

Civil Initial Pleadings (Attorney/Credit Card) USE CASE 33-1
1:33-av-00001 PLAINTIFF v. DEFENDANT**U.S. District Court****District of New Jersey [LIVE]**

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Case Name: PLAINTIFF v. DEFENDANT**Case Number:** 1:33-av-1**Filer:****Document Number:** 511**Docket Text:**

COMPLAINT - Richard Galauski, et al. v. Amerada Hess Corporation, et al. (Filing fee \$ 350 receipt number 1268726.). (Attachments: # (1) Civil Cover Sheet) (O'MALLEY, MATTHEW)

The following document(s) are associated with this transaction:

Document description:Main Document**Original filename:**n/a**Electronic document Stamp:**

[STAMP dcecfStamp_ID=1046708974 [Date=12/14/2006] [FileNumber=1707765-0] [3da49dff86e7729c09a934fbc4315462aee9470cf1eb3a93bd3e1744a2234b6565de74cd81acaac163fd913e44b01e5db2d0a3d97c9ac03f6f075ffa5d14e02]]

Document description:Civil Cover Sheet**Original filename:**n/a**Electronic document Stamp:**

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1:33-av-1 Notice will be electronically mailed to:**1:33-av-1 Notice will be delivered by other means to:**

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

RICHARD GALAUSKI, N. BUTLER, D. ALLEN, D. SAPP, J. TELLES,
K. BECKER, W. YOUNGER and J. MELLON, individually & OBOSS

(b) County of Residence of First Listed Plaintiff Monmouth Cty., NJ
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

William B. McGuire & Matthew P. O'Malley, Tompkins McGuire
Wachenfeld & Barry, LLP, 4 Gateway, Newark, NJ 07102 (973) 622-3000

DEFENDANTS

AMERADA HESS CORP., EXXON MOBIL CORP., GETTY
PETRO. MKTG, INC., MOTIVA ENTERS., LLC, SUNOCO INC.

County of Residence of First Listed Defendant New York Cty., NY
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE
LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 2 U.S. Government Defendant
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | | | | | |
|---|---------------------------------------|----------------------------|--|----------------------------|---------------------------------------|
| | PTF | DEF | | PTF | DEF |
| Citizen of This State | <input checked="" type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated <i>or</i> Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated <i>and</i> Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input checked="" type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input checked="" type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition		

V. ORIGIN

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from another district (specify)
- ☐ 6 Multidistrict Litigation
- ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
28 USC 1332(d)(2)

Brief description of cause:

Class Action Complaint against companies engaged in the sale of motor fuel for, inter alia, consumer fraud

VII. REQUESTED IN COMPLAINT:

☒ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE Hon. Marilyn Hall Patel (N.D. Cal.) DOCKET NUMBER C-06-7621 MHP (N.D. Cal.)

DATE

12/14/2006

SIGNATURE OF ATTORNEY OF RECORD

MATTHEW P. O'MALLEY

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RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

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**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

RICHARD GALAUSKI, NATHAN
BUTLER, DONALD ALLEN, DENNIS
SAPP, JOHN TELLES, KEN BECKER,
WILLIAM YOUNGER and JIM MELLON,
individually and on behalf of others similarly
situated,

Plaintiffs,

vs.

AMERADA HESS CORPORATION,
EXXON MOBIL CORPORATION, GETTY
PETROLEUM MARKETING, INC.,
MOTIVA ENTERPRISES, LLC AND
SUNOCO, INC.,

Defendants.

Civil Action No.

CLASS ACTION COMPLAINT AND JURY
TRIAL DEMAND

COMPLAINT

Plaintiffs Richard Galauski, Nathan Butler, Donald Allen, Dennis Sapp, John Telles, Ken Becker, William Younger and Jim Mellon, individually and on behalf of others similarly situated, through their attorneys, for their Complaint against Defendants Amerada Hess Corporation ("Hess"), Exxon Mobil Corporation ("Exxon Mobil"), Getty Petroleum Marketing, Inc. ("Getty"), Motiva Enterprises LLC ("Motiva") and Sunoco, Inc. ("Sunoco"), state as follows:

NATURE OF CASE

1. Plaintiffs bring this class action complaint individually and on behalf of persons who purchased motor fuel in the States of California, Arizona, Florida, Texas, North Carolina, New Jersey and Virginia when the motor fuel at the time of sale to Plaintiffs or class members was greater than 60 degrees Fahrenheit. During each such sale of “hot” motor fuel, the Defendants delivered a smaller quantity of motor fuel to Plaintiffs or class members than the amount for which Defendants charged them because the Defendants measured the amount of motor fuel they delivered in non-standard “gallons” which contained variable quantities of motor fuel depending on the temperature of the motor fuel. The Defendants continue these practices which are injurious to Plaintiffs and class members.

THE PLAINTIFFS

2. Plaintiff Richard Galauski is a resident of Howell, New Jersey. He is a citizen of New Jersey and is engaged in business as a truck driver and also owns and operates chartered boats. Plaintiff purchased hot diesel fuel in connection with his business from Defendants Hess, Exxon Mobil, Getty, Motiva and Sunoco in the State of Florida. Plaintiff Galauski purchased hot gasoline fuel for personal, family or household use from Defendants Exxon Mobil and Motiva in the States of Florida and New Jersey.

3. Plaintiff Nathan Butler is a resident of Oakland Park, Florida. Butler is a Florida citizen and is engaged in business as a truck driver. He purchased hot diesel fuel from Defendant Sunoco in the State of Florida. Plaintiff Butler purchased hot gasoline fuel for personal, family or household use from Defendants Exxon Mobil and Motiva in the State of Florida.

4. Plaintiff Donald Allen is a resident of Goodyear, Arizona. Allen is a Florida citizen. Plaintiff Allen purchased hot gasoline fuel for personal, family or household use from Defendant Exxon Mobil in the State of Arizona.

5. Plaintiff Dennis Sapp is a resident of Reidsville, North Carolina. Sapp is a North Carolina citizen and is engaged in business as a truck driver. He purchased hot diesel fuel from Defendants Hess and Motiva in the State of North Carolina. Plaintiff Sapp purchased hot gasoline fuel for personal, family or household use from Defendants Hess and Motiva in the State of North Carolina.

6. Plaintiff John Telles is a resident of Pinole, California. Plaintiff Telles is a citizen of California. Plaintiff Telles purchased hot gasoline fuel for personal, family or household use from Defendant Exxon Mobil in the State of California.

7. Plaintiff Ken Becker is a resident of Montgomery, Texas. He is a citizen of Texas and is engaged in business as a truck driver. Plaintiff Becker purchased hot diesel fuel in connection with his business from Defendant Exxon Mobil in the State of Texas.

8. Plaintiff William Younger is a resident of Kathleen, Florida. He is a citizen of Florida and is engaged in business as a truck driver. Plaintiff Younger purchased hot diesel fuel in connection with his business from Defendant Exxon Mobil in the State of Florida.

9. Plaintiff Jim Mellon is a resident of Theodore, Alabama. He is a citizen of Alabama. Plaintiff Mellon purchased hot gasoline fuel for personal, family or household use from Defendant Motiva in the State of Virginia.

10. Plaintiffs have purchased hot motor fuel from one or more of the Defendants in this District and one or more of the Defendants have injured Plaintiffs in the manner herein stated.

THE DEFENDANTS

11. Defendant Amerada Hess Corporation (“Hess”) is a corporation organized under the laws of the State of Delaware with its principal place of business in New York, New York.

12. At all times relevant to this Complaint, Hess has been engaged in the sale of motor fuel in the State of New Jersey and in this District under the Hess brand name.

