UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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10-1130

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WILLIAM WHITE, KEN BAILEY, R. CARLEEN CORDWELL, HENRY KRIEGSTEIN, JOAN KRIEGSTEIN, HILARY SCHULTZ, NADINE MONACO, ANN BUTTRICK FLOYD, and SANDCASTLE REALTY, INC.
Appellants/Plaintiffs

vs.

R.M. PACKER, CO., INC., DRAKE PETROLEUM CO., INC. KENYON OIL COMPANY, MID-VALLEY OIL COMPANY, FRANCIS J. PACIELLO d/b/a EDGARTOWN MOBIL, and DEPOT CORNER, INC.,
Appellees/Defendants

_____

APPEAL FROM THE
UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

_____

PLAINTIFFS/APPELLANTS' BRIEF

_____

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FRAP 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1, the undersigned counsel to plaintiff/appellant Sandcastle Realty,Inc. hereby certifies that none of its stock is owned by a public company or a parent company.

SANDCASTLE REALTY, INC.
By its Attorney,

//Stephen Schultz
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DATE: March 19, 2010

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Reasons Why Oral Argument Should be Heard

Appellants/plaintiffs request oral argument in this case for the following reasons: (1) the case is a class action potentially affecting thousands of people, (2) the price fixing issues in the case raise questions of public importance, (3) the price gouging issues in the case raise issues of public importance and raise issues of first impression relating to a law which has never been interpreted by the courts.

Jurisdictional Statement

The District Court had jurisdiction of this case pursuant to 28 USC § 1331, 28 USC § 1332(d)(2), 28 USC § 1337, 15 USC § 4, 15 USC § 15(a) and 15 USC § 26.

On January 7, 2010, the District Court entered judgment on behalf of the defendants.

On January 28, 2010, the plaintiffs filed a timely notice of appeal.

This Court has jurisdiction of the appeal pursuant to 28 USC § 1291.

Statement of the Issues

1. Whether there is a dispute of material facts as to whether defendants fixed the price of gasoline being sold at their gasoline stations on Martha's Vineyard in violation of 15 USC § 1?

2. Whether there is a dispute of material facts as to whether defendants engaged in price gouging following Hurricanes Katrina and Rita in violation of Mass. Gen. Laws c. 93A § 2 and 940 CMR § 3.18?

Statement of the Case

On or about August 2, 2007, plaintiffs filed the original Complaint in this case in the Massachusetts Superior Court. The Complaint alleged that defendants engaged in price fixing in violation of Mass. Gen. Laws c. 93 § 4 ("the Massachusetts Antitrust Act") and price gouging in violation of Mass. Gen. Laws c. 93A § 2 and 940 CMR § 3.18 ("the Massachusetts Price Gouging Law").

On August 28, 2007, defendants removed the case to federal court.

On February 2, 2008, plaintiffs filed a Motion for Leave to file an Amended Complaint without opposition, adding two plaintiffs to the case. The Motion was allowed on February 28, 2008.

On February 6, 2008, plaintiffs filed a Motion for Leave to file a Second Amended Complaint. The Second Amended Complaint substituted allegations of "price fixing" in violation of the Sherman Act for the allegations in the First Amended Complaint of "price fixing" in violation of the Massachusetts Antitrust Act.

On February 12, 2009, the Court allowed plaintiffs' Motion for Leave to file a Second Amended Complaint.

On May 15, 2009, defendants moved jointly for summary judgment on Count I, which alleged "price fixing" in violation of the Sherman Act.

On May 15, 2009, defendants moved individually, but with nearly identical motions, for summary judgment on Count II of the Second Amended Complaint, which alleged "price gouging" following Hurricanes Katrina and Rita in violation of the Massachusetts Price Gouging Law.

On January 6, 2010, the District Court (Zobel, J.) issued an Order granting defendants' motions for summary judgment.

On January 7, 2010, the District Court entered judgment on behalf of the defendants.

Statement of Facts[1]

Plaintiffs are summer home-owners, year round residents, and a real estate agency from Martha's Vineyard. *App. A77-79* (¶¶3-11)[2].

The defendants are the owners and operators of four gasoline stations on Martha's Vineyard. The four defendant gasoline stations are: (1)Tisbury Shell–located in Vineyard Haven and owned by R.M. Packer, (2) XtraMart Citgo–located in Vineyard Haven and owned by Drake/Kenyon, (3) Edgartown Mobil–located in Edgartown and owned by Francis Paciello; and (4) Depot Corner–located in Edgartown and owned by Depot Corner, Inc. *App.A0199* (*# 1*) The two gas stations in Edgartown (Edgartown Mobil and Depot Corner Mobil) share common ownership, as Francis Paciello is President of Depot Corner, Inc. and is either the sole shareholder in Depot Corner, Inc. or is the sole shareholder with his wife. *App. A0610-611.* The defendant Drake not only owned its own gas station (XtraMart Citgo), but it also supplied gasoline to the two defendant gasoline stations located in Edgartown. *App. A0457, A0624-A0653.*

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[1] The facts are set forth in detail by plaintiffs in four different pleadings: Plaintiffs' Local Rule 56.1 Statement relating to Defendants' Jt. Motion for Summary on Judgment on Count I (*see App. A0361-A0404*) and Plaintiffs' Local Rule 56.1 Statement in Response to each of the Defendants' Statements of Undisputed Facts Relating to their Motions for Summary Judgment on Count II (*See App A0405-A0416, A0417-A0426 and A0427-A0411*). Significant facts are also noted in the Argument section of this Brief.

[2] Citations to the Appendix are noted as "*App.*". Citations to the Addendum to this Brief are noted as "*Add.*".

Plaintiffs allege that the four gasoline stations owned by the defendants conspired to fix gasoline prices from at least as early as December 31, 1999 to the date of the filing of this lawsuit. *App. A0080, A0091 (¶ ¶ 21, 82*).

All parties acknowledge, for purposes of deciding defendants' summary judgment motions, that prices at all of defendants' gas stations were parallel for the period that plaintiffs allege that defendants conspired to fix prices. *App. A0366 (#11*).

During a five year period beginning August 1, 2003, gasoline prices at the defendants' gasoline stations exceeded prices at stations located on Cape Cod, by an average of 56 cents/gallon. *Add. 3*. As the added cost of delivering gasoline to the island of Martha's Vineyard was only 21cents/gallon, defendants' gas stations earned 35 cents/gallon additional profit from the sale of gasoline, which could not be explained by the fact that there are additional costs to operating a gasoline station on an island. *Add. 3; App. A0382-A0384 (#s 11-15)*.

Hurricane Katrina made landfall in the United States on August 29, 2005. *App. A0835*. Hurricane Rita made landfall on September 24, 2005. *Id.* A "market emergency", defined as an "abnormal disruption of any market for

petroleum products", *940 CMR § 3.01*, commenced on August 29, 2005 and concluded on December 1, 2005.[3]

During the period of the market emergency, defendants increased their price of gasoline by as much as 60 cents per gallon and increased their profit margins by as much as 51 cents/gallon over the profit margin they had been realizing prior to the market emergency (i.e. an increase in profit of more than 68%). *See Section II.A.1 of this Brief, infra.*

[3] In their Memoranda supporting their Motions for Summary Judgment, defendants accepted for purposes of their motions that a market emergency existed during this period. *Depot Corner Memo, p.2, fn 2.*

Summary of Argument

The Lower Court erred in granting summary judgment on plaintiffs' price fixing claim. The Lower Court improperly required plaintiffs to present evidence that excluded the possibility that defendants were acting independently, rather than which tended to exclude that possibility. In essence, the Court improperly ruled as a matter of law that plaintiffs could not prove a conspiracy to fix prices via circumstantial evidence. Moreover, the Lower Court's opinion picked apart plaintiffs' evidence, concluding that each independent piece of evidence was insufficient, without ever viewing the evidence as a whole. (*Section I.A, pp. 12-17).*

Defendants have stipulated that they maintained parallel prices at their gas stations. While parallel conduct requires further enhancement to state a claim of price fixing, such conduct gets a case "close to stating a claim." Parallel pricing animated by "plus factors" raises an inference of conspiracy. (*Section I.B.1, 2, pp. 17-21*).

There was considerable evidence of parallel price changes unrelated to changes of cost. Expert evidence presented to the Lower Court concluded that these price changes under economic theory were "inconsistent with independent, non-cooperative behavior". Yet, the Lower Court simply disregarded this evidence, apparently concluding on its own personal belief, that nominal

competitors can maintain parallel pricing, no matter for how long a period of time, no matter if pricing diverges from costs, and no matter the opportunities presented to potentially increase profits by diverging from parallel pricing. (*Section I.B.3.a, pp. 21-24*)

Although the defendants Drake and Packer denied speaking with each other, there was evidence of the Presidents of the two companies communicating by telephone to "check in with each other". There was further evidence of the President of one of the companies boasting that he spoke frequently with the President of the other company. The Lower Court found this evidence of communications between company presidents to be irrelevant, as no conversations were overheard fixing prices. This is an example of the Court's improper insistence on direct evidence and refusal to give weight to extremely relevant circumstantial evidence of a conspiracy. (*Section I.B.3.b, pp. 24-30*)

The Lower Court acknowledged that evidence existed showing that defendants' gas stations realized net profits of 35 cents/gallon higher than gasoline stations on Cape Cod. The Lower Court improperly cites to plaintiffs' economic expert for the proposition "that defendants' profits . . . were consistent with non-cooperative behavior." In fact, plaintiffs' economic expert stated that defendants' profits were "abnormally high relative to presumably interdependent, non-cooperative prices. . ." (*Section I.B.3.c, pp. 30-34*).

All of the defendants had as a motive to conspire the earning of abnormally large profits. In addition, even the Lower Court found that the defendant Drake gave the defendant Paciello an unusual personal loan for $2 million which a jury could reasonably infer gave Paciello an incentive to conspire with Drake. (*Section I.B.3,d pp. 34-36).*

There was further evidence (totally disregarded by the Lower Court) that the Defendant Drake had a proclivity to acting secretly to stifle competition, as shown by its secretly funding a campaign to keep out a potential competitor that wished to sell gas at a lower retail price. (*Section I.B.3.e, pp. 36-37*).

Other "plus factors", which exist in this case, which have been recognized as relevant circumstantial evidence of a conspiracy, include high barriers to entry into the market, inelastic demand, fixed relative market shares, regional price variations, and price leadership by a larger firm. (*Section I.B.3.f-i., pp. 37-39*).

Finally, defendants have set forth pretextual reasons justifying their parallel pricing and abnormal pricing. The Lower Court acknowledged that there is evidence that defendants made false statements relating to (1) the basis of their pricing, (2) whether they spoke to each other, and (3) how much they earned. (*Section I.B.4, pp. 39-41*).

The Lower Court also erred in granting summary judgment on plaintiffs' claim that defendants engaged in price gouging following Hurricanes Katrina and Rita.

The facts are undisputed that there is a gross disparity in defendants' profit margins after Hurricanes Katrina and Rita compared to their profit margins being realized immediately before the hurricanes. The Lower Court erroneously concluded that this gross disparity in profits was irrelevant to a determination of whether defendants engaged in price gouging. To reach this conclusion, the court ignored common sense, case law interpreting an analogous law and the interpretation of price gouging set forth by the Federal Trade Commission, which should have guided the court in interpretation the Massachusetts Price Gouging Law. The Lower Court also ignored gross disparities in the absolute price of gasoline after the hurricanes compared to the prices which existed immediately before the hurricane. (*Section II, pp.42-57*).

Argument

I. THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT DISMISSING COUNT I OF THE SECOND AMENDED COMPLAINT ALLEGING PRICE FIXING.

In reviewing a grant of summary judgment, this Court must review the facts in the light most favorable to the non-moving party, and draw all reasonable inferences in that party's favor. *Estrada v. Rhode Island*, 594 F.3d 56, 59, n. 2 (1st Cir. 2010). "It is not for the court on summary judgment to weigh the evidence 'but to determine whether there is a genuine issue for trial." 594 F.3d 56, 61

A. The Court Failed to Properly Apply the Law to the Facts of this Case.

1. The Court Improperly Required Plaintiffs to Present Evidence that Excluded the Possibility that Defendants were Acting Independently, Rather than which Tended to Exclude that Possibility.

The Lower Court nominally states the law correctly at the beginning of its Opinion. The Court notes that to demonstrate a contract, combination or conspiracy, plaintiff "must present evidence that *tends to* exclude the possibility . . . [defendants] were acting independently." *Monsanto Co. v.*

Spray-Rite Serv. Corp., 465 U.S. 752, 768 (1984). *Add. 4.* (Emphasis added).

