IN THE SUPREME COURT OF OHIO

Supreme Court Case No. 07-1408

Donald J. Casserlie, et al. ,	:	
Appellants,	:	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District
v.	:	Court of Appeals Case No. CA-06-088361
Shell Oil Company, et al.,	:	
Appellees.	:	

MERIT BRIEF OF APPELLEES SHELL OIL COMPANY, EQUILON ENTERPRISES LLC, EQUIVA SERVICES LLC, LYDEN OIL COMPANY, THE LYDEN COMPANY, AND TRUE NORTH ENERGY, INC.

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INTRODUCTION

The sole question before this Court is whether, under Uniform Commercial Code ("UCC") Section 2-305, allegations regarding a seller's purported subjective intent raise a fact issue precluding summary judgment, where the objective record evidence otherwise demonstrates that seller's prices were commercially reasonable and commercially justifiable. Despite the legislative history of the Section 2-305 and the overwhelming case law interpreting it—each of which establish that the answer to this question must be in the negative—Appellants ask this Court to ignore this authority, and to hold not only that a "subjective" inquiry into an otherwise objectively-reasonable "good faith" price is required, but also that summary adjudication is never appropriate where allegations of "bad faith" pricing are at issue. For all of the reasons discussed herein and in the briefs filed below, Appellants' request should be rejected. The trial and appellate courts correctly applied the law to the record of this case, and their judgment in favor of Appellees as a matter of law should be affirmed.

SUMMARY OF ARGUMENT

Appellants are known in the gasoline industry as "lessee-dealers." That is, they are independent operators of gasoline stations who sell (in this case) Shell-branded gasoline to the public. As lessee-dealers, Appellants have no ownership interest in the stations that they operate, having a purely contractual relationship with Shell. Among the agreements between Appellants and Shell is a Dealer Agreement that provides for how Appellants buy gasoline from Shell. As is typical of gasoline supply agreements, the Dealer Agreement has an open price term. That is, the Agreement does not set a specific price for gasoline, but rather, provides that the selling price shall be the "dealer prices * * * in effect at the time loading commences at the [refinery] and for the place of delivery."

Open price contracts are commonplace and have been used for decades to accommodate the parties' mutual interest in a long-term agreement while recognizing the fluctuation in gasoline prices over time. Indeed, the industry could not function without these types of agreements. The UCC recognizes the commercial importance of open price term contracts, specifically validating them in Section 2-305 so long as the seller sets the price in good faith.

In this case, Appellants contend that Shell's prices for Shell-branded gasoline were not set in good faith. In the ever-shifting theories of their case, Appellants' have at various times claimed that Shell's price was not set in good faith because (i) it was different from prices charged to other Shell customers that had different contracts; (ii) the price did not permit Appellants' to operate profitably; and/or (iii) Shell set its prices with the intent to drive Appellants out of business. Even assuming arguendo that was any factual basis in the record to support any of Appellants' theories, which there is not, each of these claims have been addressed by courts throughout the country and—like Appellants' claims in the courts below—each claim has been defeated as a matter of law.

More specifically, applying decades of UCC precedent from courts around the country, including a Sixth Circuit decision under Ohio law, both the trial and appellate courts properly held that the test of a seller's good faith is *objective* and that Shell's prices satisfied the UCC standard for good faith because they were within the range of prices charged by Shell's competitors and because Shell did not discriminate between similarly-situated buyers. Appellants ask this Court to ignore this overwhelming precedent and the clear intent and purpose of Section 2-305, and to instead adopt a *subjective* test whereby an otherwise commercially reasonable, nondiscriminatory price would violate the Ohio version of the Code if a fact-finder decides that the seller's intentions were somehow impure. Indeed, ignoring roughly a dozen

cases in which courts have granted summary judgment with respect to nearly identical claims, Appellants suggest that questions of bad-faith pricing may *never* be resolved on summary judgment, but instead must always be the subject of a trial.

This Court should reject Appellants' invitation to have Ohio stand alone in proclaiming that, in this State, a seller's subjective intent will be used to determine whether an otherwise commercially reasonable, non-discriminatory price was set "in good faith." Such a result would undermine the UCC's codified purpose of achieving uniformity and predictability in commercial law, thereby impacting every industry in the state that relies upon open price terms for the conduct of its business. More importantly, the lower courts were correct that under Ohio law—as in jurisdictions across the nation—the test for determining good faith under an open price term is an *objective* one. Thus, for the reasons set forth herein and below, this Court should affirm the decision of the appellate court below.

STATEMENT OF FACTS

The Appellees in this case are: Shell Oil Company; Equilon Enterprises LLC; Equiva Services LLC; Lyden Oil Company; The Lyden Company; and True North Energy, Inc. At various times between 1995 and the present, Appellees Shell Oil Company ("Shell Oil"), Equilon Enterprises LLC ("Equilon"), and True North Energy ("True North") each sold Shell-branded gasoline to retailers in Greater Cleveland, and/or were lessors of Shell-branded gasoline stations.[1] Appellants claim that Appellees set their gasoline prices in violation of UCC Section

[1] These business relationships between Shell Oil, Equilon Enterprises LLC, True North, and the remaining Appellees are described below. See infra at pp. 4-8. Except as otherwise specified, references to "Shell" herein refer to Appellees collectively.

2-305.[2] Thus, a brief description of each Appellee and its pricing practices is set forth below.

A. Shell And Equilon—1995-1999.

From 1995 through 1997, Shell Oil refined, marketed and sold Shell-branded gasoline in the Cleveland area. (See Deposition of Tom Gravlin (Feb. 27, 2003) ("Gravlin Dep.") at 44, 67 (Supp. 220, 226).)[3] In January 1998, Shell Oil and Texaco, Inc.—through their respective subsidiaries—formed a limited liability company called Equilon Enterprises LLC into which the parties contributed their Western and Mid-Continent United States refining and marketing assets, including their respective service stations. (Id.; see also Defendants True North Energy LLC, True North Management, Lyden Oil, and Lyden Co.'s Responses to Plaintiffs' First Set of Interrogatories ("TNE Int. Resp."), Interrogatory Response 2 at p. 4 (Shell Supp. 4).) As part of the formation of Equilon, the agreements relating to Shell-branded service stations in Cleveland were assigned to Equilon. (Id.) Because Equilon's pricing practices were substantially the same as Shell Oil's pricing practices, Shell Oil and Equilon are here referred to collectively as "Shell."

Like most oil refiners at the time, Shell distributed its gasoline through both a network of retailers—predominantly lessee-dealers—and a wholesale network of distributors called "jobbers." (Gravlin Dep. at 68 (Supp. 226)); see also *Tom-Lin Ent., Inc. v. Sunoco, Inc.* (C.A.6, 2003), 349 F.3d 277, 285; *Havird Oil Co. v. Marathon Oil Co.* (C.A.4, 1998), 149 F.3d 283, 285; *Au Rustproofing Ctr., Inc. v. Gulf Oil Corp.* (C.A.6, 1985), 755 F.2d 1231, 1235-36; *Shell Oil Co. v. HRN, Inc.* (Texas 2004), 144 S.W.3d 429, 431; *Exxon Corp. v. Santa Clara Cty.*

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[2] Codified in Ohio at R.C. § 1302.18. For ease of reference, Appellees will generally refer to UCC numbering in text, but will provide the appropriate Ohio Revised Code reference in citations.

[3] Pursuant to S.Ct.Prc.R. VII, § 3, Shell has filed a non-duplicative Supplement, which is referred to in this brief as "Shell Supp." References in this brief to "App." refer to Appellants' Appendix, and references to "Supp." refer to Appellants' Supplement to Merit Brief.

(Cal.App.1997), 51 Cal.App.4th 1672, 1687. This "dual distribution system" of retailers and wholesalers has been a part of the petroleum marketing industry for decades. Id.

