No. 10-1130

United States Court of Appeals for the First Circuit

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

KAREN LODGE
Plaintiff

v.

R.M. PACKER COMPANY, INC.; DRAKE PETROLEUM CO. INC.; KENYON OIL COMPANY; DEPOT CORNER, INC.; FRANCIS J. PACIELLO, d/b/a Edgartown Mobil
Defendants – Appellees

MID-VALLEY OIL COMPANY
Defendant

UP-ISLAND AUTOMOTIVE, INC.; J.P. NOONAN TRANSPORTATION, INC.; NELSON J. DEBETTENCOURT & SONS, INC.
Interested Parties

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

DEFENDANTS - APPELLEES' BRIEF

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FRAP 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1, the undersigned counsel to defendants - appellees Drake Petroleum Co., Inc. and Kenyon Oil Company, hereby certify that none of their stock is owned by a public company or a parent company.

Drake Petroleum Co., Inc.
and Kenyon Oil Company,
By their attorneys,

/s/ *William J. Fidurko*

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Dated: April 26, 2010

FRAP 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1, the undersigned counsel to defendant - appellee R.M. Packer Company, Inc., hereby certifies that none of its stock is owned by a public company or a parent company.

R.M. Packer Co., Inc.,
By its attorneys,

/s/ *Patrick T. Jones*

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FRAP 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1, the undersigned counsel to appellee-defendant Depot Corner, Inc., hereby certifies that none of its stock is owned by a public company or a parent company.

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Dated: April 26, 2010

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Defendants - Appellees support oral argument in this case because both the price-fixing and price-gouging issues in this case raise serious questions of importance to the parties and the public.

JURISDICTIONAL STATEMENT

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

On January 28, 2010, the plaintiffs filed a notice of appeal. This Court has jurisdiction of the appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the District Court properly granted summary judgment on Count I of the Second Amended Complaint in favor of the defendants where the evidence offered in support of the plaintiffs' price-fixing claim did not tend to exclude the possibility of independent pricing actions.

2. Whether defendants are entitled to judgment in their favor as a matter of law on Count II, where they have not engaged in price-gouging in violation to 94 C.M.R. § 3.18, and where the defendants' prices after Hurricanes Katrina and Rita were not unconscionably high, that is, were not grossly disparate from either the price immediately prior to the alleged market emergency or the price of readily obtainable product in the trade area.

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 ch. 93, § 4 ("the Massachusetts Antitrust Act") and price gouging in violation of Mass. Gen. Laws ch. 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.

After a hearing, 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 THE FACTS

The defendants are the owners and operators of four gasoline stations on Martha's Vineyard. The four appellee gasoline stations are:

- Tisbury Shell – located in Vineyard Haven and owned by R.M. Packer;
- XtraMart Citgo – located in Vineyard Haven and owned by Drake/Kenyon;
- Edgartown Mobil – located in Edgartown and owned by Francis Paciello; and
- Depot Corner – located in Edgartown and owned by Depot Corner, Inc.

Two stations are located in Vineyard Haven across from one another (Tisbury and XtraMart) and two are located in Edgartown (Edgartown Mobil and Depot Corner).

There are six gasoline stations in or near the town centers of Vineyard Haven, Oak Bluffs and Edgartown. *Record Appendix A0083 (¶27)*.[1]

Plaintiffs allege that only four of the six gasoline stations in or near the town centers of Vineyard Haven, Oak Bluffs and Edgartown conspired to fix the price of gasoline on Martha's Vineyard. *A0083, A0093 (¶¶27, 82)*.

Two gasoline stations located in Oak Bluffs are located less than three miles away from the two defendants in Vineyard Haven. These two non-defendant gasoline stations are DeBettencourt Mobil and Jim's Fuel Station.

In addition, there are three other gasoline stations located on Martha's Vineyard that are not defendants in this case. They are Airport Fuel Services in Edgartown, Up-Island Automotive in West Tisbury and Menemsha Texaco in Chilmark.

In total there are nine gasoline stations located on Martha's Vineyard, only four of which are alleged to have conspired and/or violated the Massachusetts price-gouging regulation according to the Plaintiffs' Second Amended Complaint.

[1] References to the Record Appendix are hereinafter identified without any prefix.

Price-Fixing

Plaintiffs allege that the four defendants contracted, combined or conspired among themselves to fix, raise, maintain and/or stabilize the prices charged at the retail level to purchasers of gasoline at the defendants' gasoline stations. *A0092.*

In the plaintiffs' answers to the defendants' contention interrogatories, they cite their personal observations and the experts' proposed testimony as the basis for their allegations of price-fixing. *A0210; A0213; A0216; A0219;A0222; A0225; A0228 and A0231.*

In the plaintiffs' depositions, they testify similarly. *A0234-A0238; A0241; A0244-A0246; A0249-0250; A0253-A0254; A0257; A0260-A0261; and A0264-A0265.*

Plaintiff Hilary Schultz, in her deposition testimony also cites the expected testimony of Steven Wehner as a basis for the plaintiffs' price-fixing claim. *A0234-A0238.*

Steven Wehner, a former island resident who unsuccessfully petitioned the Martha's Vineyard Commission to open his own gas station, testified that he met with Jim Ahern of Drake, ten years ago, in 1999, to discuss whether Drake would be interested in supplying Wehner's proposed gas station or leasing such property to run its own station. As a result of that meeting, Mr. Wehner claims that he "got the impression that on retail price . . . that Ralph [Ralph Packer] set the price and that Drake followed it, . . ." *A0292.*

The basis of Mr. Wehner's impression was an alleged phone call by Jim Ahern to Ralph Packer, in which Mr. Wehner claims he heard Mr. Ahern call Ralph Packer on the speakerphone and say something to the effect of "I'm checking in, how are you?" *A0274.*

"They [Ahern and Packer] did not talk about pricing or anything like that." *A0274.*

In the context of a discussion regarding leasing the property, Ahern also allegedly told Wehner that "Ralph and I talk;" and, in response to Wehner's question whether Drake would consider giving a 10 cent discount to island residents, said, "Ralph Packer is not giving the people anything, I'm not going to give them anything." *A0277-A0278; A0274.*

Ahern also allegedly suggested that if the Edgartown stations "started dropping prices . . . one or two delivery trucks might not make it on the boat and they'll get the idea real quick." *A0275.*

Wehner then offered his opinion: "it was my understanding that they [Drake – a wholesale supplier to the Edgartown stations] orchestrated the delivery trucks, that it was in their purview to have a delivery not make it every once in a while maybe if they needed to get somebody's attention because they controlled the delivery." *A0275.*

On the subject of price-fixing, Wehner admitted however that he is "*not aware of any conversations between anyone at R.M. Packer and anyone at Drake regarding pricing of gasoline on Martha's Vineyard*" and has no evidence of any price fixing involving the Paciello defendants either. *A0291, A0293*. (Emphasis added.)

The plaintiffs' proposed expert, Frank Gollop, examined the prices of all the appellee stations and compared them to prices charged in three towns on Cape Cod during the same period of time. He did not compare the defendants' prices to the prices charged by the other five gas stations on the island, including two stations in Oak Bluffs located less than three miles away from the two defendants in Vineyard Haven (miles nearer than the defendants in Edgartown are to those in Vineyard Haven). Indeed his report is entirely silent regarding the presence of the five other gasoline stations located on Martha's Vineyard and the extent to which they participate in the sale of retail gasoline on the island. *A0456.*

Comparing the defendants' prices to those in selected towns on Cape Cod, Gollop concludes that the gasoline sold at the defendants' stations (four stations in total) was sold at "supra-competitive" prices "during at least the August 2003 through July 2008 period." *A0474.*

Next, comparing the daily price data for the four defendant stations to each other, Gollop finds that the defendants engaged in "parallel pricing." *A0481*.

Examining the defendants' daily price and cost data, Gollop states that the inferences to be drawn from the pricing behavior are "mixed". *A0474*

Gollop states that there are instances where the evidence is "not inconsistent with either cooperative or non-cooperative behavior" and others where the pricing pattern is "not inconsistent with non-cooperative behavior." *A0475*. Gollop does not define what he means by "cooperative behavior."

Gollop also provides his opinions regarding three "plus factors": (1) abnormal profits, (2) fixed market shares for substantial periods of time, and (3) existence of an industry conducive to oligopolistic price fixing, either interdependently or through a more express form of collusion." *A0480.*

Price-Gouging

The plaintiffs have alleged that Drake has engaged in "price-gouging" in violation of Mass. Regs. Code Title 940, §3.18 and Massachusetts General Laws, Chapter 93A. *A0091-A0093 (¶¶79, 85-93).*

The plaintiffs claim that a market emergency period commenced on August 29, 2005, and concluded on December 1, 2005. *A0090 (¶ 70).*

The affidavit of Leonard Antos of Drake reflects the prices that Drake charged for a gallon of regular, mid-grade and super-grade gasolines from June 1, 2005 through June 1, 2006. *A0341*.

The price Drake charged for a gallon of regular unleaded 87 Octane gasoline from August 22, 2005 through August 28, 2005 was $3.099. *A0341*.