Yet, the Lower Court never applied to plaintiffs the standard it acknowledged to be the law. This is evident throughout the Opinion and clearly demonstrated in the Court's conclusion that "Plaintiff must rely on this direct evidence and the plus factors [the evidence discussed by the Lower Court], in total, *to exclude* the possibility of independent action and survive summary judgment. It is not enough." *Add. 10.* (Emphasis added).

The Court did not examine, as it should have, whether the evidence presented by plaintiffs "tended to" exclude the possibility of independent action. Rather, the Court set forth a standard impossible to meet and, in essence, determined, contrary to law, that no amount of circumstantial evidence, which by definition does not definitively prove a matter, could satisfy the Lower Court's improper standard requiring the plaintiffs to exclude the possibility of independent action.

Unfortunately, the Lower Court ignored considerable case law warning it not to do exactly what it has done in this case. Only in rare cases can a plaintiff establish the existence of a section 1 conspiracy by showing an explicit agreement; most conspiracies are proven by inferences drawn from the behavior of the alleged conspirators. *Todorov v. DCH Healthcare*

Facility 921 F.2d 1438, 1456 (11th Cir. 1991). "[C]oncerted action may be inferred from circumstantial evidence of the defendant's conduct and course of dealings." *Monsanto Co. v. Spray-Rite Service Corp*., 465 U.S. 752, 764 (1984).

The recent case of *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litigation*, 2009 WL 5218057 (D.Conn.), decided three months ago, sets forth the proper standard for deciding summary judgment actions in antitrust price fixing cases. While the court was discussing the problems with the arguments presented by defendants' counsel in that case, it could just as easily have been discussing the problems with the Lower Court opinion in this case. In the *EPDM* case, the court cogently states:

> Establishing an antitrust case on the basis of circumstantial evidence necessarily means that the evidence produced in conjunction with the plus factors is susceptible to differing inferences-the inference that, on the one hand, the defendants were engaged in illegally collusive behavior or that, on the other hand, they were merely engaged in lawful, independent parallel conduct. Thus, the issue at summary judgment often involves a determination of whether the plaintiff has gone far enough to dispel the inference that the defendants acted permissibly.
>
> To do so, a plaintiff seeking to defeat a motion for summary judgment in a "section one" antitrust case "must present evidence that 'tends to exclude the possibility' that the alleged conspirators acted independently." *Matsushita*, 475 U.S. at 88 (quoting *Monsanto*, 465 U.S. at 764). Here, the parties essentially dispute the meaning of the standard "tends to exclude the possibility" that the defendants acted permissibly. Based on the arguments set forth in their briefs and the representations of counsel at the oral argument, the DSM defendants appear to contend that

> the plaintiffs' evidence has not absolutely excluded the possibility that they were engaged in independent, permissible conduct and, therefore, summary judgment is appropriate. . . . If the plaintiffs' evidence proved so conclusively that the DSM defendants were not engaged in permissible acts, however, then there would be no need for a jury and the plaintiffs would be entitled to summary judgment. The plaintiffs, however, are not seeking summary judgment, and acknowledge that their evidence gives rise to competing inferences.
>
> Subsequent courts that have analyzed *Matsushita*'s antitrust summary judgment standard have not adopted the DSM defendants' position that, where the plaintiff has put forward evidence that establishes a plausible inference of illegal collusive behavior, summary judgment is nevertheless appropriate if it does not absolutely or even strongly outweigh the defendants' legitimate explanation. To adopt the defendants' position would permit the courts to stand in the stead of the fact-finder at trial by weighing competing inferences and determining which party has established the "better" explanation. According to the Supreme Court, however, "*Matsushita* ... did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases." *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 468, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992).
>
> Fundamentally, "tends to exclude" does not mean "excludes." . . . At most, the court's role in examining the factual inferences at the summary judgment stage is limited to determining whether the parties have drawn "reasonable and therefore permissible," inferences from the evidence presented. Id. at 253.

2009 WL 5218057, *21-22.

Significantly, in this case, the Lower Court found that plaintiffs' theory of conspiracy, supported by the plus factors it set forth, was "economically reasonable". *Add. 5.* In light of this finding, by rejecting the permissible

inferences that could be drawn from plaintiff's evidence, the Lower Court improperly stood in the stead of the fact finder in this case.

2. **The Court Improperly Failed to View the Evidence as a Whole To Determine Whether Plaintiffs Had Set forth Sufficient Circumstantial Evidence of a Plausible Conspiracy.**

The Lower Court's opinion picks apart plaintiffs' evidence, concluding that each independent piece of evidence is insufficient, in and of itself, to prove that defendants did not act independently. The Court never examines all of plaintiffs' evidence to determine, if when viewed together, it presents sufficient circumstantial evidence to allow this case to go to a jury.

In antitrust litigation, "plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. . . . [T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690, 699 (1962)(Citation omitted).

In the case of *In re High Fructose Corn Syrup Antitrust Litigation*, 295 F.3d 651, 655-656 (7th Cir. 2002), Judge Posner warns that in deciding whether there is enough evidence of price fixing to create a jury issue, a court asked to dismiss a price-fixing suit on summary judgment must be careful to avoid three traps.

Unfortunately, the Lower Court has fallen, if not jumped, into the second trap that Judge Posner hoped lower courts would avoid. He warned:

> The second trap to be avoided in evaluating evidence of an antitrust conspiracy for purposes of ruling on the defendants' motion for summary judgment is to suppose that if no single item of evidence presented by the plaintiff points unequivocally to conspiracy, the evidence as a whole cannot defeat summary judgment. . . . The question for the jury in a case such as this would simply be whether, when the evidence was considered as a whole, it was more likely that the defendants had conspired to fix prices than that they had not conspired to fix prices.

B. The Evidence, Viewed as A Whole and in the Light Most Favorable to Plaintiffs, Presents a Dispute of Material Facts As to the Existence of Price Fixing.

A review of all of the evidence as a whole and in the light most favorable to the plaintiffs shows considerable evidence from which this Court could conclude that there was a tacit or explicit agreement to fix gas prices among the defendants. Defendants concede that they have sold gasoline at parallel prices for at least seven years, an incredibly long period of time to maintain a system of parallel pricing without a prior understanding. One defendant admitted he made secret payments for the purpose of "seeking to prevent competition that might depress the price of gasoline on the Vineyard." Two of the defendants were overheard communicating with each other, despite these defendants' denial that they ever spoke with each other. One defendant admitted he spoke frequently with another defendant. One defendant was granted a below-market two million dollar loan from another defendant, although the defendant receiving the loan acknowledges that no-one

else would loan him the money and the defendant granting the loan acknowledges that it was unprecedented. All of the defendants enjoyed, not better than average, but extraordinary profits for a gas station. Although defendants have for years defended their higher prices than the mainland by claiming they result from their higher costs, an expert analysis of defendants' costs shows that they do not come close to justifying the high prices charged by all of the defendants.

1. **Defendants' Stipulation to the Existence of Parallel Pricing, While in and of Itself not Conclusive of the Existence of a Conspiracy to Fix Prices, Comes "Close" to Admitting that Plaintiffs Have Stated an Actionable Claim.**

Defendants have stipulated that they have maintained parallel prices at their gas stations on Martha's Vineyard. *App. A0366* (*#11*). The Lower Court similarly has found that there is evidence from which a jury could infer parallel pricing. *Add. 2-3.*

While parallel conduct requires further enhancement to establish a claim of a price fixing violation, parallel conduct gets the case "close to stating a claim". *Bell v. Twombly*, 550 U.S. 544, 557 (2007). *Cf. In re: Public Offering PLE Antitrust Litigation,* 233 F.R.D. 70, 76 (D. MA 2006), ("Identical behavior among businesses regarding pricing is probative of a price-fixing conspiracy between them".

Thus, defendants' parallel pricing gets plaintiffs' close to defeating summary judgment. The plethora of additional circumstantial evidence of a prior understanding or tacit agreement get the plaintiffs well over the line. The parallel pricing is particularly probative in this case, as it does not occur on just a few occasions, but occurred at a minimum (accepting defendants' admission alone) 365 days/year for a period of seven consecutive years, an extremely long time to maintain a system of parallel pricing without a prior understanding.

2. **Parallel Pricing in addition to the Existence of "Plus Factors" Makes Out a Case of a Price Fixing Conspiracy.**

The Supreme Court has recognized, and the Lower Court nominally acknowledges, that parallel conduct, animated by "plus factors" raises an inference of conspiracy to the level of plausibility. *Bell v. Twombly*, 550 U.S. at 557, n. 4. Courts have uniformly held that where there are sufficient "plus" factors in addition to parallel pricing, an inference of conspiracy is reasonable. *See, In re High Fructose Corn Syrup Antitrust Litigation*, 295 F. 3d 651, 655-661 (7th Cir. 2002); *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litigation*, *supra*.

In *Bell v. Twombly*, 550 U.S. at 557, n. 4, the Court noted that "[c]ommentators have offered several examples of parallel conduct allegations that would state a §1 claim under this standard", and cited *Areeda & Hovenkamp, Antitrust Law* (2d ed. 2003) ("*Areeda*") and *Blechman, Conscious Parallelism,*

Signaling and Facilitating Devices: The Problem of Tacit Collusion Under the Antitrust Laws, 24 N.Y.L.S.L. Rev. 881 (1979) ("*Blechman*"), as the commentators on which they relied.

Blechman lists (among others) the following as "plus factors" that have been frequently recognized by courts as sufficient with parallel pricing to allow the inference of a conspiracy: (1) motive to conspire, (2) pricing contrary to economic factors, and (3) abnormally high profits. *Blechman* at pp. 886-887.

Areeda notes the following "plus factors", all of which are relevant to this case: (1) interfirm communications, (2) repeated non-verbal communications between defendants, (3) price leadership by a large firm, (4) market concentration and (5) high barriers to market entry. *Areeda* at §§ 1430a, 1430b, 1430f, 1430g.

In addition Judge Posner recognizes many of the plus factors discussed in *Areeda* and *Blechman* in more formal economic language. *Posner, Antitrust Law*, at pp. 69-93 (2d ed. 2001) ("*Posner*"). The Supreme Court and lower courts frequently rely upon Judge Posner's antitrust treatise. See, e.g., *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,127 S.Ct. 2705, 2715-17 (2007); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 221 & 223-24 (1993).

Judge Posner recognizes two different types of "plus factor". First, he notes that some "plus factors" identify those markets in which conditions are propitious

for the emergence of collusion. *Posner* at p. 69. Second, he notes that other "plus factors" determine whether there really is collusive pricing in any of the markets. *Id.* *Posner* concludes that there is a need to identify both types of "plus factors", because "in a market in which conditions are favorable to collusion", the existence of the second type of "plus factor" may be "persuasive evidence of collusive pricing", while in the a market without conditions favorable to collusion, the existence of the second type of "plus factors" may be no evidence of collusive behavior at all. *Id*. As examples of the first type of "plus factor", *Posner* identifies the following conditions: (1) A market concentrated on the selling side, (2) Inelastic demand at competitive prices, (3) Entry takes a long time, (4) A nondurable product, (5) The principal firms sell at the same level in the chain of distribution, (5) Prices Can be Changed Quickly, and (6) The market is local. *Posner* at pp. 69-79. As examples of the second type of "plus factor", *Posner* identifies the following conditions: (1) A fixed relative market share, (2) Regional price variations and (3) Abnormally high profits. *Id.* at pp. 79-91.

3. **In This Case, There is Evidence of Numerous "Plus Factors" From Which this Court Should Infer the Existence of a Conspiracy to Fix Prices.**

    a. Plus Factor # 1: Pricing Contrary to What Economic Factors Would Indicate/ Parallel Price Increases that Bear Little or No Relationship to Cost

A particularly significant "plus factor" is rapid increases in price unjustified by changes to defendants' costs. *Posner* notes that simultaneous price changes unexplained by similar changes in cost may be good evidence of the initiation of a price fixing scheme. *Posner* at p. 88; *accord Blechman* at p. 886.

The Lower Court found that "[o]ver three periods of time, from May 25 to September 15, 2004, March 20 to May 25, 2005, and July 15 to November 7, 2005, prices at the four gas stations rose or held steady while the wholesale cost of gas declined. This parallel pricing developed even though the relative wholesale cost of Shell, Citgo, and Mobil gasoline varied." *Add. 2-3*.

The Lower Court inexplicably concluded that "price changes unrelated to costs . . . would all be expected if defendants engaged in conscious parallelism, aligning their prices without an agreement to fix prices." *Add. 6*. The Lower Court cites to no evidence supporting this conclusion. The Lower Court cites to no authority supporting this conclusion.

