No. 17-

IN THE

Supreme Court of the United States

SPEEDWAY LLC, *et al.*,

Petitioners,

v.

ZACHARY WILSON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Rules Enabling Act limits an Article III court's authority to approve and enforce a class settlement under Fed. R. Civ. P. 23(e) if its terms would "abridge, enlarge, or modify any substantive right," as held by the Fifth and Seventh Circuits, or whether class settlements are instead private agreements outside the scope of the Rules Enabling Act, as held by the Third, Sixth, and Eighth Circuits, and the Tenth Circuit below?

2. Whether Article III, Rules Enabling Act and/or Fed. R. Civ. P. 23(e) permit a federal court to approve a class settlement where the settlement creates a third party (*cy pres*) fund to be distributed exclusively to state government regulators, not to any class members, and even then only if the regulators change the law prospectively?

3. Whether the state action holding in *Shelley v. Kraemer*, 334 U.S. 1 (1948), is limited to the racial discrimination context, or instead applies generally to court action, including judicial approval and enforcement of class settlements violating the First Amendment?

4. Whether anti-competitive injury and/or speech injury constitute injury-in-fact to confer standing on objectors to class settlements when the terms seek to change the regulations governing the objectors' business?

PARTIES TO THE PROCEEDING

Objector-Petitioners are Speedway LLC, 7-Eleven, Inc., Circle K Stores, Inc., Kum & Go, L.C., Marathon Petroleum Company LLC, Murphy Oil USA, Inc., Pilot Travel Centers LLC, Flying J, Inc., The Pantry, Inc., QuikTrip Corporation, RaceTrac Petroleum, Inc., and Sheetz, Inc.

Plaintiff-Respondents are Zachary Wilson; Mathew Cook; Brent Donaldson; Samantha Baylard; Craig Massey; Richard Galauski; William Boyd; Lisa Mcbride; Tamara Miller; Heartland Landscape Group LLC; Team Trucking; James Anliker; Dennis K. Mann; Phyllis Lerner; Herb Glaser; Steven Rubin; Max Candiotty; Fred Aguirre; James Jarvais; Mara Redstone; Raphael Sagalyn; J.C. Wash; Jean W. Neese; Cecil R. Wilkins; Wayne Byram; Gary Kohut; Debra Berg; Tia Gomez; Shonna S. Butler; Ben Dozier; Mark Scivner; Barbara Cumbo; James Graham; Kennedy G. Kraatz; Melissa D. Murray; Michael A. Warner; Clinton J. Davis; Steven R. Rutherford; Lisa Ann Lee; Brent Crawford; Dixcee Millsap; Carl Ritterhouse; Samuel Ely; Victor Ruybalid; Hadley Bower; Kristy Deann Mott; Charles Cockrell, Jr.; William Ruttherford; Jan Rutherford; Mark Wyatt; Dawn Lalor; Gerald Panto, Jr.; Edger Paz; Charles D. Jones; Michael Gauthreaux; Joann Korleski; Jeff Jenkins; Sara Terry; Jacob Steed; Marvin Bryan; John Telles; Christopher Payne; Scott Campbell; Jonathan Charles Conlin; Priscilla Craft; Robert Hicks; Richard Patrick; Jessica Honigberg; Rayshaun Glanton; Garland Williams; Annie Smith; Bobby Roberson; Sam Hotchkiss; Anna Legates; Andrea Frayser; Melvin Ellison; Cecil Wilkins; Betty Cherry; Joy Howell; Allen Ray Klein,

Defendant Respondents are BP Corporation North America, Inc.; Citgo Petroleum Corporation; Conoco Phillips Company; Valero Marketing and Supply Company; Sunoco Corporation; Equilon Enterprises, LLC, D/B/A Shell Oil Products Company, LLC; Motiva Enterprises, LLC; Tesoro Refining and Marketing Company; Sam's Club; Love's Travel Stop & Country Stores, Inc.; G and M Oil Company, Inc.; United El Segundo, Inc.; World Oil Corporation; M.M. Folwer, Inc.; Dansk Investment Group, Inc.; B-B Oil Company, Inc.; Port Cities Oil LLC; Flash Market, Inc; J&P Flash, Inc.; Magness Oil Company; Coulson Oil Company, Inc.; Diamond State Oil, LLC; EZ Mart Stores, Inc.; Thorntons, Inc.

Non-Petitioning Objectors below are Wawa, Inc., Melissa Holyoak; Adam Schulman; Amy Alkon; Nicolas S. Martin; Theodore H. Frank.

RULE 29.6 STATEMENT

Objector-Petitioner Speedway LLC is an indirect, wholly-owned subsidiary of Marathon Petroleum Corporation. Marathon Petroleum Corporation is a publically-held corporation which has no parent corporation.

Objector-Petitioner 7-Eleven, Inc. is wholly-owned by SEJ Asset Management & Investment Company ("SAM"), a Delaware corporation. SAM is wholly-owned by Seven-Eleven Japan Co., Ltd. ("SEJ"), a Japanese corporation. SEJ is wholly-owned by Seven & I Holdings Co., Ltd., a Japanese corporation, whose stock is publicly traded on the Tokyo Stock Exchange.

Objector-Petitioner Circle K Stores, Inc. is an indirect wholly-owned subsidiary of Alimentation Couche-Tard Inc., a publicly held Canadian company. Alimentation Couche-Tard Inc. is the only publicly held company that owns 10% or more of Circle K Stores, Inc. Objector-Petitioner The Pantry Inc. was merged into Circle K Stores, Inc. on September 14, 2015 and is no longer a separate corporate entity.

Objector-Petitioner Kum & Go, L.C, is an Iowa limited liability company whose common ownership units are owned by Krause Holdings, Inc., an Iowa corporation, and the W.A Krause Revocable Trust, and no publicly held company owns 10% or more of Kum & Go, L.C.'s ownership interests.

Objector-Petitioner Marathon Petroleum Company LLC is jointly owned by Marathon Oil Company and

Marathon Domestic LLC. Marathon Oil Company is a wholly-owned subsidiary of Marathon Oil Corporation. Marathon Domestic LLC is a wholly-owned subsidiary of Marathon Petroleum Holdings LLC, which is a wholly-owned subsidiary of Marathon Oil Downstream, Ltd., which is a wholly-owned subsidiary of Marathon Oil Corporation. Marathon Oil Corporation is the only publicly held company that owns 10% or more of Marathon Petroleum Company LLC's ownership interests.

Objector-Petitioner Murphy Oil USA, Inc. is a wholly-owned subsidiary of Murphy Oil Corporation, a publicly held company with no parent corporations. Murphy Oil Corporation is the only publicly held company that owns 10% or more of Murphy Oil USA, Inc.'s ownership interests.

Objector-Petitioner Pilot Travel Centers LLC does not have a parent corporation and there is no publicly-held company that owns 10% or more of Pilot Travel Centers LLC's stock.

Objector-Petitioner Flying J, Inc. is a Utah corporation. However, on July 1, 2010, pursuant to the Sale Motion dated December 30, 2009 filed in United States Bankruptcy Court for the District of Delaware, Case No. 08-13384(MFW), Pilot Travel Centers LLC purchased and assumed all operations of Flying J Inc.'s Travel Centers/Truck Stop business.

Objector-Petitioner QuikTrip Corporation is a privately held company with no publicly held corporate owners. QuikTrip Corporation has no parent corporations. There is no publicly held company that owns 10% or more of QuikTrip Corporation.

Objector-Petitioner RaceTrac Petroleum, Inc. is a privately held company with no parent corporations. There is no publicly held company that owns 10% or more of RaceTrac Petroleum, Inc.

Objector-Petitioner Sheetz, Inc. is a privately held company with no parent corporations. There is no publicly held company that owns 10% or more of Sheetz, Inc.

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Courts of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 872 F.3d 1094. App. 13-70. The District Court's order granting final approval of the class settlements is not reported but is available at 2015 WL 5010048. App. 75-159.

JURISDICTION

The judgment of the court of appeals was initially entered on August 23, 2017. A petition for panel rehearing was granted, and the original opinion was withdrawn and a revised opinion was entered on September 21, 2017. The remaining petitions for rehearing en banc were denied on October 3, 2017. App. 160-62. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. art. I § 8, cl. 5

> The Congress shall have power … to … fix the Standard of Weights and Measures ….

U.S. Const. amend. I

> Congress shall make no law … abridging the freedom of speech.

28 U.S.C. § 2072

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts … and courts of appeal. (b) Such rules shall not abridge, enlarge or modify any substantive right….

Act to Establish the Nat'l Bureau of Stds., Ch. 872, 31 Stat. 1449 (56th Cong. Sen. II) (Mar. 3, 1901); 15 U.S.C. § 271.

(Text in Appendix)

SUMMARY

At the heart of this petition lie two overarching concerns: *first*, the circuits are deeply split in their interpretations of the limitations imposed by Article III and the Rules Enabling Act, the authority granted by Rule 23(e), and the role of *cy pres* in class settlements; and *second*, whether it is appropriate to use class settlements either to achieve regulatory reform previously unachievable through the political process or as a vehicle for restricting political advocacy in violation of the First Amendment.

With respect to the splits, the Tenth Circuit in this case joined the Third, Sixth, and Eighth Circuits in holding class settlements are voluntary, private agreements that never implicate any Rules Enabling Act concerns. In contrast, the Fifth and Seventh Circuits have held the opposite, concluding that, because F.R.C.P 23(e) mandates

judicial approval and enforcement of class settlements, they are more than private agreements and therefore are subject to the Rules Enabling Act's constraints on an Article III court's Rule 23(e) discretion.

The Tenth Circuit also departed from other circuits on the degree of deference an appellate court must give to a District Court's Rule 23(e) approval of third-party fund (*cy pres*) settlements. In *Marek v. Lane*, 134 S. Ct. 8 (2013) (statement on denial of certiorari), Chief Justice Roberts recognized this divergence and invited writ of certiorari petitions that would "afford[] the Court an opportunity to address more fundamental concerns" surrounding the use of third-party (*cy pres*) funds in class action litigation, concerns such as when, if ever, *cy pres* relief should be considered." *Id.* at 9. The Chief Justice underscored the need to evaluate the "respective role of the judge and parties [] in shaping" such remedies. *Id.* In the five years since *Marek*, the circuit split has become more acute.

This case also raises important First Amendment concerns. Class counsel represented to the court that a primary benefit of the settlements was their prohibition of advocacy by silencing the settling defendants. These judicially-blessed settlements censor speech and prevent governmental regulators from hearing all speakers on issues of public concern. Such judicial action necessarily is "state action," yet the Tenth Circuit held *Shelley v. Kraemer*'s state-action holding applies only in the race discrimination context, not in the First Amendment context. 334 U.S. 1 (1948). Thus, in addition to the circuit splits, this case also implicates a recurring question of national significance: whether *Shelley* is limited to the race discrimination context.

Worse yet, the settlements involve no violations of *existing* law but instead are premised on a plan to *change* the law. They involve lump sum payments to state governmental regulators (in contrast, class members receive no payment whatsoever), and these cash payouts are wholly contingent on the regulators first agreeing to change the law, thereby creating a *quid pro quo* arrangement. The Tenth Circuit thus approved class settlements designed to weaponize the class action device to provide political opponents political relief using the judiciary, all while circumventing the established political and regulatory processes contemplated by the Constitution. The settlements' enlistment of an Article III court on one side of a public policy debate—enforcing a judgment that is unquestionably political, not remedial—violates separation-of-powers principles and improperly enmeshes the judiciary in a political project. These systemic and structural concerns were not lost on the Tenth Circuit, which stated it would not have approved the settlement terms, but it could not say that the District Court's decision was an "abuse of discretion." App. 68-70.

Certiorari should be granted and the decision below reversed. Alternatively, the Court could consider granting certiorari in this case and in *In re Google Referrer Header Privacy Litigation*, 869 F.3d 737 (9th Cir. 2017), in which a petition for writ of certiorari is due the day after this petition. As a pair, these petitions would provide the Court an excellent opportunity to resolve the circuit conflicts regarding third-party fund (*cy pres*) class action settlements and to address the multiple concerns the Chief Justice raised nearly five years ago. This petition in particular affords the Court an opportunity to address the "fundamental concerns" with a federal court crafting remedies that: extend beyond the parties to the

settlement; fail to address violations of existing law; and fail to provide tangible benefit to the class, indeed it makes the class worse off.

STATEMENT OF THE CASE

I. Factual Background

A. The Constitutional and Congressional Framework for Establishing Weights and Measures

Since the automobile was invented over 100 years ago, retailers have sold motor fuel by the gallon, which is defined by statute as a set volume without reference to temperature and is not subject to negotiation because it is dictated by law. "The retail sale of motor fuel in volumetric gallons (*i.e.*, without compensating for temperature) is required by federal and state law and is consistent with longstanding custom and practice in the industry in the United States." *In re Motor Fuel Temp. Sales Practices Litig.*, MDL No. 1840, 2013 WL 3795206 at * 4 (D. Kan. July 19, 2013) (granting summary judgment to the non-settling defendants on California claims, stating that the law "clearly permits [the] sale of motor fuel by the gross gallon without adjusting for temperature.").

Petitioners seek to use a *cy pres* class settlement remedy to effect wholesale changes in the market to obtain a new method of sale based on automatic temperature compensation ("ATC"), which adjusts the price or volume per gallon depending on the fuel's temperature. Indeed, the District Court held that the "settlements are reasonably calculated to help initiate a market transition to ATC." App. 117, *see also* App. at 118 n.46 (describing

"the purpose of the litigation" as being "to change the way the industry operates and facilitate a market transition to ATC"). The District Court recognized that, in doing so, the settlements "may ultimately seek to change some law, or to change the regulatory environment." App. 147. Plaintiff-Respondents, too, recognized that new regulations will be needed before ATC can be adopted and implemented. (Doc. 4840 Trans. at 62 ("there may need to be regulations that need to be put forth as to what the inspections will be...")). Thus, the settlements seek to achieve a new policy that currently is "contrary to [state] law" and "facially unreasonable." 2013 WL 3795206 at * 4. ("Plaintiffs' attempt to construe the term 'gallon' to mean temperature-adjusted gallon is both contrary to [] law … and facially unreasonable."); *Duke v. Flying J, Inc.*, 178 F. Supp. 3d 918, 926 (N.D. Cal. 2016) (finding in a case remanded from the MDL that "[e]ach of these state's laws and administrative regulations/procedures require that motor fuel be sold on a volumetric basis (without reference to temperature), and provide specific penalties if motor fuel is sold on another basis."); and *id.* ("conduct authorized via a specific consumer protection statutory scheme, *i.e.*, the Weights and Measures regime, cannot impose liability under a general consumer protection statute….Conduct cannot be lawful and unlawful at the same time").

The Constitution's Weights and Measures Clause expressly commits the authority to enact such market regulations to Congress, not the judiciary. U.S. CONST. art. I § 8, cl. 5. The weights-and-measures laws prohibit motor fuel retailers from selling fuel with reference to temperature. Retailers cannot implement an ATC device—as would be required under the settlements—unless and until Weights and Measures regulators first change the law to permit that new measurement method.

Congress established a cooperative federal-state framework for setting uniform Weights and Measures standards, as follows:

- **The Weights and Measures Clause**. The U.S. Constitution vests in Congress the power to "fix the Standard of Weights and Measures." U.S. CONST. art. I § 8, cl. 5.

- **The NIST Organic Act**. Congress established the National Bureau of Standards ("NBS"), now known as NIST.[1] Congress empowered NIST "to develop, maintain, and retain custody of the national standards of measurement, and provide the means and methods for making measurements consistent with those standards." 15 U.S.C. § 272(b)(2).

- **Congressional Command to "Secure Uniformity" in Weights and Measures Standards**. In carrying out its charge to "cooperate with the States in securing *uniformity* in Weights and Measures laws and methods of inspection," NIST established the National Conference on Weights and Measures ("NCWM") to "ensure that *uniform standards* are applied to commercial transactions…." 15 U.S.C. § 272(c)(4). These standards have been adopted into law by every state at issue in this litigation.[2]

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1. Act to Establish the Nat'l Bureau of Stds., Ch. 872, 31 Stat. 1449 (56th Cong. Sen. II) (Mar. 3, 1901); 15 U.S.C. § 271.

2. Handbook 44 at Section 3.30 ¶ S.1.2.1; Doc. 1244 at p. 15 fns 26-28 (collecting State laws).

B. The Weights and Measures Regulators Rejected Plaintiffs' Alternative Measurement Method.

The constitutionally-designated decision makers have repeatedly and thoughtfully rejected the "relief" Plaintiffs seek. *See* Laurence H. Tribe, Joshua D. Branson and Tristan L. Duncan, *Too Hot For Courts to Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine*, WLF No. 169 at 11-12 (Wash. Legal Found. Jan. 2010) ("Were a court to award relief based on its conclusion that temperature-adjusted metrics are superior to the 'gallon' for the purposes of fuel sales, it would essentially be adopting a new standard of measure for retail sale of gasoline."). NCWM considered and resolved the policy issues about which the Plaintiff-Respondents complain. In 2009, the NCWM reached a "conference consensus against ATC" and overwhelmingly voted to reject proposals both to permit and to mandate ATC at retail.[3] In 2010, NCWM again voted against permitting or mandating ATC. (Doc. 1336 at Ex. 17.) The class settlements here seek to reverse this outcome.

C. The Class Settlements

The class settlements generally involve two types of "relief." In 24 of the settlements, the settling defendants agreed to pay a sum of money into a fund for inducing

3. 2009 Report of the Laws and Regulations Committee (withdrawing Item 232-1 (mandatory ATC method of sale at retail) and Item 232-2 (permissive ATC at retail)), NCWM, Voting Record of the 94th Annual Meeting (2009), NCWM, Voting Tally Form for Vote to Accept Laws and Regulations Committee Report (July 15, 2009)).

state Weights and Measures regulators to change the law and permit ATC. These "Regulator Fund" settlements purportedly aim to defray the official costs associated with implementing ATC.[4] They create a financial incentive for government officials to change their previous, deliberate decisions not to authorize ATC. If the state regulators reject the conditional terms for receipt of the money, then the Regulator Fund escheats to the state treasury. App. 101 n.34, 103 n.38, 104 n.41, 118 n.46.

One example of a Regulator Fund settlement provides that the settling-defendant will pay $5 million, one-third of which may be used by each state's department of weights and measures or other agency responsible for regulating retail motor fuel dispensers to defray some of the costs of implementing ATC at retail. App. 95, 97.

The remaining four settlements (hereinafter the "Speech" settlements) include commitments to convert stations to ATC if the states in which they operate change their laws to authorize ATC and contain speech-related provisions requiring the settling defendant to either affirmatively campaign for ATC or to stop opposing it and remain silent. *See* Doc. 4447-2 at ¶ 4.6 (Casey's); Doc.

4. "Regulator Fund" settlements include those entered into by Motiva Enterprises LLC and Equilon Enterprises LLC d/b/a Shell Oil Products US, BP Products North America Inc. and BP West Coast Products LLC, ConocoPhillips Company, Exxon Mobil Corporation, Esso Virgin Islands, Inc. and Mobil Oil Guam, Inc, CITGO Petroleum Corporation, Sinclair Oil Corporation, Chevron USA, G&M Oil, United El Segundo, World Oil, B-B Oil, Coulson Oil, Diamond State, Flash Market, J&P Flash, Magness, Port Cities Oil, Tesoro, Love's, E-Z Mart, Thorntons, MM Fowler, W.R. Hess, and Sunoco. *See, e.g.,* Docs. 4328, 4447, 4472; 4724, 4775, and 4786.

4447-3 at ¶ 4.6 (Sam's); Doc. 4472-4 at ¶ 4.5 (Valero). *See also* Doc. 4447-2 at ¶ 14(a).

Examples of Speech settlements include the Dansk Settlement, which requires Dansk to lobby California in favor of retail ATC and provides Dansk will not obstruct any effort by Class Counsel related to the adoption of regulations related to retail ATC. App. 148. And the Valero Settlement more bluntly silences Valero's political and associational speech: "Valero agrees to abstain from *any* regulatory, legislative, lobbying or trade association activity *involving* ATC and agrees *not to oppose* ATC." App. 148-49 (quoting Valero settlement; emphasis added).

These judicially-approved and judicially-enforceable compulsions and suppressions of speech are critical provisions of the Speech settlements. Plaintiff-Respondents have emphasized the "great benefit" of shutting down Valero's speech: "Valero's agreement to stop any efforts to block any such legislation or regulations is … a great benefit to consumers…. [and] will benefit the class ***by assisting consumer representatives in their efforts to change the law.***" Doc. 4456 at ¶2 (emphasis added).

II. Procedural History

Beginning in 2006, a number of class actions were filed in over 26 states alleging that selling motor fuel by the gallon violated various state consumer protection statutes and the common law. In 2007, these class actions were consolidated in MDL No. 1840 in the District of Kansas. On January 3, 2011, Costco – facing a certified class action trial – was the first defendant to settle, and the District Court granted final approval in April 2012.

App. 85. Also in 2012, under the pressure of an imminent bellwether trial, 10 defendants negotiated settlement agreements with Plaintiff-Respondents. App. 88. In September 2012, the District Court conducted a class trial of the Plaintiff-Respondents Kansas claims against Defendants-Petitioners 7 Eleven Inc., Kum & Go, and QuikTrip Corp. App. 87. ***That trial resulted in a complete defense verdict.*** App. 87. In late 2012, the district court preliminarily approved the 10 settlements that had been reached on the eve of trial. App. 88.

Another 18 MDL defendants negotiated settlements in November 2013, which the District Court preliminarily approved in 2014. App. 92–93. Plaintiff-Respondents then sought final approval of all settlements. (Doc. 4834 (June 8, 2015).) Class Members had through March 23, 2015, to opt out or object to the new 28 settlements. App. 93.

Several objectors—including the Petitioners—filed timely objections. (*See* Docs. 4809 (Mar. 23, 2015) & 4819 (May 6, 2015).) (*See also* Objections, Docs. 4798 & 4808 (Mar. 23, 2015).)

On August 21, 2015, the District Court approved the settlements. App. 75–159. On September 22, 2015, it issued a final judgment. App. 71–74. Petitioners timely filed a notice of appeal to the Tenth Circuit.

On August 23, 2017, the Tenth Circuit issued its original opinion, affirming the District Court. Petitioners timely filed petitions for *en banc* rehearing. On September 21, 2017, the petition for panel rehearing filed by the Alcon Objectors was granted in part, the original opinion was withdrawn, and a revised opinion was entered. App.

75–159. The remaining petitions for rehearing *en banc* were denied on October 3, 2017. App. 160-162.

REASONS FOR GRANTING THE PETITION

I. The Circuits Are Split on Whether Article III and the Rules Enabling Act Limit Judicial Discretion Under Federal Rule of Civil Procedure 23(e).

A. The Tenth Circuit Joins the Third, Sixth, and Eighth Circuits in Categorically Rejecting the Rules Enabling Act's Applicability to the Class Settlement Context, in Stark Contrast to the Fifth and Seventh Circuits, Which Have Reached the Opposite Conclusion.

Federal Rule of Civil Procedure 23(e) limits the court's discretion in approving class settlements to agreements that are "fair, adequate and reasonable." *See also* 2003 Adv. Comm. Note to FRCP 23(e). Notwithstanding the discretion afforded by Rule 23(e)'s "fair, reasonable, and adequate" standard, Rule 23, a procedural rule, cannot expand a court's Article III authority. Moreover, Rule 23(e) discretion also is cabined by the Rules Enabling Act, which directs that federal procedural rules "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b).

The Court in *Tyson Foods, Inc. v. Bouaphakeo* recently emphasized the Rules Enabling Act's imperative against interpretations of Rule 23 that would alter substantive rights: "[E]vidence cannot be deemed improper merely because the claim is brought on behalf of a class. To so hold would ignore the Rules Enabling Act's pellucid

instruction that use of the class device cannot 'abridge ... any substantive right.'" 136 S.Ct. 1036, 1046 (2016); *accord Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011) ("Because the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,' a class cannot be certified on the premise that Wal–Mart will not be entitled to litigate its statutory defenses to individual claims.").

This Court has twice addressed the interplay between Rule 23(e) and the Rules Enabling Act in the class settlement context. Nevertheless, the circuits take differing approaches. In *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), the Court affirmed the reversal of a global asbestos settlement class action certified under the aegis of Rule 23(e) to establish a creative, judicially-approved administrative mechanism for processing and resolving asbestos claims. *Id.* at 598-601. The Court explained that the Rules Enabling Act forbade such a reimagining of Rule 23(e). *Id. a*t 620. The Court noted Article III judges "lack authority to substitute for Rule 23's certification criteria a standard never adopted – that if a settlement is 'fair,' then certification is proper." *Id.* at 622. "Rule 23, which must be interpreted with fidelity to the Rules Enabling Act and applied with the interests of absent class members in close view, cannot carry the large load [the parties], class counsel, and the District Court heaped upon it." *Id.* at 629.

Next, in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), the Court reversed a class settlement certified pursuant to Rule 23(b)(1)(B) and Rule 23(e) that sought to resolve respondent's future asbestos liability. *Id.* at 830, 845. The Court examined pre-Rule 23 precedent on limited

funds, reasoning "that when subdivision (b)(1)(B) was devised to cover limited fund actions, the object was to stay close to the historical model." *Id.* at 842. Rejecting respondent's "adventurous application of Rule 23(b)(1)(B)," the Court reiterated the important limits imposed by the Rules Enabling Act on Rule 23 class actions: "The Rules Enabling Act underscores the need for caution. As we said in *Amchem,* no reading of [Rule 23] can ignore the Act's mandate that 'rules of procedure "shall not abridge, enlarge or modify any substantive right."' *Id.* at 845 (quoting *Amchem*); *id.* at 861 ("[W]e are bound to follow Rule 23 as we understood it upon its adoption, and that we are not free to alter it except through the process prescribed by Congress in the Rules Enabling Act.").

Notwithstanding *Amchem*, *Ortiz*, and a host of other cases in which the Court has rebuked applications of Rule 23 that infringed upon substantive rights, the circuits have diverged in their assessment of Article III and the Rules Enabling Act's limits on a court's Rule 23(e) discretion in the class-settlement context.

The Tenth Circuit has now joined the Third, Sixth, and Eighth Circuits in reaching the remarkable conclusion that "the Rules Enabling Act has no application in [the class settlement] context." App. 57. *See also In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 172 n.8 (3d Cir. 2013) ("Because 'a district court's certification of a settlement simply recognizes the parties' deliberate decision to bind themselves …,' we do not believe the inclusion of a *cy pres* provision in a settlement runs counter to the Rules Enabling Act;"); *Whitlock v. FSL Mgmt., LLC*, 843 F.3d 1084, 1092 (6th Cir. 2016) ("[T]he Rules Enabling Act is not fatal to class certification where, as here, class certification

is sought to enforce a settlement agreement."); and *Marshall v. Nat'l Football League*, 787 F.3d 502, 511 n.4 (8th Cir. 2015) (same). These Circuits follow *Sullivan v. DB Invs., Inc.*, 667 F.3d 273 (3d Cir. 2011), in which the Third Circuit reasoned a court lacks authority to alter the terms of a private contract between settling parties. *Id.* at 313 ("[A] court does not 'abridge, enlarge, or modify any substantive right' by approving a voluntarily-entered class settlement agreement.").

In contrast, the Fifth and Seventh Circuits take the opposite view. As the Fifth Circuit explained:

> A class settlement is not a private agreement between the parties. It is a creature of Rule 23, which authorizes its use to resolve the legal claims of a class "only with the court's approval." …. In granting approval, the court must, as always, adhere to the precepts of Article III and the Rules Enabling Act. While a "welcome byproduct" of deciding cases or controversies on a class-wide basis, the goal of global peace does not trump Article III or federal law. *Sullivan*, 667 F.3d at 355-56 (Jordan, J., dissenting).

In re Deepwater Horizon, 732 F.3d 326, 343 (5th Cir. 2013). *Accord Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 481 (5th Cir. 2011) (Jones, J., concurring) ("Cy Pres distributions arguably violate the Rules Enabling Act by using a wholly procedural device … to transform substantive law 'from a compensatory remedial structure to the equivalent of a civil fine'"); *In re Gen. Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1135-

36 (7th Cir. 1979) (holding settlement approval "would contravene the Rules Enabling Act"). *See also Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666, 677 (S.D.N.Y. 2011) (Second Circuit Judge Chin, sitting by designation) (finding settlement agreement exceeded bounds of Rule 23 and the Rules Enabling Act because it was "'an attempt to use the class action mechanism to implement forward-looking business arrangements …;'" citation omitted), *cited with approval in Golan v. Holder*, 565 U.S. 302, 335 (2012); *see also* Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 621, 623 (2010) ("Use of cy pres simultaneously violates the constitutional dictates of separation of powers by employing a Federal Rule of Civil Procedure to alter the compensatory enforcement mechanism dictated by the applicable substantive law … It has somehow become common practice among many courts, scholars, and members of the public to view the modern class action as a free-standing device designed to do justice and police corporate evildoers. As nothing more than a Federal Rule of Civil Procedure, however, the class action device may do no more than enforce existing substantive law …."); Laura J. Hines, *The Unruly Class Action*, 82 Geo. Wash. L. Rev. 718, 759-761 (2014) (discussing the limits imposed by the Rules Enabling Act on interpretations of Rule 23). *See also Keepseagle v. Perdue*, 856 F.3d 1039, 1069 (D.C. Cir. 2017) (Rogers Brown, J. dissenting) (noting *cy pres* use in class settlements is "inherently dubious").

Lacking clear limits from this Court on third-party fund class settlements, the Tenth Circuit here sanctioned the creation of a lobbying fund for changing the law on how fuel is measured and sold at retail because it believed such

approval was not an "abuse of discretion". App. 70. But, as in *Amchem*, these class settlements "cannot carry the large load [Respondents and the lower courts] heap[] upon them," 521 U.S. at 629, because they ignore existing law.

B. The Circuits are Split on the Appropriate Limits of Third-Party Funds (*Cy Pres)* in Class Settlements.

Cy pres—a legal doctrine originating in estate law as a tool for disposing of unclaimed property—was first introduced in the class settlement context in the 1970s as a way to dispose of funds remaining after all known class members had collected. Redish at 621, 633-35. Although the Tenth Circuit did not use the term "*cy pres*" to describe the settlement funds here, these settlements are *cy pres* settlements as they do precisely what *cy pres* settlements do: they provide class funds to third parties rather than to class members. Here, the class settlements would provide no compensation to class members; the entirety of the settlement funds ($22 million) would be distributed to third parties. App. 28-29. The fact that the third-party recipients are government regulators rather than traditional charities merely underscores the national significance of the issues in the case.

The circuits are split in a number of ways on the role of *cy pres* in class settlements. They split on the role of the judge and on the limits of *cy pres* distribution.

1. The Circuits are Split on the Role of the District Court in Approving Class Settlements.

The circuits are split on the role of the judge in approving *cy pres* class settlements. Under the better view – found in the First Circuit – judicial restraint must be exercised: "[d]istribution of funds at the discretion of the court is not a traditional Article III function." *In re Lupron Mktg. and Sales Prac. Litig.*, 677 F.3d 21, 38 (1st Cir. 2012) (Ret. Justice David Souter sitting by designation). Article III judges are ill-suited to oversee third-party funds because they are not accountable "'for funding decisions [they] make; [they] are not accustomed to deciding whether certain nonprofit entities are more 'deserving' of limited funds than others; and [they] do not have the institutional resources and competencies to monitor that 'grantees' abide by the conditions [they] or the settlement agreements set.'" *Id.* (quoting *In re Compact Disc Minimum Advertised Price Anti. Litig.*, 236 F.R.D. 48, 53 (D. Me. 2006)). *See also* Redish at 642 (*cy pres* "effectively transforms the court's function into a fundamentally executive role, because … the court presides over the administrative redistribution of wealth ….").

The Tenth Circuit here, however, took the opposite approach and concluded that administration of third-party funds by an Article III judge is within Rule 23(e) discretion. App. 28-29. The Regulator Fund is held in escrow by the District Court and is only released after class counsel presents certification that the Regulators will permit ATC. App. 97 n.28. But what if the regulators, after accepting the money, decide it is insufficient to cover

the administrative cost of inspection of ATC equipment or otherwise decide ATC is not worth the time and money and revert to making ATC illegal? Can the class members sue to enforce the terms of the settlement or sue the court for negligent distribution and oversight, or are they left with no recourse? Concerns of this type are what led the First Circuit in *Lupron* to restrict the role of the trial court to ensure "the auditing function [would] not fall on the district court." 677 F.3d at 39. Nevertheless, the Eighth and Ninth Circuits align with the Tenth Circuit in their acceptance of judicial enmeshment. *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1040 (9th Cir. 2011) (holding the trial court should actively fashion the *cy pres* award); *Powell v. Georgia-Pacific Corp.*, 119 F.3d 703, 704 (8th Cir. 1997) (approving a settlement distribution plan giving the court sole discretion for disposing of residual funds).

2. The Circuits are Split on the Limits of *Cy Pres* Distribution.

The circuits also are divided on the role *cy pres* can play in class settlements.

To begin, they split on the court's duty to ensure *cy pres* plans align with class members' interests. In the Fifth and Ninth Circuits, a *cy pres* proposal will fail unless it targets the plaintiff class and "provides reasonable certainty that any member will be benefitted." *Nachshin,* 663 F.3d at 1040. *Accord In re Klier*, 658 F.3d at 474 (5th Cir.); *In re Katrina Canal Breaches Litig.,* 628 F.3d 185, 195 (5th Cir. 2010). In contrast, the Tenth Circuit below affirmed settlements despite the express recognition that they will in fact cost class members money and may make the class worse off. App. 63 (recognizing that the

settlements might make class members "marginally worse off than non-class members"), 65 (explaining that under the settlement "there exists a possibility that consumers will actually pay slightly *more* for gas …")(emphasis in original).

Another important circuit split involves whether *cy pres*-only class settlements, in which all monetary benefits flow to third parties and none goes to class members, are ever permissible. Most circuits say "no" and adhere to the guidance of the American Law Institute, which only permits *cy pres* distributions after the court first attempts to redistribute any residual funds to known class members and if further distribution would over-compensate class members beyond their alleged injuries. *See* American Law Institute, *Principles of the Law of Aggregate Litigation* at § 3.07(b) (Apr. 1, 2009); *see also In re BankAmerica Corp. Sec. Litig.*, 775 F3d 1060, 1063-64 (8th Cir. 2015) (citing ALI § 3.07(b)); *In re Baby Products*, 708 F.3d at 173-74 (3d Cir.) (same); *IRA Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 689-90 (7th Cir. 2013) (same); *In re Lupron*, 677 F.3d at 30 (1st Cir. (same); *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007) (citing draft of same); *accord Klier*, 658 F.3d at 479 (5th Cir.) ("Where the terms of a settlement agreement are … insufficient to overcome the presumption that the settlement provides for further distribution to class members, there is no occasion for charitable gifts, and *cy pres* must remain offstage.").