The average price Drake charged for a gallon of regular unleaded 87 Octane gasoline during the three months of the proposed market emergency period was $3.363. *A0341*.

The highest price Drake charged for a gallon regular unleaded 87 Octane gasoline during the proposed market emergency period, August 29, 2005 through December 1, 2005 *A0048 (¶79)*, was $3.699 (on September 2, 2005 through September 18, 2005). *A0344.*

The affidavit of Sidney Richards, CPA reflects the prices that Tisbury Shell charged for a gallon of regular unleaded and premium unleaded gasoline from July 3, 2005 to January 31, 2006. *A0302-0312*.

The price Tisbury Shell charged for a gallon of regular unleaded gasoline from August 22, 2005 through August 28, 2005 was $3.204. The average price Tisbury Shell charged for a gallon of regular unleaded gasoline during the three months of the proposed market emergency period was $3.248. *A0307, A0310*.

The highest price Tisbury Shell charged for a gallon of regular unleaded gasoline during the proposed market emergency period, August 29, 2005 through December 1, 2005, was $3.569 (on September 7, 2005 through September 18, 2005). *A0307-A0312*.

The affidavit of Kevin Cain includes the prices that Depot Corner charged at 199 Main Street and 141 Main Street for regular, blended and premium unleaded gasolines from August 1, 2005 through December 31, 2005. *A0320-A0334.*

The price Depot Corner charged for a gallon of regular unleaded gasoline at 141 Main Street from August 22, 2005 through August 28, 2005 was $3.249. During that same week, the price Depot Corner charged for a gallon of regular unleaded gasoline at 199 Main Street was $3.289. *A0320-0334.*

The average price Depot Corner charged for a gallon of regular unleaded gasoline during the three months of the proposed market emergency period was $3.377 at 141 Main Street and $3.418 at 199 Main Street. *A0320-A0334.*

The highest price Depot Corner charged for a gallon of regular unleaded gasoline during the proposed market emergency period, August 29, 2005 through December 1, 2005 was $3.849 at 141 Main Street (on September 3, 2005 through September 8, 2005) and $3.889 at 199 Main Street (on September 3, 2005 through September 5, 2005). *A0320-A0334.*

SUMMARY OF THE ARGUMENT

The District Court properly granted summary judgment in favor of the defendants on the plaintiffs' price-fixing claim because the plaintiffs have failed to produce sufficient evidence of an explicit agreement or conspiracy among the defendants to fix prices. The Sherman Act prohibits actual *agreements*, not individual pricing decisions (even when a firm rests its own decision upon its belief that its competitors will do the same). Instead of offering proof of a conspiracy, the plaintiffs have simply piled pieces of ambiguous evidence on top of one another. However, the plaintiffs' "direct" and circumstantial evidence does not add up, and is not probative of a conspiracy to fix prices. At most, the plaintiffs' evidence proves that the defendants have behaved rationally and lawfully to maximize their profits in a concentrated market. By all accounts, including the plaintiffs' expert's opinion, the market for retail gasoline on Martha's Vineyard is conducive to oligopolistic pricing, such that the defendants need not enter into a price-fixing agreement to maximize joint profits. In such a market, "cooperative" or "supra-competitive" parallel prices are the logical result of rational competition.

As the District Court correctly reasoned, conscious parallelism, or sometimes-called "tacit collusion" or "oligopolistic price coordination," is not in itself unlawful. It is not unlawful for firms in a concentrated market to set their prices at a profit maximizing, even supracompetitive, level by recognizing their shared economic interests and their interdependence with respect to price and output decisions.

The District also properly granted summary judgment in favor of the defendants on the plaintiffs' price-gouging claims. Massachusetts law prohibits prices (not profits) that are "unconscionably high" and that represent "gross disparities" between the prices charged immediately before and after the commencement of a market emergency. Here, the defendants' prices increased only by small percentages and declined shortly thereafter. Moreover, the small shifts in relative price were consistent with changes in the local trade area, as well as historical fluctuations during non-emergency periods.

ARGUMENT

I. STANDARD OF REVIEW

This Court is to review the District Court's decision to grant summary judgment *de novo*. *E.g., Anderson v. Comcast Corp.*, 500 F.3d 66, 71 (1st Cir. 2007). This standard of review permits the Court "embrace or reject the rationale employed by the lower court and still uphold its order for summary judgment." *Houlton Citizens' Coal v. Town of Houlton*, 175 F.3d 178, 184 (1st Cir. 1999). It is within the Court's "discretion to affirm the district court's entry of summary judgment on any ground revealed in the record." *Morales-Vallellanes v. Potter*, 339 F.3d 9, 18 (1st Cir. 2003).

II. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANTS ON COUNT I BECAUSE THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE HYPOTHESIS OF A PRICE-FIXING CONSPIRACY AMONG THE DEFENDANT RETAIL GAS STATIONS

A. To Avoid Summary Judgment, Plaintiffs Must Produce Enough Evidence for a Reasonable Jury to Find That There Was an Explicit Agreement to Fix Prices

To establish their price-fixing claims, the plaintiffs must show a contract, combination or conspiracy, that is, concerted action between distinct parties. 15 U.S.C. § 1. In the context of price-fixing cases, the Supreme Court distinguishes between *agreements* to fix prices, which are prohibited under the Sherman Act, and "conscious parallelism," which is not. As former First Circuit Chief Judge (now Supreme Court Justice) Breyer stated in *Clamp-All Corp. v. Cast Iron Soil Pipe Institute, et al:*

> Courts have noted that the Sherman Act prohibits *agreements*, and they have almost uniformly held, at least in the pricing area, that such individual pricing decisions (even when each firm rests its own decision upon its belief that competitors will do the same) do *not* constitute an unlawful agreement under Section 1 of the Sherman Act.

Id., 851 F.2nd 478, 484 (1st Cir. 1988) (*superseded on other grounds*).

Therefore, in order to survive a summary judgment motion, the plaintiffs must produce "evidence that tends to exclude the possibility of independent action by the [parties]. That is, there must be direct or circumstantial evidence that reasonably tends to prove that the [parties] had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984). Conduct that is "as consistent with permissible [activity] as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). The plaintiffs must produce evidence that "tends to exclude the possibility that the defendants merely were engaged in lawful conscious parallelism." *City of Tuskaloosa v. Harcros Chems., Inc.*, 158 F.3rd 571, 588 (11th Cir. 1998).

A merely tacit agreement is not an antitrust violation. *E.g.*, *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964 (2007); *Clamp-All Corporation v. Cast Iron Soil Pipe Institute, et al.*, 851 F.2nd 478, 484 (1st Cir. 1988) (superseded on other grounds). As even Judge Posner has reluctantly acknowledged, "an express, manifested agreement, and thus an agreement involving actual, verbalized communication, must be proved in order for a price-fixing conspiracy to be actionable under the Sherman Act." *In Re High Fructose*, 295 F.3rd 651, 654 (7th Cir. 2002).

Nevertheless, plaintiffs argue that there is "considerable evidence from which this Court could conclude that there was a tacit *or* explicit agreement to fix gas prices" (p. 17 of Plaintiffs' Brief) (emphasis added), as if evidence of a tacit agreement were the equivalent of an explicit agreement. On this critical point, the plaintiffs are fundamentally mistaken. Evidence of a tacit agreement is plainly insufficient as a matter of law to survive a motion for summary judgment.

"Tacit collusion" is just another name for "conscious parallelism," which the Supreme Court has repeatedly held is lawful. The Supreme Court and circuit courts construing the Sherman Act have recognized that in oligopolistic markets where a few firms dominate, a phenomenon exists in which markets may behave in a non-competitive manner resembling price fixing <u>without</u> any actual agreement or conspiracy on the part of the competitors. Such "conscious parallelism" is "the process, *not in itself unlawful*, by which firms in a concentrated market might effect a shared monopoly power, setting their prices at a profit maximizing, supra-competitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964 (2007), <u>*quoting*</u> *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993) (emphasis added).

For instance, a seller may raise its prices in a competitive market in anticipation that competitors will likely follow by also raising their prices, recognizing the extra profit to be made. Such "tacit agreements" have been termed "interdependent behavior" and are not themselves unlawful. <u>*See*</u> <u>*e.g.*,</u> *Theatre*

Enterprises, Inc. v. Paramount Film Distrib. Corp. 346 U.S. 537, 541 (1954); *In re Flat Glass Antitrust Litig*., 385 F.3rd 350, 360 (3rd Cir. 2004); *Williamson Oil Co., Inc. v. Philip Morris USA*, 346 F.3rd 1287, 1300-01 (11th Cir. 2003); *In Re High Fructose Corn Syrup Antitrust Litigation*, (295 F. 3rd 651, 654 (7th Cir. 2002); *Blomkest Fertilizer v. Potash Corp. of Saskatchewan*, 203 F.3rd 1028, 1033 (8th Cir. 2000); *Clamp-All Corporation v. Cast Iron Soil Pipe Institute, et al*., 851 F.2nd 478, 484 (1st Cir. 1988) (superseded on other grounds).

