No.

In the Supreme Court of the United States

WINDY COVE, INC., ET AL.,

Petitioners,

v.

CIRCLE K STORES, INC.,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

(PUBLIC COPY–SEALED MATERIALS REDACTED)

KENNETH P. ROBERTS
Counsel of Record
STUART E. COHEN
K.P. Roberts & Associates, APLC
6355 Topanga Canyon Blvd.
Suite 403
Woodland Hills, CA 91367
(818) 888-3553
kroberts@kprlawinc.com
scohen@kprlawinc.com

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QUESTIONS PRESENTED

1. Whether all gasoline, including branded gasoline, is a fungible commodity.

2. Whether in an open price term contract governed by California Commercial Code §2305 (adopted from Uniform Commercial Code §2-305), setting wholesale prices by using a method and manner that is not standard within the industry nor used by any other wholesale distributor pushes a case out of Uniform Commercial Code §2-305's good faith safe harbor provision.

3. Whether in an open price term contract governed by California Commercial Code §2305 (adopted from Uniform Commercial Code §2-305), the proper "in the range" price comparison analysis in determining whether a seller's price is commercially reasonable (and thus set in good faith) is (a) a comparison between those within the same class of trade as the seller/merchant or (b) a comparison between those whom the seller considers to be its "competitors" regardless of class of trade.

LIST OF ALL PARTIES TO THE PROCEEDING

Petitioners to this proceeding include:

Windy Cove, Inc.
HB Fuels, Inc.
Staffing and Management Group, Inc.
Kazmo, LLC
Sun Rise Property, LLC
Hamid Kalhor
Mohammad Bahour

Respondent includes Circle K Stores, Inc.

CORPORATE DISCLOSURE STATEMENT

Petitioner Windy Cove, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

Petitioner HB Fuels, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

Petitioner Staffing and Management Group, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

Petitioner Kazmo, LLC, is a California limited liability company.

Petitioner Sun Rise Property, LLC, is a California limited liability company.

RELATED PROCEEDINGS

United States District Court (S.D.Cal.)

AKB Petroleum, Inc. v. Circle K Stores, Inc.,
Case No. 3:23-cv-00388-MMA-DEB
(Mar. 1, 2023)

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Windy Cove, Inc., HB Fuels, Inc., Staffing and Management Group, Inc., Kazmo, LLC, Sun Rise Property, LLC, Hamid Kalhor, and Mohammad Bahour (collectively "Petitioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 121 F.4th 1355 (9th Cir. 2024). (App. A, pgs. 1a-10a). The district court's order granting respondent Circle K Store, Inc.'s (herein "CK" or

"Respondent") motion for summary judgment and denying Petitioners' motion for partial summary adjudication is reported at 2023 WL 6284466 (S.D. Cal., Sept. 7, 2023). (App. B, pgs. 11a-53a).

JURISDICTION

The judgment of the court of appeals was entered on December 3, 2024. (App. A, pgs. 1a-10a). Petitioners' petition for rehearing on panel and en banc was denied on January 13, 2025. (App. C, pgs. 54a-55a.)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of statutes and codes are set forth below, while the full and complete statutes and code provisions are reproduced in Appendix E to this petition.

California Commercial Code §2305

> § 2305. Open price term
>
> (1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if
>
> (a) Nothing is said as to price; or
>
> (b) The price is left to be agreed by the parties and they fail to agree; or

> (c) The price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.
>
> (2) A price to be fixed by the seller or by the buyer means a price for him to fix in good faith.

California Commercial Code §2305, Comment 4

> Subdivision (2) is in accord with prior California law as expressed in California Lettuce Growers, Inc. v. Union Sugar Co., 45 Cal.2d 474, 289 P.2d 785 (1955): ". . where a contract confers on one party a discretionary power affecting the rights of the other, a duty is imposed to exercise that discretion in good faith and in accordance with fair dealing."

UCC § 2-305[1], Comment 3

> Subsection (2), dealing with the situation where the price is to be fixed by one party rejects the uncommercial idea that an agreement that the seller may fix the price means that he may fix any price he may wish by the express qualification that the price so fixed must be fixed in good faith. Good faith includes observance of reasonable commercial standards of fair dealing in the trade if

[1] UCC §2-305 is set forth in full in Appendix E.

> the party is a merchant. (Section 2-103). But in the normal case a "posted price" or a future seller's or buyer's "given price," "price in effect," "market price," or the like satisfies the good faith requirement.

(Comment 3 to UCC §2-305 is also referenced in the Editors' Notes to California Commercial Code §2305)

STATEMENT

While Petitioners are a group of gas station owners operating under the Mobil brand who acquire their Mobil branded fuel supply from their wholesale distributor, respondent Circle K ("CK" or "Respondent"), as every state has codified Uniform Commercial Code ("UCC") §2-305 for governing open price term contracts[2], with the exception of Louisiana, the reach of the Ninth Circuit's decision applies nationwide and is applicable to every open price term contract regardless of the type of goods, whether branded or unbranded. California codified UCC §2-305 at California Commercial Code §2305.

The Ninth Circuit's opinion deviates from all prior court decisions among the circuits, as well as case precedent within the Ninth Circuit, for determining what constitutes a good faith commercially reasonable price under California Commercial Code §2305(2) (as adopted from UCC §2-305(2)). The Ninth Circuit rewrites how to establish good faith in all open price

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[2] A list of citations to all 50 states' open price term contract statutes adopted from UCC §§2-305(1) and (2) is provided in Appendix D (see App. D, pgs. 56a-59a).

term contracts regardless of industry or goods being sold.

First, the Ninth Circuit concluded that all gasoline is "fungible," regardless of brand. This conclusion that all gasoline, including branded gasoline (e.g., Shell, Chevron, 76, Mobil, etc.) as well as unbranded, is a fungible commodity, conflicts with decisions from other circuits who have addressed fungibility of gasoline. The Ninth Circuit gave no consideration of branded gasoline when making that finding.[3] In *Shell Oil Co. v. A.Z. Servs., Inc.*, 990 F.Supp. 1406, 1413 (S.D. Fla. 1997), the court concluded that branded gasoline is not fungible. Similarly, other courts have concluded that brands or a specific brand's additions to a common product are not fungible products. See e.g., *U.S. v. Pabst Brewing Co.*, 384 U.S. 546, 559 (1966); *Fortner Enterprises, Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 509 (1960); 19 Code of Federal Regulations ("C.F.R.") §10.593(d).