The Tenth Circuit below took the opposite approach, as has the Ninth Circuit. They have approved class settlements in which *no distribution* is made to absent class members. App. 65 (approving settlements pouring more than $22 million into a fund for third-party

governmental regulators and no monetary award to class members); *see also Google Referrer*, 869 F.3d at 742 (approving an $8.5 million third-party charitable fund, stating "[w]e have never imposed a categorical ban on a settlement that does not include direct payments to class members").

Petitioners' certiorari petition provides the Court with a perfect opportunity to bring the circuits into alignment on these important *cy pres* issues, which, in turn, would curb any incentive to forum shop based on the current circuit splits.

II. The Circuits Are Split on the Need to Consider Article III Justiciability at the Rule 23(e) Class Settlement Stage.

The Tenth Circuit departed from the Article III jurisprudence of this Court and of other circuits when it failed to consider the justiciability of the underlying class actions before taking up the question of settlement approval. *Compare* App. 53-57, 147 (failing to assess the justiciability of the underlying actions) *with Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 94 (1998) ("On every writ of error or appeal, the first and fundamental question is that of jurisdiction."); *Oryszak v. Sullivan*, 576 F.3d 522, 526-527 (D.C. Cir. 2009) (Ginsburg, J. concurring) ("a court must decline to adjudicate a nonjusticiable claim").

The Tenth Circuit's failure to first consider whether the district court properly exercised jurisdiction over the underlying class actions directly conflicts with the Seventh Circuit's class-settlement decisions in *In re Walgreen*

Co. Stockholder Litig., 832 F.3d 718 (7th Cir. 2016) and *In re Subway Footlong Sandwich Marketing and Sales Practices Litig.*, 869 F.3d 551 (7th Cir. 2017). In *Walgreen*, the Seventh Circuit explained that, when reviewing a settlement, if a "class action seeks only worthless benefits" it "should be dismissed out of hand." 832 F.3d at 724. The Seventh Circuit reiterated this requirement in *Subway*. 869 F.3d at 557. The Seventh Circuit's approach recognizes that in approving a class settlement federal courts must first determine whether the Court may properly entertain the underlying class action or whether the "remedies" at issue warrant outright dismissal.

The Seventh Circuit's approach is consistent with the well-settled precedent from this Court and multiple circuits holding that an Article III court must first evaluate the justiciability of a case when analyzing whether to certify it as a litigation class action. *Olden v. LaFarge Corp.*, 383 F.3d 495, 498 (6th Cir. 2004) ("The question of subject matter jurisdiction is a prerequisite to class certification …."); *Bertulli v. Indep. Ass'n of Continental Pilots*, 242 F. 3d 290, 294 (5th Cir. 2001) (same).

A related threshold Article III issue is also present in this case, namely whether Plaintiff-Respondents ever had Article III standing. Article III requires that the plaintiff (1) have suffered an injury in fact, (2) that is traceable to the defendant's conduct, and (3) "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citation omitted). The most fundamental problem with the settlements here is that they do not "settle" any plausible legal claims. The existing law does not authorize the use of ATC at retail.

The settlements, therefore, provide *no* relief to absent class members except for speculative relief dependent on future changes in the law, and they fail to redress an "injury … caused by …violation of [an existing] law." *Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009); *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006) ("Plaintiffs' alleged injury is also 'conjectural or hypothetical' in that it depends on how legislators [will] respond …."); *Hill v. Vanderbilt Capital Advisors, LLC*, 834 F. Supp. 2d 1228, 1254 (D.N.M. 2011) ("[T]he relief the Court could grant would not redress the Plaintiffs' alleged injury, because … [it] requires the Legislature to act;" citing *Arakaki v. Lingle*, 477 F.3d 1048, 1063 (9th Cir. 2007) (same)).

The Tenth Circuit suggested that there was no Article III issue because there is no authority to support an argument that "when the parties to a *settlement* agreement ultimately agree to a remedy that doesn't actually and fully redress a plaintiff's alleged injury, that factor somehow operates to retroactively dissolve the plaintiff's Article III standing to bring—and thus a federal court's jurisdiction to hear—that plaintiff's *claims* in the first place." App. 53 (emphasis added). But Petitioners challenged whether there was Article III jurisdiction over the underlying claims, not merely the settlements. Furthermore, standing must be assessed at each stage of the litigation. *Lujan*, 504 U.S. at 561. If the settlements include relief that an Article III court lacks authority to approve and enforce, then the settlements present the very same redressability problems at the end of the case as they do at the beginning. The redressability prong for Article III jurisdiction does not change merely because the Court is asked to act under Rule 23(e) rather than under Rule 23(a)-(d).

Finally, but of particular note, a serious Article III political question plagues this litigation. In *Baker v. Carr*, 369 U.S. 186 (1962), this Court identified six factors that typically characterize a political question. Following *Baker*, this Court has emphasized the first two factors: "a textually demonstrable constitutional commitment of the issue" and "a lack of judicially discoverable and manageable standards." *See, e.g., Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012). Those factors are unquestionably present here, yet the Tenth Circuit gave the back of the hand to these threshold Article III issues. App. 55 citing to Spdwy Aplt. Br. 28; *see also*, Tenth Cir. Doc. 10109548382, 2016 WL 66484 at * 53-58 ; Tenth Cir. Doc. 01019640759 at 10-14.; App. 147.

In the underlying class action, the central issue—that ATC is a more accurate and consistent method of fuel measurement than volumetric gallons—is a value judgment that the Constitution commits to Congress. U.S. CONST. art. I § 8, cl. 5; *Baker v. Carr*, 369 U.S. 186 (1962); *Luther v. Borden*, 48 U.S. (7 How.) 1, 47 (1849); *Gilligan v. Morgan*, 413 U.S. 1, 7, 10 (1973). *See also* Tribe et al., "*Too Hot for Courts to Handle*," at 13-14 ("[I]n *Baker* itself, the Court emphasized that the determination of whether a dispute is amenable enough to principled resolution to comply with the Article III conception of the 'judicial power' requires a 'discriminating analysis of the particular question posed' and in particular of 'the possible consequences of judicial action;'" citations omitted). Evaluating alternative measurement methods is quintessentially a legislative function that involves balancing trade-offs and requires "a quantifying judgment that is unguided and ill-suited to the development of judicial standards." *Vieth v. Jubelirer*, 541 U.S. 267, 296 (2004) (plurality opinion); *see also Schroder v. Bush*, 263 F.3d 1169, 1176 (10th Cir. 2001)

Every court to scrutinize the merits of the claims in the underlying litigation ultimately concluded that the claims were either meritless or non-justiciable. Even the District Court below rejected Plaintiff-Respondents' California claims as "facially unreasonable." 2013 WL 3795206 at * 20. The Northern District of California similarly dismissed a case remanded from the underlying MDL involving claims under Florida, Louisiana, Mississippi, South Carolina, North Carolina, Oklahoma, Tennessee, Texas, and Virginia law, because the claims were "facially unreasonable," asserted "nonjusticiable political questions," and were preempted by the federal Weights and Measures regime. *Flying J*, 178 F. Supp. 3d at 925, 927. Despite these holdings, the District Court nevertheless approved, and the Tenth Circuit affirmed, class settlements based on these "facially unreasonable" and nonjusticiable claims, claims that would have been "dismissed out of hand" in another circuit. *See In re Walgreen*, 832 F.3d at 724 (discussed *supra*).

The fact that the underlying class action was structured as a consumer class action does not change this analysis. *Zivotofsky v. Clinton* makes clear that, where the Constitution commits an issue to the political branches, the courts lack "the authority to decide the disputes before it." 132 S.C. 1421, 1427 (2012); *see also id.* at 1432 (Sotomayor, J., concurring). The Constitution does just that here. *See also* Tribe et al, "*Too Hot for Courts to Handle,*" at 10-11 (Jan. 2010) ("The power to 'fix the Standard of Weights and Measures' is all but emptied of significance if the process that Congress puts in motion articulates and defines uniform units of measurement only to have courts decide which units apply to which transactions….").

The Tenth Circuit reasoned that "the settlements don't actually change the law"; but rather merely "facilitate" a change in the law. App. 55. But that is not the test by which separation of powers is measured. Rather, a court usurps legislative authority if it "second guesses" the decisions of political branches or causes "embarrassment" by triggering multiple pronouncements on the same issues. *Baker,* 369 U.S. at 217. That is exactly what happened here. The courts below second guessed the judgment of the NCWM regulators, who Congress chose to decide whether or not ATC is the more "fair" method of sale, not an Article III court in the guise of a Rule 23(e) "fairness" determination.

In *American Electric Power Co., Inc., v. Connecticut*, 564 U.S. 410 (2011) ("*AEP*"), this Court had the opportunity to address the applicability of the political question doctrine in common law cases but did not reach those issues because the court split 4-4 on whether the Second Circuit properly exercised jurisdiction over the case. *Id.* at 416. In *AEP*, however, the petitioners relied on the second and third *Baker* factors, not factor one, which requires a clear textual commitment of the issue to a political branch, such as to the Weights and Measures Clause here.

The Tenth Circuit's decision, therefore, conflicts with this Court's and the other circuits' subject matter jurisdiction jurisprudence.

III. The Circuits Are Split on Whether the Holding of *Shelley v. Kraemer* is Limited to Discrimination Cases.

In *Shelley v. Kraemer*, 334 U.S. 1 (1948), this Court found that court enforcement of private contracts constituted "state action." In *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), this Court also held that court approval of peremptory juror strikes constituted "state action." The Tenth Circuit's "no state action" holding below conflicts with this precedent, as well as the "state action" analysis of other circuits.

The Tenth Circuit rejected Petitioners' argument that the District Court's settlement approval constituted state action, stating that "courts have uniformly declined to extend *Shelley* beyond cases involving discrimination." App. 51-52 (citing *Everett v. Paul Davis Restoration, Inc.*, 771 F.3d 380, 386 n.1 (7th Cir. 2014); *Naoko Ohno v. Yuko Yasuma*, 723 F.3d 984, 998 (9th Cir. 2013); *Davis v. Prudential Sec., Inc.*, 59 F.3d 1186, 1191 (11th Cir. 1995); *United Egg Producers v. Standard Brands, Inc.*, 44 F.3d 940, 943 (11th Cir. 1995)).

The other circuits are not so uniform as the Tenth Circuit suggests. For instance, *Ohno v. Yasuma* cites *Shelley* and recognizes that actions of federal courts *"do constitute governmental action."* 723 F.3d at 993-94 (emphasis added). In this regard, the Tenth Circuit departs from the Ninth Circuit. Indeed, the Ninth Circuit at least acknowledged that *Shelley* applies outside the race discrimination context and that judicial action is state action (even if it ultimately held the enforcement of a foreign judgment was not state action because the law

required courts to recognize foreign judgments without inquiry into the merits). *Id.* at 997.

Davis similarly did not involve approval of class settlements, but instead only concerned the enforcement of a bilateral arbitration award, which did not require the Court to make a judgment on the merits of the decision. *Davis*, 59 F.3d at 1191. Thus, the Tenth Circuit's statement that the Ninth and Eleventh Circuits categorically reject extending *Shelley* outside the race discrimination context overstates the reasoning of those courts. Rather, the Tenth Circuit's reasoning conflicts with these other circuits because the Tenth Circuit, unlike those other circuits, does not distinguish between whether judicial approval requires exercising judgment regarding the substance of the underlying decision *i.e.* substantive approval of the underlying terms at issue (as exists in class settlement context or in restrictive covenant situation) or mere acknowledgment of decisions made by other judges (*i.e.* recognition of foreign judgments and arbitrator awards). In the former, Rule 23(e) requires the court to make a substantive judgment regarding the validity of the settlement terms whereas, in the latter, the court is not called upon to make or endorse any substantive judgment.

More fundamentally, neither *Shelley* nor *Edmonson* purport to limit their "state action" principles to race discrimination. *See* Erwin Chemerinsky, *Rethinking State Action*, 80 Nw. U. L. Rev. 503, 525 (1985) ("as *Shelley* holds, court action always is state action."). No principled basis for distinction exists. As in *Shelley* and *Edmonson*, *but for* the judicial approval and enforcement of the constitutionally offensive contractual obligations, the abridgment of the constitutional rights would not occur.

Indeed, "the certification of a mandatory class followed by settlement of its action for money damages obviously implicates the Seventh Amendment jury trial rights of absent class members" as well as "due process principle[s] of general application." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846-48 (1999) (emphasis added). If "judicial action" in the class settlement context was not "state action," then the Seventh Amendment and Due Process findings in *Ortiz* would be wrong.

In short, the fact that this case involves a class-action settlement does not bestow it with "talismanic immunity from constitutional limitations." *New York Times Co. v. Sullivan,* 376 U.S. 254, 269 (1964). "The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised." *Id.* at 265. The fact that the settlements are a nullity unless the Court approves and enforces the class settlements demonstrates "state action."

The settlements infringe Petitioners' First Amendment rights in two respects. First, they allocate funds to state agencies as part of a lobbying campaign to allow ATC, and, they also compel absent class members to subsidize political speech with which they disagree,[5] all of which together diminish Petitioners' own speech against ATC. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 736 (2011) (subsidizing one candidate's political

5. Indeed, the uncontested evidence below established that a significant portion of the class members oppose ATC. *See In re Motor Fuel Temperature Sales Practices Litig.*, 271 F.R.D. 221, 231 (D. Kan. 2010) (recognizing that the American Trucking Association, "the largest diesel fuel consumer group in the United States has repeatedly taken a public position against implementation of [ATC]").

speech prejudices and burdens the First Amendment rights of the opposing candidate). But for the judicial thumb on the scale of this policy debate, the speech of petitioners' opponents would not be amplified. Second, the remaining settlements contain provisions both requiring class counsel to lobby for ATC (compelled speech) and prohibiting settling defendants from engaging in speech opposing ATC (compelled silence), which also together diminishes Petitioners' own speech against ATC. This Court consistently condemns such speech restrictions. *See Harris v. Quinn*, 134 S. Ct. 2618, 2644 (2014) (emphasizing the "bedrock principle" that "no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support."); *United States v. United Foods, Inc.*, 533 U.S. 405, 410-411 (2001) ("First Amendment concerns apply here because of the requirement that [class members] subsidize speech with which they disagree.").

The Tenth Circuit never disputed that the settlements here abridge speech; rather, it simply found that the class settlements were private agreements and that there was no state action. App. 50. But that makes no sense. The class settlements here are designed to enlist the court to censor speech and chill advocacy. If allowed, these settlements would contract the marketplace of ideas and cause structural harm to our democratic form of government by depriving governmental regulators of honest and accurate public opinion on issues of public concern. This Court should grant certiorari to resolve the circuit splits and confusion regarding whether *Shelley* applies outside the discrimination context and extends to the First Amendment context.

IV. The Tenth Circuit Applied an Objector Standing Analysis That Conflicts With Decisions of This Court and Other Circuits.

Petitioners established standing to object to the class settlements in four, independent ways. First, Petitioners participate in an industry that the settlements seek to change, forcing Petitioners and other motor fuel retailers to alter their substantive right to conduct their business in accordance with existing law. *See* Appendix 8, Objections to Class Settlement 4 (June 9, 2015) (internal quotes and citations omitted). Petitioners detailed throughout the litigation the anti-competitive harms that the Settlements pose. App. 118 n.46, SA 4. Anti-competitive harms are cognizable Article III injuries. *See Clinton v. City of New York*, 524 U.S. 417, 433 (1998) (adversely altering competitive conditions is an injury sufficient to establish standing); *see also Authors Guild*, 770 F. Supp. 2d at 669, 682-83 (rejecting settlement, in part because of concerns raised by Google's competitors).

The settlements operate as a law reform effort that, if successful, would alter the conduct of not only the settling parties, but of all motor fuel retailers, including Petitioners. Accordingly, Petitioners' interest is not that of a typical non-settling defendant complaining that other defendants have settled. In these circumstances, Petitioners have a stake in the settlements and should be heard because they are participants in the regulated industry that the settlements seek to alter. *See Massachusetts v. EPA,* 549 U.S. 497, 517 (2007) (standing attaches to those possessing "a personal stake in the outcome of the controversy") (internal quotes and citation omitted). This "stake" in the class settlements, which seek to change the regulations

of the motor fuel retail industry, is so irrespective of petitioners' prior role as non-settling defendants who won at trial or on summary judgment and were dismissed from the litigation.

Second, as discussed above, the settlements burden Petitioners' First Amendment rights, giving rise to a cognizable injury.

Third, the Tenth Circuit's "plain legal prejudice" standard is detached from Article III. Under the Tenth Circuit's formulation, dismissed defendants would never have standing to contest a settlement because they are no longer part of the litigation. This blanket denial of Petitioners' access to the courts—predicated on status and not stake—cannot survive under Article III. Nor can any rational concept of standing deem constitutional injuries (like speech injuries) insufficient. App. 140. (holding that burdens on speech do not "rise to the level of plain legal prejudice as we have defined it."). It strains credulity to hold that interference with contractual rights satisfies plain legal prejudice, but that infringement with speech rights does not. The Tenth Circuit functionally manufactured two standing requirements, a permissive one for class plaintiffs and a restrictive one for other stake-holders. This discriminatory standing formulation finds no support in Article III and departs from the more permissive standing cases for non-settling defendants. *Eichenholtz v. Brennan*, 52 F. 3d 478, 482 (3d Cir. 1995) ("Where the rights of third parties are affected, it is not enough to evaluate the fairness of the settlement to the settling parties; the interests of the third parties must be considered."); *Dunn v. Sears, Roebuck & Co.,* 639 F.2d 1171, 1173-74 (5th Cir. 1981) (finding prejudice where none

of the listed categories of harm existed), *corrected in other respects by,* 645 F.2d 511 (5th Cir. 1981).

Thus the Tenth Circuit's standing analysis conflicts with the analysis of this Court and these other circuits.

Judge Baldock recognized the problematic nature of his circuit's plain legal prejudice approach highlighting that it has dubious support and can be traced to a treatise (not Article III). *See New England Health Care Emps. Pension Fund v. Woodruff*, 520 F.3d 1255, 1257-58 (10th Cir. 2008) (Baldock, J., dissenting from the denial of rehearing). Accordingly, Judge Baldock asserted that the prejudice standard "desperately needs clarification." *Id*. at 1258.

Fourth, Petitioners Speedway and Murphy Oil are members of the class. *See* App. at 47 ("The district court didn't find Speedway's objection deficient because Speedway failed to prove class membership[.]"). Petitioners timely objected to each of the settlements, fulfilling its obligation to place the settling defendants on notice of the objections, yet the courts below faulted Petitioners for not providing copious details regarding the objections, none of which were required by the class notice itself. *See* App. at 44, 48 n.5. Petitioners objected to every settlement and listed the settlements to which they objected in their Objection. App. SA 2, 6-19. Petitioners therefore meet this Court's requirements for prudential standing. *Cf. Devlin v. Scardelletti,* 536 U.S. 1, 7 (2002) (class members who timely object to a settlement possess prudential standing to appeal).

The Petitioners have established standing under any of the four bases above, permitting this Court to address the merits questions in this petition.

V. This Case Presents Recurring Issues of National Significance.

The class settlements here attempt to transform the way motor fuel is sold in roughly half the nation. They demand relief in over 26 states and target the economically vital gasoline and diesel industry—an industry that helps generate more than $1 trillion to the national economy or 7.5 percent of the U.S. gross domestic product and contributes over 9 million American jobs. They do so in a manner that will replace a nationally-uniform standard that has stood the test of time for a century, the volumetric gallon, with a patchwork of different local requirements generating only uncertainty and confusion.

The classes themselves are unprecedented in their size, consisting of every person or entity which has purchased motor fuel from a retail station in over 26 states. In *Walmart v. Dukes*, this Court described a 1.5 million plaintiff class as "one of the most expansive class actions ever," 564 U.S. at 342 (2011); but the settlement classes here exceed that by a hundred times over. In return for surrendering their claims, the hundreds of millions of absent class members receive nothing but speculative "information" that the Tenth Circuit acknowledged could cause economic harm to the class. *See* Part I.B.2, *supra*.

But more problematic is that the settlements hijack the class-action procedural vehicle and use it to alter substantive rights. The purpose of the settlements

is to change the law, a change that the Plaintiff-Respondents' contend would benefit the class, but which the governmental regulators have rejected as a net detriment to society and which the Tenth Circuit recognized could economically harm the class. Such a court-enforced class settlement transforms the judiciary from its traditional role as a forum for resolving "cases and controversies" by interpreting and *applying existing* law, into both a political operative approving a lobbying campaign and a police officer patrolling and enforcing who says (or cannot say) what in the public debate.

Moreover, because the limits on federal court power in approving class settlements currently vary significantly depending on the circuit in which the case is litigated, the risk of forum shopping is real if the Court does not soon address the limitations imposed by Article III, the Rules Enabling Act, and Rule 23(e), as well as the role of *cy pres*, in the class settlement context. The increased use of *cy pres* settlements makes this a recurring issue of national importance. Redish at 661.

This case presents an ideal vehicle for addressing these fundamental questions and concerns. As the Tenth Circuit itself acknowledged, the settlements here push the bounds of appropriate relief. They raise substantial separation-of-powers and First Amendment concerns. Moreover, rarely does a certiorari petition come before the Court in a class action after the conclusion of a class trial, after all class and merits issues have been resolved both by the MDL judge and the transferor judges. The record before the Court contains all settled factual issues and the only issues remaining are purely legal questions sharpened for this Court's resolution and upon which

the circuits diverge. Petitioners held strong for over a decade of litigation and urge the Court to finally address the important outcome-determinative issues that have plagued this case for so long.

CONCLUSION

The petition should be granted.

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APPENDIX

APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED SEPTEMBER 21, 2017

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 15-3221 (D.C. No. 2:07-MD-01840-KHV) (D. Kan.)

IN RE: MOTOR FUEL TEMPERATURE SALES PRACTICES LITIGATION

ZACHARY WILSON; MATHEW COOK; BRENT DONALDSON; SAMANTHA BAYLARD; CRAIG MASSEY; RICHARD GALAUSKI; WILLIAM BOYD; LISA MCBRIDE; TAMARA MILLER; HEARTLAND LANDSCAPE GROUP LLC; TEAM TRUCKING; JAMES ANLIKER; DENNIS K. MANN; PHYLLIS LERNER; HERB GLASER; STEVEN RUBIN; MAX CANDIOTTY; FRED AGUIRRE; JAMES JARVAIS; MARA REDSTONE; RAPHAEL SAGALYN; J.C. WASH; JEAN W. NEESE; CECIL R. WILKINS; WAYNE BYRAM; GARY KOHUT; DEBRA BERG; TIA GOMEZ; SHONNA S. BUTLER; BEN DOZIER; MARK SCIVNER; BARBARA CUMBO; JAMES GRAHAM; KENNEDY G. KRAATZ; MELISSA D. MURRAY; MICHAEL A. WARNER; CLINTON J. DAVIS; STEVEN R. RUTHERFORD; LISA ANN LEE; BRENT CRAWFORD; DIXCEE MILLSAP; CARL RITTERHOUSE; SAMUEL ELY; VICTOR RUYBALID; HADLEY BOWER; KRISTY DEANN

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MOTT; CHARLES COCKRELL, JR.; WILLIAM RUTTHERFORD; JAN RUTHERFORD; MARK WYATT; DAWN LALOR; GERALD PANTO, JR.; EDGER PAZ; CHARLES D. JONES; MICHAEL GAUTHREAUX; JOANN KORLESKI; JEFF JENKINS; SARA TERRY; JACOB STEED; MARVIN BRYAN; JOHN TELLES; CHRISTOPHER PAYNE; SCOTT CAMPBELL; JONATHAN CHARLES CONLIN; PRISCILLA CRAFT; ROBERT HICKS; RICHARD PATRICK; JESSICA HONIGBERG; RAYSHAUN GLANTON; GARLAND WILLIAMS; ANNIE SMITH; BOBBY ROBERSON; SAM HOTCHKISS; ANNA LEGATES; ANDREA FRAYSER; MELVIN ELLISON; CECIL WILKINS; BETTY CHERRY; JOY HOWELL; ALLEN RAY KLEIN,

Plaintiffs-Appellees,

v.

CIRCLE K STORES, INC.; PILOT TRAVEL CENTERS, LLC; KUM&GO, L.C.; QUICKTRIP CORPORATION; MURPHY OIL USA, INC.; RACE TRAC PETROLEUM, INC.; MARATHON PETROLEUM COMPANY, LLC; THE PANTRY, INC.; SPEEDWAY SUPERAMERICA, LLC; SHEETZ, INC.; WAWA, INC.; FLYING J INC.; 7-ELEVEN, INC.; PTCAA TEXAS, LP;

Defendants-Appellants,

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v.

CHEVRON USA, INC.; CASEY'S GENERAL STORE, INC.; SINCLAIR OIL CORPORATION; EXXON MOBIL CORPORATION; ESSO VIRGIN ISLANDS, INC. MOBIL OIL GUAM, INC.; BP PRODUCTS NORTH AMERICA INC.,

Defendants-Appellees,

and

BP CORPORATION NORTH AMERICA, INC.; CITGO PETROLEUM CORPORATION; CONOCO PHILLIPS COMPANY; VALERO MARKETING AND SUPPLY COMPANY; SUNOCO CORPORATION; EQUILON ENTERPRISES, LLC, d/b/a SHELL OIL PRODUCTS COMPANY, LLC; MOTIVA ENTERPRISES, LLC; TESORO REFINING AND MARKETING COMPANY; SAM'S CLUB; LOVE'S TRAVEL STOP & COUNTRY STORES, INC.; G AND M OIL COMPANY, INC.; UNITED EL SEGUNDO, INC.; WORLD OIL CORPORATION; M.M. FOLWER, INC.; DANSK INVESTMENT GROUP, INC.; B-B OIL COMPANY, INC.; PORT CITIES OIL LLC; FLASH MARKET, INC; J&P FLASH, INC.; MAGNESS OIL COMPANY; COULSON OIL COMPANY, INC.; DIAMOND STATE OIL, LLC; EZ MART STORES, INC.; THORNTONS, INC.,

Defendants.

Appendix A

No. 15-3227 (D.C. No. 2:07-MD-01840-KHV) (D. Kan.)

IN RE: MOTOR FUEL TEMPERATURE SALES PRACTICES LITIGATION

ZACHARY WILSON; MATHEW COOK; BRENT DONALDSON; SAMANTHA BAYLARD; CRAIG MASSEY; RICHARD GALAUSKI; WILLIAM BOYD; LISA MCBRIDE; TAMARA MILLER; HEARTLAND LANDSCAPE GROUP LLC; TEAM TRUCKING; JAMES ANLIKER; DENNIS K. MANN; PHYLLIS LERNER; HERB GLASER; STEVEN RUBIN; MAX CANDIOTTY; FRED AGUIRRE; JAMES JARVAIS; MARA REDSTONE; RAPHAEL SAGALYN; J.C. WASH; JEAN W. NEESE; CECIL R. WILKINS; WAYNE BYRAM; GARY KOHUT; DEBRA BERG; TIA GOMEZ; SHONNA S. BUTLER; BEN DOZIER; MARK SCIVNER; BARBARA CUMBO; JAMES GRAHAM; KENNEDY G. KRAATZ; MELISSA D. MURRAY; MICHAEL A. WARNER; CLINTON J. DAVIS; STEVEN R. RUTHERFORD; LISA ANN LEE; BRENT CRAWFORD; DIXCEE MILLSAP; CARL RITTERHOUSE; SAMUEL ELY; VICTOR RUYBALID; HADLEY BOWER; KRISTY DEANN MOTT; CHARLES COCKRELL, JR.; WILLIAM RUTTHERFORD; JAN RUTHERFORD; MARK WYATT; DAWN LALOR; GERALD PANTO, JR.; EDGER PAZ; CHARLES D. JONES; MICHAEL GAUTHREAUX; JOANN KORLESKI; JEFF

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JENKINS; SARA TERRY; JACOB STEED; MARVIN BRYAN; JOHN TELLES; CHRISTOPHER PAYNE; SCOTT CAMPBELL; JONATHAN CHARLES CONLIN; PRISCILLA CRAFT; ROBERT HICKS; RICHARD PATRICK; JESSICA HONIGBERG; RAYSHAUN GLANTON; GARLAND WILLIAMS; ANNIE SMITH; BOBBY ROBERSON; SAM HOTCHKISS; ANNA LEGATES; ANDREA FRAYSER; MELVIN ELLISON; CECIL WILKINS; BETTY CHERRY; JOY HOWELL; ALLEN RAY KLEIN,

Plaintiffs-Appellees,

v.

CIRCLE K STORES, INC; PILOT TRAVEL CENTERS, LLC; KUM&GO, L.C.; QUICKTRIP CORPORATION; MURPHY OIL USA, INC.; RACE TRAC PETROLEUM, INC.; MARATHON PETROLEUM COMPANY, LLC; THE PANTRY, INC.; SPEEDWAY SUPERAMERICA, LLC; SHEETZ, INC.; WAWA, INC.; FLYING J INC.; 7-ELEVEN, INC.; PTCAA TEXAS, LP,

Defendants-Appellants,

CHEVRON USA, INC.; CASEY'S GENERAL STORE, INC.; SINCLAIR OIL CORPORATION; EXXON MOBIL CORPORATION; ESSO VIRGIN ISLANDS, INC.; MOBIL OIL GUAM, INC.; BP PRODUCTS NORTH AMERICA INC.,

Defendants-Appellees,

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and

BP CORPORATION NORTH AMERICA, INC.; CITGO PETROLEUM CORPORATION; CONOCO PHILLIPS COMPANY; VALERO MARKETING AND SUPPLY COMPANY; SUNOCO CORPORATION; EQUILON ENTERPRISES, LLC, d/b/a SHELL OIL PRODUCTS COMPANY, LLC; MOTIVA ENTERPRISES, LLC; TESORO REFINING AND MARKETING COMPANY; SAM'S CLUB; LOVE'S TRAVEL STOP & COUNTRY STORES, INC.; G AND M OIL COMPANY, INC.; UNITED EL SEGUNDO, INC.; WORLD OIL CORPORATION; M.M. FOLWER, INC.; DANSK INVESTMENT GROUP, INC.; B-B OIL COMPANY, INC.; PORT CITIES OIL LLC; FLASH MARKET, INC; J&P FLASH, INC.; MAGNESS OIL COMPANY; COULSON OIL COMPANY, INC.; DIAMOND STATE OIL, LLC; EZ MART STORES, INC.; THORNTONS, INC.,

Defendants.

No. 15-3228 (D.C. No. 2:07-MD-01840-KHV) (D. Kan.)

IN RE: MOTOR FUEL TEMPERATURE SALES PRACTICES LITIGATION

ZACHARY WILSON; MATHEW COOK; BRENT DONALDSON; SAMANTHA BAYLARD; CRAIG MASSEY; RICHARD GALAUSKI; WILLIAM BOYD; LISA MCBRIDE; TAMARA MILLER; HEARTLAND LANDSCAPE GROUP LLC; TEAM TRUCKING; JAMES ANLIKER; DENNIS K. MANN; PHYLLIS LERNER; HERB GLASER; STEVEN RUBIN; MAX CANDIOTTY; FRED AGUIRRE; JAMES JARVAIS; MARA REDSTONE; RAPHAEL SAGALYN; J.C. WASH; JEAN W. NEESE; CECIL R. WILKINS; WAYNE BYRAM; GARY KOHUT; DEBRA BERG; TIA GOMEZ; SHONNA S. BUTLER; BEN DOZIER; MARK SCIVNER; BARBARA CUMBO; JAMES GRAHAM; KENNEDY G. KRAATZ; MELISSA D. MURRAY; MICHAEL A. WARNER; CLINTON J. DAVIS; STEVEN R. RUTHERFORD; LISA ANN LEE; BRENT CRAWFORD; DIXCEE MILLSAP; CARL RITTERHOUSE; SAMUEL ELY; VICTOR RUYBALID; HADLEY BOWER; KRISTY DEANN MOTT; CHARLES COCKRELL, JR.; WILLIAM RUTTHERFORD; JAN RUTHERFORD; MARK WYATT; DAWN LALOR; GERALD PANTO, JR.; EDGER PAZ; CHARLES D. JONES; MICHAEL GAUTHREAUX; JOANN KORLESKI; JEFF JENKINS; SARA TERRY; JACOB STEED; MARVIN BRYAN; JOHN TELLES; CHRISTOPHER PAYNE; SCOTT CAMPBELL; JONATHAN CHARLES CONLIN; PRISCILLA CRAFT; ROBERT HICKS; RICHARD PATRICK; JESSICA HONIGBERG; RAYSHAUN GLANTON; GARLAND WILLIAMS; ANNIE SMITH; BOBBY ROBERSON; SAM HOTCHKISS; ANNA LEGATES; ANDREA

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FRAYSER; MELVIN ELLISON; CECIL WILKINS; BETTY CHERRY; JOY HOWELL; ALLEN RAY KLEIN,

Plaintiffs-Appellees,

v.

BP CORPORATION NORTH AMERICA, INC.; CITGO PETROLEUM CORPORATION; CONOCO PHILLIPS COMPANY; COSTCO WHOLESALE CORPORATION; EXXON MOBIL CORPORATION; SINCLAIR OIL CORPORATION; VALERO MARKETING AND SUPPLY COMPANY; SUNOCO CORPORATION; EQUILON ENTERPRISES, LLC., d/b/a SHELL OIL PRODUCTS COMPANY, LLC; MOTIVA ENTERPRISES, LLC; TESORO REFINING AND MARKETING COMPANY; SAM'S CLUB; LOVE'S TRAVEL STOP & COUNTRY STORES, INC.; G AND M OIL COMPANY, INC.; UNITED EL SEGUNDO, INC.; WORLD OIL CORPORATION; M.M. FOLWER, INC.; J&P FLASH, INC.; DANSK INVESTMENT GROUP, INC.; CIRCLE K STORES, INC; KUM&GO, L.C.; MURPHY OIL USA, INC.; MARATHON PETROLEUM COMPANY, LLC; FLYING J INC.; 7-ELEVEN, INC.; PTCAA TEXAS, LP; PILOT TRAVEL CENTERS, LLC; QUICKTRIP CORPORATION; RACE TRAC PETROLEUM, INC.; THE PANTRY, INC.; SPEEDWAY SUPERAMERICA, LLC; SHEETZ, INC.; WAWA, INC.; B-B OIL COMPANY, INC.; COULSON OIL

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COMPANY, INC.; PORT CITIES OIL LLC; FLASH MARKET, INC.; J&P FLASH, INC.; DIAMOND STATE OIL, LLC; MAGNESS OIL COMPANY; THORNTON'S, INC.,

Defendants,

and

CHEVRON USA, INC.; EZ MART STORES, INC.; CASEY'S GENERAL STORE, INC.,

Defendants-Appellees,

v.