"The inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964 (2007). This is why the courts require plaintiffs to present additional evidence (a/k/a "plus factors) beyond mere parallel pricing that tends to show that the parallel pricing among competitors was the result of an agreement and not merely lawful, interdependent actions of competitors who meet one another's prices. Otherwise the jury will be forced to engage in speculation and conjecture, to such a degree as to render its finding a guess. *Williamson Oil Co., Inc*. 346 F.3rd at 1302.

B. Conscious Parallelism, a Common Reaction of Firms In a Concentrated Market That Recognize Their Shared Economic Interests and Their Interdependence With Respect To Price and Output Decisions, Is Not Itself Unlawful

Relying on evidence that the defendants engaged in parallel pricing, the plaintiff nevertheless fail to acknowledge that this phenomenon is just as likely to occur without an agreement as with an agreement.

> No advance agreement is necessary to explain leading or following for the bulk of business parallelism. In deciding whether to follow a rival's price increase, each firm knows that a widely unfollowed price increase will be rescinded. Accordingly, each rival will consider whether it is better off when everyone charges the same high or low price. If the former, it will follow. By that process, noncompetitive prices and other practices, once initiated, can spread through a market without any traditional conspiracy. (*Emphasis added.)* Areeda and Hovenkamp, *Antitrust Law*, ¶1425.

For this reason, a court cannot draw an inference of conspiracy from the mere fact that defendants' price changes are parallel and seem to be coordinated. As Areeda and Hovenkamp state:

> In a concentrated market, such as the one at hand, a pattern of oligopoly coordination might give a firm reason to believe that its own price increases would be matched by others. Thus, the presence of a concentrated oligopoly market tends to undermine the circumstantial evidence of agreement. *Id.*

See also *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964 (2007); and *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993).

The defendants, for the sake of argument, concede that there is evidence of conscious parallelism,[2] and that the market on Martha's Vineyard is a concentrated one in which oligopolistic price coordination without an actual agreement occurs. The proximity of the gas stations to one another and the conspicuous posting of prices make Martha's Vineyard conducive to conscious parallelism, especially where, as the plaintiffs' own expert concedes, there are high barriers to entry and inelastic demand. *A0482-0483*.

The plaintiffs, however, fail to recognize the fundamental reality that given the peculiar nature of the retail gasoline business, whereby the defendants operate on a small island and publish their prices openly to all, they do not need to have an agreement to achieve supracompetitive prices. Instead, the plaintiffs argue as if proof of a purely tacit agreement is actionable, relying on the Antitrust Law treatise of Judge Richard Posner, rather than any Supreme Court or First Circuit authority.

Putting aside the merits of Professor/Judge Posner's theory, his "economic approach" is not the law. Indeed, it is an alternative theory to the traditional and

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[2] The plaintiffs repeatedly label this assumption for the sake of argument (that conscious parallelism exists) as a "stipulation" or "admission." This is false and misleading. The defendants are merely viewing the evidence in the light most favorable to the plaintiffs and explaining why even assuming such conscious parallelism, that evidence is insufficient to meet the plaintiffs' burden of production.

mainstream theory of antitrust law, which governs in the First Circuit. In Judge Posner's opinion, it is "unfortunate" that the law requires evidence of an overt agreement and that the plaintiff in a price-fixing case must present evidence that "tends to exclude the possibility of independent action by the defendants." *Posner, Antitrust Law*, at pp. 99-100, 2nd Edition (2001). Even if one accepts his theory, it is not applicable to the facts of this case. Oligopolists who understood that their fortunes are fundamentally interdependent, sometimes can achieve high price-cost margins even without the formation of an expressed cartel. This can occur absent any direct communication among competitors. For example, imagine a small town with two gas stations.

> They are located directly across the street from each other at the town's main intersection and are identical in terms of capacity, ancillary services, and quality of product. Almost all consumers will therefore buy from the lower priced station. The prices are posted on pumps and large electronic signs; they can be changed virtually immediately and costlessly by typing in new numbers.
>
> If we assume, for the sake of the example, that entry cannot occur, one likely outcome of 'competition' is that each station will charge the price that maximizes joint profits – the same price they would charge if they could merge. Neither gasoline station has an incentive to cut price below the monopoly level. Each realizes that it cannot steal customers from its competitor before its competitor can respond. And the competitor will respond because it is more profitable to match the price and share the market at a lower price than to permit the price-cutting station to steal market share. Each station should rationally anticipate immediate matching and therefore, not cut price in the first instance. **Cooperative pricing is thus a**

> **logical outcome of the "game" without any secret meeting or additional communication.** If for some reason, the joint profit maximizing price were to rise, one station could raise price. Although the other station likes getting all the business, it should know that if it does not raise price to its competitor's level, the competitor will surely lower price very soon, thus, it should even be possible to coordinate a price increase in this setting . . . This example demonstrates that cooperation and parallel behaviors are possible without secret communication about pricing or output and without 'agreements.' (Emphasis added.)

Product Differentiation; Communication Among Competitors: Game Theory and Antitrust, 5 *George Mason Law Review*, 423, (Spring, 1997), S.W. Carleton, Richard H. Gurtner and Andrew M. Rosenfield.

Analogously, the same is true of the four subject gas stations on Martha's Vineyard. XtraMart and Tisbury Shell are located across one from another and the remaining two stations are just miles away. Like the example above, the firms are safe from entry, which the plaintiffs themselves have shown to be the case on Martha's Vineyard, and instantly know each other's posted prices (they communicate their price information to each other and consumers simultaneously). Consequently, they are likely to engage in "cooperative pricing" without any secret meetings or any explicit agreements that would violate the nation's antitrust laws. The defendants are each rationally taking account of their competitors' likely responses to their actions and would be foolish not do so. Would the plaintiffs prefer that the defendants not post their prices? Should the defendants not reasonably anticipate the results of their pricing actions? To quote Judge Breyer,

> How does one order a firm to set its prices *without* regard to the likely reactions of its competitors? See 6 Areeda & Turner, paras. 1432-33; 3 Areeda & Turner, para. 840.

Clamp-All Corp. v. Cast Iron Soil Pipe Institute, et al., 851 F.2nd 478, 484 (1st Cir. 1988).

C. The District Court Properly Applied the Summary Judgment Standard for a Price-Fixing Conspiracy in Violation of Section I of the Sherman Act and Concluded that the Plaintiffs' Evidence, Considered as a Whole, Does Not Tend to Exclude the Possibility of Merely Interdependent Pricing Behavior

In addition to arguing that proof of mere tacit collusion is sufficient to survive summary judgment, the plaintiffs also argue that the District Court failed to consider the plaintiffs' evidence as a whole. This simply not true; the lower court viewed the plaintiffs' evidence as a *whole* and concluded that even viewing the evidence in that way, it was not enough. *Add. 010.* As the Court concluded, the "direct evidence" is ambiguous at best and arguably suggests a lack of agreement. Neither the alleged verbal communications between Packer and Ahern nor the alleged false statement and pretextual justifications can be reasonably interpreted as providing evidence that tends to exclude independent action. Similarly, the loan between Drake and Paciello is at best ambiguous evidence. Accordingly, no reasonable jury could find an agreement to fix prices based upon this evidence even viewing it in a light most favorable to the plaintiffs. *Id*.

Plaintiffs' Allegations Regarding Price-fixing

The plaintiffs claim to have evidence of "nine plus factors" suggesting price-fixing among the defendants' retail stations. Most of these "plus factors" the plaintiffs draw from the economic opinions of Frank Gollop. Conceptually, the plaintiffs' "nine" contentions rest on two types of evidence: (1) non-economic and 2) economic evidence. The non-economic evidence consists of (a) alleged intercompany communications between Drake and Packer in 1999 (plus factor #2), (b) secret and unilateral actions by Drake to stop a new gas station from opening on the island (plus factor #5), and (c) a loan from Drake, as a wholesaler, to its retail customer, Paciello (plus factor #4). The economic evidence consists of Professor's Gollop's opinions regarding (a) the structure of the market (plus factors ##6, 7, and 8) and (b) the defendants' prices and profits (plus factor ##1, 3 and 9). None of this evidence, whether considered jointly and severally, is sufficient to carry the plaintiffs' burden of production. Both the non-economic and economic evidence are ambiguous and fail to suggest that the defendants' parallel prices are more likely than not the result of an agreement. Indeed, the non-economic evidence is even suggestive of the lack of an agreement among the defendants. Moreover, the plaintiffs' economic evidence actually undermines the plaintiffs' case that there was an actual agreement to fix prices; it is further proof of the phenomenon of conscious parallelism and why an express agreement is completely unnecessary for island gas stations to achieve parallel and supra-competitive prices given the structure of the market and the instant availability of pricing information.