The Lower Court's conclusion is totally contrary to the evidence presented to the Lower Court through plaintiffs' expert Frank Gollop, a professor of economics at Boston College, who has taught both graduate and undergraduate courses in industrial organization and antitrust economics. Prof. Gollop found that the "cost trends and coincident defendant pricing patterns [during the three time

periods noted by the Lower Court] are inconsistent with independent, non-cooperative behavior." *App. A0475.* Prof. Gollop noted:,:

> The significant and rapid decline in costs experienced by stations selling homogeneous (in this case identical) products (regular grade gasoline) and thereby facing highly if not perfectly elastic inter-station demand is the economic basis for the expectation that price competition would break out. . . . This is not the outcome expected from a model of non-cooperative behavior. In a homogeneous product, highly elastic demand environment, it makes no business sense to increase price as your costs decline, especially when you have reason to believe your rival's costs have declined as well, unless you know your rivals will follow. . . . Similarly, it makes no business sense for a rival to follow a price increase. At a minimum, when a rival increased its pump price, its competitors would have been expected not to follow but to passively enjoy the fruit of additional sales volume. . . . Price stability over such a long period of time in the face of these cost decreases is not the expected result of non-cooperative behavior among sellers of a perfectly homogeneous product.

App. A0476-A0477.

Specifically, discussing the third time period noted by the Lower Court where prices increased despite drops in costs (July 15 to November 7, 2005), Prof. Gollop concluded:

> The pattern of pricing in the post-Katrina interval and the significant per gallon increases in gross margins are inconsistent with a model of non-cooperative behavior. A competitive, non-cooperative market would have been expected to moot opportunistic behavior by any individual station.

App. A0479.

The Lower Court has simply decided to disregard economic theory presented by Prof. Gollop, and based apparently on its own personal belief, decided that even without cooperation, in an oligopolistic market, nominal

competitors can maintain parallel pricing, no matter for how long a period of time (in this case for years), no matter if pricing diverges from costs, and no matter the opportunities presented to potentially increase profits by diverging from parallel pricing.

It is particularly significant that the defendants Drake and Depot Corner, Inc. admitted that they ignored their own costs or did not even know their own costs when setting their prices, and claimed that they do not even know at what margin over cost they need to sell their gasoline in order to make a profit. *App. A0687, A0711-A0712, A0757-A0758.* Without a prior agreement with Packer that it will set prices at a level guaranteeing everyone a healthy profit, such a pricing methodology would be suicidal.

b. Plus Factor # 2: Verbal Communications among Defendants

Areeda has identified "[v]erbal communication, direct and indirect" as a "plus factor" supporting an inference of conspiracy. *Areeda*, §1430a. *See, also, In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litigation, supra at *20* (one plus factor is a high level of interfirm communications, that would suggest that the defendants consciously agreed not to compete).

In this case, two different witnesses observed James Ahern (the president of the defendant Drake) pick up the phone, call Ralph Packer (the president of the defendant Packer), and without introducing himself make small talk to Mr. Packer.

Add. 7. One witness recalled Ahern stating basically that he was checking in. *App. A0274* (*p.* 40). One witness recalled Ahern stating after the phone call that he and Packer spoke frequently, while the other witness recalled Ahern indicating "he talked" with the President of Packer. *Add. 7, App. A0680, App. A0277*(*p. 52*). [4]

This evidence takes on considerably increased significance because it directly contradicts the testimony of both the president of Packer and the President of Drake claiming that they never spoke with each other on the phone and at most had spoken with each other in person on one occasion in their lives. *App. A1106* (*132*)-*A1107(133*), *A0597-A0598*. Viewing the evidence in the light most favorable to the plaintiffs, it is certainly reasonable to infer that defendants'

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[4] Plaintiffs introduced in Opposition to Defendants' Motion for Summary Judgment the deposition testimony and an Affidavit of two partners (Steven Wehner and Sean Conley) of a group entitled the Vineyard Service Center, which during the alleged Class Period was seeking permission to build a gas station in Vineyard Haven which would have competed with the defendants Packer and Drake. *App. A0548-A0575, A0576-A0577, A0674-A0680.*. In order to operate a gas station on Martha's Vineyard, the Vineyard Service Center needed to get the permission of the Martha's Vineyard Commission. *Add. 1, 2.* The Vineyard Service Center's proposal to the Martha's Vineyard Commission promised to sell gasoline at a price lower than gasoline was being sold by other gasoline stations on Martha's Vineyard. *App. A0565-A0566, A0577* (¶ 2).

Mr. Wehner related two meetings he had with James Ahern. *App. A0555-A0559, A0579* (¶4). At the second meeting, in which both Mr. Wehner and Mr. Conley participated, the conversation turned to what would happen to Island gasoline prices, if the Vineyard Service Center were to offer a discount on its retail gas prices. *App. A0275*. Mr. Wehner offered his opinion that there would be a chain reaction of price drops. *Id.* In response, Mr. Ahern stated that if the defendant Edgartown Mobil ever started mucking around with prices on the Island, one or two Drake delivery trucks a week to Edgartown Mobil might not make it on the boat. *Id*, In addition, at this same meeting, Mr. Ahern picked up the telephone to "check in" with Mr. Packer. *App.A0274* (*pp. 39-40*).

presidents lied under oath about their "frequent" phone conversations[5] to cover up the fact that they in fact conspired to fix prices.[6]

The Lower Court summarily dismissed the significance of one of the defendants admitting to a potential competitor (who was contemplating selling retail gasoline at a lower price) that he spoke with another defendant "frequently", and "we all work together". The Lower Court found the evidence to be not of significance, because the statements were made back in 1999 and because "Mr. Wehner was talking with Ahern (and Packer) as a potential wholesale purchaser of gasoline, and wholesale pricing is not at issue in this case." *Add. 7.* Similarly, the Lower Court found that it was irrelevant if defendants' testimony was false[7], because the substance of the phone conversation overheard was "collateral to the issue at hand", as it was made during the course of "a meeting concerning wholesale gasoline, not retail gasoline". *Add. 10.*

The fact that the conversations between Ahern, Wehner and Conley took place in 1999 in no way renders them irrelevant. Plaintiffs allege in the Second Amended Complaint that defendants conspired to fix gas prices from at least 1999

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[6] The frequency of the defendants' phone conversations is supported by the fact that Ahern knew Packer's phone number and Packer was non-plussed that Ahern would "check in" with him.

[7] The Court offers no reason that Wehner or Conley would fabricate their testimony regarding the phone conversation between the defendants and the fact that both persons recollect Ahern indicating either that he talked with Packer or that they talked frequently. Given the need to review the testimony in the light most favorable to the plaintiffs, it would be inappropriate to suggest any reason, even if one existed. On the other hand, defendants have considerable reason to fabricate their testimony that they never spoke with each other, given their desire to avoid the consequences of this law suit.

to the date of the filing of the law suit. *App. A0030* (¶ 21). The Lower Court found, however, that Count I was limited by the statute of limitations to Sherman Act violations occurring on or after August 2, 2003, and that Ahern's statements regarding speaking frequently with Packer therefore occurred "nearly four years prior to the earliest date for which plaintiffs bring this claim." *Add. 3, 7.*

The Lower Court, in finding Ahern's 1999 statements and conversation with Packer to be irrelevant to proving a conspiracy misunderstands the Supreme Court's ruling in *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997).[8] In *Klehr*, the Court declared that in the case of a price-fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, each overt act that is part of the violation and that injures the plaintiff, e.g., each sale to the plaintiff, "starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times." *Id.* Nevertheless, the Court noted that the "commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period." *Id.* In other words, damages are limited to the last four years of the conspiracy. The court did not rule that events occurring four years prior to the

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[8] The Lower Court cited to *Klehr v. A.O. Smith Corp* in its order of June 23, 2008, limiting discovery in this case to August 2, 2003.

commencement of the lawsuit were not relevant to proving the existence of a conspiracy.

In fact, a number of courts have noted the relevance of events occurring more than four years prior to commencement of the lawsuit to the issue of proof of the existence of a conspiracy. In *U.S. v. Hoyter Oil Co.*, 51 F.3d 1265, 1271 (6th Cir. 1995) (a case finding defendants guilty of fixing the retail price of gasoline), the court found that communications outside the statute of limitations period established the existence of a conspiracy, and that "once a conspiracy has been established, it is presumed to continue until there is an affirmative showing [by the defendant]that it has been abandoned." In *Wilder Enterprises, Inc. v. Allied Artists Pictures Corp*, 632 F.2d 1135, 1143 (4th Cir. 1980), the court held that discovery should be allowed for years preceding the limitations period, as it is relevant to the issues of conspiracy and futility. *See, also, Kellam Energy, Inc. v. Duncan*, 616 F.Supp. 215, 218 (D.C.Del.1985) (discovery allowed for five years preceding limitations period of the antitrust statutes) ; *Maritime Cinema Service Corp. v. Movies en Route, Inc.*, 60 F.R.D. 587 (S.D.N.Y.1973) (discovery allowed for six years prior to alleged damages).

Moreover, the Lower Court's finding that one of the defendant's admission that he spoke frequently with another defendant was "collateral to the issue at hand", as it was made during the course of "a meeting concerning wholesale

gasoline, not retail gasoline", *Add. 10*, certainly does not view the evidence in the light most favorable to the plaintiff. Mr. Wehner is clear in his testimony that his conversations with Mr. Ahern involved both the discussion of the retail and the wholesale price of gasoline.[9] Even defendants admit that Ahern allegedly told Wehner that "Ralph and I talk" *"[in] the context of a discussion regarding leasing the property. . ."* *App. A0202* (#15).

Moreover, the Lower Court's insistence that communications must involve discussions regarding fixing retail prices in order to be relevant totally disregards the concept of proof by circumstantial evidence, or proof by evidence of "plus factors" plus parallel pricing. If a conversation related directly to fixing retail prices, it would be direct evidence of price fixing, and there would be no need to present any circumstantial evidence of price fixing through proof of the existence of "plus factors" *See Williamson v. Philip Morris*, 346 F.3d 1287, 1299 (11th Cir.

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[9] Mr. Wehner testified that the second meeting with Mr. Ahern in 1999, in which Mr. Ahern telephoned Mr. Packer, was more about leasing the property to Drake and finding out if Drake was willing to sell gasoline at a leased station at a retail discount price, *App. A0559-A0560*, and that wanting to find out if Drake's offer to sell gasoline to Mr. Wehner on a wholesale basis at a price of rack plus 19 "was not one of the reasons" he went down to Providence to see Ahern. *App. A0556.*

Plaintiffs certainly recognize that the Lower Court did not create on its own the notion that the conversation between Mr. Wehner, Mr. Conley and Mr. Ahern related to the wholesale price of gasoline. This, in fact, was Mr. Conley's recollection of the conversation. *App. A0676.* The Lower Court, in choosing to only recognize Mr. Conley's recollection of events, did not view the evidence in the light most favorable to the plaintiffs.

Moreover, Mr. Conley and Mr. Wehner's recollection was identical regarding the most important element of the meeting. They both recollected Mr. Ahern, knowing Mr. Packer's phone number, calling Packer without identifying himself, and Mr. Ahern acknowledging that he was in some type of regular communication with Mr. Packer.

2003) ("In the unusual case where the plaintiff is able to muster direct evidence of price fixing, summary judgment is categorically inappropriate.")

The Lower Court cites to no caselaw indicating that the only relevant interfirm communications is communications relating to price fixing. In *Fears v. Wilhelmina Model Agency, Inc.*, 2004 WL 594396, * 7, * 13 (S.D.N.Y.) , the court noted that it could find no case law indicating that interfirm communication, "in order to be relevant, had to be specifically about the subject matter of the alleged conspiracy." *Id.* Rather, it concluded that "a high level of interfirm communications" can serve to bolster the inference of a conspiracy drawn from parallel acts, even when the communications dealt with "collateral acts", as one can infer from such evidence an "industry inundated with collusion". *Id.*

c. Plus Factor # 3: Abnormal Profits Realized by the Defendants

Both *Blechman* and *Posner* note that abnormal profits, when combined with parallel pricing, is evidence of the existence of collusion. *Posner* notes that when reliable profit data is obtainable and "abnormally high rates of return" are found, this may be evidence of collusion. *Posner*, p. 90.