MELISSA HOLYOAK; ADAM SCHULMAN; AMY ALKON; NICOLAS S. MARTIN; THEODORE H. FRANK,

Objectors-Appellants.

No. 15-3254 (D.C. No. 2:07-MD-01840-KHV) (D. Kan.)

IN RE: MOTOR FUEL TEMPERATURE SALES PRACTICES LITIGATION

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ANNIE SMITH; CHRISTOPHER PAYNE; PHYLLIS LERNER; HERB GLAZER; MARA REDSTONE; BRENT CRAWFORD; VICTOR RUYBALD; ZACH WILSON; LISA MCBRIDE; RAPHAEL SAGALYN; BRENT DONALDSON; GARY KOHUT; RICHARD GAULAUSKI; CHARLES BYRAM; JEAN NEESE; SHONNA BUTLER; GERALD PANTO, JR.; JOANN KORLESKI; TAMARA MILLER; PRISCILLA CRAFT; JEFF JENKINS; JAMES GRAHAM, CLASS REPRESENTATIVES,

Plaintiffs-Appellees,

v.

COSTCO WHOLESALE CORPORATION,

Defendant-Appellant,

and

BP PRODUCTS NORTH AMERICA INC.; BP WEST COAST PRODUCTS, LLC; CASEY'S GENERAL STORES, INC.; CITGO PETROLEUM CORPORATION; CONOCOPHILLIPS COMPANY; EQUILON ENTERPRISES LLC, D/B/A SHELL OIL PRODUCTS US; MOTIVA ENTERPRISES LLC; EXXON MOBIL CORPORATION; MOBIL OIL GUAM, INC.; ESSO VIRGIN ISLANDS, INC.; SAM'S EAST, INC.; SAM'S WEST, INC.; WAL-MART STORES, INC.; WAL-MART STORES EAST, LP; SINCLAIR OIL CORPORATION;

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VALERO MARKETING AND SUPPLY COMPANY; CHEVRON U.S.A., INC.; SUNOCO, INC. (R&M); B-B OIL COMPANY, INC.; COULSON OIL COMPANY, INC.; DIAMOND STATE OIL, LLC; FLASH MARKET, INC.; J&P FLASH, INC.; MAGNESS OIL COMPANY; PORT CITIES OIL, LLC; E-Z MART STORES, INC.; LOVE'S TRAVEL STOP & COUNTRY STORES, INC.; WR HESS COMPANY; M.M. FOWLER, INC., D/B/A FAMILY FARE; DANSK INVESTMENT GROUP, INC., F/K/A USA PETROLEUM CORPORATION; TESORO REFINING AND MARKETING COMPANY; THORNTONS, INC.; G&M OIL COMPANY, INC.; G&M OIL CO., LLC; UNITED EL SEGUNDO, INC.; WORLD OIL CORPORATION,

Defendants,

v.

SPEEDWAY LLC; 7-ELEVEN, INC.; CIRCLE K STORES, INC; KUM & GO, L.C.; MARATHON PETROLEUM COMPANY LP; MURPHY OIL USA, INC.; PILOT TRAVEL CENTERS, LLC; FLYING J INC.; PTCAA TEXAS, LP; RACETRAC PETROLEUM, INC.; QUIKTRIP CORPORATION; SHEETZ, INC.; THE PANTRY, INC.; WAWA, INC.,

Objectors.

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JUDGMENT

Before **LUCERO**, **PHILLIPS**, and **MORITZ**, Circuit Judges.

These cases originated in the District of Kansas and were argued by counsel.

The judgment of that court is affirmed.

Entered for the Court

/s/
ELISABETH A. SHUMAKER, Clerk

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED SEPTEMBER 21, 2017

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 15-3221

IN RE: MOTOR FUEL TEMPERATURE
SALES PRACTICES LITIGATION

ZACHARY WILSON; MATHEW COOK; BRENT DONALDSON; SAMANTHA BAYLARD; CRAIG MASSEY; RICHARD GALAUSKI; WILLIAM BOYD; LISA MCBRIDE; TAMARA MILLER; HEARTLAND LANDSCAPE GROUP LLC; TEAM TRUCKING; JAMES ANLIKER; DENNIS K. MANN; PHYLLIS LERNER; HERB GLASER; STEVEN RUBIN; MAX CANDIOTTY; FRED AGUIRRE; JAMES JARVAIS; MARA REDSTONE; RAPHAEL SAGALYN; J.C. WASH; JEAN W. NEESE; CECIL R. WILKINS; WAYNE BYRAM; GARY KOHUT; DEBRA BERG; TIA GOMEZ; SHONNA S. BUTLER; BEN DOZIER; MARK SCIVNER; BARBARA CUMBO; JAMES GRAHAM; KENNEDY G. KRAATZ; MELISSA D. MURRAY; MICHAEL A. WARNER; CLINTON J. DAVIS; STEVEN R. RUTHERFORD; LISA ANN LEE; BRENT CRAWFORD; DIXCEE MILLSAP; CARL RITTERHOUSE; SAMUEL ELY; VICTOR RUYBALID; HADLEY BOWER; KRISTY DEANN

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MOTT; CHARLES COCKRELL, JR.; WILLIAM RUTTHERFORD; JAN RUTHERFORD; MARK WYATT; DAWN LALOR; GERALD PANTO, JR.; EDGER PAZ; CHARLES D. JONES; MICHAEL GAUTHREAUX; JOANN KORLESKI; JEFF JENKINS; SARA TERRY; JACOB STEED; MARVIN BRYAN; JOHN TELLES; CHRISTOPHER PAYNE; SCOTT CAMPBELL; JONATHAN CHARLES CONLIN; PRISCILLA CRAFT; ROBERT HICKS; RICHARD PATRICK; JESSICA HONIGBERG; RAYSHAUN GLANTON; GARLAND WILLIAMS; ANNIE SMITH; BOBBY ROBERSON; SAM HOTCHKISS; ANNA LEGATES; ANDREA FRAYSER; MELVIN ELLISON; CECIL WILKINS; BETTY CHERRY; JOY HOWELL; ALLEN RAY KLEIN,

Plaintiffs - Appellees,

v.

CIRCLE K STORES, INC.; PILOT TRAVEL CENTERS, LLC; KUM&GO, L.C.; QUICKTRIP CORPORATION; MURPHY OIL USA, INC.; RACE TRAC PETROLEUM, INC.; MARATHON PETROLEUM COMPANY, LLC; THE PANTRY, INC.; SPEEDWAY SUPERAMERICA, LLC; SHEETZ, INC.; WAWA, INC.; FLYING J INC.; 7-ELEVEN, INC.; PTCAA TEXAS, LP;

Defendants - Appellants,

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v.

CHEVRON USA, INC.; CASEY'S GENERAL STORE, INC.; SINCLAIR OIL CORPORATION; EXXON MOBIL CORPORATION; ESSO VIRGIN ISLANDS, INC. MOBIL OIL GUAM, INC.; BP PRODUCTS NORTH AMERICA INC.,

Defendants - Appellees,

and

BP CORPORATION NORTH AMERICA, INC.; CITGO PETROLEUM CORPORATION; CONOCO PHILLIPS COMPANY; VALERO MARKETING AND SUPPLY COMPANY; SUNOCO CORPORATION; EQUILON ENTERPRISES, LLC, d/b/a SHELL OIL PRODUCTS COMPANY, LLC; MOTIVA ENTERPRISES, LLC; TESORO REFINING AND MARKETING COMPANY; SAM'S CLUB; LOVE'S TRAVEL STOP & COUNTRY STORES, INC.; G AND M OIL COMPANY, INC.; UNITED EL SEGUNDO, INC.; WORLD OIL CORPORATION; M.M. FOLWER, INC.; DANSK INVESTMENT GROUP, INC.; B-B OIL COMPANY, INC.; PORT CITIES OIL LLC; FLASH MARKET, INC; J&P FLASH, INC.; MAGNESS OIL COMPANY; COULSON OIL COMPANY, INC.; DIAMOND STATE OIL, LLC; EZ MART STORES, INC.; THORNTONS, INC.,

Defendants.

Appendix B

No. 15-3227

IN RE: MOTOR FUEL TEMPERATURE
SALES PRACTICE LITIGATION

ZACHARY WILSON; MATHEW COOK; BRENT DONALDSON; SAMANTHA BAYLARD; CRAIG MASSEY; RICHARD GALAUSKI; WILLIAM BOYD; LISA MCBRIDE; TAMARA MILLER; HEARTLAND LANDSCAPE GROUP LLC; TEAM TRUCKING; JAMES ANLIKER; DENNIS K. MANN; PHYLLIS LERNER; HERB GLASER; STEVEN RUBIN; MAX CANDIOTTY; FRED AGUIRRE; JAMES JARVAIS; MARA REDSTONE; RAPHAEL SAGALYN; J.C. WASH; JEAN W. NEESE; CECIL R. WILKINS; WAYNE BYRAM; GARY KOHUT; DEBRA BERG; TIA GOMEZ; SHONNA S. BUTLER; BEN DOZIER; MARK SCIVNER; BARBARA CUMBO; JAMES GRAHAM; KENNEDY G. KRAATZ; MELISSA D. MURRAY; MICHAEL A. WARNER; CLINTON J. DAVIS; STEVEN R. RUTHERFORD; LISA ANN LEE; BRENT CRAWFORD; DIXCEE MILLSAP; CARL RITTERHOUSE; SAMUEL ELY; VICTOR RUYBALID; HADLEY BOWER; KRISTY DEANN MOTT; CHARLES COCKRELL, JR.; WILLIAM RUTTHERFORD; JAN RUTHERFORD; MARK WYATT; DAWN LALOR; GERALD PANTO, JR.; EDGER PAZ; CHARLES D. JONES; MICHAEL GAUTHREAUX; JOANN KORLESKI; JEFF

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JENKINS; SARA TERRY; JACOB STEED; MARVIN BRYAN; JOHN TELLES; CHRISTOPHER PAYNE; SCOTT CAMPBELL; JONATHAN CHARLES CONLIN; PRISCILLA CRAFT; ROBERT HICKS; RICHARD PATRICK; JESSICA HONIGBERG; RAYSHAUN GLANTON; GARLAND WILLIAMS; ANNIE SMITH; BOBBY ROBERSON; SAM HOTCHKISS; ANNA LEGATES; ANDREA FRAYSER; MELVIN ELLISON; CECIL WILKINS; BETTY CHERRY; JOY HOWELL; ALLEN RAY KLEIN,

Plaintiffs - Appellees,

v.

CIRCLE K STORES, INC; PILOT TRAVEL CENTERS, LLC; KUM&GO, L.C.; QUICKTRIP CORPORATION; MURPHY OIL USA, INC.; RACE TRAC PETROLEUM, INC.; MARATHON PETROLEUM COMPANY, LLC; THE PANTRY, INC.; SPEEDWAY SUPERAMERICA, LLC; SHEETZ, INC.; WAWA, INC.; FLYING J INC.; 7-ELEVEN, INC.; PTCAA TEXAS, LP,

Defendants - Appellants,

CHEVRON USA, INC.; CASEY'S GENERAL STORE, INC.; SINCLAIR OIL CORPORATION; EXXON MOBIL CORPORATION; ESSO VIRGIN ISLANDS, INC.; MOBIL OIL GUAM, INC.; BP PRODUCTS NORTH AMERICA INC.,

Defendants - Appellees,

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and

BP CORPORATION NORTH AMERICA, INC.; CITGO PETROLEUM CORPORATION; CONOCO PHILLIPS COMPANY; VALERO MARKETING AND SUPPLY COMPANY; SUNOCO CORPORATION; EQUILON ENTERPRISES, LLC, d/b/a SHELL OIL PRODUCTS COMPANY, LLC; MOTIVA ENTERPRISES, LLC; TESORO REFINING AND MARKETING COMPANY; SAM'S CLUB; LOVE'S TRAVEL STOP & COUNTRY STORES, INC.; G AND M OIL COMPANY, INC.; UNITED EL SEGUNDO, INC.; WORLD OIL CORPORATION; M.M. FOLWER, INC.; DANSK INVESTMENT GROUP, INC.; B-B OIL COMPANY, INC.; PORT CITIES OIL LLC; FLASH MARKET, INC; J&P FLASH, INC.; MAGNESS OIL COMPANY; COULSON OIL COMPANY, INC.; DIAMOND STATE OIL, LLC; EZ MART STORES, INC.; THORNTONS, INC.,

Defendants.

No. 15-3228

IN RE: MOTOR FUEL TEMPERATURE SALES PRACTICES LITIGATION

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ZACHARY WILSON; MATHEW COOK; BRENT DONALDSON; SAMANTHA BAYLARD; CRAIG MASSEY; RICHARD GALAUSKI; WILLIAM BOYD; LISA MCBRIDE; TAMARA MILLER; HEARTLAND LANDSCAPE GROUP LLC; TEAM TRUCKING; JAMES ANLIKER; DENNIS K. MANN; PHYLLIS LERNER; HERB GLASER; STEVEN RUBIN; MAX CANDIOTTY; FRED AGUIRRE; JAMES JARVAIS; MARA REDSTONE; RAPHAEL SAGALYN; J.C. WASH; JEAN W. NEESE; CECIL R. WILKINS; WAYNE BYRAM; GARY KOHUT; DEBRA BERG; TIA GOMEZ; SHONNA S. BUTLER; BEN DOZIER; MARK SCIVNER; BARBARA CUMBO; JAMES GRAHAM; KENNEDY G. KRAATZ; MELISSA D. MURRAY; MICHAEL A. WARNER; CLINTON J. DAVIS; STEVEN R. RUTHERFORD; LISA ANN LEE; BRENT CRAWFORD; DIXCEE MILLSAP; CARL RITTERHOUSE; SAMUEL ELY; VICTOR RUYBALID; HADLEY BOWER; KRISTY DEANN MOTT; CHARLES COCKRELL, JR.; WILLIAM RUTTHERFORD; JAN RUTHERFORD; MARK WYATT; DAWN LALOR; GERALD PANTO, JR.; EDGER PAZ; CHARLES D. JONES; MICHAEL GAUTHREAUX; JOANN KORLESKI; JEFF JENKINS; SARA TERRY; JACOB STEED; MARVIN BRYAN; JOHN TELLES; CHRISTOPHER PAYNE; SCOTT CAMPBELL; JONATHAN CHARLES CONLIN; PRISCILLA CRAFT; ROBERT HICKS; RICHARD PATRICK; JESSICA HONIGBERG; RAYSHAUN GLANTON; GARLAND WILLIAMS; ANNIE SMITH; BOBBY ROBERSON; SAM HOTCHKISS; ANNA LEGATES; ANDREA

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FRAYSER; MELVIN ELLISON; CECIL WILKINS; BETTY CHERRY; JOY HOWELL; ALLEN RAY KLEIN,

Plaintiffs - Appellees,

v.

BP CORPORATION NORTH AMERICA, INC.; CITGO PETROLEUM CORPORATION; CONOCO PHILLIPS COMPANY; COSTCO WHOLESALE CORPORATION; EXXON MOBIL CORPORATION; SINCLAIR OIL CORPORATION; VALERO MARKETING AND SUPPLY COMPANY; SUNOCO CORPORATION; EQUILON ENTERPRISES, LLC., d/b/a SHELL OIL PRODUCTS COMPANY, LLC; MOTIVA ENTERPRISES, LLC; TESORO REFINING AND MARKETING COMPANY; SAM'S CLUB; LOVE'S TRAVEL STOP & COUNTRY STORES, INC.; G AND M OIL COMPANY, INC.; UNITED EL SEGUNDO, INC.; WORLD OIL CORPORATION; M.M. FOLWER, INC.; J&P FLASH, INC.; DANSK INVESTMENT GROUP, INC.; CIRCLE K STORES, INC; KUM&GO, L.C.; MURPHY OIL USA, INC.; MARATHON PETROLEUM COMPANY, LLC; FLYING J INC.; 7-ELEVEN, INC.; PTCAA TEXAS, LP; PILOT TRAVEL CENTERS, LLC; QUICKTRIP CORPORATION; RACE TRAC PETROLEUM, INC.; THE PANTRY, INC.; SPEEDWAY SUPERAMERICA, LLC; SHEETZ, INC.; WAWA, INC.; B-B OIL COMPANY, INC.; COULSON OIL

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COMPANY, INC.; PORT CITIES OIL LLC; FLASH MARKET, INC.; J&P FLASH, INC.; DIAMOND STATE OIL, LLC; MAGNESS OIL COMPANY; THORNTON'S, INC.,

Defendants,

and

CHEVRON USA, INC.; EZ MART STORES, INC.; CASEY'S GENERAL STORE, INC.,

Defendants-Appellees,

v.

MELISSA HOLYOAK; ADAM SCHULMAN; AMY ALKON; NICOLAS S. MARTIN; THEODORE H. FRANK,

Objectors - Appellants.

No. 15-3254

IN RE: MOTOR FUEL TEMPERATURE SALES PRACTICES LITIGATION

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ANNIE SMITH; CHRISTOPHER PAYNE; PHYLLIS LERNER; HERB GLAZER; MARA REDSTONE; BRENT CRAWFORD; VICTOR RUYBALD; ZACH WILSON; LISA MCBRIDE; RAPHAEL SAGALYN; BRENT DONALDSON; GARY KOHUT; RICHARD GAULAUSKI; CHARLES BYRAM; JEAN NEESE; SHONNA BUTLER; GERALD PANTO, JR.; JOANN KORLESKI; TAMARA MILLER; PRISCILLA CRAFT; JEFF JENKINS; JAMES GRAHAM,
Class Representatives,

Plaintiffs - Appellees,

v.

COSTCO WHOLESALE CORPORATION,

Defendant - Appellant,

and

BP PRODUCTS NORTH AMERICA INC.; BP WEST COAST PRODUCTS, LLC; CASEY'S GENERAL STORES, INC.; CITGO PETROLEUM CORPORATION; CONOCOPHILLIPS COMPANY; EQUILON ENTERPRISES LLC, d/b/a Shell Oil Products US; MOTIVA ENTERPRISES LLC; EXXON MOBIL CORPORATION; MOBIL OIL GUAM, INC.; ESSO VIRGIN ISLANDS, INC.; SAM'S EAST, INC.; SAM'S WEST, INC.; WAL-MART STORES, INC.; WAL-MART STORES EAST, LP; SINCLAIR OIL CORPORATION; VALERO MARKETING

AND SUPPLY COMPANY; CHEVRON U.S.A., INC.; SUNOCO, INC. (R&M); B-B OIL COMPANY, INC.; COULSON OIL COMPANY, INC.; DIAMOND STATE OIL, LLC; FLASH MARKET, INC.; J&P FLASH, INC.; MAGNESS OIL COMPANY; PORT CITIES OIL, LLC; E-Z MART STORES, INC.; LOVE'S TRAVEL STOP & COUNTRY STORES, INC.; WR HESS COMPANY; M.M. FOWLER, INC., d/b/a Family Fare; DANSK INVESTMENT GROUP, INC., f/k/a USA Petroleum Corporation; TESORO REFINING AND MARKETING COMPANY; THORNTONS, INC.; G&M OIL COMPANY, INC.; G&M OIL CO., LLC; UNITED EL SEGUNDO, INC.; WORLD OIL CORPORATION,

Defendants,

v.

SPEEDWAY LLC; 7-ELEVEN, INC.; CIRCLE K STORES, INC; KUM & GO, L.C.; MARATHON PETROLEUM COMPANY LP; MURPHY OIL USA, INC.; PILOT TRAVEL CENTERS, LLC; FLYING J INC.; PTCAA TEXAS, LP; RACETRAC PETROLEUM, INC.; QUIKTRIP CORPORATION; SHEETZ, INC.; THE PANTRY, INC.; WAWA, INC.,

Objectors.

September 21, 2017, Filed

Appendix B

ORDER

Before **LUCERO**, **PHILLIPS**, and **MORITZ**, Circuit Judges.

These matters are before the court on the *Petition for Panel Rehearing and Rehearing En Banc* filed by appellants Alkon, Frank, Holyoak, Martin, and Schulman in number 15-3228. Upon consideration, the panel grants in part, and only to the extent of the modifications contained in the attached revised Opinion, that part of the request seeking panel rehearing. The Opinion filed on August 23, 2017, is hereby withdrawn, and shall be replaced by the attached revised Opinion effective the date of this order. The Clerk is directed to file the attached revised Opinion forthwith.

That part of this *Petition* seeking rehearing en banc, as well as the *Petition for Rehearing En Banc* filed by the Speedway Objectors in numbers 15-3221 and 15-3327, remain pending.

Entered for the Court

/s/_____
ELISABETH A. SHUMAKER,
Clerk

Appendix B

Before **LUCERO**, **PHILLIPS**, and **MORITZ**, Circuit Judges.

MORITZ, Circuit Judge.

Consumers purchase gasoline by the gallon. But gas expands as it heats up. And that means the number of molecules—and, accordingly, the amount of energy—in a gallon of gas will vary based on the temperature at which it's dispensed. Yet retailers don't control for the effects of temperature when they sell gas to consumers. So consumers who purchase gas dispensed at higher temperatures may be getting less energy than they expect.

These simple laws of physics gave rise to complex litigation. Several individuals in multiple states (collectively, the plaintiffs) brought class action lawsuits against various fuel retailers (collectively, the defendants) based on the defendants' failure to control for, or at least disclose, the effects of temperature on fuel. In 2007, the Judicial Panel on Multidistrict Litigation consolidated these cases and designated the District of Kansas as the transferee district.

After years of legal wrangling, several of the parties entered into settlement agreements, which the district court ultimately approved. These appeals arise from (1) the district court's approval of those settlement agreements and (2) its interpretation of one of them. We consolidated the appeals for procedural purposes and now affirm.

Appendix B

Background

I. The Costco Settlement Agreement

The first defendant to settle was Costco Wholesale Corporation (Costco). Under Sections 4.2 and 4.3 of the Costco settlement agreement (the Costco Agreement), Costco agreed to convert pumps at its existing gas stations in certain states to Automatic Temperature Control (ATC) pumps, and to install ATC pumps at its new gas stations in certain states. And under Section 4.4, Costco agreed to a specific "[i]mplementation [p]eriod": it would "complete the conversion and installation of ATC set forth in sections 4.2 and 4.3 . . . within five years" at a certain yearly rate. Costco App. 178.

But these requirements weren't absolute. Section 4.7 of the Costco Agreement contains the following language:

> **Other Agreements**. If at any time prior to the completion of conversion and installation of ATC, Class Counsel and Class Representatives agree to enter into any agreement with any person or company to resolve any action or any other pending or threatened claim concerning ATC that is materially more favorable to that person or company than this Amended Settlement Agreement is to Costco (including, without limitation, calling for a lower conversion percentage, slower rate of conversion to ATC or for completion of conversion to ATC at a later date than required by Section 4.4), Class

> Counsel and Class Representatives agree to notify Costco promptly of the terms of such agreement. At Costco's sole discretion, it may adopt the materially more favorable terms in any such agreement in place of its obligations under Section 4.4. Costco agrees to notify Class Counsel and Class Representatives in writing of any such election. The Parties agree that any change in Costco's obligations under Section 4.4 as a result of any such election that is not a change that is materially adverse to the Settlement Class does not require additional notice to the class.

Id. at 180.

The district court approved the Costco Agreement on April 24, 2012. Nearly two years later, several of the plaintiffs agreed, via a "STIPULATION OF DISMISSAL WITH PREJUDICE" (the Stipulation), to dismiss their individual claims against several other defendants. App. vol. 16, 4538. And unlike the Costco Agreement, the Stipulation didn't require any of those other defendants to implement ATC at all, let alone to do so by a certain date and on a certain schedule. Understandably viewing this result as more favorable than the one it obtained, Costco filed notice of its intent to invoke its rights under Section 4.7. It then asked the district court to grant Costco leave to adopt the "terms" of the Stipulation and to dismiss the plaintiffs' claims against Costco with prejudice. Costco. App. 250.

The district court denied both requests. In doing so, it concluded that (1) Section 4.7 only applies to agreements that "concern the implementation of ATC"—e.g., agreements that "call[] for a lower conversion percentage, a slower rate of conversion to ATC[,] or completion of conversion to ATC at a later date than required by Section 4.4" of the Costco Agreement, *id.* at 255; and (2) because the Stipulation didn't require the dismissed defendants to implement ATC at all, it necessarily didn't "concern the implementation of ATC," *id.* at 254-55. Accordingly, the district court refused to let Costco adopt the "terms" in the Stipulation, *id.* at 250, or to dismiss the claims against Costco with prejudice.

II. The Remaining Settlement Agreements

In the meantime, the plaintiffs negotiated settlement agreements with 28 other defendants. For reasons we set forth in Discussion Section II, *infra*, only nine of those settlement agreements (plus the Costco Agreement) are at issue here: the plaintiffs' settlement agreements with defendants BP, Chevron, Citgo, ConocoPhillips, ExxonMobil, Shell, Sinclair, Sunoco, and Valero. These ten settlement agreements fall into two general categories, which we refer to as conversion settlements and fund settlements.

The Costco and Valero settlements are conversion settlements. Much like Costco, Valero agreed to convert existing pumps in certain states to ATC and to install ATC pumps at new stations in certain states.

Appendix B

The remaining settlement agreements are fund settlements. They require BP, Chevron, Citgo, ConocoPhillips, ExxonMobil, Shell, Sinclair, and Sunoco each to pay a certain sum—ranging from $61,000 to $5,000,000—into a common fund. Under the terms of the settlement agreements, portions of that fund may be used to (1) reimburse fuel retailers for expenses they incur if they convert to ATC; and (2) defray costs that state agencies incur if those states agree to permit or require ATC at resale. Neither the conversion settlements nor the fund settlements provide any money to class members.

As relevant here, two groups of objectors lodged objections to some or all of the relevant settlement agreements. We refer to the first group of objectors, comprising class members Amy Alkon, Nicolas Martin, Theodore H. Frank, Melissa Holyoak, and Adam Schulman, collectively as "Alkon." We refer to the second group of objectors, comprising non-settling defendants QuikTrip Corporation, 7-Eleven, Inc., Circle K Stores, Inc., Kum & Go, L.C., Marathon Petroleum Company LP, Murphy Oil USA, Inc., Pilot Travel Centers, LLC, Flying J, Inc., PTCAA Texas, LP, RaceTrac Petroleum, Inc., Sheetz, Inc., Speedway LLC, The Pantry, Inc., and Wawa, Inc., collectively as "Speedway."

Alkon objected to the settlement agreements on numerous grounds, arguing that (1) approval of the settlement agreements violates the First Amendment; (2) approval of the settlement agreements violates separation-of-powers principles; (3) ATC conversion harms some class members and confers no benefit on

others; (4) the settlement agreements afford preferential treatment to class counsel by paving the way for excessive attorney's fees; and (5) Fed. R. Civ. P. 23(b)(3)'s superiority requirement precludes class certification. Speedway advanced similar objections, arguing that approval of the settlement agreements (1) violates the First Amendment; (2) violates Article III of the United States Constitution; and (3) poses separation-of-powers problems. The district court addressed and rejected these objections and ultimately approved the settlement agreements.

Costco now appeals the district court's order refusing to allow it to exercise its rights under Section 4.7 of the Costco Agreement. Alkon and Speedway both appeal the district court's order approving the remaining settlement agreements, and Alkon additionally appeals the district court's order approving the Costco Agreement.

Discussion

I. Costco isn't entitled to invoke its rights under Section 4.7.

Costco asserts that the district court erred in refusing to allow it to exercise its rights under Section 4.7 of the Costco Agreement. Because this argument presents a question of contract interpretation, our review is de novo. *In re Universal Serv. Fund Tel. Billing Practice Litig.*, 619 F.3d 1188, 1211 (10th Cir. 2010).

In denying Costco's motion, the district court relied in part on the fact that Section 4.7 applies only if "Class

Counsel and Class Representatives agree to enter into any agreement with any person or company to resolve any action or any other pending or threatened claim *concerning ATC*." Costco App. 180 (emphasis added). Specifically, the district court concluded that the phrase "concerning ATC" modifies the term "agreement," and thus that only agreements "concerning ATC" can trigger Costco's rights under Section 4.7.

Costco argues this was error. Citing the last-antecedent rule, it maintains that the phrase "concerning ATC" modifies its nearest antecedents—i.e., "claim" and "action"—and not, as the district court found, the more remote term "agreement." *See Caughey v. Emp't Sec. Dep't*, 81 Wn.2d 597, 503 P.2d 460, 463 (Wash. 1972)[1] (explaining that "qualifying words and phrases" typically "refer to the last antecedent").

But as the plaintiffs correctly point out, the last-antecedent rule only operates if "no contrary intention appears" in the contract. *Id.* And here, the district court implicitly concluded that Section 4.7's parenthetical list of examples evinces just such a "contrary intention." *Id.*

We agree. By giving a parenthetical list of examples of agreements that concern ATC—i.e., agreements that "call[] for a lower conversion percentage, slower rate of conversion to ATC, or for completion of conversion to ATC at a later date"—rather than examples of "claims"

1. The Costco Agreement specifies that it "is intended to and shall be governed by the laws of the State of Washington." Costco App. 134.

or "actions" concerning ATC, Costco App. 180, Section 4.7 expresses an "intention" that is "contrary" to the general rule that "qualifying words and phrases refer to the last antecedent," *Caughey*, 503 P.2d at 463. Specifically, Section 4.7's parenthetical list indicates that rather than modifying its nearest antecedents, the phrase "concerning ATC" instead modifies the term "agreement." Costco App. 180.

Costco resists this conclusion. It points out that Section 4.7's parenthetical list of examples is preceded by the phrase "including, without limitation." *Id.* Thus, Costco concludes, the district court erred in using Section 4.7's parenthetical list of specific examples to limit the general phrase "any agreement" to agreements that are similar to those in Section 4.7's parenthetical list—i.e., agreements that concern ATC.[2] *Id.*

In support, Costco cites *United States v. West*, 671 F.3d 1195 (10th Cir. 2012). There, we acknowledged that the principle of ejusdem generis "[o]rdinarily . . . limits

2. In its reply brief, Costco advances a different, albeit related, argument: it asserts that the district court erred in relying on Section 4.7's parenthetical list of examples because "allowing a 'parenthetical to drive the interpretation of the whole provision' would impermissibly permit the 'tail to wag the dog.'" Costco Rep. Br. 9 (quoting *Cabell Huntington Hosp., Inc. v. Shalala*, 101 F.3d 984, 990 (4th Cir. 1996)). Because Costco didn't advance this argument in its opening brief, we decline to consider it. *See Reedy v. Werholtz*, 660 F.3d 1270, 1274 (10th Cir. 2011) ("[A] party waives issues and arguments raised for the first time in a reply brief." (quoting *M.D. Mark, Inc. v. Kerr-McGee Corp.*, 565 F.3d 753, 768 n.7 (10th Cir. 2009))).

general terms which follow specific ones to matters similar to those specified." *Id.* at 1200 (alterations in original) (quoting *Gooch v. United States*, 297 U.S. 124, 128, 56 S. Ct. 395, 80 L. Ed. 522 (1936)). But we declined to apply that interpretive canon to the statute at issue in *West*, in part because Congress prefaced that statute's list of examples with the phrase "including, but not limited to." *Id.* at 1200 (emphasis omitted) (quoting 21 U.S.C. § 860(e)(1)); *see also id.* at 1201-02.

Much like the statute at issue in *West*, Section 4.7 prefaces its list of examples with the phrase "including, without limitation." Costco App. 180; *see* 671 F.3d at 1200. But unlike our task in *West*—which was to discern "Congress' intent in enacting" the relevant statute, 671 F.3d at 1200—our task here is to determine how the Supreme Court of Washington would interpret Section 4.7, *cf. Valley Forge Ins. Co. v. Health Care Mgmt. Partners, Ltd.*, 616 F.3d 1086, 1093 (10th Cir. 2010) ("[O]ur task in diversity cases is to predict how the state supreme court would rule."). And that court recently applied ejusdem generis to a statutory list despite the presence of a similar introductory phrase. *See State v. Larson*, 184 Wn.2d 843, 365 P.3d 740 (Wash. 2015).

In *Larson*, the court examined a statute that prohibited, in relevant part, the "possession of an item, article, implement, or device designed to overcome security systems *including, but not limited to*, lined bags or tag removers." *Id.* at 741 (emphasis added) (quoting Wash. Rev. Code § 9A.56.360(1)(b)). The court agreed with the State that "[t]he statutory language 'including, but not

limited to'" indicated that "lined bags and tag removers" were "illustrative examples rather than an exhaustive list." *Id.* at 743 (quoting § 9A.56.360(1)(b)). But "contrary to the State's assertions," the court also concluded that those "illustrative examples were intended to limit the scope of the statute" to similar items. *Id.* (emphasis omitted). And in reaching that conclusion, the court applied the limiting canon of ejusdem generis. *See id.*

Under *Larson*, we conclude that Section 4.7's use of the phrase "including, without limitation" indicates that agreements "calling for a lower conversion percentage, slower rate of conversion to ATC, or for completion of conversion to ATC at a later date," Costco App. 180, are "illustrative examples" of the types of agreements that will trigger Section 4.7, "rather than an exhaustive list" of the agreements that will do so, 365 P.3d at 743. But, under *Larson*, we likewise conclude that Section 4.7's list of "illustrative examples" nevertheless demonstrates an "inten[t] to limit the scope of" Section 4.7 to agreements that are "similar" to those examples. 365 P.3d at 743. And, under *Larson*, we reach that conclusion despite the fact that Section 4.7 prefaces its list of illustrative examples with the phrase "including, without limitation."[3] Costco App. 180; *see Larson*, 365 P.3d at 743.

