

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Erick Kelecseny, on Behalf of Himself and All Others Similarly Situated, John Egizi, on Behalf of Himself and All Others Similarly Situated, and Todd Jessup on Behalf of Himself and All Others Similarly Situated,

Plaintiffs,

v.

Chevron U.S.A., Inc, a Pennsylvania Corporation; Exxon Mobil Corporation, a New Jersey Corporation; BP Products North America, Inc., a Delaware Corporation; Shell Oil Company, a Delaware Corporation; ConocoPhillips Company, a Delaware Corporation; Tower Energy Group, a California Corporation; and DOES 1 through 10, inclusive;

Defendants.

08-CV-61294-Altonaga-Brown

**THIRD AMENDED COMPLAINT
CLASS ACTION**

JURY TRIAL DEMANDED

Plaintiffs, Erick Kelecseny (“Kelecseny”), John Egizi (“Egizi”), Todd Jessup (“Jessup”) and Ken Terrell (“Terrell”) (collectively “Plaintiffs”), individually and on behalf of the proposed Classes described below, bring this action against the Defendants sued herein and demand a jury trial.

NATURE OF THE ACTION

1. In or around 2004, major gasoline manufacturers began to replace methyl tertiary-butyl ether (“MTBE”) as an oxygenate in gasoline, and began to use ethanol as a supplement to the gasoline that they sold to the consuming boating public. Unfortunately, when used in boats, ethanol blended gasoline will: 1) expire more quickly around water; 2) cause damage to boat engines and fuel systems; and 3) cause significant damage to the fiberglass fuel tanks – necessitating their replacement.

2. Despite having actual knowledge of these problems, the major gasoline manufacturers distributed, marketed and sold ethanol blended gasoline for use in boats without providing the consuming boating public with notice or warning that the use of ethanol blended gasoline will: 1) expire more quickly around water; 2) cause damage to boat engines and fuel systems; and 3) cause significant damage to fiberglass fuel tanks used in boats and similar watercraft.

3. Plaintiffs bring this class action against all the Defendants on a market share theory because a significant portion of the gasoline sold to owners of boats and similar watercraft in Florida was sold by the Defendants.

4. The Classes that Plaintiffs seeks to represent are defined as follows:

Class A: All persons who own boats and who filled the boat's fuel tank with gasoline blended with ethanol from a gasoline retailer in Florida.

Class B: All persons in Florida who own boats with a fiberglass fuel tank that had damage to the engine, fuel tank, fuel line(s), or other components of the fuel system caused by the use of gasoline blended with ethanol from a gasoline retailer in Florida.

Class C: All persons who own boats and who had damage to their boat's fuel system or engine due to Phase Separation.

5. Plaintiffs have made a diligent attempt to identify the ethanol blended gasoline manufacturers responsible for their damages, but the method of supply and nature of the defect with the ethanol in boats makes such identification impossible.

6. Plaintiffs used ethanol blended gasoline in their boats.

7. Ethanol blended gasoline caused damage to Plaintiffs and the Class members.

8. Defendants produced and/or marketed the ethanol blended gasoline used by Plaintiffs and the Class members for use in their boats and similar watercraft.

9. Defendants wrongfully produce and/or market ethanol blended gasoline for use in boats and similar watercraft without adequate warnings to consumers.

THE PARTIES

10. Plaintiffs, Eric Kelesceny and John Egizi are over the age of 18 and are residents of Highlands County, Florida.

11. Plaintiff, Todd Jessup, is over the age 18 and is a resident of Indian River County, Florida.

12. Plaintiff, Ken Terrell, is over the age of 18 and is a resident of Broward County, Florida.

13. Defendant Chevron U.S.A., Inc. is a Pennsylvania Corporation doing business in Florida.

14. Defendant Exxon Mobil Corporation is a New Jersey Corporation doing business in Florida.

15. Defendant BP Products North America, Inc. is a Maryland Corporation doing business in Florida.

16. Defendant Motiva Enterprises, LLC, formerly known as Shell Oil Company, is a Delaware Limited Liability Company doing business in Florida.