1. DTW Pricing—the Lessee-Dealer's Price for Shell-Branded Gasoline.

The relationship between Shell and a lessee-dealer is governed by two agreements: the Dealer Agreement and the Motor Fuel Station Lease. (See, e.g., Dealer Agreement of Jim Wise Enters. (Supp. 109); Motor Fuel Station Lease of Jim Wise Enters. (Supp. 96).) The Lease conveys a leasehold interest in a Shell-branded service station in return for rent payments. (See generally Motor Fuel Station Lease of Jim Wise Enters. (Supp. 96).) The Dealer Agreement establishes the terms and conditions under which the lessee-dealer is permitted to operate a Shell-branded service station and to purchase Shell-branded gasoline. (See generally Motor Fuel Station Lease of Jim Wise Enters. (Supp. 96).) Pursuant to Article 8 of the Dealer Agreement—the open-price term—the lessee-dealer agrees to pay Shell's posted price for Shell-branded gasoline:

> The prices shall be (a) for motor fuels, the dealer prices for the respective grades and brands delivered in effect at the time loading commences at the [refinery] and for the place of delivery * * * such current dealer prices may be ascertained at Shell's offices * * *.

(See, e.g., Dealer Agreement of Jim Wise Enters., p.5, Art. 8 (Supp. 113).) Because it includes delivery by tanker truck, this posted price is referred to as the "dealer tank wagon" price or the "DTW" price. (Gravlin Dep. at 32 (Supp. 217).)

In the Cleveland market, Shell set the DTW price in an effort to compete with its major competitor, British Petroleum ("BP"). (Id. at 41-2 (Supp. 220).) Additionally, in recognition of the different competitive conditions that exist within any large metropolitan area (often dictated by geography and traffic patterns), Shell divided each metropolitan area into trade areas in which Shell believed that the competitive environment was the same. (See id.; see also id. at 24 (Supp.

215).) Shell monitored the street price of stations within each of these trade areas and adjusted its DTW price as the prevailing street prices changed. This pricing methodology is commonly referred to as "street back pricing" because the refiner is adjusting the DTW price charged to a dealer based on market observations of the retail prices seen on the "street" in the surrounding neighborhood. (See Plaintiffs' Expert Report of Stephen Shelton ("Shelton Report") at § 11 (pp. 8-9) (Supp. 291-92).) Given the relative strength of BP in the Cleveland market, Shell followed BP's prices rather than trying to establish the price of gasoline in the market. Thus, in the Cleveland market, *Shell was a price follower,* while BP was the price leader. (Gravlin Dep. at 35-6, 41-2 (Supp. 218, 220).)

Undisputedly, Shell charged each lessee-dealer in that trade-area the same DTW price. (Id. at 41-2 (Supp. 220).) For administrative purposes, Shell grouped trade areas that receive the same DTW into price administration districts, or "PADs." (Id. at 23-24 (Supp. 6).) DTW prices are the same throughout a given PAD. (Gravlin Dep. at 76, 105-07 (Supp. 228, 236).) In other words, every dealer within a specific PAD paid the same DTW. (Id.)

2. Jobbers—JTP or Rack Pricing.

Shell also sold gasoline to jobbers. (Id. at 68 (Supp. 226).) Jobbers are typically small oil companies that develop and own service stations and may also own storage facilities. See, e.g., *Tom-Lin*, 349 F.3d at 279; *HRN*, 144 S.W.3d at 431. Jobbers also typically operate their own fleet of trucks to pick up gasoline at refinery racks or terminals for delivery to the gasoline service stations they operate and/or supply. Id. Unlike a lessee-dealer, a jobber bears a number of risks that are associated with ownership of transportation, storage and service station assets, such as capital investment, credit risk, accident liability, and environmental problems. *Tom-Lin*, 349 F.3d at 285. Jobbers also relieve the refiner of the administrative burden of dealing with the service stations that the jobbers operate and/or supply. Id.

In recognition of these greater risks and responsibilities, a jobber can typically contract to purchase gasoline at the oil company's terminal at the posted "rack" price. This price is typically lower than the delivered DTW price charged a lessee-dealer.[4] Id. at 285-86; (see also Shelton Report at § 11 (pp. 8-9) (Supp. 291-92).) Shell set its rack prices in an effort to be competitive with the rack prices charged by its major competitors at the same terminal. (See Defendants Shell Oil Company, Equilon Enterprises LLC and Equiva Services LLC's Answers and Objections to Plaintiffs' First Set of Written Interrogatories ("Shell's Int. Resp.") at Interrogatory Response 4 at pp. 5-6 (Shell Supp. 20-21).) Unlike the DTW price, the rack price is not based on a competitor's "street price," but on a different set of factors such as competitors' rack prices; daily gasoline and crude oil spot prices; volume data, including product ratios; changes in supply costs; and gasoline market developments in contiguous spot markets. (Id.)

B. <u>True North Energy—1999 To The Present</u>.

In November 1999, Equilon and The Lyden Company, an Amoco jobber operating and/or supplying Amoco stations in Cleveland and other Ohio cities, entered into a joint venture called True North Energy, LLC. As part of the formation of the True North joint venture, Lyden contributed its Amoco stations and re-branded them as Shell stations, and Shell contributed its existing Shell-branded stations—including the corresponding Dealer Agreements and Motor Fuel Station Leases. (See Deposition of Geoff Lyden, III (January 22, 2004) ("Lyden Dep.") at 84, 99, 140, 141 (Shell Supp. at 48,52,62-63).) After the formation of the joint venture, True North became the distributor of Shell-branded gasoline to the Cleveland network of Shell-branded service stations, including the stations operated by Appellants. (Id.) As the lessee-

[4] The rack price is a posted price for gasoline that is actually picked up at an oil refinery or terminal, *i.e.*, the rack. (Gravlin Dep. at 69, 142 (Supp. 227, 246).)

dealers' Leases and Dealer Agreements expired, they could continue as Shell-branded dealers by renewing similar agreements with True North.[5]

True North's Retail Sales Agreements, like Shell's Dealer Agreements, had an open price term for the purchase of Shell-branded gasoline at True North's posted DTW price:

> "Retailer [lessee-dealer] shall pay Seller [True North] for the Products the price in effect on the date of delivery for the place of delivery. Retailer may ascertain Seller's current prices at Seller's offices or at such other place designated by Seller."

(See, e.g., Retail Sales Agreement of Prymas Corp. at Pt. II, Art. 3 (p. 2) (Supp. 174).)

When True North took over responsibility for distributing Shell-branded gasoline, it did not use trade areas or PADs to set the price for gasoline sales to dealers. Rather, True North set the price to the lessee-dealers as the wholesale price it paid Equilon for gasoline plus 7 cents per gallon. (See Lyden Dep. at 42-3, 86 (Shell Supp. 38, 49).)[6] True North's pricing methodology is commonly referred to as "rack-plus" pricing, as opposed to the "street back" pricing methodology utilized by Shell. Id.

C. The Appellants And Their Alleged Pricing Claims.

As stated above, Appellants are predominately lessee-dealers who did not own the service stations or the underlying property, but rather leased stations from Appellees.[7]

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[5] In the case of Equilon and True North, such agreements were called Retail Sales Agreements and Retail Facility Leases, respectively.

[6] Prior to forming True North, The Lyden Company had historically priced gasoline to its dealers in this manner. (Lyden Dep. at 42-3, 86 (Shell Supp. 38, 49).)

[7] Five of the Appellants, Steve Herold, Clydie Nelson, Amos Norwood, Ron Serraglio and Robert Herold were "open" dealers, not lessee-dealers. Open dealers own their service station premises and therefore have only a supply agreement with Appellees for the purchase of gasoline. Nonetheless, open dealers have the same open price term provisions as the lessee-dealers and thus the legal analysis of the open dealers' pricing claims is the same as the analysis of the lessee-dealers' pricing claims.

