilson (“Wilson”), Matthew Cook (“Cook”), and Wonderland 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”), 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.

Shell Oil Company (“Shell”)<sup>1</sup> appeared through David M. Harris and Sandra B.

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<sup>1</sup> Equilon Enterprises, LLC (“Equilon”) is a subsidiary of Shell. Plaintiffs contend that Equilon does business as “Shell Oil Products US.” Over Shell’s objection, Equilon was (continued...)

Gallini.

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

Petro Stopping Centers, Inc., LP (“Petro”)<sup>2</sup> appeared through Justin J. Wolosz and Tyson 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 common law claims for unjust enrichment 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:

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<sup>1</sup> (...continued)

substituted as a party in place of Shell shortly after the final pretrial conference (*see* doc. 2202 in main MDL file, i.e., D. Kan. Case No. 07-1740). All subsequent references in this pretrial order to Shell shall include Equilon. And all subsequent references to the document numbers of court filings shall be to the main MDL file unless otherwise noted.

<sup>2</sup> Petro is named as a defendant in *Wilson* but not in *Am. Fiber*. The court has not certified any class with respect to Petro. Plaintiffs have represented that in the May 2012 trial they are pursuing only “certified claims,” and they are dismissing causes of action that were not certified. *See* paragraph 12, *infra*; doc 1748 at 5 and n.7; and Oct 20, 2010 Status Conf. Transc. at 28, 59. Accordingly, this pretrial order does not address claims, defenses, or other subjects with respect to Petro.

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"),<sup>3</sup> 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. A further review of 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, and that Cook lacks standing to pursue claims against BP, Casey's and 7-Eleven.<sup>4</sup>

BP, COP, Kum & Go, Shell, Circle K, and Valero do not own, operate, or control any retail motor fuel stations in Kansas. Therefore, 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.

Although Equilon sells motor fuel at wholesale in Kansas, Shell has not owned, operated, or controlled any retail motor fuel stations in Kansas during the relevant time period. Nor has Shell franchised the use of *Shell* or *Texaco* brands, or sold motor fuel to

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

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

third parties in Kansas during the relevant time period. Therefore, plaintiffs lack standing to assert claims against Shell.

Furthermore, certain defendants<sup>5</sup> contend this court lacks Article III subject matter jurisdiction because this court certified class actions for determining “liability” and “injunctive relief.” Both: (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 believe and agree the substantive issues in this case are governed by

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<sup>5</sup> 7-Eleven, Circle K, Flying J, Kum & Go, QuikTrip, Casey’s, Sam’s West, and Valero.

Kansas law, i.e., because all of plaintiffs' claims arise under Kansas state law. But defendants contend federal doctrines also apply to the claims and/or defenses, as explained below, and that principles of equity govern plaintiffs' requests for injunctive relief.

#### **4. STIPULATIONS.**

**a.** The following facts are uncontroverted:

(1) Retailers sell motor fuel in Kansas by the gallon without reference to temperature.

(2) Gasoline expands and contracts approximately 1.0% for every 15 degrees Fahrenheit change in temperature.

(3) Diesel fuel expands and contracts approximately 0.6% for every 15 degrees Fahrenheit change in temperature.

(4) Wilson, a person, is a named plaintiff in *Wilson* and, between March 2003 and June 13, 2008, resided at 500 Parma Way in Gardner, Kansas.

(5) Wonderland, a corporation organized under laws of the State of Kansas, is a named plaintiff in *Wilson*, and between May 2000 and June 13, 2008, maintained its principal place of business at 7803 Meadow View Dr. in Shawnee, Kansas.

(6) Cook, a person, is a named plaintiff in *Am. Fiber* and, between January 2007 and May 22, 2008, resided at 1403 Mundell Dr. in Mulane, Kansas.

(7) BP, a corporation organized under the laws of the State of Maryland, is a defendant in *Wilson* and *Am. Fiber*, and maintains its principal operating office in Warrenville, Illinois.

(8) Casey's, a corporation organized under the laws of the State of Iowa, is a defendant in *Wilson* and *Am. Fiber*, and maintains its principal place of business in Ankeny, Iowa.

(9) Circle K, a corporation organized under the laws of the State of Texas, is a defendant in *Wilson*, and maintains its principal place of business in Arizona.

(10) [Intentionally omitted]

(11) COP, a corporation organized under the laws of the State of Delaware, is a defendant in *Wilson* and *Am. Fiber*, and maintains its principal place of business in Houston, Texas.

(12) Kum & Go, a limited liability company organized under the laws of the State of Iowa, is a defendant in *Wilson* and *Am. Fiber*, and maintains its principal place of business in West Des Moines, Iowa.

(13) QuikTrip, a corporation organized under the laws of the State of Oklahoma, is a defendant in *Am. Fiber*, and maintains its principal place of business in Tulsa, Oklahoma.

(14) Sam's West, a corporation organized under the laws of the State of Delaware, is a defendant in *Wilson*, and maintains its principal place of business in Bentonville, Arkansas.

(15) Shell, a corporation organized under the laws of the State of Delaware, is a defendant in *Wilson* and *Am. Fiber*, and maintains its principal place of business in Houston, Texas.

(16) Valero, a corporation organized under the laws of the State of Delaware, is a defendant in *Wilson* and *Am. Fiber*, and maintains its principal place of business in San Antonio, Texas.

(17) 7-Eleven, a corporation organized under the laws of the State of Texas, is a defendant in *Wilson* and *Am. Fiber*, and maintains its principal place of business in Dallas, Texas.