17. Defendant ConocoPhillips Company is a Delaware Corporation doing business in Florida.

18. Defendant Tower Energy Group Corporation is a California Corporation doing business in Florida.

19. Defendant Sunoco, Inc. is a Pennsylvania Corporation doing business in Florida.

20. Defendant Murphy Oil USA, Inc. is a Delaware Corporation doing business in Florida.

21. Defendant Citgo Petroleum Corporation is a Delaware Corporation doing business in Florida.

22. Defendant Hess Corporation is a Delaware Corporation doing business in Florida.

23. Defendant RaceTrac Petroleum, Inc. is a Georgia Corporation doing business in Florida.

24. Defendant Marathon Oil Corporation, also known as Marathon Oil Company, is a Delaware Corporation doing business in Florida.

25. Defendant Gate Petroleum Company is a Florida Corporation doing business in Florida.

26. Defendant Valero Energy Corporation is a Delaware Corporation doing business in Florida.

JURISDICTION AND VENUE

27. This Court has original jurisdiction over the claims asserted herein individually and on behalf of the class pursuant to 28 U.S.C. Section 1332, as amended in February 2005 by the Class Action Fairness Act. Jurisdiction is proper because: (1) the amount in controversy in this class action exceeds five million dollars, exclusive of interest and costs; (2) Defendants have purposefully availed themselves of the privilege of conducting business activities within Florida, where they distribute and sell the products at issue in this lawsuit to Plaintiffs and to the members of the proposed classes; and (3) a substantial number of the members of the proposed classes are citizens of a state different from that of Defendants.

28. Venue is proper in this judicial district pursuant to 28 U.S.C. Section 1391, as a substantial part of the events giving rise to the claims asserted herein occurred in the Southern District of Florida.

FACTUAL ALLEGATIONS

29. The Defendants in this action are the largest oil companies producing and supplying gasoline and operating in Florida. The Defendants manufacture a substantial share of the market of all ethanol blended gasoline sold at gas stations, marinas, harbors, boat docking areas and other points of distribution throughout Florida. The ethanol blended gasoline manufactured by Defendants is virtually identical in that it is comprised of gasoline blended with ethanol. Any other additives that an individual defendant may add to the ethanol gasoline manufactured and sold by that individual defendant would not influence, positively or negatively, the characteristics of the ethanol gasoline that has caused damage to Plaintiffs and the Class members.

30. Due to the general methods for the use and distribution of gasoline used to fuel boats, Plaintiffs do not know the identity of each of the named Defendants that sold the ethanol blended gasoline that they purchased for use in their boats.

31. An oxygenate is a gasoline additive that is used to increase the oxygen content of gasoline. A higher oxygen content results in a higher octane level for the gasoline. Prior to 2004, MTBE was widely used by Defendants as an oxygenate in gasoline. However, due to environmental concerns, MTBE has been banned in numerous states. With the restrictions on MTBE, Defendants selected ethanol as a replacement for MTBE.

32. Prior to, during and after the change from MTBE gasoline to ethanol blended gasoline, Defendants made no changes to their advertising or marketing to disclose to the consuming public that ethanol blended gasoline was in any way different from the MTBE gasoline. Instead, Defendants continued calling the ethanol blended gasoline simply “unleaded gasoline,” indicating that it was in no way different from the MTBE gasoline that had been sold previously and was suitable for use in boats.

33. Ethanol, while relatively suitable for use in most automobiles, poses special problems when used in boats and similar watercraft.

34. The federal Clean Air Act (42 U.S.C. §7545(o)) and the Florida Renewable Fuel Standard Act (§526.201, Fla. Stat. et. Seq.) contain provisions for the supply of gasoline blended with ethanol in Florida. The Florida Act contains an express exemption in §526.203(3), Fla. Stat., allowing fuel to be sold for use in boats and similar watercraft.

35. Plaintiffs do not allege herein that ethanol blended gasoline is defective for all uses. This lawsuit is directed at Defendants' unlawful marketing and sale of ethanol blended gasoline for use in boats and similar watercraft in which ethanol blended gasoline is not suitable.

