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Attorneys for Plaintiffs

SUPERIOR COURT FOR THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

CROSSROAD PETROLEUM, INC., a

California corporation; MURPHY

PETROLEUM, INC., a California corporation;

BALBOA PETROLEUM, INC., a California

corporation; TAMARACK PETROLEUM,

INC., a California corporation; SB

PETROLEUM, INC., a California corporation;

UM PETROLEUM, INC., a California

COMPLAINT FOR:

1. **BREACH OF CONTRACT**
2. **NEGLIGENCE**
3. **BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING**
4. **BUSINESS AND PROFESSIONS CODE SECTION 21200**
5. **BUSINESS & PROFESSIONS CODE**

1 corporation; BARTON PETROLEUM, INC.,
2 a California Corporation; CITRUS
3 PETROLEUM, INC., a California corporation;
4 THRIFTY PETROLEUM, INC., a California
5 Corporation; HK PETROLEUM, INC., a
6 California corporation; NATIONAL CITY
7 COMPLEX, INC., a California corporation;
8 A&A HOLDINGS, INC., a California
9 corporation; and MERCED MARKET, INC., a
10 Washington corporation,

11 Plaintiffs,

12 v.

13 BP WEST COAST PRODUCTS LLC, a
14 California Limited Liability Company,
15 RETALIX LTD., an Israeli Business; and
16 DOES 1 through 100, inclusive,

17 Defendants.

SECTION 17045
6. BUSINESS & PROFESSIONS CODE
SECTION 17200

REQUEST FOR JURY TRIAL

1 **INTRODUCTION**

2 1. Plaintiffs are entities who purchased franchises from BP West Coast Products LLC
3 (hereinafter "BP"), to own and/or operate gasoline stations under the BP and ARCO brand, along
4 with *ampm* Mini Market stores (hereinafter, "Plaintiffs" or "BP franchisees").

5 2. BP is part of a multinational conglomerate that reaps hundreds of billions of dollars
6 in profits every year.

7 3. In stark contrast, Plaintiffs are the prototypical American entrepreneurs. Their
8 businesses provide the indispensable service of supplying our cars with gasoline and a convenient
9 place to purchase items at their Mini Market stores. The typical BP franchise owned by Plaintiffs
10 operates at a relatively low profit margin (often just a few pennies) dependent upon a high-volume
11 business that provides much greater profits to others (such as BP) in the chain of commerce.

12 4. In its business dealings with BP franchisees, BP has breached its agreements with
13 Plaintiffs in numerous ways, causing each BP franchisee hundreds of thousands of dollars or more
14 in damages. As described below, BP has materially breached its obligations under its franchise
15 agreements.

16 5. This complaint also sets forth other instances of BP's improper conduct, all done to
17 squeeze every penny of profit from its businesses, regardless of the consequences to others.

18 6. By this action, Plaintiffs seek full recompense as victims of BP's improper conduct.

19 **THE PARTIES**

20 7. At all relevant times, plaintiff Crossroad Petroleum, Inc. was a California corporation
21 doing business in the State of California, with its principal place of business in the city of San
22 Diego, CA and is the owner or operator of one or more BP franchise.

23 8. At all relevant times, plaintiff Murphy Petroleum, Inc. was a California corporation
24 doing business in the State of California, with its principal place of business in the city of San
25 Diego, CA and is the owner or operator of one or more BP franchise.

1 9. At all relevant times, plaintiff Balboa Petroleum, Inc. was a California corporation
2 doing business in the State of California, with its principal place of business in the city of San
3 Diego, CA and is the owner or operator of one or more BP franchise.

4 10. At all relevant times, plaintiff Tamarack Petroleum, Inc. was a California corporation
5 doing business in the State of California, with its principal place of business in the city of Carlsbad,
6 CA and is the owner or operator of one or more BP franchise.

7 11. At all relevant times, plaintiff SB Petroleum, Inc. was a California corporation doing
8 business in the State of California, with its principal place of business in the city of Highland, CA
9 and is the owner or operator of one or more BP franchise.

10 12. At all relevant times, plaintiff UM Petroleum, Inc. was a California corporation doing
11 business in the State of California, with its principal place of business in the city of Imperial Beach,
12 CA and is the owner or operator of one or more BP franchise.

13 13. At all relevant times, plaintiff Barton Petroleum, Inc. was a California corporation
14 doing business in the State of California, with its principal place of business in the city of Redlands,
15 CA and is the owner or operator of one or more BP franchise.

16 14. At all relevant times, plaintiff Citrus Petroleum, Inc. was a California corporation
17 doing business in the State of California, with its principal place of business in the city of Redlands,
18 CA and is the owner or operator of one or more BP franchise.

19 15. At all relevant times, plaintiff Thrifty Petroleum, Inc. was a California corporation
20 doing business in the State of California, with its principal place of business in the city of Highland,
21 CA and is the owner or operator of one or more BP franchise.

22 16. At all relevant times, plaintiff HK Petroleum, Inc. was a California corporation doing
23 business in the State of California, with its principal place of business in the city of San Diego, CA
24 and is the owner or operator of one or more BP franchise.

25 17. At all relevant times, plaintiff National City Complex, Inc. was a California
26 corporation doing business in the State of California, with its principal place of business in the city
27 of National City, CA and is the owner or operator of one or more BP franchise.

1 18. At all relevant times, plaintiff A&A Holdings, Inc. was a California corporation
2 doing business in the State of California, with its principal place of business in the city of San
3 Bernardino, CA and is the owner or operator of one or more BP franchise.

4 19. At all relevant times, plaintiff Merced Market, Inc. was a Washington corporation
5 doing business in the State of Washington, with its principal place of business in the city of Seattle,
6 WA and is the owner or operator of one or more BP franchise.

7 20. Plaintiffs are informed and believe, and thereon allege, that defendant BP West Coast
8 Products LLC is, and at all relevant times has been a Delaware Limited Liability Company, with its
9 principal place of business located in La Palma, California. Plaintiffs are informed and believe that
10 the decisions made by BP regarding gas pricing, Retalix, *ampm* vendor payments, and other ARCO
11 and *ampm* operations were made principally in California.

12 21. Plaintiffs are informed and believe, and thereon allege, that defendant Retalix LTD
13 ("Retalix") is, and at all relevant times has been, a business with its corporate headquarters in
14 Ra'anana, Israel. Retalix conducts business under the trademark Retalix and its North American
15 Headquarters are in Plano, Texas. Retalix USA ("Retalix USA") is a Texas Corporation, and acts as
16 an instrumentality for its foreign parent or sister companies, including Retalix. Retalix USA
17 performs duties sufficiently important that if the foreign corporation (Retalix) did not have Retalix
18 USA as its representative, the foreign corporation (Retalix) would require its own officials to
19 perform similar services.

20 22. Plaintiffs do not know the true names or capacities of the persons or entities sued
21 herein as DOES 1 to 100, inclusive, and therefore sue such defendants by such fictitious names.
22 Plaintiffs are informed and believe and thereon allege that each of the DOE defendants is in some
23 manner legally responsible for the damages suffered by plaintiff and the members of the class as
24 alleged herein. Plaintiff will amend this Complaint to set forth the true names and capacities of
25 these defendants when they have been ascertained, along with appropriate charging allegations, as
26 may be necessary.

27 23. Plaintiffs are informed and believe, and thereon allege, that at all relevant times, each
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1 defendant was an agent, employee, employer, and/or partner of, and/or in a joint venture with, each
 2 other defendant. Plaintiffs further allege that such acts or omissions alleged on the part of each
 3 defendant were conducted in the course, scope and furtherance of the agency, employment,
 4 partnership and/or joint venture in which each other defendant participated or is participating. As
 5 such, Plaintiffs allege that each defendant is both primarily and vicariously liable for the acts or
 6 omissions of each other defendant, and each defendant has acted in the course and scope of such
 7 agency, employment, partnership and/or joint venture.

8 JURISDICTION AND VENUE

9 24. This Court has jurisdiction over the entire action by virtue of the fact that this is a
 10 civil action wherein the matter in controversy, exclusive of interest and costs, exceeds the
 11 jurisdictional minimum of the Court. The acts and omissions complained of in this action emanated
 12 from the state of California, and Defendants reside and/or conduct business in the State of
 13 California.

14 25. Venue is proper because the acts and/or omissions complained of took place, in
 15 whole or in part within the venue of this Court.

16 GENERAL ALLEGATIONS

17 26. Each of the Plaintiffs, over a period of several years, entered into several agreements
 18 with BP, including:

- 19 • A Contract Dealer Gasoline Agreement (hereinafter "Gas Agreement") setting forth
 20 the terms of fuel sales and operations between Plaintiffs and BP, an exemplar of which is attached
 21 hereto as Exhibit "A";
- 22 • An *ampm* MINI MARKET AGREEMENT (hereinafter "Convenience Store
 23 Agreement") setting forth the terms of consumer goods sales and operations between Plaintiffs and
 24 BP, an exemplar of which is attached hereto as Exhibit "B";
- 25 • A contract setting forth the terms of purchase for point of sale software for the
 26 franchise (the "Retalix Agreement"), an exemplar of which is attached hereto as Exhibit "C".

1 **A. VENDOR MANIPULATION**

2 27. The Gas Agreement and the Convenience Store Agreement (collectively, the
3 “Franchise Agreements”) state that BP has the exclusive right to select the initial list of vendors for
4 a range of products and services, including without limitation:

- 5 • Consumable goods such as food and drink related items;
- 6 • Hardware such as point of sale equipment;
- 7 • Software such as point of sale software;
- 8 • Services such as payment processing, repairs and training.

9 28. Moreover, the Convenience Store Agreement (Exhibit B) provides that BP
10 franchisees can proffer additional vendors, who are to be approved by BP if the vendors are
11 “responsible,” comply with pertinent product specifications and do not result in an unreasonably
12 large number of available vendors, as follows:

13 **14.01** From time to time, BPWCP shall provide Operator with a list
14 of merchandise and equipment vendors approved or suggested by
15 BPWCP. BPWCP will, upon written request by Operator or a vendor,
16 approve any responsible vendor for products or equipment upon
17 showing that the specifications will be met in a lawful manner and the
18 terms of the contract are satisfactory, provided that BPWCP reserves
19 the right to limit the number of approved suppliers to a reasonable
20 number and to charge a reasonable fee to evaluate a proposed vendor.

21 29. Over the last several years, many of the BP franchisees have requested that BP
22 consider alternative vendors to the vendors selected by BP. However, BP routinely rejects such
23 alternative vendors, notwithstanding the fact that those vendors could make a “showing that the
24 specifications will be met in a lawful manner and the terms of the contract[s] are satisfactory.”

25 30. Some of BP’s existing vendors pay BP a fee for the right to be the exclusive vendor
26 to BP’s franchisees for a particular product or service and/or additional consideration. Upon
27 information and belief, BP’s refusal to allow additional vendors to provide services to BP
28 franchisees at a lower price is because the vendors would not provide BP with (or BP believes they
29 would not provide it with) comparable kickbacks or other financial advantage.