The Lower Court found "[p]rice coordination is easy [on Martha's Vineyard]." *Add. 5, n. 4. Posner, p. 69,* has concluded that "in a market in which conditions are favorable to collusion", the existence of "plus factors", such as

abnormally high profits, may be "*persuasive evidence* of collusive pricing". (*Emphasis added.*)

The Lower Court acknowledged that evidence exists showing that defendants' gas stations realized net profits 35 cents/gallon higher than gasoline stations on Cape Cod. *Add. 3*. The Lower Court erroneously cites to Prof. Gollop's Expert Report, at pp. 25-27, to support its conclusion "that defendants' profits . . . were consistent with non-cooperative behavior". *Add. 6*. Professor Gollop in fact never concludes that "defendants' profits were consistent with non-cooperative behavior." Rather, Prof. Gollop states, in relevant part, *App. A0480-A0481*:

> The economic analysis described above in section 2 [concluding that the profit margin of defendants' gasoline stations was 35 cents/gallon higher than the profit margin realized by gasoline stations on Cape Cod] is based on the premise that retail service stations on Cape Cod exist in a competitive environment. It follows that price-cost margins at these stations reflect profits consistent with interdependent but otherwise non-cooperative competition. . . . . Higher prices unexplained by higher costs translate penny-for-penny into higher gross margins. The average 35-cent per gallon incremental margin is, in my opinion, abnormally high relative to presumably interdependent, non-cooperative prices and returns observed for the same period of time at Cape stations—stations that experience the same seasonal business patterns.

Thus, Prof. Gollop is not stating, as the Lower Court concludes, that defendants' profits were consistent with non-cooperative behavior, but rather that defendants' profits were "abnormally high", when compared to the "presumably interdependent, non-cooperative prices" of the Cape Cod gasoline stations.

In fact, the evidence shows that Defendants' profits were all astronomically high. *App. A0388-A0391* (*#s 27-34*). While the average gas station in the country has enjoyed gross profit margins ranging from approximately $0.11 - $0.16/gallon and net profit margins of approximately five (5) cents per gallon, *App. A0924-A0925,A0937*, defendants have enjoyed gross profit margins four to five times greater than the profit margins enjoyed by other gas stations. Packer has enjoyed gross profit margins averaging $0.84/gallon, defendant Drake has enjoyed gross profit margins of $0.84, and defendant Depot Corner, Inc. has enjoyed gross profit margins of $0.59/gallon. *App. A0547, A0976-A0992, A0993-A1030, A1202-A1242, A1259-A1261*.

The defendant Drake owns and operates close to 250 gas stations. *App. A0683, A0694.* Vineyard Haven Citgo's profits are far greater, and totally out of line, with the profits earned at all other gas stations owned by the defendant Drake. *App. A0392 (# 36*). While a majority of Drake's gas stations net less than $100,000/year, and none of its other gas stations selling less than one million gallons of gasoline per year earned net profits greater than $100,000/year (XtraMart Citgo on average sold approximately 743,000 gallons of gasoline per year), XtraMart Citgo on average was netting close to $200,000/year. *App. A0704-A0705. A0523, A0976-A0992*. While XtraMart Citgo made a gross profit/gallon over 80 cents/gallon for each of the past five years, apparently there was not a

single other gas station owned or operated by Drake which earned a gross profit/gallon over 30 cents/gallon. *App. A0392* (*# 37*), *A1259-A1261, A0687*. Similarly, Depot Corner, Inc.'s shareholders and family earned more than $100,000 per year in salary, the company bought a boat and over $160,000 in classic cars for its owner, and granted its owner a $500,000 loan, none of which has been repaid by its owner. *App. A0393-A0394* (*#s 38-42*); *A1032-A1034, A0614, A0618, A1051-A1071*. The defendant Packer, while failing to keep records of Tisbury Shell profits, has taken $950,000 in dividends from the company in the past five years, as well as having received $1,885,379.42 in loans, on which he acknowledges that he makes no loan repayments personally. *App. A0394-A0397* (*#s 43-50*); *A1121-A1124, A1129-A1131, A1137-A1152, A0671*.

Unfortunately, the Lower Court failed to analyze just how abnormally high defendants' profits were compared to profits realized by gasoline stations elsewhere in the country and other gasoline stations operated by the defendant Drake.[10] Thus, the Lower Court never seeks to explain why none of the defendants

[10] It is unclear why the Court chose to ignore certain evidence presented by the Plaintiffs. The Court inexplicably allowed Defendants' Joint MotionTo Strike Plaintiffs' Statements of Material Fact in Dispute. *App. A0020*(Docket Sheet, Entry 6/24/09). Pursuant to Local Rule 56.1, Plaintiffs filed a Response to Defendants' Joint Statement of Undisputed Facts, which included both a paragraph by paragraph response to Defendants' Statement of Allegedly Undisputed Facts, as well as Plaintiffs' own statement of Material Facts in Dispute. Defendants filed a Motion to Strike Plaintiffs' own statement of material facts in dispute, somehow trying to limit the court to only considering those facts initially acknowledged by the defendants as allegedly being undisputed. Inexplicably, the Court granted from the bench, without explanation and without having taking argument on the issue, defendants' motion at the end of the oral argument on the Motions for Summary Judgment. In its Opinion, the Lower Court clearly considered some of the evidence that it wrongfully excluded, while failing to consider other evidence that

ever sought over a six year period to sell at a lower price than its competitors (where considerable profits could still have been realized) to increase sales volume and to increase overall profits.[11] Again, the Court did not analyze whether there was evidence which tended to show the existence of a conspiracy, but rather, with little or no analysis, found all evidence as failing, because of its inability to independently definitively prove the existence of a conspiracy.

d. Plus Factor # 4: Motive to Conspire

The Supreme Court has expressly ruled that existence of a motive to conspire is a relevant consideration in Sherman Act cases. In *Interstate Circuit, Inc*. v. *United States*, 306 U.S. 208, 225 (1939), the Court upheld an injunction based on "unanimity" of conduct and "the strong motive for such unanimity of action." In *Poller v. CBS*, 368 U.S. 464 (1962), the Court reversed a grant of summary judgment, because of plaintiff's evidence of CBS's motive to cancel its affiliation agreement with a local television station. *See also Posner* at p. 71.

All of the defendants had as a motive to conspire the earning of abnormally large profits. *See Prior Section of this Brief.*

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it wrongfully excluded. While the Lower Court's improper ruling on Defendants' Motion to Strike raises doubts about the correctness of the Lower Court's legal reasoning in this case, it cannot be stated with any certainty that it directly led to the Court's failure to consider any particular evidence in this case.

[11] The Vineyard Service Center's willingness to sell gasoline at prices considerably below the prices being offered by defendants shows that a party, not conspiring to fix prices, could independently conclude that it could make a good profit by selling at a market rate, and that it was not somehow inevitable, as the Lower Court seems to believe, that absent a conspiracy, every competitor would necessarily sell its gasoline at the abnormally high prices imposed by the defendants.

In addition, the defendant Francis Paciello had as a motive to conspire and to agree to maintain his prices at extraordinarily high levels his desire to obtain a $2 million loan from the defendant Drake, which he could not obtain elsewhere. Upon acceptance of the loan, the defendant Francis Paciello was completely beholden to the defendant Drake and knowingly placed himself in a position where he had no choice, and was obviously willing, to do Drake's bidding regarding keeping up gas prices. Drake, on the other hand, for no explicable reason, made an unprecedented $2 million personal loan at a low interest rate, impossible to explain but for the existence of a conspiracy.

On May 17, 2000, Drake gave Francis Paciello a personal loan for $2 million with a 20 year term at an interest rate 1 ½ % below the prime rate. *App. pp. A0400-A0401*(*#s 63, 66*); *A0624-A0653, A0621-A0622, A1157-A1176.* Paciello agreed to the loan, although Drake could call in the loan at any time after 10 years. *Id.* Drake agreed to give the loan, although Paciello could not get the loan at any rate from anyone else. *App. A622.* Drake acknowledges that this is the only personal loan it can recall ever giving as part of a distribution agreement. *App. A0584.* The only explanation offered by Drake for giving Francis Paciello a personal loan at a below prime interest rate, when he could not obtain a loan elsewhere, was that it was in return for his business. *App. A0619.* In fact, Drake

had already had Paciello's business for approximately 15 years at the time that it gave him the $2 million loan. *Id.*

The Lower Court correctly found that "a jury could . . . reasonably infer that this unusual loan gave Paciello some incentive to conspire with Drake, and that the repayment terms could leave Paciello beholden to Drake." *Add. 9.* However, once again, refusing to view the evidence in the light most favorable to the plaintiffs, the Lower Court concluded that the loan "could simply reflect a business decision in the context of a wholesale gasoline supply agreement." *Add. 10.*

e. Plus Factor # 5: Demonstrated Willingness to Act Secretly to Influence Gas Prices

Another "plus factor" in this case is evidence that the defendant Drake was willing to act secretly to influence gas prices.

Drake hired Al Norman, President of "Sprawlbusters", to establish a citizens group to oppose Tisbury Fuel's application for a new gas station. *App. A0599-A0603, A0551-A0554.* Norman was hired to campaign against the station and to testify before the Martha's Vineyard Commission as to reasons that the Vineyard did not need another gas station. *App. A0600-A0601.* Drake admits hiring Norman, because Drake was "seeking to prevent competition that might depress the price of gasoline on the Vineyard." *App. A0603.* Drake itself did not testify itself against awarding Tisbury Fuel a permit to build a new gas station. *App. A0601.*

The Lower Court dismisses this evidence as nothing more than "conduct that would be expected even in a competitive gasoline retail market". *Add. 6, n.* 5. The Lower Court totally misses the point. Plaintiffs do not cite to this evidence solely because the defendant sought to keep ahead of potential competition. Rather, plaintiffs cite to this evidence because it shows the defendants' willingness to act secretly (i.e. it did not testify itself against a potential new competitor, but hired a straw to do so on its behalf) to stifle competition. The Lower Court completely fails to discuss the significance of this evidence showing defendants' willingness and proclivity to act secretly to stifle competition, i.e. the exact issue underlying this case.

f. Plus Factor # 6: High Barriers to Entry Into the Market

Areeda notes that price coordination is more difficult when substitute products are available or firms can enter the market with ease. *Areeda* §1430g. *Posner* similarly notes entry taking a long time as conducive to collusion. *Posner*, pp. 72-75.

The island of Martha' Vineyard is ideally suited for price coordination, as entry into the market could not be more difficult. Any new proposed developments, potentially considered to be Developments of Regional Impact, such as gasoline stations, must be approved by the Martha's Vineyard Commission (MVC). *Add.* 1-2. A new gas station has not been approved since 1997. *Id.* Since

1997, three groups (Vineyard Service Center, Tisbury Fuel Service, and the "Gervais/Goldsborough" partnership) have all unsuccessfully petitioned the MVC for permission to open a new service station on the island. *App. A0482-A0483.* The Tisbury Fuel Service petition was denied, although it included an offer committing to sell gasoline for five years at 36 cents/gallon over its costs, a margin that, according to Mr. Wehner and as shown by the evidence in this case, was far lower than the margin being offered by other stations on the Island. *Id.*; *App. A0391* (*#s32-34*).

The Lower Court notes some of the barriers to entry into the market cited above. The Lower Court fails to discuss why these high barriers to entry, although admittedly not dispositive, should not be considered important pieces of evidence.

g. Plus Factor # 7: Inelastic Demand

Posner notes that when demand is inelastic, collusion to raise the price is particularly attractive, as rasing price will increase revenues without reducing demand. *Posner*, p. 71. The Lower Court acknowledges the "highly inelastic" demand for gasoline on the island of Martha's Vineyard, but concludes only that it was conducive to the development of parallel pricing rather than that it was conducive to collusion, as noted by *Posner*. *Add. 5, n. 4*.

h. Plus Factor # 8: Fixed Relative Market Shares

Posner notes that fixed relative market shares is evidence of collusion in those markets that are propitious for the development of collusion. *See Pl. Brief, infra, p. 21.* The Lower Court acknowledges that the market share of the defendants remained stable from 2004 to 2006, *Add. 3; App. A0481*, but again concludes that such evidence is only relevant to showing parallel pricing, without discussing its reasons for ignoring *Posner's* conclusion that such evidence is also relevant to proof of collusion. *Add. 6.*

i. Plus Factor # 9: Regional Price Variations

Posner notes regional price variations as indicative of price collusion. *Posner* at 87. In this case, there was considerable variation between the price of gasoline sold on Cape Cod and the price of gasoline sold at defendants' gas station. See. *Add. 3.*

4. **Defendants Have Set forth Pretextual Reasons Justifying Their Parallel Pricing and Abnormal Profits, Providing Further Circumstantial Evidence of the Existence of a Conspiracy to Fix Prices In this Case.**

"While evidence of 'pretext' standing alone is not sufficient to show joint action in violation of the antitrust laws, evidence of pretext, if believed by a jury, would disprove the likelihood of independent action on the part of [defendant]." (*citation omitted*). *DeLong Equipment Co. v. Washington Mills Abrasive Co.*, 887 F.2d 1499, 1514 (11th Cir. 1989). *See, also, Big Apple BMW v. BMW of North America*, 974 F.2d 1358, 1360 (3d Cir. 1992)(Inferences of concerted action plus

evidence that reasons given by defendants to justify action were pretextual sufficient to defeat summary judgment in antitrust action.); *Sport Mart Inc. v. No Fear, Inc.*, 1996 WL 296643, *8 (N.D.Ill.)(Existence of pretext supports an inference of the existence of a pricing agreement.).