Then, based on its finding that all gasoline is fungible, the Ninth Circuit found that when determining whether a wholesale price of gasoline has been established in good faith, that the wholesale distributor (such as CK) need only find one "competitor" who sells the product at a higher price, and thus, the Ninth Circuit concludes that CK's prices are commercially reasonable and set in good faith. Under the Ninth Circuit's holding, the "competitor" need not be in the same class of trade of the wholesale distributor (CK) either and who the "competitors" are, are to be decided by the seller. Based on the Ninth Circuit's decision, it is hard to imagine a situation in

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[3] If gasoline is truly fungible, then branded gasoline is irrelevant and there is no reason for brand as it is all the same product.

which a price would not be commercially reasonable based on this new standard.

Prior to the Ninth Circuit's decision, other circuits drew distinctions between the refiner and wholesale distributor/supplier (hereafter "Jobber") class of trades. Cases such as *Shell Oil Co. v. HRN, Inc.*, 144 S.W.3d 429, 431 (Tex. 2004) ("*HRN*") and others explained the importance of class of trade as class of trade were key comparators when determining whether a price set was commercially reasonable or not.

CK admittedly is not a refiner and admittedly is a wholesale distributor of Mobil branded fuel. Yet CK compares its wholesale prices to those of refiners (e.g., Chevron) to evaluate whether its prices are "in the range" of other sellers, regardless of brand or class of trade. The Ninth Circuit found that while CK's price may have been higher than other wholesale distributors, CK's price was less than one refiner (Chevron), and based on being less than Chevron (a refiner), the Ninth Circuit found CK's prices were commercially reasonable and set in good faith.[4] Of note, Mobil branded gasoline is distributed solely by Mobil branded distributors in California, and not by the refiner, ExxonMobil.

Moreover, as in this situation, CK competes in the same market as Petitioners. CK operates its own Mobil branded stations and sells the same Mobil branded fuel at retail prices that are often the same,

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[4] That factual finding by the Ninth Circuit was made on a disputed fact which Petitioners presented evidence showing dates on which CK was the highest price of comparators, even when comparing to Chevron which at times was higher and at times lower than CK.

and at times higher than the wholesale price that CK charges the Petitioners. However, based on the Ninth Circuit's decision, the inability to compete because of prices set is essentially irrelevant.

The Ninth Circuit reached this decision notwithstanding that "fungibility" was not an argument before or discussed in the trial court nor in any of the briefs to the Ninth Circuit. The Ninth Circuit went outside the record to create a new rule for pricing.

Computer assisted Westlaw research confirms that no case or statutory search has employed fungibility as a standard for application of California Commercial Code §2305 or UCC §2-305.

Last, the Ninth Circuit essentially eliminated UCC §2-305's safe harbor provision found in Comment 3 to UCC §2-305 which applies to a "normal case." In the "normal case," the seller can satisfy the good faith safe harbor provision by establishing a price in effect. Prior case law held that where the seller's manner and/or method in calculating price was not in accordance with the industry's common practice and standard, that such situations were not the "normal case."

Petitioners established that the industry standards for wholesalers setting wholesale prices is based on what is known generally in the industry as "rack plus," meaning the wholesale price is calculated based on the wholesale distributor's cost to acquire the gasoline at the rack (storage), plus cost of delivery to the service station, plus a small markup for margin. Petitioners presented undisputed evidence from CK's own wholesale pricing director, from other wholesale distributors in the same market as Petitioners and

CK, and from CK's own retained expert, all of whom establish that CK does not follow or adhere to industry practice and standards when pricing wholesale fuel. CK's own pricing director, along with CK's retained expert, also admit not being able to identify any other wholesale distributor that priced fuel in the same or in a similar fashion as CK.

Yet, the Ninth Circuit has now done away with the safe harbor and rendered obsolete any discussion whether the manner in which wholesale prices are set was done within the acceptable industry custom and practice. Instead, the Ninth Circuit simply established a new standard that so long as the seller's price is at least lower than one other supplier of gasoline in the marketplace, (regardless of class of trade), the price is commercially reasonable and set in good faith. This conclusion conflicts with at least one other decision of the Ninth Circuit and with decisions of all other courts which have been tasked to determine good faith commercial reasonability in open price term contracts for the sale of goods.

A. Pertinent Factual Background

Petitioners' First Amended Complaint sets forth three causes of action for Breach of Contract – Breach of Covenant of Good Faith and Fair Dealing, Declaratory Relief, and Unfair Business Practices.

The history and dynamics of the parties leading up these Petitioners (and other gas station owners) going from lessee dealers of Mobil branded gas stations, to Petitioners becoming owners of their Mobil stations, to Petitioners entering into open price term contracts with CK, to CK serving as Petitioners' wholesale distributor of Mobil branded fuel, to the circumstances

leading up to this lawsuit being filed, casts more light on the severity of the Ninth Circuit's new rule.

1. ExxonMobil (Formerly A Refiner) Either Owned, Or Under A Master Lease, Leased Stations To Lessee Dealers, Including Petitioners, And Sold Mobil Branded Gasoline To Its Leased Stations.

Until around 2008, the supply and distribution of motor fuel was dominated by the largest named brand fuel companies, to wit, Chevron, Shell, 76, BP, Texaco, ExxonMobil, and others, otherwise known in the industry as the "Majors." The Majors added their own proprietary additives to the gasoline it refined to be sold as branded gasoline. The branded fuel was then sold retail to the motoring public by the lessee dealers.

Petitioners were lessee dealers of ExxonMobil pursuant to which most of the station's repairs, maintenance, remodeling, upgrades, and product support, including repairs to the structure, fuel pumps, pumping and dispensing system, and environmental costs and expenses were paid for by ExxonMobil.

2. ExxonMobil Withdraws As Both A Refiner and As A Direct Seller of Mobil Gasoline in California.

Around 2012, ExxonMobil stopped refining its fuel in California and withdrew from the direct fuel supply to its retail stations in California. ExxonMobil offered to sell its gas stations to its lessee dealers (including Petitioners). Stations not sold were offered and sold to CK.

Each of these Petitioners exercised their right to purchase the land and their stations. Petitioners paid hundreds of thousands of dollars, and in some cases, over a million dollars to purchase their stations. Each of the Petitioners' stations are located in the counties of Los Angeles, Orange, and San Diego, California.[5]

The purchased properties were subject to deed restrictions limiting use of the properties to the sale of Mobil branded gasoline.

