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ORIGINAL
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06 DEC 13 AM 10:10
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CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

10 MARK RUSHING, JOHN TELLES,
11 KENNETH BECKER, WILLIAM
12 YOUNGER, CHARLES PARRISH,
13 LESLEY DUKE, ROY EDSON, JOHN
14 TAYLOR, RICHARD GALAUSKI,
15 NATHAN BUTLER, and PAMELA
16 ALWELL, individually and on behalf of
17 others similarly situated,

Plaintiffs,

vs.

18 ALON USA, INC., AMBEST, INC.,
19 CHEVRON USA, INC., CIRCLE K
20 CORPORATION, CITGO PETROLEUM
21 CORPORATION, CONOCOPHILLIPS,
22 COSTCO WHOLESALE CORPORATION,
23 FLYING J, INC., PETRO STOPPING
24 CENTERS, L.P., PILOT TRAVEL
25 CENTERS LLC, INC., 7-ELEVEN, INC.,
26 SHELL OIL PRODUCTS COMPANY LLC,
27 TESORO REFINING AND MARKETING
28 COMPANY, THE KROGER COMPANY,
TRAVELCENTERS OF AMERICA, INC.,
VALERO MARKETING AND SUPPLY
COMPANY AND WAL-MART STORES,
INC.,

Defendants.

MHP

C 06 7621

CASE NO.:

COMPLAINT
(CLASS ACTION)
JURY TRIAL DEMAND

COMPLAINT
CASE No.:

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COMPLAINT

Plaintiffs Mark Rushing, John Telles, Kenneth Becker, William Younger, Charles Parrish, Lesley Duke, John Taylor, Roy Edson, Richard Galauski, Nathan Butler and Pamela Alwell, individually and on behalf of others similarly situated, through their attorneys, for their Complaint against Defendants ALON USA, Inc. ("ALON"), Ambest, Inc. ("AmBest"), Chevron USA, Inc. ("Chevron"), Circle K Corporation ("Circle K"), CITGO Petroleum Corporation ("Citgo"), ConocoPhillips, Costco Wholesale Corporation ("Costco"), Flying J, Inc. ("Flying J"), Petro Stopping Centers, L.P. ("Petro"), Pilot Travel Centers LLC ("Pilot"), 7-Eleven, Inc. ("7-Eleven"), Shell Oil Products Company LLC ("Shell"), Tesoro Refining and Marketing Company ("Tesoro"), The Kroger Company ("Kroger"), TravelCenters of America, Inc. ("TCA"), Valero Marketing and Supply Company ("Valero") and Wal-Mart Stores, Inc. ("Wal-Mart"), 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, Texas, Florida, 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 Mark Rushing is a resident of Spearville, Louisiana. He is a citizen of Louisiana and is engaged in business as a truck driver. Plaintiff purchased hot diesel fuel in

1 connection with his business from Defendants AmBest, Flying J, TCA, Petro and Pilot in the
2 following states: Arizona, California, Florida, New Jersey, North Carolina, Texas and Virginia.
3 Plaintiff Rushing purchased hot gasoline fuel for personal, family or household use from
4 Defendants Chevron, Circle K, ConocoPhillips, Shell and Wal-Mart in the States of Louisiana and
5 Michigan.

6
7 3. Plaintiff John Telles is a resident of Pinole, California. Pinole is located in Contra
8 Costa County and is within this District. Plaintiff Telles is a citizen of California and is engaged
9 in business as a truck driver. He purchased hot diesel fuel from Defendants AmBest, Flying J,
10 Petro, Pilot and TCA in the States of Arizona and California. Plaintiff Telles also purchased
11 gasoline fuel for personal, family, or household use from Defendants Chevron, ConocoPhillips,
12 Costco, Tesoro and Valero in the State of California.

13
14 4. Plaintiff Kenneth Becker is a resident of Montgomery, Texas. He is a citizen of
15 Texas and is engaged in business as a truck driver. Plaintiff Becker purchased hot diesel fuel in
16 connection with his business from Defendants Flying J, Pilot, 7-Eleven and TCA in the State of
17 Texas. Plaintiff Becker purchased hot gasoline fuel for personal, family or household use from
18 Defendants Chevron, Circle K, ConocoPhillips, 7-Eleven and Shell in the State of Texas.

19
20 5. Plaintiff William Younger is a resident of Kathleen, Florida. He is a citizen of
21 Florida and is engaged in business as a truck driver. Plaintiff purchased hot diesel fuel in
22 connection with his business from Defendants AmBest, Circle K, Flying J, Petro, Pilot, Shell,
23 TCA and Valero in the States of Florida, Georgia, New Jersey, North Carolina, Texas and
24 Virginia. Plaintiff Younger purchased hot gasoline fuel from Defendants Circle K, Flying J and
25 TCA in the States of Florida, New Jersey, North Carolina Texas, and Virginia.

26
27 6. Plaintiff Charles Parrish is a resident of Sierra Vista, Arizona. He is a citizen of
28 Arizona and is engaged in business as a truck driver. Plaintiff purchased hot diesel fuel in

1 connection with his business from Defendants Flying J, Petro and Pilot in the States of Arizona,
2 Texas and Virginia. Plaintiff Parrish purchased hot gasoline fuel from Defendant Flying J in the
3 States of Arizona, Texas and Virginia.