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3. As Costco points out, "courts have historically employed the principle of *ejusdem generis* to limit general terms following specific terms." *West*, 671 F.3d at 1200 (emphasis omitted). But Washington applies the canon more broadly. *See Larson*, 365 P.3d at 743 (applying ejusdem generis where list of specific terms followed more general ones); *Sw. Wash. Chapter, Nat. Elec. Contractors Ass'n v. Pierce Cty.*, 100 Wn.2d 109, 667 P.2d 1092, 1096 (Wash. 1983) (explaining that

Alternatively, even assuming that ejusdem generis applies, Costco argues that "the most general quality shared by Section 4.7's [examples] is . . . that they all minimize or eliminate Costco's obligations under the settlement," not that they all concern the implementation of ATC. Costco Rep. Br. 11. And because the Stipulation—if Costco were allowed to adopt it—would share this general quality, Costco asserts that the Stipulation triggered Costco's rights under Section 4.7.

We find this argument foreclosed by Section 4.7's plain language, which only allows Costco to "adopt the materially more favorable terms in any . . . agreement in place of its obligations *under Section 4.4*." Costco App. 180 (emphasis added). Section 4.4 requires Costco to "complete the conversion and installation of ATC set forth in sections 4.2 and 4.3 above within five years of the Effective Date in accordance with the following schedule." *Id.* at 178. Sections 4.4.1 through 4.4.5 then set out the schedule under which Costco must implement ATC. In comparison, Section 4.2 states that Costco will convert pumps at existing stations to ATC. And Section 4.3 states that Costco will install ATC pumps at any new stations.

By specifying that Costco may only replace its obligations under Section 4.4— rather than its obligations

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ejusdem generis applies to "pattern such as '[specific], [specific], or [general]' *or* '[general], including [specific] and [specific]'" (alterations in original) (emphasis added)). Accordingly, the fact that Section 4.7's parenthetical list of specific examples follows the general term "any agreement," Costco. App. 180, rather than vice versa, doesn't alter our analysis.

under Sections 4.2 and 4.3—Section 4.7 operates to allow Costco to adopt from other agreements only those more favorable terms that govern *how quickly and thoroughly* it must implement ATC under Section 4.4, not to substitute more favorable terms governing whether or not it must implement ATC *at all* under Sections 4.2 and 4.3.

Costco disagrees with this analysis. It insists that Section 4.7 allows it to replace not only its "obligations under Section 4.4, but also those listed in Sections 4.2 and 4.3." Costco Aplt. Br. 34. In support, it points out that Sections 4.2, 4.3, and 4.4 are all explicitly "subject to" one another and to Section 4.7. *Id.* at 35 (quoting Costco App. 177-78).

The plaintiffs argue that Costco forfeited this argument by failing to raise it before the district court. In response, Costco's reply brief directs our attention to a single sentence in its briefing below. There, Costco pointed out that Sections 4.2 and 4.3 "expressly provide that Costco's obligation to install ATC is '[s]ubject to the other provisions in this Agreement,'" including Section 4.7. Costco App. 220 (alternation in original) (quoting Costco App. 177).

But even assuming we could characterize this single sentence as "argument," Costco "failed to identify in its *opening* brief where it raised this argument before the district court." *Harolds Stores, Inc. v. Dillard Dep't Stores, Inc.*, 82 F.3d 1533, 1540 n.3 (10th Cir. 1996) (emphasis added) (declining to consider appellant's argument where appellant failed to provide record citation in opening brief

establishing it raised argument below); *see also* 10th Cir. R. 28.2(C)(2) ("For each issue raised on appeal, all briefs must cite the precise reference in the record where the issue was raised and ruled on.").

Moreover, on appeal, Costco doesn't merely argue that Sections 4.2 and 4.3 are subject to Section 4.7, as it (at least cursorily) suggested below. Instead, Costco argues on appeal that Sections 4.2, 4.3, and 4.4 are all subject to *each other*, and that all three sections are therefore "interdependent" and "stand or fall together." Costco Aplt. Br. 35. Because the plaintiffs are correct that Costco (1) didn't raise this specific argument below and (2) doesn't attempt to establish plain error on appeal, we decline to consider this argument. *See Schrock v. Wyeth, Inc.*, 727 F.3d 1273, 1284 (10th Cir. 2013) (explaining that forfeiture rule applies to new theory presented on appeal, even if that theory falls under same general category as argument presented below); *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1131 (10th Cir. 2011) (noting that failure to argue for plain error on appeal "surely marks the end of the road" for forfeited argument).

Further, we reject the suggestion Costco did make below—i.e., that simply because Sections 4.2 and 4.3 are "[s]ubject to" Section 4.7 means that Costco can replace its obligations under Sections 4.2 and 4.3, as opposed to its obligations under Section 4.4, with more favorable terms. Costco App. 177. First, if this were the case, the parties would have had no reason to specifically refer to Section 4.4 in Section 4.7; Section 4.4 is, like Sections 4.2 and 4.3, also "[s]ubject to" Section 4.7. Costco App. 178. Second,

when viewed together, Section 4.7's list of representative examples—e.g., "calling for a lower conversion percentage, slower rate of conversion to ATC, or for completion of conversion to ATC at a later date than required by Section 4.4"—and its explicit language allowing Costco to "adopt . . . materially more favorable terms . . . *in place of its obligations under Section 4.4*," Costco App. 180 (emphasis added), make clear that Section 4.7 is only triggered by agreements that contain more favorable terms concerning *how* to implement ATC under Section 4.4, not *whether* to implement ATC under Section 4.2 and 4.3.

Costco again disagrees. It insists that Section 4.7's examples are actually consistent with applying Section 4.7 to agreements that, like the Stipulation, don't require *any* ATC implementation. "For example," Costco argues, "'a lower conversion percentage' is consistent with the [S]tipulation's terms requiring a zero 'conversion percentage.'" Costco Aplt. Br. 36 (quoting Costco App. 180). Likewise, "a 'slower rate of conversion to ATC' is consistent with the [S]tipulation's terms requiring no 'rate of conversion to ATC.'" *Id.* (quoting Costco App. 180). And finally, "'completion of conversion to ATC at a later date' is consistent with the [S]tipulation's terms requiring no 'completion of conversion to ATC' at any date." *Id.* (quoting Costco App. 180).

We reject this argument. First, contrary to Costco's characterization, the Stipulation doesn't actually contain any such express "terms." *Id.* It simply states that the individual defendants "are dismissed with prejudice from the separate civil actions." App. Vol. 16, 4538.

Second, even if we were inclined to treat such "terms," Costco Aplt. Br. 36, as implicit in the Stipulation, the fact remains that Washington law requires us to "impute [to the parties] an intention corresponding to the reasonable meaning of the words [they] used" in drafting the Costco Agreement. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 115 P.3d 262, 267 (Wash. 2005); *see id.* ("We generally give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent."). And rather than giving the words in Section 4.7's examples their "reasonable," "ordinary," and "popular" meanings, *id.*, Costco's argument gives them tortured and unnatural ones. We don't ordinarily say a car is "moving zero miles per hour"; we say it isn't moving. We don't typically say a car is "accelerating at a rate of zero miles per hour"; we say it isn't accelerating. And we certainly don't say that a car that's never coming will "arrive at a later date"; we simply say it will never arrive. Thus, Section 4.7's examples don't support Costco's position.

Costco advances one final argument on appeal. It asserts that the district court's conclusion that Section 4.7 only applies to agreements that concern *how* to implement ATC, as opposed to *whether* to do so, undermines Section 4.7's purpose. In support, Costco points out that district court's interpretation would allow Costco to assert its rights under Section 4.7 in response to a later agreement that contains materially more favorable terms—"but only if such terms are not *too* 'materially more favorable.'" Costco Aplt. Br. 33. In other words, while Costco could adopt later settlement terms that require a *slower*

conversion to ATC, it couldn't adopt later settlement terms that would require *no* conversion to ATC. *Id.* And according to Costco, this result is contrary to "the parties' intent." *Id.* at 34.

But as the plaintiffs point out, this argument asks the panel to look beyond the plain language of Section 4.7 to the parties' subjective intent in drafting that agreement. And under Washington law, "the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used." *Hearst*, 115 P.3d at 267. Here, we can determine the parties' intent "from the actual words [they] used." *Id.* Specifically, we can determine their intent from (1) Section 4.7's language indicating that Section 4.7 only applies to agreements "concerning ATC," Costco App. 180; (2) Section 4.7's parenthetical list of examples, which all describe how a party must implement ATC, as opposed to whether it must do so; and (3) Section 4.7's repeated references to Section 4.4, which likewise details how Costco must implement ATC, as opposed to Sections 4.2 and 4.3, which instead explain whether it must do so. Taken together, these three aspects of Section 4.7 demonstrate that the parties never intended to allow Costco to replace its obligations regarding *whether* to implement ATC under Sections 4.2 and 4.3 with more favorable terms. Instead, they only intended to allow Costco to replace its obligations regarding *how* to implement ATC under Section 4.4 with such terms. And because that intent is evident from "the actual words [the parties] used" in Section 4.7, we decline to look beyond those words to the parties' subjective intent. *Hearst*, 115 P.3d at 267. Accordingly, we affirm the

district court's order denying Costco's motion to invoke its rights under Section 4.7.

II. The district court didn't abuse its discretion in approving the settlement agreements.

Both Speedway and Alkon appeal the district court's order approving the remaining 28 settlement agreements. And Alkon additionally appeals the district court's order approving the Costco Agreement. But before we may consider the merits of their challenges, we must first determine whether Speedway and Alkon have standing to advance them.

A. Although Speedway lacks standing to object to any of the settlement agreements, Alkon has standing to challenge 10 of them.

Speedway asserts that it objected to all of the settlement agreements except the Costco agreement. But the district court concluded that Speedway failed to demonstrate it had Article III standing to challenge any of them. Speedway challenges this ruling on appeal, arguing that (1) it has standing under the plain-legal-prejudice doctrine; (2) it has standing under *Bond v. United States*, 564 U.S. 211, 131 S. Ct. 2355, 180 L. Ed. 2d 269 (2011); and (3) it has standing to challenge eight of the settlement agreements as a member of the underlying settlement classes.

"The doctrine of standing is 'an essential and unchanging part of the case-or-controversy requirement

of Article III . . . .'" *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 663, 113 S. Ct. 2297, 124 L. Ed. 2d 586 (1993) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). To establish standing, a party must demonstrate (among other things) an "injury in fact," *id.* (quoting *Lujan*, 504 U.S. at 560)—i.e., "an invasion of a legally protected interest," *id.*

Non-settling defendants like Speedway "generally have no standing to complain about a settlement." *Weinman v. Fid. Capital Appreciation Fund* (*In re Integra Realty Res., Inc.*), 262 F.3d 1089, 1102 (10th Cir. 2001) (quoting *Transamerican Ref. Corp. v. Dravo Corp.*, 952 F.2d 898, 900 (5th Cir. 1992)). That's because they lack "a legally protected interest in the settlement" and therefore can't satisfy Article III's injury-in-fact requirement. *Id.* But as Speedway points out, "[c]ourts have recognized a limited exception to this rule where nonsettling parties can demonstrate they are 'prejudiced' by a settlement." *Id.* "'[P]rejudice' in this context means 'plain legal prejudice,' as when 'the settlement strips the party of a legal claim or cause of action.'" *Id.* (alteration in original) (quoting *Mayfield v. Barr*, 985 F.2d 1090, 1093, 300 U.S. App. D.C. 31 (D.C. Cir. 1993)).

Here, Speedway asserts it qualifies for this exception because (1) "the settlements prejudice [its] legal right to conduct business as [it has] historically done and as currently authorized by law," Spdwy. Aplt. Br. 48; and (2) the settlements burden its speech. But as the plaintiffs suggest, these alleged injuries don't rise to the level

of plain legal prejudice as we have defined it.[4] *See New England Health Care Emps. Pension Fund v. Woodruff*, 512 F.3d 1283, 1288 (10th Cir. 2008) (explaining that plain legal prejudice "include[s] any interference with a party's contract rights or a party's ability to seek contribution or indemnification," and that "[a] party also suffers plain legal prejudice if the settlement strips the party of a legal claim or cause of action, such as a cross[-]claim or the right to present relevant evidence at trial" (quoting *Weinman*, 262 F.3d at 1102-03)). Thus, we agree with the district court that Speedway lacks standing to object to any of the settlements on this basis.

Alternatively, Speedway cites *Bond*, 564 U.S. 211, 131 S. Ct. 2355, 180 L. Ed. 2d 269, for the proposition that "when a federal branch [of government] acts in excess of its delegated power[s]," then individuals who are "adversely affected . . . have standing to object." Spdwy. Aplt. Br. 52. Because Speedway alleges that (1) the district court acted in excess of its delegated powers by approving the settlements, and (2) the settlements adversely affect

4. Perhaps realizing as much, Speedway argues for the first time in its reply brief that the settlement agreements "risk depriving [it] of the defenses asserted in this litigation." Spdwy. Rep. Br. 20. But Speedway conceded below that the settlement agreements didn't "place[]" Speedway "at a 'tactical' disadvantage in the underlying litigation." App. vol. 20, 5510. And in any event, Speedway didn't raise this argument in its opening brief. Accordingly, we deem the argument waived and decline to consider it. *See Reedy v. Werholtz*, 660 F.3d 1270, 1274 (10th Cir. 2011) ("[T]he general rule in this circuit is that a party waives issues and arguments raised for the first time in a reply brief." (quoting *M.D. Mark, Inc. v. Kerr-McGee Corp.*, 565 F.3d 753, 768 n. 7 (10th Cir. 2009))).

Speedway, it argues that it has standing to object to the settlements under *Bond*.

First, we question whether Speedway adequately preserved this argument for appeal; below, Speedway confined its analysis of *Bond* to a one-paragraph footnote. *Cf. United States v. Hardman*, 297 F.3d 1116, 1131 (10th Cir. 2002) ("Arguments raised in a perfunctory manner, such as in a footnote, are waived."). Perhaps that explains why the district court didn't address it. And perhaps we need not address it either. *See Singleton v. Wulff*, 428 U.S. 106, 120, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."); *Salt Lake Tribune Publ'g Co. v. Mgmt. Planning, Inc.*, 454 F.3d 1128, 1142 (10th Cir. 2006) (declining to address issue that district court didn't rule on, even though parties fully briefed it below).

In any event, even if we assume Speedway preserved this argument for appeal, it conflates Article III standing, which is at issue here, with prudential standing, which was at issue in *Bond*. *See Sac & Fox Nation of Mo. v. Pierce*, 213 F.3d 566, 573 (10th Cir. 2000) (distinguishing between Article III standing and prudential standing and explaining that, under latter doctrine, "a plaintiff generally must assert its own rights, rather than those belonging to third parties").

In *Bond*, there was no question that the defendant had Article III standing to challenge the criminal statute at issue; her conviction under that statute resulted in

her incarceration, and her incarceration "constitute[d] a concrete injury" that was "redressable by invalidation of the conviction." 564 U.S. at 217 (quoting *Spencer v. Kemna*, 523 U.S. 1, 7, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998)). Instead, the question in *Bond* was whether the defendant had *prudential* standing to challenge the statute on certain grounds. Citing the Tenth Amendment, *id.* at 214, she attempted to challenge the statute on the basis that it "interfere[d] with the powers reserved to States," *id.* at 216; *see id.* at 217, 220, 225.

Citing "the prudential rule that a party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties,'" Court-appointed amicus insisted this argument was one that the "States and States alone" could make. *Id.* at 220 (quoting *Warth v. Seldin*, 422 U.S. 490, 499, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)). The Court disagreed, reasoning that "[t]he limitations . . . federalism entails are not . . . a matter of rights belonging only to the States"; rather, "[f]ederalism also protects the liberty of all persons within a State." *Id.* at 222. Accordingly, the Court held that there was "no basis in precedent or principle to deny [the defendant's] standing to raise her claims." *Id.* at 226.

But in doing so, the Court reiterated that "[a]n individual who challenges federal action on these grounds is, of course, subject to the Article III requirements." *Id.* at 225. And it's those very "Article III requirements" that pose a problem for Speedway here. *Id.* As discussed above, "[n]on-settling defendants generally have no [Article III]

standing to complain about a settlement," *Weinman*, 262 F.3d at 1102 (quoting *Transamerican Ref. Corp.*, 952 F.2d at 900), because they lack "a legally protected interest in the settlement" and therefore can't satisfy Article III's injury-in-fact requirement, *id.* And while there exists an exception to this general rule for parties that can demonstrate plain legal prejudice, *see id.*, Speedway fails to satisfy that exception for the reasons discussed above.

Finally, even assuming it lacks standing to challenge all of the settlement agreements as a non-settling defendant, Speedway asserts that it nevertheless has class-member standing to challenge eight of those settlement agreements: Valero, Chevron, CITGO, Sinclair, Shell, ConocoPhillips, BP, and Exxon. *See Tennille v. W. Union Co.*, 785 F.3d 422, 429 (10th Cir. 2015) (noting that objectors had standing because they were class members).

The district court rejected Speedway's class-member argument below. In doing so, it pointed out that the court's Notice to Class Members outlined the following requirements for objecting to the settlements: "To object, you must send a letter via first class mail stating which Settlement(s) you object to and why. Be sure to include your name, address, telephone number and signature. You must mail the objection to [the Clerk of the Court, class counsel and defense counsel] no later than March 23, 2015." App. vol. 27, 7522 (quoting App. vol. 27, 7547).

On March 23, 2015, Speedway filed its initial objection. But according to the district court's order, that objection "did not identify which settlement agreements [Speedway]

objected to *based on class membership*." App. vol. 27, 7523 (emphasis added). Instead, it merely asserted that (1) "[*s*]*ome* of the Objectors are members of the settlement classes as defined in *some* of the . . . Settlements and have standing to object to *those* settlements for that reason as well," App. vol. 20, 5513 (emphases added), and (2) because "*some* of objectors' employees . . . bought retail fuel while on business trips for which they were reimbursed by their respective companies . . . , they are members of *these* settlement classes," *id.* at 5514 (emphases added). And while Speedway appended a declaration to its objection in which a Marathon employee attests to purchasing gas while on official business, the district court noted that the declaration doesn't "identify from which retailers [the employee] purchased fuel." App. vol. 27, 7523.

Based on these perceived deficiencies in Speedway's objection, the district court ruled that Speedway "did not timely identify who was objecting based on class membership and to which settlements they objected." *Id.* Thus, it concluded, Speedway's "objections based on class membership [were] untimely and not properly before the [c]ourt." *Id.* at 7524.

On appeal, Speedway challenges the district court's ruling, arguing that "[c]lass membership need not be supported with evidence at the time an objection is filed." Spdwy. Aplt. Br. 47. But Speedway's argument misconstrues the district court's ruling. The district court didn't find Speedway's objection deficient because Speedway failed to prove class membership, as Speedway alleges. Instead, the district court found Speedway's

objection deficient because Speedway failed to "timely identify who was objecting based on class membership and to which settlements they objected." App. vol. 27, 7523. In other words, the district court didn't require Speedway to *prove* membership in any particular class; it merely required Speedway to specifically *allege* (1) the class or classes of which it was a member, and (2) the settlements it was objecting to on that basis. And it found that Speedway failed to timely do so.

In short, the district court concluded that Speedway's "objections based on class membership" weren't "properly before the [c]ourt" because Speedway failed to comply with the district court's notice requirements. *Id.* at 7524. And Speedway makes no attempt in its opening brief to argue that such a decision was beyond the bounds of the district court's discretion.[5] *See In re Deepwater Horizon*, 739 F.3d 790, 808-09 (5th Cir. 2014) (concluding that "district court plainly acted within its discretion" in declining to consider objections where objectors failed to timely comply with requirements of court's "Preliminary Approval Order"). Under these circumstances, we won't disturb the district court's ruling that Speedway's objections weren't properly before it. *See Reedy*, 660 F.3d at 1274 (declining to address propriety of district court's ruling because appellant failed to "challenge the court's *reasoning* on th[at] point" (emphasis added)). Accordingly, we decline to consider Speedway's objections to the settlement agreements.

5. Speedway does attempt to address this issue in its reply brief, arguing for the first time that it did, in fact, "[c]ompl[y] with" the district court's notice requirements. Spdwy. Rep. Br. 17. But arguments raised for the first time in a reply brief are waived. *See Reedy*, 660 F.3d at 1274.

That leaves Alkon. The plaintiffs don't dispute that Alkon is indeed a member of 10 of the settlement classes: Costco, BP, Chevron, Citgo, ConocoPhillips, ExxonMobil, Shell, Sinclair, Sunoco, and Valero. Accordingly, Alkon has standing to challenge those 10 settlement agreements. *See Tennille*, 785 F.3d at 429 (noting that objectors had standing because they were class members).

But Alkon doesn't assert it has standing to challenge the remaining 19 settlement agreements, and has therefore waived any argument that it does. *See Colo. Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537, 544 (10th Cir. 2016). Accordingly, we confine our remaining analysis to Alkon's challenges to the 10 settlement agreements listed above.[6] In doing so, we "review the [district] court's approval of the settlement agreement[s] for an abuse of discretion." *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1186 (10th Cir. 2002) (quoting *United States v. Hardage*, 982 F.2d 1491, 1495 (10th Cir. 1993)). To the extent that several of Alkon's arguments present constitutional questions, our review is de novo. *See Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1199 (10th Cir. 2000).

6. In evaluating Alkon's arguments, we consider those portions of Speedway's opening brief that Alkon adopts by reference. *See* Fed. R. App. P. 28(i) ("In a case involving more than one appellant or appellee, including consolidated cases, . . . any party may adopt by reference a part of another's brief.").

B. The district court's approval of the fund settlements doesn't violate the First Amendment.

The fund settlements set aside money for state regulators to defray the costs associated with enacting and implementing new regulatory programs for conversion to ATC. Alkon argues this aspect of the agreements requires absent class members to subsidize the plaintiffs' lobbying efforts aimed at obtaining regulatory approval for ATC. And according to Alkon, this amounts to the "compelled funding of speech" in violation of the First Amendment. Spdwy. Aplt. Br. 37; *see* Alk. Aplt. Br. 45.

But as the plaintiffs point out, the First Amendment only limits state—as opposed to private—action. *Dominion Video Satellite, Inc. v. Echostar Satellite L.L.C.*, 430 F.3d 1269, 1276 (10th Cir. 2005). And the plaintiffs insist that neither the district court's approval nor its potential enforcement of these private settlement agreements constitutes state action for purposes of the First Amendment. *Cf. Davis v. Prudential Sec., Inc.*, 59 F.3d 1186, 1192 (11th Cir. 1995) ("[T]he mere confirmation of a private arbitration award by a district court is insufficient state action to trigger the application of the Due Process Clause.").

Citing *Shelley v. Kraemer*, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948), Alkon disagrees. In *Shelley*, the Court held that a state court's enforcement of private covenants designed to prevent people of color from purchasing real estate constituted state action for purposes of the Equal

Protection Clause. 334 U.S. at 18-20. Under *Shelley*, Alkon argues, "[t]he judicial imprimatur of the approval orders . . . demonstrate[s]" that the settlement agreements at issue here "are more than merely private contracts." Alk. Aplt. Br. 38.

But as the plaintiffs note, courts have uniformly declined to extend *Shelley* beyond cases involving discrimination. *See, e.g., Everett v. Paul Davis Restoration, Inc.*, 771 F.3d 380, 386 n.1 (7th Cir. 2014) ("However, *Shelley*'s holding has never been applied outside the context of race discrimination."); *Naoko Ohno v. Yuko Yasuma*, 723 F.3d 984, 998 (9th Cir. 2013) (noting that "*Shelley*'s attribution of state action to judicial enforcement has generally been confined to the context of discrimination claims under the Equal Protection Clause"); *Davis*, 59 F.3d at 1191 ("The holding of *Shelley*, however, has not been extended beyond the context of race discrimination."); *United Egg Producers v. Standard Brands, Inc.*, 44 F.3d 940, 943 (11th Cir. 1995) ("[T]he reach of *Shelley* remains undefined outside of the racial discrimination context.").

Alkon doesn't suggest that the settlement agreements implicate the Equal Protection Clause. Nor does it cite any cases extending *Shelley* outside of that context or present a reasoned argument why we should do so here.[7] Accordingly, we conclude that the district court's

7. In its reply brief, Alkon argues, "[The p]laintiffs' response that the settlements are purely private arrangements devoid of any state action has no persuasive force as applied to the millions of absent class members compelled to donate funds to support a controversial political cause." Alk. Rep. Br. 25. But Alkon

approval of the settlement agreements doesn't constitute state action. And absent any state action, Alkon's First Amendment argument fails. *See Dominion Video Satellite, Inc.*, 430 F.3d at 1276.

C. The district court's approval of the settlement agreements doesn't violate Article III.

Next, Alkon asserts that the settlement agreements violate Article III and separation of power principles for various reasons. Before we address the merits of some of these arguments, we first explain why we decline to address the merits of others.

First, for the reasons discussed below, we decline to address Alkon's assertion that the district court lacked Article III authority to approve the settlement agreements because (1) those settlement agreements don't actually redress the plaintiffs' alleged injuries; (2) whether the settlement agreements will actually provide any redress for the plaintiffs' alleged injuries is contingent upon the actions of third-party actors, e.g., state legislatures; and (3) the settlement agreements aim to change the law, rather than to redress an injury caused by a violation of existing law.

We agree with Alkon that, to establish Article III standing, "a litigant must have suffered some actual injury that can be redressed by a favorable judicial decision."

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provides neither argument nor authority to support this assertion. Accordingly, we decline to consider it. *Cf. Hardman*, 297 F.3d at 1131 ("Arguments raised in a perfunctory manner . . . are waived.").

Iron Arrow Honor Soc'y v. Heckler, 464 U.S. 67, 70, 104 S. Ct. 373, 78 L. Ed. 2d 58 (1983). The problem is that Alkon makes no effort to explain how Article III's redressability requirement operates in the context of a settlement agreement. Alkon appears to be suggesting that when the parties to a settlement agreement ultimately agree to a remedy that doesn't actually and fully redress a plaintiff's alleged injury, that factor somehow operates to retroactively dissolve the plaintiff's Article III standing to bring—and thus a federal court's jurisdiction to hear— that plaintiff's claims in the first place. But we know of no authority that would support this argument. And Alkon cites none. Accordingly, we find this argument inadequately briefed and decline to consider it. *See* Fed. R. App. P. 28(a)(8)(A) (requiring argument section of appellant's brief to contain "contentions and the reasons for them, with citations to the authorities . . . on which the appellant relies"); *Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007) ("[W]e routinely have declined to consider arguments that are . . . inadequately presented[] in an appellant's opening brief.").

Likewise, we decline to consider Alkon's assertion that the conversion settlement agreements constitute advisory opinions and therefore run afoul of Article III. *See Fialka-Feldman v. Oakland Univ. Bd. of Trs.*, 639 F.3d 711, 715 (6th Cir. 2011) ("The 'case or controversy' requirement prohibits all advisory opinions . . . ."). Here, the Valero and Costco settlement agreements contain releases enjoining class members from suing based on "actions taken by [Valero and Costco] that are authorized or required by" the agreements. Alk. Aplt. Br. 31. Alkon alleges that if the

"plaintiffs tried to bring a lawsuit against Costco today contending that its gasoline sales practices in 2017 will violate consumer law, the complaint would be dismissed as unripe." *Id.* at 35. Yet "just because [the plaintiffs] changed the cover sheet to say 'Proposed Settlement' rather than 'Complaint,'" Alkon laments, the parties were able to "induce[] the district court to issue an advisory opinion that no class member may proceed against Costco's and Valero's future practices." *Id.* But again, Alkon doesn't cite any authority suggesting that a district court's approval of a private settlement agreement containing a future-conduct release constitutes an advisory opinion. And again, its failure to do so waives this argument.

Finally, we decline to consider Alkon's related argument that the future-conduct releases in the conversion-settlement agreements purport to release claims that aren't "based on the identical factual predicate as that underlying the claims in the settled class action." *TBK Partners, Ltd. v. W. Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982). Here, the underlying claims against Costco and Valero are based on Costco and Valero's *failure* to use ATC. Yet the settlement agreements purport to release future claims against Costco and Valero for *using* ATC, as the settlements require them to do. And Alkon makes a convincing argument that using ATC and not using ATC aren't identical factual predicates; rather, they're opposite ones.

But despite its obligation to do so, Alkon doesn't provide a record citation establishing that it raised this identical-factual-predicate argument below. *See* 10th Cir.

R. 28.2(C)(2); *Harolds Stores, Inc*, 82 F.3d at 1541 n.3. And our independent review of the record suggests it didn't. Moreover, Alkon fails to argue for plain error on appeal. And that "surely marks the end of the road for" this argument on appeal. *Richison*, 634 F.3d at 1131.

Turning next to the arguments that Alkon has adequately preserved and briefed, it first argues that the district court abused its discretion in approving both the fund and conversion settlement agreements because (1) regulators and policymakers have long debated requiring or authorizing ATC at retail but have ultimately "chosen not to," Spdwy. Aplt. Br. 28; (2) selling gas by the gallon is lawful; (3) deciding whether to use ATC is a policy decision best left to the legislature; (4) the district court made an impermissible policy judgment about ATC when it found that class members would derive some benefit from the settlements to the extent that the settlements will increase the odds of conversion to ATC; (5) what the plaintiffs actually seek here is a change in the existing law, which is a political remedy, not a judicial one; and (6) the district court lacked authority to provide that political remedy under Article III.

But as the district court reasoned, the settlements don't actually change the law. True, the fund settlement agreements remove one disincentive to implementing ATC by offering funds to reimburse state regulators for costs incurred as a result of conversion. But the district court didn't order states to require, or even allow, conversion to ATC; that decision remains in the hands of state lawmakers—a fact that Alkon concedes (and in fact relies

on) in arguing that the plaintiffs can't satisfy Article III's redressability requirement. Thus, contrary to Alkon's argument, the district court didn't usurp the legislature's role by "altering the method of sale cooperatively established by Congress and the States," Spdwy. Aplt. Br. at 30; instead, policy decisions about whether to allow or require ATC remain with state policy makers.

Second, Alkon says a court can't "approve a class settlement based on an unanchored belief that the settlement would further the public interest." *Id.* at 31. In support, it cites *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997). But even assuming that *Amchem* supports this general assertion, the district court in this case didn't approve the settlements based on "an unanchored belief that the settlement would further the public interest," Spdwy. Aplt. Br. 31; it made a finding that the settlements would benefit the class members.

Third, Alkon argues that in approving the settlements, the district court violated the Rules Enabling Act. *See* 28 U.S.C. § 2072(b) (explaining that Federal Rules "shall not abridge, enlarge or modify any substantive right"). In support, Alkon cites *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011). There, the district court ruled that a settlement agreement ran afoul of the Rules Enabling Act because it "attempt[ed] to use the class action mechanism to implement forward-looking business arrangements that [went] far beyond the dispute before the [c]ourt in th[at particular] litigation." *Id.* at 677.

But as the plaintiffs point out, at least two of our sister circuits have since concluded that the Rules Enabling Act has no application in this context. *See Marshall v. Nat'l Football League*, 787 F.3d 502, 511 n.4 (8th Cir. 2015) (concluding that district court's approval of settlement agreement "is not a 'substantive adjudication of the underlying causes of action,' and therefore . . . does not implicate the Rules Enabling Act") (quoting *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 173 n.8 (3d Cir. 2013)), *cert. denied*, 136 S. Ct. 1166, 194 L. Ed. 2d 177 (2016); *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 313 (3d Cir. 2011) ("In the absence of a finding that plaintiffs are actually entitled to relief under substantive state law, we reiterate that a court does not 'abridge, enlarge, or modify any substantive right' by approving a voluntarily-entered class settlement agreement." (quoting § 2072(b))); *cf. Whitlock v. FSL Mgmt., LLC*, 843 F.3d 1084, 1092-93 (6th Cir. 2016). We find these authorities persuasive. Accordingly, we reject this argument.

D. Attorney's fees don't render the district court's approval of the settlement agreements an abuse of discretion.

A district court may approve a settlement agreement "after a hearing and on finding that it is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). We review a district court's approval of a settlement agreement under Rule 23(e)(2) for an abuse of discretion. But we review any factual findings for clear error. *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1186-87 (10th Cir. 2002).

This court has "noted four factors to be considered in assessing whether a proposed settlement is fair, reasonable and adequate," *id.* at 1188:

> (1) whether the proposed settlement was fairly and honestly negotiated;
>
> (2) whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt;
>
> (3) whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation; and
>
> (4) the judgment of the parties that the settlement is fair and reasonable.

Id. (quoting *Gottlieb v. Wiles*, 11 F.3d 1004, 1014 (10th Cir. 1993), *abrogated on other grounds by Devlin v. Scardelletti*, 536 U.S. 1, 122 S. Ct. 2005, 153 L. Ed. 2d 27 (2002)).

Here, Alkon argues that an additional factor rendered the district court's approval of the settlement agreements an abuse of discretion. Alkon points out that the settlement agreements contemplate awarding millions of dollars in attorney's fees and argues that this aspect of the settlement agreements makes class counsel—rather than class members—the primary beneficiaries of those

agreements.[8] According to Alkon, Rule 23(e) simply doesn't permit such a result.[9]

We agree with Alkon that class action settlements pose obvious conflict-of-interest problems. "The defendant cares only about the size of the settlement, not how it is divided between attorneys' fees and compensation for the class. From the selfish standpoint of class counsel and the defendant, therefore, the optimal settlement is one modest in overall amount but heavily tilted toward attorneys' fees." *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014). Thus, class counsel may be tempted "to sell out the class by agreeing with the defendant to recommend that the judge approve a settlement involving a meager recovery for the class but generous compensation for the lawyers." *Id.*

Alkon suggests that's what happened here. In support, it advances three general arguments: (1) the agreements don't benefit the class; (2) even assuming

8. Alkon doesn't challenge the district court's ultimate award of attorney's fees. Instead, it argues only that the amount of attorney's fees that the settlement agreements permitted class counsel to request is so high as to render the district court's approval of those agreements an abuse of discretion.

9. Alkon asserts that any refusal to consider this aspect of the settlement agreements in determining whether the district court abused its discretion would create a circuit split. But for purposes of this case, we need not affirmatively resolve this issue; even assuming that we must incorporate this factor into our analysis, we conclude that under the facts of this case, the district court didn't abuse its discretion in approving the settlement agreements.

the agreements benefit the class, they provide the same benefit to the general public; and (3) even assuming the agreements provide unique benefits to the class, the primary beneficiaries of the agreements are class counsel, who stand to receive millions of dollars in attorney's fees.

In challenging the district court's conclusion that the settlement agreements benefit the class, Alkon first argues that the district court's conclusion that the settlements benefit the class members is based on clearly erroneous factual findings. Specifically, Alkon asserts the district court clearly erred in finding that "retailers [who convert to ATC] would not raise prices to reflect increases in marginal costs because of competition." Alk. Aplt. Br. 24.