1. Plaintiffs' Non-economic Evidence of Inter-firm Communications, Secret Actions, Motives to Conspire and Personal Loans is Neither Probative nor Likely to Assist the Jury on the Issue of Whether the Defendants Had an Actual Agreement to Fix Prices

In terms of non-economic evidence, the best the plaintiffs can muster is the testimony of Steven Wehner and Sean Conley, who unsuccessfully petitioned the Martha's Vineyard Commission to open their own gas station. However, a close examination of this evidence reveals that it is not sufficient to enable a reasonable jury to reject the possibility that the four stations set their prices without an actual price fixing agreement.

Inter-firm Communications

At his deposition, Mr. Wehner testified that he met with Jim Ahern of Drake in 1999 to discuss whether Drake would be interested in supplying Wehner's proposed gas station or leasing such property to run its own station. As a result of that meeting, Mr. Wehner claims that he "got the *impression* that on retail price . . . that Ralph [Ralph Packer] set the price and that Drake followed it . . ." *A0201-A0202 (¶12.)* (Emphasis added). The basis of Mr. Wehner's impression was an alleged phone call by Jim Ahern to Ralph Packer, in which Mr. Wehner claims he heard Mr. Ahern call Ralph Packer on the speakerphone and say something to the effect of "I'm checking in, how are you?" *A0202 (¶13).* "They [Ahern and Packer] did not talk about pricing or anything like that." *A0202 (¶14).* In the context of a discussion regarding leasing the property, Ahern also allegedly told Wehner that "Ralph and I talk;" and, in response to Wehner's question whether Drake would consider giving a 10 cent discount to island residents, said, "Ralph Packer is not giving the people anything, I'm not going to give them anything." *A0202 (¶15).* Ahern also allegedly suggested that if the Edgartown stations "started dropping prices . . . one or two delivery trucks might not make it on the boat and they'll get the idea real quick." *A0202 (¶16.)* Wehner then offered his opinion: "it was my understanding that they [Drake – a wholesale supplier to the Edgartown stations] orchestrated the delivery trucks, that it was in their purview to have a delivery not make it every once in a while maybe if they needed to get somebody's attention because they controlled the delivery." *Id.*

First, this alleged conversation was so clearly ambiguous and vague that no one can draw a reasonable inference about price-fixing from it. Indeed, Wehner admitted that he is "not aware of any conversations between anyone at R.M. Packer and anyone at Drake regarding pricing of gasoline on Martha's Vineyard" and has no evidence of any price fixing involving the Paciello defendants either.

A0202 (¶18.) Moreover, Wehner's impressions of how Drake and Packer set retail prices are not evidence, but even if Wehner's impressions were reasonable and admissible, they merely show that in 1999, Drake and Packer priced according to a "follow the leader" pattern; nothing more. Indeed,

> A firm in a concentrated industry typically has reason to decide (individually) to copy an industry leader. After all, a higher-than-leader's price might lead a customer to buy elsewhere, while a lower-than-leader's price might simply lead competitors to match the lower price, reducing profits for all. One does not need an agreement to bring about this kind of follow-the-leader effect in a concentrated industry. See 6 Areeda & Turner paras. 1432-33.

Clamp-All Corp. v. Cast Iron Soil Pipe Institute, et al., 851 F.2nd 478, 484 (1st Cir. 1988).

Furthermore, Wehner's "understanding" of Drake's power as a wholesaler ignores the facts that Drake has a supply contract with the Edgartown stations and that Drake would lose money by disrupting the supply to Edgartown, and that the Edgartown stations could get their gas from another supplier if Drake acted this way. Nevertheless, putting aside the paucity, reasonableness, or credibility of Wehner's "understanding," it is critical to note that Ahern's alleged bravado and hypothetical threats are not evidence of an agreement. At most, Ahern's alleged statements are evidence of Drake's power over the supply to two gas stations on the island, nothing more. Even assuming for the sake of argument the truth and admissibility of Wehner's "understanding" that Ahern could conceivably bully the

Edgartown stations, Wehner's understanding and Ahern's alleged statements are not evidence that the defendants agreed to foreswear price competition. It is merely evidence that Drake, as a supplier, had an adversarial relationship with two of the four defendants and could affect their supply of wholesale gasoline. It is not evidence suggesting any explicit agreement to set prices among the four defendants.

Given the age (eleven years ago), context (discussion of supplying wholesale gas and leasing property), dearth (a mere few statements) and ambiguity (Wehner's impression is only one possible interpretation of Ahern's statement) of these alleged statements, the District Court properly concluded that no reasonable jury could infer an agreement to fix prices based on this evidence.

Secret, Unilateral Actions of Drake

As for the alleged demonstration of Drake's "willingness to act secretly to influence gas prices," this alleged evidence is not probative of a price-fixing conspiracy. At most, it is evidence that Drake alone (without the other defendants), sponsored a citizens group to lobby against another the creation of another gas station[3] on Martha's Vineyard. For this reason, it is not probative of a

[3] The Court may be interested to know that plaintiff William White was an investor in the proposed gas station, and plaintiff Hilary Schultz was the station's attorney.

conspiracy; it is merely undisputed proof that Drake seeks to maximize its own profits, as presumably every commercial enterprise does.

Personal Loan

Similarly, the loan from Drake to Paciello is suggestive of rational business behavior, not conspiracy. Drake, as a wholesaler of gasoline, is trying to keep a significant customer in business so that it can sell more gasoline. *A0585, 0590*. Plaintiffs suggest that Paciello was beholden to Drake and thus motivated to conspire, but this is meaningless. With or without the loan, Drake, as a wholesaler, and Paciello, as a retailer, are beholden to each other in the sense that they are dependent on one another to generate profits. For the same reason, they also have a financial "motive to conspire," regardless of the existence of the loan. Neither fact is probative of whether they actually conspired.

2. Plaintiffs' Economic Evidence Confirms the Phenomenon of Conscious Parallelism and Is at Best Ambiguous as to Whether Defendants Had an Actual Agreement to Fix Prices

As an initial matter, plaintiffs' theory of conspiracy is implausible. Economic plausibility is relevant in evaluating the plaintiffs' evidence for purposes of motions for summary judgment. The less plausible the plaintiffs' theory, the greater scrutiny the court should give to the plaintiffs' evidence. See *Matsushita*, 475 U.S. at 588. The plaintiffs assert that only four of the nine gas stations on Martha's Vineyard conspired to set prices of gasoline. If the defendants were conspiring to set the prices of retail gasoline on Martha's Vineyard, why would the defendants not include two nearby stations in their conspiracy? Plaintiffs' expert, Frank Gollop, completely ignores the remaining five stations in his analysis, including two stations in Oak Bluffs located less than three miles away from the two defendants in Vineyard Haven (miles nearer than the defendants in Edgartown are to those in Vineyard Haven). Instead, he compares the defendants' prices to prices charged in three towns on Cape Cod during the same period. Indeed, his report is entirely silent regarding the presence of the five other gasoline stations located on Martha's Vineyard and the extent to which they participate in the sale of retail gasoline on the island. *A0203 (¶19).* For this reason alone, plaintiff's theory and Gollop's opinions are inadequate to raise a jury question.

Gollop's testimony is also striking in its failure to aid the plaintiff's prima facie case. Gollop's conclusions, taken in their most pro-plaintiff light are that the defendants sold gasoline at "supra-competitive" prices (not unlawful) and that the defendants engaged in "interdependent" pricing behavior (not unlawful). Gollop's opinions are therefore insufficient to raise a genuine issue regarding price fixing. Specifically, Gollop concludes that the defendants sold gasoline at their stations at "supra-competitive" prices during at least the August 2003 through July 2008 period. *A0230 (¶20).* Gollop's conclusion is not probative, however. As the Supreme Court has repeatedly held, "supra-competitive" is not a synonym for "fixed." In fact, "supra-competitive" prices are lawful and expected in cases of conscious parallelism. *See, e.g., Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964 (2007). Because such evidence is ambiguous, showing "supra-competitive" or interdependent pricing is inadequate to demonstrate conspiracy. *Id.* As Gollop himself states, the inferences to be drawn from the pricing behavior are "mixed". *A0203 (¶22).* Gollop states that there are instances where the evidence is "not inconsistent with either cooperative or non-cooperative behavior." In plain English, this means that the evidence is consistent with both independent and cooperative behavior. Gollop repeats this conclusion in several places within his report. However, ambiguous evidence is insufficient to carry the plaintiff's burden of production. *See Matsushita*, 475 U.S. at 588 and *In Re Flat Glass*, 385 F.3rd at 358. Furthermore, equivocal expert opinions that merely indicate the possibility of the existence of an element of the plaintiff's prima facie case are insufficient as a matter of law. *See, e.g., Somers's Case*, 344 Mass. 581, 584 (Mass. 1962).

Gollop's strongest conclusion is that there are instances that are "inconsistent with independent, non-cooperative behavior." In other words, removing the double negatives, Gollop opines that the evidence is consistent with interdependent and cooperative behavior. Unfortunately for the plaintiffs, federal anti-trust law prohibits neither interdependent nor cooperative behavior.