4 7. Plaintiff Lesley Duke is a resident of Hertford, North Carolina. He is a citizen of
5 North Carolina and is engaged in business as a truck driver. Plaintiff purchased hot diesel fuel in
6 connection with his business from Defendants AmBest, Flying J, Petro, Pilot and TCA in the
7 States of Florida, North Carolina, Texas and Virginia. Plaintiff Duke purchased hot gasoline fuel
8 from Defendants Chevron, CITGO and ConocoPhillips in the States of North Carolina and
9 Virginia.

10 8. Plaintiff John Taylor is a resident of Cross Junction, Virginia. He is a citizen of
11 Virginia and is engaged in business as a truck driver. Plaintiff purchased hot diesel fuel in
12 connection with his business from Defendants AmBest, Flying J and Shell in the State of Virginia.
13 Plaintiff Taylor purchased hot gasoline fuel primarily for personal, family or household use from
14 Defendant Shell in the State of Virginia.

15 9. Plaintiff Roy Edson is a resident of Lynchburg, Virginia. He is a citizen of
16 Virginia. Plaintiff Edson purchased hot diesel fuel for use in Virginia. Plaintiff Edson purchased
17 hot gasoline fuel primarily for personal, family or household use from Defendant Kroger in the
18 State of Virginia.

19 10. Plaintiff Richard Galauski is a resident of Howell, New Jersey. He is a citizen of
20 New Jersey and is engaged in business as a truck driver. Plaintiff purchased hot diesel fuel in
21 connection with his business from Defendants AmBest, Chevron, Citgo, ConocoPhillips, Flying J,
22 Pilot, Shell and TCA in the State of Florida. Plaintiff Galauski also purchased hot gasoline fuel
23 from Defendants CITGO, Shell and Valero in the States of Florida and New Jersey.
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1 19. At all the times relevant to this Complaint, Chevron was engaged in the sale of motor
2 fuel in the State of California and in this District under the Chevron and Texaco brand names.

3 20. Defendant Circle K Corporation ("Circle K") is incorporated under the laws of the
4 State of Delaware with its principal place of business in Phoenix, Arizona.

5 21. At all times relevant to this Complaint, Circle K was engaged in the sale of motor fuel
6 in the State of California and in this District under the Circle K brand name.

7 22. Defendant CITGO Petroleum Corporation ("CITGO") is incorporated under the laws
8 of the State of Delaware with its principal place of business in Houston, Texas.

9 23. CITGO is a wholly owned operating subsidiary of PDV Holding, Inc.

10 24. CITGO's ultimate parent is the national oil company of the Bolivarian Republic of
11 Venezuela, Petroleos de Venezuela, S.A.

12 25. At all times relevant to this Complaint, CITGO was engaged in the sale of motor fuel
13 in the State of California and in this District at CITGO and 7-Eleven locations under the CITGO
14 brand name.

15 26. Defendant ConocoPhillips is incorporated under the laws of the State of Delaware with
16 its principal place of business in Houston, Texas.

17 27. At all times relevant to this Complaint, ConocoPhillips was engaged in the sale of
18 motor fuel in the State of California and in this District under the Conoco, Phillips 66 and 76
19 brand names.

20 28. Defendant Costco Wholesale Corporation ("Costco") is incorporated under the laws of
21 the State of Washington with its principal place of business in Issaquah, Washington.

22 29. At all times relevant to this Complaint, Costco was engaged in the sale of motor fuel in
23 the State of California and in this District.

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1 30. Defendant Flying J, Inc. ("Flying J") is incorporated under the laws of the State of
2 Utah with its principal place of business in Ogden, Utah.

3 31. At all the times relevant to this Complaint, Flying J was engaged in the sale of motor
4 fuel in the State of California and in this District.

5 32. Defendant Pilot Travel Centers LLC is formed under the laws of the State of Delaware
6 with its principal place of business in Knoxville, Tennessee.

7 33. At all times relevant to this Complaint, Pilot Travel was engaged in the sale of motor
8 fuel in the State of California and in this District.

9 34. Defendant 7-Eleven, Inc. ("7-Eleven") is incorporated under the laws of the State of
10 Texas with its principal place of business in Dallas, Texas.

11 35. At all the times relevant to this Complaint, 7-Eleven was engaged in the sale of motor
12 fuel in the State of California and in this District.

13 36. Defendant Shell Oil Products Company LLC ("Shell") is formed as a limited liability
14 company under the laws of the State of Delaware with its principal place of business in Houston,
15 Texas.

16 37. At all times relevant to this Complaint, Shell was engaged in the sale of motor fuel in
17 the State of California and in this District under the Shell brand name.

18 38. Defendant Tesoro Refining and Marketing Company ("Tesoro") is incorporated under
19 the laws of the State of Delaware with its principal place of business in Auburn, Washington.

20 39. At all times relevant to this Complaint, Tesoro was engaged in the sale of motor fuel in
21 the State of California and in this District under the Tesoro brand name as well as, in conjunction
22 with Wal-Mart, the Mirastar name.

23 40. Defendant The Kroger Company ("Kroger") is incorporated under the laws of the State
24 of Ohio with its principal place of business in Cincinnati, Ohio.