The Lower Court acknowledges that defendant Drake[12] denies that he ever spoke with defendant Packer, yet there is evidence to the contrary. *Add.* 9.

Furthermore, the Lower Court acknowledges that while it found that there is evidence from which a jury could infer supracompetitive profits and parallel pricing, the defendant Packer has denied the existence of supracompetitive profits and parallel pricing, but rather has sought to justify the high prices on Martha's Vineyard as resulting from higher costs of operating a gasoline station than exist on the mainland.[13] *Add. 2, 9.*

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[12] There is also evidence that defendant Packer also falsely denies having ever spoken with defendant Drake. *See Pl/Appellant's Brief, infra, p.25.*

[13] It is ironic that it is defendant's attorney (knowledgeable regarding the law) and not his client that came up with the defense of parallel pricing. To this day, the defendant Packer insists that he barely makes a profit, and sets his prices to cover his costs.

The evidence showed that Defendants' gas stations sold their gasoline at prices that were an average of 56 cents/gallon higher than prices on Cape Cod. *App. A0459-A0460*. The Defendant Packer justifies the higher price of gasoline at its stations compared to prices on Cape Cod, as resulting from additional transportation costs, storage costs, higher cost of living and higher insurance rates. *App. A0459-A0460.*. An analysis of these costs, which Packer claims justifies the defendants' higher gas prices, shows the reasons given by Packer for the higher prices are pretextual, as the costs identified by Packer can account for only 38% of the difference in prices being charged by defendants' gas stations when compared to gas stations on Cape Cod. *App. A0383-A0384* (*#s 12-15*); *App. A0663-A0664, A0460-A0474.*

Furthermore, the Lower Court acknowledged that Packer claimed that Tisbury Shell earned less than $100,000/year and stated that it had issued no dividends in the past 10 years, yet, financial records

Yet, the Lower Court concluded that regardless of whether defendants made pretextual statements, "their substance is collateral to the issue at hand: establishing the existence of an agreement to fix prices."

In other words, the Lower Court acknowledges that there is evidence that defendants made false statements relating to (1) the basis of their pricing, (2) whether they spoke to each other, and (3) how much profit they earned. It is inconceivable how the Lower Court can possibly characterize these subjects as collateral to the central issues raised in this case.

In essence, the Lower Court has confused the concept of "collateral evidence" with the concept of "circumstantial evidence". By apparently considering the only non-collateral evidence to be evidence definitively proving the existence of a conspiracy, the Lower Court has dismissed this case, not because it does not contain considerable circumstantial evidence of the existence of a conspiracy, but, in fact, for no other reason than that it does not contain direct evidence of a conspiracy, which plaintiffs are not required to present.

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indicate that R.M. Packer averaged more than $800,000 in earnings per year and paid $950,000 in dividends between 2003 and 2007 (Tisbury Shell accounted for 40% of R.M. Packer Co. revenues). *Add. 9.*

II. THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT DISMISSING COUNT II OF THE SECOND AMENDED COMPLAINT ALLEGING PRICE GOUGING FOLLOWING HURRICANES KATRINA AND RITA.

The "Massachusetts Price Gouging Law", 940 CMR § 3.18 was promulgated by the Attorney General pursuant to Mass. Gen. Laws, Chapter 93A, § 2 (c). Section 3.18, which is captioned "Price-Gouging", reads as follows:

> (1) It shall be an unfair or deceptive act or practice, during any market emergency, for any petroleum-related business to sell or offer to sell any petroleum product for an amount that represents an unconscionably high price.
>
> (2) A price is unconscionably high if:
>
> > (a) the amount charged represents a gross disparity between the price of the petroleum product and
> >
> > > 1. the price at which the same product was sold or offered for sale by the petroleum-related business in the usual course of business immediately prior to the onset of the market emergency, or
> > >
> > > 2. the price at which the same or similar petroleum product is readily obtainable by other buyers in the trade area; and
> >
> > (b) the disparity is not substantially attributable to increased prices charged by the petroleum-related business suppliers or increased costs due to an abnormal market disruption.

A. The Lower Court Erred in Finding as a Matter of Law that an "Unconscionably High Price" under the Massachusetts Price Gouging Statute Does Not Factor Into Account Unconscionable Changes in Profit Margin at Which the Gasoline is Sold.

One overriding issue is dispositive of plaintiffs' "price gouging" claim: whether "price gouging" should be measured solely by changes in prices at the pump (as found by the Lower Court) or whether "price gouging" should be measured by changes in profit realized from changes in pricing at the pump. Deciding this issue one way has resulted in a defendants' judgment in this case. Deciding this issue the other way would result in a plaintiffs' judgment in this case. Yet, despite the overriding importance of this one issue and the extensive briefing of the issue by all parties, the Lower Court relegated this issue to a two sentence footnote, containing in essence no analysis and no supporting citations. The Lower Court states in full:

> Plaintiffs' arguments concerning margin rather than price, including those which rely on the Federal Trade Commission report and New York case law, are inconsistent with the plain language of the statute. The statute expressly directs the comparison of price, not margin.

Add. 11, n.7.

The Lower Court's analysis (or lack thereof) is contrary to common sense, ignores rules of statutory construction, erroneously interprets Chapter 93A as if it does no more than set forth the common law, fails to look to the Federal Trade

Commission, as it should, for guidance, and ignores case law in another jurisdiction which has interpreted a nearly identical statute to the Massachusetts Price Gouging law in a manner contrary to the Lower Court's interpretation.

1. **The Evidence is Overwhelming that Defendants Realized an Unconscionable Profit after Hurricanes Katrina and Rita.**

The evidence is overwhelming that defendants realized an unconscionable profit after Hurricanes Katrina and Rita. Without question, there is at a minimum a dispute of fact regarding this issue, which must result in the denial of defendants' motions for summary judgment.

Edgartown Mobil and Depot Corner increased their daily profit margin by as much as 41 cents/gallon from the profit margin it had realized the day prior to Hurricane Katrina. *App. A0540-A0543.* Average daily profit margins in October 2005 were 51% higher than average profit margins in August 2005 (the month prior to the hurricanes) at Edgartown Mobil and 54% higher than average profit margins in August at Depot Corner.[14]

[14] Average monthly profit margins are set forth in Prof. Gollop's Report, Table 13. *App.A0547.* Even utilizing the Lower Court's more restrictive definition of the period immediately prior to Hurricane Katrina (i.e. the day before the hurricane), profit margins at Edgartown Mobil increased from 59 cents/gallon on August 28, 2005 at Edgartown Mobil to an average of 88 cents/gallon in October 2005 at Edgartown Mobil (i.e. an increase of 46%) and from 63 cents/gallon August 28, 2005 to an average of 92 cents/gallon in October 2005 at Depot Corner (i.e. an increase of 49%). *App. A0540-A0543, A0547.* Similarly large increases in profit margins are found for the other defendants, even if profit margins are compared to the day prior to Hurricane Katrina rather than to the month prior to the hurricanes, as computed by Professor Gollop. *Id.*

XtraMart Citgo increased its profit margin by as much as 51 cents/gallon after Hurricane Katrina. *Id.* Average daily profit margins in November 2005 were 68% higher than average profit margins in August 2005.[15]

Tisbury Shell increased its profit margin by as much as 36 cents/gallon after Hurricane Katrina. *Id*. Average daily profit margins in October 2005 were 38% higher than average profit margins in August 2005.[16]

2. **As a Matter of Common Sense and Pursuant to Basic Rules of Statutory Construction, This Court Must Look at Increases in Profit Resulting from Changes in Prices at the Pump to Determine if Price Gouging Occurred.**

Almost by definition after a market emergency there will be a change in price. The concern is that gasoline stations will take advantage of the change in price to gouge their customers, i.e. to increase their profits. Yet, the Lower Court refused to look at the very issue (i.e. whether consumers are being gouged by increased profits) which the law was aimed to prevent.

The Massachusetts Price Gouging Law does not prohibit selling a petroleum product at a "high price", but at "an amount that represents an unconscionably high price". *940 CMR § 3.18(1).* The statute specifically notes that a price is not unconscionable if it is substantially attributable to increased costs. *940 CMR §*

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15 *Id.*

16 *Id.*

3.18(2)(b). Prof. Gollop concludes that in undertaking an economic analysis in this case, "it is clear that changes in gross margins is the relevant test for price gouging in the Massachusetts law." *App. A0489.*

To justify its ignoring defendants' grossly unconscionable increases in profits, the Lower Court rigidly imposes the language of section (2) of the Massachusetts Price Gouging Law as the only circumstance under which section (1) of the Law can be violated. While 940 CMR §3.01 defines "market emergency", it does not define "unconscionably high price". If the Attorney General had wished to define "unconscionably high price" as the criteria set forth in Section 3.18(2), it could have done so by establishing the Section 3.18(2) criteria as the definition of "unconscionably high price". 940 CMR §3.18(2) states that "[a] price is unconscionably high if . . ." certain events occur. It does not state that a price is unconscionably high "only if" those events occur.

3. **The Lower Court Failed to Look to Federal Trade Commission Interpretations of Price Gouging in the Sale of Retail Gasoline in Analyzing What Constitutes an Unfair Method of Competition Under Massachusetts General Law Chapter 93A.**

"In analyzing what constitutes unfair methods of competition and unfair or deceptive acts or practices, which are not defined in G.L. c. 93A, this court looks to interpretations by the Federal Trade Commission." *Ciardi v. LaRoche, Ltd.*, 436 Mass. 53, 59 (2002). Yet, the Lower Court refused to look to the FTC

interpretation of what constituted "price gouging" following Hurricanes Katrina and Rita.

Section 632 of the Federal Trade Commission's appropriations legislation for fiscal 2006 directed the Commission to investigate nationwide gasoline prices and possible price gouging in the aftermath of Hurricane Katrina. *2006 Pub. L. No. 109-108 § 632*. In response, the Federal Trade Commission issued its Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases (Spring 2006). *App. A0762-A0973*. Prof. Gollop concluded that the FTC Report was an authoritative source for quantifying the criteria constituting unconscionable pricing as defined in the Massachusetts Price Gouging Law. *App. A0485*.

The FTC examined gasoline prices at 24,197 gasoline stations across the country. *App. A0810*. It found that retailers priced at very high prices for only very short periods. *Id*. In fact, in only one city studied did the highest price stay above $3.50/gallon for more than one day. *Id.* In Chapel Hill, North Carolina, a high of $3.71 was posted for four consecutive days at one station. *Id.* Stations' peak price generally lasted only one or two days, and only lasted for 4-5 days on a couple of occasions for the over 24,000 stations studied. *Id.* Four thousand six hundred and fifty-four (4,654) stations were examined in the Northeast, while one

thousand five hundred and eighty nine (1,589) stations were examined in the Boston area. *Id.*

Peak prices at the defendants' stations remained above $3.50/gallon longer than in any of the 24,197 gasoline stations examined across the country, including the over four thousand stations examined by the FTC in the Northeast. At Edgartown Mobil, the price of regular gasoline stayed above $3.50 for 47 straight days; the peak price of $3.89 remained for 6 days. *App. A1243-1247.* At Depot Corner Mobil, the price of regular gasoline stayed above $3.50 for 46 straight days; the peak price of $3.85 held constant for 6 days. *App. A1248-A12*52. At XtraMart Citgo, the price of regular gasoline stayed above $3.50 for 42 straight days; the peak price of $3.70 remained for 17 days. *App. A1253-A1258.* At Tisbury Shell, the price of regular gasoline stayed above $3.50 for at least 24 straight days (the prices posted for 15 contiguous days are indecipherable); the peak price of $3.599 remained for 12 days. *App. A1259-1261.*

To determine when an increase in gross margin constituted "price gouging", the FTC Report examined 99 retailers, all of whom had been accused of price gouging after Katrina, and many of whom had settled state charges and paid a fine. *App. A0490.* Staff received documents from 39 of these retailers. *Id.* Twenty-four (24) of these stations were single-location retailers. *Id.* Of the 24 stations, the average increase in margin for September 2005 compared to August 2005 was 2

cents/gallon. *Id*. The FTC concluded that a retailer had "a price increase not substantially explained by increased costs if its gross margin increased by more than five cents per gallon or more between August and September 2005." *Id*.