Specifically, Professor Gollop opines that the price patterns he examined between May of 2004 and September of 2004 "was not the expected non-cooperative business strategy." Again, this opinion is insufficient to raise an issue regarding price-fixing. It is not evidence that tends to exclude the possibility of merely interdependent behavior, which is necessary according to the standards set forth by the Supreme Court in *Matsushita*, 475 U.S. 574, 588 (1986). Nevertheless, plaintiffs argue that it made no business sense for the defendants to increase their prices as costs declined. It does, however, if they are in a concentrated market with transparent prices and inelastic demand, as Gollop concedes. *A0482-A0483*.

Comparing the defendants' prices to those in selected towns on Cape Cod, Gollop concludes that the gasoline sold at the defendants' stations was sold at "supra-competitive" prices "during at least the August 2003 through July 2008 period." *A0203 (¶20).* Next, comparing the daily price data for the four appellee stations to each other, Gollop finds that the defendants engaged in "parallel pricing." *A0203 (¶21).* Examining the defendants' daily price and cost data, Gollop states that the inferences to be drawn from the pricing behavior are "mixed". *A0203 (¶22).* Gollop states that there are instances where the evidence is "not inconsistent with either cooperative or non-cooperative behavior" and others where the pricing pattern is "not inconsistent with non-cooperative behavior." *A0203 (¶23).* Obviously, these conclusions are not evidence of price-fixing.

Gollop also opines that there are some limited time intervals in which the pricing patterns are "inconsistent with independent, non-cooperative behavior." *A0204 (¶24).* For example, Gollop opines that the price pattern he examined between May of 2004 and September of 2004 "was not the expected non-cooperative business strategy." *A0204 (¶25).* Similarly, Gollop opines, "the patterns of pricing in the post-Katrina interval . . . are inconsistent with the model of non-cooperative behavior." *A0204 (¶26).* The plain meaning of these opinions is that Gollop finds evidence of conscious parallelism.

After finding nothing more than evidence of conscious parallelism, Gollop next considers three "'plus factors' from which [according to plaintiffs' counsel] courts can infer a conspiracy when found in conjunction with 'conscious parallelism.' " *A0204 (¶27).* The three plus factors he considers are: (1) abnormal profits, (2) fixed market shares for substantial periods of time, and (3) existence of an industry conducive to oligopolistic price fixing, either interdependently or through a more express form of collusion." *A0204 (¶28).*

First, on the subject of profits, Gollop's conclusion is not quite clear, but according to the plaintiffs, Gollop presumes that the profits among certain Cape Cod gas stations are consistent with interdependent but otherwise non-cooperative competition, and that the four defendants' profits are "abnormally high" in comparison with these Cape Cod stations. *A0480-A0481*. Yet, this is not evidence of a price-fixing agreement. It is merely more evidence of oligopolistic pricing, which need not be the result of an actual agreement. *See Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964 (2007); and *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993). Therefore, it is not evidence that tends to exclude the possibility of independent action.

Similarly, on the subject of the market structure, Gollop concedes that it reveals "an economic environment conducive to oligopolistic pricing. The principal market characteristics are barriers to entry and inelastic demand." *A0205 (¶32).* This merely shows that Martha's Vineyard is an example of a market conducive to consciously parallel pricing. Obviously, the defendants did not create the market structure. Even the plaintiffs would be hard-pressed to blame the defendants for the geographic fact that Martha's Vineyard is an island.

Again, with respect to market shares, Gollop reaches the ambiguous conclusion that the evidence does not suggest cooperative or non-cooperative behavior. *A0204 (¶30).*

3. Plaintiffs' Reliance on the Decision of *In re EPDM Antitrust Litigation* Is Misplaced

The plaintiffs repeatedly cite the recent decision by the United States District Court for the District of Connecticut (Second Circuit), *In re EPDM Antitrust*

Litigation, 2009 U.S. District Lexis 120770 (D. Conn. 2009), which denied the defendants' motion for motion for summary judgment, and argue that it is significantly analogous to the present case. Like the plaintiffs, the District Court for the District of Connecticut also cites Judge Posner and his opinions, particularly his opinions in *High Fructose Corn Syrup Antitrust Litigation*, 295 F.3rd 651 (7th Cir. 2002). In that case, Judge Posner cautioned that courts must avoid certain traps when examining motions for summary judgment.

One trap in particular identified by Judge Posner, "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." *Id*. Citing Judge Posner, the plaintiffs argue that the District Court fell into this trap. However, the plaintiffs are wrong. The District Court did properly consider the evidence in the context as a whole. The Court first examined each piece of purported evidence individually, not to weigh the evidence, but determine whether the plaintiffs' inferences from such evidence were reasonable. Finding that no one piece of evidence pointed unequivocally to an actual price-fixing agreement, the Court also considered the evidence as whole. *Add. 040, 010*. After doing so, the Court properly concluded that the evidence was insufficient for a reasonable fact-finder to find that defendants could not have been engaging in independent, permissible conduct. In other words, the Court found that the plaintiffs' inferences, even when considered in context, were not reasonable. Plaintiffs' argument begs the question: if each piece of evidence, examined individually, fails to suggest an agreement, what about the pieces, considered as whole, makes them add up to more than the sum of their parts? Tellingly, the plaintiffs have failed to demonstrate how any reasonable person viewing the evidence as a whole rather than as the sum of its parts could conclude that it adds up to more than zero.

The facts of *In re EPDM Antitrust Litigation* are not analogous

The plaintiffs in *EPDM* presented evidence of parallel prices as well as certain plus factors. As the Court in *EPDM* correctly points out, the most commonly relevant plus factors include: "1) A motive to conspire, which can be evidence that the industry is susceptible to price-fixing; 2) non-competitive behavior, i.e., evidence that the defendants acted contrary to their economic self-interests; and 3) evidence of a traditional conspiracy, such as a high level of inter-firm communications that would suggest that the defendants consciously agreed not to compete. *EPDM*, 2009 U.S. District Lexis 120770, at 66.

The first two plus factors are not nearly as probative as traditional evidence of conspiracy though. For instance, a motive to conspire, i.e., that the characteristics of a market make collusion feasible and thus establish a motive to conspire, is simply a restatement of the "theory of interdependence." Accordingly, evidence of this plus factor may not, by itself, be sufficient to defeat a motion for summary judgment. *Id*. at 75-76.

Similarly, the plus factor of "acting against self-interest" is also not as probative of an antitrust conspiracy as the third factor, evidence of a traditional conspiracy, which is "noneconomic evidence that there was an actual, manifest agreement not to compete." *Id.* at 85-86 (*quoting* *In re Flat Glass Antitrust Litigation*, 385 F.3[rd] 350, 361 (3[rd] Cir. 2004). "Without doubt, the key plus factor at summary judgment is the plaintiffs' evidence of an actual, manifest agreement, i.e., evidence which includes 'customary indications of a traditional conspiracy,' or 'proof that the defendants got together and exchanged assurances of common action or otherwise adopted a common plan even though no meetings, conversations, or exchanged documents are shown.'" *Id.* at 86 (citing *Flat Glass* at 361 and quoting Philip E. Areeda and Herbert Hovencamp, *Antitrust Law*, pp. 1434b, at 243.)

Although the EDPM Court denied the defendants' motion for summary judgment, the evidence of a traditional conspiracy presented by the plaintiffs in that case was both qualitatively and quantitatively different than the evidence presented by the plaintiffs in this matter. As the *EDPM* Court noted, the plaintiffs presented a "**plethora** of emails, memoranda, and other inter-firm communications" regarding "price increases, prices, customers and capacity."

(Emphasis added.) *Id.* at 89. Indeed, the Court concluded that the plaintiffs had laid out a "comprehensive narrative . . . of the alleged conspiratorial activity" Representative examples of those communications included memos prepping a boss for an industry conference saying, "Thank them [competitors] for their support of us on 1/1/99 price increase. Tell them we are trying to avoid any conflict with them"; Interrogatory Answers admitting that the parties discussed North American pricing and one party stating that it would not lead a price increase because they had led in the past and suffered as a result; and similar internal memos, emails, and discovery responses. *Id.* at 90-93. Not surprisingly, considering the "plethora" of evidence plaintiffs presented in the *EPDM* case, the Court found that the plaintiffs had created an issue of fact whether the defendants participated in a traditional conspiracy to fix prices and allocate the American *EPDM* market. "The plaintiffs' Section I claim survives the sum of the plaintiffs' evidence permits a fact-finder to conclude that, more likely than not, the defendants entered a traditional conspiracy to fix the prices of EPDM in violation of Section I of the Sherman Act." *Id.* at 96.

The plaintiffs also cite the *Fears v. Wilhelmina Modeling Agency* case out of the United States District Court for the Southern District of New York, 2004 U.S. District Lexis 4502 (2004), as another comparable case. However, as with the *EPDM* case, the Court was presented with a high level of inter-firm communication and evidence of a traditional conspiracy. As the Court stated, "The evidence of parallel pricing, the **sheer volume** of communications and agreements, coupled with **crystal clear** evidence that suggests IMMA members even colluded to fix clients' service fees, a close cousin of models' commissions, when viewed together, "tends to exclude the possibility" that the defendants acted independently with regard to models' commissions." *Id.* (Emphasis added.)