13. Defendant Exxon Mobil Corporation (“Exxon Mobil”) is a corporation organized under the laws of the State of New Jersey with its principal place of business in Irving, Texas.

14. At all times relevant to this Complaint, Exxon Mobil has been engaged in the sale of motor fuel in the State of New Jersey and in this District under the Exxon and Mobil brand names.

15. Defendant Getty Petroleum Marketing, Inc. (“Getty”) is incorporated under the laws of the State of Maryland with its principal place of business in East Meadow, New York.

16. At all times relevant to this Complaint, Getty was engaged in the sale of motor fuel in the State of New Jersey and in this District under the Getty and Lukoil brand names.

17. Defendant Motiva Enterprises LLC (“Motiva”) is a limited liability company formed under the laws of the State of Delaware with its principal place of business in Houston, Texas.

18. At all times relevant to this Complaint, Motiva was engaged in the sale of motor fuel in the State of New Jersey and in this District under the Shell and Texaco brand names.

19. Defendant Sunoco, Inc. (“Sunoco”) is incorporated under the laws of the State of Pennsylvania with its principal place of business in Philadelphia, Pennsylvania.

20. At all times relevant to this Complaint, Sunoco was engaged in the sale of motor fuel in the State of New Jersey and in this District under the Sunoco brand name.

JURISDICTION AND VENUE

21. Minimal diversity of citizenship exists between the parties.

22. The amount in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs.

23. This Court therefore has jurisdiction over this class action under 28 U.S.C. § 1332(d)(2).

24. Venue is proper in this Court under 28 U.S.C. §1391(a)(2) because a substantial number of the transactions at issue in this action occurred in this District.

FACTUAL BACKGROUND

Motor Fuels Are Purchased for the Energy They Provide

25. The burning of motor fuel provides the energy harnessed by internal combustion, diesel, rotary and jet engines that are used to power automobiles, trucks, trains, planes, boats, motorcycles and other engine-powered devices such as lawn mowers and generators.

26. When Plaintiffs and class members buy motor fuel, they are buying energy.

27. The energy content of motor fuel is expressed and measured in terms of British Thermal Units (“BTU”).

The Physical Properties of Motor Fuel

28. Motor fuels are petroleum distillate liquids, and their volumes (i.e., the amount of space they occupy) expand and contract as a result of changes in their temperatures even though the actual amount of the fuel remains unchanged.

29. As the temperature of motor fuel increases, the fuel expands, or increases, because its molecules move further apart, making the motor fuel less dense, and, as a result, the same quantity of fuel at the higher temperature takes up a greater space (i.e., a greater volume). As the

temperature of motor fuel decreases, the fuel contracts, or decreases, because its molecules move closer together making the motor fuel denser, and, as a result, the same quantity of fuel at the lower temperature takes up a smaller space (i.e., a smaller volume).

30. Thus, for instance, one U.S. petroleum gallon of gasoline at 60 degrees Fahrenheit has a volume of 231 cubic inches, but the same quantity of gasoline at 75 degrees Fahrenheit has a volume of 233.39085 cubic inches, and the same quantity of gasoline at 90 degrees Fahrenheit has a volume of 235.7817 cubic inches.

31. Defined volumetrically alone a “gallon” of liquid equals a volume of 231 cubic inches.

32. Due to the physical properties of motor fuel described above, however, the amount of motor fuel which fills a 231 cubic inch space varies with the temperature of the motor fuel.

33. In other words, a “gallon” (defined volumetrically without reference to temperature) of motor fuel at any given temperature does not contain an equivalent amount of motor fuel as a “gallon” (defined volumetrically without reference to temperature) of motor fuel at a different temperature.

34. Thus, a “gallon” defined volumetrically without reference to temperature is not a standard unit of measure.

35. Because a “gallon” defined volumetrically without reference to temperature is not a standard unit of measure, a “gallon” of motor fuel as that term is used in the petroleum industry is not defined volumetrically without reference to the temperature of the motor fuel.

36. A standard “gallon” unit of motor fuel as defined by usage of trade in the petroleum industry is defined, from the refinery to the retailer, volumetrically with reference to temperature.

37. Specifically, a “gallon” of motor fuel in the petroleum industry means that amount of motor fuel which occupies 231 cubic inches when its temperature is 60 degrees Fahrenheit.

Sales of Commodities at a Price Per Unit Means or Implies Fungible Units

38. Many commodities are sold in variable quantities.

39. When commodities are sold in variable quantities, they are typically sold at a specified price per standard unit of measure.

40. Sales of commodities at a specified price per standard unit of measure means or implies, unless otherwise stated, that standard units of a particular kind or grade of the commodity are fungible or, in other words, that each such unit is freely interchangeable with any other such unit of that same kind or grade of the commodity.

41. Trading of such fungible commodities at a specified price per standard unit of measure brings consistency, predictability and uniformity to transactions in that commodity.

42. A standard unit of measure is one which has a recognized and permanent value, such that the amount of any given commodity contained in a standard unit of that commodity does not vary and is always the same.

43. The price of a fungible commodity in a given transaction would have little if any relevance or meaning beyond that specific transaction if the price were not expressed in terms of a price per standard unit because market participants would have no reliable means of comparing the costs and benefits of any given transaction for that commodity with any other transaction for the commodity.

44. For instance, using a standard unit of measurement enables merchants to standardize their product pricing, enabling them to deliver equal amounts of a commodity at uniform prices.

It also enables merchants to compare their own prices with those of their competitors, in turn enabling merchants to determine whether their pricing is competitive.

45. The practice similarly enables buyers to compare pricing of various merchants, as well as to gauge from transaction to transaction whether they are paying more, less or the same for the commodity.

46. For these reasons, trading of fungible commodities at a specified price per standard unit of measure has long been a standard commercial practice.

47. In addition, for these same reasons, the expression of a sale of a commodity in terms of a specified price per standard unit of measure has come to mean or imply that such units are fungible (which is to say freely interchangeable).

48. Motor fuel is a fungible commodity sold and purchased in variable quantities.

49. At the retail level, Defendants advertise and sell motor fuel at a specified price per standard unit of measure expressed in “gallons” without expressly defining “gallons.”

The Interdependence of Price, Volume and Temperature

50. The cost of motor fuel acquired in a purchase of non-temperature adjusted motor fuel is a function of three corresponding quantifiable and interdependent variables: price, volume and temperature.

51. These three variables are interdependent such that for any given change in the temperature of each unit delivered, there exists a corresponding change in price per unit delivered or volume per unit delivered.

52. By way of example, with respect to the sale of one volumetric gallon of gasoline at 60 degree Fahrenheit priced at \$2.98, a temperature increase of 15 Fahrenheit has exactly the same

effect on the cost to the consumer as a price increase of 2.98 cents or a 2.31 cubic inch decrease in the volume of gasoline delivered.

Industry Knowledge of the Impact of Motor Fuel Temperature Variations

53. Refiners and marketers of motor fuel products have long been aware of the volume-variable properties of motor fuel resulting from changes in the temperature of motor fuel.

54. In the early 1900's, the Rockefeller family business, the Standard Oil Trust, experienced difficulties in accounting for inventory credits provided to business partners owning wellheads because of the volume variations of petroleum distillates associated with their temperature variations during the delivery and storage processes. Because of the inherent unreliability of measuring quantities of petroleum distillates by volumetric measure alone and the resulting non-uniformity in commercial transactions for petroleum distillates, the Standard Oil Trust funded research by The American Petroleum Institute to analyze the problem and to create an appropriate standardized unit of measurement for use in the sale of petroleum products.