3. CK Became A Wholesale Distributor ("Jobber") of Mobil Branded Fuel.

To facilitate ExxonMobil's operational withdrawal in California, ExxonMobil entered into a wholesale distributor agreement with CK. Per the agreement, CK then became Petitioner's supplier of Mobil branded gasoline.

Wholesale distributors or wholesale suppliers like CK are known as "Jobbers" in the industry.

CK admits that it is not a refiner and instead is in the wholesale distributor or "Jobber" class of trade.

Jobbers are not refiners. Refiners produce, *refine,* market and distribute gasoline to service station dealers who sell under the brand of the refiner and are referred to as Majors, a class of trade distinct from Jobbers.

In the marketplace today there are hundreds of Jobbers of motor fuel throughout the United States, including Jobbers who supply branded fuel (including

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[5] During the pendency of this action, Petitioner Staffing and Management sold its station to another non-party dealer. Petitioner Staffing and Management continues to seek damages it sustained up to the time of sale.

Mobil brand), besides CK, as well as unbranded fuel. In Petitioners' market today, examples of Jobbers include CK, Supreme Oil, SEI Fuels, and Southern Counties Fuels.

4. Petitioners Acquired Their Stations And Entered Into Open Price Term Fuel Supply Agreements With CK (Which CK Then Became Petitioners' Wholesale Distributor For Mobil Branded Fuel).

As part of the sale and purchase of the stations, ExxonMobil required the Petitioners to execute a supply contract with CK for the supply of Mobil branded gasoline.

The long-term Complete Contract of Sale (Branded-Reseller) (herein "Gasoline Agreements"), which Petitioners were required to execute with CK as a condition of their purchase of the stations, were non-negotiable and contained open price terms for gasoline which state:

> 6. Price. The price per gallon to be paid by Purchaser shall be the Seller's price in effect at the time and place of delivery to dealers of the same class and in the same trade area as Purchaser. … *All prices charged by Seller are subject to the provisions of applicable law*. (Italics added).

No formula, manner, or basis for how CK would set its wholesale price for fuel sold to Petitioners was set forth in the Gasoline Agreements.

The Gasoline Agreements with open price term contacts between Petitioners and CK were governed by California Commercial Code §2305.

In addition, based on the contracts with CK, Petitioners were also made responsible for the maintenance, repair, repairing and/or replacing underground storage tanks and pipelines, environmental compliance, and all matters relating to the operation of the station.

5. CK Operated Its Own Company Owned and Operated Properties ("COOPs") Where It Sold Mobil Branded Fuel Under the Mobil Flag And Which CK's COOPs Compete With Petitioners.

In addition to supplying its lessee dealer stations and dealer owned stations with Mobil branded fuel (like those of Petitioners), CK also operates its own chain of Mobil branded stations ("COOPs" which stands for company owned and operated properties). Many of CK's COOPs are located in the same market or in close vicinity to other Mobil branded stations owned by dealers, including the Petitioners. CK's COOPs compete with Petitioners in the retail sale of Mobil branded gasoline to the motoring public, and against other station brands as well.

Prior to this lawsuit and continuing to the present day, CK's COOPs regularly sell their Mobil branded gasoline at retail prices below and within pennies of the wholesale price CK charges to the Petitioners to acquire their supply of the same fuel. CK's price was between $0.25 to $0.50 or more per gallon than prices charged by other Jobbers (see section 8 below), whom

ExxonMobil has since authorized to wholesale Mobil branded fuel after its transaction with CK.

CK's pricing practices make it impossible for gas station dealers being supplied by CK to compete in the sale of Mobil branded gasoline and gasoline in general without having to set their retail prices at, below, or within pennies of their purchase price; selling at a virtual loss.

6. Petitioners Made CK Aware Of The Impact That CK's Wholesale Prices Were Having On The Petitioners' Stations.

Since around September 2019, Petitioners, along with other numerous gas station dealers, complained to CK about CK's retail street prices for gasoline sold at CK's COOPs in the same market as Petitioners and others. Petitioners complained that CK's wholesale prices charged to Petitioners were in line with CK's retail street prices, and at times, were even higher than CK's retail street prices for the same gasoline. In effect, Circle K was pricing Petitioners out of the market.

In response to an email from the owner of Petitioner Windy Cove, CK Vice President Gerardo Valencia responded, "Thanks for your note. I am discussing and reviewing your concerns with the team and we will get back to you in the next few days." Petitioners also took their complaints to their CK representative Michael Bohnert, who admits that he told Mr. Valencia, "we need to help these guys. They're dying down there. This is killing them" and asked that CK help Petitioners because Mr. Bohnert believed Petitioners' complaints were valid.

Despite CK's assurances to look into and follow up on the issues, the only "fix" offered by CK was to take over the gasoline sales operations at the Petitioners' stations and pay Petitioners some form of compensation, while Petitioners would continue to operate the fuel operations at the stations on CK's behalf.

Other than offering this "fix," nothing was done or changed, and this lawsuit followed.

7. The Method Used By CK To Set Its Wholesale Prices For the Fuel Sold to Petitioners.

Stephanie Fry, CK's Director of Fuels for the West Coast Business Unit, is the person that sets CK's wholesale gasoline prices. Ms. Fry testified that CK's pricing of Mobil branded gasoline starts by taking Chevron's branded rack price,[6] to which CK then adds an "adder" to that price. When Ms. Fry was asked to breakdown the "adder," not even she was aware of the "adder" components or how that "adder" is derived.

CK then compares its calculated wholesale price against claimed "Dealer Buyer Prices" of Chevron[7], Shell and 76 as reported by the Lundberg Survey ("Lundberg").

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[6] "Rack price" generally means the cost to acquire the fuel from the fuel storage terminal. In this case, CK begins by basing its wholesale price on the cost to acquire Chevron gasoline at storage terminal.

[7] Chevron had the highest and greatest brand loyalty of consumers in California, enjoying approximately 15% of market share as opposed to Mobil brand under CK which had a limited market share of 2-3%.