Gross margins at defendants' gas stations in each month of September through November 2005 exceeded each respective station's August gross margin by more than the five-cent threshold established by the FTC. *App. A0547*. In fact, the lowest monthly increase in gross margin at any of the defendants' gas stations following Hurricane Katrina was seventeen (17) cents/gallon, while the highest increase in gross margin for any month at the defendants' gas stations was forty-one (41) cents/gallon. *Id*. In other words, the increases in profits were from three times to eight times greater than the amount of an increase that the FTC concluded constituted price gouging.

The FTC Report further found that the monthly weighted average gross profit margin for the 24 retail stations accused of price gouging following Hurricane Katrina studied by the FTC was 14 cents per gallon in August 2005, and after Hurricane Katrina was 16 cents per gallon. *App. A0914-A0925, A0937*. This compares to defendants' profit margins, all of which peaked at more than $1.00/gallon following Hurricane Katrina. *App. A0540-A0543, A1243-A1258, A1262-A1268.*

4. **The Lower Court Failed to Examine Analagous State Price Gouging Statutes in Interpreting the Massachusetts Price Gouging Statute.**

New York case law is extremely instructive in determining whether the increase in the price of gasoline at Edgartown Mobil and Depot Corner Mobil should be considered as a matter of law unconscionable. New York, like Massachusetts, has a "price gouging" law. The law, like the Massachusetts law, defines "price gouging" as "unconscionably extreme" pricing in periods of market disruptions gauged by a "gross disparity" in before and after pricing or when compared to comparable pricing in the trade area, which cannot be justified by additional costs outside the control of the defendant. Yet, the Lower Court refused to look at court interpretations of this law for guidance in interpreting the Massachusetts statute.[17]

Specifically, New York Gen. Bus. Law §396-r provides in relevant part:

> 1. Legislative findings and declaration. The legislature hereby finds that during periods of abnormal disruption of the market caused by strikes, power failures, severe shortages or other extraordinary adverse circumstances, some parties within the chain of distribution of consumer goods have taken unfair advantage of consumers by charging grossly excessive prices for essential consumer goods and services. . . . .
>
> 2. During any abnormal disruption of the market for consumer goods and services vital and necessary for the health, safety and welfare of consumers, no party within the chain of distribution of such consumer

[17] Nor did the Court cite to the law of any state supporting its extremely restrictive reading of the Massachusetts Price Gouging law.

> goods or services or both shall sell or offer to sell any such goods or services or both for an amount which represents an unconscionably excessive price. . . .
>
> 3. Whether a price is unconscionably excessive is a question of law for the court.
>
> > (a) The court's determination that a violation of this section has occurred shall be based on any of the following factors: (I) that the amount of the excess in price is unconscionably extreme; or (ii) that there was an exercise of unfair leverage or unconscionable means; or (iii) a combination of both factors in subparagraphs (I) and (ii) of this paragraph.
> >
> > (b) In any proceeding commenced pursuant to subdivision four of this section, prima facie proof that a violation of this section has occurred shall include evidence that
> >
> > > (i) the amount charged represents a gross disparity between the price of the goods or services which were the subject of the transaction and their value measured by the price at which such consumer goods or services were sold or offered for sale by the defendant in the usual course of business immediately prior to the onset of the abnormal disruption of the market or
> > >
> > > (ii) the amount charged grossly exceeded the price at which the same or similar goods or services were readily obtainable by other consumers in the trade area. A defendant may rebut a prima facie case with evidence that additional costs not within the control of the defendant were imposed on the defendant for the goods or services.

At least two New York courts have found gas stations to have engaged in price gouging after Hurricane Katrina in remarkably similar circumstances as those found in the case before this Court. In *Spitzer v. My Service Center, Inc.*, 14

Misc.3d 1217(A), 836 N.Y.S.2d 487, 2007 WL 102463, 2007 (N.Y. Sup., Westchester Cty. 2007), the court found that increases in gas prices following Hurricane Katrina to $3.45/gallon (resulting in a 32 cent/gallon increase in profit margin from pre-Katrina margins), and to $3.62/gallon (resulting in a 21 cent/gallon increase in profit margin from pre-Katrina margins) both "patently violated" the New York price gouging statute, given that they were "excessive increases" which "did not bear any relation to the supplier's cost".

In *Spitzer v. Wever Petroleum, Inc.,* 14 Misc.3d 491, 827 N.Y.S.2d 813 (N.Y.Sup., Albany Cty. 2006), the court found that a gas station's increase in its price per gallon to $3.60/gallon following Hurricane Katrina, which resulted in increases in profits/gallon ranging from 14 cents/gallon - 60 cents/gallon violated the New York price gouging statute. Specifically, the court found:

> [T]here exists a gross disparity between a $0.83 per gallon mark-up pre-Hurricane Katrina and a $0.97, $1.08 or $1.43 per gallon mark-up post Hurricane Katrina. . . . While Wever did raise prices in accordance with an increase in Exxon Mobil's base cost, Wever's increase far exceeded the needed increase for Wever to maintain a similar pre-Hurricane profit or to generate the required revenue to purchase gasoline from Exxon Mobil the next business day and were unconscionably excessive.

5. <u>The Common Law Cases Upon Which The Lower Court Relies in fact Support Plaintiffs' Position in this Case</u>.

The Lower Court, rather than look to FTC interpretations of price gouging or comparable laws to the Massachusetts price gouging law, instead looks to Massachusetts contract law. *Add.* 12. However, the Massachusetts Supreme

Judicial Court has stated on numerous occasions, the "consumer protection statutes (i.e. Chapter 93A) created new substantive rights by making conduct unlawful which was not previously unlawful under the common law or any prior statute. The statutory language is not dependent on traditional tort or contract law concepts for its definition." *Heller v. Silverbranch Construction Corp.*, 376 Mass. 621, 625 (1978); *see, also, Kattar v. Demoulas*, 433 Mass. 1, 13 (2000).

Regardless, the cases cited by the Lower Court, actually support plaintiffs' position that this Court should be looking at changes in profit margins and not pump prices alone. As the Lower Court noted, in the context of Massachusetts contract law, "a gross disparity exists when the difference between the value and the consideration is so substantial that the exchange is facially inadequate." *Add.*12). In other words, to determine if a "gross disparity" exists, a court must look at the defendants' costs, as well as its prices.

B. **The Lower Court Erred in Finding that there was not a Gross Disparity in the Absolute Price of Gasoline After Hurricanes Katrina and Rita Compared to Absolute Price of Gasoline that Existed Immediately Prior to the Hurricanes.**

Even if, *arguendo,* this Court were to compare absolute prices from before and after the "market emergency" rather than changes in profit margins, it should find that there was a "gross disparity" in prices, which cannot be explained by changes in cost, i.e. violating the Massachusetts Price Gouging Law.

Prices at Edgartown Mobil rose 43 cents/gallon and prices at Depot Corner Mobil rose 42 cents/gallon in the 7-day period immediately following Hurricane Katrina compared to their prices for the 7 days preceding Hurricane Katrina.[18] *App. A0486-A0487.* During the week of September 28-October 3, following Hurricane Rita and a full month after Hurricane Katrina, prices of regular gasoline were above their August 21-28 levels by 35 cents/gallon at both Edgartown Mobil and Depot Corner Mobil. *Id.* Two weeks later the prices at both stations were still 27 cents/gallon higher than they were during the week of August 21-28. *Id.*

Prices of regular gasoline at XtraMart Citgo rose 48 cents/gallon in the 7-day period following Hurricane Katrina compared to their prices for the 7 days preceding Hurricane Katrina. *Id.* Average prices of regular gasoline at XtraMart Citgo rose an additional 12 cents/ gallon during the next seven days (i.e. 60 cents/gallon above their pre-Hurricane prices). *Id.* During the week of September 28-October 3, following Hurricane Rita and a full month after Hurricane Katrina, prices of regular gasoline were above their August 21-28 levels by 42 cents/gallon at XtraMart Citgo. *Id.* Two weeks later the price was still 35 cents/gallon higher than it was during the week of August 21-28. *Id.* Average prices at XtraMart Citgo during the 7-day period November 22-28 were still above their late May 2005 levels by 14 cents/gallon. *Id.*

[18] The disparity in prices is even greater when compared to prices at which gasoline was being sold in May 2005, the period of time which Professor Gollop argues is the most relevant period for comparison. *App. A0486.*

Prices of regular gasoline at Tisbury Shell rose 18 cents/gallon in the 7-day period following Hurricane Katrina from the price of gasoline in the 7 days prior to the Hurricane. *Id*. Average prices of regular gasoline at Tisbury Shell rose an additional 18 cents/ gallon during the next seven days. *Id*. During the week of September 28-October 3, following Hurricane Rita and a full month after Hurricane Katrina, prices of regular gasoline were above their August 21-28 levels by 32 cents/gallon at Tisbury Shell. *Id*. Two weeks later the price was still 20 cents/gallon higher than it was during the week of August 21-28. *Id*. Average prices at Tisbury Shell during the 7-day period November 22-28 were still above their late May 2005 levels by 12 cents/gallon. *Id*.

Yet, the Lower Court finds these increases in gas prices (ranging from 36-60 cents/gallon) not to be a "gross disparity" in prices, manipulating the numbers by turning them into percentage changes, and by comparing the changes to changes which occurred at other times in totally different circumstances of no relevance to the "Price Gouging Law". *Add.* 13. By describing the change of gas prices at XtraMart Citgo as being only a 19.36% change, *id.*, the Lower Court cannot change the reality that consumers at the defendant's station had to pay 60 cents/gallon more for gasoline than they had to pay two weeks earlier. The fact that gas prices changed by similar percentages in other periods of time unrelated to the market emergency is irrelevant, as these prior changes in price may well have

been caused by changes in cost, a justification which does not exist in this case, as shown by defendants' increases in profit margins, a fact which the Lower Court insisted on ignoring. The Lower Court's computation of "average price increases" over the entire market emergency period is the most misleading of the statistics utilized by the Lower Court. *Add.* 13. The Massachusetts Price Gouging Law prohibits price gouging "during" a market emergency. It does not require price gouging "throughout" the market emergency period. Thus, the fact that prices began to drop in late October 2005 to levels that existed in the week prior to Hurricane Katrina[19] (which decreases significantly the average percentage increase in price for the entire period) does not mean that price gouging did not occur in September and October. At most, this would affect the amount of damages to which plaintiffs are entitled and would not support the granting of summary judgment.

C. **Even if this Court Chooses Not to Overturn as a Matter of Law the Lower Court's Dismissal of Count II, at a Minimum, It Should Certify the Issue of the Interpretation of the Massachusetts Price Gouging Statute to the Massachusetts Supreme Judicial Court.**

Section 1 of Rule 1:03 of the Massachusetts Supreme Judicial Court provides in relevant part:

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[19] While prices dropped during this period reflecting significant decreases in cost, the defendants maintained their higher profit margins in late October, which they had come to enjoy as the result of the hurricanes. *App. A0540-A0543, A0547.*

> This court may answer questions of law certified to it by . . . a Court of Appeals of the United States . . ,when requested by the certifying court if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of this court.

The Lower Court in this case has acknowledged that the Massachusetts Price Gouging Law "does not define any of the emphasized terms, [and] no court has interpreted the statute. . ." *Add.* 11. Thus, it would be well within this Court's discretionary authority to defer to the Massachusetts Supreme Judicial Court, if it chooses to do so. *See, Currie v. Group Insurance Commission*, 290 F.3d 1, 9, n. 7 (1st Cir. 2002).

Conclusion

For the reasons stated in this Brief, this Court should overturn the Lower Court's granting of summary judgment in this case. In the alternative, this Court should overturn the Lower Court's granting of summary judgment on Count I and certify to the Massachusetts Supreme Judicial Court the question of whether "price gouging" under 940 CMR § 3.18 should be measured solely by changes in prices at the pump (as found by the Lower Court) or whether "price gouging" should be measured by changes in profit realized from changes in pricing at the pump.

Certificate of Compliance with Rule 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because this brief contains 13,607 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in a proportionally spaced typeface, i.e. 14 point Times New Roman, using Microsoft Word 2007.

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Addendum

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 07-11601-RWZ

WILLIAM WHITE, *et al.*

v.

R. M. PACKER CO., INC., *et al.*

ORDER

January 6, 2010

ZOBEL, D.J.

I. Introduction

Martha's Vineyard is an island some seven miles off the coast of Massachusetts. The island's gas stations charge relatively high prices for gasoline, and plaintiffs, a group of residents and a corporation, see evidence of a decade-long conspiracy to fix prices and instances of price gouging following hurricanes Katrina and Rita in 2005. They now sue four of the gas stations with a two-count complaint alleging, respectively, violation of the Sherman Act § 1 and Mass. Gen. Laws ch. 93A. Defendants move jointly for summary judgment on Count I and separately on Count II.