55. The American Petroleum Institute turned to the National Bureau of Standards (the Bureau) for assistance in creating such a standard.

The Development of the Industry Standard "Gallon"

56. The Bureau's work resulted in the creation of a petroleum industry standard now known as ASTM-IP D 1250.

57. ASTM-IP D 1250 defines a standard unit of measurement for a U.S. petroleum gallon as 231 cubic inches at 60 degrees Fahrenheit.

58. The inclusion of a temperature component in the definition of "gallon" ensured that the amount of fuel contained in every defined "gallon" was exactly the same amount.

59. The defined “gallon” thereby enabled all parties to a motor fuel transaction to measure accurately the amount of motor fuel changing hands in a transaction, notwithstanding the variations in the volume of the fuel resulting from temperature changes.

60. Thus, the industry has adopted as the standard unit of measurement of a “gallon” of petroleum product as 231 cubic inches at 60 degrees Fahrenheit in order to bring certainty and predictability to petroleum transactions.

61. That industry standard has been adopted throughout the United States petroleum industry and various government agencies, including:

- a. The United States Department of Treasury, through its Bureau of Customs, which requires imported petroleum products to be declared in gallons of 231 cubic inches at 60 degrees Fahrenheit;
- b. The American Petroleum Institute, which has adopted the definition as a recommended industry standard, API 2540, also called D-1250;
- c. The American Society for Testing and Materials, which has adopted D-1250 as the recommended industry standard;
- d. The American National Standards Institute, which has adopted as the recommended industry standard, ANSI 711.83 which is D-1250;
- e. The Federal Trade Commission, which has adopted as a mandatory standard relating to packaged petroleum products the definition of a gallon of 231 cubic inches at 60 degrees Fahrenheit, 16 CFR, 500.8 (B).

62. Despite the industry-wide adoption of this standardized definition of a “gallon,” the Defendants have and continue to use the non-standard, non-temperature-adjusted definition of a

“gallon” in their measurement of the motor fuel they delivered and continue to deliver to Plaintiffs and class members.

The Petroleum Industry Profits from the Sale of Hot Motor Fuel to Consumers

63. Due to the temperature sensitive properties of motor fuel, there are more non-temperature-adjusted “gallons” of motor fuel in a warmer batch of motor fuel than the number of non-temperature-adjusted “gallons” there are in a cooler batch of motor fuel.

64. Expressed in terms of their respective energy content, there are fewer BTU in a non-temperature-adjusted “gallon” of motor fuel at any given temperature than the number of BTU in the same non-temperature-adjusted “gallon” of motor fuel at a lower temperature.

65. Consequently, in sales of motor fuel measured in non-standard, non-temperature-adjusted “gallons,” a seller can sell more “gallons” of motor fuel at a warmer temperature than at a cooler temperature.

66. The average temperature of motor fuel sold annually in the United States exceeds 60 degrees Fahrenheit.

67. Because the average temperature of motor fuel sold annually in the United States exceeds 60 degrees Fahrenheit, each year the petroleum industry delivers to consumers substantially smaller quantities of motor fuel per non-standard “gallon” than the industry would deliver if it measured deliveries of motor fuel to consumers by the industry standard “gallon” of 231 cubic inches of motor fuel at 60 degrees Fahrenheit.

68. As a result, consumers in the United States collectively spend billions of dollars more each year to purchase the same quantity of motor fuel they would have received at advertised prices “per gallon” if the industry measured deliveries of motor fuel to consumers by the industry standard “gallon” of 231 cubic inches of motor fuel at 60 degrees Fahrenheit.

The Petroleum Industry Opposes Temperature Compensation in the U.S.

69. Because the petroleum industry profits from the sale of hot motor fuel to U.S. consumers, it has resisted all efforts to change its practice of measuring deliveries of motor fuel to retail customers in non-standard, non-temperature-adjusted “gallons.”

70. The technology for temperature compensation equipment has been available for years to ensure that every gallon of motor fuel consumers purchase contains the same quantity of motor fuel regardless of its temperature.

71. Temperature compensation equipment automatically adjusts each pumped gallon of motor fuel to provide a volume greater than 231 cubic inches when the temperature of the fuel exceeds 60 degrees Fahrenheit. The exact amount of the increased volume corresponds directly to the amount by which the actual temperature of the fuel exceeds 60 degrees Fahrenheit.

72. Conversely, temperature compensation equipment automatically adjusts each pumped gallon of motor fuel to provide a volume less than 231 cubic inches when the temperature of the fuel is less than 60 degrees Fahrenheit. The exact amount of the decreased volume corresponds directly to the amount by which the actual temperature of the fuel is lower than 60 degrees Fahrenheit.

73. Because the petroleum industry profits from the sale of hot motor fuel to consumers at non-standard, non-temperature-adjusted “gallons,” however, the industry has repeatedly fought efforts to require the installation of temperature compensation equipment at retail fuel pumps in the United States.

74. When acting as retail sellers of motor fuel, the Defendants have refused to install temperature compensation equipment at their retail outlets. When acting as franchisors, the Defendants control the specifications of the motor fuel dispensing devices at their franchisees’

retail locations and prohibit their franchisees from installing temperature compensation equipment.

The Petroleum Industry Embraces Temperature Compensation in Canada

75. The average temperature of motor fuel sold annually in Canada is less than 60 degrees Fahrenheit.

76. Consequently, if the petroleum industry were to measure its deliveries of motor fuel to Canadian consumers by the same non-standard “gallon” it uses to measure its delivery of motor fuel to U.S. consumers, the industry would deliver to Canadian consumers substantially larger quantities of motor fuel per non-standard “gallon” than by measuring deliveries of motor fuel by the industry standard “gallon” of 231 cubic inches of motor fuel at 60 degrees Fahrenheit. In Canada, the use of the same non-standard “gallon” used in the U.S. would benefit Canadian consumers and substantially diminish industry profits.

77. Accordingly, in Canada the petroleum industry has voluntarily implemented use of the industry standard “gallon” in retail sales through the voluntary and widespread use of temperature compensation equipment at retail pumps.

78. The petroleum industry has also supported legislation in Canada requiring the installation of temperature compensation equipment at retail pumps.

79. The petroleum industry’s position on temperature compensation equipment thus depends on whether the absence of the equipment allows it to earn greater profits or causes it to earn reduced profits. Where the sales of hot motor fuel, as in the United States, allow the petroleum industry to earn even higher profits, the industry opposes the installation of such equipment as being too costly. Where the sales of cold motor fuel, as in Canada, reduce industry profits, the industry supports the use of such equipment.

Consumers and Competition

80. The industry-wide practice of selling non-standard, non-temperature-adjusted motor fuel at the retail level has additional anti-competitive effects that harm consumers, including Plaintiffs and class members, and benefit retailers, including Defendants.

81. The temperature at which Defendants sell gas varies significantly from retailer to retailer. Because U.S. (but not Canadian) retailers refuse to install widely available temperature-compensation equipment, the amount of motor fuel that a consumer actually obtains at a given price varies from retailer to retailer and from purchase to purchase.

82. Defendants' refusal to sell standardized, temperature-adjusted motor fuel at the retail level obscures the true price of motor fuel and raises the costs that consumers must incur to ascertain the true quantity, and thus the true price-per-gallon, of the motor fuel they purchase. In other words, variation in the temperature at which non-standardized quantities of motor fuel are delivered makes the actual price of motor fuel less observable and increases consumers' search costs.

83. Some retailers provide temperature information on demand, but obtaining such information is time consuming. The opportunity costs of requesting, and obtaining, such information can be significant.