30 31. Needless to say, because the vendors are not subject to being replaced by competitors

1 offering lower prices, the vendors who pay the kickbacks and/or other financial consideration to BP
2 can recoup such expenditures by charging above-market prices for their goods and services to BP
3 franchisees. Neither BP nor the vendors disclose these kickbacks or other financial advantage to the
4 franchisees, including Plaintiffs.

5 32. Upon information and belief, non-BP gasoline stations and convenience stores are
6 charged lower prices by the same vendors on BP's list for identical products. The reason for the
7 price differential is that the vendors must pay fees to BP for exclusivity and other fees.

8 33. BP's refusal to approve the alternative vendors suggested by its BP franchisees has
9 resulted in tens (if not hundreds) of thousands of dollars in damages to each of the Plaintiffs. This is
10 because the BP "approved" vendors charge higher prices than the "alternative" vendors proffered by
11 the BP franchisees. This is not surprising since the BP vendors have to recoup the monies that they
12 pay to BP for the privilege of being on BP's "approved" list.

13 **B. RETALIX**

14 34. Retalix sells point of sale and inventory software for tracking gasoline sales, and
15 convenience store sales.

16 35. Plaintiffs allege upon information and belief, that BP entered into a licensing
17 agreement with Retalix, whereby Retalix paid BP a sum of money to have the right to distribute the
18 Retalix software to its franchisees. Upon information and belief, Retalix (either by itself or through
19 its wholly owned subsidiary, Retalix USA) was obligated to provide support to BP and BP
20 franchisees in connection with problems that developed through beta testing and implementation.
21 Retalix and/or BP have also implemented approximately six (6) version changes to the Retalix
22 program, none of which have solved the problems that have attended the program, as described
23 below.

24 36. Sometime in late 2006, early 2007, prior to full deployment, BP and Retalix began
25 beta testing Retalix at several franchise locations, offering the software for free to those franchises
26 that would participate in the pilot program.

27 37. During the pilot program, the Retalix software failed often, and exhibited several
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1 major defects, including, but not limited to:

- 2 • System Shutdowns – the software periodically crashes, halting all business
3 operations at the site;
- 4 • Lost Transactions – the software occasionally fails to record transactions, though the
5 customer nonetheless receives the product (gasoline or *ampm* products), with the BP franchisee
6 receiving nothing in return from the customer;
- 7 • Non-Compliant Receipts – the receipts issued through the Retalix program failed to
8 comply, on occasions, with state laws, resulting in fines to franchisees, including some of the
9 Plaintiffs;
- 10 • Overcharging Cards – charging customers more than the price of their purchase,
11 including in several cases overcharges of over 1000% - resulting in harm to the BP franchisees'
12 businesses.

13 38. Because BP and Retalix conducted the beta testing, they were aware of these defects
14 at all times.

15 39. Despite the defects, BP required that Plaintiffs purchase Retalix software and
16 required hardware directly from BP to the franchisees for between \$30,000.00 and \$35,000.00.

17 40. Plaintiffs allege that they could have purchased adequate and legally compliant point
18 of sale systems that functioned properly for significantly less than the cost of the Retalix system.

19 41. Once installed, the Retalix software began exhibiting the same defects that it did
20 during the beta testing.

21 42. The Retalix program has been an unmitigated disaster for Plaintiffs. On some sales,
22 the Retalix program overcharges customers (sometimes more than \$1,000 for a tank of gasoline).
23 On other sales, the customer's accounts are not charged – even though the transaction has been
24 completed. There is no integrity in the inventory tracking, and Plaintiffs have no ability to
25 determine if they are overpaying for royalties due to BP.

26 43. The Retalix program will also periodically “crash” – resulting in a complete
27 termination of business at the gasoline stations and *ampm* Mini Markets. Needless to say, if a
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1 customer comes to the BP station that is closed, the BP franchisee loses sales that could have taken
2 place at that time. Significantly, receipts issued through the Retalix program have occasionally
3 failed to comply with state laws, resulting in Plaintiffs having to pay fines for such regulatory
4 violations. The “crashing” of the Retalix program occurred through beta testing, and continues
5 through the filing of this complaint – notwithstanding the introduction of various “versions” of the
6 Retalix program by Retalix and BP that were specially designed and revised for BP ARCO
7 franchisees.

8 44. Payments submitted through the Retalix software are sometimes permanently lost,
9 causing each Plaintiff additional damages.

10 45. Plaintiffs were harmed economically as a result of the defects in several ways,
11 including, at least one, if not all of the following:

- 12 • Lost sales during system shutdowns;
- 13 • Lost sales due to transactions disappearing, allowing customers to walk off with
14 inventory with no money transferring to Plaintiffs’ accounts;
- 15 • Sales made at incorrect prices (e.g., \$.01 packs of cigarettes) due to Retalix errors.
- 16 • Incorrect or missing information (e.g., change due to a customer who has pumped
17 gas);
- 18 • Lost customers due to frequent shutdowns and lost confidence due to overcharged
19 cards;
- 20 • Fines from the government for issuing receipts that did not comply with applicable
21 laws;
- 22 • Having to hire and train additional employees to help compensate for the problems
23 with the Retalix software.

24 46. BP forced Plaintiffs to purchase the Retalix program when it knew through beta
25 testing that it did not work, ostensibly because BP had invested millions of dollars in the Retalix
26 program and the only way that it could recoup its investment was by forcing its franchisees to
27 purchase the Retalix program and/or because Retalix gave BP unprecedented visibility into

1 Plaintiffs' businesses so that it could devise new ways to extract profits from Plaintiffs. Such
2 conduct constitutes, among other things, a breach of contract, fraud and a breach of the implied
3 covenant of good faith and fair dealing. Indeed, the Retalix program is negligently designed, has
4 been negligently repaired by Retalix and is not suited for its intended applications in Plaintiffs'
5 businesses. Both BP and Retalix have had actual knowledge of the defects in the program and its
6 application to Plaintiffs' businesses.

7 47. BP, despite knowing of these defects, continued to charge royalties for all products
8 that left Plaintiffs' shelves or pumps, even if Plaintiffs were not getting paid for them because of
9 defects in the Retalix software.

10 48. Retalix was specifically obligated not only to customize and provide "fixes" for
11 problems to the specially designed program, but the contractual agreements between Retalix and BP
12 contain provisions that specify certain obligations that Retalix owes to "Franchisees" in the event
13 that there is a problem with the Retalix program.

14 49. It is now more than four years since the Retalix software was first implemented, and
15 the same problems persist.

16 50. Despite constant complaints from franchisees, BP and Retalix have either been
17 unable or unwilling to repair the problems with the Retalix software.

18 **C. BP'S PRICING PRACTICES VIOLATE THE IMPLIED COVENANT OF**
19 **GOOD FAITH AND FAIR DEALING**

20 51. BP has violated the implied covenant of good faith and fair dealing in its agreements
21 with franchisees in connection with its contracts to sell gasoline to its franchisees. While BP
22 reserved the sole right to set the wholesale price of gasoline sold to Plaintiffs, the implied covenant
23 of good faith and fair dealing required it to not set the price of gasoline in a manner that frustrated
24 the entire purpose behind the franchisor/franchisee contractual relationships.

25 52. **BP's ARCO Business Model.** BP advertises to consumers that ARCO is a "high-
26 volume, low-cost retailer." It does not advertise additives such as Chevron's Techron and does not
27 claim to offer superior quality gas. Unlike many other brands, BP's ARCO stations generally do not
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1 accept credit card transactions. BP's ARCO franchisees must sell gasoline at a lower retail price per
2 gallon than their nearby competitors that accept credit card transactions, including discount stations.
3 BP sells itself to franchisees on a model of low gasoline prices and a high volume of sales.

4 53. The Gas Agreement envisions that one of the purposes of the BP
5 Franchisor/Franchisee relationship is to allow franchisees to "compete more effectively" in the
6 marketplace. (Exhibit A, Section 5.) Consistent with that purpose, while BP has discretion to set the
7 wholesale price of gasoline, that discretion must be exercised in good faith.

8 54. While the term "compete more effectively" is not specifically defined in the Gasoline
9 Agreement, it has been understood by the parties, through direct representations, custom and
10 practice, to mean that BP would sell gasoline at prices that were significantly below the "street
11 price" of its competitors.

12 55. Plaintiffs can no longer compete effectively with other gasoline stations because in
13 the last four or more years BP has substantially decreased the difference in price between what it
14 charges Plaintiffs for gasoline and what Plaintiffs' nearby competitors are charging – contrary to
15 what BP represented to BP Franchisees as to what it meant by "compete more effectively" when
16 they entered the agreements.

17 56. In order to compete more effectively and make a reasonable profit on their
18 investment of \$1 million and more for the franchise, and to pay for overhead expenses (including, in
19 some locations in the Northwest United States, the cost of personnel who fill gasoline tanks), and to
20 make "royalty" payments, the wholesale price of the gasoline that BP sells to its franchisees needs to
21 be substantially lower than the price sold at the pump at BP franchise stations. This is so also
22 because ARCO is considered a discount brand of gasoline and ARCO must be priced lower than
23 major retailers such as Shell, Chevron, Unocal, and others.

24 57. **Pricing Methodology.** BP contends it uses the following pricing methodology: it
25 first utilizes a retail market price survey of the likely competitors of BP franchisees, which
26 establishes the street or "support" price; and then BP subtracts the state and federal taxes, a credit
27 card factor, and a statewide "assumed margin" in cents per gallon that BP believes the competitors

1 are making from each gallon of gasoline; BP then contends that it from time to time will exercise its
2 discretion to adjust prices up or down given a myriad of factors. However, BP admits that it departs
3 from its established pricing methodology (a methodology which is ostensibly designed to make the
4 franchisees competitive) during certain times when it advantages BP and disadvantages the
5 franchisees to the point where, after factoring in taxes, BP franchisees are paying for gasoline at a
6 wholesale price higher than the price at which its competitors are selling gasoline at retail.

7 58. Moreover, BP admits that one of the components of its pricing methodology (called
8 the “assumed margin” of the franchisees’ competition) is entirely made up and not reflective of the
9 real world margin of its competition. However, BP has undertaken no analysis to determine what
10 the actual margin is of competitors, while acknowledging that the information would be valuable to
11 setting a competitive price. BP has access to industry data and marketing analysis which
12 demonstrates that the competitive margin earned by BP franchisees’ competitors is in the area of 17-
13 22 cents per gallon. Instead, BP’s current assumed margin is far below this and is therefore arbitrary
14 and not reflective of the real world margin. It is believed that the use of this arbitrary “assumed
15 margin” figure by BP results in the BP franchisee being substantially overcharged.

16 59. Accordingly, the BP franchisee is harmed at least two distinct ways with the pricing
17 methodology. First, it already receives and pays for wholesale gasoline at prices that BP concedes is
18 far more expensive than it should be by using this arbitrary “assumed margin” figure. And second,
19 when it suits BP, BP will depart from its pricing methodology so that Plaintiffs cannot “compete
20 more effectively” with other gasoline stations, because BP abandons its pricing methodology and
21 dramatically increases the wholesale price it charges relative to the price that competing gasoline
22 stations are charging their customers.