(18) Flying J, a corporation organized under the laws of the State of Delaware, is a defendant in *Wilson*, and maintains its principal place of business in Utah.<sup>6</sup>

**b.** The following documents constitute business records within the scope of Fed. R. Evid. 803(6) or public records within the scope of Fed. R. Evid. 803(8) and may be introduced in evidence during trial without further foundation, subject to objections based solely on grounds of relevancy:

- (1) Agreements between refiners/suppliers and wholesale purchasers.
- (2) Brand/Image Standards.
- (3) Exemplar bills of lading.
- (4) Exemplar wholesale invoices.
- (5) Electronic records, or hard copies of such records, of underground storage tank temperature data produced by defendants.
- (6) Electronic records, or hard copies of such records, of retail price data

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<sup>6</sup> Because of a bankruptcy stay, plaintiffs did not move for class certification against Flying J, and no class has been certified against it.

produced by defendants.

- (7) Electronic records, or hard copies of such records, of sales volume data produced by defendants.
- (8) Electronic records, or hard copies of such records, of bill of lading data or invoices produced by defendants.
- (9) Electronic records, or hard copies of such records, of station identifying data produced by defendants.
- (10) EIA Data.
- (11) Handbook 44 (2011 and/or prior Editions).
- (12) Handbook 130 (2011 and/or prior Editions).
- (13) Exemplar retail motor fuel dispenser seal from Kansas Weights and Measures Department.
- (14) March 11, 2009 Fuel Delivery Temperature Study adopted by the California Energy Commission (“CEC”). Available at the CEC’s website: [http://www.energy.ca.gov/transportation/fuel\\_delivery\\_temperature\\_study/index.html](http://www.energy.ca.gov/transportation/fuel_delivery_temperature_study/index.html).

The parties will continue to work together to reach agreement on additional documents that may constitute business or public records and shall file a stipulation in this regard no later than 14 business days before trial.

**c.** Copies of exhibits may be used during trial in lieu of originals. But defendants only agree to the use of copies of plaintiffs’ purchase receipts if the copies are sufficiently

legible.

**d.** The parties have not yet stipulated to the admission of any trial exhibits. But the parties will continue to work together to reach agreement on documents to which they may stipulate on admission, and a stipulation in this regard shall be filed no later than 3 business days before trial. For purposes of this entire pretrial order, the calculation of “business days” does not include Saturday, Sunday, or any legal holiday as defined by Fed. R. Civ. P. 6(a)(6).

**e.** At trial, witnesses who are within the subpoena power of the court and who are officers, agents, or employees of the parties need not be formally subpoenaed to testify, provided that opposing counsel is given at least 5 business days advance notice of the desired date of trial testimony.

**f.** By no later than 5:00 p.m. each day of trial, counsel shall confer and exchange a good faith list of the witnesses who are expected to testify the next day of trial.

## **5. FACTUAL CONTENTIONS.**

### **a. Plaintiffs’ Contentions.**

Plaintiffs and thousands of other Kansas consumers buy motor fuel (gasoline and diesel fuel) in Kansas from defendants directly or from branded stations that defendants control or appear to control. Plaintiffs purchase motor fuel for the energy it can provide. Because defendants misrepresent the quality and value of motor fuel, and omit material facts related to the quality and value of motor fuel, plaintiffs and consumers purchase motor fuel at retail with the understanding 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.

Although plaintiffs may receive a standard and uniform amount of liquid, they do not receive a standard, uniform, and 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 have been aware that temperature is a material fact to a motor fuel transaction for many years, and well before 2002. When defendants buy motor fuel at wholesale to sell to consumers, 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 or “net” basis). When a defendant purchases motor fuel at wholesale on a net basis and the fuel is warmer than 60 degrees Fahrenheit, that defendant pays a lower overall price per volumetric gallon.

When defendants sell motor fuel to plaintiffs and other Kansans, they do not inform them that temperature affects the quality and value of motor fuel being sold at retail. When defendants sell motor fuel to plaintiffs and other Kansans, they do not inform them of the temperature of the motor fuel being sold at retail so plaintiffs can make a price-quantity comparison. When defendants sell motor fuel to plaintiffs and other Kansans, they do not correct the volume of fuel being sold to account for the effect of temperature on value and quality. When defendants sell motor fuel to plaintiffs and other Kansans, they do not correct the price of fuel being sold to account for the effect of temperature on value and quality. When defendants sell motor fuel to plaintiffs and other Kansans, they simply provide a volumetric measurement of motor fuel for a stated price (e.g., a non temperature-adjusted or “gross” basis), irrespective of the temperature, quality, and value of the motor fuel.

Motor fuel sold at retail in Kansas can exceed 100 degrees Fahrenheit, and is warmer than 60 degrees Fahrenheit on average. In areas like Kansas and the southern United States, where motor fuel sold at retail is warmer than 60 degrees Fahrenheit on average, defendants benefit financially at the expense of plaintiffs and consumers by purchasing fuel on a net basis at wholesale and selling fuel at retail on a gross basis. Temperature correction is the most fair and equitable method of selling motor fuel, and ensures consumers are receiving fair value for their fuel dollar, regardless of the temperature at the time of pumping. Temperature correction also provides consistency and transparency in retail motor fuel transactions, allowing consumers to make more informed price/value comparisons. Selling fuel adjusted to the volume at 60 degrees Fahrenheit (15 degrees Celsius) throughout the

entire distribution system, including to retail consumers, is the most equitable way fuel can be sold without the buyer or 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. 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. Nor do defendants disclose to consumers the temperature of the motor fuel or the fact temperature affects the energy content of that motor fuel.

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.

Defendants are members of one or more petroleum trade associations. Through these trade associations, these defendants conspired to prevent adoption of ATC technology in the United States through dissemination of false and misleading information, the exertion of undue pressure, and the threat of boycotting ATC pump manufacturers. Because of those efforts, Kansas consumers still purchase motor fuel on a gross 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 or convenience stores, to truck stop owners and operators. 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 nondeceptive 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, unconscionable, or unfair to sell fuel by the gallon without adjustment or disclosures based on temperature. Plaintiffs apparently contend defendants’ wrongful conduct includes both affirmative representations, and also omissions of material fact, that are deceptive and unconscionable. Defendants deny having made any statement or representation that is deceptive. Defendants further deny they have omitted, concealed, suppressed, or otherwise failed to state any material fact. Defendants deny the temperature of their 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.