Appellants initially filed this lawsuit in August 1999, alleging that "[Appellees] set the open price term in bad faith in order to maximize profits at some stations and drive other Shell dealers out of business * * *." (See Third Am. Compl. at ¶ 10 (p.16) (Supp. 18).)[8] Throughout the proceedings in the trial court, Appellants maintained that the price for Shell-branded gasoline was not set in good faith because it exceeded Shell's rack price plus "two cents per gallon for profit and 1.6 cents per gallon on average for transportation." (See Plaintiffs' Expert Report of Alan Taub ("Taub Report") at p. 2 (Shell Supp. 87).) Indeed, Appellants' counsel told the trial court that the dealers' bad-faith pricing claim was based on the difference between the lessee-dealer's DTW price and the rack price paid by jobbers who pick up gasoline at the terminal:

> I think the Court's [sic] already articulated our position, that is the bad faith pricing based on the disparity between what Shell charged my clients and what they should have charged them based on what they were charging [] jobbers—in other words, people that had stations that took their own tank trucks and bought it at the station.

(See Transcript of Trial Court's May 6, 2003, Hearing on Defendants' Motion to Dismiss at 23 (Shell Supp. 168).)

Thus, Appellants' focus in the trial court was on arguments that (i) Shell Oil's DTW price was set in bad faith because it was not "rack-based;" and (ii) True North's "rack-based" price was set in bad faith because its "plus" factor exceeded an amount unilaterally selected by their alleged expert. (See id.; see also Taub Report at p. 2 (Shell Supp. 87).) On appeal, however,

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[8] In 2002, Appellants filed a Third Amended Complaint that sought to add additional plaintiffs to the litigation. (*See* Third Am. Compl. at ¶¶ 42-51, 149-63 (pp. 25-26, 47-48) (Supp. 25-26, 47-48).) These additional parties alleged that Shell/Equilon charged them a higher DTW price due to their race. *Id.* at ¶¶ 149-63 (pp. 47-48) (Supp. 47-48).) The trial court determined these claims were untimely filed and the court of appeals affirmed that ruling. Appellants sought to appeal that ruling to this Court. This Court refused to accept the appeal of that issue. Appellants' request that the Court revisit this issue (*see* Appellants' Merit Brief at fn.4) is improper and should be rejected.

Appellants have seemingly moved away from these rack-pricing-based arguments, instead focusing more narrowly on claims that Shell's price was set in "bad faith" because Shell allegedly intended that pricing to drive Appellants out of business. (See, e.g., Appellants' Merit Brief at 1.)

Under any theory of the case, however, the lower courts properly recognized that, based upon the record evidence, Appellants' claims failed as a matter of law. UCC Section 2-305 does not (i) obligate Shell to provide uniform pricing to buyers who are not similarly-situated; (ii) obligate Shell to sell gasoline at prices that ensure a particular margin, or protect against competitive erosion of that margin; or (iii) permit, much less require, an inquiry into the alleged subjective intent behind an otherwise commercially reasonable, non-discriminatory price. Thus, reviewing Section 2-305 and applying the uniform body of case law construing that Section, the courts below correctly held that Shell's DTW prices were set in good faith under Section 2-305 because the DTW prices were within the range of what was charged by Shell's competitors and because there was no evidence of price discrimination between similarly-situated dealers.

PROCEDURAL HISTORY[9]

This case was filed in August 1999. The complaint contained a variety of claims allegedly arising out of the parties' contractual relationship, including the bad-faith pricing claim that is the subject of this appeal. With regard to the pricing claim, the parties engaged in 21 months of discovery before Shell moved for summary judgment. The trial court granted summary judgment in Shell's favor, noting in part:

In order to show that defendants set the open price term in a commercially

[9] A more detailed statement of the procedural history of this litigation is set forth at pages 1 through 6 of the Brief of Defendants-Appellees filed in the court of appeals. The Court is referred to that document for additional information.

> unreasonable manner, it must be shown that defendants DTW was not within the range of its competitors in the market area. Defendants have submitted affidavit testimony of John Umbeck, PhD, which establishes that the DTW prices set by defendants was within the range set by its competitors in the relevant market area. *Plaintiffs failed to rebut this evidence.*

(Journal Entry and Opinion (April 13, 2005) at p. 6 (App. 9) (emphasis added).)

Appellants unsuccessfully appealed. In affirming the trial court's ruling, the appellate court reviewed applicable Ohio law, including the case of *Master Chemical Corp. v Inkrott* (1990), 55 Ohio St.3d 23, which is so heavily relied upon by Appellants. After specifically concluding that *Master Chemical* adopted an *objective* test of good faith (rather than the subjective test urged by Appellants), that court stated:

> Thus, a commercially reasonable DTW price is one within the range of DTW prices charged by other refiners in the market and can be considered a good faith price under Ohio law absent some evidence that Shell used pricing to discriminate among its purchasers. Therefore for the dealers to show that Shell acted in bad faith, they must show that the price for gasoline was not fixed in a commercially reasonable manner and that the pricing was commercially unjustifiable. Shell will satisfy the good-faith test if its DTW prices are within the range of the dealer prices of its major competitors.

(Journal Entry and Opinion (May 31, 2007) at p. 9 (App. 25).) Because the record established that Shell's prices were in the range of what competitors charged, and there was no evidence that Shell used pricing to discriminate among similarly-situated purchasers, the appellate court found that Shell's prices were good-faith prices. (Id. at pp. 11-15 (App. 27-31).) This was particularly true given that the lessee-dealers' failed to provide ***any*** "background evidence" of how other marketers of gasoline set their prices from which a comparison to standard industry practices could be made. (Id. at 11-14 (App. 27-30).) Thus, the appellate court correctly determined that the lessee-dealers had failed to meet the burden of rebutting Shell's evidence that its prices were commercially reasonable. (Id. at pp. 9, 11-12 (App. 25, 27-28).)

Of the multiple assignments of error presented by Appellants in their appeal here, this Court accepted only the single issue concerning UCC Section 2-305, rejecting all other issues presented for appeal.

ARGUMENT

Proposition of Law: Pursuant to UCC Section 2-305 (Revised Code Section 1302.18), a price that is objectively demonstrated to be both commercially reasonable and non-discriminatory is a "good faith" price, and an inquiry into the seller's subjective intent is neither permitted nor required.

A. An Objective Inquiry Into A Seller's Good Faith Is Consistent With The Intent Of UCC Section 2-305 And Is In Accord With The Decisions Of The Vast Majority Of Courts That Have Examined This Question.

The purpose of the UCC is to facilitate commerce by providing a uniform body of case law to govern commercial transactions. UCC § 1-102 (R.C. § 1301.02(A)(3).). In particular, the purpose of Section 2-305 is to establish the enforceability of agreements in which the price term must be left open because of changing market conditions. UCC § 2-305 (R.C. § 1302.18); see also *Havird Oil,* 149 F.3d at 290 (noting that Section 2-305 "serves to fill the gap and save the contract"). To supply an implied price term for such contracts, that section provides that a "price to be fixed by the seller or by the buyer means a price for him to fix in good faith." UCC § 2-305 (R.C. § 1302.18); *Havird Oil,* 149 F.3d at 290. In the case of a merchant, this good-faith standard requires that the price be set with "honesty in fact" and in "observance of reasonable commercial standards of fair dealing in the trade." See UCC § 2-305(2) (R.C. § 1302.18); UCC § 2-103 (R.C. § 1302.01); see also *Tom-Lin,* 340 F.3d at 281-82. As is clear from both the drafting history and the overwhelming weight of authority interpreting Section 2-305, a seller's "good faith" may be conclusively established through objective evidence demonstrating (1) that the seller's price was within the range of its competitors, and (2) that the seller did not discriminate between similarly-situated buyers.

1. The Drafting History Demonstrates that Section 2-305 Is Intended to Prevent Discriminatory Pricing and To Avoid Endless Litigation Over Price Levels.