23 60. **Retaliation.** When Plaintiffs attempt to increase the retail price they charge for
24 gasoline at its stations so that they would have a greater per-gallon profit, BP changes its pricing for
25 such stations (*i.e.*, it increases the wholesale price it charges) – which punitively lowers the profit
26 they can obtain in their businesses. BP’s practice also serves to deter Plaintiffs from attempting to
27 increase retail prices because doing so will result in no net profit benefit, but instead will serve to

1 decrease their volumes relative to their competition. Accordingly, BP franchisees are forced to
2 submit to BP's pricing practices otherwise they would suffer additional financial harm.

3 61. **BP's Gas Sales to Competitors**. Although the Gas Agreement contemplates that BP
4 may sell gas to Plaintiffs' competitors, these contractual provisions do not authorize these sales at
5 any price BP wishes. BP franchisees did not expect that BP would make gasoline sales to its
6 competitors at large volumes and at prices below those offered to franchisees.

7 ///

8 ///

9 **D. GASOLINE PRICE MANIPULATION**

10 62. BP uses "zone" pricing to change gasoline prices within different regions of a state.
11 In "zone" pricing, BP will look to a specific number of stations within the zone, see what prices they
12 are charging, and use that as a benchmark to determine what prices to charge.

13 63. BP uses "zone" pricing to reduce the margins franchisees can earn from gasoline
14 sales, and in order to capture and retain more of those margins for BP.

15 64. Because of "zone" pricing, BP does not tether the price offered to franchisees to the
16 wholesale "rack" price of gasoline (i.e., the price charged for gasoline sold at a gasoline distribution
17 terminal or "rack") or the cost of gasoline plus some profit margin.

18 65. BP's "zone" pricing allows it to arbitrarily alter the street price that franchisees must
19 charge. For example, when the price of gasoline is rising, BP's wholesale price often goes up
20 without reference to the street price of competing stations. However, when the price of gasoline is
21 falling, BP does not adjust its prices until days after the market begins to lower, thereby extracting
22 monies that should belong to franchisees.

23 66. Also, when BP franchisees complain or otherwise resist actions by BP, BP will
24 sometimes manipulate zones or pricing within zones to punish franchisees by reducing their profit
25 margins, sometimes forcing them to operate their gasoline business at a loss. BP has used such
26 gasoline price manipulation against Plaintiffs over the last several years.

27 67. Section 5 of the Gas Agreement (Exhibit A) BP states that the agreement between the
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1 parties is intended to “enable Buyer to compete more effectively with Buyer’s competitors...” The
2 contractual agreement defines a temporary voluntary allowance as a mechanism to allow BP to
3 enable franchisees to remain competitive.

4 68. Also in Section 5 of the Gas Agreement (Exhibit A), BP is entitled to set the price of
5 wholesale gasoline. The right to set retail or “street” prices is reserved for franchisees. Section 19.5
6 of the Gas Agreement (Exhibit A) defines the “Relationship of the Parties.” Under this section, the
7 franchisee “shall undertake all obligations as an independent contractor and *shall exercise and be*
8 *responsible for exclusive control of the* Premises, the employees and *all activities conducted*
9 *there.*” (emphasis added) This control extends to the retail pricing of gasoline.

10 69. BP now sets its wholesale prices in direct conflict with the street prices chosen by
11 franchisees. BP maintains a systematic policy to adjust the wholesale price in order to control a
12 franchisee’s street price. BP engages in this conduct even though the contractual agreement reserves
13 the right to set retail gasoline prices to the franchisees. These activities preclude franchisees from
14 effectively competing with their competitors.

15 70. Because BP adjusts the wholesale prices in an effort to control the retail prices of
16 franchisees, wholesale price adjustments are not tethered to the going rack price or BP’s cost of
17 gasoline.

18 71. Disparities in the margins between the rack price and the wholesale price eliminate
19 franchisees’ ability to effectively compete with their competitors.

20 72. These pricing controls have resulted in a significant decrease in the ability of
21 franchisees to earn a living from their investment in the ARCO brand and to receive a reasonable
22 return on their investment of sometimes in excess of \$1 million. At times, this improper and bad
23 faith retail price control results in franchisees operating at a loss and bankruptcy.

24 73. This pricing system reorients the benefits of selling gasoline in a departure from the
25 longstanding ARCO business model. Under the current pricing system BP has extracted, for itself,
26 profits that in the past would have gone to Plaintiffs.

27 74. BP usurps the contractual right of BP franchisees to set their own retail prices by
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1 controlling that retail price through the bad faith manipulation of the wholesale prices.

2 75. By the use of the Retalix system and other means, BP tracks the margins at which
3 individual franchisees price their gasoline. BP tracks franchisee margins in the form of an internal
4 document that labels franchisees with a color code system (*i.e.* green, yellow, orange or red) that
5 indicates the amount of the margin. If a franchisee sets margins at a rate higher than expected by
6 BP's internal rubric, BP will often alter the franchisee's wholesale gasoline prices in order to bring
7 the deviating franchisee in line and reduce any ability of the franchisee to control his own gasoline
8 pricing. In this way, BP oversteps its sole discretion in its contractual agreement to set wholesale
9 prices by controlling retail prices that are contractually reserved for the franchisees. BP also acts in
10 contravention to the spirit of the contract, expressed in Section 5 of Exhibit A, by not allowing
11 franchisees to be competitive.

12 76. Although BP represents to its franchisees that zone pricing is based on a pricing
13 algorithm, BP in fact maintains discretion in its zone pricing scheme to adjust the wholesale price of
14 gasoline in order to control the retail or "street" price of a franchisee's gasoline.

15 77. Further, the Gas Agreement states that BP will provide deliveries subject to an
16 automatic delivery system. However, rather than delivering gasoline on an automatic basis, BP
17 manipulates the timing and/or volume of deliveries in order to maximize profits to BP, and to the
18 detriment of BP franchisees. This also constitutes another breach of the implied covenant of good
19 faith and fair dealing.

20 78. BP manipulates delivery dates and times in order to deliver gasoline when prices are
21 dropping, and restrict deliveries when prices are rising. Upon information and belief, BP does this
22 because its profit is tied to the price of gasoline *when delivered* (*i.e.*, upon departure from the
23 distribution terminal). Thus, if BP delivers gasoline when prices are highest, it will be able to
24 extract a larger profit out of BP franchisees.

25 **E. RETALIATORY DENIAL OF FRANCHISE SALES**

26 79. BP has, on several occasions, refused to accept third parties proposed by franchisees
27 as purchasers of the franchisees' businesses, or otherwise interfered with the purchase of franchises.

28

1 Upon information and belief, BP does so to punish BP franchisees that complain about BP's unfair
2 practices.

3 80. BP does so by improperly denying qualified purchasers, placing unreasonable
4 restrictions on lenders, requiring franchisees to sell by auction, and/or losing or not completing
5 paperwork necessary to effect a sale.

6 **F. DEBIT CARD FEE**

7 81. While BP's ARCO business model has historically been to accept no credit card
8 payments (and in turn offer the customers gasoline prices lower than the competition), BP does
9 permit debit card transactions for the purchase of gasoline and other products. There is a 35-cent
10 charge per transaction (previously 45 cents per transaction). A portion of the debit card fee is paid
11 to a vendor PayPoint Electronic Payment Systems, Inc., who has a contractual relationship with BP
12 to process these transactions. Upon information and belief, a portion of the debit card fee is paid to
13 BP. However, the fee is charged and collected at the franchise locations and is rightfully included as
14 part of the gross sales due to the franchisee under the franchise agreement.

15 **FIRST CAUSE OF ACTION**

16 (Breach of Contract)

17 (All Plaintiffs Against BP)

18 82. Plaintiffs allege and incorporate by reference as though set forth in full at this point
19 all of the allegations of the preceding paragraphs.

20 83. BP has breached its contracts with Plaintiffs in at least the following respects: 1) BP
21 has materially breached the Retalix agreement by not providing functioning point-of-sale software
22 and forcing Plaintiffs to accept such software; 2) BP has materially breached the Gas Agreement by
23 failing to deliver gas at the times and in the quantities required by the Agreement's provisions re
24 Orders and Delivery; 3) BP has materially breached the Convenience Store Agreement by its
25 wrongful retention of advertising and promotion fees and vendor payments; and 4) BP has
26 materially breached the Convenience Store Agreement by wrongfully failing to disburse debit card
27 transaction fee proceeds.

28

Retalix

84. At various points in time, each of the Plaintiffs and BP entered into a valid and enforceable Convenience Store Agreement.

85. At various points in time, each of the Plaintiffs and BP entered into a valid and enforceable Retalix Agreement or otherwise entered a contract under which Plaintiffs paid valuable consideration to BP in exchange for the right to use the Retalix system.

86. Plaintiffs paid BP for the Retalix software.

87. BP has materially breached the agreements by not providing functioning point of sale software.

88. The Retalix Agreement and the Franchise Agreements require franchisees to purchase and install an upgraded POS/BOS System and equipment as required by BP. BP sold the Retalix system, but failed to provide a functioning POS/BOS system and therefore breached its contractual obligations.

89. BP has further breached its contract by breaching the implied covenant of good faith and fair dealing, by forcing the sale of the Retalix software to Plaintiffs despite knowing that the software was defective and likely to cause harm to Plaintiffs' BP franchise businesses, as well as charging royalties to Plaintiffs for goods and gasoline that Plaintiffs were not getting paid for due to defects in the Retalix software.

90. BP breached its implied warranties of fitness and merchantability by providing the Retalix system that failed to adequately function as a POS/BOS system.

91. BP further breached the implied covenant of good faith and fair dealing by using its superior position of knowledge and confidence to sell Plaintiffs a defective product in order to benefit BP, knowing that it was to the detriment of Plaintiffs.

92. Plaintiff as required under the terms of the contract faithfully performed the contract, and all obligations due, except to the extent performance may have been excused.

93. Plaintiffs have been damaged by the fact that they purchased a defective product, by lost profits during system shut downs, failed and/or unrecorded transactions, fines from non-

1 compliant receipts, and other defects causing economic losses to Plaintiffs.

2 94. Plaintiffs were also damaged as a result of having to pay royalties to BP for goods
3 and gasoline that customers were able to take without paying for due to defects in the Retalix
4 software, despite BP knowing of the defects.

5 95. Because BP knew of the defects in the Retalix software, the consequential damages
6 caused by those defects were reasonably foreseeable to BP. Thus, according to proof, Plaintiffs are
7 also entitled to recover consequential damages arising from BP's breach.

8 96. The Convenience Store Agreement (Exhibit B) requires, at section 15.04, franchisees
9 to purchase point of sale cash collection systems. BP breached this agreement by failing to provide
10 an adequate and fully operational point of sale cash collection system.

11 97. BP continued to breach its contractual obligations by promising to fix problems with
12 the Retalix system and failing to provide a working system.

13 98. Plaintiffs have suffered damages in an amount to be proven at trial as a result of their
14 being required to install the Retalix system, including consequential damages and loss of goodwill.