There is nothing deceptive, unconscionable, or unjust 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. Notwithstanding plaintiffs' suggestions, consumers would

not pay less for a gallon of fuel, nor would they receive larger gallons of fuel without paying more for them. Likewise, even if plaintiffs' theory were correct (which it is not), the temperatures in Kansas average very close to or below 60 degrees Fahrenheit annually, and thus Kansas consumers would see no discernible benefit from any such changes. 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 contradict and undercut plaintiffs' claim that defendants are gaining anything from alleged temperature expansion, and belie plaintiffs' claims of unjust enrichment, 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, Shell,<sup>7</sup> 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 asserts it likewise does not sell motor fuel at retail in Kansas, and cannot be liable for retailers’ sales practices.

## **6. THEORIES OF RECOVERY.**

**a. List of Plaintiffs’ Theories of Recovery.** Plaintiffs assert they are entitled to prevail upon the following three alternative theories of recovery:

(1) By misrepresenting and omitting material facts, defendants’ conduct was deceptive and unconscionable under the KCPA (*Wilson* Complaint, Count 3; *Cook* Complaint, Count 1);

(2) By selling motor fuel at retail without adjusting for temperature,

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<sup>7</sup> Shell does not sell motor fuel in Kansas. However, its subsidiary, Equilon, does sell motor fuel at wholesale in Kansas. As earlier indicated, plaintiffs assert that Equilon does business as “Shell Oil Products US” and, over Shell’s objection, Equilon was substituted as a party for Shell in the two Kansas cases shortly after the final pretrial conference.

defendants have been unjustly enriched (*Wilson* Complaint, Count 4; *Cook* Complaint, Count 4); and

(3) 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)(1)(A) or (D).** 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 knowingly or with reason to know made representations that the motor fuel sold to plaintiffs had characteristics, uses, or quantities that the motor fuel did not have, or that the motor fuel sold to plaintiffs consisted of a particular standard or quality which differed materially from defendants' representations;<sup>8</sup> and

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<sup>8</sup> Specifically, plaintiffs contend that defendants knowingly or with reason to know made the following representations:

- a) When defendants posted a "price per gallon," defendants misrepresented that they were providing the same quantity of fuel in each gallon of the same kind of motor fuel;
- b) When defendants posted a "price per gallon," defendants misrepresented that they were providing the same amount of energy in each gallon of the same kind of motor fuel;

(continued...)

- (4) Plaintiffs have been aggrieved by defendants' misrepresentations.

Defendants disagree with plaintiffs' formulation of the fourth element of this claim.

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<sup>8</sup> (...continued)

c) Defendants represented that they were selling motor fuel in fungible, freely interchangeable gallon units when in fact they delivered gallon units of motor fuel that were not fungible or freely interchangeable;

d) When defendants posted a "price per gallon," defendants misrepresented that they were selling fungible units of motor fuel when, in fact, volumetric units of the same kind of motor fuel were not fungible because identical volumetric units at different temperatures contain different quantities of fuel;

e) When defendants posted a "price per gallon," defendants misrepresented that they were selling fungible units of motor fuel when, in fact, volumetric units of the same kind of motor fuel were not fungible because identical volumetric units at different temperatures differ in energy content;

f) Defendants misrepresented that each gallon of motor fuel is the equivalent measure of a gallon used by the government to test and certify miles per gallon obtained in newly purchased automobiles;

g) Defendants themselves and through their respective trade associations misrepresented to regulatory bodies that there were no benefits to consumers in selling motor fuel on a temperature adjusted basis;

h) Defendants themselves and through their respective trade associations misrepresented to regulatory bodies the costs to defendants associated with selling motor fuel on a temperature adjusted basis;

i) Defendants misrepresented to others that they obtained no economic benefit from not implementing ATC in the U.S. and/or implementing ATC in Canada; and

j) Defendants misrepresented to others that the cost of implementing ATC was prohibitively expensive.

Defendants disagree with and object to paragraphs (c) and (f)-(j) on the grounds they are not preserved by the pleadings and would render plaintiffs' sworn interrogatory answers false or incomplete, and are therefore inconsistent with those sworn statements as well. Defendants' objections are noted for the record but overruled.

That is, defendants assert that K.S.A. § 50-634, as interpreted by *Stein v. Sprint Corp.*, 22 F. Supp. 2d 1210, 1216 (D. Kan 1998) and *Benedict v. Altria Group, Inc.*, 241 F.R.D. 668 (D. Kan. 2007), requires plaintiffs to prove “injury” and “causation” as an element of this claim. Defendants further assert that Article III standing under these cases requires injury-in-fact, traceability (causation), and redressability, and the language of the KCPA cannot and does not overcome those requirements.

**c. 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;
- (3) 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;<sup>9</sup> and

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<sup>9</sup> 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) 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;
- (continued...)

- (4) Plaintiffs have been aggrieved by defendants' willful failure to disclose a material fact, or by defendants' willful concealment, suppression, or

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<sup>9</sup> (...continued)

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.

omission of a material fact in the sale of motor fuel.

Defendants disagree with plaintiffs' formulation of the fourth element of this claim, for the reasons explained at the end of paragraph 6(b) above.

**d. 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 induced plaintiffs to purchase motor fuel in which such transaction was excessively one-sided in favor of defendants, or defendants engaged in deceptive behavior, and plaintiffs held an unequal bargaining power in defendants' sale of motor fuel; and
- (4) Plaintiffs have been aggrieved by defendants inducing plaintiffs to purchase motor fuel in which such transaction was excessively one-sided in favor of defendants, or by defendants engaging in deceptive behavior and plaintiffs holding an unequal bargaining power in the defendants' sale of motor fuel.