The prices reported by Lundberg are not verifiable nor accurate. The Lundberg prices do not take into account any volume discounts, other discounts, allowances, rebates, or reduction in purchase price that are offered by the producer or supplier to the dealer/gas station to which Lundberg reports prices of. Nor does Lundberg identify the gas station dealer from who price information is received. It is not known from which station(s) within a given county that information is from. Nor is the Lundberg data verified against invoices. Instead, Lundberg claims it receives pricing information as a result of phone calls to one or more gas station dealers.

Ms. Fry admits that CK does not know where Lundberg obtains its information, nor does she know what incentives, rebates, or discounts Chevron, and Jobbers selling 76 or Shell provide when they supply gasoline to their gas station dealers. CK does not consider the price of unbranded gasoline, or prices of gasoline paid by larger box retailers like Costco. CK's price comparisons are not reflective of the market.

8. CK's Manner In Setting Its Wholesales Fuels Prices Does Not Conform To The Industry And Trade Practices Of Other Wholesalers' Pricing Practices.

Petitioners presented evidence of how other wholesale distributors of Mobil and non-Mobil branded fuels set their wholesale prices, including those within Petitioners and CK's market. While these other wholesale distributors set prices in a similar fashion to one another, none set prices in a manner similar to that used by CK.

Even CK and its own retained expert, Dr. John Umbeck, admit they do not know of any other

wholesale distributor that sets their wholesale prices in the same or similar way that CK does.

Except for CK, other wholesale distributors of both Mobil branded and non-Mobil branded fuels follow the industry and trade practice of wholesale distributors when setting wholesale prices. That pricing formula is calculated, or with a slight variation, based on the cost to acquire the fuel at the storage/rack, plus cost of delivery, and plus a small markup (around $0.02 to 0.05 per gallon). This is known in the industry as "rack plus" pricing.

Petitioners presented the declaration from Michael Davis, CEO of Supreme Oil ("Supreme"). Supreme is a wholesale distributor of Mobil branded gasoline in California and other states, including within Los Angeles and San Diego counties, where two of the Petitioners are located. Supreme prices on a formula based on its cost to obtain the fuel, plus freight, plus a markup or margin. Supreme provides price incentives to its station clients, such as volume discounts.

Petitioners also presented the declaration from Adam Marcus, Senior Director of Wholesale Fuels and Zone Operations for SEI Fuels ("SEIF"), a Mobil gasoline Jobber. SEIF markets to service stations dealers in San Diego and Los Angeles Counties. Like Supreme, SEIF sets its wholesale fuel prices based on its daily rack price to acquire Mobil branded gasoline and then adds a markup of typically $0.01 to $0.05 per gallon, freight, and taxes, or SEIF uses a formula price negotiated with individual dealers.

Petitioners also presented the declaration from Joseph Balestreri, Vice President of Branded Wholesale for Southern Counties Oil Co. ("SC Fuels"). SC Fuels is a wholesale distributor of Shell, 76, and

other branded fuels. Similar to Supreme and SEIF, SC Fuels sets its wholesale gasoline prices based on the cost to acquire the gasoline at the rack from where it is purchased, plus a return on financial investment that SC Fuels may have related to the location supplied, plus freight charges, plus a markup of "several cents" per gallon. Mr. Balestreri confirmed that the manner that CK sets its wholesale prices is not a "typical pricing method used by wholesale distributors in California and is primarily used by Majors such as Chevron and BP or independent refiners such as Phillips Petroleum and Marathon." SC Fuels provides rebates to dealers it supplies which lowers the net buying price.

Based on using rack plus pricing as used by wholesale distributors, such as Supreme and SEIF, their wholesale prices for the same exact Mobil branded fuel are regularly priced from $0.25 to $0.55 per gallon less than the wholesale price charged by CK to the Petitioners for the same fuel.

Petitioners each had their own annual minimum purchase volume requirements with CK of 729,000 gallons (for Windy Cove), 1,200,000 gallons (for Mr. Bahour and his station), and 995,225 gallons (for Mr. Kalhor and his station).

In addition, regarding CK's reliance on using the Lundberg surveys, Supreme, SC Fuels, and SEIF all said they do not provide their prices to Lundberg.

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9. When Price Comparing, CK Does Not Take Into Consideration The Prices Of Other Lower Priced Majors In Determining Whether CK's Prices Are "In the Range."

CK uses Lundberg to compare its wholesale prices to the "Dealer Buying Price" of three majors, Chevron, Shell and 76. The Lundberg survey also includes price data for Valero, Arco, and Marathon, all of whom are Majors (i.e., refiners). CK expert, Dr. Umbeck, admits and classifies Valero as a branded refiner and a "major" which Dr. Umbeck said Valero was a "big player" in California.

When Dr. Umbeck was questioned why he did not take into consideration the prices of these other majors when comparing CK's prices to determine whether CK's prices were commercially reasonable, Dr. Umbeck said that Valero's prices were not in the Lundberg data that CK's counsel supplied to him. Yet, the copies of the Lundberg data that CK offered as evidence to the trial court included the prices of Valero, as well as Arco, and Marathon.

10. Petitioners Sought To Terminate The Gasoline Agreements With CK But CK Refused And Refused To Allow Another Wholesale Distributor Of Mobil Branded Gasoline To Supply Petitioners' Stations.

Prior to bringing this action, Petitioners provided CK with notice of termination and repudiation of the Gasoline Agreements and advised they would pay the amount of liquidated damages as set forth under the terms of the Gasoline Agreements. CK refused to allow Petitioners to terminate the contracts claiming

that under the grant deed with use restrictions, Petitioners were contractually required to purchase their Mobil branded fuel from CK.

Petitioner Windy Cove received an offer of fuel supply from SEIF, another wholesale distributor of Mobil branded gasoline. SEIF was also agreeable to supply the other Petitioners' stations provided their contracts with CK had been terminated and CK allowing Petitioners to obtain their supply from another wholesale distributor. ExxonMobil was informed of this request and took no issue with SEIF supplying Petitioners so long as CK was in agreement as well.

However, CK refused to permit SEIF to supply the Petitioners.

B. Procedural History

On July 13, 2021, Petitioners filed their complaint in the San Diego County Superior Court. On August 6, 2021, CK removed the action to the United States District Court for the Southern District of California based on diversity jurisdiction.

Petitioners filed their First Amended Complaint on September 7, 2021, which on January 5, 2022, CK answered and counterclaimed.

On or about March 2023, the parties filed their respective dispositive motions and Daubert motions.