1 52. A substantial part of the acts, omissions, and transactions forming the basis of this
2 Complaint arose or took place in the counties of Alameda, Contra Costa and San Francisco.

3 **FACTUAL BACKGROUND**

4 ***Motor Fuels Are Purchased for the Energy They Provide***

5
6 53. The burning of motor fuel provides the energy harnessed by internal combustion,
7 diesel, rotary and jet engines that are used to power automobiles, trucks, trains, planes, boats,
8 motorcycles and other engine-powered devices such as lawn mowers and generators.

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

10 55. The energy content of motor fuel is expressed and measured in terms of British
11 Thermal Units ("BTU").

12 ***The Physical Properties of Motor Fuel***

13
14 56. Motor fuels are petroleum distillate liquids, and their volumes (i.e., the amount of
15 space they occupy) expand and contract as a result of changes in their temperatures even though
16 the actual amount of the fuel remains unchanged.

17 57. As the temperature of motor fuel increases, the fuel expands, or increases, because its
18 molecules move further apart making the motor fuel less dense, and, as a result, the same quantity
19 of fuel at the higher temperature takes up a greater space (i.e., a greater volume). As the
20 temperature of motor fuel decreases, the fuel contracts, or decreases, because its molecules move
21 closer together making the motor fuel denser, and, as a result, the same quantity of fuel at the
22 lower temperature takes up a smaller space (i.e., a smaller volume).

23
24 58. Thus, for instance, one U.S. petroleum gallon of gasoline at 60 degrees Fahrenheit has
25 a volume of 231 cubic inches, but the same quantity of gasoline at seventy-five degrees Fahrenheit
26 has a volume of 233.39085 cubic inches, and the same quantity of gasoline at ninety degrees
27 Fahrenheit has a volume of 235.7817 cubic inches.
28

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

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

4 61. In other words, a “gallon” (defined volumetrically without reference to temperature) of
5 motor fuel at any given temperature does not contain an equivalent amount of motor fuel as a
6 “gallon” (defined volumetrically without reference to temperature) of motor fuel at a different
7 temperature.
8

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

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

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

16 65. Specifically, a “gallon” of motor fuel in the petroleum industry means that amount of
17 motor fuel which occupies 231 cubic inches when its temperature is 60 degrees Fahrenheit.
18

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

20 66. Many commodities are sold in variable quantities.

21 67. When commodities are sold in variable quantities, they are typically sold at a specified
22 price per standard unit of measure.
23

24 68. Sales of commodities at a specified price per standard unit of measure means or
25 implies, unless otherwise stated, that standard units of a particular kind or grade of the commodity
26 are fungible or, in other words, that each such unit is freely interchangeable with any other such
27 unit of that same kind or grade of the commodity.
28

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

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

6 71. The price of a fungible commodity in a given transaction would have little if any
7 relevance or meaning beyond that specific transaction if the price were not expressed in terms of a
8 price per standard unit because market participants would have no reliable means of comparing the
9 costs and benefits of any given transaction for that commodity with any other transaction for the
10 commodity.
11

12 72. For instance, using a standard unit of measurement enables merchants to standardize
13 their product pricing, enabling them to deliver equal amounts of a commodity at uniform prices. It
14 also enables merchants to compare their own prices with those of their competitors, in turn
15 enabling merchants to determine whether their pricing is competitive.
16

17 73. The practice similarly enables buyers to compare pricing of various merchants, as well
18 as to gauge from transaction to transaction whether they are paying more, less or the same for the
19 commodity.
20

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

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

26 76. Motor fuel is a fungible commodity sold and purchased in variable quantities.
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1 Trust funded research by The American Petroleum Institute to analyze the problem and to create
2 an appropriate standardized unit of measurement for use in the sale of petroleum products.

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

5
6 *The Development of the Industry Standard "Gallon"*

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

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

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

13 87. The defined "gallon" thereby enabled all parties to a motor fuel transaction to measure
14 accurately the amount of motor fuel changing hands in a transaction, notwithstanding the
15 variations in the volume of the fuel resulting from temperature changes.

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

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

- 21
- 22 a. The United States Department of Treasury, through its Bureau of Customs, which
23 requires imported petroleum products to be declared in gallons of 231 cubic inches
24 at 60 degrees Fahrenheit;
 - 25 b. The American Petroleum Institute, which has adopted the definition as a
26 recommended industry standard, API 2540, also called D-1250;
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- 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; and
- 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).

90. 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

91. 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.

92. 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.

93. 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.

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

1 95. Because the average temperature of motor fuel sold annually in the United States, and
2 in each of the states where Plaintiffs reside, exceeds 60 degrees Fahrenheit, each year the
3 petroleum industry delivers to consumers substantially smaller quantities of motor fuel per non-
4 standard "gallon" than the industry would deliver if it measured deliveries of motor fuel to
5 consumers by the industry standard "gallon" of 231 cubic inches of motor fuel at 60 degrees
6 Fahrenheit.

7
8 96. As a result, consumers in the United States collectively spend billions of dollars more
9 each year to purchase the same quantity of motor fuel they would have received at advertised
10 prices "per gallon" if the industry measured deliveries of motor fuel to consumers by the industry
11 standard "gallon" of 231 cubic inches of motor fuel at 60 degrees Fahrenheit.