The plaintiffs' evidence of inter-firm communications in the present case pales in comparison to the cases cited by the plaintiffs. Rather than showing a concentrated degree of high level inter-firm communication, plaintiffs have merely produced evidence of eleven-year-old verbal communications between Packer and Ahern (from 1999), four years before the period covered by the plaintiffs' claim, with no clear evidence as to the content of those decade old conversations, and no evidence of subsequent communications, coupled only with economic evidence that supports, rather than undermines, the conclusion that the retail gasoline market on Martha's Vineyard is an example of conscious parallelism.

III. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT ON COUNT II OF THE SECOND AMENDED COMPLAINT ALLEGING PRICE GOUGING

The Massachusetts price-gouging regulation, Massachusetts Code Regulations, Title 940, § 3.18 (hereinafter "Section 3.18"), was promulgated by the

Attorney General pursuant to Mass. General 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.

Under this Massachusetts regulation, a retailer commits price-gouging if, during a market emergency period, it charges a grossly disparate price (prong (a)) **and** the disparity is not substantially attributable to increased costs (prong (b)). A plaintiff must prove both prong (a) and (b) to establish price-gouging. If the Court determines that a defendant has charged a grossly disparate price, that defendant may still defend itself by showing that its prices were substantially attributable to increased prices charged by its suppliers or increased costs due to the market disruption.

Here, the District Court properly interpreted the plain language of this regulation and Massachusetts law when deciding this matter. The Court determined that the regulation requires an evaluation of the differences between the prices, not profits, at the defendants' gas stations in the week immediately prior to the alleged market emergency in August, 2005 and the prices during the alleged market emergency period from August 29, 2005 to November 30, 2005.[4] *Add. 011-013*. As clearly stated by the District Court, the "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. 011, n. 7*. There is no genuine dispute in this case as to the price changes at the defendants' gasoline stations during the relevant time period. Based on the plain language of the regulation, this Court should uphold the District Court's decision granting summary judgment on Count II of the Plaintiffs' Second Amended Complaint.[5]

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[4] For the purpose of this appeal only, the defendants do not dispute that there was a market emergency during this time period.

[5] The plaintiffs' arguments do not fare any better under Chapter 93A. The Attorney General has the authority to specify acts that violate Chapter 93A. *Purity Supreme, Inc. v. Attorney General*, 380 Mass. 762, 775, 407 N.E.2d 297, 306 (Mass., 1980) ("[T]he Legislature has, by G.L. c. 93A, s 2(c), delegated to the Attorney General the power to promulgate rules and regulations defining with specificity act and practices which violate G.L. c. 93A, s 2(a)."). Because the Attorney General has specified those actions that constitute price-gouging in

A. The Plain Language Of 940 CMR § 3.18(2)(a) Supports The District Court's Decision

The term "price-gouging," itself, is imprecise and admits of various meanings, with different jurisdictions defining the concept in different ways. See Federal Trade Commission Report, Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases (Spring 2006), at 137 n.2, 189-97 (noting the variation in states' approaches). *A0911-A0912, A0961-A0969*. Two operative terms in the regulation, however, "unconscionably" and "gross disparity," have recognizable legal meanings. Where recognized legal terms and concepts are employed in a regulation, those terms and concepts should be construed in light of their commonly accepted legal sense. See 2B Norman J. Singer, Sutherland Statutory Construction § 47.30 at 361-66 (6^{th} ed. 2000) (absent evidence to the contrary, "legal terms in a statute are presumed to have been used in their legal sense"); *Seideman v. City of Newton*, 895 N.E. 2d 439, 444 (Mass. 2008) (holding "we 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.'") Accordingly, the Court should construe the terms "unconscionably" and "gross disparity" in light of their recognized legal meaning.

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violation of Chapter 93A, gasoline pricing decisions that fall short of the conduct proscribed in the regulation will not give rise to a violation of 93A.

1. Unconscionability

Under Massachusetts law, a sale will be substantively unconscionable if there is "gross disparity in the consideration," such that the "disparity 'itself leads inevitably to the felt conclusion that knowing advantage was taken of [one party].'" *Waters v. Min Ltd.*, 587 N.E.2d 231, 233 (Mass. 1992) (alteration in original) (quoting *Jones v. Star Credit Corp.*, 59 Misc.2d 189, 192, 298 N.Y.S.2d 264 (N.Y. Sup. Ct. 1969)). A contract is substantively unconscionable if the "disparity of interests in [the] contract is 'so gross that the court cannot resist the inference that it was improperly obtained and is unconscionable.'" *Id.* (citing *In re Estate of Vought*, 351 N.Y.S.2d 816, 76 Misc.2d 755 (N.Y. Sup. Ct. 1973)).

A contract is not substantively unconscionable unless the price for the good or service is substantially higher than its value. Courts typically require the price to be two or more times greater than its retail value. For an illustrative list of such cases, defendants refer the Court to this compilation located in the Massachusetts Practice Series chapter on Inflated Price:

> Murphy v. McNamara, 36 Conn.Sup. 183, 416 A.2d 170 (1979) (conditional sale disguised as 18-month lease required payment of $1,268 for color TV sold at retail for $499, more than 2 times regular retail sales price); Toker v. Perl, 103 N.J.Super. 500, 247 A.2d 701 (1968), affirmed 108 N.J. Super. 129, 260 A.2d 244 (1970) (price of $799.95 for freezer was more than 2 times maximum value of $300); Toker v. Westerman, 113 N.J.Super. 452, 274 A.2d 78 (1970) (cash price of $899.98 for freezer was approximately 2 times reasonable retail value of $350-$400); Jones v. Star Credit Corp., 59 Misc.2d 189, 298 N.Y.S.2d 264 (1969) (contract price 4.8 times "maximum

> retail value of approximately $300"); In re Stewart, 93 B.R. 878 (Bkrtcy.E.D.Pa.1988) (under Pennsylvania law, charging $2,625.84 for credit purchase of TV and VCR with cash price of $867, where seller admitted that he marked up items greater than twice their retail price in order to accommodate his liberal credit policies, was unconscionable); People ex rel. Vacco v. Beach Boys Equipment Co., Inc., 273 A.D.2d 850, 709 N.Y.S.2d 729 (2000) (retail price of $1,200 for electric generator following ice storm was unconscionably excessive price, where other retailers in trade area charged less than one half of that price for same generator). See also Remco Enterprises, Inc. v. Houston, 9 Kan.App.2d 296, 677 P.2d 567 (1984) (stating that where contract price is more than 2 times fair retail value of goods, there is greatly increased possibility that it will be found unconscionable, but holding under circumstances that contract charging roughly twice fair retail value and slightly more than 3 times wholesale value was not unconscionable).

Howard J. Alperin, 35 *Massachusetts Practice Series: Consumer Law*, § 5:34 n. 18 (2d ed. Current through 2007-2008 Pocket Part) (collecting cases). Unconscionability based on differences between the price and the wholesale value is often based on greater disparities:

> Kugler v. Romain, 58 N.J. 522, 279 A.2d 640 (1971) (cash sale price of $249.50 for children's educational books was six or seven times wholesale price of $35 - $40 and about 2 times maximum retail value of $108 - $110); Coleman v. Fiore Bros., Inc., 113 N.J. 594, 552 A.2d 141 (1989) (contract in which homeowner was charged $5,000 plus finance charges, for total of $14,951, for 12 windows which cost defendant only $611 installed, would be "demonstrably unconscionable"); Frostifresh Corp. v. Reynoso, 52 Misc.2d 26, 274 N.Y.S.2d 757 (1966), reversed on other grounds 54 Misc.2d 119, 281 N.Y.S.2d 964 (1967) (contract price 3.29 times wholesale price); State

> by Lefkowitz v. ITM, Inc., 52 Misc.2d 39, 275 N.Y.S.2d 303 (1966) (prices varied from two to six times cost of units to merchant).

Massachusetts Practice Series: Consumer Law, § 5:34 n. 19.[6]

In sum, under Massachusetts law, unconscionability based on price requires the price of the good to be at least twice its normal retail or wholesale value. There is no evidence of any such pricing here.

2. Gross Disparity

The Restatement (Second) of Contracts states:

> Inadequacy of consideration does not of itself invalidate a bargain, but gross disparity in the values exchanged may be an important factor in a determination that a contract is unconscionable and may be sufficient ground, without more, for denying specific performance.

Restatement (Second) of Contracts, § 208, cmt. c (emphasis supplied). The seminal Massachusetts case on gross disparity of consideration is *Waters v. Min Ltd.*, 587 N.E.2d 231, 233 (Mass. 1992). In *Waters*, the defendants persuaded the plaintiff to accept $50,000 for an annuity policy worth $694,000 over the twenty-five year term of the policy and which had a cash value at the time of the

[6] Requiring a palpable disparity between the price of the good and its value helps minimize the many dangers and problems often associated with substantive unconscionability, including its potential impairment of freedom of contract (where there are no procedural unconscionability concerns), and the risk that courts will engage in ill-advised paternalism. See Craig Horowitz, *Reviving the Law of Substantive Unconscionability: Applying the Implied Covenant of Good Faith and Fair Dealing to Excessively Priced Consumer Credit Contracts*, 33 UCLA L. Rev. 940 (1986) (outlining concerns over the concept of substantive unconscionability).

transaction of $189,000. The Supreme Judicial Court noted the circumstances surrounding the exchange (considerations bearing on procedural unconscionability), but also emphasized the terms of the exchange itself, remarking that "the cash value of the annuity policy at the time the contract was executed was approximately four times greater than the price to be paid by the defendants." *Waters*, 412 Mass. at 69; 587 N.E.2d at 234. The Court found that a four-fold disparity between the value of the annuity and its price drove "too hard a bargain" for the Court to "assist its enforcement." 412 Mass. at 68; 587 N.E.2d at 234.