On September 7, 2023, the trial court denied Petitioners' dispositive motion while granting CK's motion for summary judgment. (App. B, pgs. 11a-53a).

Petitioners filed an appeal of the ruling to the Ninth Circuit. On December 3, 2024, the Ninth

Circuit issued its opinion in this matter, affirming the trial court's grant of summary judgment in favor of CK. (App. A, pgs. 1a-10a.)

On December 17, 2024, Petitioners filed their petition for rehearing or for an en banc hearing, which the Ninth Circuit denied on January 13, 2025. (App. C, pgs. 54a-55a).

REASONS FOR GRANTING THE PETITION

The issues presented in this petition are of exceptional importance that apply to every open term price contract governed by UCC §2-305, California Commercial Code §2305, and by every state's equivalent statute (see App. D, pgs. 56a-59a), for determining if the prices charged under an open price term contract are commercially reasonable and set in good faith.

In this case, the Ninth Circuit creates a novel and new interpretation and rule for open price terms not previously employed by the Ninth Circuit or any other court and ***abandons*** the generally accepted approach by other courts.

1. The Ninth Circuit's Opinion Finding That All Gasoline, Including Branded Gasoline, Is A Fungible Commodity Is Contrary To Law And Creates A Split Among The Circuits.

Up until the Ninth Circuit's opinion in this case, there was no dispute that refined and branded gasoline was <u>not</u> a fungible product. Nor was there a dispute or any conflict between the circuits that branded products were not fungible commodities.

In this case, no party, nor the trial court, in any filing or ruling discussed, argued, used, or mentioned the word or term "fungible" or "fungibility," nor did any party, nor the trial court, seek such a determination.

In violation of Rule 10 of this Court, the Ninth Circuit took it upon itself to determine whether gasoline (including branded gasoline) is a fungible commodity.

Courts and regulations have already made clear that branded products are not fungible nor are they fungible commodities. For instance, 19 C.F.R. §10.593(d) states:

> '[f]ungible good or material' means a good or material, as the case may be, that is interchangeable with another good or material for commercial purposes and the properties of which are essentially identical to such other good or material.[8]

Importantly, as this court held in *U.S. v. Pabst Brewing Co.*, 384 U.S. 546, 559 (1966), in recognizing the differential importance between branded and unbranded products:

> Beer is not a fungible commodity like wheat; product differentiation is important, and the ordinary consumer is likely to choose a particular brand rather

[8] *See also* 19 C.F.R. §102.1(f), 19 U.S.C. §4531, and United States – Mexico – Canada Agreement (USMCA) (2018), Chapter 4, Article 4.1, for similar definitions of fungible goods or fungible materials.

> than purchase any beer indiscriminately.

This court also said, "money is a fungible commodity—like wheat or, for that matter, unfinished steel". *Fortner Enterprises, Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 509 (1960); *Pooshs v. Philip Morris USA, Inc.*, 904 F.Supp.2d 1009, 1032 (N.D. Cal. 2012) (cigarettes are not fungible as each manufacturer adds its own chemicals and substances to their cigarettes); *In re Dow Corning Corp.*, 250 B.R. 298, 363 (Bankr. E.D. Mich. 2000) (breast implants are not fungible as manufacturers use different designs and compositions making each an identifiable product); *Sanderson v. Int'l Flavors & Fragrances, Inc.*, 950 F.Supp. 981, 991–92 (C.D. Cal. 1996) (fragrances are not fungible as each manufacturers' fragrances differ in composition).

The same is true here in terms of gasoline. Once the brand adds its own additives to the refined fuel, the gasoline is no longer a fungible commodity. This was clearly explained in *Shell Oil Co. v. A.Z. Servs., Inc.*, 990 F.Supp. 1406, 1413 (S.D. Fla. 1997):

> Finally, the Court agrees with the Magistrate Judge that Shell, by including a special additive in its fuel, does not sell a fungible commodity. *See, e.g., Power Test,* 754 F.2d at 98 ('Power Test gasoline is simply not fungible with any and all other gasolines'); *Freeman v. United Cities Propane Gas of Georgia, Inc.,* 807 F.Supp. 1533, 1540 (M.D.Ga.1992) (gasoline is not a fungible good because 'various companies place additives in the product in an attempt to

> distinguish their brand from other very similar brands')…. Shell gasoline is not a fungible commodity ….

Here, however, by the Ninth Circuit unilaterally deciding that all gasoline, including branded gasoline, is a fungible commodity, the Ninth Circuit went against years of prior court holdings – including holdings from this Court – and created a split among the circuits and this court as to what constitutes a fungible commodity, particularly whether branded products (in this instance branded gasoline) are fungible products.

Accordingly, on that basis alone, this writ should be granted.

2. The Ninth Circuit's Conclusion That So Long As A Seller's Price Is Less Than One "Competitor" Then That Price Is Set In Good Faith Eliminates The UCC §2-305 Safe Harbor Provision.

California Commercial Code §2305 -- and all of the other 48 states with similar open price term statutes with the exception of Louisiana (see App. E) -- governs open price term contracts and states:

> [a] price to be fixed by the seller or by the buyer means a price for him to fix in good faith.

Good faith is defined in Comment No. 3 to UCC §2-305(2) as:

> Good faith includes observance of reasonable commercial standards of fair dealing in the trade if the party is a merchant. (Section 2-103).

Courts agree that the last sentence of Comment 3 of UCC §2-305 creates a good faith "safe harbor" provision. *Two Bros. Distrib. v. Valero Mktg & Supply Co.*, 270 F.Supp.3d 1112, 1123 (Ariz. 2017). That sentence provides:

> But in the **normal case** a '*posted price*' or a future seller's or buyer's '*given price*,' '*price in effect*,' '*market price*,' or the like satisfies the good faith requirement. (Emphasis in bold and italics added.)

Now, however, the Ninth Circuit ignores the "normal case" analysis universally applied by courts across the nation to determine if the pricing practices under an open price term contract are in good faith and commercially reasonable, and instead created a completely new standard that conflicts with prior case law and the intention of the drafters.

The Ninth Circuit's holding in this case eliminates UCC §2-305's safe harbor by simply requiring that the seller need only establish that its price is at least lower than one of its "competitors," is up to the seller (CK) to decide even if the competitor is not within the same class of trade.

Based on the Ninth Circuit's new standard, the manner and method used to calculate price, even if contrary to industry common and practices, is meaningless and obsolete to determine commercial reasonableness. No court prior to this case has held or suggested the same.