15 Orders and Delivery

16 99. The Gas Agreement provides, in so many words, or in sum and substance, that
17 "Buyer will order and make available for retail sale all grades of Gasoline which BPWCP offers to
18 Buyer (hereinafter collectively, "Product"), in amounts sufficient to satisfy all foreseeable retail
19 customer demand for Product at the Premises and will at all times have available for sale some of
20 each grade of Product, subject only to allocation of Product by BPWCP in a manner determined in
21 BPWCP's sole discretion in Buyer's geographic area. BPWCP will use its best efforts to fill
22 Buyer's orders."

23 100. The Gas Agreement further provides that "At BPWCP's sole discretion, BPWCP
24 reserves the right to provide ARCO branded motor fuels solely through an automatic Gasoline
25 ordering and delivery system and to not accept individual orders placed by Buyer. Buyer agrees to
26 accept and pay for such Product as BPWCP delivers to the Premises. Buyer shall provide accurate
27 and timely information as reasonably requested by BPWCP in connection with the automatic

28

1 gasoline inventory and delivery system.” In most instances BP relies on an automatic ordering and
2 delivery system and does not accept individual orders. BP’s automatic gasoline ordering and
3 delivery system was intended by the parties to require gas to be delivered according to franchisee
4 needs based on foreseeable retail customer demand and BP’s best efforts to fill that demand, and to
5 prevent either the franchisee or BP from manipulating delivery times or quantities for financial
6 advantage based on anticipated changes in gasoline prices. The Delivery provisions of the Gas
7 Agreement permit BP to “select the method and mode of shipment and delivery,” but do not give BP
8 discretion over the timing or quantities of delivery.

9 101. BP has breached the express or implied in fact terms of the Gas Agreement by
10 delivering gas at times and in quantities dictated by BP’s financial advantage and not automatically,
11 based on foreseeable retail customer demand and BP’s best efforts to satisfy same. Plaintiffs are
12 informed and believe that BP delays or accelerates delivery to take advantage of price changes,
13 which take effect at 3:00 p.m. daily. Plaintiffs are informed and believe that BP often delays
14 delivery when prices are rising and accelerates delivery when prices are falling. When prices are
15 falling, BP also “dumps” gas on franchisees by delivering more gas than is required by foreseeable
16 retail customer demand in order to make sure that franchisees pay higher prices on more fuel than
17 foreseeable customer demand requires. This tactic by BP also effectively forces the franchisees to
18 provide BP with storage space for BP’s fuel. At the other extreme, BP often runs franchisees out of
19 fuel, completely shutting the gas station down, failing to exercise best efforts to satisfy foreseeable
20 consumer demand and failing to follow the automatic delivery system. Such “run outs” may be
21 caused either by BP’s delaying delivery to wait for a higher price to apply, or may be caused by
22 BP’s desire to retaliate against a franchisee for doing something that BP does not like. In any case,
23 such run outs are breaches of the Gas Agreement and can be devastating to the Plaintiffs’
24 businesses.

25 102. Plaintiffs have been damaged in an amount by be proven at trial by BP’s breaches of
26 the Order and Delivery provisions of the Gas Agreement, including consequential damages and loss
27 of goodwill.

BP's Retention of Advertising and Promotion Fees and Vendor Payments

103. BP has materially breached the Convenience Store Agreement by failing to use all unrebated promotional and marketing funds and vendor payments for promotion and marketing of the *ampm* brand, and instead using them to funnel extra money from Plaintiffs to BP, as described below.

104. Section 7.04 of the Convenience Store Agreement provides for the franchisee's payment of a monthly Advertising and Promotion Fee equal to 5.5% of the Franchisee's Gross Sales (as defined in the Convenience Store Agreement) during the prior month. Section 7.03 of some Convenience Store Agreements further provides that BP will rebate an amount equal to 2% of the Gross Sales during the prior month to the franchisee if the franchisee participates in all required programs during the calendar month, and this has been BP's practice.

105. Section 12.02 of the Convenience Store Agreement (Exhibit B) provides:

12.02 Using funds collected from Operator pursuant to Section 7.04 and from other am/pm Operators and using funds collected as promotional and other allowances, BPWCP shall arrange or provide advertising and promotion which may, in BPWCP's sole discretion, include local or regional advertising placed by BPWCP, advertising copy and designs for use of Operator, display or other allowances to Operators, handbills, flyers, brochures, signs, point of purchase, billboards, high rise signs, internet advertising, other materials, the expenses of developing and producing promotions and advertising, both by outside agencies and BPWCP personnel, and marketing research. BPWCP's obligation to provide the foregoing shall be limited in cost to the amount of the advertising and promotion fee paid by Operator and funds collected as promotional and other allowances. The entire amount of the advertising and promotion fee paid by Operator and of promotional and other allowances shall be used by BPWCP for expenses relating to advertising and promotion at such times and in such manner as BPWCP solely determines.

Some versions of the Convenience Store Agreement may contain language for Sections 12.02 that is slightly different but imposes similar obligations on BP. For example: "In its discretion, BP may (a) rebate these allowances in part or in full directly to participating *ampm* mini market franchisees, or (b) use such funds for advertising and promotional purposes for the benefit of *ampm* mini markets or for the promotion and development of the Marks." (The "Marks" refers to the *ampm* name, trademark and service mark and any other marks BP may authorize for use.)

106. Plaintiffs are informed and believe that BP has breached, has a practice of breaching, and will continue to breach if not enjoined, Section 12.02 of the Convenience Store Agreement by, without limitation, diverting to its own use some portion of the Advertising and Promotion Funds and vendor payments instead of using all such funds for uses permitted in the Convenience Store Agreement (i.e., advertising and promotion of *ampm* and certain rebates and discounts to franchisees). Plaintiffs are informed and believe that BP's breaches include, but are not limited to, classifying vendor discounts as other types of payments or allowances so as to try to defeat the ability of franchisees to directly receive such benefits.

107. Plaintiffs have suffered damages from BP's breach of the Convenience Store Agreement alleged herein in an amount to be shown at trial, including consequential damages and loss of goodwill.

108. Plaintiffs, as required under the terms of the Convenience Store Agreement, performed the contract, and all obligations due, except to the extent performance may have been excused.

Wrongful Failure to Disburse Debit Card Transaction Fee Proceeds

109. BP breached its contract with franchisees by failing to properly disburse proceeds gained through the debit card transaction fee. BP has retained a portion of the 35 or 45 cent fee charged to customers per transaction for debit card use in contravention of the franchise agreement. The portion of this fee retained by BP is properly categorized as Gross Sales under the Franchise Agreement which BP is required to pay to franchisees.

110. Plaintiffs have been damaged by the fact that money due and owing to them has been diverted and paid to others.

SECOND CAUSE OF ACTION

(Negligence – As to Retalix Software System)

(All Plaintiffs Against Retalix)

111. Plaintiffs allege and incorporate by reference as though set forth in full at this point all of the allegations of the preceding paragraphs.

1 112. Retalix owes Plaintiffs a duty to exercise due care in developing and repairing the
2 Retalix program that it specifically designed for use by BP Franchisees based upon, among other
3 things, visits it made to many of the Plaintiffs' sites and information obtained during beta testing of
4 the product for specific use that it knew was for Plaintiffs and other BP Franchisees. This product
5 was not of general use to the public, but was geared toward and designed specifically for BP
6 Franchisees.

7 113. Retalix has had actual knowledge of the defects in the program and its application to
8 Plaintiffs' businesses. Retalix had full knowledge that the point of sale systems developed for BP
9 franchises would be used in franchisee locations and the Plaintiffs' stores. Retalix intended and
10 specifically designed its point of sale system to enter and end up in the stream of commerce at the
11 site of Plaintiffs' stores.

12 114. Retalix also engaged in affirmative efforts to repair the Retalix system, creating a
13 further duty of care in connection with those efforts. Retalix breached its obligations by acting
14 below the applicable standard of care in connection with efforts to repair the system that failed to
15 remediate the defects in the Retalix system.

16 115. The contractual agreements between BP and Retalix contain provisions that specify
17 certain obligations that Retalix owes to "Franchisees" in the event that there is a problem with the
18 Retalix program.

19 116. Retalix's repairs to the POS/BOS system were specially accounted for by Retalix and
20 were done in response to requests from BP franchisees. These repair efforts of Retalix were not
21 done in the general course of business operations, but pursuant to contractual obligations that were
22 geared specifically toward "users" of the program (i.e., BP franchisees). These repair efforts were
23 not episodic; rather, they occurred during the course of years that Plaintiffs had the Retalix program
24 and experienced consistent problems with the program and Retalix's subsequent specially designed
25 attempts to repair its designed system.

26 117. BP franchisees reported malfunctions of the Retalix system installed at their location
27 to a BP helpdesk. Franchisees were provided a ticket number for each malfunction report. In

1 response to repeated service calls franchisees were told that their ticket would be escalated to several
2 layers of service classes, some of which were serviced directly by Retalix. These malfunction and
3 service requests were provided based upon the maintenance fee paid by BP franchisees a portion of
4 which was received by Retalix.

5 118. Retalix breached its duty to reasonably repair and maintain the Retalix system by
6 failing to properly remedy various material malfunctions to the Retalix system.

7 119. Because the Retalix system was intended for and installed at franchisee locations, the
8 contract between BP and Retalix could not have been performed without impinging on the
9 franchisees' businesses.

10 120. Because of the information gathered during the beta test program and the large
11 number of complaints issued, Retalix should have reasonably known that the installation and
12 subsequent version updates would be insufficient to prevent material harm from occurring at BP
13 franchisee's business locations.

14 121. BP franchisees suffered harm on occasions when the Retalix system malfunctioned,
15 that harm caused monetary losses and loss of business.

16 122. Retalix's conduct in failing to reasonably provide a working POS/BOS system and
17 the continued failure to provide reasonable fixes, remedies and updates directly caused the
18 Plaintiffs' injuries.

19 123. Retalix charged for the sale and continued to charge maintenance fees for the
20 POS/BOS system despite knowing the system had flaws, the updates had flaws and the high
21 probability of the system causing plaintiffs damage.

22 124. Further, Retalix breached its duty to Plaintiffs by developing a defective product that
23 would inevitably cause significant damages to the Plaintiffs.

24 125. Retalix employees were specifically tasked with the support and maintenance of BP
25 franchisee sites, including coming to individual franchise locations to inspect, repair and service the
26 Retalix POS/BOS system in both the initial installations and the service of the system in response to
27 Plaintiffs' complaints.

28

1 126. The Retalix POS/BOS system installed at Plaintiffs' business locations was intended
 2 to affect the Plaintiffs specifically. The system was not built for the public and could not be
 3 purchased "off the shelf." Instead, this system was designed, built and implemented solely for BP
 4 franchisees. Retalix and BP worked in conjunction to develop and build this software system and
 5 specifically designed it for BP franchisees.

6 127. Retalix acted negligently in the creation and repair of the Retalix BOS/POS system.