84. Defendants' refusal to sell standardized, temperature-adjusted motor fuel at the retail level, or to report the temperature at which a given batch of motor fuel is delivered, prevents consumers from accurately making even rudimentary price comparisons in determining where to purchase motor fuel.

85. The opacity of prices in the retail motor fuel market gives retailers unfair power over price and impairs the basic competitive processes that work to maximize consumer benefit in a

market economy. Undisclosed variation in the quantities of motor fuel delivered to consumers allows retailers that deliver less product at a given price to earn greater profits than retailers that deliver more product at the same price. By extension, retailers that deliver less consumer benefit are more likely than retailers that deliver more consumer benefit to survive market competition.

86. Defendants' refusal to sell standardized, temperature-adjusted motor fuel also creates perverse incentives for motor fuel retailers. The current means by which motor fuel is delivered at the retail (but not wholesale) level creates incentives for retailers to transport, store and deliver motor fuel to consumers in a way that maximizes the motor fuel's temperature. At worst, the current means of delivering motor fuel at the retail (but not the wholesale) level creates incentives for retailers to affirmatively heat motor fuel to earn a competitive edge vis-à-vis competitors. These incentives have the effect of widening the variation in the temperature at which motor fuel is delivered at the retail level and impairing market competition by further obscuring the true price of motor fuel.

87. Motor fuel retailers sell a variety of fuel products that vary by octane levels and other aspects of the fuel's chemical make-up. This variation maximizes consumer choice and is at the heart of efforts by Defendants to market and sell motor fuel "brands."

88. Many consumers track the fuel economy of their vehicles, both to ensure that their vehicles remain in proper working order, and to determine which "brand" of motor fuel delivers optimal performance.

89. The variation in the actual amounts of motor fuel delivered introduces substantial uncertainty into consumers' efforts to gauge the performance of their vehicles, leading to sub-optimal choice of motor fuel "brand."

90. Because consumers cannot make fully informed decisions about which "brand" of motor fuel delivers optimal performance, Defendants' refusal to sell standardized, temperature-adjusted motor fuel at the retail level foils consumer choice and thus impairs basic market competition.

CLASS ACTION ALLEGATIONS

91. Plaintiffs bring this action on behalf of all persons who purchased motor fuel at a temperature greater than 60 degrees Fahrenheit from one or more of the Defendants in the States of California, Arizona, Florida, North Carolina, Texas, Virginia, and New Jersey. Excluded from the class are all officers and directors of the Defendants, their parents, subsidiaries and affiliates, any law firm or attorney of record in this matter and any judge who presides over this case.

92. The class is so numerous that joinder of all members is impracticable. While the exact number of class members is unknown, Plaintiffs believe that the proposed class would include millions of customers.

93. There are questions of fact and law common to all class members, including:

- a. Whether the Defendants sell motor fuel to consumers at temperatures above 60 degrees Fahrenheit;
- b. Whether "gallon" as that term is used in the retail sale of motor fuel is a standard unit of measure which has a recognized and permanent value, such that the amount of motor fuel in one gallon does not vary and is always the same in every gallon;

- c. Whether the Defendants' practice of measuring motor fuel delivered in retail sales transactions by a non-standard, non-temperature-adjusted "gallon" is an unfair practice;
- d. Whether the Defendants' practice of measuring motor fuel delivered in retail sales transactions by a non-standard, non-temperature-adjusted "gallon" is a fraudulent practice;
- e. Whether the Defendants' practice of measuring motor fuel delivered in retail sales transactions by a non-standard, non-temperature-adjusted "gallon" is a deceptive practice;
- f. Whether the Defendants' practice of measuring motor fuel delivered in retail sales transactions by a non-standard, non-temperature-adjusted "gallon" is an unlawful practice;
- g. Whether the Defendants' practice of measuring motor fuel delivered in retail sales transactions by a non-standard, non-temperature-adjusted "gallon" is an unconscionable practice;
- h. Whether the Defendants' practice of measuring motor fuel delivered in retail sales transactions by a non-standard, non-temperature-adjusted "gallon" has harmed Plaintiffs and class members;
- i. Whether the Defendants' practice of measuring motor fuel delivered in retail sales transactions by a non-standard, non-temperature-adjusted "gallon" should be enjoined;
- j. Whether the Defendants should be required to make Plaintiffs and class members whole for any harm caused by the Defendants' practice of measuring motor fuel

delivered in retail sales transactions by a non-standard, non-temperature-adjusted “gallon” and, if so, in what amount.

94. The common questions of fact or law are central to the adjudication of this action and predominate over any issues affecting only individual members.

95. Plaintiffs’ claims are typical of the claims of the class because Plaintiffs are members of the proposed class, their claims have the same essential characteristics as the claims of class members, their claims arise from the same general course of conduct that gives rise to claims of all class members and their claims are based on the same legal theories as those of all other class members.

96. A trial of this matter will therefore be manageable if it is certified as a class action.

97. Plaintiffs will fairly and adequately protect the interests of the members of the class.

98. Plaintiffs will adequately represent the plaintiff class because they have no interest that is adverse or antagonistic to the interests of absent class members.

99. Plaintiffs have retained counsel who have substantial experience and success in the prosecution of complex class action and consumer-protection litigation.

100. The expense of prosecuting Plaintiffs’ and class members’ claims individually would significantly exceed any economic benefit Plaintiffs or class members could realize individually, thus making individual litigation of their claims economically impractical and infeasible. Accordingly, a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

101. The prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the Defendants.

102. The Defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

CAUSES OF ACTION
Count One
(Violation of the Arizona Consumer Fraud Act)

103. Plaintiffs reallege paragraphs 1-102 above as paragraph 103 of this Count.

104. Plaintiffs bring this Count on behalf of all persons who purchased hot motor fuel from any of the Defendants in the State of Arizona.

105. Motor fuel is merchandise under the Arizona Consumer Fraud Act.

106. The Defendants violated and continue to violate the Arizona Consumer Fraud Act by engaging in the following deceptive acts or practices in connection with the sale or advertisement of hot motor fuel:

- a. Delivering to Plaintiffs and class members motor fuel substantially in excess of 60 degrees Fahrenheit;
- b. Representing to Plaintiffs and class members motor fuel unit prices in terms of the standard unit of a “gallon,” when in fact Defendants deliver non-standard “gallons” of motor fuel measured volumetrically without reference to temperature;
- c. Delivering to Plaintiffs and class members less motor fuel than Defendants agreed to deliver when the temperature of the motor fuel exceeded 60 degrees Fahrenheit.

107. The Defendants violated and continue to violate the Arizona Consumer Fraud Act by engaging in the following deceptive concealment, suppression and omission of material facts in connection with the sale or advertisement of hot motor fuel:

- a. Concealing, suppressing and omitting that Defendants are delivering to Plaintiffs and class members motor fuel substantially in excess of 60 degrees Fahrenheit;
- b. Concealing, suppressing and omitting that the standard U.S. Petroleum Gallon in the motor fuel industry at all levels of distribution except the retailer-to-consumer level of distribution is 231 cubic inches at 60 degrees Fahrenheit;
- c. Concealing, suppressing and omitting that each volumetric gallon of hot motor fuel sold by the Defendants at the retail level contains less motor fuel than the standard U.S. Petroleum Gallon;
- d. Concealing, suppressing and omitting that each volumetric gallon of hot motor fuel sold by the Defendants at the retail level contains less energy than the standard U.S. Petroleum Gallon;
- e. Concealing, suppressing and omitting that the energy content of motor fuel sold by the Defendants varies according to its temperature;
- f. Concealing, suppressing and omitting that the term gallon used by the Defendants in the sale of motor fuel to consumers at the retail level of distribution is not a standard unit of measure.