The court in *Allapattah Servs., Inc. v. Exxon Corp.*, 61 F.Supp.2d 1308, 1319 (S.D. Fla. 1999) makes clear of the importance of setting prices in good faith in an open price term contract:

> The duty of good faith is especially applicable in situations when the contract confers one party with the discretion to determine certain terms of a contract, such as an open price term agreed to be unilaterally set. *See id.* (citing *Hubbard Chevrolet Co. v. General Motors Corp.,* 873 F.2d 873, 876 (5th Cir. 1989). The duty acts to preserve and to control opportunistic behavior, by requiring that the price be "reasonable and set pursuant to reasonable commercial standards of fair dealing in the trade." *TCP Industries, Inc. v. Uniroyal, Inc.,* 661 F.2d 542, 548 (6th Cir. 1981). Consequently, although it may be agreed that one party has the discretionary authority to set an open price term, this discretion is circumscribed by the duty placed on the discretion-exercising party to set the price in good faith.

In this case, CK maintains that its wholesale prices charged to Petitioners were made in good faith as CK's wholesale prices were in line with the Dealer Buying Prices for Chevron, Shell and 76 gasoline (which are Majors, i.e. refiners). CK is admittedly not a refiner.

For the safe harbor to apply, the case must first be a "normal case." *Two Bros.* discussed "normal case" and said:

> In the "normal case," evidence that a seller charged the regularly posted price will place the seller in the safe harbor

> and satisfy the requirement of good faith. (270 F.Supp.3d at 1123.)

In *Nanakuli Paving & Rock Co. v. Shell Oil Co.*, 664 F.2d 772, 805 (9th Cir. 1981), the Ninth Circuit recognized that "the words "in the normal case" mean that, although a posted price (price in effect, market price, etc.) will usually be satisfactory, it will not be so under all circumstances."

As discussed in *Shell Oil Co. v. HRN, Inc.*, 144 S.W.3d 429, 431 (Tex. 2004) ("*HRN*"), a case that CK, the trial court, and the Ninth Circuit heavily rely on:

> [A] 'claimant may push a case out of the safe harbor … by showing that the … price … was either discriminatory ***or*** *not commercially reasonable*. [Emphasis and italics added.] *Id.* at 434; *Two Bros.*, 270 F.Supp.3d at 1123.

Court cases define the standard allowing proof of industry standards to show that manner and method of pricing based upon industry standards and practices as a way to establish commercial unreasonableness. *HRN* made clear that the desire of the drafters of the UCC and Comments thereto "to eliminate litigation over prices that **are nondiscriminatory *and set in accordance with industry standards***." *HRN*, 144 S.W.3d at 435 (with emphasis added).

Both *HRN* and *Two Bros.* confirm that where the dispute is over the manner in which price is set, the case is not a normal case if the manner used was not conforming to industry standard and practice.

The courts are split on "what is required to overcome the presumption of good faith created by the

safe harbor," thus the majority and minority views. *See Two Bros.*, 270 F.Supp.3d at 1123.

On the majority side of the split, a plaintiff may push a case out of the safe harbor only by showing that a posted price was set with objective bad faith, to wit —that the price was either discriminatorily set or that the price was not set in accordance with industry standards. *HRN*, 144 S.W.3d at 435.

As *Allapattah* further explained the good faith's analysis on the objective commercial reasonableness of fixing the open price term, at 61 F.Supp.2d at 1323:

> Departures from customary usages and commercial practice, flushed out through expert testimony, strongly indicate that the merchant's conduct is unreasonable.

See also *ConSeal v. Neogen Corp.*, 488 F.Supp.3d 1257, 1277 (S.D. Fla. 2020).

On the minority side, courts holds that a case falls outside the safe harbor if a claimant shows the posted price was set with subjective bad faith in the form of improper motive. *Id.* at 435-436. But subjective bad faith is not read alone but to be read in conjunction with the "commercial realities of the case." *Id.* at 435-436. As explained in *HRN*, supra, 144 S.W.3d at 435-436*:*

> Although the subjective element of good faith may have a place elsewhere in the Code (citation omitted) … we do not believe this subjective element was intended to *stand alone* as a basis for a claim of bad faith under section 2.305. Rather we conclude that allegations of dishonesty under this section must also

> have some basis in objective fact which at a minimum requires some *connection to the commercial realities* of the case.

In rejecting the use of a standalone subjective (improper motive) analysis as a basis of challenge under UCC §2-305, the court in *HRN* said, "[t]he effect (of permitting a subjective analysis) is to allow a jury to determine in every section 2.305(b) case whether there was any 'improper motive animating the price-setter," even if the prices ultimately charged **were undisputedly within the range of those charged throughout the industry.**" *Id.* at 435 (emphasis added). *HRN* made it clear that in a good faith analysis, pricing must still be commercially reasonable and consistent with "industry standards." *Ibid.*

In *Nanakuli*, the Ninth Circuit concluded that commercially reasonable pricing included review of the manner in which price was determined and whether that manner was consistent with industry standards and practices.[9] 61 F.Supp.2d at 1323. *HRN* also discussed the importance of *Nanakuli*, recognizing that the manner in setting price is of importance:

> The buyer complained that the price increase was not in good faith because

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[9] Both *HRN*, supra, 144 S.W.3d at 436, and *Two Bros.*, supra, 270 F.Supp.3d at 1122-1123, fn. 6, distinguish *Nanakuli*'s holding because *Nanakuli* did not involve issues of subjective bad faith that were before the *HRN* and *Two Brothers* courts. See also, *Richards v. Direct Energy Services*, 246 F.Supp.3d 538, 559 (D. Conn. 2017), and *Camcara, Inc. v. Air Products*, 663 F.Supp.3d 443, 448 (E.D. Penn 2023).

> the seller had not observed 'reasonable commercial standards of fair dealing in the trade.' Disregarding the posted-price presumption, **the court concluded that this was not a normal case because the dispute was** 'not over the amount of the increase … *that is, the price that the seller fixed* … **but over the manner in which that increase was put into effect**.' *The price increase failed to conform to commercially reasonable standards ….*

Id. at 436 (emphasis added with citations omitted).