7 128. Plaintiffs suffered significant damages as a direct and proximate result of Retalix's
 8 negligent development of the software, including, at least one, if not all of the following:

- 9 • Lost sales during system shutdowns;
- 10 • Lost sales due to transactions disappearing, allowing customers to walk off with
 11 inventory with no money transferring to Plaintiffs' accounts;
- 12 • Sales made at incorrect prices (e.g., \$.01 packs of cigarettes) due to Retalix errors.
- 13 • Incorrect or missing information (e.g., the amount of change due to a customer who
 14 has pumped gas);
- 15 • Lost customers due to frequent shutdowns and lost confidence due to overcharged
 16 payment cards;
- 17 • Fines from the government for issuing receipts that did not comply with applicable
 18 laws;
- 19 • Having to hire and train additional employees to help compensate for the problems
 20 with the Retalix software.

21 129. Plaintiffs have been damaged in an amount to be shown at trial including
 22 consequential damages and loss of goodwill.

23 **THIRD CAUSE OF ACTION**

24 (Breach of the Covenant of Good Faith and Fair Dealing)

25 (All Plaintiffs Against BP)

26 130. Plaintiffs allege and incorporate by reference as though set forth in full at this point
 27 all of the allegations of the preceding paragraphs.

1 131. BP violates the covenant of good faith and fair dealing implied in its contracts with
2 Plaintiffs in many ways relative to 1) gasoline pricing and sales, and 2) the *ampm* convenience
3 stores.

4 Gasoline Pricing and Sales

5 132. At various points in time, each of the Plaintiffs and BP entered into a valid and
6 enforceable written contract for the purchase, sale, and resale of petroleum products at the retail
7 level (the "Gas Agreement," an exemplar of which attached hereto as Exhibit "A").

8 133. The Gas Agreement contains an open price term obligating BP to set its prices to
9 Plaintiffs in conformance with the duty of good faith and fair dealing. It envisions that one of the
10 purposes of the BP Franchisor/Franchisee relationship is to allow franchisees to "compete more
11 effectively" in the marketplace. (Exhibit A, Section 5.)

12 134. While the term "compete more effectively" is not specifically defined in the Gasoline
13 Agreement, it has been understood by the parties, through direct representations, custom and
14 practice, to mean that BP would sell gasoline at prices that were significantly below the "street
15 price" of its competitors.

16 135. Pursuant to their Agreements with BP, Plaintiffs must buy their gasoline directly
17 from BP. At the same time, BP has sold gasoline directly to Plaintiffs' competitors – including
18 discount stations and non-ARCO branded retailers.

19 136. In order for franchisees to compete effectively and make a reasonable profit on their
20 investments of \$1 million and more for a franchise, and to pay for overhead expenses (including, in
21 some locations in the Northwest United States, the cost of personnel who fill gasoline tanks), the
22 wholesale price of the gasoline that BP sells to its franchisees needs to be substantially lower than
23 the price sold at the pump at BP franchise stations.

24 137. For years, BP and its franchises operated under this aforesaid pricing model, with BP
25 selling gasoline at prices consistent with the business model that formed the entire basis for the
26 franchises' business relationship with BP – at prices that were substantially (e.g., 16 cents or more
27 per gallon) less than the "street price" of its competitors.

28

138. BP's exercise of its discretion over wholesale pricing is subject to prescribed or implied limitations. Absent a good faith limitation on BP's exercise of its discretion, the pricing term in this contract becomes illusory and unenforceable. Under the common law of California, BP's discretion over wholesale pricing is subject to an implied covenant of good faith and fair dealing. Plaintiffs' claims relating to wholesale gasoline pricing are predicated alternatively upon the common law of good faith and fair dealing as applied to open price terms, as well as the open price term provisions of the Uniform Commercial Code, as enacted in California. *See* California Commercial Code §2-305(2).

BP's Wholesale Gasoline Pricing

139. BP engages in at least six practices that, separately and collectively, violate the covenant of good faith and fair dealing and the reasonable expectations of the parties, and which result in higher wholesale gasoline prices charged to Plaintiffs than is permitted by BP's covenant of good faith and fair dealing and which have caused Plaintiffs damages thereby. These practices include:

- a) charging excessive wholesale prices that conflict with the ARCO business model and are not commercially reasonable in relation to other wholesale prices charged to dealers that compete with Plaintiffs;
- b) setting its wholesale prices to Plaintiffs through a "streetback" pricing methodology that includes an "assumed margin" collected by competing retailers that is entirely arbitrary and is known by BP to be substantially lower than the actual margins earned by Plaintiffs' competitors;
- c) departing from its streetback pricing methodology in a "heads, I win/ tails, you lose" fashion by considering rack prices when it is to BP's advantage to do so but not when it is to BP's disadvantage. BP anticipates increases in gas prices and builds increases into wholesale prices when gas prices are rising but fails to anticipate decreases in the price of gas by building decreases into wholesale prices charged to Plaintiffs when gas prices are falling;
- d) imposing price and non-price retaliation against dealers by 1) setting higher wholesale gasoline prices either to individual dealers (or to all dealers within the same "price zone"

1 as an individual dealer) that BP seeks to punish in retaliation for the dealer's attempt to collect
2 higher margins on retail gasoline sales than the "assumed margin" used by BP; and 2) imposing
3 sanctions on non-conforming dealers on non-price matters, such as access to credit, leases, or other
4 advantages; and

5 e) setting its wholesale gasoline prices in a manner designed to manipulate Plaintiffs'
6 retail gasoline prices despite the fact that the Gas Agreement allocates to Plaintiffs the unilateral
7 right to set retail prices;

8 f) Setting its wholesale prices to Plaintiffs at levels that are higher than prices charged
9 by BP to Plaintiffs' competitors, including Safeway, Costco, and independent gasoline retailers.

10 **Pricing Methodology**

11 140. BP contends it uses a methodology called "streetback pricing," with certain
12 departures from a streetback pricing method as BP determines enables BP to maximize its profits.
13 BP applies its pricing method separately for each of hundreds of "price zones" which are geographic
14 areas within which BP contends that it sets a uniform wholesale price to all BP dealers. Plaintiffs
15 are informed and believe BP is the only major refiner of fuel that currently uses a streetback pricing
16 method. Other major refiners have switched to a rack pricing system where wholesale gasoline
17 prices are set uniformly for dealers operating in broad geographical areas served by distribution
18 terminals called "racks," subject to small differences representing the cost of delivery. Under this
19 method of pricing, the wholesale price to dealers is not set based upon a strategy of manipulating
20 retail prices at the level of particular price zones as BP does.

21 141. BP first utilizes a retail market price survey of competitors of BP franchisees in the
22 pricing zone. BP applies many different factors to the street prices of Plaintiffs' competitors before
23 arriving at what BP calls the "support" price. BP subtracts from the support price state and federal
24 taxes and a statewide "assumed margin" in cents per gallon (8 cents in California) that BP assumes
25 the competitors are making from each gallon of gasoline. BP contends that from time to time it will
26 further exercise discretion to adjust prices up or down given a myriad of factors. However, BP
27 admits that it departs from its established pricing methodology (a methodology which is ostensibly

1 designed to make the franchisees competitive) during certain times when it advantages BP and
2 disadvantages the franchisees to the point where, after factoring in taxes, BP franchisees are
3 sometimes paying for gasoline at a wholesale price higher than the price at which its competitors are
4 selling gasoline at retail.

5 142. At the same time, BP contends that it continues to advertise to the public its
6 longstanding business model and policy, which states that customers can save 5 or 10 cents or more
7 by purchasing their gasoline from ARCO stations. Nonetheless, the price that BP sets in its sale of
8 gasoline to Plaintiffs does not allow Plaintiffs to sell the gasoline at the aforesaid price differentials.

9 143. Plaintiffs' ability to compete with other gasoline retailers at the higher retail prices
10 required by BP's high wholesale prices is further limited by the fact that BP's ARCO business
11 model has historically been to accept debit cards but not credit cards and to charge the consumer a
12 35-cent (previously 45-cent) charge for using a debit card. In order to offset the disadvantages to
13 the consumer of not being able to use a credit card (which frequently gives the consumer airline
14 miles or other benefits) and for having to pay the 35-cent debit fee, ARCO dealers must, all other
15 things being equal, charge an even lower retail price than is charged by their competitors that accept
16 credit cards and/or do not charge consumers for debit card transactions.

17 **Pricing in Conflict with the ARCO Business Model**

18 144. The ARCO business model has for many years been that ARCO stations price so that
19 they will be cheaper than the competition. BP touts ARCO to the public as a "high-volume, low-
20 cost retailer." ARCO's business model has been to offer retail prices that are substantially (e.g., 16
21 cents per gallon or more) cheaper than the average of the competition. The ARCO business model
22 from the consumer side has remained essentially unchanged; BP positions ARCO with the public as
23 cheap gas. But from the dealer side, the ARCO business model began to change fundamentally at
24 some point after BP acquired ARCO. Whereas ARCO formerly set its wholesale prices to dealers at
25 levels that would support high volumes of sales at consumer prices that were substantially cheaper
26 than the competition, BP now sets wholesale prices much higher compared to the competition faced
27 by Plaintiffs. Plaintiffs pay wholesale prices for BP gas that are comparable to, or even higher than,

1 the prices paid by dealers of the major refiners at the high-priced end of the retailing spectrum. Yet
 2 BP and the public still expect Plaintiffs to charge retail prices that are substantially cheaper than the
 3 average of the competition, and BP makes extensive efforts, through Franchise Business Consultants
 4 and pricing and other devices, to insure that Plaintiffs continue to price at the low-priced end of the
 5 retailing spectrum. BP has violated the covenant of good faith and fair dealing by pricing in a
 6 manner that is in conflict with the ARCO business model and in conflict with Plaintiffs' reasonable
 7 expectations. So long as BP retains a business model that touts low prices to consumers and/or
 8 pressures franchisees to charge low prices to the public, the duty of good faith and fair dealing
 9 requires that BP charge wholesale prices that are consistent with that business model.

10 **BP's "Assumed Margin"**

11 145. BP admits that one of the components of its pricing methodology (called the
 12 "assumed margin" of the franchisees' competition) is entirely made up and not reflective of the real
 13 world margin of its competition. BP has undertaken no analysis to determine what the actual
 14 margin is of competitors, while acknowledging that the information would be valuable to setting a
 15 competitive price. BP has access to industry data and marketing analysis which demonstrates that
 16 the competitive margin earned by BP franchisees' competitors is in the range of 17-22 cents per
 17 gallon or more. Instead, BP's current assumed margin is far below the competitors' true margins
 18 and is therefore arbitrary and violates BP's obligation of good faith and fair dealing. Moreover,
 19 BP's assumed margin has not changed in many years, even while the retail price of gasoline has
 20 risen dramatically, as have Plaintiffs' costs such as rent or mortgage costs and labor.

21 **Pricing Asymmetry**

22 146. BP departs from its purported pricing methodology in an inconsistent and
 23 asymmetrical fashion. When gas prices are rising, BP departs from its streetback pricing
 24 methodology to sharply increase its wholesale prices in consideration of changes in rack prices and
 25 in anticipation of higher retail and wholesale prices in the coming days. However, when the price of
 26 gas is falling, BP does not consider rack prices or anticipate lower retail or wholesale prices in the
 27 coming days and is slow to reduce its wholesale prices to Plaintiffs as the price of gas falls. BP's

1 departures from its streetback pricing model have a “heads, I win/tails, you lose” character that is
2 inconsistent with the duty of good faith and fair dealing and is in violation thereof.