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." Defendants also disagree with plaintiffs'

formulation of the fourth element of this claim, for the reasons explained at the end of paragraph 6(b) above.

**e. Essential Elements of Plaintiffs' Unjust Enrichment 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) In the sale of motor fuel, a benefit was conferred upon defendants by plaintiffs;
- (2) Defendants retained the benefit; and
- (3) Defendants' retention of the benefit was unjust.<sup>10</sup>

Defendants disagree with plaintiffs' statement of the elements of this claim. According to defendants, under Kansas law, the elements of unjust enrichment are: (1) a benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge of the benefit by the defendant; and (3) the acceptance or retention of the benefit by the defendant under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value. *See Haz-Mat Response, Inc. v. Certified Waste Services, Ltd.*, 259 Kan. 166, 910 P. 2d 839 (1996); *In the Matter of Estate of Sauder*, 283 Kan. 694, 156 P. 3d, 1204 (2007).

**f. Essential Elements of Plaintiffs' Civil Conspiracy Claim.** Subject to the

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<sup>10</sup> *See Estate of Draper v. Bank of America, N.A.*, 205 P.3d 698, 706 (Kan. 2009); *Nelson v. Nelson*, 205 P.3d 715, 724 (Kan. 2009).

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;
- (5) Injury as the proximate result thereof.<sup>11</sup>

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 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:

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<sup>11</sup> *Whitfield v. Clippinger*, No. 08-2085-CM, 2009 WL 102669, at \*3 (D. Kan. Jan. 7, 2009)(citing *Diederich v. Yarnevich*, No. 196 P.3d 411, 419 (Kan. Ct. App. 2008)). Plaintiffs believe no proof of damage is required in the May, 2012 liability trial per the prior orders of the court.

(1) 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.<sup>12</sup> 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 Kansas and federal common law.

(2) As to plaintiffs' non-KCPA claims, they believe an injunction is appropriate if:

- (a) There is a reasonable probability of irreparable future injury to plaintiffs;
- (b) An action at law will not provide an adequate remedy;
- (c) The threatened injury to plaintiffs outweighs whatever damage the proposed injunction may cause the opposing party; and
- (d) The injunction, if issued, would not be adverse to the public interest.<sup>13</sup>

## **7. DEFENSES.**

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<sup>12</sup> K.S.A. § 50-634(a)(2)

<sup>13</sup> *Bd. of County Comm'rs of Reno County v. Asset Mgmt. & Mktg. L.L.C.*, 28 Kan. App. 2d 501, 505-06, 18 P.3d 286, 290-91 (2001); K.S.A. § 60-901 et seq; Fed. R. Civ. P. 65(d).

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

**Defenses and affirmative defenses applicable to ALL of plaintiffs’ certified causes of action (asserted by all defendants unless otherwise indicated):<sup>14</sup>**

- (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.

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<sup>14</sup> Plaintiffs have informed the court they intend to dismiss the remaining claims in their complaints that were not certified. Doc. 1748 at 5 & n.7. 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.

- (4) [Fourth Affirmative Defense – Abstention] The court should abstain from exercising jurisdiction over plaintiffs’ requests for injunctive relief under the *Burford* doctrine.
- (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) [First Defense – Lack of Standing] Plaintiffs do not have standing to bring any claims against defendants from whom they have not purchased motor fuel at the time of the filing of the complaint. Wilson and Cook do not have standing to bring KCPA claims against

defendants from whom they have not purchased motor fuel for personal, family, household, agricultural, or business purposes as required by the KCPA at the time of the filing of the complaint. Wonderland has no standing to pursue a claim under the KCPA.

- (8) [Second Defense – No Benefit to Class As A Whole] Class-wide injunctive relief is not appropriate because plaintiffs cannot prove the requested injunctive relief will benefit the class as a whole, or that injunctive relief is appropriate respecting the class as a whole.
- (9) [Third Defense – Improper Party (No Retail Sales)] The Refiner Defendants, i.e., BP, COP, Shell, and Valero, do not own or operate any retail motor fuel stations in Kansas, and therefore are not engaged in the sales practices alleged to have caused harm to plaintiffs.
- (10) [Fourth Defense - Improper Party (No Retail Sales on Leased Property)] Sam's West has owned and operated seven retail stations in Kansas from January 2001 to the present. At various times during that same time period, either Wal-Mart Stores, Inc. or the Wal-Mart Real Estate Business Trust leased land in Kansas to Tesoro West Coast Company upon which retail station were owned and operated by an entity or entities other than Sam's West (the "Leased Land Stations"). Because Sam's West does not own, operate, or control any of the Leased Land Stations, Sam's West and plaintiffs are negotiating a

stipulation to confirm the remaining claims asserted by plaintiffs against Sam's West in *Wilson* are limited to claims related to the seven stations owned and operated by Sam's West, and plaintiffs have not brought any claims against Sam's West with regard to the Leased Land Stations. Sam's West expects this issue will be resolved prior to the deadline to file motions for summary judgment. However, if the issue cannot be resolved prior to that date, Sam's West will be filing a motion for summary judgment on this issue.

- (11) [Fifth Defense – Improper Party (No Control Over Retail Sales)] The Refiner Defendants are not liable for the allegedly unlawful conduct of independently owned and operated branded retail stations.
- (12) [Sixth Defense – Improper Party (No Apparent Agency)] There is no apparent agency relationship among the Refiner Defendants and independently operated retail stations.
- (13) [Seventh Defense – Improper Party (No Agency)] The Refiner Defendants' licensing of trademarks, trade dress, and brand insignia does not create an actual or apparent agency relationship.
- (14) [Eighth Defense – Improper Party (No Control Over Retail Sales)] The injunctive relief requested by plaintiffs is inappropriate against the Refiner Defendants, because they do not control and thus cannot change the retailers' allegedly unlawful conduct.