108. The Defendants intended to do the aforementioned acts and intended that Plaintiffs and class members would rely on the Defendants' concealments, suppressions or omissions in the purchase of hot motor fuel.

109. Plaintiffs and class members relied on Defendants' deceptive acts or practices in connection with Plaintiffs and class members' purchases of hot motor fuel and that reliance caused them to sustain actual damages.

110. Plaintiffs and class members sustained consequent and proximate actual damages as a result of their reliance on Defendants' deceptive acts or practices because they received less motor fuel than they were entitled to receive and for which they paid.

111. Defendants' sale of hot motor fuel and their deceptive acts and practices in connection therewith was and is reckless, shows spite or ill will or demonstrates a reckless indifference to the interests of Plaintiffs and class members.

112. Defendants' conduct has further injured Plaintiffs and class members by impairing competition within retail motor fuel markets and preventing Plaintiffs and class members from making fully informed decisions about the motor fuel they purchase.

WHEREFORE, Plaintiffs respectfully request that this Court enjoin Defendants from engaging in the unlawful conduct alleged herein; require the Defendants to install temperature correcting equipment on their retail motor fuel dispensing devices or require Defendants to post conspicuous notice on their retail motor fuel dispensing devices notifying consumers of the temperature at which the motor fuel is being sold and the effect of temperature on the energy content of motor fuel; require Defendants to notify all affected persons of the Court's injunction; declare that selling motor fuel in non-standard gallons or at temperatures above 60 degrees Fahrenheit without volume adjustment violates the Arizona Consumer Fraud Act; award monetary damages incidental to the requested injunctive or declaratory relief; award Plaintiffs and/or class members a reasonable attorneys' fee and award such other relief as the Court may deem just and proper.

Count Two
(Violation of California Business and Professions Code)

113. Plaintiffs reallege paragraphs 1-102 above as paragraph 113 of this Count.

114. Plaintiffs bring this Count on behalf of all persons who purchased hot motor fuel from any of the Defendants in the State of California.

115. Defendants violated and continue to violate the California Business and Professions Code §17200, *et seq.* through one or more of the following unfair, unlawful or fraudulent practices:

- a. Delivering to Plaintiffs and class members motor fuel substantially in excess of 60 degrees Fahrenheit;
- b. Representing to Plaintiffs and class members motor fuel unit prices in terms of the standard unit of a “gallon,” when in fact Defendants deliver non-standard “gallons” of motor fuel measured volumetrically without reference to temperature;
- c. Delivering to Plaintiffs and class members less motor fuel than Defendants agreed to deliver when the temperature of the motor fuel exceeded 60 degrees Fahrenheit;
- d. Concealing, suppressing and omitting that Defendants are delivering to Plaintiffs and class members motor fuel substantially in excess of 60 degrees Fahrenheit;
- e. Concealing, suppressing and omitting that the standard U.S. Petroleum Gallon in the motor fuel industry at all levels of distribution except the retailer-to-consumer level of distribution is 231 cubic inches at 60 degrees Fahrenheit;

- f. Concealing, suppressing and omitting that each volumetric gallon of hot motor fuel sold by the Defendants at the retail level contains less motor fuel than the standard U.S. Petroleum Gallon;
- g. Concealing, suppressing and omitting that each volumetric gallon of hot motor fuel sold by the Defendants at the retail level contains less energy than the standard U.S. Petroleum Gallon;
- h. Concealing, suppressing and omitting that the energy content of motor fuel sold by the Defendants varies according to its temperature;
- i. Concealing, suppressing and omitting that the term gallon used by the Defendants in the sale of motor fuel to consumers at the retail level of distribution is not a standard unit of measure;
- j. Violating Cal.Bus. & Prof.Code § 17500 by advertising hot motor fuel to the public with the foregoing representations and omissions, which were and are untrue or misleading or both and which the Defendants knew were and are untrue or misleading or both;
- k. Violating Cal. Business & Prof. Code 13413 by selling hot motor fuel to the public with the foregoing representations and omissions, which were and are deceptive or misleading or false, and of which the Defendants knew were and are deceptive or misleading or false.

116. Plaintiffs and class members have been injured by Defendants' conduct in that they have lost money and/or property as a result of Defendants' unfair, unlawful or fraudulent acts alleged above because they received less motor fuel than they were entitled to receive and for which they paid.

117. Defendants' conduct has further injured Plaintiffs and class members by impairing competition within retail motor fuel markets and preventing Plaintiffs and class members from making fully informed decisions about the motor fuel they purchase.

118. Defendants continue to commit the unfair, unlawful or fraudulent acts alleged above.

WHEREFORE, Plaintiffs respectfully request that this Court enjoin Defendants from engaging in the unlawful conduct alleged herein; require the Defendants to install temperature correcting equipment on their retail motor fuel dispensing devices or require Defendants to post conspicuous notice on their retail motor fuel dispensing devices notifying consumers of the temperature at which the motor fuel is being sold and the effect of temperature on the energy content of motor fuel; require Defendants to notify all affected persons of the Court's injunction; declare that selling motor fuel in non-standard gallons or at temperatures above 60 degrees Fahrenheit without volume adjustment violates the California Business & Professions Code; award monetary damages incidental to the requested injunctive or declaratory relief; award Plaintiffs and/or class members a reasonable attorneys' fee, including under California Code of Civil Procedure 1021.5, and award such other relief as the Court may deem just and proper.

Count Three
(Violation of California Consumers Legal Remedies Act (California Civil Code 1770, et. seq.))

119. Plaintiffs reallege Paragraphs 1-102 above as paragraph 119 of this Count.

120. Plaintiffs bring this Count on behalf of all individuals who, within three years from the date of the filing of this Complaint, purchased hot motor fuel, for personal, family, or household purposes, from any defendant in California.

121. Defendants violated and continue to violate the California Consumer Legal Remedies Act, including without limitation California Civil Code Section 1170 (a) (5), through

one or more of the following unfair methods of competition and unfair or deceptive acts or practices:

- a. Representing to Plaintiffs and class members motor fuel prices in terms of the standard unit of a “gallon,” when in fact Defendants deliver non-standard “gallons” of motor fuel measured volumetrically without reference to temperature;
- b. Concealing, suppressing, and omitting that Defendants are delivering to Plaintiffs and class members motor fuel substantially in excess of 60 degrees Fahrenheit;
- c. Concealing, suppressing and omitting that the standard U.S. Petroleum Gallon in the motor fuel industry at all levels of distribution except the retailer-to-consumer level of distribution is 231 cubic inches at 60 degrees Fahrenheit;
- d. Concealing, suppressing, and omitting that each volumetric gallon of hot motor fuel sold by the Defendants at the retail level contains less motor fuel than the standard U.S. Petroleum Gallon;
- e. Concealing, suppressing, and omitting that each volumetric gallon of hot motor fuel sold by the Defendants at the retail level contains less motor fuel than a gallon as defined by California Regulations;
- f. Concealing, suppressing, and omitting that the energy content of motor fuel sold by the Defendants varies according to its temperature.

122. Plaintiffs and class members have been injured by Defendants’ unfair methods of competition and unfair or deceptive acts or practices because they received less motor fuel than they were entitled to receive and for which they paid.

123. Defendants' conduct has further injured Plaintiffs and class members by impairing competition within retail motor fuel markets and preventing Plaintiffs and class members from making fully informed decisions about the motor fuel they purchase.