Section 2-305 was adopted as part of an effort to "clarify and modernize" commercial law, thereby facilitating commerce. UCC § 1-102 (R.C. § 1301.02). At common law, some courts had held that open-price term contracts were too ambiguous to enforce, although most pre-Code cases recognized the validity and commercial importance of such contracts. See, e.g., *Standard Oil Co. v. Petroleum Prods. Storage Co.*(Tenn.1931), 44 S.W.2d 317, 318-19 (holding a "price in effect" term in a supply agreement to be unambiguous and enforceable); *Robinson v. Shell Oil Co.* (Wash.1933), 21 P.2d 246, 249 (upholding an open price term contract). Speaking at the 1943 National Conference of Commissioners on Uniform State Laws, Professor Karl Llewellyn, the UCC's principal drafter, noted that the goal of proposed Section 2-305 was to reaffirm the validity of open price term contracts, especially in the refining industry:

> [G]asoline filling station contracts, for example, calling for a five-year supply, the price to ship according to some indicated market guide and the like * * * . The courts are in the main supporting these contracts, but they have had some difficulty with them. The attempt here is to make sense out of that body of law and state that sense.

See Transcript of National Conference of Commissioners on Uniform State Laws Fifty-Third Annual Conference (August 17-21, 1943) (hereinafter "NCCUSL Transcript") at Shell Supp. 195.

While seeking to validate the use of open price term contracts, the UCC's drafters also were concerned that Section 2-305 "should not require suppliers in industries where 'price in effect'-type contracts are often used to establish that the price ultimately charged was a reasonable one." See, e.g., *Wayman v. Amoco Oil Co.* (D.Kan.1996), 932 F.Supp. 1322, 1346 (analyzing the drafting history of Section 2-305), affirmed (C.A.10, 1998), 195 F.3d 1347. In a formal session discussing an early draft of Section 2-305, the drafters specifically recognized

that, in some industries, "the entire industry is on [an open price term] basis," and that requiring sellers in such industries to establish the economic reasonableness of their prices in order to satisfy Section 2-305 would "mean[] that in every case the seller is going to be in a lawsuit," transforming every sales contract into "a public utility rate case." Malcolm, The Proposed Commercial Code: A Report on Developments from May 1950 through February 1951, 6 Bus. Law. 113, 186 (1951) (hereinafter "Malcolm Report") (Shell Supp. 227)[10] One of the drafters, Mr. Bernard Broeker, noted that the prevailing industry interpretation of open price term contracts "is that when you come to fix the price on a particular contract, you do not discriminate against this particular purchaser." Id. The drafters thought it "of tremendous importance" that Section 2-305 be phrased so that "it is clear that [sellers] do not have to establish that [they] are fixing reasonable prices, because that gets you into the rate of return of profit, whether you are using borrowed money, and all those questions." Id. Professor Llewellyn agreed, and the Code reporters indicated that they would revise the earlier draft language to clarify that Section 2-305 is intended "to avoid discriminatory prices" while "preserving [the practice of using] seller's standard prices." Id

In order to minimize judicial intrusion into the setting of prices under open-price term contracts, the drafters also adopted Comment 3. The comment incorporates a legal presumption into the good-faith standard of Section 2-305, allowing sellers to avoid liability by treating all similarly-situated buyers the same in terms of price. See § 2-305, cmt. 3 (providing that "in the normal case a 'posted price' or a future seller's or buyer's 'given price,' 'price in effect,' 'market

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[10] This article, by the chairman of the UCC drafting committee, is a compilation of various reports, correspondence, and meeting minutes of the Committee on the Proposed Commercial Code of the ABA's Corporation, Banking, and Business Law Section. See id. at 113 (Shell Supp. 197).

price,' or the like satisfies the good faith requirement").[11] As one court observed, it "is abundantly clear * * * that the chief concern of the UCC Drafting Committee in adopting § 2-305 (2) was to prevent *discriminatory* pricing—i.e., to prevent suppliers from charging two buyers with identical pricing provisions in their respective contracts different prices for arbitrary or discriminatory reasons." *Wayman*, 923 F. Supp. at 1346-47 (emphasis sic). Thus, the drafting history makes clear the drafters' intent to avoid "open[ing] the can of worms" that would result if the "good faith" language of Section 2-305 could be used by buyers to challenge the subjective fairness or economic reasonableness of a seller's price. *Wayman,* 932 F. Supp. at 1350; see also *HRN*, 144 S.W.3d at 435 ("Premising a breach of contract claim solely on assumed subjective motives injects uncertainty into the law of contracts and undermines one of the UCC's primary goals—'to promote certainty and predictability in commercial transactions'") (citation omitted).

This drafting history supports the decisions of the courts below. Unable to reconcile this history with the position they advocate, Appellants resort to misstating the history. For example, Appellants advise the Court that Mr. Broeker was "merely a spectator" and "an outsider" who "was not one of the drafters of Article 2." (Appellants' Merit Brief at 19.) These are simply untrue statements. Mr. Broeker was part of the four-person drafting and final subcommittee responsible for UCC Article 2. See The American Law Institute, National Conference of

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[11] Confusingly, Appellants suggest that the weight to be afforded to the UCC's Official Comments is somehow in question because "the Ohio Legislators never adopted the UCC comments into Ohio law." (Appellants' Merit Brief at fn.5). Regardless of whether the Ohio legislature formally adopted the Official Comments, the Comments provide meaning and context to the Code provisions. Ohio courts, including this Court, routinely look to and rely upon the Official Comments to interpret the UCC. See, e.g., *Internatl. Periodical Distrib. v. Bizmart, Inc.* (2002), 95 Ohio St.3d 452, 455; *Provident Bank v. Gast* (1979), 57 Ohio St.2d 102, 106. Appellants advance no reason to support the contention that the Official Comments should be ignored in this case. Moreover, as if to underscore the silliness of this argument, Appellants themselves refer to and rely upon the Official Comments in their Merit Brief. (See Appellant's Merit Br. at fn.3 (referring to Official Comment 19 to UCC Section 1-201 (R.C. § 1301.01).)

Commissioners on Uniform State Law, 1956 Recommendations of the Editorial Board for the Uniform Commercial Code vii-viii (Shell Supp. 240-41). He also was a member of the "Committee on Sales Transactions," which studied, reported on, and provided comments to the Spring 1950 draft of Article 2. See Malcolm Report, 6 Bus. Law. 113, 142-50 (Shell Supp. 206-210).) The history thus confirms that far from being a "mere spectator" or "outsider," Mr. Broeker was intimately involved in the drafting of Article 2 of the UCC, including Section 2-305.

In another misstatement, Appellants assert that Professor Llewellyn "immediately rejected" Mr. Broeker's views. (Appellants' Merit Brief at 21.) As support for their assertion, Appellants cite what they represent to be a full quotation (ending with a period) by Professor Llewellyn: "I don't agree with Mr. Broeker's interpretation of the language as it stands." (Id.) But the quotation is both incomplete and misleading if taken out of context. Professor Llewellyn's complete statements confirm that his disagreement was with Mr. Broeker's belief that the current language did not clearly reflect the meaning intended by the drafters, NOT a disagreement with that meaning:

> MR. LLEWELLYN: The Staff have no objection *to the substance.*
>
> MR. PANTZER: You remember, Mr. Llewellyn, that we had the claim clauses in the paper board contract and in the canned goods contract.
>
> MR. LLEWELLYN: I don't agree with Mr. Broeker's interpretation of the language as it stands, but see no reason why *the fact that I think it is clear* should interfere with rephrasing it *so that everybody can think it clear.*

See Proceedings of the Larger Editorial Board of the American Law Institute (Sunday Morning Session, January 28, 1951) (hereinafter "Proceedings") at 195 (Shell Supp. 258) (emphases added). Thus, it is clear that Professor Llewellyn disagreed with Mr. Broeker's concern that the draft language "as it stands" could be interpreted to invite litigation over the reasonableness of

prices. Id. But he *agreed* with Mr. Broeker that this should not be the law, and thus agreed to rephrase the language so that it was not open to such an unintended interpretation.