3 **Retaliation**

4 147. Plaintiffs are informed and believe that BP also departs from its streetback pricing
5 model in order to raise wholesale prices to an individual dealer or price zone for the purpose of
6 punishing a dealer who has decided to attempt to collect a margin that is higher than BP’s assumed
7 margin. Plaintiffs are informed and believe that BP also retaliates against franchisees through
8 higher gas prices for other reasons, including but not limited to a franchisee’s refusal to participate
9 in *ampm* promotions. Considering retaliatory motives in the setting of wholesale prices violates
10 BP’s duty of good faith and fair dealing.

11 148. BP maintains unofficial suggested retail prices. BP suggests that retail prices be set
12 at a specific profit margin on a per-gallon basis. If a Plaintiff attempts to increase the retail price he
13 charges for gasoline at his stations so that he would have a greater per-gallon profit margin, BP may
14 change its pricing for such stations (i.e., BP increases the wholesale price it charges), which
15 punitively lowers the margin the franchisee can obtain. BP’s practice serves to deter Plaintiffs from
16 attempting to increase retail prices because doing so will result in higher wholesale prices and no net
17 profit to the franchisee, while decreasing the franchisee’s sales volume relative to his competition.
18 By way of example, if a franchisee purchases gasoline for \$3.50 per gallon and sets a retail price of
19 \$3.65 per gallon for a margin of fifteen cents, BP may raise the wholesale price to \$3.57 to reduce
20 that margin to 8 cents. Where BP’s retaliatory pricing results in the raising of the wholesale price to
21 an entire price zone, BP’s conduct punishes not just the retailer whose margins BP seeks to
22 discipline but all other BP franchisees in the same price zone.

23 149. Plaintiffs are informed and believe that punitive measures used by BP include the
24 threat or imposition of non-price sanctions, such as delivery manipulation, “run outs” (i.e., situations
25 where the franchisee has no gas to sell), non-renewal of lending benefits or access to new stores, and
26 writing the franchisee up for “defaults” under the contract that would not be charged as “defaults”
27 but for BP’s intent to punish the franchisee.

1 **BP's Manipulation of Retail Prices**

2 150. Section 5 of the Gas Agreement (Exhibit A) provides that BP is entitled to set the
3 price of wholesale gasoline. BP is not afforded the right to set the retail price of gasoline at a
4 Franchise location. Section 19.5 of the Gas Agreement (Exhibit A) defines the "Relationship of the
5 Parties." Under this section, the franchisee "shall undertake all obligations as an independent
6 contractor and shall exercise and be responsible for exclusive control of the Premises, the employees
7 and all activities conducted there." This control extends to the retail pricing of gasoline, which is
8 reserved for franchisees. Franchisees are denied this ability to exercise this contractual purpose
9 because of the control exerted by BP.

10 151. BP engages in manipulation of Plaintiffs' retail prices despite its contractual
11 agreement reserving the right to set retail prices to the franchisees. Thus, while BP maintains that it
12 does not set street prices for franchisees, BP does in fact, in bad faith, control BP franchisees' street
13 price artificially by its improper modification of the wholesale gasoline prices. These activities
14 remove the ability of franchisees to be competitive in the marketplace. The purpose of the
15 contractual agreement which purports to allow Plaintiffs to set their own retail or "street" price was
16 understood by the parties at the time they entered into the contract. That purpose is central to the
17 Agreements, so that BP franchisees could decide if they wanted to run the businesses at a higher
18 margin and risk selling less volume or, in the alternative, price at a lower margin and benefit from
19 higher volumes. However, BP franchisees are stripped of that ability because BP prices so as to cap
20 Plaintiffs' margins regardless of the area price, the rack price or its cost of gasoline.

21 152. BP's attempts to manipulate retail prices and margins also violates the duty of good
22 faith and fair dealing to the extent that it is motivated by a desire to increase sales volume at the
23 *ampm* Mini Markets that are typically situated at the retailer's gasoline station. BP earns royalties
24 on all sales at the *ampm* Mini Markets. Retail gasoline prices are far more visible to consumers than
25 are the prices of items in associated convenience stores. Plaintiffs are informed and believe that BP
26 tries to induce Plaintiffs to charge low gas prices in part to bring more customers into the *ampm*
27 stores and therefore to drive higher *ampm* sales. However, the Gas Agreement and the Convenience

1 Store Agreement are entirely separate agreements, and any desire by BP to drive convenience store
2 volume is entirely outside the contemplation of the Gas Agreement. It therefore violates BP's duty
3 of good faith and fair dealing for BP to consider the goal of increasing convenience store volume in
4 setting its wholesale gasoline prices or in attempting to manipulate retail gasoline prices or margins.

5 **BP's Gas Sales to Plaintiffs' Competitors**

6 153. Although the Gas Agreement contemplates that BP may sell gas to Plaintiffs'
7 competitors (Exhibit A, Sections 4 & 19.11), these contractual provisions do not authorize these
8 sales prices that violate BP's duty of good faith and fair dealing to Plaintiffs. BP franchisees did not
9 expect that BP would make gasoline sales to their competitors at large volumes and at such low
10 prices.

11 154. BP sells large volumes of gasoline to Plaintiffs' competitors in the spot market
12 wholesale and to retail competitors of Plaintiffs at prices that are far lower than those prices charged
13 to BP franchisees. This practice upsets Plaintiffs' justified expectations when they entered into
14 these agreements that BP may sell gas to Plaintiffs' competitors but not at prices far below what BP
15 franchisees are required to pay for the same gasoline.

16 155. In direct violation of its implied covenants, BP sells gasoline to the competitors of
17 Plaintiffs at a price that is lower than the prices at which BP sells gasoline to its own franchisees.
18 This means that franchisees cannot set retail prices that are competitive with neighboring stations
19 also selling BP gasoline who can buy it at a lower wholesale price.

20 156. In addition to selling gasoline to its franchisees and independent purchasers, BP has
21 sold gasoline to low-cost, high-volume marketers such as Safeway at a wholesale price below the
22 wholesale price it offers to its franchisees. This effectively prevents Plaintiffs from being able to set
23 competitive retail prices with these other purchasers of BP gasoline.

24 157. In order to be competitive, BP franchisees must receive wholesale prices, at an
25 absolute minimum, equal to the wholesale prices at which competing stations receive BP gasoline.
26 Moreover, the competitors to whom BP sells gasoline at lower prices than those charged to Plaintiffs
27 are firms that are free-riding on the investments made by Plaintiffs, which are to essential BP's

1 refinery operations. As BP and its consultants have recognized, the franchisees provide BP with an
 2 enormously important benefit – guaranteed demand. Without guaranteed demand, which is based
 3 on the long-term contractual commitments of the franchisees to purchase only BP fuel, BP would
 4 face far greater risks in making decisions about building or expanding refineries. Plaintiffs’
 5 competitors are independent fuel retailers such as Safeway, Costco, and many other brands and
 6 businesses that do not provide BP with guaranteed demand. Plaintiffs, on the other hand, have spent
 7 large sums – often in excess of \$1 million – for their stations, and they are locked into long-term
 8 (e.g., 20-year) contracts that provide BP with guaranteed demand for its fuel. BP breaches the
 9 covenant of good faith and fair dealing implied in the Gas Agreement when it sells fuel to such
 10 firms at prices that are below those at which it will sell to Plaintiffs, who provide the commitments
 11 necessary to allow BP to build or expand its refineries.

12 **BP’s Manipulation of Deliveries to Time Price Increases and Decreases**

13 158. As alleged in paragraphs 182-85, above, Plaintiffs contend that the Gas Agreement
 14 requires BP to deliver gas at times and in quantities dictated by foreseeable retail customer demand
 15 and BP’s best efforts to satisfy same pursuant to an automatic ordering and delivery system, which
 16 *does not give BP any discretion* regarding delivery times and quantities or to manipulate them for its
 17 own benefit. Plaintiffs thus contend that BP’s manipulation of delivery times and quantities is
 18 breach of contract, express or implied. In the alternative, if BP is found to have any discretion
 19 regarding delivery times and quantities, BP’s manipulation of them for its own benefit constitutes a
 20 separate breach of the implied covenant of good faith and fair dealing in contravention of the
 21 reasonable expectations of the parties.

22 159. BP’s breaches of the covenant of good faith and fair dealing have harmed Plaintiffs
 23 by causing them to incur higher prices for gas than they would have incurred in the absence of such
 24 breaches, which has led to lower profit margins and/or lower sales volumes than they would have
 25 had in the absence of such breaches.

26 **BP’s Practices Concerning *ampm* Convenience Stores**

27 160. The Franchise Agreements and the Retalix Agreement include covenants of good
 28

1 faith and fair dealing, which require that BP not do anything to deprive Plaintiffs of the benefit of
 2 the Agreement. BP violates the covenant of good faith and fair dealing implicit in the Convenience
 3 Store Agreement, and the reasonable expectations of the parties, in at least the following ways:
 4 1) forcing Plaintiffs to accept a point-of-sale cash management system that BP knew was flawed,
 5 but as to which BP persisted at least in part so that BP could use the Retalix system to gain intimate
 6 knowledge of Plaintiffs' businesses to determine how best to extract profit from Plaintiffs'
 7 operations; 2) imposing unreasonable restrictions on the approval of vendors; 3) in the alternative to
 8 Plaintiffs' breach of contract claim set forth in paragraphs 160 to 165, above, if BP is deemed to
 9 have discretion as to the use of Promotional and Marketing Fees received from franchisees and/or
 10 promotional and other allowances or discounts received from vendors, failing either to use all such
 11 funds for the advertising and promotion of the *ampm* brand and certain rebates and discounts to
 12 franchisees; and 4) imposing penalties and unreasonable burdens on franchisees who elect not to
 13 participate in the Required Promotions that extend beyond what the *ampm* Agreement provides and
 14 interfering with franchisees' rights to buy from vendors on freely negotiated terms.

15 Retalix

16 161. To the extent that BP had discretion to require Plaintiffs to accept the Retalix point-
 17 of-sale system, BP was required to exercise such discretion in conformance with the duty of good
 18 faith and fair dealing. BP abused that discretion, and violated the covenant of good faith and fair
 19 dealing, by forcing Plaintiffs to accept a point-of-sale cash management system that BP knew was
 20 flawed, particularly whereas BP persisted at least in part so that BP could use the Retalix system to
 21 determine how best to extract profits from Plaintiffs' operations. Pursuit of the latter goal by BP is a
 22 goal that is not consistent with the covenant of good faith and fair dealing.

23 Approval of Vendors

24 162. The Convenience Store Agreement spells out BP's and the franchisee's contractual
 25 rights and obligations for approval of new vendors. Section 14.01 provides in pertinent part (or,
 26 depending on the version, may contain verbiage substantially similar to the following):

27 **14.01** From time to time, BPWCP shall provide Operator with a list
 28 ~~of merchandise and equipment vendors approved or suggested by~~

BPWCP. BPWCP will, upon written request by Operator or a vendor, approve any responsible vendor for products or equipment upon showing that the specifications will be met in a lawful manner and the terms of the contract are satisfactory, provided that BPWCP reserves the right to limit the number of approved suppliers to a reasonable number and to charge a reasonable fee to evaluate a proposed vendor.