124. Plaintiffs seek an order enjoining Defendants methods, acts and practices.

125. Plaintiffs request and award of court costs and attorney's fees pursuant to Civil Code Section 1780 (c).

126. Plaintiffs have or will provide written notice to Defendants pursuant to Civil Code Section 1782 and will amend this Complaint to seek damages against one or more Defendant pursuant to Section 1780 should any such Defendant not correct and rectify its violations of Section 1770 within the time specified in Section 1782.

WHEREFORE, Plaintiffs respectfully request that this Court enjoin Defendants from engaging in the unlawful conduct alleged herein; require the Defendants to install temperature correcting equipment on their retail motor fuel dispensing devices or require Defendants to post conspicuous notice on their retail motor fuel dispensing devices notifying consumers of the temperature at which the motor fuel is being sold and the effect of temperature on the energy content of motor fuel; require Defendants to notify all affected persons of the Court's injunction; declare that selling motor fuel in non-standard gallons or at temperatures above 60 degrees Fahrenheit without volume adjustment violates the California Consumer Legal Remedies Act; and award Plaintiffs and/or class members a reasonable attorneys' fee and award such other relief as the Court may deem just and proper.

Count Four
(Violation of the Florida Deceptive and Unfair Trade Practices Act)

127. Plaintiffs reallege paragraphs 1-102 above as paragraph 127 of this Count.

128. Plaintiffs bring this Count on behalf of all persons who purchased hot motor fuel from any of the Defendants in the State of Florida.

129. Plaintiffs are consumers under the Florida Deceptive and Unfair Trade Practices Act.

130. The advertising and sale of motor fuel is trade or commerce under the Florida Deceptive and Unfair Trade Practices Act.

131. The Defendants violated and continue to violate the Florida Deceptive and Unfair Trade Practices Act by engaging in the following unconscionable acts or practices and unfair or deceptive acts or practices in the sale of hot motor fuel, all of which were likely to mislead or deceive Plaintiffs and class members acting reasonably in the same circumstances:

- a. Delivering to Plaintiffs and class members motor fuel substantially in excess of 60 degrees Fahrenheit;
- b. Representing to Plaintiffs and class members motor fuel unit prices in terms of the standard unit of a “gallon,” when in fact Defendants deliver non-standard “gallons” of motor fuel measured volumetrically without reference to temperature;
- c. Delivering to Plaintiffs and class members less motor fuel than Defendants agreed to deliver when the temperature of the motor fuel exceeded 60 degrees Fahrenheit;
- d. Concealing, suppressing and omitting that Defendants are delivering to Plaintiffs and class members motor fuel substantially in excess of 60 degrees Fahrenheit;
- e. Concealing, suppressing and omitting that the standard U.S. Petroleum Gallon in the motor fuel industry at all levels of distribution except the retailer-to-consumer level of distribution is 231 cubic inches at 60 degrees Fahrenheit;

- f. Concealing, suppressing and omitting that each volumetric gallon of hot motor fuel sold by the Defendants at the retail level contains less motor fuel than the standard U.S. Petroleum Gallon;
- g. Concealing, suppressing and omitting that each volumetric gallon of hot motor fuel sold by the Defendants at the retail level contains less energy than the standard U.S. Petroleum Gallon;
- h. Concealing, suppressing and omitting that the energy content of motor fuel sold by the Defendants varies according to its temperature;
- i. Concealing, suppressing and omitting that the term gallon used by the Defendants in the sale of motor fuel to consumers at the retail level of distribution is not a standard unit of measure.

132. Plaintiffs and class members were aggrieved by and sustained actual damages and as a result of the Defendants' conduct because they received less motor fuel than they were entitled to receive and for which they paid.

133. Defendants' conduct has further injured Plaintiffs and class members by impairing competition within retail motor fuel markets and preventing Plaintiffs and class members from making fully informed decisions about the motor fuel they purchase.

WHEREFORE, Plaintiffs respectfully request that this Court enjoin Defendants from engaging in the unlawful conduct alleged herein; require the Defendants to install temperature correcting equipment on their retail motor fuel dispensing devices or require Defendants to post conspicuous notice on their retail motor fuel dispensing devices notifying consumers of the temperature at which the motor fuel is being sold and the effect of temperature on the energy content of motor fuel; require Defendants to notify all affected persons of the Court's injunction;

declare that selling motor fuel in non-standard gallons or at temperatures above 60 degrees Fahrenheit without volume adjustment violates the Florida Deceptive and Unfair Trade Practices Act; award monetary damages incidental to the requested injunctive or declaratory relief; award Plaintiffs and/or class members a reasonable attorneys' fee and award such other relief as the Court may deem just and proper.

Count Five
(Violation of the New Jersey Consumer Fraud Act)

134. Plaintiffs reallege paragraphs 1-102 above as paragraph 134 of this Count.

135. Plaintiffs bring this Count on behalf of all persons who purchased hot motor fuel from any of the Defendants in the State of New Jersey.

136. Motor fuel is merchandise under the New Jersey Consumer Fraud Act.

137. In connection with Defendants' sale or advertisement of motor fuel and Defendants' subsequent performance of their agreements to sell motor fuel, the Defendants performed the following affirmative acts, among others, that constitute unconscionable commercial practices, deception, fraud and misrepresentation, all of which had the capacity to mislead Plaintiffs and class members:

- a. Delivering to Plaintiffs and class members motor fuel substantially in excess of 60 degrees Fahrenheit;
- b. Representing to Plaintiffs and class members motor fuel unit prices in terms of the standard unit of a "gallon," when in fact Defendants deliver non-standard "gallons" of motor fuel measured volumetrically without reference to temperature;

- c. Delivering to Plaintiffs and class members less motor fuel than Defendants agreed to deliver when the temperature of the motor fuel exceeded 60 degrees Fahrenheit.

In connection with Defendants' sale or advertisement of motor fuel and Defendants' subsequent performance of their agreements to sell motor fuel, the Defendants knowingly engaged in the concealment, suppression and omission the material facts, among others:

- a. Concealing, suppressing and omitting that Defendants are delivering to Plaintiffs and class members motor fuel substantially in excess of 60 degrees Fahrenheit;
- b. Concealing, suppressing and omitting that the standard U.S. Petroleum Gallon in the motor fuel industry at all levels of distribution except the retailer-to-consumer level of distribution is 231 cubic inches at 60 degrees Fahrenheit;
- c. Concealing, suppressing and omitting that each volumetric gallon of hot motor fuel sold by the Defendants at the retail level contains less motor fuel than the standard U.S. Petroleum Gallon;
- d. Concealing, suppressing and omitting that each volumetric gallon of hot motor fuel sold by the Defendants at the retail level contains less energy than the standard U.S. Petroleum Gallon;
- e. Concealing, suppressing and omitting that the energy content of motor fuel sold by the Defendants varies according to its temperature;
- f. Concealing, suppressing and omitting that the term gallon used by the Defendants in the sale of motor fuel to consumers at the retail level of distribution is not a standard unit of measure.

138. The Defendants intended Plaintiffs and class members would rely upon the concealed, suppressed and omitted material facts in the purchase of motor fuel.

139. Plaintiffs and class members sustained ascertainable loss as a result of the Defendants' conduct because they received less motor fuel than they were entitled to receive and for which they paid.

140. Defendants acquired money from Plaintiffs and class members by means of the Defendants' unlawful conduct.

141. Defendants' conduct has further injured Plaintiffs and class members by impairing competition within retail motor fuel markets and preventing Plaintiffs and class members from making fully informed decisions about the motor fuel they purchase.