In this case, the District Court correctly noted that "[w]ith 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."[7] *Add. 012*. Contrary to the plaintiffs' contention, consumers cannot be gouged by "increased profits." They can only be gouged, if at all, by prices. The law protects consumers from unconscionable prices, not unconscionable profits (whatever that might mean). Consumers see only the price, not the profit margin. This is another reason

[7] Profit margins are not relevant unless the defendants are trying to argue that their prices are not unconscionable because of increased costs. Here, the defendants did not make that argument in connection with their motion for summary judgment. Therefore, the court need not reach that prong of the test.

why the lower court was correct to focus on finding a "gross disparity" in price, before even addressing profit margins. Like substantive unconscionability, a "gross disparity" requires a ***substantial*** difference in values.

B. There Is No Gross Disparity in Pricing In This Case Under 940 CMR § 3.18(2)(a)(1)

In contrast to those cases involving multiples of two to six, the average price the defendants' stations charged for a gallon of regular unleaded gasoline during the proposed market emergency period was only a very small percentage higher than the prices they charged during the week preceding the commencement of the market emergency period.[8] Indeed, the average price charged for a gallon of regular unleaded gasoline during the market emergency period at Tisbury Shell[9], Depot Corner (199 Main Street), Depot Corner (141 Main Street) and XtraMart were only 1.37%, 3.922%, 3.940%, and 8.52%, respectively, higher than the prices

[8] This number was determined by adding the retail prices from 8/22/05 through 8/28/05 and dividing that number by seven days. The average price for the proposed market emergency was determined by adding the retail prices from August 29, 2005 through December 1, 2005 and dividing that number by days for which data was available.

[9] The prices for Tisbury Shell are taken from the Affidavit of Sidney Richards, the accountant for R.M. Packer. The plaintiffs incorrectly rely on the Affidavit of Shannon Bastardi, a paralegal for the plaintiffs' attorneys, for these prices. The prices for Tisbury Shell from that affidavit were stricken by the lower court. The plaintiffs indicated that they intended to appeal that decision and, therefore, included her affidavit in the Appendix. However, the plaintiffs did not appeal the decision to strike those prices and, as a result, their reliance on her affidavit and inclusion of the stricken sections of her affidavit is inappropriate.

charged during the week preceding the commencement of the market emergency. *A0305-A0312, A0317-A0334, A0339-A0350*. The unconscionability cases cited above involved increases of 200% and 600%. The suggestion that retailers whose average prices during the market emergency period increased by less than 9%, and as low as 1.37%, were engaged in price-gouging is without merit.

Pursuant to the plain language of the regulation, the Court must compare the price charged during the market emergency to the price "immediately prior to the onset of the market emergency." 940 CMR § 3.18(2)(a)(1). The District Court logically concluded that "immediately prior to" means the day or week immediately before the market emergency.[10] *Add. 012-013*.

In the week preceding the plaintiffs' proposed market emergency date, the average retail prices for regular unleaded gasoline at Tisbury Shell, Depot Corner (199 Main Street), Depot Corner (141 Main Street) and XtraMart were $3.204, $3.289, $3.249, $3.099, respectively. *A0307, A0320, A0343*. The average prices these stations charged for a gallon of regular gasoline during the three months of the proposed market emergency period were $3.248, $3.418, $3.377, and $3.363, respectively, i.e., only 1.37%, 3.922%, 3.940% and 8.52% higher than the week

[10] The defendants submit that the relevant differences in prices are practically the same if one uses the price charged on the day prior to the market emergency or if one uses the average price charged for the week immediately preceding the market emergency.

preceding the market emergency, respectively. *A0305-A0312*, *A0317-A0334*, *A0339-A0350*. There is no legal or linguistic definition of "unconscionability" that supports plaintiffs' argument that an average price increase as low as 1.37% and no higher than 8.52% is actionable.[11]

Faced with the dual obstacles of uncontroverted evidence and common sense, the plaintiffs argue that the Court should assess price-gouging on a day-to-day basis, rather than on the basis of the average price during the market emergency period.[12] While such an assessment was dismissed by the District Court and is not supported by the regulation itself, even under this assessment, the defendants' prices were not unconscionable. The highest prices charged on any day during the proposed market emergency period for Tisbury Shell, Depot Corner (199 Main Street), Depot Corner (141 Main Street) and XtraMart, were never more than 11.57%, 18.467%, 18.242%, and 19.36%, respectively, greater than the prices charged on the day immediately preceding the market emergency. *A0305-A0312, A0317-A0334, A0339-A0350*. These increases, which reflect the single greatest

[11] The prices and percentages referenced herein are not disputed by the plaintiffs. In addition, the prices and percentages do not include premium gasoline prices as the plaintiffs have not referenced those prices and the analysis and calculations are similar to those for regular unleaded gasoline.

[12] The plaintiffs also suggest that the prices in late May 2005 are somehow the relevant prices to evaluate for "immediately prior" to the market emergency. The plaintiffs' contention, however, is inconsistent with their own arguments and is misplaced.

pricing disparity for each station and are not even close to the increase by multiples which courts have found "unconscionable" pricing.[13]

Significantly, in November, each defendants' prices actually sank below the pre-market emergency price by an average of 8.02%, 7.48%, 7.60%, and 2.84% for Tisbury Shell, Depot Corner (199 Main Street), Depot Corner (141 Main Street) and XtraMart respectively. *A0305-A0312*, *A0317-A0334*, *A0339-A0350*. In fact, at each of the stations, for at least 24 days of the market emergency period, the prices were equal to or lower than those charged previously. *Id.* Given the overall low average price increases, and the fact that prices started to fall even during the market emergency period, the plaintiffs' price-gouging contentions are untenable.

Further, as pointed out by the District Court, a review of the pricing history at defendants' stations shows that the fluctuation in pricing during the relevant period of time was consistent with normal operation of the market. For example, as explained by the lower court, "the average monthly price at Tisbury Shell varied by more than 23% over the course of 2004, nearly 26% before the market

[13] Any manner of observation confirms that the plaintiffs' claims fail. For instance, the differences between the price during the week preceding the market emergency and the average prices charged by the Defendants' stations for the months of September and October are extremely low, only 10.21% and 2.19% at Tisbury Shell, only 13.13% and 5.47% at Depot Corner (199 Main Street), only 13.41% and 5.87% at Depot Corner (141 Main Street) and only 16.82% and 8.7% at XtraMart. *A0305-A0312*, *A0317-A0334*, *A0339-A0350*. These changes in price, like the other changes discussed, do not constitute a gross disparity.

emergency in 2005, and almost 36% in 2006. 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 period." *Add. 013-014* (citing *A0508-A0509*).

The undisputed evidence, therefore, demonstrates that there is no gross disparity between the prices charged before the market emergency and those charged after the market emergency. If the differences noted above constituted a "gross disparity," very little room would be left for disparities that are not "gross." Indeed the dictionary definition of "gross," itself, connotes a certain largeness of scale. See Webster's Ninth New Collegiate Dictionary, 539 (1989) (providing definitions such as "glaringly noticeable" and excessively fat").

By the same analysis, there is no gross disparity between the defendants' prices and the prices of gasoline on the Cape, even if one irrationally accepts that an island and the mainland constitute the same trade area.[14] Comparing the defendants' price increases to the average price increase of Cape Cod stations from

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[14] With respect to 3.18(2)(a)(2), the plaintiffs' claim fails because the alleged disparity of approximately 20% (set forth in the plaintiff's expert's report) between the defendants' gasoline prices and the prices at select gas stations on Cape Cod is not a large enough difference to constitute a "gross disparity." Further, as a matter of law, this Court must find that gas stations on Cape Cod are not part of the same "trade area" as the defendants' stations. Indeed, in their analysis of the "trade area," the plaintiffs completely ignore the fact that there are five other gas stations on Martha's Vineyard, and instead compare the defendants' prices to the Cape Cod area. As such, the plaintiffs' claim under this section also fails.