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

13
14 97. Because the petroleum industry profits from the sale of hot motor fuel to U.S.
15 consumers, it has resisted all efforts to change its practice of measuring deliveries of motor fuel to
16 retail customers in non-standard, non-temperature-adjusted "gallons."

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

20
21 99. Temperature compensation equipment automatically adjusts each pumped gallon of
22 motor fuel to provide a volume greater than 231 cubic inches when the temperature of the fuel
23 exceeds 60 degrees Fahrenheit. The exact amount of the increased volume corresponds directly to
24 the amount by which the actual temperature of the fuel exceeds 60 degrees Fahrenheit.

25 100. Conversely, temperature compensation equipment automatically adjusts each pumped
26 gallon of motor fuel to provide a volume less than 231 cubic inches when the temperature of the
27 fuel is less than 60 degrees Fahrenheit. The exact amount of the decreased volume corresponds
28

1 directly to the amount by which the actual temperature of the fuel is lower than 60 degrees
2 Fahrenheit.

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

7
8 102. When acting as retail sellers of motor fuel, the Defendants have refused to install
9 temperature compensation equipment at their retail outlets. When acting as franchisors, the
10 Defendants control the specifications of the motor fuel dispensing devices at their franchisees’
11 retail locations and prohibit their franchisees from installing temperature compensation equipment.

12 *The Petroleum Industry Embraces Temperature Compensation in Canada*

13
14 103. The average temperature of motor fuel sold annually in Canada is less than 60 degrees
15 Fahrenheit.

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

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

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

4 112. Defendants' refusal to sell standardized, temperature-adjusted motor fuel at the retail
5 level, or to report the temperature at which a given batch of motor fuel is delivered, prevents
6 consumers from accurately making even rudimentary price comparisons in determining where to
7 purchase motor fuel.
8

9 113. The opacity of prices in the retail motor fuel market gives retailers unfair power over
10 price and impairs the basic competitive processes that work to maximize consumer benefit in a
11 market economy. Undisclosed variation in the quantities of motor fuel delivered to consumers
12 allows retailers that deliver less product at a given price to earn greater profits than retailers that
13 deliver more product at the same price. By extension, retailers that deliver less consumer benefit
14 are more likely than retailers that deliver more consumer benefit to survive market competition.
15

16 114. Defendants' refusal to sell standardized, temperature-adjusted motor fuel also creates
17 perverse incentives for motor fuel retailers. The current means by which motor fuel is delivered at
18 the retail (but not wholesale) level creates incentives for retailers to transport, store, and deliver
19 motor fuel to consumers in a way that maximizes the motor fuel's temperature. At worst, the
20 current means of delivering motor fuel at the retail (but not the wholesale) level creates incentives
21 for retailers to affirmatively heat motor fuel to earn a competitive edge vis-à-vis competitors.
22 These incentives have the effect of widening the variation in the temperature at which motor fuel
23 is delivered at the retail level and impairing market competition by further obscuring the true price
24 of motor fuel.
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1 115. Motor fuel retailers sell a variety of fuel products that vary by octane levels and other
2 aspects of the fuel's chemical make-up. This variation maximizes consumer choice and is at the
3 heart of efforts by Defendants to market and sell motor fuel "brands."

4 116. Many consumers track the fuel economy of their vehicles, both to ensure that their
5 vehicles remain in proper working order, and to determine which "brand" of motor fuel delivers
6 optimal performance.
7

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

11 118. Because consumers cannot make fully informed decisions about which "brand" of
12 motor fuel delivers optimal performance, Defendants' refusal to sell standardized, temperature-
13 adjusted motor fuel at the retail level foils consumer choice and thus impairs basic market
14 competition.
15

16 CLASS ACTION ALLEGATIONS

17 119. Plaintiffs bring this action on behalf of all persons who purchased motor fuel at a
18 temperature greater than 60 degrees Fahrenheit from one or more of the Defendants in the States
19 of California, Arizona, Florida, Texas, North Carolina, Virginia, and New Jersey. Excluded from
20 the class are all officers and directors of the Defendants, their parents, subsidiaries and affiliates,
21 any law firm or attorney of record in this matter and any judge who presides over this case.
22

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

26 121. There are questions of fact and law common to all class members, including:
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- 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;

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- 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; and
- 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.

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

123. 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.

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

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

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

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

128. 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.

1 Accordingly, a class action is superior to other available methods for the fair and efficient
2 adjudication of this controversy.

3 129. The prosecution of separate actions by individual members of the class would create a
4 risk of inconsistent or varying adjudications with respect to individual members of the class which
5 would establish incompatible standards of conduct for the Defendants.
6

7 130. The Defendants have acted or refused to act on grounds generally applicable to the
8 class, thereby making appropriate final injunctive relief or corresponding declaratory relief with
9 respect to the class as a whole.
10

11
12 **CAUSES OF ACTION**
13 **Count One**
14 **(Violation of the Arizona Consumer Fraud Act)**

15 131. Plaintiffs reallege paragraphs 1-130 above as paragraph 131 of this Count.

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

18 133. Motor fuel is merchandise under the Arizona Consumer Fraud Act.