142. Defendants continue to commit the unlawful acts alleged herein.

WHEREFORE, Plaintiffs respectfully request that this Court enjoin Defendants from engaging in the unlawful conduct alleged herein; require the Defendants to install temperature correcting equipment on their retail motor fuel dispensing devices or require Defendants to post conspicuous notice on their retail motor fuel dispensing devices notifying consumers of the temperature at which the motor fuel is being sold and the effect of temperature on the energy content of motor fuel; require Defendants to notify all affected persons of the Court's injunction; declare that selling motor fuel in non-standard gallons or at temperatures above 60 degrees Fahrenheit without volume adjustment violates the New Jersey Consumer Fraud Act; award monetary damages incidental to the requested injunctive or declaratory relief; award Plaintiffs and/or class members a reasonable attorneys' fee and award such other relief as the Court may deem just and proper.

Count Six
(Violation of the North Carolina Unfair and Deceptive Trade Practices Act)

143. Plaintiffs reallege paragraphs 1-102 above as paragraph 143 of this Count.

144. Plaintiffs bring this Count on behalf of all persons who purchased hot motor fuel from any of the Defendants in the State of North Carolina.

145. The Defendants violated and continue to violate the North Carolina Unfair and Deceptive Trade Practices Act by engaging in the following unfair or deceptive acts or practices in the sale of hot motor fuel, all of which had the capacity to deceive Plaintiffs and class members:

- a. Delivering to Plaintiffs and class members motor fuel substantially in excess of 60 degrees Fahrenheit;
- b. Representing to Plaintiffs and class members motor fuel unit prices in terms of the standard unit of a “gallon,” when in fact Defendants deliver non-standard “gallons” of motor fuel measured volumetrically without reference to temperature;
- c. Delivering to Plaintiffs and class members less motor fuel than Defendants agreed to deliver when the temperature of the motor fuel exceeded 60 degrees Fahrenheit;
- d. Concealing, suppressing and omitting that Defendants are delivering to Plaintiffs and class members motor fuel substantially in excess of 60 degrees Fahrenheit;
- e. Concealing, suppressing and omitting that the standard U.S. Petroleum Gallon in the motor fuel industry at all levels of distribution except the retailer-to-consumer level of distribution is 231 cubic inches at 60 degrees Fahrenheit;

- f. Concealing, suppressing and omitting that each volumetric gallon of hot motor fuel sold by the Defendants at the retail level contains less motor fuel than the standard U.S. Petroleum Gallon;
- g. Concealing, suppressing and omitting that each volumetric gallon of hot motor fuel sold by the Defendants at the retail level contains less energy than the standard U.S. Petroleum Gallon;
- h. Concealing, suppressing and omitting that the energy content of motor fuel sold by the Defendants varies according to its temperature;
- i. Concealing, suppressing and omitting that the term gallon used by the Defendants in the sale of motor fuel to consumers at the retail level of distribution is not a standard unit of measure.

146. Plaintiffs and class members sustained actual damages as a result of the Defendants' conduct because they received less motor fuel than they were entitled to receive and for which they paid.

147. Defendants' conduct has further injured Plaintiffs and class members by impairing competition within retail motor fuel markets and preventing Plaintiffs and class members from making fully informed decisions about the motor fuel they purchase.

WHEREFORE, Plaintiffs respectfully request that this Court enjoin Defendants from engaging in the unlawful conduct alleged herein; require the Defendants to install temperature correcting equipment on their retail motor fuel dispensing devices or require Defendants to post conspicuous notice on their retail motor fuel dispensing devices notifying consumers of the temperature at which the motor fuel is being sold and the effect of temperature on the energy content of motor fuel; require Defendants to notify all affected persons of the Court's injunction;

declare that selling motor fuel in non-standard gallons or at temperatures above 60 degrees Fahrenheit without volume adjustment violates the North Carolina Unfair and Deceptive Trade Practices Act; award monetary damages incidental to the requested injunctive or declaratory relief; award Plaintiffs and/or class members a reasonable attorneys' fee and award such other relief as the Court may deem just and proper.

Count Seven
(Violation of the Texas Deceptive Trade Practices-Consumer Protection Act)

148. Plaintiffs reallege paragraphs 1-102 above as paragraph 148 of this Count.

149. Plaintiffs bring this Count on behalf of all persons who purchased hot motor fuel from any of the Defendants in the State of Texas.

150. Motor fuel is a good under the Texas Deceptive Trade Practices-Consumer Protection Act.

151. Plaintiffs are consumers under the Texas Deceptive Trade Practices-Consumer Protection Act.

152. The advertising, offering for sale and sale of motor fuel is trade or commerce under the Texas Deceptive Trade Practices-Consumer Protection Act.

153. The Defendants violated and continue to violate the Texas Deceptive Trade Practices-Consumer Protection Act by engaging in the following unconscionable, false, misleading or deceptive acts or practices in connection with the sale or advertisement of hot motor fuel, all of which were false or had the capacity to deceive:

- a. Delivering to Plaintiffs and class members motor fuel substantially in excess of 60 degrees Fahrenheit;
- b. Representing to Plaintiffs and class members motor fuel unit prices in terms of the standard unit of a "gallon," when in fact Defendants deliver non-standard

“gallons” of motor fuel measured volumetrically without reference to temperature;

- c. Delivering to Plaintiffs and class members less motor fuel than Defendants agreed to deliver when the temperature of the motor fuel exceeded 60 degrees Fahrenheit;
- d. Representing that hot motor fuel has characteristics, uses, benefits, or quantities which it does not have.

154. The Defendants violated and continue to violate the Texas Deceptive Trade Practices-Consumer Protection Act by engaging in the following unconscionable, false, misleading or deceptive acts or practices in connection with the sale or advertisement of hot motor fuel, all of which had the capacity to deceive:

- a. Concealing, suppressing and omitting that Defendants are delivering to Plaintiffs and class members motor fuel substantially in excess of 60 degrees Fahrenheit;
- b. Concealing, suppressing and omitting that the standard U.S. Petroleum Gallon in the motor fuel industry at all levels of distribution except the retailer-to-consumer level of distribution is 231 cubic inches at 60 degrees Fahrenheit;
- c. Concealing, suppressing and omitting that each volumetric gallon of hot motor fuel sold by the Defendants at the retail level contains less motor fuel than the standard U.S. Petroleum Gallon;
- d. Concealing, suppressing and omitting that the energy content of motor fuel sold by the Defendants varies according to its temperature;

- e. Concealing, suppressing and omitting that the term gallon used by the Defendants in the sale of motor fuel to consumers at the retail level of distribution is not a standard unit of measure;
- f. Failing to disclose information concerning motor fuel, as stated above, which was known at the time of the transaction where such failure to disclose such information was intended to induce Plaintiffs and class members into retail sale transactions into which Plaintiffs and class members would not have entered had the information been disclosed.

155. The Defendants intended that Plaintiffs and class members would rely on the Defendants' concealments, suppressions or omissions in the purchase of hot motor fuel.

156. Plaintiffs and class members relied on Defendants' false, misleading or deceptive acts or practices.

157. The Defendants, by engaging in the foregoing conduct, took advantage of Plaintiffs and class members' lack of knowledge, ability, experience or capacity to a grossly unfair degree.

158. Plaintiffs and class members sustained actual damages, the producing cause of which was the Defendants' unconscionable or deceptive acts or practices, because they received less fuel motor fuel than they were entitled to receive and for which they paid.

159. Defendants' sale of hot motor fuel and their unconscionable and deceptive acts and practices in connection therewith was and is reckless, shows spite or ill will or demonstrates a reckless indifference to the interests of consumers.