This construction of Professor Llewellyn's statement is bolstered by the fact that the drafters accepted—not rejected as Appellants now claim—the substance of Mr. Broeker's points. As Walter D. Malcolm, Chairman of the Committee on the Proposed Uniform Commercial Code, reported at the time:

> At the executive session the Reporters and Editorial Board *approved in principle both suggestions made by Mr. Broeker* but the Reporters wished to revise the specific language suggested. The Reporters did not object to preserving sellers' standard prices but want the language to avoid discriminatory prices.

Malcolm Report, 6 Bus. Law. 186 (Shell Supp. 227) (emphasis added). Thus, Appellants' extreme departures from the historical record are inaccurate and should not be relied upon.

2. The Overwhelming Weight of Authority Supports the Use of an Objective Standard and Summary Adjudication in Analyzing Pricing Claims under UCC 2-305.

An overwhelming body of case law has developed in the gasoline marketing industry applying UCC Section 2-305 in cases challenging a refiner's dealer tank wagon ("DTW") price. The courts in these cases have consistently have granted judgment as a matter of law to refiners upon an objective showing both that the DTW price is within the range of DTW prices charged by other major refiners and that the refiner does not discriminate among buyers in a price zone. Importantly, these courts have granted judgment ***as a matter of law*** despite the presence of allegations virtually identical to those that Appellants have made in this case—i.e., that a price was set in "bad faith" because (i) it was higher than prices available to certain other buyers; (ii) the price did not permit dealers to profitably compete; and/or (iii) that the refiner set its prices with the intent to drive the dealers out of business. Thus, as set forth below, Appellants' argument that summary adjudication is not appropriate in cases involving allegations of "bad

faith" (see Appellants' Merit Brief at 12-13) has been flatly rejected by courts across the country, and this Court should also reject it.

a. Where a posted price is objectively reasonable, alleged evidence that lower prices are available to other buyers who are not similarly-situated is insufficient to raise an issue of fact or to otherwise defeat summary judgment.

Courts have consistently rejected claims that a price is set in "bad faith" because lower prices are available to purchasers having different contracts with refiners. For example, in granting summary judgment in *Tom-Lin*, 349 F.3d 277, the court rejected—*as a matter of law*—plaintiffs' claim that the DTW price was set in "bad faith" because it exceeded the price at which certain other Sunoco retailers could purchase fuel from jobbers. *Tom-Lin.*, 349 F.3d at fn.7 ("The relevant standard * * * is the DTW and rack price that a refiner like Sunoco sets for gasoline, not the price for which a middlemen re-sells a refiner's gasoline to [other] retailers.") Indeed, *Tom-Lin* involved facts virtually identical to those of this case.

In *Tom-Lin*, twelve Sunoco dealers sued Sunoco, alleging that it had charged them "excessively high prices for gasoline" in violation of R.C. § 1302.18. Id. at 278. Like Shell, Sunoco marketed its gasoline in Ohio using both jobbers and dealers. Id. at 279. Sunoco was a price follower in Ohio, "follow[ing] the lead of BP and Marathon." Id. Further, like Shell, Sunoco set its DTW price "based on a survey of what other major competitors are charging at their retail stations in each of Sunoco's 'pricing zones.'" Id. In setting its DTW price, Sunoco would then "reduce that average retail price by a six to nine-cent margin * * *." Id. As with Shell's rack price, the rack price that Sunoco charged jobbers was "typically lower than the DTW price because Sunoco [did] not have to transport the gasoline purchased by a jobber." Id. at 280.

After reviewing relevant precedent, the *Tom-Lin* court held that plaintiffs had failed to establish a claim for "bad faith pricing." More specifically, the court held that a plaintiff must, at a minimum, prove the following in order to establish that a price was set in bad faith:

> Thus, under Ohio law, to show that a merchant-seller lacks good faith in fixing a price pursuant to a contract with an open price term, it must be shown that the price was not fixed in a commercially reasonable manner and, moreover, that the pricing was commercially unjustifiable. These are two distinct issues, and both involve an *objective* analysis of the merchant-seller's conduct.

Id. at 281-82 (emphasis in original).

Thus, in order to show that a price is commercially unreasonable, the court found that a plaintiff must "produce background evidence of the manner in which other marketers of gasoline * * * set their prices." Id. at 282-3. If a plaintiff fails to show that a price is commercially unreasonable, then "*a fortiori,* the Plaintiffs cannot show that [a seller's] actions were commercially unjustifiable." Id. Thus, the *Tom-Lin* court properly concluded that, under Ohio law, whether a price is a bad faith price is an *objective* test.

Tom-Lin is in accord with numerous other cases in which courts across the nation have granted judgment as a matter of law despite allegations that lower prices were available to purchasers having different contracts with the refiner. For example, in *Ajir v. Exxon Corp.* (C.A.9, May 26, 1999), Nos. 97-17032 and 97-17134, 1999 U.S. App. LEXIS 11046,[12] the court affirmed summary judgment on plaintiffs' claim that Exxon's price was set in bad faith, despite evidence that "jobber-supplied" Exxon retailers could purchase fuel for less. Id. at *17. Rejecting plaintiffs' argument that this discrepancy raised an issue of fact as to bad faith, the *Ajir* court held that summary judgment was appropriate because Exxon charged all *similarly-situated*

[12] Unpublished cases relied upon herein are contained, in alphabetical order, in Shell's Supplement, beginning at Shell Supp. 284.

retailers the same price, and that price was "similar to what other major oil companies charged their dealers." Id. at *24; see also *Schwartz v. Sun Oil Co.* (E.D.Mich., Dec. 9, 1999), No. 96-72862, 1999 U.S. Dist. LEXIS 22257l at *51-59, reversed in part and affirmed in part (C.A.6, 2002), 276 F.3d 900 (reversing jury verdict and granting judgment as a matter of law despite evidence that "jobbers" could purchase fuel at lower prices, where "plaintiffs offered no evidence that Sun's DTW price formula was not followed or was a formula uniquely applied to plaintiffs or did not follow an industry norm"); *USX Corp. v. Internatl. Minerals & Chem. Corp.* (N.D.Ill., Feb. 8, 1989), No. 86 C 2254, 1989 U.S. Dist. LEXIS 1277 at *1 (granting summary judgment because "Section 2-305 (2) does not impose a requirement for a seller to match the lowest price available"); *Adams v. G.J. Creel & Sons, Inc.* (South Carolina 1995), 465 S.E.2d 84, 86 (affirming directed verdict despite evidence that "consignment customers and private retail customers were charged a lower price," because plaintiff paid "the 'dealer tankwagon' price for gasoline * * * [and] this was also the same price charged by Creel to the other similarly situated station it serviced.").

Thus, where the record evidence demonstrates that a refiner's price does not discriminate among similarly-situated buyers, and that the price is "within the range" of other refiners' prices, evidence that other buyers (with different contracts) may be able to purchase gasoline at lower prices is not sufficient to support a claim for "bad faith" pricing, and such alleged evidence does not raise an issue of fact sufficient to deny summary judgment.

b. Where a posted price is objectively reasonable, alleged evidence that the price does not permit dealers to operate profitably is insufficient to raise an issue of fact or to otherwise defeat summary judgment.

Importantly, where a refiner's price is non-discriminatory and within the range of prices charged by other refiners, evidence that the prices do not allow the dealers to profitably compete

against other retailers likewise does not create an issue of fact sufficient to defeat summary judgment. Indeed, courts have repeatedly granted judgment as a matter of law despite such allegations.