II. Background

Martha's Vineyard is home to 15,000 year-round residents and 125,000 residents during the summer. The island is accessible by ferry, including one capable of carrying vehicles, or by air. Nine gas stations serve the island's petrol needs. The most recent gas station opening was in 1997. Since then the Martha's Vineyard

Commission ("MVC"), which must approve certain types of commercial development including gas stations, has denied all petitions to open stations. See generally Tisbury Fuel Serv., Inc. v. Martha's Vineyard Comm'n, 864 N.E.2d 1229 (Mass. App. Ct. 2007) (upholding a decision to deny an application to build a gasoline station).

On August 28, 2007, plaintiffs brought this suit against the owners of four of the stations: Tisbury Shell, XtraMart Citgo, Depot Corner Mobil, and Edgartown Mobil. Tisbury Shell, owned by defendant R.M. Packer, and XtraMart Citgo, owned by defendant Drake Petroleum ("Drake"), are located in Vineyard Haven.[1] Edgartown Mobil, owned by defendant Frank Paciello, and Depot Corner, owned by defendant Depot Corner of which Paciello is the sole shareholder (collectively "Edgartown Mobils"), are located in Edgartown, eight miles to the southeast of Vineyard Haven. R.M. Packer and Drake are also gasoline distributors, and Paciello purchases gasoline for the Edgartown Mobils at wholesale from Drake.

The record includes evidence from which a jury could infer both supracompetitive profits and parallel pricing.[2] From August 1, 2003, to October 14, 2005, the average price difference between Tisbury Shell and XtraMart Citgo was 0.9 cents. From October 15, 2005, through March of 2008, prices were identical, with rare exceptions. The Edgartown Mobils' prices rose and fell in sync with the Vineyard Haven stations and averaged slightly higher costs. Over three periods of time, from

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[1] Defendant Kenyon, although named as a separate defendant, merged with defendant Drake on January 1, 2004.

[2] The record is viewed "in the light most hospitable to the party opposing summary judgment, indulging all reasonable inference in that party's favor." Griggs-Ryan v. Smith, 904 F.2d 112, 115 (1st Cir. 1990).

May 25 to September 15, 2004, March 20 to May 25, 2005, and July 15 to November 7, 2005, prices at the four gas stations rose or held steady while the wholesale cost of gas declined. This parallel pricing developed even though the relative wholesale cost of Shell, Citgo, and Mobil gasoline varied. Also, during the period from 2004 to 2006, the market share of the defendants remained stable, varying by no more than 1.2 percentage points.

According to plaintiffs' expert, during a five-year period beginning August 1, 2003, gasoline prices at the defendants' stations exceeded prices at stations in Cape Cod, Massachusetts, by an average of 56 cents per gallon. The added cost in delivering gasoline on the island amounted to 21 cents, leaving an additional net profit of 35 cents per gallon.[3]

Plaintiffs' Second Amended Complaint alleges in Count I that the four defendants fixed gas prices in violation of the Sherman Act, § 1, thereby harming a class defined as all individuals who purchased gas at the defendants' stations from December 31, 1999, to the date of filing. Count I is limited, however, by the statute of limitations to Sherman Act violations occurring on or after August 2, 2003 (Docket # 53). Count II alleges price gouging in violation of Mass. Gen. Laws ch. 93A, § 2 during the period of time following hurricanes Katrina and Rita from August 29 to December 1, 2005, with a class of all individuals who purchased gasoline at defendants' stations from approximately August 31, 2005, through December 2, 2005.

[3]Plaintiffs' expert, Frank Gollop, calculated these numbers after reviewing financial data produced by defendants during discovery. (Docket # 137 Ex. 3.)

Defendants move jointly for summary judgment on Count I, and individually, but with nearly identical motions, on Count II.

III. Analysis

To survive a motion for summary judgment, the opposing party must "set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." Matsushita Elec. Indus. v. Zenith Radio Corp. 475 U.S. 574, 587 (1986).

A. Count I – Sherman Act

Section 1 of the Sherman Act, 15 U.S.C. § 1, prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." Accordingly, to demonstrate a contract, combination, or conspiracy plaintiff must "present evidence that tends to exclude the possibility that . . . [defendants] were acting independently." Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 768 (1984); see Matsushita, 475 U.S. at 588 (holding "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy").

While an agreement to fix prices is unlawful, conscious parallelism, where competitors independently decide to parallel each others' prices, is lawful.

> Tacit collusion, sometimes called oligopolistic price coordination or conscious parallelism, describes the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions.

Brooke Group LTD., v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227 (1993). Therefore, while an antitrust claim may be predicated on parallel pricing, which for purposes of their motion, defendants concede exists, there must also be "plus factors," circumstantial evidence that suggests an associated agreement rather than the independent conduct of conscious parallelism. Apex Oil v. DiMauro, 822 F.2d 246, 253-54 (2d Cir. 1987); see Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 557 n.4 (2007) (giving examples of the type of parallel conduct allegations that would state a § 1 claim); Clamp-All Corp. v. Cast Iron Soil Pipe Inst., 851 F.2d 478, 484 (1st Cir. 1988) (finding that evidence of price lists showing parallel pricing, without more, "does not permit a finding of more than such individual, interdependent, price setting"). The theory of conspiracy, supported by these plus factors, must also be economically reasonable, Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451, 468-69 (1992), which defendants concede for purposes of this motion.[4]

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[4] The conditions in the Martha's Vineyard gasoline market are remarkably conducive to the development of parallel pricing, whether through a conspiracy or merely conscious parallelism. The market for gasoline is highly inelastic; gasoline is a necessity and residents cannot feasibly purchase gasoline off of the Vineyard, so gasoline demand is minimally affected by a change in price. Price coordination is easy, because there are only nine gas stations on the Vineyard and gasoline prices are openly posted. Further, gasoline is a non-durable good, so a consumer who does not buy today will need to buy tomorrow. Therefore, a station owner can advertise a higher price, wait a short time to see if other gas stations follow, and if they do not, the owner can reduce the price with minimal loss to sales.

Plaintiffs point to a variety of plus factors as evidence of conspiracy, but most are indicative only of parallel pricing and do not tend to exclude the possibility of independent action. Specifically, a motive to earn large profits, abnormal profits, price changes unrelated to costs, price leadership by one firm, and fixed market shares would all be expected if defendants engaged in conscious parallelism, aligning their prices without an agreement to fix prices.[5] (See Pl. Expert Report 25-27 (concluding that defendants' profits, stable market shares, and parallel pricing were consistent with non-cooperative behavior).) Plaintiffs do, however, point to some direct evidence and four plus factors which, as characterized by plaintiff, suggest an agreement. I review this evidence below.

1. Direct Evidence

Steven Wehner was part of a consortium in the late 1990s that unsuccessfully petitioned the MVC to open a gas station, and he met with both James Ahern, then president of Drake, and Ralph Packer, representing R.M. Packer, to discuss the wholesale supply of gasoline. During a discussion with Ahern in December 1999, Wehner suggested leasing this new station to Drake, but indicated that Drake would have to honor a gasoline discount proposal that the consortium had made to the MVC. Ahern responded that Drake would not be offering discounts if Packer did not "cut

[5]Nor is there evidence of an agreement in either Drake's hire of a third party to lobby before the MVC against the approval of any new gas station, which is conduct that would be expected even in a competitive gasoline retail market, or structural attributes of the Vineyard economy which are not attributable to defendants' conduct and simply make the economy ripe for the development of conscious parallelism.

those [Vineyard resident] people any slack." (Dep. of Steven Wehner 38, Docket # 137 Ex. 4.)

At a subsequent meeting in December the parties again talked about the wholesale supply of gasoline. During the meeting Ahern picked up the phone and called Packer, without introducing himself, and the two made small talk. After the call he stated "I talk to Packer frequently," and "we all work together." (Dep. of Sean Conley 12, 15, Docket # 137 Ex. 12.)

Later in the meeting, Wehner shared his belief that a new discount gas station would cause a chain reaction among gas stations on the island, lowering prices. Ahern responded that if the Edgartown Mobils, which purchased Drake gasoline, started mucking around with prices, gasoline deliveries might be interrupted and "they'll get the idea real quick." (Dep. of Steven Wehner, at 44.)

Plaintiffs' argument that these statements by Ahern are direct evidence of conspiracy has two substantial problems. First, these statements occurred in 1999, nearly four years prior to the earliest date for which plaintiffs bring this claim. Second, Mr. Wehner was talking with Ahern (and Packer) as a potential wholesale purchaser of gasoline, and wholesale pricing is not at issue in this case. Notwithstanding these problems, Ahern's aversion to a unilateral gasoline discount makes good business sense in a competitive market, and whatever the antitrust implications might be if Drake actually interrupted supplies to the Edgartown Mobils, prospective comments about interrupting supplies demonstrate a lack of agreement to fix prices. Only the statement

"we all work together" suggests coordinated behavior, and as noted above, the conversation concerned wholesale gasoline prices in 1999.

2. Verbal Communications

Plaintiff offers as evidence of conspiracy both Ahern's 1999 statement that he talks frequently with Packer and the undisputed fact that Paciello talks often with Drake, see Apex Oil, 822 F.2d at 254 (identifying a high level of interfirm communication as a plus factor), but the existence of these communications does not support a reasonable inference of conspiracy. First, as discussed, the only evidence of communications between Ahern and Packer dates to 1999, and the content of those communications is unknown. There is no evidence of any communications between Ahern or Drake and Packer after 1999. Second, no inference can reasonably be drawn from the existence of communications between Paciello and Drake, because they would necessarily have to communicate regarding their ongoing contract for the wholesale supply of gasoline. There is no evidence that their communications concerned retail pricing.

3. Personal Loan

The current sales contract between Drake and Paciello, effective February 10, 2003, for a 20-year term, includes a personal loan to Paciello, which he used to buy out the co-owner of the Edgartown Mobils. Drake has the right to terminate after 10 years, at which time the balance of the loan would become immediately due. This loan is unique; to Ahern's recollection it is the only instance where Drake loaned money to an individual, or signed a 20-year sales contract.

There is a facially legitimate justification for the loan, to allow a part-owner of a longtime customer to secure full ownership, but a jury could also reasonably infer that this unusual loan gave Paciello some incentive to conspire with Drake, and that the repayment terms could leave Paciello beholden to Drake. See In re Nasdaq Market-Makers Antitrust Litigation, 894 F. Supp. 703, 713 (S.D.N.Y. 1995) (identifying common motivation as a plus factor).

4. False Statements and Pretextual Justifications

Ahern and Packer made statements during the course of this litigation that plaintiff alleges are false or pretextual. See Fragale & Sons Bev. Co. v. Dill, 760 F.2d 469, 474 (3d. Cir. 1985) (identifying pretext as circumstantial evidence of conspiracy). First, Ahern claims he has never spoken with Packer on the phone and can recall only one business meeting with him (Dep. of James Ahern 38-42, Docket # 137 Ex. 6), which is contrary to his statements to Wehner in 1999.

Second, Packer denies that Tisbury Shell's prices are kept at a higher than competitive level (Dep. of Ralph Packer 36, Docket # 137 Ex. 29), and claims that Tisbury Shell earns less than $100,000 per year and has issued no dividends in the past 10 years. (Id. at 45-46, 70.) In contrast, there is evidence from which parallel pricing could reasonably be inferred, and financial records indicate that R.M. Packer averaged more than $800,000 in earnings and paid $950,000 in dividends between 2003 and 2007.[6] (R.M. Packer Consolidating Statements, Docket # 137 Exs. 30-34.)

However, regardless of whether these statements were false or pretextual, their

[6] R.M. Packer did not maintain a separate accounting for Tisbury Shell, but it accounted for 40% of revenues.

substance is collateral to the issue at hand: establishing the existence of an agreement to fix prices. The evidence of Ahern communications is from 1999, not 2003 or later, in a meeting concerning wholesale gasoline, not retail gasoline. The existence (or lack thereof) of competitive pricing and the profits at Tisbury Shell relate to parallel pricing, but do not help to distinguish between conscious parallelism and concerted action.

5. Summary Judgment - Significance of the Direct Evidence and Plus Factors

Plaintiff must rely on this direct evidence and the plus factors, in total, to exclude the possibility of independent action and survive summary judgment. It is not enough. The "direct evidence" is ambiguous at best and arguably suggests a lack of agreement. The evidence of verbal communications between Packer and Ahern dates to 1999, four years before the period covered by plaintiffs' claims, and there is no information as to the content of these decade-old conversations. The alleged false statements and pretextual justifications concern matters which are collateral to proving the existence of an agreement. All that is left is a loan which could provide motive for Paciello and Drake to conspire, or could simply reflect a business decision in the context of a wholesale gasoline supply agreement. Significantly, there is no evidence of any communications between Packer and Drake after 1999, nor of any communications, at any time, among all three defendants. No reasonable jury could find an agreement to fix prices based on this evidence. Defendants are entitled to summary judgment on Count I.