160. Defendants' conduct has further injured Plaintiffs and class members by impairing competition within retail motor fuel markets and preventing Plaintiffs and class members from making fully informed decisions about the motor fuel they purchase.

WHEREFORE, Plaintiffs respectfully request that this Court enjoin Defendants from engaging in the unlawful conduct alleged herein; require the Defendants to install temperature correcting equipment on their retail motor fuel dispensing devices or require Defendants to post conspicuous notice on their retail motor fuel dispensing devices notifying consumers of the temperature at which the motor fuel is being sold and the effect of temperature on the energy content of motor fuel; require Defendants to notify all affected persons of the Court's injunction; declare that selling motor fuel in non-standard gallons or at temperatures above 60 degrees Fahrenheit without volume adjustment violates the Texas Deceptive Trade Practices-Consumer Protection Act and award Plaintiffs and/or class members a reasonable attorneys' fee and award such other relief as the Court may deem just and proper.

Count Eight
(Violation of the Virginia Consumer Protection Act of 1977)

161. Plaintiffs reallege paragraphs 1-102 above as paragraph 161 of this Count.

162. Plaintiffs bring this Count on behalf of all persons who purchased hot motor fuel from any of the Defendants in the State of Virginia.

163. The Defendants are suppliers of motor fuel under the Virginia Consumer Protection Act of 1977.

164. Motor fuel is a good under the Virginia Consumer Protection Act of 1977.

165. The advertisement, sale or offering for sale of motor fuel to be used primarily for personal, family or household purposes is a consumer transaction under the Virginia Consumer Protection Act of 1977.

166. The Defendants violated and continue to violate the Virginia Consumer Protection Act of 1977 using the following deception, fraud, false pretense, false promise or misrepresentation in connection with advertisement, offering for sale and sale of hot motor fuel:

- a. Delivering to Plaintiffs and class members motor fuel substantially in excess of 60 degrees Fahrenheit;
- b. Representing to Plaintiffs and class members motor fuel unit prices in terms of the standard unit of a “gallon,” when in fact Defendants deliver non-standard “gallons” of motor fuel measured volumetrically without reference to temperature;
- c. Delivering to Plaintiffs and class members less motor fuel than Defendants agreed to deliver when the temperature of the motor fuel exceeded 60 degrees Fahrenheit;
- d. Misrepresenting that hot motor fuel has quantities, characteristics uses or benefits that it does not have;
- e. Misrepresenting that hot motor fuel is of a particular quality that it is not;
- f. Advertising hot motor fuel with intent not to sell it as advertised, or with intent not to sell at the price or upon the terms advertised;
- g. Concealing, suppressing and omitting that Defendants are delivering to Plaintiffs and class members motor fuel substantially in excess of 60 degrees Fahrenheit;
- h. Concealing, suppressing and omitting that Defendants are delivering to Plaintiffs and class members motor fuel substantially in excess of 60 degrees Fahrenheit;
- i. Concealing, suppressing and omitting that the standard U.S. Petroleum Gallon in the motor fuel industry at all levels of distribution except the retailer-to-consumer level of distribution is 231 cubic inches at 60 degrees Fahrenheit;

- j. Concealing, suppressing and omitting that each volumetric gallon of hot motor fuel sold by the Defendants at the retail level contains less motor fuel than the standard U.S. Petroleum Gallon;
- k. Concealing, suppressing and omitting that each volumetric gallon of hot motor fuel sold by the Defendants at the retail level contains less energy than the standard U.S. Petroleum Gallon;
- l. Concealing, suppressing and omitting that the energy content of motor fuel sold by the Defendants varies according to its temperature;
- m. Concealing, suppressing and omitting that the term gallon used by the Defendants in the sale of motor fuel to consumers at the retail level of distribution is not a standard unit of measure.

167. The Defendants knew their representations and omissions in connection with the advertisement, offering for sale and sale of hot motor fuel were false and made them with the intent to deceive Plaintiffs and class members.

168. The Defendants intended that Plaintiffs and class members would rely on the Defendants' concealments, suppressions or omissions in the purchase of hot motor fuel.

169. Plaintiffs and class members reasonably relied on Defendants' deceptive acts or practices in connection with Plaintiffs and class members' purchases of hot motor fuel.

170. Plaintiffs and class members sustained actual damages as a result of their reliance on Defendants' deceptive acts or practices because they received less motor fuel than they were entitled to receive and for which they paid.

171. Defendants' conduct has further injured Plaintiffs and class members by impairing competition within retail motor fuel markets and preventing Plaintiffs and class members from making fully informed decisions about the motor fuel they purchase.

172. Defendants' sale of hot motor fuel and their deceptive acts and practices in connection therewith was willful.

WHEREFORE, Plaintiffs respectfully request that this Court enjoin Defendants from engaging in the unlawful conduct alleged herein; require the Defendants to install temperature correcting equipment on their retail motor fuel dispensing devices or require Defendants to post conspicuous notice on their retail motor fuel dispensing devices notifying consumers of the temperature at which the motor fuel is being sold and the effect of temperature on the energy content of motor fuel; require Defendants to notify all affected persons of the Court's injunction; declare that selling motor fuel in non-standard gallons or at temperatures above 60 degrees Fahrenheit without volume adjustment violates the Virginia Consumer Protection Act of 1977; award monetary damages incidental to the requested injunctive or declaratory relief; award Plaintiffs and/or class members a reasonable attorneys' fee and award such other relief as the Court may deem just and proper.

Date: December 14, 2006

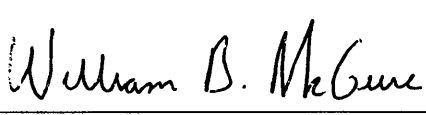
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PLAINTIFFS HEREBY DEMAND A JURY TRIAL OF ALL MATTERS
TRIABLE BY A JURY.

Date: December 14, 2006

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L. Civ. R. 11.2 CERTIFICATION

I, Matthew P. O'Malley, of full age, hereby certify and say:

1. I am an attorney-at-law admitted to practice before this Court and am a partner at the law firm of Tompkins, McGuire, Wachenfeld & Barry, LLP, Four Gateway Center, 5th Floor, 100 Mulberry Street, Newark, New Jersey 07102, New Jersey counsel for plaintiffs herein.
2. Pursuant to and consistent with L. Civ. R. 11.2, I hereby disclose that the matter in controversy is the subject of a separate action pending in the United States District Court, Northern District of California under Case No. C-06-7621 (MHP), filed yesterday, December 13, 2006.
3. The plaintiffs in that action are Mark Rushing, John Telles, Kenneth Becker, William Younger, Charles Parrish, Lesley Duke, Roy Edson, John Taylor, Richard Galauski, Nathan Butler, and Pamela Alwell, individually and on behalf of others similarly situated.
4. The defendants in that action are Alon USA, Inc.; Ambest, Inc.; Chevron USA, Inc.; Circle K Corporation; Citgo Petroleum Corporation; ConocoPhillips; Costco Wholesale Corporation; Flying J, Inc.; Petro Stopping Centers, L.P.; Pilot Travel Centers LLC, Inc.; 7-Eleven, Inc.; Shell Oil Products Company LLC; Tesoro Refining and Marketing Company; The Kroger Company; TravelCenters of America, Inc.; Valero Marketing and Supply Company and Wal-Mart Stores, Inc.
5. Other than the Rushing case filed in the Northern District of California, the undersigned is unaware of any other related action pending in any court, or of any pending arbitration or administrative proceeding.

I certify that the foregoing statements made by me are true. If any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: December 14, 2006



Matthew P. O'Malley