Another case discussed in *HRN* dealing with the manner in which prices were set was *Allapattah*. The *HRN* court observed that the issue complained of in *Allapattah* was the manner in which the wholesale price was calculated. *Id.* at 436. *HRN* did not criticize *Allapattah* or claim it to be part of the cases embracing the minority view authorizing subjective bad faith analysis.

Similarly, in *Two Bros.,* the court refused to decide whether the minority or the majority view regarding 2305 should be applied because under the facts of *Two Bros*., the plaintiff would lose under both the minority and majority rules.

In *Two Bros.*, the buyer was not successful because it failed to show that Valero's (the seller) manner of price setting deviated from industry practices.

Two Bros. also confirmed the scope of *Nanakuli*'s challenge. As the court in *Two Bros.* noted, 270 F.Supp.3d at 1123, fn. 6 (with emphasis added):

> Because Two Brothers *challenges the amount rather than the manner of price setting* in this case, *Nanakuli* does not provide useful guidance.

Regardless of whether view is to be followed, this case involves objective bad faith, being the manner in which CK set its wholesale prices. This case additionally involves an element of subjective bad faith in that after Petitioners took their complaints regarding CK's pricing methods directly to CK's management, CK's only possible suggestion as a "fix" was to take over Petitioners' gas operations. At no time after did CK follow up or address Petitioners' complaints.

Let alone, commercial reasonableness is a question of fact for the jury. *Eastwood Ins. Servs., Inc. v. Titan Auto Ins. of N.M., Inc.*, 469 F.App'x 596, 598 (9th Cir. 2012) ("Commercial reasonableness 'primarily involve[s] questions of fact, based on all the circumstances.'"); *Roboserve, Inc. v. Kato Kagaku Co.*, 78 F.3d 266, 278 (7th Cir. 1996) ("The question of what is 'reasonable' under a contract is an issue of fact for the trier of fact."); *Rexing Quality Eggs v. Rembrandt Enter., Inc.*, 360 F.Supp.3d 817, 845 (S.D. Ind. 2018) ("summary judgment is inappropriate because '[w]hat is commercially reasonable is a question of fact,' which must, in the ordinary course, be reserved for the jury to decide"); *Citri-Lite Co. v. Cott Beverages, Inc.*, 721 F.Supp.2d 912, 926 (E.D. Cal. 2010) ("Whether [a party] exerted commercially reasonable efforts is a factually intense issue.").

Yet, both the trial court and the Ninth Circuit improperly endeavored and made factual determinations without any discussion, analysis, or

consideration of first determining whether CK's practices in setting wholesale prices was done within the common standard and practice in the industry. If not, then this is not a "normal case" and is pushed out of the safe harbor provision.

Here, Petitioners presented undisputed evidence that CK's manner in setting wholesale prices was anything but in conformance with the standard pricing practice in the industry for wholesale distributors. CK's own employees, including Stephanie Fry, CK's Director of Fuels for the West Coast Business Unit, along with CK's retained expert, Dr. Umbeck, admit not being able to identify any other wholesale distributor who prices in the same or similar manner as CK.

Petitioners presented declarations from Supreme, SEIF, and SC Fuels, all of whom are wholesale distributors, two of which wholesale Mobil branded fuel in the same market as CK and Petitioners. Those declarations constitute undisputed evidence that the standard method and practice for setting wholesale prices is *rack plus*. Rack plus generally meaning the cost to acquire the fuel at the rack (storage), plus cost of delivery, plus a small mark up for margin of around $0.02 to $0.05 per gallon. Those declarations also establish that each used a formula similar to one another, and that none of them set wholesale prices in a similar fashion as CK, nor do they know of any other wholesale distributor that sets prices the way CK does.

This is clear undisputed evidence of objective bad faith that this is not a "normal" case and the safe harbor does not apply.

However, based on the Ninth Circuit's new standard that so long as the seller's price is less than at least one of its "competitors", the safe harbor and its "normal case" requirement are eliminated. This goes against cases in other circuits, such as *HRN*, *Two. Bros.*, and *Allapattah* as well as the holding within the Ninth Circuit in *Nanakuli.*

3. The Ninth Circuit's New "In The Range" Price Comparison Among The Seller's "Competitors" Test Dispenses With Years of Prior Precedent That The Proper "In The Range" Comparison Is Among Those Within The Same Class Of Trade.

In this case, the Ninth Circuit held, "[i]t is undisputed that CK's prices were lower than at least one refiner. The district court was therefore correct in finding that CK's prices were "in the range" of those charged by its competitors." (App. A, pg. 9th Cir., pgs. 9a-10a.)

This holding creates a new standard requiring a price comparison of those the seller considers to be its "competitors" regardless of class of trade, as opposed to prior case precedent requiring a price comparison between those within the same class of trade.

Up until this holding, *HRN* and other courts make clear that in order to determine whether a price set is commercially reasonable, class of trade must be adhered to and the compared buyer or seller are to be in the same class of trade. As *HRN* said:

> The court of appeals' wholesale cost analysis indiscriminately compares Shell's DTW price to prices available to other **classes of trade**, with different

> contractual buying arrangements. Included in the comparison are branded and unbranded jobbers who pick up their gasoline at terminals, open dealers who own their own premises, and company-owned stores operated by other refiners. **Evidence that different prices are available to different classes of trade is not evidence of bad faith under section** 2.305.

HRN, 144 S.W.3d at 437-438 (emphasis added, citations omitted).

Thus, *HRN* stands for the pricing analysis be among those in the same class of trade. In *HRN*, the in-kind comparison was between major refiner to major refiner.

Following *HRN*'s class of trade holding, it is respectfully submitted that the corollary of this is also true. Comparisons of prices charged by wholesale distributors (jobbers) should be compared to prices of other wholesale distributors (jobbers), and not a comparison between wholesale distributors (jobbers) and refiners, which is what CK does and which the Ninth Circuit and trial court found to be the proper comparison; even in light of CK's admission that it is not a refiner.

As CK is admittedly a wholesale distributor and not a refiner, CK's comparators should be to wholesale distributors such as Supreme, SEI, and SC Fuels.

The Ninth Circuit's new "competitor" comparison standard appears to stem from the trial court's misinterpretation of *HRN* that *HRN* required a "competitor" comparison as opposed to a same class of

trade comparison. As the trial court stated in granting CK's summary judgment motion:

> The Court follows the majority of decisions, which suggest a commercially reasonable price is one within the range of prices **charged by other competitors** in the relevant market. See HRN, Inc., 144 S.W. 3d at 434. (App. B, USDC Opinion, 41a, with emphasis in bold added).