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

- 22 a. Delivering to Plaintiffs and class members motor fuel substantially in excess of 60
23 degrees Fahrenheit;
24
25 b. Representing to Plaintiffs and class members motor fuel unit prices in terms of the
26 standard unit of a "gallon," when in fact Defendants deliver non-standard "gallons"
27 of motor fuel measured volumetrically without reference to temperature;
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- 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. 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:
 - e. Concealing, suppressing and omitting that Defendants are delivering to Plaintiffs and class members motor fuel substantially in excess of 60 degrees Fahrenheit;
 - f. 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;
 - g. 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;
 - h. 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;
 - i. Concealing, suppressing and omitting that the energy content of motor fuel sold by the Defendants varies according to its temperature;
 - j. 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;
- k. 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.

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

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

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

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

26 138. Plaintiffs reallege paragraphs 1-130 above as paragraph 138 of this Count.
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1 139. Plaintiffs bring this Count on behalf of all persons who purchased hot motor fuel from
2 any of the Defendants in the State of California.

3 140. Defendants violated and continue to violate the California Business and Professions
4 Code §17200, *et seq.* through one or more of the following unfair, unlawful or fraudulent
5 practices:
6

- 7 a. Delivering to Plaintiffs and class members motor fuel substantially in excess of 60
8 degrees Fahrenheit;
- 9 b. Representing to Plaintiffs and class members motor fuel unit prices in terms of the
10 standard unit of a “gallon,” when in fact Defendants deliver non-standard “gallons”
11 of motor fuel measured volumetrically without reference to temperature;
- 12 c. Delivering to Plaintiffs and class members less motor fuel than Defendants agreed
13 to deliver when the temperature of the motor fuel exceeded 60 degrees Fahrenheit;
- 14 d. Concealing, suppressing and omitting that Defendants are delivering to Plaintiffs
15 and class members motor fuel substantially in excess of 60 degrees Fahrenheit;
- 16 e. Concealing, suppressing and omitting that the standard U.S. Petroleum Gallon in
17 the motor fuel industry at all levels of distribution except the retailer-to-consumer
18 level of distribution is 231 cubic inches at 60 degrees Fahrenheit;
- 19 f. Concealing, suppressing and omitting that each volumetric gallon of hot motor fuel
20 sold by the Defendants at the retail level contains less motor fuel than the standard
21 U.S. Petroleum Gallon;
- 22 g. Concealing, suppressing and omitting that each volumetric gallon of hot motor fuel
23 sold by the Defendants at the retail level contains less energy than the standard U.S.
24 Petroleum Gallon;
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- 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.

141. 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.

142. 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;

1 declare that selling motor fuel in non-standard gallons or at temperatures above 60 degrees
2 Fahrenheit without volume adjustment violates the California Business & Professions Code;
3 award monetary damages incidental to the requested injunctive or declaratory relief; award
4 Plaintiffs and/or class members a reasonable attorneys' fee, including under California Code of
5 Civil Procedure 1021.5, and award such other relief as the Court may deem just and proper.
6

7 **Count Three**

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

9 143. Plaintiffs reallege Paragraphs 1-130 above as paragraph 143 of this Count.

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

13 145. Defendants violated and continue to violate the California Consumer Legal Remedies
14 Act, including without limitation California Civil Code Section 1170 (a) (5), through one or more
15 of the following unfair methods of competition and unfair or deceptive acts or practices:
16

- 17 a. Representing to Plaintiffs and class members motor fuel prices in terms of the
18 standard unit of a "gallon," when in fact Defendants deliver non-standard "gallons"
19 of motor fuel measured volumetrically without reference to temperature;
20
21 b. Concealing, suppressing, and omitting that Defendants are delivering to Plaintiffs
22 and class members motor fuel substantially in excess of 60 degrees Fahrenheit;
23
24 c. Concealing, suppressing and omitting that the standard U.S. Petroleum Gallon in
25 the motor fuel industry at all levels of distribution except the retailer-to-consumer
26 level of distribution is 231 cubic inches at 60 degrees Fahrenheit;
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- 1 d. Concealing, suppressing, and omitting that each volumetric gallon of hot motor fuel
- 2 sold by the Defendants at the retail level contains less motor fuel than the standard
- 3 U.S. Petroleum Gallon;
- 4 e. Concealing, suppressing, and omitting that each volumetric gallon of hot motor
- 5 fuel sold by the Defendants at the retail level contains less motor fuel than a gallon
- 6 as defined by California Regulations;
- 7 f. Concealing, suppressing, and omitting that the energy content of motor fuel sold by
- 8 the Defendants varies according to its temperature.
- 9

10 146. Plaintiffs and class members have been injured by Defendants' unfair methods of

11 competition and unfair or deceptive acts or practices because they received less motor fuel than

12 they were entitled to receive and for which they paid.

13 147. Plaintiffs' seek an order enjoining Defendants methods, acts, and practices.