B. Count II – Mass. Gen. Laws ch. 93A, § 2

The Massachusetts Attorney General has defined petroleum price gouging for the purposes of Mass. Gen. Laws ch. 93A. See id. at § 2© (giving the attorney general authority to issue regulations interpreting ch. 93A, § 2).

> (1) It shall be an unfair or deceptive act or practice, during any market emergency, for any petroleum-related business to sell or offer to sell any petroleum product for an amount that represents an unconscionably high price.
>
> (2) A price is unconscionably high if:
>
> (a) the amount charged represents a gross disparity between the price of the petroleum product and
>
> 1. the price at which the same product was sold or offered for sale by the petroleum-related business in the usual course of business immediately prior to the onset of the market emergency [the parties agree, for the purposes of the pending motions, that the market emergency was August 29, 2005 through December 1, 2005], or
>
> 2. the price at which the same or similar petroleum product is readily obtainable by other buyers in the trade area; and
>
> (b) the disparity is not substantially attributable to increased prices charged by the petroleum-related business suppliers or increased costs due to an abnormal market disruption.

940 Mass. Regs. Code 3.18.

Thus, to constitute price gouging, the price must by unconscionably high, defined as a *gross disparity* from either the price *immediately prior* to the market emergency or the price of readily obtainable product in the trade area.[7] The statute does not define any of the emphasized terms, no court has interpreted the statute, and

[7] Plaintiffs' arguments concerning margin rather than price, including those which rely on the Federal Trade Commission report and New York case law, are inconsistent with the plain language of the statute. The statute expressly directs the comparison of price, not margin.

the parties dispute the meaning. However, the plain language and Massachusetts law provide guidance. See Seideman v. City of Newton, 895 N.E.2d 439, 444 (Mass. 2008) (holding "[w]e derive the words' usual and accepted meanings from sources presumably known to the statute's enactors, such as their use in other legal contexts and dictionary definitions").

"Gross disparity" is a term of art in Massachusetts contract law. In that context, a gross disparity exists when the difference between the value and the consideration is so substantial that the exchange is facially inadequate. See Waters v. Min Ltd., 587 N.E.2d 231, 234 (Mass. 1992) (finding an unconscionable "gross disparity" where defendant purchased an annuity worth $189,000 for only $50,000, and citing a case where $4,750 in value was exchanged for $2,750); Jones v. Star Credit Corp., 298 N.Y.S. 2d 264, 266 (N.Y. Sup. Ct. 1969) (finding sale of $300 freezer for $900 is unconscionable), cited in Waters, 587 N.E.2d at 233. With price gouging in the gasoline context, the concern is that the seller uses the buyer's need for gas to drive an unjustly hard bargain. So, by analogy, a gross disparity is a rise in price so significant that it is facially not a normal market fluctuation.

The parties also differ on the meaning of "immediately prior," with the defendants suggesting either the day preceding or the average of the prior week, and plaintiffs offering the price in late May 2005. However, "immediately prior" plainly does not encompass the price three months prior to the market emergency. Defendants' prior-

week definition is logical, in keeping with the purpose of the statute and the appropriate measure.[8]

The largest disparity in price between any single day during the market emergency and the average of the week before was 11.57% at Tisbury Shell (Packer's Mem. in Supp. 8, Docket # 115), 19.36% at Xtramart Citgo (Drake Mem. in Supp. 7, Docket # 122), and 18.5% at the Edgartown Mobils (Paciello Mem. in Supp. 8, Docket # 119).[9] The average price increase over the market emergency was 3% at Tisbury Shell, 11% at Xtramart Citgo, and 4% at the Edgartown Mobils.

A review of the pricing history at defendants' stations shows that this degree of price fluctuation is consistent with the normal operation of the market. For example, the average monthly price at Tisbury Shell varied by more than 23% over the course of 2004, nearly 26% before the market emergency in 2005, and almost 36% in 2006. (Gollop Expert Report, at Table 1.) On a month-to-month basis, there was a fall of 13% between August and September of 2006, a nearly identical variation to the 14% rise over the same period in 2005, during the emergency. Id. Therefore, as a matter of law, these changes in price are not a "gross disparity" and do not represent price gouging.

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[8] There is no meaningful difference between the one-week average and the day prior. For example, the price was $3.10 at XtraMart Citgo for the entire week preceding August 29, 2005. (Gollop Expert Report, at Table 11.)

[9] Prices are for regular unleaded, although the numbers are similar and the conclusion the same for mid-level and premium. A review of the underlying evidence submitted in support of these motions indicates that the defendants used different methods to calculate the percentage change in price, but these differences have only a small and immaterial effect on the outcome of the calculation. For the sake of simplicity, this court simply relies on the numbers used by the defendants in their briefs.

Moreover, the result is the same when comparing prices on Martha's Vineyard with Cape Cod.[10] Prices are always higher on Martha's Vineyard because the cost of supplying gasoline on the island is greater than the cost of supplying gasoline on mainland Massachusetts. Tisbury Fuel Serv., 864 N.E.2d at 773 n.1 ("Gasoline prices on Martha's Vineyard are high and do not reflect market prices elsewhere in Massachusetts"). In August 2005, prior to the market emergency, the price difference was 20%. The difference during the market emergency was 16.7% in September, 21% in October, and 25% in November. (Gollop Expert Report, at Table 1.) These small shifts in relative price, with the difference actually declining in September, are not, as a matter of law, a gross disparity constituting price gouging.

IV. Conclusion

Defendants' joint motion for partial summary judgment on Count I (Docket # 111) is ALLOWED. Defendants' motions for summary judgment on Count II (Docket ## 114, 116, 120) are ALLOWED. Drake's motion to compel (Docket # 106) is DENIED AS MOOT. Drake's motion for leave to file a reply (Docket # 107) and R.M. Packer's motion for leave to file a reply (Docket # 108), both concerning previously decided motions to dismiss, are DENIED AS MOOT.

Judgment may be entered for defendants.

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[10] The parties also dispute whether the relevant trade area is Martha's Vineyard or Cape Cod, but the court will assume the plaintiff-favorable Cape Cod definition, as it does not affect the outcome of the analysis. Plaintiffs do not compare defendants' prices with other gas stations on the island.

January 6, 2010
DATE

/s/Rya W. Zobel
RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WILLIAM WHITE ET AL
Plaintiff

V.

R.M. PACKER CO., INC. ET AL
Defendants

CIVIL ACTION

NO. 07CV11601-RWZ

JUDGMENT

ZOBEL, D. J.

In accordance with the ORDER dated 1/6/10; Judgment is entered for the defendants.

By the Court,

1/7/10
Date

s/ Lisa A. Urso
Deputy Clerk

15 U.S.C.A. § 1

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

15 U.S.C.A. § 15

§ 15. Suits by persons injured

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only--

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

(b) Amount of damages payable to foreign states and instrumentalities of foreign states

(1) Except as provided in paragraph (2), any person who is a foreign state may not recover under subsection (a) of this section an amount in excess of the actual damages sustained by it and the cost of suit, including a reasonable attorney's fee.

(2) Paragraph (1) shall not apply to a foreign state if--

(A) such foreign state would be denied, under section 1605(a)(2) of Title 28, immunity in a case in which the action is based upon a commercial activity, or an act, that is the subject matter of its claim under this section;

(B) such foreign state waives all defenses based upon or arising out of its status as a foreign state, to any claims brought against it in the same action;

(C) such foreign state engages primarily in commercial activities; and

(D) such foreign state does not function, with respect to the commercial activity, or the act, that is the subject matter of its claim under this section as a procurement entity for itself or for another foreign state.

(c) Definitions

For purposes of this section--

(1) the term "commercial activity" shall have the meaning given it in section 1603(d) of Title 28, and

(2) the term "foreign state" shall have the meaning given it in section 1603(a) of Title 28.

M.G.L.A. 93A § 2

§ 2. Unfair practices; legislative intent; rules and regulations

(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

(b) It is the intent of the legislature that in construing paragraph (a) of this section in actions brought under sections four, nine and eleven, the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended.

(c) The attorney general may make rules and regulations interpreting the provisions of subsection 2(a) of this chapter. Such rules and regulations shall not be inconsistent with the rules, regulations and decisions of the Federal Trade Commission and the Federal Courts interpreting the provisions of 15 U.S.C. 45(a)(1) (The Federal Trade Commission Act), as from time to time amended.

CODE OF MASSACHUSETTS REGULATIONS
TITLE 940: OFFICE OF THE ATTORNEY GENERAL
CHAPTER 3.00: GENERAL REGULATIONS

Current through March 5, 2010, Register #1151

3:18 Price Gouging

(1) It shall be an unfair or deceptive act or practice, during any market emergency, for any petroleum-related business to sell or offer to sell any petroleum product for an amount that represents an unconscionably high price.

(2) A price is unconscionably high if:

(a) the amount charged represents a gross disparity between the price of the petroleum product and

1. the price at which the same product was sold or offered for sale by the petroleum-related business in the usual course of business immediately prior to the onset of the market emergency, or

2. the price at which the same or similar petroleum product is readily obtainable by other buyers in the trade area; and

(b) the disparity is not substantially attributable to increased prices charged by the petroleum-related business suppliers or increased costs due to an abnormal market disruption.

McKinney's General Business Law § **396-r**

Mckinney's Consolidated Laws of New York Annotated

General Business Law
Chapter 20. Of the Consolidated LawsA
Article 26. Miscellaneous
§ 396-r. Price gouging

1. Legislative findings and declaration. The legislature hereby finds that during periods of abnormal disruption of the market caused by strikes, power failures, severe shortages or other extraordinary adverse circumstances, some parties within the chain of distribution of consumer goods have taken unfair advantage of consumers by charging grossly excessive prices for essential consumer goods and services.

In order to prevent any party within the chain of distribution of any consumer goods from taking unfair advantage of consumers during abnormal disruptions of the market, the legislature declares that the public interest requires that such conduct be prohibited and made subject to civil penalties.

2. During any abnormal disruption of the market for consumer goods and services vital and necessary for the health, safety and welfare of consumers, no party within the chain of distribution of such consumer goods or services or both shall sell or offer to sell any such goods or services or both for an amount which represents an unconscionably excessive price. For purposes of this section, the phrase "abnormal disruption of the market" shall mean any change in the market, whether actual or imminently threatened, resulting from stress of weather, convulsion of nature, failure or shortage of electric power or other source of energy, strike, civil disorder, war, military action, national or local emergency, or other cause of an abnormal disruption of the market which results in the declaration of a state of emergency by the governor. For the purposes of this section, the term consumer goods and services shall mean those used, bought or rendered primarily for

personal, family or household purposes. This prohibition shall apply to all parties within the chain of distribution, including any manufacturer, supplier, wholesaler, distributor or retail seller of consumer goods or services or both sold by one party to another when the product sold was located in the state prior to the sale. Consumer goods and services shall also include any repairs made by any party within the chain of distribution of consumer goods on an emergency basis as a result of such abnormal disruption of the market.

3. Whether a price is unconscionably excessive is a question of law for the court.

(a) The court's determination that a violation of this section has occurred shall be based on any of the following factors: (i) that the amount of the excess in price is unconscionably extreme; or (ii) that there was an exercise of unfair leverage or unconscionable means; or (iii) a combination of both factors in subparagraphs (i) and (ii) of this paragraph.

(b) In any proceeding commenced pursuant to subdivision four of this section, prima facie proof that a violation of this section has occurred shall include evidence that

(i) the amount charged represents a gross disparity between the price of the goods or services which were the subject of the transaction and their value measured by the price at which such consumer goods or services were sold or offered for sale by the defendant in the usual course of business immediately prior to the onset of the abnormal disruption of the market or

(ii) the amount charged grossly exceeded the price at which the same or similar goods or services were readily obtainable by other consumers in the trade area. A defendant may rebut a prima facie case with evidence that additional costs not within the control of the defendant were imposed on the defendant for the goods or services.

4. Where a violation of this section is alleged to have occurred, the attorney general may apply in the name of the People of the State of New York to the supreme court of the State of New York within the judicial district in which such violations are alleged to have occurred, on notice of five days, for an order enjoining or restraining commission or continuance of the alleged unlawful acts. In any such proceeding, the court shall impose a civil penalty in an amount not to exceed twenty-five thousand dollars and, where appropriate, order restitution to aggrieved consumers.