- (15) [Ninth Defense – Improper Party] Circle K has not sold motor fuel from retail stations in Kansas since February 1999.
- (16) [Tenth Defense – Proximate Cause] A number of factors other than temperature affect the amount of energy in a given quantity of motor fuel, and the impact of those factors significantly exceeds the effect of fuel temperature. Therefore, plaintiffs cannot prove that temperature related issues proximately cause any injury.
- (17) [Eleventh Defense – No Injury] Consumers do not pay more for motor fuel measured by the gallon than for motor fuel if sold on a temperature-adjusted basis.
- (18) [Twelfth Defense – No Injury] Retail motor fuel prices are determined by competition in the relatively small geographic markets in which retailers compete and, if ATC was required, a retailer delivering larger “net” gallons would increase its unit price; retailers would not deliver larger units at the same price as smaller units.
- (19) [Thirteenth Defense – No Injury] Plaintiffs purchased motor fuel at retail from defendants at temperatures below 60° F.
- (20) [Fourteenth Defense--Mootness/Lack of Standing] Plaintiffs’ claim for injunctive relief is barred against BP, COP, Kum & Go, Shell, Circle K, and Valero because they do not operate any retail motor fuel stations in the State of Kansas.

**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.
- (2) [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.
- (3) [Fifteenth Defense – Failure of Proof] Defendants have not made any false or misleading statements regarding the retail sale of motor fuel.
- (4) [Sixteenth Defense – Failure of Proof] Defendants have not willfully concealed, suppressed, or omitted any material information regarding the retail sale of motor fuel, because (i) defendants have no legal or equitable duty to disclose fuel temperature information to consumers, (ii) defendants have not failed to disclose any material facts, and (iii) defendants' alleged omissions were not "willful" as that term is used in the KCPA.
- (5) [Third Defense – Improper Party (No Retail Sales)] The Refiner Defendants are not directly liable under the KCPA for sales of motor fuel made by independent branded retailers, because the Refiner

Defendants do not engage in any of the allegedly deceptive conduct about which plaintiffs complain.

- (6) [Seventeenth Defense – Improper Plaintiffs] Corporate entities and other non-individual plaintiffs or class members are not “consumers” as defined by the KCPA, and cannot assert claims under the KCPA.
- (7) [Eighteenth Defense – Damages Unavailable] Statutory penalties under the KCPA are only recoverable in an individual action, and not in a class action.
- (8) [Nineteenth Defense--Failure of Proof] The KCPA claim fails because plaintiffs have not proven and cannot prove that any defendant has violated the KCPA as to any plaintiff or as to the class as a whole, because plaintiffs cannot prove the temperature at which any particular purchase of motor fuel was made.
- (9) [First Defense--Lack of Standing/Failure to State a Claim] A plaintiff who has no proof of purchase for personal, household, family, or non-corporate business use has no standing to assert a claim under the KCPA.

**c. Defenses and Affirmative Defenses Applicable to Plaintiffs’ Unjust Enrichment Claim:**

- (1) [First Affirmative Defense – Specific Authorization] Defendants have not inequitably or unconscionably retained a benefit because Kansas

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

- (2) [Second Affirmative Defense – Illegality] Defendants have not inequitably or unconscionably retained a benefit because selling retail motor fuel with ATC is prohibited by Kansas law.
- (3) [Seventh Affirmative Defense – Availability of Adequate Remedy at Law] Plaintiffs’ and class members’ claims for unjust enrichment are barred because plaintiffs’ purchases of motor fuel constitute express sales contracts and plaintiffs have an adequate remedy at law.
- (4) [Twentieth Defense – No Injunctive Relief] Injunctive relief is not an appropriate remedy for an unjust enrichment claim.
- (5) [Twenty-First Defense – Improper Party (No Retail Sales)] The Refiner Defendants have not been unjustly enriched by motor fuel sales made by independent retailers, because the Refiner Defendants receive no benefit from plaintiffs’ purchases of motor fuel by the gallon from those retailers.
- (6) [Twenty-Second Defense – Failure of Proof] The unjust enrichment claim fails because plaintiffs have not proven and cannot prove that any defendant has been unjustly enriched as to any plaintiff or as to the class as a whole, because plaintiffs cannot prove the temperature at which any particular purchase of motor fuel was made.

- (7) [Twenty-Third Defense – Failure of Proof] The unjust enrichment claim fails because plaintiffs have not proven and cannot prove that defendants have unjustly retained a benefit.
- (8) [Twenty-Fourth Defense – No Unjust Enrichment with Contract] Because each retail sale of motor fuel constitutes a contract for the sale of motor fuel, no claim may be made for unjust enrichment.
- (9) [Twenty-Fifth Defense – Failure of Proof] Because the retailer defendants typically buy more net gallons than they sell gross gallons in Kansas, and because the average temperature of gross gallons sold is near or below 60 degrees Fahrenheit, then even under plaintiffs’ theories, defendants’ retail sales practices are not unjust and confer no unlawful benefit.

**d. Defenses and Affirmative Defenses Applicable to Plaintiffs’ Civil Conspiracy Claim:**

- (1) [Eighth 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.
- (2) [Twenty-Sixth Defense – Failure of Proof] Plaintiffs have admitted that Casey’s, 7-Eleven, Valero, and Sam’s West did not participate in the conspiracy plaintiffs allege.