14 148. Plaintiffs request an award of court costs and attorney's fees pursuant to Civil Code

15 Section 1780 (c).

16 149. Plaintiffs have or will provide written notice to Defendants pursuant to Civil Code

17 Section 1782 and will amend this Complaint to seek damages against one or more Defendant

18 pursuant to Section 1780 should any such Defendant not correct and rectify its violations of

19 Section 1770 within the time specified in Section 1782.

20 WHEREFORE, Plaintiffs respectfully request that this Court enjoin Defendants from

21 engaging in the unlawful conduct alleged herein; require the Defendants to install temperature

22 correcting equipment on their retail motor fuel dispensing devices or require Defendants to post

23 conspicuous notice on their retail motor fuel dispensing devices notifying consumers of the

24 temperature at which the motor fuel is being sold and the effect of temperature on the energy

25 content of motor fuel; require Defendants to notify all affected persons of the Court's injunction;

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1 declare that selling motor fuel in non-standard gallons or at temperatures above 60 degrees
2 Fahrenheit without volume adjustment violates the California Consumer Legal Remedies Act; and
3 award Plaintiffs and/or class members a reasonable attorneys' fee and award such other relief as
4 the Court may deem just and proper.

5
6 **Count Four**
7 **(Violation of the Florida Deceptive and Unfair Trade Practices Act)**

8 150. Plaintiffs reallege paragraphs 1-130 above as paragraph 150 of this Count.

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

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

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

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

- 18
- 19 a. Delivering to Plaintiffs and class members motor fuel substantially in excess of 60
20 degrees Fahrenheit;
 - 21 b. Representing to Plaintiffs and class members motor fuel unit prices in terms of the
22 standard unit of a "gallon," when in fact Defendants deliver non-standard "gallons"
23 of motor fuel measured volumetrically without reference to temperature;
 - 24 c. Delivering to Plaintiffs and class members less motor fuel than Defendants agreed
25 to deliver when the temperature of the motor fuel exceeded 60 degrees Fahrenheit;
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- 1 d. Concealing, suppressing and omitting that Defendants are delivering to Plaintiffs
2 and class members motor fuel substantially in excess of 60 degrees Fahrenheit;
3 e. Concealing, suppressing and omitting that the standard U.S. Petroleum Gallon in
4 the motor fuel industry at all levels of distribution except the retailer-to-consumer
5 level of distribution is 231 cubic inches at 60 degrees Fahrenheit;
6 f. Concealing, suppressing and omitting that each volumetric gallon of hot motor fuel
7 sold by the Defendants at the retail level contains less motor fuel than the standard
8 U.S. Petroleum Gallon;
9 g. Concealing, suppressing and omitting that each volumetric gallon of hot motor fuel
10 sold by the Defendants at the retail level contains less energy than the standard U.S.
11 Petroleum Gallon;
12 h. Concealing, suppressing and omitting that the energy content of motor fuel sold by
13 the Defendants varies according to its temperature;
14 i. Concealing, suppressing and omitting that the term gallon used by the Defendants
15 in the sale of motor fuel to consumers at the retail level of distribution is not a
16 standard unit of measure.
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19 155. Plaintiffs and class members were aggrieved by and sustained actual damages and as a
20 result of the Defendants' conduct because they received less motor fuel than they were entitled to
21 receive and for which they paid.
22

23 WHEREFORE, Plaintiffs respectfully request that this Court enjoin Defendants from
24 engaging in the unlawful conduct alleged herein; require the Defendants to install temperature
25 correcting equipment on their retail motor fuel dispensing devices or require Defendants to post
26 conspicuous notice on their retail motor fuel dispensing devices notifying consumers of the
27 temperature at which the motor fuel is being sold and the effect of temperature on the energy
28

1 content of motor fuel; require Defendants to notify all affected persons of the Court's injunction;
2 declare that selling motor fuel in non-standard gallons or at temperatures above 60 degrees
3 Fahrenheit without volume adjustment violates the Florida Deceptive and Unfair Trade Practices
4 Act; award monetary damages incidental to the requested injunctive or declaratory relief; award
5 Plaintiffs and/or class members a reasonable attorneys' fee and award such other relief as the
6 Court may deem just and proper.

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

10 156. Plaintiffs reallege paragraphs 1-130 above as paragraph 156 of this Count.

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

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

14 159. In connection with Defendants' sale or advertisement of motor fuel and Defendants'
15 subsequent performance of their agreements to sell motor fuel, the Defendants performed the
16 following affirmative acts, among others, that constitute unconscionable commercial practices,
17 deception, fraud and misrepresentation, all of which had the capacity to mislead Plaintiffs and
18 class members:
19

- 20 a. Delivering to Plaintiffs and class members motor fuel substantially in excess of 60
21 degrees Fahrenheit;
22 b. Representing to Plaintiffs and class members motor fuel unit prices in terms of the
23 standard unit of a "gallon," when in fact Defendants deliver non-standard "gallons"
24 of motor fuel measured volumetrically without reference to temperature;
25 c. Delivering to Plaintiffs and class members less motor fuel than Defendants agreed
26 to deliver when the temperature of the motor fuel exceeded 60 degrees Fahrenheit;
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- d. 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;
- e. Concealing, suppressing and omitting that Defendants are delivering to Plaintiffs and class members motor fuel substantially in excess of 60 degrees Fahrenheit;
- f. 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;
- g. 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;
- h. 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;
- i. Concealing, suppressing and omitting that the energy content of motor fuel sold by the Defendants varies according to its temperature;
- j. 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.