We're not convinced that the district court ever made such an unequivocal finding. To the contrary, the court explicitly recognized the possibility that retailers might pass the additional expenses associated with conversion along to their customers, and concluded not that competition would necessarily prevent retailers from raising prices altogether, but simply that competition would impact whether retailers raised their prices "and if so by how much." App. vol. 27, 7513.

Moreover, in approving the plaintiffs' settlement agreements with BP, Chevron, Citgo, ConocoPhillips, ExxonMobil, Shell, Sinclair, Sunoco, and Valero, the district court incorporated by reference its earlier analysis in approving the Costco Agreement. And there, the district court again (1) explicitly acknowledged the

possibility that retailers might raise prices in response to conversion; (2) concluded it was impossible to determine with any certainty the prices that retailers might charge for gas in the future; and (3) reasoned that, *even assuming* the price of fuel might rise slightly as a result of conversion, class members would still benefit simply from "knowing that they can get accuracy and consistency of fuel measurement for their fuel dollar, regardless of fuel temperature at the time of pumping." R. vol. 11, 3146. In other words, the district court didn't necessarily find that retailers wouldn't raise fuel prices; it concluded that even assuming fuel prices might rise slightly, conversion to ATC would still benefit class members. Thus, we conclude that the district court didn't make a clearly erroneous fact finding, let alone rely on that finding to the objectors' detriment.

Next, in a related argument, Alkon asserts the district court "independently erred in refusing to consider" (1) the report of its expert witness, David Henderson; and (2) evidence supporting Alkon's cross-subsidization theory. Alk. Aplt. Br. 25. That theory posits that "any temperature differentials in volumetric gasoline sales simply mean[] that customers purchasing at above-average temperatures [are] cross-subsidizing customers purchasing at below-average temperatures without any additional profit to the retailers," and that while converting ATC will "end the cross-subsidization," doing so will only benefit the former at the expense of the latter, "without any net benefit to the class as a whole." *Id.* at 10-11.

But Alkon fails to provide a citation to the record demonstrating that the district court "refus[ed] to consider" either the Henderson report or Alkon's cross-subsidization theory. *Id.* at 25. To the contrary, the district court explicitly acknowledged the Henderson report in approving the Costco settlement and then explained why it found it unnecessary to resolve whether, as the Henderson report suggests, ATC conversion will increase consumer fuel costs. And in approving the remaining settlement agreements, the district court incorporated this analysis by reference. The fact that the district court ultimately found the Henderson report irrelevant doesn't establish that the district court "refus[ed] to consider" that report, as Alkon alleges. *Id.*

Similarly, while the district court didn't explicitly address Alkon's cross-subsidization theory, Alkon doesn't provide a record citation that suggests the district court "refus[ed] to consider" it. *Id.* And in any event, Costco's cross-subsidization theory simply posits that the class as a whole won't reap any economic benefit from ATC conversion. Because the district court took that possibility into account and explained why it declined to find the potential lack of any economic benefit dispositive in determining whether the settlement agreements benefited the class, any error in the district court's failure to consider Alkon's cross-subsidization theory was harmless.

Next, even assuming the settlement agreements benefit the class, Alkon argues those benefits aren't unique to the class members. After all, it points out, non-members will receive the same supposed benefits from

ATC conversion. And unlike class members, non-members won't have to release their claims in order to obtain those benefits. Thus, Alkon asserts, the agreements actually leave class members worse off than non-members.

We reject this argument for two reasons. First, the district court found that the plaintiffs' "overall prospects of ultimately prevailing in litigation" were slim. App. vol. 27, 7502. In other words, class members didn't give up much by releasing their claims. So even assuming that class members are now worse off than non-class members, any difference is marginal. Second, and more importantly, Alkon cites no authority for the proposition that a district court abuses its discretion in approving a settlement agreement unless the agreement benefits class members more than it benefits non-members. Here, the class members gave up their claims—claims the district court said were unlikely to succeed—in exchange for an informational benefit. While non-class members might receive the same benefit, this isn't a zero-sum game where that fact somehow detracts from the informational benefit that class members might receive. Likewise, the fact that class members may be marginally worse off than non-class members doesn't change the fact that class members will still be better off than they were before the settlement. Under these circumstances, the district court didn't abuse its discretion.

Finally, even assuming that class members will receive some marginal informational benefit from the settlement agreement, Alkon argues that class counsel remain the primary beneficiaries of the settlement agreements. And

according to Alkon, that makes the settlement agreements unreasonable.

Under the Costco Agreement, Costco agreed to pay attorney's fees in whatever amount the court awarded. Under the Valero Agreement, Valero agreed to pay $4,000,000 in attorney's fees. Finally, under the remaining eight settlement agreements that Alkon has standing to challenge, the defendants agreed not to oppose attorney's fees and litigation costs of up to 30% of the settlement amounts. The following list illustrates that percentage for each of the remaining relevant settlement agreements:

BP:	$1,500,000
CITGO:	$270,000
ConocoPhillips:	$1,500,000
ExxonMobil:	$1,500,000
Shell:	$1,500,000
Sinclair:	$240,000
Chevron:	$637,500
Sunoco:	$18,300

In total, that means the defendants agreed not to object to attorney's fees up to $11,165,800, plus any amount the court awarded for the Costco Agreement.

Alkon argues that this amount is "grossly disproportionate" to any benefit the class members might receive from the settlement agreements. Alk. Aplt. Br. 27.

But in making this argument, Alkon puts the attorney's fees on one side of the ledger and the potential *economic* benefits to the class on the other—benefits that Alkon says will amount to, at most, one cent per consumer per year.

While this comparison makes for compelling imagery, it also mischaracterizes the district court's decision. The district court didn't base its approval of the settlement agreements on a finding that they might provide class members with an economic benefit. In fact, it readily acknowledged that (1) it's impossible to accurately predict ATC's potential impact on future fuel prices and (2) there exists a possibility that consumers will actually pay slightly *more* for gas under ATC. Instead, the district court found that the settlement agreements provide class members with an informational benefit: "accuracy and consistency of fuel measurement for their fuel dollar." R. vol. 27, 7500; *see also id.* at 7502. To the extent that Alkon attempts to reduce the question before us to one of simple arithmetic, its arguments are unpersuasive.

So too is its citation to *In re Dry Max Pampers Litigation*, 724 F.3d 713 (6th Cir. 2013). There, a divided panel of the Sixth Circuit concluded that the district court abused its discretion in approving a settlement agreement under which the class members received meaningless injunctive relief, while class counsel raked in $2.73 million—much less than defendants agreed to pay in attorney's fees here. *Id.* at 721. But class counsel in *In re Dry Max Pampers Litigation* apparently also did much less work: counsel didn't "take a single deposition, serve a single request for written discovery, or even file

a response to [defendant's] motion to dismiss." *Id.* at 718. Alkon doesn't suggest that's the case here, and a mere glance at the district court's docket—which contains almost 5,000 entries spanning more than nine years—confirms otherwise.

More importantly, the district court's order approving the settlement agreement in *In re Dry Max Pampers Litigation* failed to address any of the objector's objections. *Id.* at 717. When a district court "is required to make a discretionary ruling that is subject to appellate review, we have to satisfy ourselves, before we can conclude that the judge did not abuse his discretion, that he exercised his discretion, that is, that he considered the factors relevant to that exercise." *New England Health Care Emps. Pension Fund v. Woodruff*, 512 F.3d 1283, 1290 (10th Cir. 2008) (quoting *United States v. Cunningham*, 429 F.3d 673, 679 (7th Cir. 2005)). While that was impossible to do in *In re Dry Max Pampers Litigation*, it's not impossible to do here; the district court provided thorough, well-reasoned responses to each objection—including, critically, Alkon's arguments that the settlement agreements (1) don't benefit class members; and (2) allow excessive attorney's fees. Because we are therefore confident that the district court in this case "considered the factors relevant" to its exercise of discretion, *Woodruff*, 512 F.3d at 1290 (quoting *Cunningham*, 429 F.3d at 679), we owe its exercise of that discretion great deference, *see Jones v. Nuclear Pharmacy, Inc.*, 741 F.2d 322, 324 (10th Cir. 1984) ("The authority to approve a settlement of a class or derivative action is committed to the sound discretion of the trial court."). We therefore decline to rely on the Sixth Circuit's opinion in *In re Dry Max Pampers Litigation*.

We likewise decline to rely on *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014), which Alkon also cites. There, the Seventh Circuit held that the district court abused its discretion in approving a settlement agreement that set aside approximately $2 million for class counsel fees and attorney expenses and only $865,284 for the 30,245 class members, concluding that the settlement amounted to "a selfish deal between class counsel and the defendant" that "disserve[d] the class." 772 F.3d at 780-81, 787. In reaching that conclusion, the Seventh Circuit suggested that the "presumption should . . . be that attorneys' fees awarded to class counsel should not exceed a third or at most a half of the total amount of money going to class members and their counsel." *Id.* at 782.

We disagree. As the Sixth Circuit has explained, "[c]onsumer class actions . . . have value to society more broadly, both as deterrents to unlawful behavior—particularly when the individual injuries are too small to justify the time and expense of litigation—and as private law enforcement regimes that free public sector resources." *Gascho v. Glob. Fitness Holdings, LLC*, 822 F.3d 269, 287 (6th Cir. 2016), *cert. denied sub nom. Blackman v. Gascho*, 137 S. Ct. 1065, 197 L. Ed. 2d 176, 2017 WL 670215 (2017), *and sub nom. Zik v. Gascho*, 137 S. Ct. 1065, 197 L. Ed. 2d 176, 2017 WL 670216 (2017). "If we are to encourage these positive societal effects, class counsel must be adequately compensated—even when significant compensation to class members is out of reach (such as when contact information is unavailable, or when individual claims are very small)." *Id.* And "[a]n inflexible, categorical rule," such as the one the Seventh

Circuit espoused in *Pearson*, "neglects these additional considerations." *Id.*

In short, Alkon doesn't cite a single case in which this court has disturbed a district court's order approving a settlement agreement. And our research yields only one: *Woodruff*, 512 F.3d 1283. But in *Woodruff*, as in *Pearson*, the district court failed to provide "any independent reasoning or analysis" to support its decision to approve the settlement agreement. *Id.* at 1290. That's not the case here. And while we may not agree with the decision the district court ultimately reached, we cannot say that decision is an abuse of discretion.

E. The district court didn't abuse its discretion in certifying the class.

Finally, Alkon asserts that because the district court found it "infeasible to distribute damages to class members if the litigation were successful," the district court erred in finding certification appropriate under Fed. R. Civ. P. 23(b)(3). Alk. Aplt. Br. 43; *see* Fed. R. Civ. P. 23(b)(3) (requiring, in relevant part, finding that class action is "superior to other available methods for fairly and efficiently adjudicating the controversy"). The district court rejected this argument, concluding that (1) the settlements "provide value and benefit to class members"; and (2) Alkon failed to establish that class members could feasibly pursue individual claims given the cost of maintaining separate actions. App. vol. 27, 7508.

"The decision to grant or deny certification of a class belongs within the discretion of the trial court. We will not interfere with that discretion unless it is abused." *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1287 (10th Cir. 1999) (quoting *Reed v. Bowen*, 849 F.2d 1307, 1309 (10th Cir. 1988)).

Here, Alkon appears to suggest that a district court necessarily abuses its discretion by certifying a class when a class action "can provide no compensatory value to class members." Alk. Aplt. Br. 43-44. But none of the cases that Alkon cites establish such a bright line rule. At best, one of them establishes that a district court *may* deny certification on similar grounds—not that a district court *must* to do. *See Quinn v. Nationwide Ins. Co.*, 281 F. App'x 771, 778 (10th Cir. 2008) (unpublished) (concluding that district court didn't abuse its discretion in refusing to certify class under Rule 23(b)(3) where "class action proposed by plaintiffs would be difficult to manage and would not be more efficient than having the claims of individual class members resolved independently"). The other cases Alkon cites are distinguishable on factual and legal grounds. *See In re Aqua Dots Prod. Liab. Litig.*, 654 F.3d 748, 752 (7th Cir. 2011) (acknowledging that district court erred in "departing from the text of Rule 23(b)(3)" in refusing to certify class, but nevertheless affirming district court's ultimate decision not to certify class under Rule 23(a)(4)); *In re Hotel Tel. Charges*, 500 F.2d 86, 89, 90-91 (9th Cir. 1974) (concluding that class action wasn't superior method of adjudication under Rule 23(b)(3) where any monetary benefit to class members would have been "entirely consumed by the costs of notice

alone," but never addressing whether non-monetary benefits to class members might satisfy Rule 23(b)(3)).

Here, the district court found that "in light of the limited size of any potential financial recovery for any particular class member and the possibility of inconsistent results, a class action [was] a far superior method of resolving the claims compared to individual suits." App. vol. 27, 7498-99. And again, even assuming we might disagree with the district court on this point, Alkon fails to establish that the district court's decision is so unreasonable as to constitute an abuse of discretion. *See Queen v. TA Operating, LLC*, 734 F.3d 1081, 1086 (10th Cir. 2013) (explaining that district court abuses its discretion only if "it makes a clear error of judgment, exceeds the bounds of permissible choice, or when its decision is arbitrary, capricious or whimsical, or results in a manifestly unreasonable judgment" (quoting *Eastman v. Union Pac. R. Co.*, 493 F.3d 1151, 1156 (10th Cir. 2007))).

Conclusion

The settlement agreements at issue here are unusual. But the decision to approve them rests with the sound discretion of the district court. Under the unique facts of this case, we can't say the district court abused that discretion. Accordingly, we affirm the district court's approval of the 10 settlement agreements that Alkon has demonstrated standing to challenge. We likewise affirm the district court's order refusing to allow Costco to adopt the terms of the Stipulation under Section 4.7 of the Costco Agreement.

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS, FILED SEPTEMBER 22, 2015, EXHIBITS OMITTED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MDL No: 1840
No: 07-md-1840-KHV

IN RE: MOTOR FUEL TEMPERATURE
SALES PRACTICES LITIGATION

(This Document Relates to Case Nos.:

2:07-cv-2492; 2:07-cv-2355; 2:07-cv-2366; 2:07-cv-2518; 2:07-cv-2405; 2:07-cv-2300; 2:07-cv-2369; 2:07-cv-2507; 2:07-cv-2350; 2:07-cv-2375; 2:07-cv-2389; 2:07-cv-2510; 2:07-cv-2398; 2:07-cv-2053; 2:06-cv-2582; 2:07-cv-2294; 2:07-cv-2483; 2:07-cv-2374; 2:07-cv-2361; 2:07-cv-2280; 2:07-cv-2371; 2:07-cv-2293; 2:07-cv-2345; 2:07-cv-2358; 2:07-cv-2430; 2:07-cv-2298; 2:07-cv-2289; 2:07-cv-2378; 2:07-cv-2504; 2:07-cv-2531; 2:07-cv-2359; 2:07-cv-2296; 2:07-cv-2416; 2:07-cv-2397; 2:07-cv-2360; 2:07-cv-2508; 2:07-cv-2399; 2:08-cv-2517)

JUDGMENT IN A CIVIL ACTION

WHEREAS on January 3, 2011, Plaintiffs entered into an Amended Settlement Agreement with Costco Wholesale Corporation;

WHEREAS prior to August 21, 2015, Plaintiffs entered into twenty-eight class action settlement agreements with BP Products North America Inc., BP West Coast Products LLC, Casey's General Stores, Inc., CITGO Petroleum Corporation, ConocoPhillips Company, Equilon Enterprises LLC d/b/a Shell Oil Products US, Motiva Enterprises LLC, ExxonMobil Corporation, Mobil Oil Guam, Inc., Esso Virgin Islands, Inc., Sam's East, Inc., Sam's West, Inc., Wal-Mart Stores, Inc., Wal-Mart Stores East, LP, Sinclair Oil Corporation, Valero Marketing and Supply Company, Chevron U.S.A. Inc., Sunoco Inc. (R&M), B-B Oil Company, Inc., Coulson Oil Company, Inc., Diamond State Oil, LLC, Flash Market, Inc., J&P Flash, Inc., Magness Oil Company, Port Cities Oil, LLC, E-Z Mart Stores, Inc., Love's Travel Stops & Country Stores, Inc., W.R. Hess Company, M.M. Fowler, Inc. d/b/a Family Fare, Dansk Investment Group (formerly known as USA Petroleum Corporation), Tesoro Refining and Marketing Company, Thorntons Inc., G&M Oil Company, Inc., G&M Oil Co., LLC, United El Segundo, Inc., and World Oil Corp.;

WHEREAS the settlement agreements, including the agreement with Costco, relate to and include, but are not limited to, all remaining class claims against the settling defendants in thirty-eight (38) actions in this multidistrict litigation as set forth on Exhibit A hereto;

WHEREAS on April 24, 2012, the Court granted final approval to the Amended Settlement Agreement between Plaintiffs and Costco in all respects except with respect to issues regarding attorney's fees and expenses under

the Amended Settlement Agreement, see Memorandum And Order (Doc. #4248);

WHEREAS on August 21, 2015, the Court granted final approval to the twenty-eight settlements in all respects except with respect to issues regarding attorney's fees and expenses under the settlements, see Memorandum And Order (Doc. #4851);

IT IS HEREBY ORDERED AND ADJUDGED THAT:

This Court has personal jurisdiction over the settling defendants and all members of the settlement classes in the thirty-eight actions set forth on Exhibit A, and jurisdiction to approve the settlement agreements at issue in the Court's April 24, 2012 and August 21, 2015 orders.

The settling defendants in the thirty-eight actions set forth on Exhibit A have served upon the appropriate state official of each State where the various actions originated, and the appropriate federal official, a notice of proposed settlement that complies with the Class Action Fairness Act, 28 U.S.C. § 1715 *et seq.*

The Court hereby approves the release language set forth in the settlement agreements at issue in the Court's April 24, 2012 and August 21, 2015 orders.

The members of the settlement classes, and anyone acting on their behalf, are hereby enjoined from asserting, or attempting to assert, any of the claims released by the terms of the settlement agreements at issue in the Court's April 24, 2012 and August 21, 2015 orders.

Appendix C

All remaining class claims against the settling defendants in the thirty-eight actions set forth on Exhibit A hereto are hereby dismissed, upon the effective date of each settlement. Such dismissal shall be with prejudice and without costs.

The class members who timely excluded themselves from the settlements, previously filed with the Court at Document Nos. 3774-1, 3774-2, 3774-3, 3774-4, 3774-5, and 4835-10, pp. 89-91, are set forth on Exhibit B hereto. Per the Court's April 24, 2012 order, the following class members have also excluded themselves from the Amended Settlement Agreement with Costco: Alcedo Ramon, Lillian Holladay and Robert Severson.

The Court will retain jurisdiction to decide outstanding issues regarding attorney's fees and expenses under the settlements.

The Court also hereby reserves its exclusive, general and continuing jurisdiction over the parties to the settlements as needed or appropriate in order to administer, supervise, implement, interpret or enforce the settlement agreements in accordance with their terms.

Dated this 22nd day of September, 2015 at Kansas City, Kansas.

s/Kathryn H. Vratil
Kathryn H. Vratil
United States District Judge

[EXHIBITS INTENTIONALLY OMITTED]

APPENDIX D — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS, FILED AUGUST 21, 2015, EXHIBITS OMITTED

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MDL No. 1840; Case No. 07-MD-1840-KHV

IN RE: MOTOR FUEL TEMPERATURE SALES PRACTICES LITIGATION.

(This Document Relates to All Cases)

August 21, 2015, Decided
August 21, 2015, Filed

MEMORANDUM AND ORDER

The Court has conditionally certified and preliminarily approved 28 settlements between plaintiffs and various defendants.[1] On June 9, 2015, the Court held a hearing

1. *See In re Motor Fuel Temp. Sales Practices Litig.*, 286 F.R.D. 488 (D. Kan. Sept. 28, 2012) (Dansk); *In re Motor Fuel Temp. Sales Practices Litig.*, No. 07-1840-KHV, 2012 WL 5876558 (D. Kan. Nov. 20, 2012) (Casey's, Sam's, BP, CITGO, ConocoPhillips, Shell, Sinclair); *In re Motor Fuel Temp. Sales Practices Litig.*, No. 07-1840-KHV, 2012 WL 6115085 (D. Kan. Dec. 10, 2012) (ExxonMobil, Valero); *In re Motor Fuel Temp. Sales Practices Litig.*, No. 07-1840-KHV, 2012 WL 5431133 (D. Kan. Oct. 27, 2014) (B-B Oil, Chevron, Coulson Oil, Diamond State, Flash Market, G & M Oil, J&P Flash, M.M. Fowler, Magness Oil, Port Cities, Thorntons, United El Segundo, W.R. Hess, World Oil); *Memorandum And Order* (Doc. #4786) filed December 10, 2014 (E-Z Mart, Love's, Sunoco, Tesoro).

regarding final settlement approval. This matter comes before the Court on *Plaintiffs' Motion And Memorandum In Support Of Final Approval Of Class Action Settlements* (Doc. #4834) filed June 8, 2015. For reasons stated below, the Court sustains plaintiffs' motion.

I. Legal Standards

A. Class Certification

Class certification is committed to the broad discretion of the trial court. *See Shook v. El Paso Cnty.*, 386 F.3d 963, 967 (10th Cir. 2004). In determining the propriety of a class action, the question is not whether plaintiffs have stated a cause of action or will prevail on the merits, but whether they meet the requirements of Rule 23, Fed. R. Civ. P. *See id.* at 971 (quoting *Anderson v. City of Albuquerque*, 690 F.2d 796, 799 (10th Cir. 1982)). In deciding whether the proposed class meets the requirements of Rule 23, though it need not blindly rely on conclusory allegations, the Court accepts plaintiffs' substantive allegations as true. *Id.* at 968 (quoting *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1290 n.7 (10th Cir. 1999)); *see also Vallario v. Vandehey*, 554 F.3d 1259, 1265 (10th Cir. 2009). The Court must conduct a "rigorous analysis" to ensure that Rule 23 requirements are met, but should not pass judgment on the merits of the case. *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1194 (10th Cir. 2010).

As the parties seeking class certification, plaintiffs have the burden to prove that Rule 23 requirements are

satisfied. *Shook*, 386 F.3d at 968; D. Kan. Rule 23.1(d).[2] Plaintiffs must first satisfy the prerequisites of Rule 23(a). To do so, they must demonstrate that (1) the class is so numerous that joinder of all members is impracticable, (2) questions of law or fact are common to the class, (3) the claims of the representative parties are typical of the claims of the class and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a).[3] After meeting these requirements,

---

2. D. Kan. Rule 23.1(d) states in part as follows:

> (d) Burden of Proof; Notice. Any party seeking to maintain a case as a class action bears the burden of presenting an evidentiary basis to the court showing that the action is properly maintainable as such.

D. Kan. Rule 23.1(d).

3. Rule 23(a) states as follows:

> (a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

plaintiffs must demonstrate that the proposed class action fits within one of the categories described in Rule 23(b), Fed. R. Civ. P.[4]

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4. Rule 23(b) states as follows:

> (b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:
>
> (1) prosecuting separate actions by or against individual class members would create a risk of:
>
> (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
>
> (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;
>
> (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

Here, plaintiffs seek to proceed under Rule 23(b)(3). Under that provision, plaintiffs must show that "questions of law or fact common to the members of the class predominate over any questions affecting individual members" and that a class action "is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). In determining predominance and superiority under Rule 23(b)(3), the Court considers the following:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b).

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

Id. In deciding whether to certify a settlement class, the Court need not inquire whether the case would present difficult management problems under Rule 23(b)(3)(D), if tried. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). All of the other requirements apply, however, and demand heightened attention in the settlement context. *Id.* Such scrutiny is vital because in the settlement context, the Court generally lacks an opportunity to adjust the class as it becomes informed by the proceedings as they unfold. *Id.*

B. Settlement Fairness

Under Rule 23(e), claims of a certified class may be settled, compromised or dismissed only with court approval. Fed. R. Civ. P. 23(e).[5] The Court may approve

5. Rule 23(e) states as follows:

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

a settlement upon finding that it is fair, reasonable and adequate. *See* Fed. R. Civ. P. 23(e)(2). In evaluating a proposed settlement, the Court's main concern is to ensure that the rights of passive class members are not jeopardized. *See* 7B Charles Alan Wright, et al., *Federal Practice & Procedure* § 1797. 1, at 79 (3d ed. 2005); *see also Amchem Prods.*, 521 U.S. at 623 (Rule 23(e) inquiry protects unnamed class members from unjust or unfair settlements when representatives become fainthearted before action adjudicated or secure satisfaction of individual claims by compromise). It is generally accepted that when examining the fairness of the proposed settlement before class certification, district courts must be "even more scrupulous than usual." *In re Warfarin*

> (2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.
>
> (3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.
>
> (4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.
>
> (5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

Fed. R. Civ. P. 23(e).

Sodium Antitrust Litig., 391 F.3d 516, 534 (3d Cir. 2004); *accord Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998); *see also* Manual for Complex Litigation, Fourth § 21.612, at 313 (2004).

In determining whether the settlement is fair, reasonable and adequate, the Court should consider the following factors:

(1) whether the proposed settlement was fairly and honestly negotiated;

(2) whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt;

(3) whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation; and

(4) the judgment of the parties that the settlement is fair and reasonable.

Rutter & Wilbanks Corp. v. Shell Oil Co., 314 F.3d 1180, 1188 (10th Cir. 2002); *Jones v. Nuclear Pharmacy, Inc.*, 741 F.2d 322, 324 (10th Cir. 1984). The proponents of the settlement must provide sufficient evidence to support a conclusion that the settlement is fair. *See Gottlieb v. Wiles*, 11 F.3d 1004, 1015 (10th Cir. 1993), *overruled in part on other grounds, Devlin v. Scardelletti*, 536 U.S. 1 (2002); *In re Sprint Corp. ERISA Litig.*, 443 F. Supp.2d 1249, 1256 (D. Kan. 2006).

Appendix D

II. Procedural And Factual Background

On June 18, 2007, the Judicial Panel on Multidistrict Litigation ("MDL Panel") designated this Court as the transferee court for federal cases challenging sales practices of motor fuel retailers and refiners with regard to motor fuel temperature. The cases challenge defendants' practice of selling motor fuel by the gallon without disclosing or adjusting for temperature and without disclosing the effect of temperature on motor fuel in 26 states (Alabama, Arizona, Arkansas, California, Delaware, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nevada, New Jersey, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah and Virginia), the District of Columbia, Puerto Rico and Guam. *Second Consolidated Amended Complaint* (Doc. # 652) filed December 1, 2008 ¶ 11. With respect to all pending cases, the Court has completed consolidated discovery. In addition, the Court has ruled on numerous dispositive and key evidentiary and legal matters. For an overview of the Court's rulings, see *Suggestion Of Remand And Final MDL Pretrial Order for Remanded Cases* (Doc. #4671) filed November 15, 2013 at 13-23.

A. Costco Settlement

In April of 2009, plaintiffs agreed to settle class claims against Costco Wholesale Corporation, a defendant in 19 of the MDL cases. *See In re Motor Fuel Temp. Sales Prac. Litig.*, 271 F.R.D. 263, 270-71 (D. Kan. 2010). Under the proposed settlement, in 14 states in which it purchased

fuel on a temperature-adjusted basis, Costco agreed over the next five years to convert its existing motor fuel dispensers to automatic temperature compensation ("ATC") dispensers and install ATC dispensers at any new retail stations. In addition, in seven states in which it purchased fuel on a non-temperature-adjusted basis, Costco agreed to convert its motor fuel dispensers to ATC dispensers if it began to purchase motor fuel on a temperature-adjusted basis.[6] On August 13, 2009, the Court conditionally certified the proposed settlement class and granted preliminary approval of the settlement. *Id.* at 272.

Following a hearing on April 1, 2010, the Court declined final class certification and final settlement approval. It found that the structure of the proposed settlement did not assure that the named representatives operated

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6. The original Costco settlement agreement proposed the following settlement class:

> All residents of [Alabama, Arizona, Arkansas, California, Delaware, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nevada, New Jersey, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, the District of Columbia and Guam] who, between January 1, 2001 and [April 22, 2009], purchased motor fuel from Costco at a temperature above 60 degrees Fahrenheit, excluding (a) officers and employees of Costco or its affiliates; and (b) the Court, and members of the Court's immediate family.

In re Motor Fuel, 271 F.R.D. at 271.

under a proper understanding of their representational responsibilities to distinct subgroups and that plaintiffs had not shown that a representative from one state could adequately represent the interests of class members who resided in different states. *Id.* at 281-84. The Court concluded that plaintiffs had not shown that the named representatives were adequate representatives under Rule 23(a)(4), Fed. R. Civ. P., but that the parties could restructure the agreement to try to remedy the problem.[7] *Id.*

On January 3, 2011, plaintiffs and Costco entered into an amended settlement agreement. *See* Exhibit A to Doc. #1769. The terms of the amended settlement mirrored those of the original settlement, except that the amended agreement created subclasses of persons who purchased fuel in each state and appointed a representative from each state to represent each subclass. *See In re Motor Fuel*, 271 F.R.D. at 270-72. Following notice to class members, the Court held a hearing and granted final approval of the amended settlement. *In re Motor Fuel Temp. Sales Prac. Litig.*, No. 07-1840-KHV, 2012 WL 1415508 (D. Kan. April 24, 2012). Specifically, the Court found that class members would benefit from an opportunity to purchase fuel at ATC because it would allow them an opportunity

7. Specifically, the Court noted that the parties could restructure the proposed settlement to (1) assure that representatives from conversion states represented class members from conversion states and representatives from non-conversion states represented class members from non-conversion states; and (2) create subclasses to account for material differences in state laws. *In re Motor Fuel*, 271 F.R.D. at 271.

to achieve accuracy and consistency of fuel measurement for their fuel dollar, regardless of temperature at the time of pumping. *See id.* at *14.[8]

B. Kansas Cases

On May 28, 2010, the Court certified classes under Rule 23(b)(2) as to the liability and injunctive relief aspects of plaintiffs' claims in two Kansas cases.[9] *See In re Motor Fuel Temp. Sales Practices Litig.*, 271 F.R.D. 221 (D. Kan. 2010). On January 12, 2012, the Court declined to decertify the classes and certified additional classes under Rules 23(b)(3) and (c)(4) as to the liability and injunctive relief aspects of the Kansas claims.[10] *See In re Motor Fuel Temp. Sales Practices Litig.*, 279 F.R.D. 598, 614-17 (D. Kan. 2012).

In April of 2012, the Court overruled defendants' motions for summary judgment on plaintiffs' claims that defendants' sales practices constituted willful omissions and/or unconscionable acts or practices under the Kansas Consumer Protection Act ("KCPA"), K.S.A.

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8. With regard to the Costco settlement, issues regarding attorney's fees, expenses and class representative incentive awards remain pending. *See* Docs. #1820, 2084.

9. The Kansas cases were *Wilson v. Ampride, Inc.*, Case No. 06-2582 and *American Fiber & Cabling, LLC v. BP West Coast Products, LLC*, Case No. 07-2053.

10. On February 13, 2013, the Court approved plaintiffs' proposed notice plan regarding the Kansas classes. *See Order* (Doc. #3729).

§§ 50-626(b)(3) and 50-627. *See In re Motor Fuel Temp. Sales Practices Litig.*, 867 F. Supp.2d 1124, 1137-42 (D. Kan. April 4, 2012). Defendants asserted that they were entitled to judgment as a matter of law because Kansas law specifically authorized the sale of motor fuel without disclosing or adjusting for temperature and because Kansas law prohibited using ATC at retail. The Court found that although Kansas law authorized the sale of retail motor fuel in gross gallons, *i.e.* 231 cubic inches with no reference to temperature, that fact standing alone did not shield defendants from liability on plaintiffs' claims. *Id.* at 1133-38. The Court declined to find as a matter of law that Kansas law categorically prohibited the use of retail motor fuel devices equipped with ATC.[11] *Id.* at 1138.

In September of 2012, the Court held a jury trial on plaintiffs' class action claims under the KCPA.[12] Plaintiffs tried the willful omission claims to a jury and the unconscionability claims to the Court. The jury found that defendants did not willfully fail to state, conceal, suppress or omit the fact that temperature affects the energy content and therefore the value of motor fuel and/or the temperature of motor fuel. *See Verdict* (Doc. #4422)

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11. In overruling defendants' motions for summary judgment on plaintiffs' Kansas claims for injunctive relief, the Court found that under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), adjudicating plaintiffs' claims did not require it to interfere with the proceedings or orders of state administrative agencies. *See Memorandum And Order* (Doc. #4231) filed April 4, 2012 at 12-14.

12. The defendants in the Kansas trial were 7-Eleven, Inc., Kum & Go, L.C. and QuikTrip Corp. *See Verdict* (Doc. #4422) filed September 24, 2012.

filed September 24, 2012. The Court found that on the evidence presented at trial, defendants' practice of selling motor fuel by the gallon without disclosing temperature, disclosing the effect of temperature or adjusting for temperature was not unconscionable. *See In re Motor Fuel Temp. Sales Practices Litig.*, No. 07-1840-KHV, 2012 WL 4794355, at *2-3 (D. Kan. Oct. 3, 2012).

C. Ten Settlements

In the summer of 2012, before the Kansas trial, plaintiffs negotiated ten settlements with the following defendants: (1) BP Products North America Inc. and BP West Coast Products LLC (collectively, "BP"); (2) CITGO Petroleum Company; (3) ConocoPhillips Company; (4) Exxon Mobil Corporation, Esso Virgin Island, Inc. and Mobil Oil Guam, Inc. (collectively, "ExxonMobil"); (5) Motiva Enterprises LLC and Equilon Enterprises LLC d/b/a Shell Oil Products US (collectively, "Shell"); (6) Sinclair Oil Corporation and its corporate affiliates (collectively, "Sinclair"), (7) Casey's General Stores, Inc.; (8) Dansk Investment Group, Inc. (formerly known as USA Petroleum Corporation) ("Dansk"); (9) Sam's Club, Sam's East, Inc., Sam's West, Inc., Wal-Mart Stores, Inc. and Wal-Mart Stores East, LLP (collectively, "Sam's"); and (10) Valero Marketing and Supply Company.

In late 2012, the Court conditionally certified and preliminarily approved the ten settlements. *See In re Motor Fuel Temp. Sales Practices Litig.*, 286 F.R.D. 488 (D. Kan. Sept. 28, 2012) (Dansk); *In re Motor Fuel Temp. Sales Practices Litig.*, No. 07-1840-KHV, 2012 WL 5876558 (D. Kan. Nov. 20, 2012) (Casey's, Sam's, BP, CITGO, ConocoPhillips, Shell, Sinclair); *In re Motor Fuel*

Temp. Sales Practices Litig., No. 07-1840-KHV, 2012 WL 6115085 (D. Kan. Dec. 10, 2012) (ExxonMobil, Valero). After several modifications to the proposed notice plan, on September 20, 2013, the Court approved a notice plan regarding the proposed settlements.[13] *See Memorandum And Order* (Doc. #4648).