- (3) [Twenty-Seventh Defense – Failure of Proof] Plaintiffs cannot proffer evidence of any coercion or corruption of the political process regarding ATC by defendants.
- (4) [Twenty-Eighth Defense – Failure of Proof] There is no evidence that defendants engaged in any unlawful overt acts in furtherance of an alleged conspiracy to pressure ATC pump manufacturers to abandon efforts to market retail ATC equipment.
- (5) [Twenty-Ninth Defense – Failure of Proof] Plaintiffs cannot establish any meeting of the minds in furtherance of the alleged conspiracy, because (i) defendants’ participation in industry organizations and trade associations is insufficient to prove an agreement to conspire, and (ii) defendants did not engage in parallel conduct motivated by an agreement or the conduct of other defendants.
- (6) [Thirtieth Defense – Failure of Proof] Plaintiffs’ conspiracy claim cannot be maintained because plaintiffs cannot establish the commission of some wrong giving rise to a cause of action independent of the conspiracy.

**e. Plaintiffs cannot maintain this case as a class action under Rule 23(b)(2), for the following reasons:**

- (1) The Rule 23(b)(2) classes certified in this case cannot stand because plaintiffs seek individualized monetary relief in addition to their claims

for injunctive relief and Rule 23(b)(2) “does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.” *See Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2557 (2011).

- (2) This court’s deferral of the issue of certification under Rule 23(b)(3) and to bifurcation of the damage portion of plaintiffs’ claims while determining “liability” in a trial of the class claims certified under Rule 23(b)(2) is inconsistent with the structure of Rule 23(b) and presents a “serious possibility” of a due process violation because the court would also adjudicate the absent class members’ rights to seek monetary relief on those claims in the absence of notice and opt-out and the other procedural safeguards found in Rule 23(b)(3). *Dukes*, 131 S.Ct. at 2558-59.
- (3) Certification cannot be maintained under Rule 23(b)(2) because there is no sufficient cohesiveness among class members with respect to their injuries and plaintiffs’ requests for injunctive relief require individualized determinations.
- (4) Certification cannot be maintained under Rule 23(b)(2), because a significant number of class members lack standing to assert claims for injunctive or declaratory relief. *Dukes*, 131 S. Ct. at 2541.
- (5) Plaintiffs cannot establish commonality under Rule 23(a)(2), because

their claims do not “depend upon a common contention” that is “capable of class-wide resolution,” meaning that “determination of its truth or falsity will resolve an issue that is central to each one of the claims in one stroke.” *Dukes*, 131 S.Ct. at 2551.

- (6) Plaintiffs cannot satisfy the typicality requirement of Rule 23(a)(3) with respect to those defendants from whom they have not purchased fuel, because plaintiffs do not have standing to bring claims against those defendants.
- (7) Plaintiffs’ claims are not typical as required by Rule 23(a)(3) because their claims are subject to unique defenses, in that plaintiffs seek recovery for business-related fuel purchases and for purchases made by their family members and employees.
- (8) Plaintiffs cannot satisfy the adequacy of representation requirement of Rule 23(a)(4) because their interests are in conflict with the interests of class members who typically purchase motor fuel at temperatures below 60° F and under plaintiffs’ theory of injury would suffer an economic harm from plaintiffs’ requested remedy of requiring ATC at retail.
- (9) Plaintiffs cannot satisfy the adequacy of representation requirement for the additional reason that their interests are in conflict with those of class members who oppose ATC at retail.

(10) Class certification of plaintiffs' civil conspiracy claim cannot be maintained because certification is inappropriate for plaintiffs' other two claims.

(11) Plaintiffs have failed to provide a viable trial plan and the trial of this case as a class action would violate Kansas substantive law, Fed. R. Civ. P. 23, and the United States Constitution.

**f. 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.

**g. 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:

- (1) 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
- (2) 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).

**h. 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.

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i. **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).

j. **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).

**k. 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, Flying J, 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).

**I. Essential Elements of Defendants' Seventh Affirmative Defense (i.e., Availability of Adequate Remedy at Law).** 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' motor fuel purchases constitute contracts for the sale of goods; and
- (2) Plaintiffs have an adequate remedy at law through available claims for breach of contract and the KCPA.

*See Midwest Asphalt Coating, Inc. v. Chelsea Plaza Homes, Inc.*, 243 P.3d 1106, 1110 (Kan. Ct. App. 2010); K.S.A. § 84-2-106(1); *Nelson v. Nelson*, 205 P.3d 715, 734 (Kan. 2009).

**m. Essential Elements of Defendants' Eighth Affirmative Defense (i.e., *Noerr-Pennington Doctrine*/"*Petitioning Immunity*").** 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) 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 defendants have been unjustly enriched from the sale of non-temperature adjusted motor fuel to plaintiffs and class members.
- c. Whether defendants have made misrepresentations of material facts regarding the motor fuel sold by defendants to plaintiffs and class members.
- d. Whether defendants knowingly or with reason to know made representations that the motor fuel sold to plaintiffs had characteristics, uses or quantities that the motor fuel did not have.
- e. Whether defendants knowingly or with reason to know that the motor fuel sold to plaintiffs consisted of a particular standard or quality which differed materially from

defendants' representations.

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

g. Whether BP, Circle K, Flying J, Kum & Go, QuikTrip and Shell, 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.<sup>15</sup>

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<sup>15</sup> Defendants object to the question of fact posed in this paragraph on the following grounds. It is not preserved by the pleadings. The complaints in the Kansas cases do not allege a conspiracy with any non-parties. This paragraph hypothesizes a conspiracy with many non-parties, and with many entities that have never been parties to the Kansas litigation. Furthermore, it includes a number of entities that were originally defendants in the Kansas cases but against whom all Kansas claims, including conspiracy, have now been dismissed. In all of these cases, defendants have been denied a full and fair opportunity to take discovery as to any alleged conspiracy between and among the Kansas defendants and these non-defendants and/or former (but now dismissed) defendants. All defendants reasonably relied on plaintiffs' dismissals of some of their conspiracy claims in the Kansas actions in foregoing additional discovery as to any alleged nexus to any Kansas conspiracy, and will therefore be unduly prejudiced if plaintiffs are permitted to expand their pleadings in this manner.