August to September 2005, reveals that the defendants' prices increased by roughly the same amount as the average increase on Cape Cod. XtraMart's increase was a mere 1 cent higher than the Cape's increase (.54 compared to .53), Tisbury Shell prices were actually 11 cents *lower* (.42), and Depot Corner's prices were equal (.53) to the Cape Cod Stations' prices. *A0508-A0509.*

In sum, the prices charged by the defendants were neither "unconscionably excessive" nor "grossly disparate." Therefore, the plaintiffs cannot satisfy 3.18(2)(a), and the plaintiffs' price-gouging claim fails as a matter of law.[15]

C. The Plaintiffs' Reliance Upon the FTC Report is Misplaced

To the extent the plaintiffs rely upon the FTC Report to define a standard for price-gouging under Massachusetts law, that reliance is misplaced.

First, there is no need to look to the FTC Report for guidance as the Attorney General has already issued specific regulations defining price-gouging, which have the force of law. *Purity Supreme, Inc. v. Attorney General,* 380 Mass. 762, 775, 407 N.E.2d 297, 306 (Mass., 1980) ("[T]he Legislature has, by G.L. c. 93A, s 2(c), delegated to the Attorney General the power to promulgate rules

[15] While the defendants will show that price increases were substantially attributable to market conditions and increased costs, there is no need for the Court to consider this issue under 3.18(2)(b). This issue is not relevant to the defendants' motions for summary judgment. Defendants did not base their motions on this provision and the plaintiffs did not file any cross-motions for summary judgment.

and regulations defining with specificity acts and practices which violate G.L. c. 93A, § 2(a).").

Second, although Chapter 93A directs courts to "consider the interpretations of unfair acts and practices under § 5 of the Federal Trade Commissions Act, 15 U.S.C. s 45(a)(1) (1970), as construed by the Federal Trade Commission," (*PMP Associates, Inc. v. Globe Newspaper Co.*, 366 Mass. 593, 595, 321 N.E.2d 915 (1975)), the FTC Report is *not* an interpretation of the Federal Trade Commissions Act.[16] Instead, it is a report compiled pursuant to a specific Congressional directive, with specific parameters and requirements. The definition of price-gouging used in the FTC Report was not developed by the FTC; it was a definition mandated by Congress for the specific purposes of the report. FTC Report, at pages iii, 137, 153 (*A0771*, *A0911*, *A0927*); <u>see also</u> Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-108 § 632, 119 Stat. 2290 (2005). Accordingly, because any definitions of price-gouging contained in the FTC Report are ultimately derived from Congress for purposes of giving direction to an investigation, rather than an FTC interpretation

[16] The plaintiffs' incorrectly cite caselaw to suggest that this Court must look to interpretations by the FTC, generally. In citing *Ciardi v. LaRoche, Ltd.*, 436 Mass. 53, 59 (2002), the plaintiffs fail to include the entire cite which provides that this court looks to interpretations by the Federal Trade Commission of Section 5(a)(1) of the Federal Trade Commission Act.

of the Federal Trade Commissions Act, any such definitions have no bearing on the Massachusetts regulation.

Third, the FTC Report itself not only acknowledges that it employs a definition of price-gouging adopted for purposes of its report to Congress, it observes that price-gouging is not "a well defined term of art in economics," FTC Report at page iii, and that various jurisdictions define the term price-gouging differently. *A0771, A0961-A0964*.[17] It is not sensible to glean from the FTC Report any definitions of price-gouging when the Report itself makes a point of noting the diversity in price-gouging laws and the absence of a recognized economic definition of the term.

In sum, whatever merit the FTC Report might have as a source of empirical data,[18] it is not meant to be, and is not an authority for defining price-gouging within the meaning of the Massachusetts regulation.

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[17] For example, some jurisdictions, such as Kansas, have suggested that the gross disparity must be at least a 25% change in price, not margin. See Kan. Stat. Ann. 50-6, 106.

[18] In their brief, the plaintiffs cite empirical data from the FTC Report. Little, if any, of that data is germane to this Court's inquiry under the Massachusetts regulation.

D. Even If the Court Does Consider the FTC Report, Plaintiffs Do Not Apply the FTC's Price-gouging Interpretations Correctly

Even assuming that use of the FTC's analysis is appropriate in determining whether there was a gross disparity between the defendants' prices and those in the relevant trade area, plaintiffs fail to properly perform this analysis. Plaintiffs mistakenly equate a benchmark used as part of the FTC's methodology – an increase in gross margin of more than five cents per gallon - with a definition of price-gouging and conclude that defendants engaged in price-gouging because their margins allegedly increased by more than $0.05. Plaintiffs completely ignore the FTC's crucial next step in this analysis. Acknowledging regional variability in pricing, the FTC wrote that if there was a $0.05 margin increase, the FTC <u>then</u> compared those stations' retail price increases to the average price increase of stations in the <u>local market area</u>. If the station's price increase from August to September 2005 did not exceed the average price increase of the local market area by more than $0.05, the FTC did <u>not</u> conclude that the particular gasoline stations engaged in price gouging. *A0784*, *A0926*. Here, the plaintiffs' expert puts Martha's Vineyard and Cape Cod in the same "trade area", a conclusion that belies common and geographic sense. However, <u>even using Prof. Gollop's grossly inflated "trade area," the average increase in Prof. Gollop's "trade area" for the relevant time was $0.53</u>. *A0508-A0509*. Compared to that increase, XtraMart's increase was a mere 1 cent higher than the Cape's increase (.54 compared to .53), Tisbury Shell's prices were actually 11 cents *lower* (.42), and Depot Corner's prices were equal (.53) to the Cape Cod Stations' price increases. Each increase, therefore, was less than the increase required by the FTC's analysis. *A0784*, *A0926*. As such, defendants did not engage in "price gouging" by <u>either</u> the FTC's analysis or under the Massachusetts regulation.

E. The Plaintiffs' Reliance on New York Law Is Misplaced

The plaintiffs' reliance upon New York law to argue that this Court should consider the defendants' margins is similarly misplaced. The New York statute and the Massachusetts regulation are not identical and have a different structure.[19]

For example, the New York statute states that a court's determination that price-gouging has occurred "shall be based upon 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." New York General Business Law § 396-r (3)(a). Under the New York statute, gross disparity only serves as presumptive evidence of price-gouging, it does not constitute price-gouging. *People by Abrams v. Two Wheel Corn*, 71 N.Y.2d, 692, 699 (N.Y. 1988)

[19] As noted above, there are several other jurisdictions which have price-gouging statutes. Significantly, the plaintiffs ignore all of those statutes and rely only on the New York statute.

(noting both the procedural and substantive unconscionability components of the statute). The New York law focuses on "leverage." Remarking upon the unfair leverage that retailers may employ during a market emergency, the Court of Appeals stated: "The use of such leverage is what defines price gouging, not some arbitrarily drawn line of excessiveness." *Id.* To put it another way, the "gross disparity" language contained in the New York statute is "procedural rather than definitional." This interpretation is consistent with the structure and phrasing of the New York statute, which in its operative language is open-ended. The New York statute thus envisions courts considering multiple factors sounding both in procedural, as well as substantive, unconscionability. *See People by Abrams v. Two Wheel Corn*, 71 N.Y.2d, 692, 699 (N.Y. 1988)

In *People by Abrams*, the New York Court of Appeals held that price increases ranging from 5% and 60% (with most prices increased by less than 30%) sufficed to establish a prima facie case of price-gouging under the New York price-gouging law. *Id.* This case is distinguishable however. Apart from the obvious fact that the New York court was not interpreting the Massachusetts regulation, the defendants in that case were increasing prices on goods already in their possession at the time of the market emergency. *Id.* at 696. This buttressed the inference that they were taking unfair advantage of the market emergency, rather than responding to increased prices/costs. In addition, price-gouging for the New York law reflected both the substantive and procedural dimensions of unconscionability; gross disparity was only evidence of price-gouging --- it was not price-gouging itself. The Massachusetts regulation, by contrast, essentially defines price-gouging in terms of gross a disparity that cannot be explained by increased costs, and anticipates a two step inquiry: (1) to determine whether there is a gross disparity; followed by (2) a determination whether that disparity is attributable to increased costs. While it might be reasonable under the more open-ended New York statute to consider margins in determining whether there is a gross disparity, the Massachusetts regulation clearly envisions an inquiry centered on price, before any inquiry into cost.

In any event, the cases interpreting the New York statute are neither binding nor persuasive authority with respect to the proper interpretation of the Massachusetts price-gouging regulation. The Attorney General has promulgated a regulation and has used terms of legal art that the Massachusetts Courts have already interpreted. There is no need to look to New York for guidance.

CONCLUSION

At most, the plaintiffs have presented evidence that the defendants' prices were interdependent. Plaintiffs have not presented sufficient evidence from which a reasonably jury could conclude that the defendants had an explicit agreement, and have thereby failed to present evidence that tends to exclude the possibility of mere interdependent pricing. With respect to price-gouging, the defendants' price increases during the alleged market emergency were insignificant, and consistent with changes in the local trade area, as well as historical fluctuations during non-emergency periods. As such, the increases were neither gross nor unconscionable, and are not actionable under Massachusetts law.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) because this brief contains 13,379 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 2003.

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CERTIFICATE OF SERVICE

I, William J. Fidurko, counsel for the appellees-defendants DRAKE PETROLEUM CO., INC. and KENYON OIL COMPANY, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on April 26, 2010.

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