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

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

- 4 a. Delivering to Plaintiffs and class members motor fuel substantially in excess of 60
5 degrees Fahrenheit;
- 6 b. Representing to Plaintiffs and class members motor fuel unit prices in terms of the
7 standard unit of a “gallon,” when in fact Defendants deliver non-standard “gallons”
8 of motor fuel measured volumetrically without reference to temperature;
- 9 c. Delivering to Plaintiffs and class members less motor fuel than Defendants agreed
10 to deliver when the temperature of the motor fuel exceeded 60 degrees Fahrenheit;
- 11 d. Concealing, suppressing and omitting that Defendants are delivering to Plaintiffs
12 and class members motor fuel substantially in excess of 60 degrees Fahrenheit;
- 13 e. Concealing, suppressing and omitting that the standard U.S. Petroleum Gallon in
14 the motor fuel industry at all levels of distribution except the retailer-to-consumer
15 level of distribution is 231 cubic inches at 60 degrees Fahrenheit;
- 16 f. Concealing, suppressing and omitting that each volumetric gallon of hot motor fuel
17 sold by the Defendants at the retail level contains less motor fuel than the standard
18 U.S. Petroleum Gallon;
- 19 g. Concealing, suppressing and omitting that each volumetric gallon of hot motor fuel
20 sold by the Defendants at the retail level contains less energy than the standard U.S.
21 Petroleum Gallon;
- 22 h. Concealing, suppressing and omitting that the energy content of motor fuel sold by
23 the Defendants varies according to its temperature;
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1 i. Concealing, suppressing and omitting that the term gallon used by the Defendants
2 in the sale of motor fuel to consumers at the retail level of distribution is not a
3 standard unit of measure.

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

7
8 WHEREFORE, Plaintiffs respectfully request that this Court enjoin Defendants from
9 engaging in the unlawful conduct alleged herein; require the Defendants to install temperature
10 correcting equipment on their retail motor fuel dispensing devices or require Defendants to post
11 conspicuous notice on their retail motor fuel dispensing devices notifying consumers of the
12 temperature at which the motor fuel is being sold and the effect of temperature on the energy
13 content of motor fuel; require Defendants to notify all affected persons of the Court's injunction;
14 declare that selling motor fuel in non-standard gallons or at temperatures above 60 degrees
15 Fahrenheit without volume adjustment violates the North Carolina Unfair and Deceptive Trade
16 Practices Act; award monetary damages incidental to the requested injunctive or declaratory relief;
17 award Plaintiffs and/or class members a reasonable attorneys' fee and award such other relief as
18 the Court may deem just and proper.

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

22 168. Plaintiffs reallege paragraphs 1-130 above as paragraph 168 of this Count.

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

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

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1 171. Plaintiffs are consumers under the Texas Deceptive Trade Practices-Consumer
2 Protection Act.

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

5 173. The Defendants violated and continue to violate the Texas Deceptive Trade Practices-
6 Consumer Protection Act by engaging in the following unconscionable, false, misleading or
7 deceptive acts or practices in connection with the sale or advertisement of hot motor fuel, all of
8 which were false or had the capacity to deceive:
9

- 10 a. Delivering to Plaintiffs and class members motor fuel substantially in excess of 60
11 degrees Fahrenheit;
- 12 b. Representing to Plaintiffs and class members motor fuel unit prices in terms of the
13 standard unit of a "gallon," when in fact Defendants deliver non-standard "gallons"
14 of motor fuel measured volumetrically without reference to temperature;
- 15 c. Delivering to Plaintiffs and class members less motor fuel than Defendants agreed
16 to deliver when the temperature of the motor fuel exceeded 60 degrees Fahrenheit;
- 17 d. Representing that hot motor fuel has characteristics, uses, benefits, or quantities
18 which it does not have.
19

20 174. The Defendants violated and continue to violate the Texas Trade Practices-Consumer
21 Protection Act by engaging in the following unconscionable, false, misleading or deceptive acts or
22 practices in connection with the sale or advertisement of hot motor fuel, all of which had the
23 capacity to deceive:
24

- 25 a. Concealing, suppressing and omitting that Defendants are delivering to Plaintiffs
26 and class members motor fuel substantially in excess of 60 degrees Fahrenheit;
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- 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.

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

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

177. 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.

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

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

7
8 WHEREFORE, Plaintiffs respectfully request that this Court enjoin Defendants from
9 engaging in the unlawful conduct alleged herein; require the Defendants to install temperature
10 correcting equipment on their retail motor fuel dispensing devices or require Defendants to post
11 conspicuous notice on their retail motor fuel dispensing devices notifying consumers of the
12 temperature at which the motor fuel is being sold and the effect of temperature on the energy
13 content of motor fuel; require Defendants to notify all affected persons of the Court's injunction;
14 declare that selling motor fuel in non-standard gallons or at temperatures above 60 degrees
15 Fahrenheit without volume adjustment violates the Texas Deceptive Trade Practices-Consumer
16 Protection Act and award Plaintiffs and/or class members a reasonable attorneys' fee and award
17 such other relief as the Court may deem just and proper.
18

19
20 **Count Eight**
(Violation of the Virginia Consumer Protection Act of 1977)

21 180. Plaintiffs reallege paragraphs 1-130 above as paragraph 179 of this Count.

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

24 182. The Defendants are suppliers of motor fuel under the Virginia Consumer Protection
25 Act of 1977.