163. Plaintiffs are informed and believe that BP has breached, has a practice of breaching, and will continue to breach if not enjoined, Section 14.01 of the Convenience Store Agreement, as well as the implied covenant of good faith and fair dealing in the Convenience Store Agreement, by, without limitation: refusing to approve new vendors upon written request despite their qualifying with respect to pertinent criteria and without any commercially reasonable justification because BP wishes to continue receiving substantial payments from current vendors that are designed solely to line BP's pockets; and arbitrarily imposing onerous burdens on franchisees to seek and obtain approval of any new vendors they wish to propose. Such burdens include, without limitation, requiring a franchisee to seek approval of a vendor on an annual basis – or more frequently as BP may require – and to submit extensive audit information. Plaintiffs are informed and believe that these requirements are intended to make requests for approval impracticable and are not required of all vendors who make payments to BP and/or were not proposed by a Franchisee. BP also discourages franchisees from even requesting approvals by telling them that approval is unlikely to be granted.

Use of Promotional and Marketing Funds and Vendor Payments

164. As discussed in Paragraph 162, above, Section 12.02 of the Convenience Store Agreement, in turn, spells out BP's disposition of the funds.

165. In the alternative to Plaintiffs' claim for breach of contract with respect to Section 12.02 of the Convenience Store Agreement, to the extent that agreement is deemed to provide BP any discretion as to the use of the Advertising and Promotion Fees collected from franchisees and the promotion and other allowances collected from vendors, including but not limited to any discretion concerning the timing of the use of any such funds, Plaintiffs are informed and believe that BP has breached, has a practice of breaching, and will continue to breach if not enjoined, the implied covenant of good faith and fair dealing in the Convenience Store Agreement, by, without

1 limitation, failing to use all of the funds received from vendors as promotional and other allowances
 2 or discounts for the advertising and promotion of the *ampm* brand and certain rebates and discounts
 3 to franchisees. Plaintiffs are informed and believe that BP's breaches include, but are not limited to,
 4 classifying vendor discounts as other types of payments or allowances so as to try to defeat the
 5 ability of franchisees to directly receive such benefits.

6 **BP's Punishment of Franchisees Who Opt Out of Required Promotions and**
 7 **Interference With Plaintiffs' Rights to Negotiate Freely With Vendors**

8 166. BP has a series of promotions that are defined in many Convenience Store
 9 Agreements as "Required Promotions" ("RP"). The vendors supplying products to *ampm* stores
 10 often pay BP fees or allowances and in return BP agrees to include the products in its RP program.
 11 BP uses an "all or nothing" rebate program to insure that the franchisees participate in the RP. If the
 12 franchisee participates in all RP, the franchisee will receive back a portion (2%) of the Advertising
 13 and Promotion Fees BP collects under the agreement. Those fees are 5.5% of the franchisee's gross
 14 sales, which drop to 3.5% if the franchisee participates in all RP and thus gets the 2% rebate. Half
 15 of that 3.5% may also be rebated to participants in the RP so that the total cost to the franchisee for
 16 opting out of the RP is 3.75% of gross sales. The RP are a poor economic proposal for the
 17 franchisees, who lose money on many promotions. Some franchisees have figured out that the RP
 18 are a poor value and have opted out, willingly accepting that it costs them 3.75% in forgone rebates
 19 to do that. Yet BP has punished such franchisees beyond what the contract allows by penalizing the
 20 franchisees with higher prices or interfering with the ability of the franchises to buy from vendors at
 21 freely negotiated prices. For example, Plaintiffs are informed and believe that BP induced Pepsi and
 22 Coca-Cola to increase their wholesale prices from \$23 per case to \$28.50 per case or more to
 23 franchisees who opted out of the RP. Imposing such penalties on franchisees who invoke their
 24 option to opt out of the RP is a violation of BP's obligation of good faith and fair dealing.

25 167. BP also impermissibly burdens franchisees who opt out of the required promotions
 26 by taking control of their computerized pricing, through Retalix, to interfere with Plaintiffs' ability
 27 to set prices that depart from prices established for the RP, in violation of BP's obligation of good

1 faith and fair dealing.

2 168. Plaintiffs as required under the terms of the Franchise Agreements, including the Gas
3 Agreement, the Convenience Store Agreement, and the Retalix Agreement, performed the contracts,
4 and all obligations due, except to the extent performance may have been excused.

5 169. As a direct and proximate cause of the facts stated above Plaintiffs have been, and
6 continue to be, damaged in an amount to be proven at trial, including consequential damages and
7 loss of goodwill.

8 **FOURTH CAUSE OF ACTION**

9 (Business & Professions Code Section 21200 – Price Discrimination)

10 (All Plaintiffs Against BP)

11 170. Plaintiffs allege and incorporate by reference as though set forth in full at this point
12 all of the allegations of the preceding paragraphs.

13 171. California Business & Professions Code Section 21200 provides as follows:

14 It is unlawful for any refiner, distributor, manufacturer, or transporter
15 of motor vehicle fuels or oils engaged in business in this state, either
16 directly or indirectly, to discriminate in price between different
17 purchasers of motor vehicle fuels or oils of like grade and quality,
18 where the effect of such discrimination is to lessen competition, or to
injure, destroy, or prevent competition with any person who either
grants or knowingly receives the benefit of such discrimination, or
with customers of either of them.

19 Upon proof being made, at any hearing on a complaint under this
20 section, that there has been such discrimination in price, the burden of
rebutting the prima facie case thus made by showing justification shall
be upon the person charged with a violation of this section.

21 While Section 21200 allows a seller to rebut a *prima facie* case of price discrimination “by
22 showing that his lower price to any purchaser or purchasers was made in good faith to meet an
23 equally low price of a competitor,” a seller seeking to establish such a “meeting competition”
24 defense must also demonstrate that the lower price “was also offered to any other of his purchasers
25 in competition with the purchaser or purchasers receiving such lower price.”

26 172. Plaintiffs are informed and believe that the lower prices that BP charges to Plaintiffs’
27 competitors are not justified by any differences in the cost of manufacturing, marketing,

1 transportation, sale, or delivery resulting from the differing methods or quantities in which such
2 commodities are sold or delivered.

3 173. Plaintiffs are informed and believe, and based thereon allege, that BP engages in
4 price discrimination in violation of Section 21200 in at least two respects: 1) selling gasoline to
5 Plaintiffs' competitors at prices lower than those at which BP sells gas to Plaintiffs; and 2) charging
6 different prices to different ARCO dealers based on a decision by BP to punish a dealer or dealers
7 operating in a particular price zone, e.g., for setting prices at which they earn a higher margin than
8 the margin that BP wants the dealer(s) to make.

9 **Sales to Plaintiffs' Competitors**

10 174. Plaintiffs are informed and believe, and based thereon allege, that BP is a refiner,
11 distributor, manufacturer and/or transporter of petroleum products within the meaning of California
12 Business and Professions Code § 21201.

13 175. Plaintiffs are informed and believe, and based thereon allege, that BP charges lower
14 prices to various non-BP branded customers within the same geographic areas as Plaintiffs, for the
15 same motor vehicle fuels, during the same time periods in violation of California Business and
16 Professions Code § 21200.

17 176. Plaintiffs are informed and believe, and based thereon allege, that there is no
18 reasonable justification for the price discrimination as herein alleged, that the lower prices charged
19 to non-BP branded customers were not made in good faith to meet an equally low price of a
20 competitor and that, even if such lower prices were otherwise justified and made in good faith to
21 meet the competition, equally low prices were not offered to other purchasers in competition with
22 dealers receiving such lower prices, including Plaintiffs.

23 177. BP has admitted that it violates Business & Professions Section 21200 in selling to
24 unbranded competitors such as Safeway. In BP's Reply Memorandum in Support of BP West Coast
25 Products LLC's Motion for Summary Adjudication of the Third Cause of Action (Gasoline Pricing)
26 in *Hogan v. BP West Coast Products LLC*, Los Angeles County Superior Court No. BC460880, BP
27 asserts, "Competition among unbranded sellers allows some long-term contract purchasers, such as

1 Safeway, to negotiate a price of several cents per gallon below unbranded rack prices.” *Id.* at 11.
2 Although BP contends that it sets low prices to Safeway in order to meet competition, BP violates
3 Section 21200 by failing to offer such lower prices to BP franchisees that compete with Safeway or
4 other unbranded retailers to whom BP sells gasoline at prices lower than those that it charges to
5 Plaintiffs.

6 178. Plaintiffs are informed and believe, and based thereon allege, that there are many
7 non-BP branded stations that compete with Plaintiffs that can buy from BP, either directly or
8 through jobbers and through the use of “unbranded” trucks, at lower prices than Plaintiffs. These
9 non-ARCO branded stations can thus sell at lower retail prices and retain higher profit margins, all
10 to the detriment of Plaintiffs, who are forced to buy BP’s products at higher prices. Plaintiffs allege
11 on information and belief that after a reasonable opportunity for further investigation or discovery
12 Plaintiffs will be able to identify which of such stations compete with which of the Plaintiffs.

13 179. Plaintiffs are informed and believe, and based thereon allege, that Plaintiffs must
14 either decrease their profit margins to be competitive or attempt to maintain their profit margins and
15 suffer a decrease in volume and business as a result of BP’s discriminatory price charged to
16 Plaintiffs.

17 180. BP’s practice of selling fuel to Plaintiffs’ competitors at prices lower than those at
18 which BP sells to Plaintiffs lessens competition, and injures, destroys, or prevents competition with
19 the non-ARCO dealers, who knowingly receive the benefit of such discrimination, *inter alia*, by
20 allowing such nonbranded dealers to free-ride on the investments and commitments made by
21 Plaintiffs, which are essential for efficient investment in refinery capacity. Plaintiffs provide BP
22 with guaranteed demand through long-term contractual commitments to purchase only BP fuel.
23 This guaranteed demand greatly reduces the risks otherwise attendant to building or expanding
24 refineries, which can be enormous and expensive undertakings. In competing against Plaintiffs
25 using BP fuel purchased at prices lower than prices obtained by Plaintiffs, the competing dealers
26 free-ride on Plaintiffs’ investments and commitments, which distorts the efficient allocation of
27 resources and injures, destroys or prevents competition between Plaintiffs and such competing

1 dealers.

2 **Retaliatory Pricing Against BP Franchisees**

3 181. Plaintiffs are informed and believe that BP further engages in price discrimination
4 prohibited by Business & Professions Code Section 21200 by setting its wholesale price to
5 particular franchisees or price zones in a retaliatory fashion designed to punish a franchisee for
6 attempting to earn margins higher than BP's assumed margin, or to punish that franchisee along
7 with all other BP franchisees in the same zone as the franchisee BP seeks to punish. Plaintiffs are
8 informed and believe that BP also retaliates against franchisees through higher gas prices for other
9 reasons, including but not limited to a franchisee's refusal to participate in *ampm* promotions. The
10 pricing differential between the disfavored dealer or zone and other dealers or zones cannot be
11 accounted for by any attempt to meet competition in selling to BP dealers (indeed, BP has no
12 competition in selling to BP dealers), nor can it be justified by differences in the cost of
13 manufacture, marketing, transportation, sale, or delivery resulting from the different methods or
14 quantities in which such commodities are sold or delivered.