Defendants' objections are overruled. First, the court finds the extent of the conspiracy as posed by this question of fact is fairly encompassed by the pleadings in the Kansas cases. Second, and just as importantly, defendants' Liaison Counsel has candidly  
(continued...)

- h. Whether plaintiffs are consumers for purposes of the KCPA.
- i. Whether defendants are suppliers for purposes of the KCPA.
- j. Has each plaintiff established standing to sue each defendant, including proof of purchase from each defendant, injury in fact, causation, and redressability?
- k. Would a change in the manner motor fuel is sold at retail require changes to Kansas regulations, procedures, and cost money?
- l. Do the Refiner Defendants (i.e., BP, COP, Shell, and Valero ), or Circle K or Kum & Go, sell motor fuel in the State of Kansas at retail?
- m. Do the Refiner Defendants 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?
- n. Do the Refiner Defendants hold out independently owned and operated retail stations as their agents?
- o. 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?
- p. If any defendant suppressed, concealed, or omitted any material information

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<sup>15</sup> (...continued)  
acknowledged that all of the companies listed in this paragraph were fully and timely disclosed in plaintiffs' interrogatory answers.

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?

q. Has any defendant made any misrepresentation of any material fact 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?

r. Have the named plaintiffs and each class member suffered the same injury by purchasing motor fuel at retail in gallon units in the State of Kansas?

s. 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?

t. 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?

u. 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?

v. 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?

w. Did any defendant sell more gross gallons of motor fuel at retail in Kansas than it purchased of net gallons at wholesale for Kansas, such that if plaintiffs' allegations regarding the alleged effect of temperature expansion on motor fuel sales are true, defendant obtained any benefit?

x. Did any defendant inequitably retain a benefit it received by selling motor fuel in gallons without regard to temperature in Kansas?

y. Did BP, COP, Kum & Go, QuikTrip, and/or Shell 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?

z. Did BP, COP, Kum & Go, QuikTrip, and/or Shell 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?

aa. Did any plaintiff, or the class as a whole, suffer any harm as a proximate result of BP, COP, Kum & Go, QuikTrip, and/or Shell 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?

bb. 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?

cc. 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' willful 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, was unconscionable under the KCPA.

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

d. Whether defendants' acceptance of the benefits conferred as a result of defendants' failure to correct motor fuel sales to account for temperature is inequitable.

e. 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?

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

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

h. Are plaintiffs permitted to bring an unjust enrichment (quasi-contract) claim when they have entered into contracts for the sale of goods when they purchase of motor fuel?

i. Do plaintiffs have an adequate remedy at law that would preclude their unjust enrichment claim? Conversely, may any plaintiff recover for unjust enrichment when each sale of motor fuel at retail constitutes the making of a contract between the buyer and the seller?

j. 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?

k. 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?

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

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

n. 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)?

o. 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?

## **10. DAMAGES.**

**a. Plaintiffs' Damages.** In the event of a judgment in favor of plaintiffs on the issue of liability, plaintiffs and the class claim they are entitled to attorneys' fees pursuant to the KCPA (specifically, under K.S.A. § 50-634(e)).

**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 in the upcoming May 2012 trial is liability, with the court to subsequently determine a schedule to decide the scope of injunctive relief and 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 liability, 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:

- (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.

An order directing defendants to:

- (1) 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;
- (2) 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

(3) 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.**

As earlier indicated, soon after the pretrial conference, the court granted plaintiffs' motion to amend their complaints to substitute Equilon in place of Shell.

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, as agreed in plaintiffs' trial plan filed on December 23, 2010 (doc. 1748):

*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.

### **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 preassigned 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.** When the pretrial conference was conducted, the parties believed the pending motions impacting the two Kansas cases were as follows:

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

- (2) Defendants' Motion to Strike Expert Report of Terry N. Faddis (doc. 2003).
- (3) Plaintiffs' Motion for Leave to File Surreply re Motion to Strike Faddis as Expert (doc. 2064).
- (4) Motion to Compel Responses to Requests for Admissions (doc. no. unknown).
- (5) Motion to Intervene by Objectors James Phillips and Michael Sandoval, re Costco Settlement (doc. 1801).
- (6) Plaintiffs' Motion for Attorneys' Fees re Costco Settlement (doc. 1820).
- (7) Costco's Motion for Leave to File Surreply (doc. 2084).
- (8) Plaintiffs' and Costco's Jointly Proposed Notice to Class Members of Amended Settlement (doc. 2157).

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

- (1) Motion to Decertify Classes.
- (2) Motion for Partial Summary Judgment Dismissing Plaintiffs' Requests for Injunctive Relief.
- (3) Motion for Summary Judgment on Plaintiffs' KCPA and Unjust Enrichment Claims.
- (4) Motion for Summary Judgment on Plaintiffs' Conspiracy Claims.
- (5) Motion for Summary Judgment Regarding Sales by Retail Stations Not

Owned or Operated by Defendants.

- (6) Motion for Summary Judgment on Preemption and other Constitutional Doctrines.
- (7) Motions to Sever for Separate Trial.
- (8) Motion to Take Judicial Notice of Certain Facts.
- (9) Motions of Some or all Defendants to Dismiss Claims of Cook, Wonderland, and Wilson for Lack of Subject Matter Jurisdiction/Lack of Standing.
- (10) Motion for Final Approval of Costco Amended Settlement.