For example, in *Richard Short Oil Co. v. Texaco, Inc.* (C.A.8, 1986), 799 F.2d 415, plaintiff complained that Texaco's practice of offering certain rebates to its retail customers—but not to jobbers like plaintiff—"place[d] Short at a severe competitive disadvantage as against Texaco's direct delivery outlets." Id. at 421. Despite these allegations, the appellate court upheld the trial court's grant of a directed verdict as to plaintiff's "bad faith" pricing claims, finding that "Texaco's posted price, offered to all its distributors nationwide, appears to satisfy [Section 2-305]." Id. at 422.

Similarly, in *Wayman*, 932 F.Supp. 1322, the court granted summary judgment despite plaintiffs' "substantial complaints about the manner in which Amoco sets its [DTW]":

> Plaintiffs claim that, contrary to Amoco's representations, Amoco's pricing strategies have been designed to yield one-sided benefits to Amoco at plaintiffs' expense. According to plaintiffs, the Wichita gasoline market is extremely competitive and driven by independent sellers and jobbers, intermediate distributors who sell gasoline to other dealers rather than directly to consumers. Plaintiffs allege that Amoco's [DTW] is higher than the price at which independent marketers buy their fuel, meaning plaintiffs make less margin per gallon. Plaintiffs claim that it is difficult for them * * * to maintain competitive retail prices that attract customers and still make a satisfactory profit on gasoline sales.

Id. at 1334.

Rejecting plaintiffs' claim that the evidence supporting these allegations raised an "issue of fact" sufficient to defeat summary judgment, the court held that Amoco's "posted price" met the good faith requirement of Section 2-305, because "it [was] undisputed that all of the plaintiffs paid the same ["posted"] price for gasoline purchased from Amoco." Id. at 1347. See also *T.A.M., Inc. v. Gulf Oil Corp.* (E.D.Pa.1982), 553 F.Supp. 499, 509-10 (granting summary

judgment despite allegations that prices were not "competitive," where "the plaintiffs [did] not allege[] that the prices they were asked to pay differed from those demanded of other Gulf dealers, or that Gulf's gasoline prices at the time in issue varied significantly from other major brand suppliers with which Gulf may be appropriately compared."); *Mikeron, Inc. v. Exxon Co., U.S.A.* (D.Md.2003), 264 F.Supp.2d 268, 276 (granting summary judgment where plaintiff failed to present any evidence of *discriminatory* pricing); *Havird Oil,* 149 F.3d at 290-91, 293 (affirming grant of renewed motion for judgment as a matter of law despite allegations that "Marathon's pricing would drive [plaintiff] out of business," because it was undisputed that "(1) Marathon charged all its customer * * * the same posted rack price; (2) Marathon's price was competitive * * * being in the 'middle of the pack' of all the wholesalers in the area; and (3) Marathon charged Havird that market price.").

In sum, these cases stand for the proposition that the test of good faith under Section 2-305 is an objective inquiry, and that good faith is conclusively established upon a showing that a refiner's DTW prices are within a range of the dealer prices of competing refiners and that the refiner does not discriminate in price among dealers in the same price zone. Any suggestion that the good faith requirement of Section 2-305 requires an evaluation of the refiner's subjective motive has been repeatedly rejected as inconsistent with the drafting history and with the commercial purposes of the statute, and a dealer's claim that pricing practices are driving it "out of business" do not change the test for good faith from an objective to a subjective inquiry.

c. Where a posted price is objectively reasonable, alleged evidence that a refiner intended to drive its dealers out of business with that price is insufficient to raise an issue of fact or to otherwise defeat summary judgment.

Also without merit is Appellants' argument that summary judgment was inappropriate due to alleged circumstantial evidence that Shell intended to drive Appellants out of business.

More specifically, Appellants are here presenting a "straw man" argument, claiming that a price set with the "intent to drive a contractual partner out of business" cannot constitute a "good faith" price. (See Appellants' Merit Brief at 7.) However—even setting aside that there is no record evidence suggesting that Shell had any such intent—the sole question that is *actually* before this Court is whether such an alleged subjective intent is relevant to a "good faith" inquiry under Section 2-305, **where the objective record evidence establishes that the price charged was otherwise commercially reasonable and commercially justifiable**. Courts reaching this question, including the trial and appellant courts below, have correctly held that the answer is "no." This Court should affirm.

As initial matter, Appellants' contention that Shell intended to "drive them out of business" through the pricing of its gasoline is not supported by the record. Indeed, at most, the record evidence cited by Appellants reflects the recognition by both Shell *and the lessee-dealers* that various market forces were likely to make it difficult for small independent operators—especially the less efficient ones—to rely on gasoline sales to sustain profitability. (See Appellants' Merit Brief at 2-4 and alleged "evidence" cited therein.) For example, beginning in about 1998, BP began a practice of more aggressive street pricing in the Cleveland area, thereby effectively reducing the margins of lessee-dealers who matched BP's prices. (See Gravlin Dep. at 35-37, 88-89, 98-101, 153-55, 172-73 (Supp. 218-219, 231-32, 234-35, 248, 252-53).) Similarly, the advent of massive multi-pump stations offering low prices (made possible due to high volume), along with conveniences such as fast-food and mini-marts, caused plaintiffs' smaller, service bay-oriented stations to become unprofitable. The market entrée of loss-leader "big box" providers such as Costco, Giant Eagle, and WalMart further reduced margins. Indeed, as is readily apparent to any member of the motoring public, the typical "footprint" of a gas

station has undergone a sea change in the last twenty or so years—and this evolution has occurred in response to ever-decreasing margins on gasoline sales at all levels of distribution, and the concomitant need for retailers to leverage margins on ancillary businesses in order to generate the return necessary to stay above water. Thus, the alleged facts that Appellants' gasoline sales margins shrunk, that they could not profitably operate based upon those margins, or even that Shell allegedly recognized that they could not profitably operate based upon those margins, is not evidence that Shell set its prices in "bad faith." Simply put, a "good faith" price is not one that guarantees buyers can profitably resell a product or operate their business.

Perhaps more importantly, regardless of Shell's alleged "intent," courts reaching the issue have properly concluded that—at least with respect to a price that is otherwise objectively reasonable—evidence of a seller's alleged subjective intent is *irrelevant* to an inquiry into "good faith" under Section 2-305. A non-discriminatory price that is within the range of other sellers' prices is a per se "good faith" price. See, e.g., *Ajir*, 1999 U.S. App. LEXIS 11046 at *24; *Richard Short*, 799 F.2d at 422; *Mikeron*, 264 F. Supp. 2d at 276; *Wayman*, 923 F. Supp. at 1350; *USX Corp.*, 1989 U.S. Dist. LEXIS 1277 at *1; *T.A.M., Inc*, 553 F. Supp. at 509-10 (E.D. Pa. 1982. The case of *Shell Oil Co. v. HRN, Inc.* (Texas 2004), 144 S.W.3d 429, is directly on point.

In *HRN*, several hundred lessee-dealers sued Shell and certain affiliates, alleging that "the refiner's pricing practices [were] forcing them out of business and therefore [were] not in good faith." Id. at 430. The trial court, relying on unrebutted evidence that (i) Shell's DTW prices were within the range of the prices charged by Shell's competitors and (ii) Shell did not discriminate between similarly situated buyers, held that Shell had established its good faith as a matter of law. Id. The court of appeals, however, reversed, "concluding that circumstantial

evidence raised a fact issue about the refiner's good faith." Id. Specifically, the court of appeals held that "[a]lthough the refiner's price was commercially reasonable when compared to the prices of other refiners in the relevant market, [there was] * * * some evidence in the record to suggest that the refiner's price might have been influenced by improper subjective motives such as the desire to force some of its dealers out of business." Id. at 430-31.