D. California Cases

In April of 2013, the Court certified classes under Rule 23(b)(2) and (3) against non-settling defendants in three California cases.[14] *See In re Motor Fuel Temp. Sales Pract. Litig.*, 292 F.R.D. 652 (D. Kan. April 5, 2013); *Order* (Doc. #4544) filed April 9, 2013. On July 19, 2013, the Court entered summary judgment in favor of those defendants. *See In re Motor Fuel Temp. Sales Practices Litig.*, 07-1840-KHV, 2013 WL 3795206 (D. Kan. July 19, 2013); *In re Motor Fuel Temp. Sales Practices Litig.*, 07-1840-KHV, 2013 WL 4411092 (D. Kan. Aug. 14, 2013). Specifically, the Court found that under California law, because Handbook 44[15] expressly authorizes the sale of gross gallons of motor

13. The Court ordered plaintiffs to provide class notice by November 29, 2013 and scheduled a final approval hearing for February 20, 2014. *Order* (Doc. #4652) filed September 26, 2013.

14. The three California cases are *Rushing v. Ambest, Inc.*, No. 06-7621-PJH (N.D. Cal.), *Lerner v. Costco Wholesale Corp.*, No. 07-1216-GHK-FMO (C.D. Cal.) and *Wyatt v. B.P. America Corp.*, No. 07-1754-BTM-JMA (S.D. Cal.).

15. In partnership with the National Institute of Standards and Technology ("NIST"), the National Conference on Weights and Measures ("NCWM") has developed specifications, tolerances and other technical requirements for weighing and measuring devices,

fuel without adjusting for temperature, defendants were entitled to a safe harbor from liability for their sales practices.[16] *See* 2013 WL 3795206, at 14-18.

In light of the summary judgment rulings in the California cases, the Court found that it would not require plaintiffs to give class notice regarding claims against the non-settling defendants in the California cases. *See In re Motor Fuel Temp. Sales Practices Litig.*, 07-1840-KHV, 2013 WL 4411092, at *4 (D. Kan. Aug. 14, 2013).[17]

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including retail motor fuel devices. The NIST publishes these standards in Handbook 44. Each state must independently decide whether to adopt all or part of Handbook 44 and how to interpret the handbook under its law. *See, e.g., Memorandum And Order* (Doc. #4369) filed August 15, 2012 at 12 (Handbook 44 is not law; it simply contains model rules for states to adopt if they choose).

16. The Court found that its holding, *i.e.* that Handbook 44 expressly authorized the sale of gross gallons without adjusting for temperature, did not conflict with its previous holding in the Kansas cases, *i.e.* that Handbook 44 did not expressly prohibit a retailer from adjusting the size or price of a gallon to equal 231 cubic inches at a standardized temperature. *See* 2013 WL 3795206, at *14. In other words, the Court found that Handbook 44 expressly authorized defendants to sell motor fuel without disclosing or adjusting for temperature but did not necessarily prohibit the sale of motor fuel at retail using ATC. *Id.* The Court also found that its summary judgment ruling in the California cases (that defendants were entitled to a safe harbor under California law) was not inconsistent with its summary judgment rulings in the Kansas cases because in the Kansas cases, defendants did not show that Kansas law provided a "safe harbor" as California law did. *Id.* at *14 n.4.

17. The Court found that to give notice after the summary judgment rulings would circumvent the purposes behind Rule

E. Suggestion Of Remand

On August 14, 2013, the Court suggested that as to the California cases, the MDL Panel remand to the transferor courts plaintiffs' California-law claims against the non-settling defendants. *See Suggestion Of Remand* (Doc. #4617) filed August 14, 2013. The MDL Panel agreed. *See Separation Of Claims And Conditional Remand Order* (Doc. #4643) filed September 13, 2013.

On November 15, 2013, the Court suggested that the MDL Panel remand to transferor courts all claims against the non-settling defendants.[18] *See Suggestions Of Remand And Final MDL Pretrial Order For Remanded Cases* (Doc. #4671). Following the suggestion of remand, as discussed below, plaintiffs entered into 18 new settlement agreements. In light of the new settlements, the Court supplemented its suggestion of remand and recommended that it retain jurisdiction over claims against the newly-settled defendants to complete settlement approval and class notice and resolve issues regarding attorney's fees.

23(c)(3), *i.e.* to give class members notice and an opportunity to opt out before the Court rules on the merits of the case. *In re Motor Fuel*, 2013 WL 4411092, at *4 (citing *Schwarzschild v. Tse*, 69 F.3d 293 (9th Cir. 1995)).

18. In one case, *Rushing v. Ambest, Inc.* (N.D. Cal. No. 06-7621-PJH; D. Kan. No. 07-2300-KHV), the Court did not suggest remand of the remaining claims of one plaintiff, Lesley Duke. *See Suggestions Of Remand And Final MDL Pretrial Order For Remanded Cases* (Doc. #4671) at 3 n.5. Those claims have since been remanded. *See Separation Of Claims And Conditional Remand Order* (Doc. #4800) filed February 19, 2015.

See Supplement To Suggestion Of Remand (Doc. #4732) filed March 23, 2014.

On April 8, 2014, the MDL Panel remanded unsettled claims in one case, *Craft v. The Kroger Co.*, (E.D. Tex. No. 07-00271; D. Kan. No. 07-2360). *See Order Lifting Stay Of Separation Of Claims And Conditional Remand Order* (Doc. #4751).

F. 18 New Settlements

Following the Court's suggestion of remand on November 15, 2013, plaintiffs entered into 18 settlement agreements with the following defendants: (1) B-B Oil Company, Inc., (2) Chevron U.S.A. Inc., (3) Coulson Oil Company, Inc., (4) Diamond State Oil, LLC, (5) E-Z Mart Stores, Inc., (6) Flash Market, Inc., (7) G&M Oil Company, Inc. and G&M Oil Co., LLC (collectively, "G&M Oil"), (8) J&P Flash, Inc., (9) Love's Travel Stops & Country Stores, Inc., (10) M.M. Fowler, Inc., (11) Magness Oil Company, (12) Port Cities Oil, LLC, (13) Sunoco, Inc., (14) Tesoro Refining and Marketing Company LLC, (15) Thorntons Inc., (16) United El Segundo, Inc., (17) W. R. Hess and (18) World Oil Corp.

In light of the new settlements, to give plaintiffs an opportunity to obtain preliminary approval and include them in the combined notice plan, the Court agreed to vacate deadlines for completing the notice and objection period regarding the previous ten settlements. *See Order* (Doc. #4679) filed November 21, 2013; *Motion To Vacate Settlement-Related Deadlines* (Doc. #4673) filed November 18, 2013.

In late 2014, the Court conditionally certified and preliminarily approved the 18 new settlements. *See In re Motor Fuel Temp. Sales Practices Litig.*, No. 07-1840-KHV, 2014 WL 5431133 (D. Kan. Oct. 27, 2014) (B-B Oil, Chevron, Coulson Oil, Diamond State, Flash Market, G & M Oil, J&P Flash, M.M. Fowler, Magness Oil, Port Cities, Thorntons, United El Segundo, W.R. Hess, World Oil); *Memorandum And Order* (Doc. #4786) filed December 10, 2014 (E-Z Mart, Love's, Sunoco, Tesoro). In addition, the Court approved plaintiffs' proposal to include the 18 new settlements in the class notice plan which the Court had previously approved for the ten earlier settlements. *See In re Motor Fuel*, 2014 WL 5431133, at *16.[19] The Court ordered plaintiffs to provide notice to settlement class members by February 20, 2015, and set March 23, 2015 as the last day for class members to opt out or object to the settlements. *See Order* (Doc. #4786) filed December 10, 2014.

III. Settlement Terms, Class Notice And Objections

A. Terms Of Ten Settlements

As discussed, in the summer of 2012, before the Kansas trial, plaintiffs negotiated settlement agreements

19. *See also Motion Of Plaintiffs For Order Conditionally Certifying Settlement Classes, Preliminarily Approving Eighteen (18) Class Action Settlements, Directing And Approving Distribution Of Class Notice, Setting Hearing For Final Approval Of Class Action Settlements And Appointing Class Counsel* (Doc. #4724) filed March, 15, 2014 at 14-15, 25-25; *Notice Of Revised Class Settlement Notice Forms* (Doc. #4749) filed March 26, 2014 and exhibits thereto.

with ten defendants. Specific details regarding the terms of the settlements are set forth in the Court's orders granting preliminary approval. *See In re Motor Fuel Temp. Sales Practices Litig.*, 286 F.R.D. 488 (D. Kan. Sept. 28, 2012) (Dansk); *In re Motor Fuel Temp. Sales Practices Litig.*, No. 07-1840-KHV, 2012 WL 5876558 (D. Kan. Nov. 20, 2012) (Casey's, Sam's, BP, CITGO, ConocoPhillips, Shell, Sinclair); *In re Motor Fuel Temp. Sales Practices Litig.*, No. 07-1840-KHV, 2012 WL 6115085 (D. Kan. Dec. 10, 2012) (ExxonMobil, Valero); *see also* Exhibits 2-11 to *Motion For Final Settlement Approval* (Doc. #4834).

1. Refiner Settlements — BP, CITGO, ConocoPhillips, ExxonMobil, Shell And Sinclair

Briefly summarized, six settlements involve so-called "refiner" defendants, *i.e.* BP, CITGO, ConocoPhillips, ExxonMobil, Shell and Sinclair. Under these settlements, defendants agree to pay the following amounts:

	Settlement Fund	Class Notice Fund
BP[20]	$4,900,000	$100,000

20. The BP Settlement includes subclasses of persons and entities who purchased retail motor fuel in 24 states (Alabama, Arizona, Arkansas, California, Delaware, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nevada, New Jersey, North Carolina, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah and Virginia) and the District of Columbia. BP Settlement ¶¶ 3(a)-(y), Exhibit 3 to Motion For Fina*l Settlement Approval* (Doc. #4834).

CITGO[21]	$800,000	$100,000
ConocoPhillips[22]	$4,900,000	$100,000
ExxonMobil[23]	$5,000,000	n/a

21. The CITGO Settlement includes subclasses of persons and entities who purchased retail motor fuel in 24 states (Alabama, Arizona, Arkansas, California, Delaware, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nevada, New Jersey, New Mexico, North Carolina, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas and Virginia) and the District of Columbia. CITGO Settlement ¶¶ 3(a)-(y), Exhibit 4 to Motion For Fina*l Settlement Approval* (Doc. #4834).

22. The ConocoPhillips Settlement includes subclasses of persons and entities who purchased retail motor fuel in 26 states (Alabama, Arizona, Arkansas, California, Delaware, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nevada, New Jersey, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah and Virginia), Guam and the District of Columbia. ConocoPhillips Settlement ¶¶ 3(a)-(bb), Exhibit 5 to Motion For Fina*l Settlement Approval* (Doc. #4834).

23. The ExxonMobil Settlement includes subclasses of persons and entities who purchased retail motor fuel in 25 states (Alabama, Arizona, Arkansas, California, Delaware, Florida, Georgia, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nevada, New Jersey, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah and Virginia), Guam, the Virgin Islands and the District of Columbia. ExxonMobil Settlement ¶¶ 3(a)-(bb), Exhibit 10 to Motion For Fina*l Settlement Approval* (Doc. #4834).

Shell[24]	$4,900,000	$100,000
Sinclair[25]	$700,000	$100,000
TOTAL	$21,200,000	$500,000

After deducting attorney's fees, litigation costs, notice expenses and costs of settlement or claims administration, the remaining proceeds of the settlement fund, *i.e.* the net proceeds, shall be allocated pro rata among the settlement states.[26] Of the net settlement funds allocated to each state, two-thirds may be used to reimburse retailers or wholesalers selling retail motor fuel under defendant's brand for expenses incurred in installing ATC.[27] The

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24. The Shell Settlement includes subclasses of persons and entities who purchased retail motor fuel in 26 states (Alabama, Arizona, Arkansas, California, Delaware, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nevada, New Jersey, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah and Virginia) and the District of Columbia. Shell Settlement ¶¶ 3(a)-(aa), Exhibit 7 to Motion For Fina*l Settlement Approval* (Doc. #4834).

25. The Sinclair Settlement includes subclasses of persons and entities who purchased retail motor fuel in 11 states (Arizona, Arkansas, Kansas, Mississippi, Missouri, Nevada, New Mexico, Oklahoma, Oregon, Texas and Utah). Sinclair Settlement ¶¶ 3(a)-(k), Exhibit 8 to Motion For Fina*l Settlement Approval* (Doc. #4834).

26. The refiner defendants agree that they will not oppose incentive fees to subclass representatives, attorney's fees and litigation costs up to 30 per cent of the settlement amounts.

27. The CITGO settlement provides funds only to state regulators and not to retailers or wholesalers. In the preliminary

remaining one-third of net settlement funds allocated to each state may be used by the state's department of weights and measures or other agency responsible for regulating retail motor fuel dispensers to defray some state costs of implementing ATC at retail.[28] After five years, any sums remaining in the net settlement fund shall become available for disbursement either to (1) retailers or wholesalers or (2) weights and measures departments, regardless whether the application for disbursement comes from a state whose allocation of the net settlement fund is exhausted. After six years, any portion of the amount of the net settlement fund which was originally allocated to facilitate ATC in a particular state shall be contributed to that state.[29]

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approval process, plaintiffs explained that the reason for the difference is that unlike the other refiner defendants, CITGO maintains that it has never owned or operated any CITGO-branded gas stations in the settlements states. *See In re Motor Fuel*, 2012 WL 5876558, at *7. Plaintiffs asserted that they agreed to a lower settlement amount for CITGO in light of unresolved legal and factual issues regarding whether CITGO is liable for motor fuel sales of its franchises. *See id.*

28. To receive payment, an eligible state agency must provide a written statement that (1) explains that the state has adopted ATC at retail and (2) describes how the state would use a portion of the settlement fund to assist in that implementation.

29. The ExxonMobil Settlement provides that after five years, any portion of the amount of the net settlement fund which was originally allocated to facilitate ATC in a particular state shall be contributed to that state. ExxonMobil Settlement ¶ 14(h), Exhibit 10 to *Motion For Final Settlement Approval* (Doc. #4834).

2. ATC Settlements — Casey's, Dansk, Sam's And Valero

The settlements with Casey's, Dansk, Sam's and Valero (the "ATC Settlements") are similar to those of the amended Costco settlement which the Court has already approved. Under the ATC Settlements, over a three to five-year phase-in period, defendants agree to install ATC at retail motor fuel pumps in certain settlement states.[30]

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30. The Casey's Settlement includes subclasses of persons and entities who purchased motor fuel from Casey's in five states (Arkansas, Indiana, Kansas, Missouri and Oklahoma). Casey's Settlement ¶¶ 2.1(a)-(e), Exhibit 9 to *Motion For Final Settlement Approval* (Doc. #4834).

The Dansk settlement class includes persons who purchased motor fuel from Dansk in California. Dansk Settlement ¶ 2.1, Exhibit 2 to *Motion For Final Settlement Approval* (Doc. #4834).

The Sam's Settlement includes subclasses of persons and entities who purchased motor fuel from Sam's in 25 states (Alabama, Arizona, Arkansas, California, Delaware, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nevada, New Jersey, New Mexico, North Carolina, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Utah and Virginia). Sam's Settlement ¶¶ 2.1(a)-(y), Exhibit 6 to *Motion For Final Settlement Approval* (Doc. #4834). Similar to Costco, Sam's agrees to install ATC in the settlement states where it purchases motor fuel on temperature-adjusted basis. *See id.* ¶¶ 1.7, 1.21, 4.2-4.4, 4.6, 6.1-6.2.

The Valero Settlement includes subclasses of persons and entities who purchased motor fuel from Valero in 24 states: (Alabama, Arizona, Arkansas, California, Delaware, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Maryland,

Also, each defendant agrees to pay specified amounts for class notice and plaintiffs' attorney's fees, subject to Court approval.[31]

B. Terms Of 18 New Settlements

As discussed, following the Court's suggestion of remand on November 15, 2013, plaintiffs entered into 18 new settlement agreements. Specific details regarding the terms of these settlements are set forth in the Court's orders granting preliminary approval. *See In re Motor Fuel Temp. Sales Practices Litig.*, No. 07-1840-KHV, 2014 WL 5431133 (D. Kan. Oct. 27, 2014) (B-B Oil, Chevron, Coulson Oil, Diamond State, Flash Market, G & M Oil, J&P Flash, M.M. Fowler, Magness Oil, Port Cities, Thorntons, United El Segundo, W.R. Hess, World Oil); *Memorandum And Order* (Doc. #4786) filed December 10, 2014 (E-Z Mart, Love's, Sunoco, Tesoro); *see also*

Mississippi, Missouri, Nevada, New Jersey, New Mexico, North Carolina, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas and Virginia). Valero Settlement ¶¶ 1.28, 2.1, Exhibit 11 to *Motion For Final Settlement Approval* (Doc. #4834).

31. Casey's agrees to pay $100,000 for class notice and $700,000 for attorney's fees. Casey's Settlement ¶¶ 3.2, 7.1.

Dansk agrees to pay all costs associated with its notice plan and $58,000 for attorney's fees. Dansk Settlement ¶ 8.

Sam's agrees to pay $200,000 for class notice and $3,000,000 for attorney's fees. Sam's Settlement ¶¶ 3.2, 7.1.

Valero agrees to pay $50,000 for class notice and $4,000,000 for attorney's fees. Valero Settlement ¶¶ 4.11-12.

Appendix D

Exhibits 12-29 to *Motion For Final Settlement Approval* (Doc. #4834).

1. Chevron Settlement

Briefly summarized, Chevron agrees to pay $2,000,000 into a settlement fund and $125,000 for class notice expenses.[32] *Id.* ¶¶ 1(s), (ii), (ll), 7-9. The remaining terms of the Chevron settlement are similar to the refiner settlements discussed above.[33]

2. 17 Remaining Settlements

Under the 17 remaining settlements, defendants agree to pay various amounts into settlement funds which

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32. The Chevron Settlement includes subclasses of persons who purchased retail motor fuel in 23 states (Alabama, Arizona, California, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nevada, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah and Virginia) and the U.S. Virgin Islands. Chevron Settlement at 15-18, Exhibit 12 to *Motion For Final Settlement Approval* (Doc. #4834).

33. Of the net settlement funds allocated to each state, two thirds may be used to reimburse retailers or wholesalers for expenses incurred in installing ATC equipment and the remaining one third may be used to defray state costs of rule making, regulation, inspection or oversight related to implementing ATC at retail. Chevron Settlement Agreement ¶ 14(a), (b). After six years, any sums remaining in the net settlement fund shall be contributed to the state. *Id.* ¶ 14(c)(i). Chevron will not oppose attorney's fees and litigation costs up to $600,000, *i.e.* 30 per cent of the settlement fund. *Id.* ¶ 26.

state departments of weights and measures, or other agencies responsible for regulating retail motor fuel dispensers, can use to defray state costs of implementing ATC at retail. In addition, the settlement funds will pay for plaintiffs' attorney's fees, litigation costs and class notice expenses. Specifically, defendants agree to pay the following amounts:

	Settlement Fund	Class Notice Fund
BB Oil[34]	$20,000	$1,000
Coulson Oil	$20,000	$1,000
Diamond State	$20,000	$1,000
Flash Market	$20,000	$1,000
J&P Flash	$20,000	$1,000

34. The settlements with BB Oil, Coulson Oil, Diamond State, Flash Market, J&P Flash, Magness Oil, Port Cities and W.H. Hess include persons and entities who purchased retail motor fuel in Arkansas from a station owned, leased, operated or controlled by a settling defendant. BB Oil Settlement at 5-6, Coulson Oil Settlement at 5-6; Diamond State Settlement at 5-6; Flash Market Settlement at 5-6; J&P Flash Settlement at 5-6; Magness Oil Settlement at 5-6; Port Cities Settlement at 5-6; W.H. Hess Settlement at 5, Exhibits 13-20 to Motion For Final Settlement Approval (Doc. #4834). Defendants will not oppose attorney's fees and litigation costs up to 30 per cent of the settlement amount and after three years, any sums remaining in the net settlement fund shall escheat to the general fund of the state. BB Oil Settlement at 8-9; Coulson Oil Settlement at 8-9; Diamond State Settlement at 8-9; Flash Market Settlement at 8-9; J&P Flash Settlement at 8-9; Magness Oil Settlement at 8-9; Port Cities Settlement at 8-9; W.H. Hess Settlement at 8-9.

Magness Oil	$20,000	$1,000
Port Cities Oil	$20,000	$1,000
W.H. Hess	$20,000	$1,000
G&M Oil[35]	$40,000	n/a
World Oil	$40,000	n/a
United El Segundo	$40,000	n/a
E-Z Mart[36]	$90,000	n/a

35. The settlements with G&M Oil, United El Segundo and World Oil include persons who purchased retail motor fuel in California from a station owned or operated by a settling defendant. G&M Oil Settlement at 13; United Settlement at 13; World Oil Settlement at 13, Exhibits 21-23 to Motion For Final Settlement Approval (Doc. #4834). Defendants will not oppose attorney's fees and litigations costs up to 30 per cent of the settlement amount and after six years, any sums remaining in the net settlement fund shall be contributed to the state's general fund. G&M Oil Settlement at 16; United Settlement at 16-17; World Oil Settlement at 16-17.

36. The E-Z Mart Settlement includes subclasses of persons and entities who purchased retail motor fuel in Oklahoma and Arkansas from a station owned, operated or controlled by defendant. E-Z Mart Settlement at 6, Exhibit 26 to Motion For Final Settlement Approval (Doc. #4834). After two years, any remaining funds shall become available to the weights and measures departments of either state under the settlement and after three years, any remaining funds shall be contributed to the state at issue. *Id*. at 9-10. E-Z Mart will not oppose attorney's fees and litigation costs up to 30 per cent of the settlement amount. *Id*. at 7.

Love's[37]	$100,000	$5,000
MM Fowler[38]	$22,500	$1,000
Sunoco[39]	$60,000	$1,000

37. The Love's Settlement includes subclasses of persons and entities who purchased retail motor fuel in Oklahoma and Georgia from a station owned, operated or controlled by defendant. Love's Settlement at 6, Exhibit 27 to Motion For Final Settlement Approval (Doc. #4834). After two years, any remaining funds shall become available to the weights and measures departments of either state under the settlement and after three years, any remaining funds shall be contributed to the state at issue. *Id.* at 9-10. Love's will not oppose attorney's fees and litigation costs up to 30 per cent of the settlement amount. *Id.* at 7.

38. The MM Fowler Settlement includes persons and entities who purchased retail motor fuel in North Carolina from a station owned, leased, operated or controlled by defendant. MM Fowler Settlement at 5, Exhibit 24 to Motion For Final Settlement Approval (Doc. #4834). After three years, any sums remaining in the net settlement fund shall escheat to the state's general fund. *Id.* at 9. MM Fowler will not oppose attorney's fees up to 30 per cent of the settlement amount. *Id.* at 7.

39. The Sunoco Settlement includes subclasses of persons and entities who purchased retail motor fuel in Indiana, Maryland, New Jersey, Pennsylvania, South Carolina and Virginia from a station owned, operated or controlled by defendant. Sunoco Settlement at 6-7, Exhibit 28 to Motion For Final Settlement Approval (Doc. #4834). After two years, any remaining funds shall become available to the weights and measures departments of any of the states under the settlement and after three years, any remaining funds shall be contributed to the state at issue. *Id.* at 11-12. Sunoco will not oppose attorney's fees up to 30 per cent of the settlement amount. *Id.* at 8.

Tesoro[40]	$50,000	n/a
Thorntons[41]	$60,000	n/a
TOTAL	$662,500	$15,000

C. Class Notice

With respect to all settlements, the Court approved a nationwide notice plan designed to obtain more than 75 per cent net reach in settlement and non-settlement states. *See Affidavit Of Jeffrey D. Dahl Regarding Execution Of The Approved Notice Plan* ("Dahl Affidavit") ¶ 6, Exhibit 30 to Motion For Final Settlement Approval") (Doc. #4834). Specifically, the notice plan included the following components: (1) web-based notice using paid banner ads with links to the settlement website; (2) targeted supplemental radio broadcast notices; (3) targeted

40. The Tesoro Settlement includes subclasses of persons and entities who purchased retail motor fuel in Nevada and Utah from a station owned, operated or controlled by defendant. Tesoro Settlement at 6, Exhibit 29 to Motion For Final Settlement Approval (Doc. #4834). After two years, any remaining funds shall become available to the weights and measures departments of either state under the settlement and after three years, any remaining funds shall be contributed to the state at issue. *Id.* at 10. Tesoro will not oppose attorney's fees up to 30 per cent of the settlement amount. *Id.* at 7.

41. The Thornton Settlement includes persons who purchased retail motor fuel in Kentucky from a station owned, leased, operated or controlled by defendant. Thorntons Settlement at 5, Exhibit 25 to Motion For Final Settlement Approval (Doc. #4834). After three years, any remaining funds shall escheat to the state's general fund. *Id.* at 8. Thorntons will not oppose attorney's fees up to 30 per cent of the settlement amount. *Id.* at 7.

supplemental published notices; and (4) additional notice via a dedicated settlement website, web-based "keyword search" ads, a press release and a toll-free help line. *Id.*

Plaintiffs submit evidence which demonstrates that the notice campaign successfully reached at least 75 per cent of class members in settlement and non-settlement states. *Id.* ¶ 7. In all, plaintiffs estimate that the notice campaign reached over 194 million class members. *Affidavit Of John Grudnowkski Regarding Execution Of The Approved Notice Plan* ¶ 6, Exhibit 31 to *Motion For Final Settlement Approval* (Doc. #4834). The notice campaign resulted in more than 308,000 visits and 18,000 pdf downloads from the settlement website. *Id.* ¶ 5. In addition, the notice administrator responded to 777 emails and 29 pieces of written correspondence related to the settlements. *Dahl Affidavit* ¶ 30. Some 104 persons asked to be excluded from one or more settlement class. *Id.* ¶ 31 and Exhibit 7 thereto.

D. Objections

Two groups and one individual filed objections to the proposed settlements. *See Objection To Proposed Settlements* ("*Frank Objection*") (Doc. #4808) filed March 23, 2015; *Objection To Proposed Settlements By QuikTrip Corporation, 7-Eleven Inc., Circle K Stores, Inc., Kum & Go, L.C ., Marathon Petroleum Company LP, Murphy Oil USA, Inc., Pilot Travel Centers, LLC, Flying J, Inc., PTCAA Texas, LP, Racetrac Petroleum, Inc., Sheetz, Inc., Speedway LLC, The Pantry, Inc., and Wawa, Inc.* ("*QuikTrip Objection*") (Doc. #4809) filed March 23, 2015;

and *Objection* (letter) by Jeff Long (individual Kansas class member) (Doc. #4798) filed February 11, 2015.

1. Frank Objectors

Theodore H. Frank, Melissa Holyoak and Adam Schulman (the "Frank Objectors") object to the settlements with BP, Chevron, CITGO, ConocoPhillips, ExxonMobil, Shell, Sinclair, Sunoco and Valero.[42] Specifically, the Frank Objectors assert that the Court cannot certify settlement classes because (1) an intra-class conflict exists among settlement class members; (2) contributions to state weights and measures departments constitute compelled political speech; (3) a class action is not "superior" because it cannot provide individual redress to class members; (4) the separation of powers doctrine counsels against certification; (5) *Burford v. Sun Oil*, 319 U.S. 315 (1943), mandates abstention; and (6) the settlement class representatives are not loyal to class members. In addition, the Frank Objectors assert that the settlements are unfair because (1) they do not benefit class members; (2) they allow excessive attorney's fees; and (3) the Valero settlement contains a most-favored-nations clause.

2. QuikTrip Objectors

Non-settling and former defendants, QuikTrip

42. The Frank Objectors assert that they are putative members of these settlement classes. *See* Exhibits 1-3 to *Frank Objection* (Doc. #4808). Plaintiffs do not challenge their standing to object.

Corporation, 7-Eleven Inc., Circle K Stores, Inc., Kum & Go, L.C., Marathon Petroleum Company LP, Murphy Oil USA, Inc., Pilot Travel Centers, LLC, Flying J, Inc., PTCAA Texas, LP, Racetrac Petroleum, Inc., Sheetz, Inc., Speedway LLC, The Pantry, Inc., and Wawa, Inc. (the "QuikTrip Objectors")[43] assert that the proposed settlements (1) violate Article III of the United States Constitution; (2) violate the First Amendment; (3) create an appearance of quid pro quo corruption; and (4) usurp the prerogatives of federal and state regulators and violate the separation of powers doctrine. Plaintiffs challenge whether the QuikTrip Objectors have standing to object.

3. Individual Objector — Jeff Long

Jeff Long, a resident of Lawrence, Kansas, objects to any settlement which gives money to the State of Kansas, on grounds that it will not properly manage the money. *See* Doc. #4798.

E. Fairness Hearing

On June 9, 2015, the Court heard oral argument from counsel for plaintiffs, settling defendants, the Frank Objectors and the QuikTrip Objectors. *See* Doc. #4838.

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43. As noted, as to Kansas claims, QuikTrip, 7-Eleven and Kum & Go obtained a jury verdict in their favor. *See Verdict* (Doc. #4422) filed September 24, 2012. As to all other claims, plaintiffs have dismissed with prejudice their claims against the QuikTrip Objectors. *See Stipulation Of Dismissal With Prejudice* (Doc. #4711).

IV. Analysis

Plaintiffs seek final approval of 28 settlements. To approve the settlements, the Court must find that class certification is appropriate under Rule 23(a) and (b)(3) and that the proposed settlements are fair, reasonable and adequate under Rule 23(e)(2).

A. Class Certification

To obtain class certification, plaintiffs must show that the prerequisites of Rule 23(a) are satisfied and demonstrate that the proposed class action fits within one of the categories described in Rule 23(b). Here, plaintiffs seek to certify a class under Rule 23(b)(3).

1. Rule 23(a) Prerequisites

To satisfy the prerequisites of Rule 23(a), plaintiffs must demonstrate that (1) the class is so numerous that joinder of all members is impracticable, (2) questions of law or fact are common to the subclass, (3) the claims of the representative parties are typical of the claims of the subclass and (4) the representative parties will fairly and adequately protect the interests of the subclass. *See* Fed. R. Civ. P. 23(a).

a. Numerosity

Rule 23(a)(1) requires plaintiffs to show that "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1); *see also Trevizo*

v. Adams, 455 F.3d 1155, 1162 (10th Cir. 2006). To satisfy this requirement, plaintiffs must produce some evidence or otherwise establish by reasonable estimate the number of class members who may be involved. *See Rex v. Owens ex rel. State of Okla.*, 585 F.2d 432, 436 (10th Cir. 1978). The Court has no set formula for determining whether plaintiffs meet this requirement. *Id.* Here, the parties estimate that the proposed settlement classes exceed 100 million members. *See attachments to Notice Of Filing Proof Of Service Of Notice Of Class Action Settlement Served Pursuant To U.S.C. § 1715* (Doc. #4338) filed June 26, 2012. On this record, the Court finds that the proposed settlement classes are so numerous that joinder of all members would be impracticable. Accordingly, plaintiffs have satisfied the numerosity requirement of Rule 23(a)(1).

b. Commonality

Rule 23(a)(2) requires plaintiffs to show that "questions of law or fact are common to the class." Fed. R. Civ. P. 23(a)(2). This inquiry requires the Court to find only whether common questions of law or fact exist; unlike Rule 23(b)(3), such questions need not predominate under this element. *See Olenhouse v. Commodity Credit Corp.*, 136 F.R.D. 672, 679 (D. Kan. 1991). Here, plaintiffs assert that defendants engaged in the same conduct with respect to all settlement class members, *i.e.* they did not compensate retail motor fuel sales for temperature and did not inform class members of the detrimental effect that thermal expansion has on quality of motor fuel. On this record, the Court finds that questions of law or fact are common to the class. Accordingly, plaintiffs have satisfied the commonality requirement of Rule 23(a)(2).

c. Typicality

Rule 23(a)(3) requires plaintiffs to show that their claims are typical of the claims of the class which they seek to represent. *See* Fed. R. Civ. P. 23(a)(3); *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1198 (10th Cir. 2010). The interests and claims of the representative plaintiffs and class members need not be identical to satisfy typicality. *See Stricklin*, 594 F.3d at 1198 (citing *Anderson*, 690 F.2d at 800). If the claims of the representatives and class members are based on the same legal or remedial theory, differing fact situations of class members do not defeat typicality. *See id.* at 1198-99 (citing *Adamson v. Bowen*, 855 F.2d 668, 676 (10th Cir. 1988)); *Jamieson v. Vatterott Educ. Ctrs., Inc.*, 259 F.R.D. 520, 547 (D. Kan. 2009). Here, the claims of the representative plaintiffs and class members are based on the same legal and remedial theories and arise from the same pattern of conduct by defendants: all of them allegedly suffered injury on account of the sale of motor fuel for specified prices per gallon without disclosing or adjusting for temperature expansion. On this record, the Court finds that plaintiffs' claims are typical of the claims of the class which they seek to represent. Thus, plaintiffs have satisfied the typicality requirement of Rule 23(a)(3).

d. Adequacy Of Representation

Rule 23(a)(4) requires plaintiffs to show that they will fairly and adequately protect the interests of the class. To meet this requirement, representative plaintiffs must be members of the class which they seek to represent and

show that (1) their interests do not conflict with those of other class members and (2) they will be able to prosecute the action vigorously through qualified counsel. *See E. Tex. Motor Freight Sys., Inc., v. Rodriguez*, 431 U.S. 395, 403 (1977); *Rutter & Wilbanks*, 314 F.3d at 1187-88; *Olenhouse*, 136 F.R.D. at 680. Minor conflicts among class members do not defeat class certification; to defeat class certification, a conflict must be "fundamental" and go to specific issues in controversy. *Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181, 1189 (11th Cir. 2003). Here, similar to the Costco amended settlement, the proposed settlements create classes or subclasses with a named representative for each state. Under this structure, it appears that the interests of each named representative are aligned with the interests of the members of their class or subclass, *i.e.* their claims involve the same state law and they receive the same relief under the settlement. *See In re Motor Fuel*, 2012 WL 1415508 at *10 (approving Costco amended settlement). For these reasons, and for reasons discussed below with regard to the Frank Objections, the Court finds that plaintiffs have satisfied the adequacy of representation requirement of Rule 23(a)(4).[44]

2. Rule 23(b) Requirements

In addition to meeting the requirements of Rule 23(a), plaintiffs must show that the settlement classes comply with one of three qualifying tests under Rule 23(b). Here, plaintiffs seek to certify classes and subclasses

44. Based on the history of this case, the Court finds that plaintiffs also satisfy the second requirement — they have prosecuted the action vigorously through qualified counsel.

under subsection (b)(3). Under that provision, plaintiffs must show that questions of law or fact common to the members of the class or subclass predominate over any questions affecting individual members and that a class action "is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). In determining predominance and superiority under Rule 23(b)(3), the Court considers the following non-exhaustive factors:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; [and]
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3). The fourth factor, *i.e.* the likely difficulty of managing a class action, does not apply in the context of a settlement class. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). All of the other requirements apply, however, and demand heightened attention in the settlement context. *Id.*

Similar to the Court's previous rulings regarding class certification in the Costco settlement and Kansas and California cases, the Court finds that plaintiffs have met the requirements of predominance and superiority. *See In re Motor Fuel*, 2012 WL 1415508 at *11 (Costco settlement); *In re Motor Fuel*, 279 F.R.D. at 613 (Kansas cases); *In re Motor Fuel*, 292 F.R.D. at 674 (California cases). Specifically, the Court finds that common questions predominate over individual questions as to whether defendants are liable to class members for selling motor fuel for a specified price per gallon without disclosing or adjusting for temperature expansion. Moreover, in light of the limited size of any potential financial recovery for any particular class member and the possibility of inconsistent results, a class action is a far superior method of resolving the claims compared to individual suits. *See Amchem Prods.*, 521 U.S. at 625 (predominance test readily met in certain cases alleging consumer fraud). On this record, the Court finds that plaintiffs have met the predominance and superiority requirements of Rule 23(b)(3). Accordingly, the Court finds that class certification is appropriate under Rule 23(b)(3).