The Ninth Circuit then adopts that misinterpretation and misapplies *HRN* in the same way the trial court did.

As the Ninth Circuit stated in this case:

> [u]nder the majority rule, a price 'within the range' of those charged by the **seller's competitors** is commercially reasonable.[10] (App., 9th Cir., 8a.)

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[10] While *HRN* does not define what would constitute in the range, when it said Shell's should be in the range of other refiners (same class of trade), *HRN* cites as authority, for its "in the range" statement, *Havird Oil Co. v. Marathon Oil Co.* 149 F.3d 283, 290-91 (4th Cir. 1998). In *Havird*, Marathon's pricing was challenged as being commercially unreasonable under South Carolina Commercial Code 2305. Marathon's price was found to be "competitive with other wholesalers in the North Augusta area, being in the "middle of the pack" of all wholesalers in the area." *Id.* at 290. *Havird* was the only case cited by *HRN* discussing the in the range standard and approved "middle of the pack" of "all wholesalers in the area."

The trial court stated that it "scoured case law" regarding open price term contracts and found no authority providing a "precise definition" of what "in the range" means in the context of UCC §2-305 commercial reasonableness inquiry. (App. B, pg. 41a). As

HRN simply does not support the trial court and the Ninth Circuit's opinions that the majority view "in the range" comparison is that between competitors.[11] Nowhere in the *HRN* opinion are the words "seller's competitors" nor "competitor" used. *HRN* also does not discuss whether a product is a commodity nor does *HRN* use the term "commodity" within.

Moreover, the lower court made no finding as to whom CK's competitors were, which the lower court recognized "what competitors constitute the appropriate comparators" is factually disputed. (App., USDC Opinion, pgs. 40a-41a.)

That did not stop the Ninth Circuit from making that factual determination. After finding that all gasoline is fungible, the Ninth Circuit then finds:

> CK is effectively in competition with everyone who sells gasoline to dealers, including refiners. (App. A, pg. 9a).

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the trial court states, "[t]his is unsurprising given that "in the range" is part of a reasonableness standard, which is, by design, a fact-intensive inquiry specific to each case …." (*Ibid.*).

[11] HRN discussed the various classes of trade in the gas industry:

> "Jobbers operate fleets of trucks to pick up gasoline at refiners' terminals and distribute it to their own stations or to independent ones. Jobbers may have distribution agreements with several refiners simultaneously. Jobbers pay a "rack" price that is available for gasoline bought and picked up at Shell's terminals. The DTW price is typically higher than the rack price, although Shell does not set either price in relation to the other." 144 S.W.3d at 431.

In making that determination, the Ninth Circuit was certainly aware of the importance of its unilateral factual finding. As the Ninth Circuit notes:

> [t]he relevant universe of competitors makes a difference, as there is evidence that CK's prices exceeded those charged by other wholesale distributors, … (App. A, pgs. 8a-9a).

As a result, the Ninth Circuit has now created, in a published decision, a rule for the good faith comparison to be between those whom the seller considers to be the "seller's competitors" based on the type of product, as opposed to prior decisions requiring a class of trade comparison.

In its decision, the Ninth Circuit also replaced the prior class of trade comparison with an all "sellers" requirement when it stated that "the majority of decisions suggest that a commercially reasonable [] price, that is, one with the range of [] prices charged by other [sellers] in the market, is a good faith price…" (App., 9th Cir., pg. 7a).

HRN criticized exactly what the Ninth Circuit did in this case; including prices from those not within the same class of trade when making its comparison.

In *HRN*, the court criticized the lower court for making a comparison that included those beyond the same class. *HRN* criticized the lower court of appeal decision because the "court of appeals' wholesale cost analysis indiscriminately compares Shell's DTW price to prices available to other classes of trade, with different contractual buying arrangements. Included in the comparison are branded and unbranded jobbers …." 144 S.W.3d at 437. *HRN* recognized that

wholesale distributors (such as CK) are not in the same class of trade as refiners and not appropriate comparators. HRN, a refiner, compared its prices to other same class of trade refiners. *HRN* concluded "[e]vidence that different prices are available to different classes of trades is not evidence of bad faith under section 2.305." *Id.* at 438.

By analogy, *HRN*'s rule compels the conclusion that evidence of prices charged by refiners is not evidence that a wholesaler distributor's (like CK) prices to its customers are in good faith. *HRN* even identified class of trade types which included unbranded and branded wholesale distributors (jobbers) (like CK), open dealers who own their premises (i.e., Petitioners), and COOPs (i.e., CK's COOPs). *Id.* at 437-438.

Here, Petitioners offered evidence that CK's prices exceed that of other Mobil branded distributors by as much as around $0.35 per gallon, that CK is the highest priced wholesale distributor, and that CK's wholesale prices were not in the range of other distributors of Mobil branded gasoline. When compared to wholesale distributors, CK was the highest price of all. Petitioner also offered evidence to showing several instances based on a sampling that established CK was priced above Chevron which the courts ignored.

No search in Westlaw has resulted in a single result, except for this case, that discusses UCC §2-305 or any equivalent state UCC provisions with that of fungibility or a fungible commodity.

That's the purpose of the class of trade comparison and determining good faith.

The Ninth Circuit's new path of a competitor "in the range" comparison to include those in different classes of trade was rejected in *HRN* and should be rejected in this instance as well. See 144 S.W.3d at 438, citing to *Ajir v. Exxon Corp.*, 1995 WL 261412, at *4 (N.D. Cal. May 2, 1995). Otherwise, should the Ninth Circuit decision in this case stand, a further split among the circuits exists.

CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be granted to address the Ninth Circuit's newly created standard for determining whether a price is set in good faith and is commercially reasonable, and its holding that all gasoline, including branded gasoline, is a fungible commodity, all of which the Ninth Circuit's holding creates conflicts among the circuits and within the Ninth Circuit as well.

Respectfully submitted.

/s/ *Kenneth P. Roberts*
Kenneth P. Roberts
Counsel of Record
STUART E. COHEN
Attorney
K.P. Roberts & Associates, APLC
6355 Topanga Canyon Boulevard
Suite 403
Woodland Hills, CA 91367
(818) 888-3553
kroberts@kprlawinc.com
scohen@kprlawinc.com

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