Reversing the court of appeals, the Texas Supreme Court rejected the precise argument that Appellants have presented in the case at bar—in particular, the argument that "the intent behind a commercially reasonable, non-discriminatory price should matter for purposes of a breach of contract claim under section 2.305." Id. at 435. The court properly noted that adopting this argument would wreak havoc on the business community, undermining the central purpose of the UCC:

> Thus, if these Dealers were charged the same DTW price by another refiner who did not have a similar plan to thin their ranks, presumably the price would pass muster under the Dealers' view of section 2.305. Premising a breach of contract claim solely on assumed subjective motives injects uncertainty into the law of contracts and undermines one of the UCC's primary goals - to "promote certainty and predictability in commercial transactions." *Am. Airlines Employees Fed. Credit Union v. Martin*, 29 S.W.3d 86, 92, 43 Tex. Sup. Ct. J. 1196 (Tex. 2000).

Id.

Moreover, as the Texas Supreme Court correctly recognized, adopting the argument urged by Appellants would completely eviscerate the presumption that a "posted price" is a good faith price, by "concluding that circumstantial evidence of 'any lack of subjective, honesty-in-fact good faith' is sufficient to create an 'abnormal' case in which the posted-price presumption no longer applies." Id. The inevitable effect would be "to allow a jury to determine in every section 2.305(b) case whether there was any 'improper motive animating the price-setter,' **even if the prices ultimately charged were undisputedly within the range of those charged**

throughout the industry." Id. (emphasis added).[13] Finding that this chaotic result would be in direct conflict with "the drafters' desire to eliminate litigation over prices that are nondiscriminatory and set in accordance with industry standards," the Texas Supreme Court held that "[a]lthough the subjective element of good faith may have a place elsewhere in the Code * * * we do not believe this subjective element was intended to stand alone as a basis for a claim of bad faith under section 2.305." Id. (citations omitted); see also *United Food Mart, Inc. v. Motiva Ent., LLC* (S.D.Fla.2005), 457 F.Supp. 1329, 1337 (rendering summary judgment in favor of the refiner despite the presence of alleged evidence that "Motiva set its DTW in bad faith with the intent to drive them out of business"). The same result is called for in the present case.

B. Neither The *Master Chemical* Case Nor The Other Cases Cited By Appellants From Other Jurisdictions Require A Contrary Result.

1. To the Extent that the Case is Relevant, *Master Chemical* Requires an Objective Test of "Honesty in Fact."

With respect to a merchant, the "good-faith" standard under UCC Article 2 requires that an open price term price be set with "honesty in fact" and the "observance of reasonable commercial standards of fair dealing in the trade." See UCC § 2-305 (2) (R.C. § 1302.18); UCC § 2-103 (R.C. § 1302.01). Appellants assert that, in *Master Chemical Company v. Inkrott* (1990), 55 Ohio St.3d 23, this Court held that the "honesty in fact" prong of this standard

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[13] As noted above, Appellants affirmatively argue this very point—that every case involving allegations of "bad faith" must get to a jury, and that summary adjudication is never appropriate. (*See* Appellants' Merit Brief at 12-13.) This unsupported contention has of course been flatly rejected by at least eight courts, and this Court should also reject it. See, e.g., *Ajir*, 1999 U.S. App. LEXIS 11046 at *24; *Richard Short*, 799 F.2d at 422; *United Food Mart*, 457 F. Supp. at 1338; *Mikeron*, 264 F. Supp. 2d at 276; *Wayman*, 923 F. Supp. at 1350; *USX Corp.*, 1989 U.S. Dist. LEXIS 1277 at *1; *T.A.M., Inc*, 553 F. Supp. at 509-10 (E.D. Pa. 1982); *HRN*, 144 S.W.3d at 434.

requires an inquiry into a seller's subjective state of mind. Appellants' reading of *Master Chemical* is incorrect. *Master Chemical* does not require a subjective inquiry with regard to an examination of good faith under UCC Section 2-305.

As an initial matter, *Master Chemical* did not involve the interpretation of the definition of "good faith" contained in UCC Article 2. Instead, *Master Chemical* involved the interpretation and application of the Ohio Uniform Fiduciaries' Act—R.C. 1339.03 *et seq.* (amended and renumbered R.C. § 5815.04 *et seq.* by 151 v H 416. Eff. 1-1-07). See *Master Chemical*, 55 Ohio St.3d at 23, 26-28. In particular, the Master Chemical Court was applying R.C. 1339.03(E), which provides that "'Good faith' includes an act when it is in fact done honestly." R.C. 1339.03(E) (renumbered at § 5815.04). Id. at 28. Thus, *Master Chemical* is silent as to the proper interpretation of "good faith" under UCC Section 2-305.

Perhaps more importantly, although the Court in *Master Chemical* did consider whether the bank had any subjective, actual knowledge of Mr. Inkrott's wrongdoing in that case, it did not do so in connection with an analysis of "good faith" under *any* provision of the UCC. Id. at 26. To the contrary, the Court inquired into the bank's "subjective" knowledge only under the Fiduciaries' Act, which in plain language provides that

> If a check is drawn upon the principal's account by a fiduciary who is empowered to do so, the bank may pay the check without being liable to the principal, unless the bank pays the check *with actual knowledge* that the fiduciary is committing a breach of the obligation as fiduciary in drawing the check or *with knowledge of such facts* that its action in paying the check amounts to bad faith.

R.C. § 5815.07 (former R.C. 1339.09) (emphasis added); see also *Master Chemical*, 55 Ohio St. 3d 23, 26. [14] Thus, the fact that this Court conducted a subjective inquiry in *Master Chemical*

[14] *Buckeye Check Cashing, Inc. v. Camp* (Greene App. 2005), 159 Ohio App. 3d 784, also relied upon by Appellants, likewise did not involve UCC § 2-305, but instead was applying UCC §3-302 (R.C. § 1305.32), defining "Holder in Due Course".

has no bearing on whether such a subjective inquiry is required with respect to UCC Section 2-305.

Indeed, to the extent that the case is relevant at all, *Master Chemical* stands for the proposition that the test for "good faith" under Section 2-305 is an objective test. More specifically, although this Court did not have cause to apply the Article 2 definition of "good faith" in *Master Chemical*, the Court did state that "honesty in fact" is to be determined by way of a strictly *objective* test. Specifically, applying the Uniform Fiduciaries Act, this Court noted that "'Good faith' is defined in R.C. 1339.03(E) [now 5815.04(E)] as 'an act when it is in fact done honestly.' This is virtually identical to the UCC 1-201 (19) [R.C. § 1301.01(S)] definition of 'good faith.'" Id. at 28. Discussing the "test" for whether an act was done with such "honesty in fact," this Court went on to say that "[i]n determining whether [a] bank acted with bad faith, courts have asked whether it was 'commercially unjustifiable, for the payee to disregard and refuse to learn facts readily available.'" (original punctuation altered). Id. at 28.

Thus, with specific reference to "honesty in fact," this Court conducted an *objective inquiry* into whether or not the challenged conduct was "commercially justifiable." Id. Indeed, since the definition of "good faith" contained in R.C. 1339.03(E) (now 5815.04(E)) does not include a clause requiring the "observance of reasonable commercial standards," this Court's *objective* inquiry in *Master Chemical* could *only* have been undertaken for the purpose of determining whether the conduct was "honest in fact." Id. Therefore, *Master Chemical* does not in any way mandate a subjective inquiry into good faith under UCC § 2-305. Appellants' contrary contention should be rejected.[15]

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[15] As noted above, Appellants' reading of *Master Chemical* (and an inherent problem with Appellants' entire contention that a subjective inquiry is required to determine good faith) would create the absurd result that the identical price to two different similarly-situated buyers could be

(continue)

2. Appellants' Invitation to Ignore the Overwhelming Weight of Authority to Follow a Single, Outlier District Court Decision Would Render Ohio Law Inconsistent with the Uniform Law Across the Nation, Thereby Undermining the Core Purpose of the UCC.