B. Fairness Of Proposed Settlements

Under Rule 23(e), the Court may approve a class action settlement upon finding that it is fair, reasonable and adequate. *See* Fed. R. Civ. P. 23(e)(2). To determine whether the proposed settlements are fair, reasonable and adequate, the Court considers the following factors:

(1) whether the proposed settlement was fairly and honestly negotiated;

(2) whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt;

(3) whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation; and

(4) the judgment of the parties that the settlement is fair and reasonable.

Rutter & Wilbanks, 314 F.3d at 1188.

Regarding the first factor, as to all settlements, the Court has no doubt that the parties reached the proposed settlement through fair and honest negotiations. The settling parties are represented by top-notch lawyers who have vigorously litigated the cases for more than seven years. This factor weighs in favor of approving the proposed settlements.

Regarding the second factor, as to all settlements, the cases present serious questions of law and fact which place the ultimate outcome of litigation in doubt. Defendants have hotly contested liability and defeated plaintiffs' claims at trial in the Kansas cases and on summary judgment in the California cases. Plaintiffs could perhaps obtain a different outcome on appeal or under the laws of other states; plaintiffs chances of prevailing seem slim,

however, placing the ultimate outcome of the litigation in doubt.

Regarding the third factor, as set forth below, the Court will evaluate separately the value of an immediate recovery based on the three types of relief provided under the settlements: (1) installing ATC; (2) providing optional funds for retailers and state regulators to facilitate installing ATC; and (3) providing optional funds for state regulators to facilitate installing ATC.

Regarding the fourth factor, as to all settlements, the settling defendants and named plaintiffs believe that the proposed settlements are fair and reasonable. This factor weighs in favor of approving the proposed settlements.

1. Value Of Recovery Under Settlements Which Install ATC

As discussed, the proposed settlements with Casey's, Dansk, Sam's and Valero provide that over a three to five-year period, defendants will install ATC at retail motor fuel pumps in certain settlement states. The terms of these settlements are substantially similar to the amended Costco settlement which the Court has already approved. As with Costco, the Court finds that as to the conversion states, *i.e.* states in which defendants agree to install ATC motor fuel dispensers, the proposed relief fairly responds to plaintiffs' claims and provides the same relief which plaintiffs might obtain if they ultimately prevailed at trial. *See In re Motor Fuel*, 2012 WL 1415508, at *12. In particular, the Court finds that class members would

benefit from an opportunity to purchase fuel at ATC because it would give them the ability to achieve accuracy and consistency of fuel measurement for their fuel dollar, regardless of fuel temperature at the time of pumping. *See id.* at *14. As to non-conversion states, *i.e.* states in which defendants purchase fuel on a non-temperature-adjusted basis and agree to install ATC dispensers if they begin to purchase motor fuel on a temperature-adjusted basis, the Court finds that plaintiffs probably cannot establish liability because defendants in those states do not benefit from buying fuel one way and selling it another. *See id.* Although the value of injunctive relief in non-conversion states seems low, it is reasonable under the circumstances. Accordingly, for reasons stated in the Court's previous orders regarding the amended Costo settlement, the Court finds that the third factor weighs in favor of approving the proposed settlements with Casey's, Dansk, Sam's and Valero. *See id.*; *In re Motor Fuel*, 271 F.R.D. at 285-87.

2. Value Of Recovery Under Settlements Which Provide Optional Funds For Retailers To Install ATC And State Regulators To Implement ATC

As discussed, under the proposed settlements with BP, ConocoPhillips, ExxonMobil, Shell, Sinclair and Chevron, defendants agree to pay certain amounts which will be allocated to each settlement state. Of the net settlement funds allocated to each state, two-thirds may be used to reimburse retailers or wholesalers selling retail motor fuel under defendant's brand for expenses incurred in

installing ATC. The remaining one-third of net settlement funds allocated to each state may be used by the state's department of weights and measures or other agency responsible for regulating retail motor fuel dispensers to defray some state costs of implementing ATC at retail. In preliminarily approving the proposed settlements, the Court found that class members would benefit from funds designed to facilitate the implementation of ATC at retail. *See In re Motor Fuel*, 286 F.R.D. at 503. Under these settlements, defendants do not agree to install ATC; rather, they agree to provide funds for optional ATC installation by retailers and optional ATC implementation by state regulators. As such, these settlements provide less value to class members than the ATC Settlements, *i.e.* the settlements under which retailers agree to install ATC. Whether these settlements will provide class members increased opportunities to purchase ATC fuel will depend on whether retailers and state regulators take independent steps to implement ATC. Moreover, even if retailers choose to install ATC, the settlements provide enough funds to convert only a small fraction of the total number of pumps in the settlement states.[45] *See In Re Motor Fuel*, 2012 WL 5876558, at *5. Nevertheless, considered together with the ATC Settlements, these settlements are reasonably calculated to help initiate a market transition to ATC by rewarding early movers through reimbursement of costs incurred by the transition. In light of plaintiffs' losses in the Kansas and California cases and their overall prospects of ultimately prevailing in litigation, the Court finds that the proposed

45. See footnote 51, *infra*.

settlements are a reasonable compromise of plaintiffs' claims.[46] Accordingly, the Court finds that the third factor weighs in favor of approving the proposed settlements with BP, ConocoPhillips, ExxonMobil, Shell, Sinclair and Chevron.

3. Value Of Recovery Under Settlements Which Provide Optional Funds For State Regulators To Implement ATC

As discussed, under the proposed settlements with CITGO, BB Oil, Coulson Oil, Diamond State, Flash Market, J&P Flash, Magness Oil, Port Cities Oil, W.H. Hess, G&M Oil, World Oil, United El Segundo, E-Z Mart, Love's, MM Fowler, Sunoco, Tesoro and Thorntons, defendants agree to pay certain amounts which will be available to each settlement state to defray regulatory costs of implementing ATC at retail. Under these settlements, defendants do not agree to install ATC or provide funds for retailers to install ATC. As such, these

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46. As noted, after five years, any sums remaining in the net settlement fund shall become available for disbursement either to (1) retailers or wholesalers or (2) weights and measures departments, regardless whether the application for disbursement comes from a state whose allocation of the net settlement fund is exhausted. The Court finds that allowing unused funds to be used for ATC in other states furthers the purpose of this litigation, *i.e.* to change the way the industry operates and facilitate a market transition to ATC. *See Order* (Doc. #4786) filed December 10, 2014 at 1. In addition, for reasons previously stated with regard to preliminary approval of the settlements, the Court finds that allowing unused funds to escheat to the state is reasonable under the circumstances. *See In re Motor Fuel*, 2012 WL 5876558, at *6.

settlements provide the least value to class members. Whether the settlement will provide class members increased opportunities to purchase ATC fuel will depend on whether state regulators take independent steps to implement ATC in their states. If they do not, after a specified period of time, the states may use remaining funds for any purpose. Individually, the value of these settlements to class members is quite small. Considered with the other settlements, however, it appears that these settlements could help further plaintiffs' goal of facilitating a market transition to ATC. In particular, to the extent that state regulatory costs may impede the ability of retailers to install ATC, it appears that these settlements may help clear the hurdle.[47] In light of plaintiffs' losses in the Kansas and California cases and their overall prospects of ultimately prevailing on their claims, the Court finds that the proposed settlements are a reasonable compromise of plaintiffs' claims. Accordingly, the Court finds that the third factor weighs in favor of approving the proposed settlements with CITGO, BB Oil, Coulson Oil, Diamond State, Flash Market, J&P Flash,

47. Some state regulators have stated that permitting ATC at retail would result in increased regulatory expenses for developing standards for equipment approval, certification testing, compliance enforcement and consumer labeling. *See Plaintiffs' Response To Objections Of QuikTrip Corporation, 7-Eleven Inc., Circle K Stores, Inc., Kum & Go, L.C., Marathon Petroleum Company LP, Murphy Oil USA, Inc., Pilot Travel Centers, LLC, Flying J, Inc., PTCAA Texas, LP, Racetrac Petroleum, Inc., Sheetz, Inc., Speedway LLC, The Pantry, Inc., and Wawa, Inc.* ("*Plaintiffs' Response To QuikTrip Objection*") *(Doc. #4817) at 14; Plaintiffs' Response To Frank Objectors' Opposition To Approval Of Settlement* (Doc. #4816) at 3.

Magness Oil, Port Cities Oil, W.H. Hess, G&M Oil, World Oil, United El Segundo, E-Z Mart, Love's, MM Fowler, Sunoco, Tesoro and Thorntons.

C. Objections

As noted, two groups (the Frank and QuikTrip Objectors) and one individual (Long) filed objections to the proposed settlements.

1. Frank Objections

The Frank Objectors object to the proposed settlements with BP, Chevron, CITGO, ConocoPhillips, ExxonMobil, Shell, Sinclair, Sunoco and Valero.[48] More specifically, the Frank Objectors assert that class certification is improper because (1) an intra-class conflict exists among settlement class members; (2) contributions to state weights and measures departments constitute compelled political speech which violates the First Amendment; (3) a class action is not "superior" because it cannot provide individual redress to class members; (4) the separation of powers doctrine counsels against certification; (5) *Burford* mandates abstention; and (6) the settlement class representatives are not loyal to class members. In addition, the Frank Objectors assert that the settlements

48. As discussed, the settlements with BP, Chevron, ConocoPhillips, ExxonMobil, Shell and Sinclair provide optional funds for retailers to install ATC and state regulators to implement ATC; the settlements with CITGO and Sunoco provide optional funds only for state regulators to implement ATC; the Valero settlement requires Valero to implement ATC.

are unfair because (1) they do not benefit class members; (2) they allow excessive attorney's fees; and (3) the Valero settlement contains a most-favored-nations clause.

a. Class Certification

i. Intra-Class Conflict

The Frank Objectors assert that an intra-class conflict exists between named plaintiffs and class members who routinely purchase gas at below-average temperatures. Frank Objection (Doc. #4808) at 8-12. Specifically, the *Frank Objectors* contend that class members who routinely purchase fuel at below-average temperatures benefit from the status quo — *i.e.* from purchasing non-ATC motor fuel — and that implementing ATC will harm their economic interests. With regard to the Costco settlement, the Court rejected a similar objection.[49] *See In re Motor Fuel*, 271 F.R.D. at 290. There, the Court found that the objection was hypothetical, *i.e.* the objectors had not shown that they or anyone they knew frequently bought gas at cooler temperatures. *Id.* The Court also found that if any class members believed that they would be worse off purchasing ATC fuel from Costco, they would be free to purchases non-ATC fuel from other vendors. *Id.*

The Frank Objectors assert that the Costco analysis does not apply here because Frank has submitted an affidavit which states that to avoid long lines, he tends to purchase fuel late at night or early in the morning and

49. Frank represented the objectors to the Costco settlement.

that he believes that ATC will result in higher prices for purchasers like him. *Id* at 10-11; *Declaration Of Theodore H. Frank In Support Of Objection* ¶ 8, attachment 1 thereto. Regarding the Costco settlement, the Court found that without an ATC option, class members have no way to determine the temperature of the fuel which they purchase. *See re Motor Fuel*, 2012 WL 1415508 at *14. Thus, even if Frank routinely purchases fuel in the morning or evening, *i.e.* when the ambient temperature is presumably cooler than in the middle of the day, he has no way to know the temperature of the fuel which he receives unless he manually measures fuel temperature at the time of purchase. *See, e.g.*, attachment to *Affidavit of John Willrodt*, Exhibit D to *Plaintiffs' Amended Motion For Preliminary Approval Of Their Settlement Agreement With Valero* ("*Valero Settlement Motion*") (Doc. #4456) filed November 7, 2012 (showing sample measurements of ambient and dispensed fuel temperatures at Valero station in San Antonio, Texas).[50] Ambient temperature alone does

50. Previously, plaintiffs proposed a settlement which required Valero to post the underground tank temperature of motor fuel. In an attempt to support the settlement, Valero took sample measurements of ambient temperature and dispensed fuel temperature over the course of a couple days at one station. *See Willrodt Affidavit* ¶ 5-6. The sample measurements show that ambient temperature alone does not necessarily indicate the temperature of dispensed fuel. For example, on October 16, 2012, around 10:00 a.m., the ambient temperature was 67 degrees and pump #2 dispensed fuel at 68.8 degrees and pump #15 dispensed fuel at 76.4 degrees. *See* Exhibit 1 to Willrodt Affidavit. The next morning around 11:00 a.m., the ambient temperature was 71 degrees and pump #5 dispensed fuel at 69.1 degrees and pump #15 dispensed fuel at 74.3 degrees. *See id.*

not indicate the temperature of dispensed fuel. Other factors such as underground storage tank temperature, timings of deliveries to the station and how frequently the dispensers are used can also affect dispensed fuel temperature. *See Valero Settlement Motion* (Doc. #4456) at 7. Thus, even if the Frank Objectors could identify class members who routinely purchase fuel in cooler ambient temperatures, they have not shown that those class members would be worse off with an ATC fuel option.

The Frank Objectors assert that the Costco analysis does not apply here because if the current settlements are approved, they include the majority of branded gas stations and cold weather purchasers will have no way to avoid purchasing ATC fuel. *See Motion For Final Settlement Approval* (Doc. #4834) at 11. The settlements alone, however, will not eliminate a class member's ability to purchase non-ATC fuel. Although the settlements are designed to help initiate a market transition to ATC, they provide funds to convert only a very small number of gas pumps.[51] Whether they will ultimately achieve that goal

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The Court rejected the settlement, finding that the proposed disclosures would provide little to no benefit to class members. *See In re Motor Fuel*, 2012 WL 5876558, at *13. Specifically, the Court found that to make use of the proposed tank temperature disclosures, "class members would need to account for statistical probabilities in the variation between tank temperature and dispensed temperature and then mathematically calculate a volume adjustment based on the likely dispensed temperature. *Id.* at *12.

51. For instance, the BP Settlement provides funds to convert approximately 1,143 pumps in 24 settlement states. *See In re Motor*

depends on forces outside the scope of the settlements and/or matters before this Court. Individual states remain free to allow or disallow ATC at retail. Other than five retailers which have agreed to install ATC, other retailers at most will have an option to seek reimbursement from a limited fund for costs associated with implementing ATC if they choose to do so. To the extent that a market transition actually occurs, it will be the result of objective, well-reasoned decisions by state law makers and competitive market forces driven by individual consumer choice. The Court overrules the Frank Objection on this ground.

ii. Compelled Political Speech

The Frank Objectors assert that the proposed settlements violate the First Amendment because they compel class members to make political donations. *Frank Objection* (Doc. #4808) at 12-15. As an initial matter, the Court notes that class members had an opportunity to opt out of the settlements and retain the value of their claims against defendants. Thus, they have not been

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Fuel, 2012 WL 5876558, at *5. In those states, approximately 7,040 stations sell BP-branded fuel. *See id.* The Court does not have information regarding the average number of pumps at each station. If each station has 5 pumps, the BP Settlement would fund ATC conversion for about 3 per cent of the total number of pumps selling BP-branded fuel in the settlement states (7,040 stations x 5 pumps = 35,200 total pumps. 1,143 ATC pumps/35,200 total pumps =.0325). Moreover, many fuel sellers adamantly oppose selling ATC fuel and appear to be committed to their current method of sale, *i.e.* non-ATC fuel. *See QuikTrip Objection* (Doc. #4809). Therefore, for any foreseeable future, it appears that consumers will be able to purchase fuel on a non-ATC basis.

required to contribute money to state agencies. Moreover, the settlement funds are not political in nature. The settlements aim to provide class members an increased opportunity to purchase ATC fuel. They do not fund a political candidate or lobby for a particular political view. The settlements merely provide funds to reimburse states for regulatory costs incurred in implementing ATC at retail, if they choose to do so. If the state chooses not to implement ATC at retail, the money will revert to the state's general fund.[52] The Court is confident that state lawmakers and regulators will independently and objectively determine whether to implement ATC at retail in their respective states.[53] The Court overrules the Frank Objection on this ground.

iii. Superiority

The Frank Objectors assert that because the settlements do not provide individual redress to class members, a class action is not superior to other means of adjudication. *Frank Objection* (Doc. #4808) at 16-18. The Court disagrees. As discussed, the proposed settlements provide value and benefit to class members. Moreover, the Frank Objectors have not shown that class members can

52. Under some settlements, the money would become available to other states for one year before reverting to the state's general fund.

53. The Court notes that plaintiffs have served notice of the settlements on more than 125 state and federal officials and none have objected. *See Plaintiffs' Response To QuikTrip Objection* (Doc. #4817) filed April 22, 2015.

feasibly pursue individual claims. Any individual damages are exceedingly small relative to the cost of maintaining separate actions, and plaintiffs' losses in the Kansas and California cases suggest dim prospects of prevailing in individual actions. The Court overrules the Frank Objection on this ground.

iv. Separation Of Powers

The Frank Objectors assert that by approving the proposed settlements, the Court will improperly entice or encourage lawmakers to change state law and/or establish state regulations in violation of the separation of powers doctrine set forth in the United States Constitution.[54] *Frank Objection* (Doc. #4808) at 18-21. The Frank

54. The separation of powers doctrine derives from the structure of our government and the body of the Constitution. The Constitution establishes a system of checks and balances in which no one branch can have more power than another. *See Stern v. Marshall*, U.S. , 131 S. Ct. 2594, 2608 (2011) ("'[T]he judicial Power of the United States . . . can no more be shared' with another branch than 'the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto.'") (quoting *United States v. Nixon*, 418 U.S. 683, 704 (1974)). Article III defines the judiciary's power and also protects its independence. *Id.* When the Framers established the system of divided power in our Constitution, it was essential that "the judiciary remain[ ] truly distinct from both the legislature and the executive." *Id.* (quoting The Federalist No. 78, p. 466 (C. Rossiter ed. 1961) (A. Hamilton). While Congress has a duty to create the nation's laws, it is the judiciary's duty to state what the law is. *Nixon*, 418 U.S. at 703 (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

Objectors are mistaken. The settlements cannot and do not require states to allow ATC at retail, nor do they unduly coerce or influence state decision making in that regard. Whether to allow ATC at retail remains exclusively in the control of state lawmakers and agencies. In finding that the proposed settlements are a fair and reasonable compromise of plaintiffs' claims, the Court is in no way directing state lawmakers and/or agencies to allow ATC at retail. The issue before this Court is whether the proposed settlements confer a fair benefit to class members in exchange for a release of their claims. The Court cannot and does not address all factors which state lawmakers and regulatory agencies must consider in deciding policies for weights and measures in particular states. To the extent that a particular state may permit ATC at retail, the settlements merely provide funds which the state can use to defray regulatory costs incurred as a result of its implementation. The Court overrules the Frank Objection on this ground.

v. *Burford* Abstention

The Frank Objectors assert that under Burford v. Sun Oil, 319 U.S. 315 (1943), the Court should abstain from approving the proposed settlements because they unduly interfere with state policymaking. Frank Objection (Doc. #4808) at 21. The Court again disagrees. Burford "is concerned with protecting complex state administrative processes from undue federal interference." *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans (NOPSI)*, 491 U.S. 350, 362 (1989). More specifically, *Burford* instructs that "[w]here timely and adequate

state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar; or (2) where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Id.* at 361 (internal quotation marks omitted); *see also Western Ins. Co. v. A & H Ins., Inc.*, 784 F.3d 725, 727 (10th Cir. 2015).

Here, the proposed settlements in no way interfere with state administrative processes. As discussed, whether to allow ATC at retail remains exclusively in the control of state lawmakers and agencies. Accordingly, *Burford* does not apply. The Court overrules the Frank Objection on this ground.

vi. Loyalty Of Class Representatives

The Frank Objectors assert that class certification is improper because class counsel picked the class representatives solely to approve settlements and that as a result, the class representatives are beholden to class counsel and their incentive payments and are unfairly motivated to accept settlements which do not benefit the class. *Frank Objection* (Doc. #4808) at 35-36. The record proves otherwise. Plaintiffs have filed more than 100 affidavits by named representatives which state that with respect to each settlement class or subclass, the

named representative understands his or her duties and representational responsibilities and believes that the proposed settlement is in the best interests of the class or subclass which he or she represents. *See* Exhibit 39 to *Motion For Final Settlement Approval* (Doc. #4834). The vast majority of the named representatives have been involved in this litigation since 2007. *See id.* Most of them have spent 30 to 50 hours on the litigation, with many spending more than 100 hours. *See id.* On this record, the Court finds that the named representatives have operated with a proper understanding of their representational responsibilities to the settlement classes. The Court overrules the Frank Objection on this ground.

b. Settlement Fairness

The Frank Objectors assert that the settlements are unfair because (1) they do not benefit class members; (2) they allow excessive attorney's fees; and (3) the Valero settlement contains a most-favored-nations clause.

i. No Benefit To Class Members

The Frank Objectors assert that the settlements do not benefit class members because (1) they confer the same prospective benefit on all fuel purchasers regardless of class membership; and (2) ATC will not economically benefit fuel purchasers. *Frank Objection* (Doc. #4808) at 22-28. As to the first argument, the fact that non-class members will also benefit from an opportunity to purchase ATC fuel does not diminish the fairness of the settlements. As discussed, the settlement classes exceed

100 million members whose claims for individual damages are exceedingly small relative to the cost of maintaining separate actions, and plaintiffs' losses in the Kansas and California cases suggest dim prospects of prevailing in individual actions. Under these circumstances, the fact that the settlements do not confer individual benefits unique to class members does not make them unfair. As discussed, the settlements are designed to increase opportunities for class members to purchase fuel at ATC, *i.e.* to achieve accuracy and consistency of fuel measurement for their fuel dollar, regardless of temperature at the time of pumping. Under the circumstances, the benefits received are a fair settlement of class member claims.

The Frank Objectors assert that ATC will not benefit class members because defendants can choose to pass along additional costs to their customers.[55] Frank

55. In an attempt to show that ATC would not benefit class members, the Frank Objectors point to a cost-benefit study which the California Energy Commission ("CEC") conducted in 2007 at the direction of the California legislature. *See Frank Objection* (Doc. #4808) at 26-27. The CEC Report attempted to quantify the benefits and costs associated with temperature compensation for retail sales of motor fuel in California. *See* CEC Report (Doc. #4835-27) at 1, Exhibit 45 to *Plaintiffs' Motion* (Doc. #4834).

On the benefit side, the CEC Report found that if ATC were mandated for use at retail stations, consumers could expect a slight benefit due to increased price transparency. *Id.* at 2. The Report noted that "[p]rices posted by two retail stations at an intersection showing identical prices may appear to be equivalent in value by the consumer, but if the fuel temperature at one station is higher than the other, the motorist would want to select the station with the cooler fuel temperature." *Id.*

On the cost side, the CEC Report found that retail station owners would experience additional expenses to retrofit equipment for ATC and slightly higher inspection fees. *Id.* It estimated that mandating ATC at retail would cost between $10,704 to $13,135 per retail outlet, for a total cost of $103.8 to $127.4 million. *Id.* In addition, retailers would incur increased costs for recurring maintenance and inspection fees. *Id.* If retailers passed through all additional expenses over a ten to 15-year time period, it estimated that requiring ATC at retail in California would cost between eight hundredths (8/100) to 18 hundredths (18/100) of a cent per gallon. *Id.*

The CEC Report concluded that if the only criterion for assessing merit is a net benefit to consumers, the legislature should not mandate ATC at retail because the cost-benefit analysis showed a net cost for consumers. The Report recommended, however, that the legislature "also consider whether the possible value of increased fairness, accuracy, and consistency of fuel measurement . . . justify mandating ATC at California retail stations." *Id.* at 3.

Here, the settlements do not mandate ATC at retail; they merely seek to facilitate voluntary ATC implementation by some retailers. Although the Frank Objectors contend that the CEC Report shows that ATC at retail would not benefit class members, it apparently has not stopped the director of California's division of measurement standards from finding that ATC at retail is permitted under California law. *See* letter dated September 13, 2011 from Kristin J. Macey, Ex. 46 to *Motion For Final Settlement Approval* (Doc. #4834). To the extent that the Frank Objectors assert that the settlements will cause the settling defendants to increase fuel prices, they do not address what effect continued litigation would have on fuel prices. *See Frank Objection* (Doc. #4808) at 27. Also, they do not address whether competitive market forces will allow the settling defendants to raise fuel prices when not all retailers are implementing ATC.

Objection (Doc. #4808) at 24-25. The Court rejected similar objections with regard to the Costco settlement. *See In re Motor Fuel*, 2012 WL 1415508, at *14. There, the Court found that the retail motor fuel market is a competitive one, that competition will determine whether Costco can raise prices and if so by how much, and that competitive pressures are particularly strong since not all retailers propose to change to ATC. *See id.* The same analysis applies here. As discussed, other than five retailers which have agreed to install ATC, other retailers at most will have an option to seek reimbursement from a limited fund for costs associated with implementing ATC. Many retailers seem to adamantly oppose ATC and presumably will continue to sell on volumetric basis without regard to fuel temperature. As such, competitive market forces will determine the prices which the settling defendants can charge. The Court overrules the Frank Objection on this ground.

ii. Excessive Attorney's Fees

The Frank Objectors assert that the proposed settlements are unfair because they allow class counsel excessive fees while conferring little to no benefit on class members. *See Frank Objection* (Doc. #4808) at 28-35. As discussed, the settlements confer a fair benefit to class members. As with the amended Costco settlement, the proposed settlements leave the Court discretion to award the appropriate amount of attorney's fees, if warranted. Under the circumstances, the Court is confident that any fee award can be fair and reasonable. *See In re Motor Fuel*, 2012 WL 1415508, at *15 (citing *Gottlieb v. Barry*, 43 F.3d 474, 482 n.4 (10th Cir. 1994)). The Court overrules

the Frank Objection on this ground.

iii. Valero Settlement — Most-Favored-Nations Clause

The Frank Objectors assert that the Valero Settlement is unfair because it contains a so-called "most-favored-nations clause" ("MFN clause") which permits Valero to retroactively modify the settlement if another defendant agrees to a more favorable deal. *See Frank Objection* (Doc. #4808) at 35.

Section 4.8 of the Valero Settlement states as follows:

> If at any time prior to the completion of conversion and installation of ATC, Class Counsel and Class Representatives agree to enter into any agreement with any person or company to resolve any action or any other pending or threatened claim concerning ATC that is materially more favorable to that person or company than this [Settlement Agreement] is to Valero (including, without limitation, calling for a lower conversion percentage, slower rate of conversion to ATC, or for completion of conversion to ATC at a later date than required by Paragraph 4.3), Class Counsel and Class Representatives agree to notify Valero promptly of the terms of such agreement. At Valero's sole discretion, it may adopt the materially more favorable terms in any such agreement in place of its obligations under

> Paragraph 4.4. Valero agrees to notify Class Counsel and Class Representatives in writing of any such election. The parties agree Paragraph 4.8 does not apply to Valero's obligations pursuant to Paragraphs 4.11 and 4.12 below. The parties agree that any change in Valero's obligations under Paragraph 4.3 as a result of any such election that is not a change that is materially adverse to the Settlement Class does not require additional notice to the class.

Valero Settlement ¶ 4.8, Ex. 11 to *Motion For Final Settlement Approval* (Doc. #4834).

The provision is virtually identical to the MFN clause in the amended Costco settlement, which the Court has approved. *See* Costco Amended Settlement Agreement, § 4.7, Exhibit B to *Defendant Costco Wholesale Corporation's Notice To Invoke Rights Under Section 4.7 Of The Settlement* (Doc. #4729) filed March 20, 2014. As with the amended Costco settlement, the provision applies only to agreements which contain more favorable terms regarding Valero's obligations under Paragraph 4.4 regarding the timetable for implementing ATC. *See Memorandum And Order* (Doc. #4793) filed January 23, 2015 at 12. It does not relieve Valero of obligations contained elsewhere in the agreement, *i.e.* to convert existing stores to ATC under Paragraph 4.1 and to install ATC at to stores under Paragraph 4.2. *See id.* Under these circumstances, the Court finds that the MFN clause is not unfair to class members. The Court overrules the Frank Objection on this ground.

For reasons discussed, the Court finds that all Frank Objections are without merit.

2. QuikTrip Objections

The QuikTrip Objectors assert that the proposed settlements (1) violate Article III; (2) violate the First Amendment; (3) create an appearance of quid pro quo corruption; and (4) usurp the prerogatives of federal and state regulators and violate separation of powers. Plaintiffs assert that the QuikTrip Objectors do not have standing to object to the settlements. The Court will first address the issue of standing.

As a preliminary matter, the Court notes that the QuikTrip arguments are based on a faulty premise, *i.e.* that ATC at retail is illegal in all settlement states. *See QuikTrip Objection* (Doc. #4809) at 11, 25. The QuikTrip Objectors assert that "**all states** currently prohibit ATC," that "every jurisdiction at issue in this case has rejected ATC," and that "the law **must** change in order for Plaintiffs to receive **any** relief" under the proposed settlements. *QuikTrip Objection* (Doc. #4809) at 11, 25; *QuikTrip Reply* (Doc. #4819) at 11 (emphasis in originals). The QuikTrip Objectors provide no support for these assertions,[56] and they are untrue.

56. To support the assertion that all states prohibit ATC, the QuikTrip Objectors cite language in the settlements with Casey's and Valero which states that the settling defendants take the position that the settlement states do not currently approve the use of ATC at retail. *See QuikTrip Objection* (Doc. #4809) at 11 (citing Casey's Settlement ¶ 4.6, Ex. 9 to *Motion For*

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In 2011, the director of California's division of measurement standards wrote a letter to plaintiffs' counsel regarding the Costco settlement. The letter states as follows: (1) California law and regulations provide sufficient authority for the division to address the evaluation, inspection and testing of ATC retail dispensers; (2) although the installation and use of ATC retail dispensers will require the state to develop procedures for evaluation, inspection and testing, the changes are not onerous; (3) one manufacturer has already received a California certificate of approval for an ATC retail dispenser; and (4) in anticipation of Costco's request to install ATC, the division has already drafted regulations which address ATC retail dispensers. *See* letter dated September 13, 2011 from Kristin J. Macey, Ex. 46 to *Motion For Final Settlement Approval* (Doc. #4834).

Also in 2011, the director of weights and measures in New Mexico testified that New Mexico allows ATC at retail. *See* Deposition of Joe Gomez at 51-52, 139, Exhibit 47 to *Motion For Final Settlement Approval* (Doc. #4834).

Final Settlement Approval (Doc. #4834) and Valero Settlement ¶ 4.5, Ex. 11 to *Motion For Final Settlement Approval* (Doc. #4834)). The fact that a settling defendant takes a position does not establish the merit of that position. Moreover, the fact that a state does not have regulations which affirmatively authorize ATC does not necessarily mean that it prohibits it. A more pertinent question would be how a state would respond to a request to install ATC. Based on the evidence in this case, it appears that to date, no retailer has requested leave to install ATC. That question is unresolved and its likely outcome is hotly disputed.

In addition, according to the CEC Report, the State of Hawaii has expressly adopted temperature compensation at retail by allowing existing retail dispensers to be modified to distribute an additional quantity of fuel (as measured in cubic inches) to compensate for warmer fuel.[57] *See* CEC Report at 1.

The QuikTrip Objectors make much ado over the fact that in 2009, at a meeting of the National Conference on Weights and Measures ("NCWM"), state officials considered and rejected proposals to amend Handbook 44 to expressly permit or mandate ATC for retail motor fuel sales. The fact that the NCWM declined to amend the handbook does not establish that the handbook prohibits ATC at retail. In 2007, *i.e.* before the NCWM declined to amend the handbook, at least 34 state officials indicated that ATC at retail was legal in their respective states.[58]

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57. Claims under Hawaiian law are not at issue in this case.

58. In 2007, the National Institute of Standards and Technology ("NIST") conducted a survey of 50 states and Washington, D.C. Thirty-four officials responded that ATC at retail was legal in their respective states or jurisdictions. *See* Exhibit 42 to *Motion For Final Settlement Approval* (Doc. #4834) (Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Washington, D.C., Georgia, Hawaii, Idaho, Illinois, Kansas, Kentucky, Louisiana, Maine, Maryland, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, Texas, Utah, Washington, West Virginia and Wisconsin). Sixteen officials responded that ATC at retail was not legal in their state or jurisdiction. *Id.* (Connecticut, Indiana, Iowa, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New

This Court has repeatedly found that the handbook is silent on the issue and does not expressly prohibit ATC. *See In re Motor Fuel*, 2013 WL 3795206, at *14; *In re Motor Fuel Temp. Sales Prac. Litig.*, No. 07-1840-KHV, 2012 WL 645997, at ** 5-7 (D. Kan. Feb. 28, 2012); *In re Motor Fuel Temp. Sales Prac. Litig.*, 534 F. Supp.2d 1214, 1224 (D. Kan. 2008); *see also Report Of Constantine V. Cotsoradis* at 2-4, Exhibit 35 to *Motion For Final Settlement Approval* (Doc. #4834). Moreover, the handbook does not establish state weights and measures law: each state must independently decide whether to adopt all or part of Handbook 44 and how to interpret the handbook under its law. *See, e.g., Memorandum And Order* (Doc. #4369) filed August 15, 2012 at 12 (Handbook 44 not law; simply contains model rules for states to adopt if they choose).