26 183. Motor fuel is a good under the Virginia Consumer Protection Act of 1977.
27
28

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

4 185. The Defendants violated and continue to violate the Virginia Consumer Protection Act
5 of 1977 using the following deception, fraud, false pretense, false promise or misrepresentation in
6 connection with advertisement, offering for sale and sale of hot motor fuel:
7

- 8 a. Delivering to Plaintiffs and class members motor fuel substantially in excess of 60
9 degrees Fahrenheit;
- 10 b. Representing to Plaintiffs and class members motor fuel unit prices in terms of the
11 standard unit of a "gallon," when in fact Defendants deliver non-standard "gallons"
12 of motor fuel measured volumetrically without reference to temperature;
- 13 c. Delivering to Plaintiffs and class members less motor fuel than Defendants agreed
14 to deliver when the temperature of the motor fuel exceeded 60 degrees Fahrenheit;
- 15 d. Misrepresenting that hot motor fuel has quantities, characteristics uses or benefits
16 that it does not have;
- 17 e. Misrepresenting that hot motor fuel is of a particular quality that it is not;
- 18 f. Advertising hot motor fuel with intent not to sell it as advertised, or with intent not
19 to sell at the price or upon the terms advertised;
- 20 g. Concealing, suppressing and omitting that Defendants are delivering to Plaintiffs
21 and class members motor fuel substantially in excess of 60 degrees Fahrenheit;
- 22 h. Concealing, suppressing and omitting that Defendants are delivering to Plaintiffs
23 and class members motor fuel substantially in excess of 60 degrees Fahrenheit;
- 24 and class members motor fuel substantially in excess of 60 degrees Fahrenheit;
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- 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.

186. 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.

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

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

189. 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.

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190. 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 13, 2006.

CARLSON, CALLADINE & PETERSON LLP

By: Robert M. Peterson
Robert M. Peterson
Attorneys for Plaintiffs

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

Date: December 13, 2006.

CARLSON, CALLADINE & PETERSON LLP

By: Robert M. Peterson
Robert M. Peterson
Attorneys for Plaintiffs

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KOREIN TILLERY LLC
3205 NORTH MICHIGAN PLAZA,
SUITE 1950
Chicago, IL 60601

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5
 6 **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA
 7

8 **MARK RUSHING, JOHN TELLES,**
HOWARD HAFFENDEN, KENNETH
 9 **BECKER, WILLIAM YOUNGER, JAMEY**
OWENS, CHARLES PARRISH, LESLEY
 10 **DUKE, JIM MELLON, WILLIAM BOYD,**
FRANK OWEN, ROY EDSON, JOHN
 11 **TAYLOR, JAY HOSTY and RICHARD**
GALAUSKI, individually and on behalf of
 12 **others similarly situated,**

CASE NO.:

Plaintiffs,

vs.

CLASS ACTION COMPLAINT AND JURY DEMAND

13
 14
 15 **ALON USA, INC., AMBEST, INC., BP**
WEST COAST PRODUCTS LLC,
 16 **CHEVRON USA, INC., CIRCLE K**
 17 **CORPORATION, CITGO PETROLEUM**
CORPORATION, CONOCOPHILLIPS,
 18 **COSTCO WHOLESALE CORPORATION,**
FLYING J, INC., PACIFIC PRIDE
 19 **SERVICES, INC., PETRO STOPPING**
CENTERS, L.P., PILOT TRAVEL
 20 **CENTERS LLC, QUIK STOP MARKETS,**
 21 **INC., 7-11 CORPORATION, SHELL OIL**
PRODUCTS COMPANY LLC, TESORO
 22 **REFINING AND MARKETING**
COMPANY, THE KROGER COMPANY,
 23 **TRAVELCENTERS OF AMERICA, INC.**
 24 **VALERO MARKETING AND SUPPLY**
COMPANY AND WALMART

Defendants.

AFFIDAVIT

I, John Telles, declare as follows:

COMPLAINT
CASE No.:

KOREIN TILLERY LLC
 3205 NORTH MICHIGAN PLAZA,
 SUITE 1950
 Chicago, IL 60601

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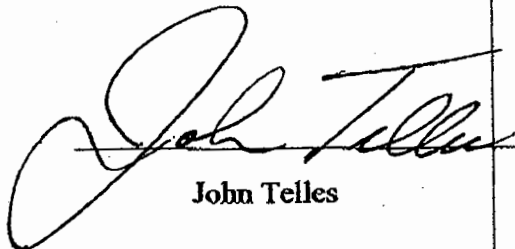
1. I am one the named plaintiffs in this complaint.

2. I live in Pinole, California and have purchased gasoline, in the Counties of San Francisco or Alameda or in the Northern District of California for personal, family, or household use, from Defendants Chevron, ConocoPhillips, Costco, Tesoro and Valero.

3. I am informed and believe that the defendants do business in the counties of San Francisco or Alameda or the Northern District of California.

4. I am also informed and believe that all of the Defendants have sold gasoline which has been consumed in the counties of San Francisco or Alameda or in the Northern District of California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed in PINOLE, CA. on December, 12, 2006.


John Telles

KOREN TILLERY LLC
3205 NORTH MICHIGAN PLAZA
SUITE 1950
CHICAGO, IL 60601