Despite Appellants' contention (at page 11 of their Merit Brief) that "numerous courts" have applied a subjective good faith test to Section 2-305, Appellants cite only two federal district court cases—one of which is currently on appeal: *Marcoux v. Shell Oil Prods. Co., LLC* (D.Mass., Oct. 25, 2004), No. 01-11300-RWZ, and *Bob's Shell, Inc. v. O'Connell Oil Assoc., Inc.* (D.Mass., August 31, 2005), 2005 U.S. Dist. LEXIS 21318. Notably, both cases are from a *single* federal district court in Massachusetts, and thus these cases do not support the allegation that "numerous" courts have applied a subjective test. More importantly, to the extent that either case supports Appellants' contention that a consideration of Shell's intent is here relevant to a good faith analysis under Section 2-305, to follow these wrongly-decided "outlier" cases would leave Ohio law squarely in conflict with that of the overwhelming number of jurisdictions that have reached this issue. See *Ajir*, 1999 U.S. App. LEXIS 11046 at *24 (California law); *Havird Oil*, 149 F.3d at 290-91 (South Carolina law); *Richard Short*, 799 F.2d at 422 (Arkansas law); *Austin*, 2005 U.S. Dist. LEXIS 22150 at *9 (Alabama law); *Mikeron*, 264 F. Supp. 2d at 276 (Maryland law); *United Food Mart*, 457 F. Supp. 2d at 1337 (Florida law); *Schwartz*, 1999 U.S. Dist. LEXIS 22257 at *59 (Michigan law); *Wayman*, 923 F. Supp. at 1350 (Kansas law); *USX Corp.*, 1989 U.S. Dist. LEXIS 1277 at *1 (Illinois law); *T.A.M.*, 553 F. Supp. at 509-10 (Pennsylvania law); *HRN*, 144 S.W.3d at 434 (Texas law); *Adams*, 465 S.E.2d at 86 (South

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(continued)
both a good faith and a bad faith price depending upon the refiner's subjective intent. If the refiner wanted one buyer's business to fail, but the other to prosper, the identical price would be bad faith as to the first buyer but good faith as to the second. This illogical result cannot be countenanced.

Carolina law). Indeed, Appellees' review of the Shepard's history of *Bob's Shell* reveals that, to date, not a single court has relied upon Magistrate Judge Neiman's opinion in any published or unpublished decision available through either Lexis or Westlaw.

Following these wrongly decided cases would, of course, flatly contradict the codified "purposes and policies" of the UCC: (1) To *simplify*, *clarify*, and modernize the law governing commercial transactions * * * [and] (2) To *make uniform* the law among the various jurisdictions. UCC § 1-102 (R.C. § 1301.02) (emphasis added); see also, e.g., *Provident Bank v. Gast*, 57 Ohio St. 2d 102, 114 (Ohio 1979) (McCormac, J., dissenting on other grounds) ("the Uniform Commercial Code was * * * adopted in every jurisdiction in the United States and was designed to make uniform the rules to be applied in commercial obligations throughout the country"). Indeed, given the overwhelming weight of authority discussed above, adopting Appellants' argument would not only defeat the goal of interjurisdictional uniformity, but would leave Ohio virtually alone among the states in the interpretation of open price terms in commercial contracts.[16] Thus, in deciding this case, the Court should look to the rulings of the

[16] On pages 9 through 11 of their Merit Brief, Appellants list various cases that they claim support the contention that a subjective inquiry is required to assess good faith under Section 2-305. However, not one of these cases involves Section 2-305 or considers the meaning or purpose of that provision. In fact, a number of these cases did not even involve the UCC. See *Jaser v. Fisher* (Conn.2001), 783 A.2d 28 (misrepresentation and fraud); *Travelers Cas. and Sur. Co. v. Citibank (S.D.), N.A.* (M.D. Fla., Sept. 28, 2007), 2007 WL 2875460 (holder in due course); *Community Bank v. Ell* (Or.1977), 564 P.2d 685 (UCC Article 9); *Reid v. Key Bank, Inc.* (C.A.1, 1987), 821 F.2d 9 ; *Hartford v. Tanner* (Kan.1996), 910 P.2d 872 (good faith duty of surety to insured); *Cagle's Inc. v. Valley Natl. Bank* (M.D.Ala.2001), 153 F.Supp.2d 1288 (UCC Article 3 "final payment rule"); *Cotran v. Rollins Hudig Hall Internatl., Inc.* (Cal. 1998), 948 P.2d 412 ("good faith" defense in wrongful termination action); *Valley Natl. Bank v. P.A.Y. Check Cashing* (N.J.Super.2004), 875 A.2d 1056 (UCC Articles 3 and 4 "presentment and transfer warrantees"); *San Tan Irr. Distrib. v. Wells Fargo Bank* (Ariz.App.2000), 3 P.3d 1113 (conversion of forged instrument); *West Branch Tank & Trailer, Inc. v. Searfoss* (Mich.App., March 10, 1998), 1998 WL 2016554 (implied duty of good faith and fair dealing). The cases thus have no bearing on the issue before this Court. See id.

vast majority of the courts in the nation that have examined the same issue, and should decline Appellant's invitation to follow an unreported case from the district of Massachusetts which to date no other court has chosen to follow. See id.

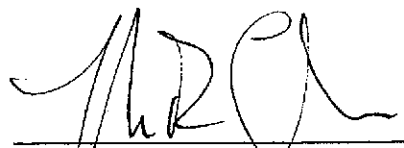
C. Shell Demonstrated That Its DTW Prices Were Commercially Reasonable Under A Proper Objective Measurement And Appellants Failed To Introduce Any Contrary Evidence.

As set forth above, the case law uniformly holds that a DTW price is a "good faith" price if it is nondiscriminatory and falls within the range of DTW prices charged by other major oil companies. In the trial court, Shell's expert witness, John Umbeck, compared Shell's DTW prices to those of its major competitors in Cleveland from 1993 through 2002. (See Affidavit of John Umbeck ("Umbeck Aff.") ¶¶ 5-7 (pp. 1-2) (Shell Supp. 259-60).) The data summarized in Mr. Umbeck's affidavit establishes that Shell's DTW prices were within the range of the prices charged by the major competitors in the market. (Id.) As the *Exxon Corp.* court noted, such evidence is "*all that is required*" to show that a price is commercially reasonable and, thus, set in good-faith. *Exxon Corp.*, 51 Cal.App.4th at 1687 (emphasis added) *citing Au Rustproofing,* 755 F.2d at 1235. Further, the record establishes that Appellees charged the same DTW price to all lessee-dealers in the same PAD." (Gravlin Dep. at 76, 105-107 (Supp. 228, 236).) Undisputedly, Appellants failed to present any evidence to the contrary. (See Journal Entry and Opinion (April 13, 2005) at p. 6 (App. 9); (Journal Entry and Opinion (May 31, 2007) at p. 9 (App. 25).) This failure was fatal to their bad faith pricing claim and warranted the granting of summary judgment in Shell's favor.

CONCLUSION

For the reasons set forth herein, the ruling of the court of appeals should be affirmed.

Respectfully submitted,



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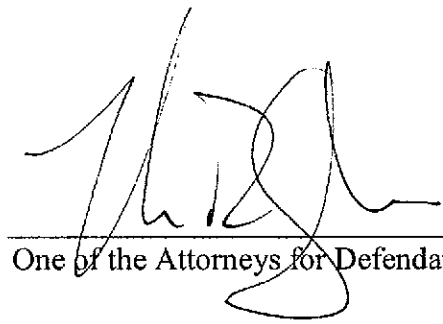
CERTIFICATE OF SERVICE

A copy of the foregoing has been sent this 7th day of March 2008 by regular United States mail, postage prepaid, to counsel for Appellants Anthony E. Farah, The O'Quinn Law Firm, 2300 Lyric Centre Building, 440 Louisiana, Houston, Texas, 77002, and Bernard S. Goldfarb, Robert E. Sweeney Company, L.P.A., Suite 1500, Illuminating Building, 55 Public Square, Cleveland, Ohio, 44113.



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