On this record, the Court must reject QuikTrip's underlying argument that ATC is illegal in every state and that the law must change before plaintiffs can obtain any relief under the proposed settlements.

a. Standing

As noted, the QuikTrip Objectors are non-settling and former defendants.[59] Plaintiffs assert that the

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York, Ohio, Pennsylvania, South Dakota, Tennessee, Vermont, Virginia and Wyoming). Officials from the State of Florida declined to answer the question, stating that Florida law did not expressly prohibit or allow ATC at retail. *Id.* at 2.

59. As noted, as to Kansas claims, 7-Eleven, Inc., Kum & Go, L.C. and QuikTrip Corp. obtained a jury verdict in their favor. *See Verdict* (Doc. #4422) filed September 24, 2012. As to

QuikTrip Objectors do not have standing to object to the settlements. Whether a party has standing is a legal question. *See Lippoldt v. Cole*, 468 F.3d 1204, 1216 (10th Cir. 2006). Under Article III of the United States Constitution, federal courts may only hear actual "cases" or "controversies."[60] U.S. Const. art. III, § 2, cl.1. To show Article III standing, a party must show that (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action; and (3) it is likely, as opposed to merely speculative, that a favorable decision will redress the injury. *New Eng. Health Care Emp. Pension Fund v. Woodruff*, 512 F.3d 1283, 1288 (10th Cir. 2008) (citing *Bronson v. Swensen*, 500 F.3d 1099, 1106 (10th Cir. 2007)).

Ordinarily, a non-settling party lacks standing to complain about a class action settlement because it has suffered no "injury in fact" and has no legally protected interest in the settlement.[61] *See In re Integra Realty Res.*,

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all other claims, plaintiffs have dismissed the QuikTrip Objectors as defendants with prejudice. *See Stipulation Of Dismissal With Prejudice* (Doc. #4711).

60. The question of standing is a "threshold determinant [ ] of the propriety of judicial intervention." *Warth v. Seldin*, 422 U.S. 490, 518 (1975); *see Bhatia v. Piedrahita*, 756 F.3d 211, 217 (2nd Cir. 2014). The standing requirements ensure that judicial resources are "devoted to those disputes in which the parties have a concrete stake." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 191 (2000).

61. Generally, only class members have standing to object to

Inc., 262 F.3d 1089, 1102 (10th Cir. 2001). Courts recognize a limited exception to this rule where a non-settling party can demonstrate that it will suffer "plain legal prejudice" as a result of the settlement. Plain legal prejudice includes "any interference with a party's contract rights or a party's ability to seek contribution or indemnification." *Id.*; *see Agretti v. ANR Freight Sys.*, 982 F.2d 242, 247 (7th Cir. 1992). "A party also suffers plain legal prejudice if the settlement strips the party of a legal claim or cause of action, such as a cross claim or the right to present relevant evidence at trial." *Woodruff*, 512 F.3d at 1288 (quoting In re Integra, 262 F.3d at 1102-03). In practice, courts find such prejudice only "in rare circumstances." *Allen v. Dairy Farmers of Am.*, No. 5:09-cv-230, 2011 WL 1706778, at *4 (D. Vt. May 4, 2011); *see In re Integra*, 262 F.3d at 1102 (not sufficient for non-settling party to show mere loss of practical or strategic advantage in litigating case): *Agretti* 982 F.2d at 247 ("mere allegations of injury in fact or tactical disadvantage as a result of a settlement simply do not rise to the level of plain legal prejudice").

The QuikTrip Objectors assert that they have standing to object because (1) they will suffer plain legal prejudice if the Court approves the settlements; and (2) Murphy Oil and Speedway are putative members of some settlement classes.

i. Legal Prejudice

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a class settlement. *See, e.g., Feder v. Elec. Data Sys. Corp.*, No. 06-40735, 248 Fed. Appx. 579, 580 (5th Cir. Sept. 25, 2007); *In re Drexel Burnham Lambert Grp., Inc.*, 130 B. R. 910, 923 (S.D.N.Y. 1991), aff'd, 960 F.2d 285 (2d Cir. 1992).

Appendix D

The QuikTrip Objectors assert that they have standing to object because they will suffer legal prejudice if the settlements are approved. Specifically, the QuikTrip Objectors assert that the settlements will cause injury to their business interests and First Amendment rights.

Injury To Business Interests

The QuikTrip Objectors assert that the proposed settlements will prejudice their legal right to conduct business as they have historically done and are authorized to do under current law, *i.e.* to sell fuel volumetrically without regard to fuel temperature. *QuikTrip Objection* (Doc. #4809) at 15. The QuikTrip Objectors assert that the entire thrust of the settlements is to change the regulatory environment in which they do business and that a permissive system of ATC implementation will effectively force all retailers to adopt ATC. *QuikTrip Reply* (Doc. #4819) at 7-9. Essentially, the QuikTrip Objectors argue that under the settlements, some retailers and states will move toward implementing voluntary ATC and that states might possibly decide to mandate ATC at retail, and that all this may result in market and/or regulatory forces requiring all retailers to implement ATC — which will harm them financially. *See id.*

The QuikTrip Objectors assert that plaintiffs' ultimate goal is to obtain mandatory ATC at retail. If so, the proposed settlements fall woefully short of that goal. The proposed settlements reflect voluntary agreements between private parties to install ATC and/or provide funds to retailers and state weights and measures agencies

to facilitate the voluntary implementation of ATC at retail to the extent it is permitted by law. The settlements do not in any way require the QuikTrip Objectors or any other non-settling party to install ATC at retail. As discussed, whether to allow ATC at retail — or mandate ATC at retail — remains exclusively in the control of state lawmakers and agencies. At most, the QuikTrip Objectors assert that the settlements will move plaintiffs one step closer to their goal, *i.e.* that voluntary implementation of ATC by some retailers may potentially cause a market shift which will result in mandatory ATC at retail. Such speculative potential business harm does not amount to an "injury in fact" sufficient to convey standing. In other words, it does not interfere with legal rights sufficiently to rise to the level of "plain legal prejudice." *See Woodruff*, 512 F.3d at 1288. The QuikTrip Objectors lack standing to object to the settlements based on alleged injury to business interests.

Injury To First Amendment Rights

The QuikTrip Objectors assert that the proposed settlements injure their First Amendment rights because they create a judicially-approved subsidy which their political rivals can use to influence government decision-making. QuikTrip Objection (Doc. #4809) at 15-17. In support of the argument, the *QuikTrip Objectors* cite *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, U.S. , 131 S. Ct. 2806 (2011). In *Bennett*, the Supreme Court held that a state cannot subsidize the speech of one political candidate because to do so effectively dilutes the speech of the other candidate.

See id. at 2814 (striking down state law that allowed candidates to obtain state funding to match spending of self-funded candidate). The QuikTrip Objectors assert that *Bennett* applies here because the settlements will fund an opposing political voice and effectively dilute their own political voice. *See QuikTrip Objection* (Doc. #4809) at 16-17. In essence, the QuikTrip Objectors assert that in the past, the settling defendants sided with the QuikTrip Objectors and opposed ATC and now, under the settlements, the settling defendants have agreed to change their position, *i.e.* to either support ATC or to abstain from taking a position regarding ATC, which will diminish the effectiveness of the QuikTrip Objectors' speech and weaken their political influence. *See id.*

As a preliminary matter, the QuikTrip Objectors mischaracterize the nature of the proposed settlements. They do not establish a government subsidy. As discussed, the settlements reflect voluntary agreements between private parties. That the Court approves the settlements as fair, reasonable and adequate under Rule 23(e)(2) does not mean that the federal government is subsidizing political speech or taking political action.[62] The settling defendants are free to switch sides in the ATC debate, and their decision to do so does not violate the First Amendment rights of the QuikTrip Objectors. On this record, the QuikTrip Objectors have not shown that they will suffer plain legal prejudice as a result of the settlements. *See*

62. For similar reasons, the Court rejects the QuikTrip assertion that the settlement agreements constitute a "court-endorsed campaign to change existing law." *QuikTrip Reply* (Doc. #4819) at 9-10.

Woodruff, 512 F.3d at 1288. The QuikTrip Objectors therefore lack standing to object to the settlements based on alleged injury to First Amendment rights.

ii. Class Membership

The QuikTrip Objectors assert that some of them have standing to object based on class membership. *See QuikTrip Objection* (Doc. #4809) at 17-18; *QuikTrip Reply* (Doc. #4819) at 3-6. Plaintiffs assert that the QuikTrip Objectors have not timely identified and/or proven the settlement classes to which they belong. *See Plaintiffs' Response To QuikTrip Objection* (Doc. #4817) at 4; *Plaintiffs' Surreply To QuikTrip Objection* (Doc. #4833) at 4-5.

The notice to class members provided the following procedure for objecting to the settlements:

> To object, you must send a letter via first class mail stating which Settlement(s) you object to and why. Be sure to include your name, address, telephone number and signature. You must mail the objection to [the Clerk of the Court, class counsel and defense counsel] no later than March 23, 2015.

Legal Notice By Order Of The United States District Court For The District Of Kansas at 13, attached as Exhibit A.

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On March 23, 2015, the QuikTrip Objectors filed their initial objection which asserted that "some" of them are members of some settlement classes. *See QuikTrip Objection* (Doc. #4809) at 17. To support the assertion, the QuikTrip Objectors provided a declaration by Marathon Petroleum employee Tonya J. Hunter which states that from 2001 to 2012, she purchased fuel in Kansas and Missouri on behalf of the company. *QuikTrip Objection* (Doc. #4809) at 17-18 and Exhibit A thereto. The affidavit does not identify from which retailers Hunter purchased fuel, and the QuikTrip Objectors did not identify which settlement agreements they objected to based on class membership. *See id.* Plaintiffs responded that the QuikTrip Objectors had not sufficiently shown that Marathon was a member of any settlement class. *See Plaintiffs' Response To QuikTrip Objection* (Doc. #4817) at 4. In reply, the QuikTrip Objectors "substituted" the Hunter declaration with declarations by Speedway employee Frank Crilley and Murphy Oil employees Rickey Burnell and Matthew Burton. *QuikTrip Reply* (Doc. #4819) at 5 n.2. The new declarations state that on behalf of Speedway, Crilley purchased gas in Texas from Valero, Love's and Chevron[63] and on behalf of Murphy Oil, Burnell purchased gas in Louisiana from Valero and Burton purchased gas in Arkansas from Exxon. *See QuikTrip Reply* (Doc. #4819) at 5 and exhibits thereto.

Plaintiffs assert that the QuikTrip Objectors did not timely identify who was objecting based on class

63. The Crilley declaration also states that he purchased gas from Stripes and Buc-ee's, *see* Exhibit 1 to *QuikTrip Objection* (Doc. #4809), but those retailers are not defendants in these MDL proceedings.

membership and to which settlements they objected. The Court agrees. The deadline for submitting objections was March 23, 2015. On or before that date, class members were required to state the settlements to which they objected and the reason for any objection. *See Legal Notice* at 13, Exhibit A hereto. On March 23, 2015, the QuikTrip Objectors filed an objection which asserted that Marathon was a settlement class member based on unspecified fuel purchases in Kansas and Missouri. More than six weeks later, on May 6, 2015, the QuikTrip Objectors "substituted" that objection with one based on class membership by Speedway and Murphy Oil. The QuikTrip Objectors did not obtain leave of Court to file objections based on new class membership. As such, the objections based on class membership by Speedway and Murphy Oil are untimely and not properly before the Court.

For these reasons, the QuikTrip Objectors lack standing to object to the proposed settlements. Nevertheless, even if the Court considered the merits, it would overrule the QuikTrip Objections.

b. Merits Of QuikTrip Objections

As noted, the QuikTrip Objectors assert that the settlements (1) violate Article III; (2) violate the First Amendment; (3) create an appearance of quid pro quo corruption; and (4) usurp the prerogatives of federal and state regulators and violate separation of powers.

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i. Article III

The QuikTrip Objectors assert that the proposed settlements violate Article III because they seek only to change future law and do not redress an injury caused by a legal violation. *See QuikTrip Objection* (Doc. #4809) at 18-22. The QuikTrip Objectors misconstrue the settlements and the facts. Plaintiffs have presented a live controversy, *i.e.* whether defendants' current method of sale violates state consumer protection laws. Although defendants prevailed in the Kansas trial and on summary judgment in the California cases, judgment has not been entered and plaintiffs retain the right to appeal. Moreover, plaintiffs' claims in states other than Kansas and California have not been decided. Although it appears that plaintiffs' chances of ultimately prevailing are slim, plaintiffs are releasing live claims in exchange for the settlements. Moreover, although the settlements may ultimately seek to change some law, or to change the regulatory environment, the overall aim of the settlements is to provide increased opportunities for class members to obtain transparent and consistent fuel measurement for their fuel dollars regardless of fuel temperature at the time of pumping.

ii. First Amendment

The QuikTrip Objectors assert that the proposed settlements violate the First Amendment because they (1) compel class members to make political donations; and (2) silence the political speech of two settling defendants, *i.e.* Dansk and Valero. *See QuikTrip Objection* (Doc. #4809) at 22-27.

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Compelled Speech

The QuikTrip Objectors assert that the settlements require class members to make political donations to state agencies. *See QuikTrip Objection* (Doc. #4809) at 22-25. For reasons discussed with respect to the Frank Objection, the Court disagrees. Class members had an opportunity to opt out of the settlements and thus are not required to make involuntary contributions to state agencies. Moreover, the settlement funds are not political in nature; they merely provide optional funds to reimburse states for regulatory costs incurred in implementing ATC at retail to the extent permitted by state law. As discussed, state lawmakers and regulators will independently and objectively determine whether to implement ATC at retail.

Silence Political Speech

The QuikTrip Objectors assert that the settlements with Dansk and Valero improperly silence political speech. *See QuikTrip Objection* (Doc. #4809) at 26-27. Specifically, the QuikTrip Objectors point to the following settlement language:

> Dansk agrees it will not impede or obstruct any legally permissible effort by Class Counsel related to the implementation, amendment or adoption of regulations related to retail ATC equipment.
>
> Valero agrees to abstain from any regulatory, legislative, lobbying or trade association activity

involving ATC and agrees not to oppose ATC.

Id. at 26 (quoting Dansk and Valero settlement agreements).

Again, the QuikTrip Objectors misconstrue the facts. The settlements reflect voluntary agreements between private parties, and any agreement not to speak is voluntary on behalf of the settling defendant. By approving the settlements, the Court is not violating First Amendment rights of the settling defendants or, by extension, the QuikTrip Objectors.

iii. Appearance Of Quid Pro Quo Corruption

The QuikTrip Objectors assert that the proposed settlements appear to have "hallmarks of corruption" because they provide "unseemly" payments to entice state regulators to change state law regarding ATC. *QuikTrip Objection* (Doc. #4809) at 27-29. For reasons already stated, the Court disagrees. The settlement funds will not benefit state lawmakers and administrators personally. To the extent that a particular state may permit ATC at retail, the settlements provide funds which a state can use to defray regulatory costs incurred as a result of its implementation. If the state chooses not to implement ATC at retail, the money will revert to the state's general fund.[64] The Court is confident that state officials will

64. Under some settlements, the money would become available to other states for one year before reverting to the state's general fund.

independently and objectively exercise their lawmaking and regulatory duties, and that the payments in question will not corrupt them.

iv. Separation Of Powers

The Quiktrip Objectors assert that the proposed settlements usurp the prerogatives of federal and state regulators and violate the doctrine of separation of powers. *QuikTrip Objection* (Doc. #4809) at 29-31. Specifically, the QuikTrip Objectors assert that it is improper for the Court to create and fund a "judicially enforceable lobbying campaign aimed at changing the decisions of the legislative and regulatory bodies responsible for uniformity and consumer protection." *Id.* at 30. The QuikTrip Objectors assert that regulators have already considered the interests of all stakeholders and decided against ATC at retail. *Id.* They argue that the settlements will in effect "override the deliberative processes of our democratic system in order to manufacture an important public policy determination enshrined in a judicially-enforceable settlement agreement." *Id.* at 31.

For reasons discussed, the Court rejects these assertions. The settlements do not require states to allow ATC at retail and do not unduly coerce or influence state decision making in that regard. In approving the proposed settlements, the Court is not directing state lawmakers or agencies to allow ATC at retail. Whether to allow ATC at retail remains exclusively in the control of independent, objective state lawmakers and agencies.

For these reasons, even if the QuikTrip Objectors had standing to object to the settlements, the Court would overrule their objections on all grounds.

3. Long Objection

Long objects to any settlement which gives money to the State of Kansas, on grounds that it will not properly manage the money.[65] *See* Doc. #4798. As previously stated, with regard to the settlement funds, the Court has utmost confidence in the ability of state lawmakers and regulators to independently and objectively make decisions that are in the best interests of the citizens of their respective states. The fact that one citizen of one state expresses a different opinion does not change the Court's position in this regard. The Court therefore overrules the Long Objection.

D. Conclusion

For reasons stated above, the Court finds that class certification is appropriate under Rule 23(a) and (b)(3) and that the proposed settlements are fair, reasonable and adequate under Rule 23(e)(2). Accordingly, the Court

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65. Specifically, Long states as follows:

> They have shown themselves to be incapable of proper money management and any money given would be a complete waste of settlement funds and would likely be squandered on something completely unrelated to this case, thus producing no actual benefits to the consumer.

Doc. #4798.

approves the 28 proposed settlements. The Court finds that the class members listed on Exhibit 7 to the *Dahl Affidavit* ¶ 31, Exhibit 30 to *Motion For Final Settlement Approval* (Doc. #4834) have opted out of the settlement.

E. Attorney's Fees

This memorandum and order does not address the Second Motion For Award Of Attorneys' Fees, Expenses, And Class Representative Incentive Awards and Memorandum In Support ("Second Motion For Attorney's Fees") (Doc. #4827) filed May 29, 2015. At the final settlement approval hearing, the Frank Objectors asserted that under Rule 23(h), Fed. R. Civ. P., class members did not receive sufficient notice of the fee request and an opportunity to object thereto.[66] *See Transcript*

66. Rule 23(h) states as follows:

> In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:
>
> (1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.
>
> (2) A class member, or a party from whom payment is sought, may object to the motion.
>
> (3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

Of Final Settlement Approval Hearing (Doc. #4840) at 54-55. Specifically, the Frank Objectors assert that under Rule 23(h), the Court must allow class members an opportunity to object to class counsel's fee motion and supporting documents. *See Response In Opposition To Motion For Leave To File Supplemental Briefing On Motion For Approval Of Attorneys' Fees* ("*Frank Response*") (Doc. #4842) filed July 2, 2015 at 1-2.[67]

In support of their argument, the Frank Objectors cite *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988 (9th Cir. 2010). There, the Ninth Circuit found that the plain text of Rule 23(h) requires a district court to set the deadline for class members to object to counsel's fee request on a date *after* the motion and supporting documents have been filed and allow class members an opportunity to object to the fee motion itself and not merely to the preliminary notice that such a motion will be filed.[68] *See id.* at 992-93.

> (4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

Rule 23(h), Fed. R. Civ. P.

67. The Frank Objectors also assert that the fee request does not satisfy Rule 23(h) because it does not provide a basis for lodestar claims, *i.e.* that it does not (1) identify timekeepers and billing rates, (2) detail expenses or (3) include affidavits from lead attorneys summarizing work performed. *See Frank Response* (Doc. #4842) at 3. The Court will consider these arguments when it addresses the merits of the fee request.

68. In *Mercury*, the district court awarded attorney's fees under a securities class action settlement. *See Mercury*, 618

Not all courts have followed *Mercury*.[69] To the contrary, in circumstances similar to this case, many courts have rejected *Mercury* and found that the class

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F.3d at 988, 990-91 (9th Cir. 2010). The class received notice that class counsel would request 25 per cent of the settlement fund. Objections were due September 4, 2008. The New York State Teachers' Retirement System ("TRS") objected on grounds that attorney's fees should not exceed 18 per cent. Two weeks later, on September 18, 2008, class counsel filed their motion for fees which included detailed information regarding the total number of hours spent and summaries of the type of work done by each firm. One week later, on September 25, 2008, the district court held a hearing on settlement fairness and attorney's fees and approved both. Regarding attorney's fees, the district court noted that TRS asserted that the fee award should be 18 per cent, but it did not object to any line item of work performed. *See id.* at 991. TRS appealed, arguing that the district court erred by setting the deadline for filing objections before the deadline for filing the fee motion and then partially basing its decision on the failure of TRS to object to any line item of work that counsel performed. *See id.* The Ninth Circuit agreed and found that by setting the class member objection deadline before the deadline for counsel to file their fee motion, the district court abused its discretion and erred as a matter of law. *Id.* at 992.

69. At least one other circuit court appears to have followed the Ninth Circuit decision in this regard. *See Redman v. RadioShack Corp.*, 768 F.3d 622, 637-38 (7th Cir. 2014) (reversing settlement approval for various reasons including "irregular" and "unlawful" procedure where class counsel did not file fee motion until after objection deadline expired; finding that objectors were handicapped because they did not have hour and expense details and did not know rationale for fee request, particularly where counsel invoked administrative costs as factor warranting increased fees).

received reasonable notice and an opportunity to object under Rule 23(h). *See, e.g., Cassese v. Williams*, 503 Fed. Appx. 55, 57-58 (2d Cir. Nov. 20, 2012) (declining to follow *Mercury*; notice of fee request reasonable under circumstances where objectors had two weeks before fairness hearing to crystalize objections and request further information); *Saccoccio v. JP Morgan Chase Bank, N.A.*, 297 F.R.D. 683, 699 (S.D. Fla. 2014) (same); *In re CertainTeed Fiber Cement Siding Litig.*, 303 F.R.D. 199, 221-22 (E.D. Pa. 2014) (declining to follow *Mercury*; notice of fee request reasonable even though motion filed after objections due); *Gascho v. Global Fitness Holdings, LLC*, No. 2:11-cv-436, 2014 WL 1350509, at *32 (S.D. Ohio April 4, 2014) (class notice provided information regarding potential for attorney's fees and opportunity to object and appear and fairness hearing).

Here, the notice to class members stated that class counsel planned to request court approval of attorney's fees and litigation costs of up to 30 per cent of the settlement funds and attorney's fees and litigation costs in the amounts of $700,000, $58,000, $3 million and $4 million from Casey's, Dansk, Sam's Club and Valero, respectively. *See Legal Notice* at 14-15, Exhibit A hereto. The notice set a deadline of March 23, 2015 for class members to object and stated that the Court would hold a fairness hearing on June 9, 2015 and consider objections at that time. *Id.* at 13-14, 16. The Court did not set a deadline for class counsel to file a motion for attorney's fees. Two months after objections were due and 11 days before the settlement fairness hearing — on May 29, 2015 — class counsel filed its fee request. *See Second Motion For Attorney's Fees* (Doc. #4827).

On these facts, the Court finds that the general notice to class members provided sufficient information regarding attorney's fees to allow class members a fair opportunity to lodge general objections to the settlements and fee request. Nevertheless, class members did not receive a chance to specifically respond or object to the actual fee motion filed by class counsel.

In response to the Frank Objection, plaintiffs suggest that the Court allow objectors additional time to address the fee motion. *See Supplemental Briefing On Motion For Approval Of Attorneys' Fees* (Doc. #4844) filed July 7, 2015. Under the circumstances, for those class members who objected to the settlements, the Court will allow additional notice and time to respond and/or object to the fee request as follows:[70]

(1) On or before **August 26, 2015**, plaintiffs shall post on the settlement class website a copy of this order and all fee applications and supporting documents.[71] *See id.* at 2-3.

(2) On or before **August 28, 2015**, to those class members who objected to the 28 settlements, plaintiffs

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70. Because the notice to class members provided sufficient information regarding attorney's fees to allow class members a fair opportunity to generally object to the settlements and fee request, only those class members who timely objected to the settlements may respond and/or object to the fee motion. Moreover, any additional filings may address only particular information contained in the fee requests and supporting documents.

71. In addition, the Court will post this order and the fee applications on its website.

shall mail copies of this order via first class mail.[72] The mailings shall include a cover letter which explains this portion of the Court's ruling and the deadlines set forth herein. In addition, the cover letter shall provide instructions on how class members can find detailed information regarding the fee request on the settlement class website.

(3) On or before **October 2, 2015**, class members may file objections to class counsel's fee request. Said objections may address only particular information contained in the fee applications and supporting documents.

(4) On **November 19, 2015 at 9:30 a.m.** in Courtroom 476, the Court will hold a hearing regarding the *Second Motion For Attorneys' Fees* (Doc. #4827) and the *Motion For Award Of Attorneys' Fees, Expenses, And Class Representative Incentive Awards And Memorandum In Support Thereof* (Doc. #1820) filed March 23, 2011.

As a final matter, the Court notes that in their reply regarding supplemental briefing on attorney's fees, plaintiffs cite "recently discovered information" which plaintiffs contend casts doubt on the motivations of objector Theodore H. Frank. *See Plaintiffs' Reply To Frank Objectors' Opposition To Plaintiffs' Supplemental Briefing On Motion For Approval Of Attorneys' Fees* (Doc. #4847) filed July 21, 2015 at 11-13. The Frank Objectors seek leave to file a surreply. *See Motion For*

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72. Plaintiffs shall include Lesley Duke in their mailings. *See Motion* (Doc. #4841) filed June 23, 2015.

Leave To File Surreply Re Plaintiffs' Supplemental Briefing On Motion For Approval Of Attorneys' Fees And Enjoin Objectors From Settling Objections Without Court Approval (Doc. #4848) filed August 4, 2015. Although the Court finds that the "recently discovered information" is not material to the matters at hand, and does not affect the Court's ruling on the Frank Objections, it will allow the Frank Objectors leave to file their surreply.

IT IS THEREFORE ORDERED that *Plaintiffs' Motion And Memorandum In Support Of Final Approval Of Class Action Settlements* (Doc. #4834) filed June 8, 2015 be and hereby is **SUSTAINED**.

IT IS FURTHER ORDERED as follows:

(1) On or before **August 26, 2015**, plaintiffs shall post on the settlement class website a copy of this order and all fee applications and supporting documents. *See id.* at 2-3.

(2) On or before **August 28, 2015**, to those class members who objected to the 28 settlements, plaintiffs shall mail copies of this order via first class mail. The mailings shall include a cover letter which explains this portion of the Court's ruling and the deadlines set forth herein. In addition, the cover letter shall provide instructions on how class members can find detailed information regarding the fee request on the settlement class website.

(3) On or before **October 2, 2015**, class members may file objections to class counsel's fee request. Said objections

may address only particular information contained in the fee applications and supporting documents.

(4) On **November 19, 2015 at 9:30 a.m.** in Courtroom 476, the Court will hold a hearing regarding the *Second Motion For Attorney's Fees* (Doc. #4827) and the *Motion For Award Of Attorneys' Fees, Expenses, And Class Representative Incentive Awards And Memorandum In Support Thereof* (Doc. #1820) filed March 23, 2011.

IT IS FURTHER ORDERED that the *Motion For Leave To File Surreply Re Plaintiffs' Supplemental Briefing On Motion For Approval Of Attorneys' Fees And Enjoin Objectors From Settling Objections Without Court Approval* (Doc. #4848) filed August 4, 2015 be and hereby is **SUSTAINED in part**. The Court grants the Frank Objectors leave to file their surreply.

Dated this 21st day of August, 2015 at Kansas City, Kansas.

/s/ Kathryn H. Vratil
Kathryn H. Vratil
United States District Judge

[EXHIBITS INTENTIONALLY OMITTED]

APPENDIX E — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED OCTOBER 3, 2017

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 15-3221

IN RE: MOTOR FUEL TEMPERATURE
SALES PRACTICES LITIGATION

ZACHARY WILSON, *et al.*,

Plaintiffs-Appellees,

v.

CIRCLE K STORES, INC., *et al.*,

Defendants-Appellants,

v.

CHEVRON USA, INC., *et al.*,

Defendants-Appellees,

and

BP CORPORATION NORTH AMERICA, INC., *et al.*,

Defendants.

Appendix E

No. 15-3227

IN RE: MOTOR FUEL TEMPERATURE SALES PRACTICES LITIGATION

ZACHARY WILSON, *et al.*,

Plaintiffs-Appellees,

v.

CIRCLE K STORES, INC, *et al.*,

Defendants-Appellants,

CHEVRON USA, INC., *et al.*,

Defendants-Appellees,

and

BP CORPORATION NORTH AMERICA, INC., *et al.*,

Defendants.

ORDER

Before **LUCERO**, **PHILLIPS**, and **MORITZ**, Circuit Judges.

Appendix E

Appellants' ("the Speedway Objectors") petition for rehearing is denied.

The petition for rehearing *en banc* was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/_____
ELISABETH A. SHUMAKER,
Clerk

APPENDIX F — FEDERAL RULES OF CIVIL PROCEDURE RULE 23

Federal Rules of Civil Procedure Rule 23

Rule 23. Class Actions

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) ***Certification Order.***

(A) *Time to Issue.* At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel.* An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) *Altering or Amending the Order.* An order that grants or denies class certification may be altered or amended before final judgment.

(2) ***Notice.***

(A) *For (b)(1) or (b)(2) Classes.* For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable

effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) *Judgment.* Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) *Particular Issues.* When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) *Subclasses.* When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) *In General.* In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) *Combining and Amending Orders.* An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) *Appointing Class Counsel.* Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) *Standard for Appointing Class Counsel.* When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) *Interim Counsel.* The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) *Duty of Class Counsel.* Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

APPENDIX G — NIST STATUTE CH. 872, 31 STAT. 1449, DATED MARCH 3, 1901

CHAP. 872.—An Act To establish the National Bureau of Standards.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Office of Standard Weights and Measures shall hereafter be known as the National Bureau of Standards.

SEC. 2. That the functions of the bureau shall consist in the custody of the standards; the comparison of the standards used in scientific investigations, engineering, manufacturing, commerce, and educational institutions with the standards adopted or recognized by the Government; the construction, when necessary, of standards, their multiples and subdivisions; the testing and calibration of standard measuring apparatus; the solution of problems which arise in connection with standards; the determination of physical constants and the properties of materials, when such data are of great importance to scientific or manufacturing interests and are not to be obtained of sufficient accuracy elsewhere.

SEC. 3. That the bureau shall exercise its functions for the Government of the United States; for any State or municipal government within the United States; or for any scientific society, educational institution, firm, corporation, or individual within the United States engaged in manufacturing or other pursuits requiring the use of standards or standard measuring instruments. All requests for the services of the bureau shall be made

in accordance with the rules and regulations herein established.

SEC. 4. That the officers and employees of the bureau shall consist of a director, at an annual salary of five thousand dollars; one physicist, at an annual salary of three thousand five hundred dollars; one chemist, at an annual salary of three thousand five hundred dollars; two assistant physicists or chemists, each at an annual salary of two thousand two hundred dollars; one laboratory assistant, at an annual salary of one thousand four hundred dollars; one laboratory assistant, at an annual salary of one thousand two hundred dollars; one secretary, at an annual salary of two thousand dollars; one clerk, at an annual salary of one thousand two hundred dollars; one messenger, at an annual salary of seven hundred and twenty dollars; one engineer, at an annual salary of one thousand five hundred dollars; one mechanician, at an annual salary of one thousand four hundred dollars; one watchman, at an annual salary of seven hundred and twenty dollars, and one laborer, at an annual salary of six hundred dollars.

SEC. 5. That the director shall be appointed by the President, by and with the advice and consent of the Senate. He shall have the general supervision of the bureau, its equipment, and the exercise of its functions. He shall make an annual report to the Secretary of the Treasury, including an abstract of the work done during the year and a financial statement. He may issue, when necessary, bulletins for public distribution, containing such information as may be of value to the public or facilitate the bureau in the exercise of its functions.

SEC. 6. That the officers and employees provided for by this Act, except the director, shall be appointed by the Secretary of the Treasury, at such time as their respective services may become necessary.

SEC. 7. That the following sums of money are hereby appropriated: For the payment of salaries provided for by this Act, the sum of twenty-seven thousand one hundred and forty dollars, or so much thereof as may be necessary; toward the erection of a suitable laboratory, of fireproof construction, for the use and occupation of said bureau, including all permanent fixtures, such as plumbing, piping, wiring, heating, lighting, and ventilation, the entire cost of which shall not exceed the sum of two hundred and fifty thousand dollars, one hundred thousand dollars; for equipment of said laboratory, the sum of ten thousand dollars; for a site for said laboratory, to be approved by the visiting committee hereinafter provided for and purchased by the Secretary of the Treasury, the sum of twenty-five thousand dollars, or so much thereof as may be necessary; for the payment of the general expenses of said bureau, including books and periodicals, furniture, office expenses, stationery and printing, heating and lighting, expenses of the visiting committee, and contingencies of all kinds, the sum of five thousand dollars, or so much thereof as may be necessary, to be expended under the supervision of the Secretary of the Treasury.

SEC. 8. That for all comparisons, calibrations, tests, or investigations, except those performed for the Government of the United States or State governments within the United States, a reasonable fee shall be

charged, according to a schedule submitted by the director and approved by the Secretary of the Treasury.

SEC. 9. That the Secretary of the Treasury shall, from time to time, make regulations regarding the payment of fees, the limits of tolerance to be attained in standards submitted for verification, the sealing of standards, the disbursement and receipt of moneys, and such other matters as he may deem necessary for carrying this Act into effect.

SEC. 10. That there shall be a visiting committee of five members, to be appointed by the Secretary of the Treasury, to consist of men prominent in the various interests involved, and not in the employ of the Government. This committee shall visit the bureau at least once a year, and report to the Secretary of the Treasury upon the efficiency of its scientific work and the condition of its equipment. The members of this committee shall serve without compensation, but shall be paid the actual expenses incurred in attending its meetings. The period of service of the members of the original committee shall be so arranged that one member shall retire each year, and the appointments thereafter to be for a period of five years. Appointments made to fill vacancies occurring other than in the regular manner are to be made for the remainder of the period in which the vacancy exists.

Approved, March 3, 1901.

APPENDIX H — 28 U.S.C. § 2072. RULES OF PROCEDURE AND EVIDENCE; POWER TO PRESCRIBE

§ 2072. Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.