15 182. Plaintiffs are informed and believe, and based thereon allege, that the effect of the
16 above-referenced price discrimination by BP, in violation of California Business and Professions
17 Code § 21200, has and will continue to lessen competition and cause injury, damages and/or destroy
18 competition, all to the detriment of Plaintiffs, because BP's system of retaliation distorts Plaintiffs'
19 independent pricing decisions and impairs Plaintiffs' ability to compete with each other and with
20 non-ARCO dealers.

21 183. As a direct result of BP's price discrimination in violation of California Business and
22 Professions Code § 21200, Plaintiffs have been injured and damaged in amount to be proven at the
23 time of trial, including consequential damages and loss of goodwill, and will continue to be injured
24 and damaged unless and until BP is enjoined from engaging in further price discrimination as
25 alleged herein.

26 184. Plaintiffs are also entitled to any other equitable relief which the Court determines is
27 reasonably necessary in order to remedy the effect of BP's violation of California Business and
28

1 Professions Code § 21200.

2 185. In accordance with California Business and Professions Code § 21202, Plaintiffs
3 request that judgment be entered for three times the amount at which Plaintiffs' actual damages are
4 assessed.

5 186. Plaintiffs are also entitled to, and hereby request, attorneys' fees and costs under
6 California Business and Professions Code § 21202 in connection with bringing this action.

7 **FIFTH CAUSE OF ACTION**

8 (Business & Professions Code Section 17045)

9 (All Plaintiffs Against BP)

10 187. Plaintiffs allege and incorporate by reference as though set forth in full at this point
11 all of the allegations of the preceding paragraphs.

12 188. California Business & Professions Code Section 17045 declares unlawful "the secret
13 payment or allowance of rebates, refunds, commissions, or unearned discounts . . . to the injury of a
14 competitor and where such payment or allowance tends to destroy competition." BP's acts of price
15 discrimination as alleged above in favor of Plaintiffs' competitors (*see* ¶¶231-37) and to the
16 detriment of dealers or zones that are the subject of BP's retaliatory pricing practices (*see* ¶¶238-40)
17 also constitute a violation of California Business & Professions Code Section 17045.

18 189. Plaintiffs are informed and believe, and based thereon allege, that the effect of the
19 above referenced price discrimination by BP, in violation of California Business & Professions
20 Code Section 17045, injures Plaintiffs as competitors and tends to destroy competition.

21 190. As a direct result of BP's price discrimination in violation of California Business &
22 Professions Code Section 17045, Plaintiffs have been injured and damaged in amounts to be proven
23 at the time of trial, including consequential damages and loss of goodwill, and will continue to be
24 injured and damaged unless and until BP is enjoined from engaging in further price discrimination
25 as alleged herein.

26 191. Plaintiffs are also entitled to any other equitable relief which the Court determines is
27 reasonably necessary in order to remedy and prevent BP's willful violation of California Business &

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1 Professions Code Section 17045.

2 192. In accordance with California Business & Professions Code Section 17082, Plaintiffs
3 request that judgment be entered for three times the amount at which Plaintiffs' actual damages are
4 assessed.

5 193. Plaintiffs are also entitled to, and hereby request, attorneys' fees and costs, under
6 California Business & Professions Code Section 17082 in connection with bringing this action.

7 **SIXTH CAUSE OF ACTION**

8 (Business & Professions Code Section 17200)

9 (All Plaintiffs Against BP)

10 194. Plaintiffs allege and incorporate by reference as though set forth in full at this point
11 all of the allegations of the preceding paragraphs.

12 195. California Business & Professions Code Section 17200, et seq. prohibits unfair
13 competition, which includes any unlawful, unfair, or fraudulent acts or practices and any unfair,
14 deceptive, untrue or misleading advertising.

15 196. BP used and continues to use unlawful, unfair or fraudulent acts or practices in
16 connection with the sale of gasoline to Plaintiffs under the Gas Agreement and with respect to the
17 convenience store business conducted pursuant to the Convenience Store Agreement. Such acts and
18 practices have continued and will continue unabated unless enjoined.

19 197. BP's unlawful acts or practices are described in Paragraphs 38-205, above and
20 include BP's violation of the common law of contract, the common law of negligence, the common
21 law of breach of the covenant of good faith and fair dealing, Uniform Commercial Code sections
22 pertaining to open price terms (California Commercial Code §2-305(2), RCW 62A.2-305(2), and
23 Or. Rev. Stat. §72.3050(2)), California Business & Professions Code Section 21200, California
24 Business & Professions Code Section 17045.

25 198. BP's unfair acts and practices are described in paragraphs 38-205, above. The utility
26 of BP's unfair acts or practices, whether viewed individually or collectively, is outweighed by the
27 gravity of the harm to Plaintiffs. The harmful impact of BP's practices on Plaintiffs outweighs the

1 reasons, justifications and motives of BP.

2 199. BP's fraudulent acts or practices include the making of false and/or misleading
3 statements in its statutorily required Franchise Disclosure Document that is given to all vendors.
4 Item 8 of the Franchise Disclosure Document describes the nature of the restrictions BP imposes on
5 a franchisee's use of vendors to supply various categories of goods and the requirements for
6 approval of new vendors. The Document explains that "[f]or reasons of quality, consistency and
7 safety, BP may require that certain equipment, motor fuel, food, merchandise and beverage items be
8 purchased from approved or designated sole source suppliers only" (Emphasis added.) The
9 Document advises that BP maintains a list of designated, approved and recommended suppliers and
10 notifies the franchisee in writing of any changes to the list. If a franchisee wishes to procure any
11 items from a supplier that are not currently approved, the franchisee must obtain BP's approval to
12 use the supplier by submitting information about the supplier as specified in the Store Systems
13 Manual. The Document represents that BP

14 may condition [its] approval [of the proposed supplier] among other
15 things on the supplier agreeing in writing not to disclose any
16 confidential information regarding [BP] or [BP's] operations, to
17 comply faithfully with [BP's] specifications for the items it sells, to
18 sell any materials bearing [BP's] marks only to [BP's] franchisees,
19 and on the supplier demonstrating to [BP's] reasonable satisfaction
20 that it is able to supply such commodities meeting [BP's]
21 specifications on a continuing basis, and that the supplier is, and will
22 continue to be, of good standing in the business community with
23 respect to its financial soundness and the reliability of its product and
24 service.

25 The Document confirms that BP "do[es] not charge any fees to secure [BP's] approval of
26 suppliers," though the franchisee or the proposed supplier may be required to pay BP's reasonable
27 costs associated with reviewing the supplier's application.

200. The Document identifies the types of issues BP will consider in evaluating a prospective vendor that a franchisee has proposed for approval. Plaintiffs are informed and believe, however, that BP does not apply those considerations in evaluating a prospective vendor for approval, but rather has a practice of refusing to approve vendors that will not pay BP (or that BP believes will not pay BP) additional funds that BP can retain for its own benefit and of imposing onerous burdens on obtaining such approval in order to limit a franchisee's ability to seek and secure approval of a new vendor. Plaintiffs are informed and believe that such requirements are designed to make requests for approval impracticable and are not required of all vendors who make payments to BP and/or were not proposed by a franchisee. However, BP does not disclose this information to franchisees. As a result, BP's practice of using the disclosures about approval of new vendors in Item 8 of the Document to sell *ampm* Mini Market franchises to prospective franchisees is fraudulent within the meaning of Business & Professions Code Section 17200 in that it is reasonably likely to deceive members of the public.

201. As a result of BP's unlawful, unfair, and fraudulent acts and practices as alleged above, Plaintiffs suffered injury in fact or have lost money or property as a result of BP's acts of unfair competition, including but not limited to paying higher prices for gasoline and convenience store items than Plaintiffs would have paid in the absence of BP's unlawful, unfair and fraudulent acts.

202. BP's acts of unfair competition should be enjoined, and the Court should make such other orders or judgments as may be necessary to prevent such acts. Plaintiffs also seek an order restoring to Plaintiffs all money or property which may have been acquired by means of such unfair competition.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment against Defendants, and each of them, as follows:

1. For compensatory and treble damages, as applicable, in an amount in excess of the jurisdictional amount, according to proof at trial;

1 2. For an injunction prohibiting BP's breaches of contract and of the covenant of good
2 faith and fair dealing;

3 3. For an injunction prohibiting BP from discriminating against Plaintiffs with respect
4 to the price of gasoline, in violation of California Business & Professions Code Sections 21200
5 and/or 17045;

6 4. For an injunction prohibiting BP from engaging in unlawful or unfair acts and
7 practices in violation of Business & Professions Code Section 17200, et seq.;

8 5. For an award of restitution to Plaintiffs of all money or property that may have been
9 acquired by BP as a result of its acts of unfair competition as alleged above;

10 6. For costs of suit incurred herein, including attorneys' fees; and

11 7. For such other and further relief as the Court deems just and proper.

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13 DATED: December 16, 2014

KABATECK BROWN KELLNER LLP

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Richard L. Kellner
Attorney for Plaintiffs
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REQUEST FOR JURY TRIAL

Plaintiffs hereby demand a trial by jury in this action.

DATED: December 16, 2014

KABATECK BROWN KELLNER LLP

Richard L. Kellner
Attorney for Plaintiffs

1 2. For an injunction prohibiting BP's breaches of contract and of the covenant of good
2 faith and fair dealing;

3 3. For an injunction prohibiting BP from discriminating against Plaintiffs with respect
4 to the price of gasoline, in violation of California Business & Professions Code Sections 21200
5 and/or 17045;

6 4. For an injunction prohibiting BP from engaging in unlawful or unfair acts and
7 practices in violation of Business & Professions Code Section 17200, et seq.;

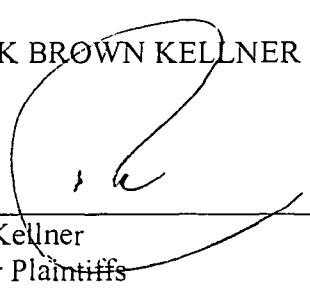
8 5. For an award of restitution to Plaintiffs of all money or property that may have been
9 acquired by BP as a result of its acts of unfair competition as alleged above;

10 6. For costs of suit incurred herein, including attorneys' fees; and

11 7. For such other and further relief as the Court deems just and proper.

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13 DATED: December 16, 2014

KABATECK BROWN KELLNER LLP

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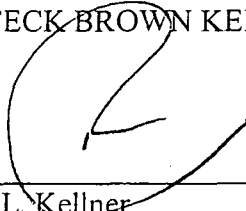
Richard L. Kellner
Attorney for Plaintiffs

REQUEST FOR JURY TRIAL

Plaintiffs hereby demand a trial by jury in this action.

DATED: December 16, 2014

KABATECK BROWN KELLNER LLP



Richard L. Kellner
Attorney for Plaintiffs