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

The dispositive motion deadline, as established in the scheduling order and any amendments, is **November 1, 2011**. As earlier ordered by the court, responses to dispositive motions shall be filed by **December 2, 2011**, and reply briefs shall be filed by **December 30, 2011** (*see* doc. 1729 at pp. 11-12). Should the court find it necessary and appropriate, a hearing on any such motions shall be held on **January 30, 2012, at 9:30 a.m.** (*see* doc. 1988, at p. 5).

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, shall be filed by **November 1, 2011**. As earlier ordered by the court, responses to dispositive motions shall be filed by **December 2, 2011**, and reply briefs shall be filed by **December 30, 2011** (*see* doc. 1729 at pp. 11-12). Should the court find it necessary and appropriate, a hearing on any such motions shall be held on **January 30, 2012, at 9:30 a.m.** (*see* doc. 1988, at p. 5).

**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.** Relatively close to the date of trial, the trial judge probably will schedule a status and/or limine conference.

**b. 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.

**c. 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.

**d. 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*.

**e. 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.**

On December 3, 2010, defendants filed their "Submission in Response to Court's November 11, 2010, Order Regarding a Proposed Trial Plan (doc. 1734), and a later reply in support of that "Trial Plan" (doc. 1761). In those submissions, defendants provided a framework for analyzing some of the important issues arising from the court's bifurcation of trial on "the liability and injunctive aspects of plaintiffs' claims" ("Phase One") and

damages (“Phase Two”).<sup>16</sup> Defendants believe some of those issues still need to be resolved, as set forth below:

First, if the Phase One trial on “liability and injunctive aspects of plaintiffs’ claims” is intended to result in a finding as to whether or not defendants violated the KCPA by committing a deceptive act or practice within the meaning of K.S.A. § 50-626, and if that finding is to have collateral estoppel effect in a potential subsequent trial on plaintiffs’ legal claims for damages, then defendants have a right to have that issue decided by a jury. Plaintiffs agree with this. Nevertheless, the parties and the court should be clear that a Phase One trial will require a jury.

Second, defendants’ Seventh Amendment rights would be violated if two different juries are empanelled in two different phases of this case to decide the same issue. *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.”).

Third, Scheduling Order No. 4 raises a related issue. Although the order contemplates that the possible Phase Two trial would be limited to “damages,” separation into phases does not relieve plaintiffs’ burden to establish in the Phase One “liability” trial that they have

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<sup>16</sup> *See* Certification Order (doc. 1675 at 32), and Scheduling Order No. 4 (doc. 1729 at 9).

satisfied all the elements of liability that would support class-wide injunctive relief. For example, under the KCPA, they would have to show that defendants' conduct was deceptive. In order to make a jury's finding on this issue in Phase One applicable and binding on absent class members in any Phase Two trial, plaintiffs must provide the absent class members with notice and an opportunity to opt out of a Phase One trial. Otherwise the absent class members would lose the opportunity to preserve any damages claims they may want to assert in the event of an adverse result in the Phase One trial.

Plaintiffs have made no attempt to refute defendants' argument that notice is required in the present circumstance. Plaintiffs nevertheless have asked the court to order defendants to pay the cost of notice. They cite no authority for this extraordinary request because none exists. As defendants pointed out in their submissions, the law is clear that providing notice is strictly a burden plaintiffs must bear. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 179 (1974).

Defendants reiterate their suggestion from their prior submissions that plaintiffs be required to file a detailed motion for approval of a notice plan, to which defendants will respond.<sup>17</sup>

Fourth, plaintiffs continue to fail to make a clear distinction between the showing necessary to support class-wide injunctive relief on the one hand, and how they would

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<sup>17</sup> Defendants believe it will be important to carefully consider any proposed notice, since there are substantial issues with notice to a potential Rule 23(b)(3) class member where such a class has not been certified and any notice would require that a class member receive sufficient information regarding the claims at issue, each class member's potential rights in an as-yet uncertified class, and an opportunity to opt out.

attempt to demonstrate “damage” (injury-in-fact) to any particular plaintiff. Defendants request the court to clarify that the “injury” issue in Phase One is whether plaintiffs can prove they have been injured, and “demonstrate that the class members ‘have suffered the same injury’”, so the requested injunctive relief “is appropriate respecting the class as a whole.” *WalMart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (quoting *Gen. Tel. Co. of Southwest v Falcon*, 457 U.S. 147, 157 (1982)); see *Stein v. Sprint Corp.*, 22 F.Supp 2d 1210, 1216 (D. Kan 1998).<sup>18</sup>

(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

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<sup>18</sup> Defendants believe plaintiffs’ prior argument to the contrary as to the named plaintiffs mistakenly relied upon that portion of the *Stein* decision that was changed upon reconsideration by U.S. District Judge John W. Lungstrum.

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   1st   day of November, 2011, at Kansas City, Kansas.

\_\_\_\_s/ Kathryn H. Vratil\_\_\_\_\_  
 Kathryn H. Vratil  
 U.S. 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

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



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

### CERTIFICATE OF SERVICE

Counsel are hereby notified that, unless the undersigned Magistrate Judge receives objections, corrections, or revisions to the foregoing proposed pretrial order by **12:00 p.m. on October 29, 2011**, it will be submitted for signature and filing by the assigned District Judge. If revisions are requested, counsel shall state in writing on a separate document in letter form the requested revision, identifying the paragraph number and the reason for such revision, and serve on opposing counsel and to the Magistrate Judge. Counsel shall confer about all such revisions before communicating them to the Magistrate Judge. Counsel are encouraged (but not required) to submit jointly any requests for revisions. At a minimum, written requests for revisions shall state whether opposing counsel consents or objects, and summarize the bases of all objections. All such requests for revisions shall be submitted via e-mail to:

*ksd\_ohara\_chambers@ksd.uscourts.gov*

This proposed pretrial order was served this 28th day of October, 2011, on the following:

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s/ James P. O'Hara  
James P. O'Hara  
U.S. Magistrate Judge