36. Given that ethanol blended gasoline is not suitable for many boats and similar watercraft, Defendants should not be marketing it for such use without providing an adequate warning of the potential harmful effects to consumers at the pump.

37. Fiberglass has historically been widely used in the construction of fuel tanks for boats. The use of gasoline with MTBE additives does not cause any damage in the fiberglass tanks used in boats. However, ethanol directly reacts with and dissolves the resin that binds the fiberglass together. This causes damage in two ways. First, ethanol weakens and destroys the fuel tanks when it dissolves the resins. These compromised fuel tanks must then be replaced. Second, the dissolved resin enters the fuel system resulting in damage when the resin sticks to the various parts of the fuel system and engine.

38. A separate, prevalent cause of damage to boats and similar watercraft is that the ethanol in ethanol blended gasoline also absorbs water much more readily than MTBE, thus causing it to expire more rapidly without warning. In moist environments, like those necessarily encountered by boats, ethanol blended gasoline can absorb water in a relatively short time. When enough water is absorbed by the ethanol, the ethanol and water solution separates from the

gasoline, leaving the gasoline floating on top of the ethanol and water solution. This results in a layer of water with a high concentration of ethanol settling underneath the gasoline. This is known as “phase separation.”

39. This water-ethanol mixture resulting from phase separation is highly corrosive and will damage components that it comes into contact with, including materials found in all boat gas tanks, fuel systems, and various engine parts.

40. Defendants, with knowledge of the problems ethanol blended gasoline causes when used in boats, failed to warn Plaintiffs that ethanol blended gasoline causes significant problems.

41. Plaintiff Kelecseny purchased the ethanol gasoline for his boat, which had a fiberglass fuel tank.

42. Plaintiff Kelecseny was forced to spend a significant amount of money to fix his fiberglass fuel tank and the boat’s fuel system and engine after these components were damaged by Defendants’ ethanol blended gasoline.

43. Plaintiffs Egizi and Jessup purchased the ethanol gasoline for their respective boats, which did not have fiberglass fuel tanks.

44. Plaintiffs Egizi and Jessup were each forced to spend a significant amount of money to fix the damage caused to their respective boats by Defendants’ ethanol blended gasoline when it underwent phase separation.

45. Plaintiff Terrell purchased the ethanol blended gasoline for his boat, which contained a fiberglass tank which was later degraded by the use of ethanol blended gasoline.

46. Plaintiff Terrell was forced to spend a significant amount of money to fix his fiberglass tank, boat’s fuel engine and other fuel system components, after these components were damaged by the Defendants’ ethanol blended gasoline.

47. At all times prior to the discovery of the damage to Plaintiffs' respective boats, Plaintiffs did not know that Defendants' ethanol blended gasoline could cause damage to their boats.

CLASS ACTION ALLEGATIONS

48. Description of the Classes: Plaintiffs bring this Florida class action on behalf of themselves and the Classes defined as follows:

***Class A:** All persons who own boats and who filled the boat's fuel tank with gasoline blended with ethanol from a gasoline retailer in Florida.*

***Class B:** All persons in Florida who own boats with a fiberglass fuel tank that had damage to the engine, fuel tank, fuel line(s), or other components of the fuel system caused by the use of gasoline blended with ethanol from a gasoline retailer in Florida.*

***Class C:** All persons who own boats and who had damage to their boat's fuel system or engine due to Phase Separation.*

49. Excluded from the Classes are governmental entities, each Defendant, any entity in which any Defendant has a controlling interest, and Defendants' officers, directors, affiliates, legal representatives, employees, co-conspirators, successors, subsidiaries, and assigns. Also excluded from the Classes is any judge, justice, or judicial officer presiding over this matter and the members of their immediate families and judicial staff.

50. Plaintiffs and the Classes bring this action for monetary, equitable, injunctive and declaratory relief pursuant to subdivisions (b)(1), (b)(2) and (b)(3) of Rule 23 of the Federal Rules of Civil Procedure.

51. Numerosity: The proposed Class members are so numerous that individual joinder of all its members is impracticable. Due to the nature of the trade and commerce involved, Plaintiffs believe that the total number of Class members is at least in the tens of thousands and that the members of the Classes are geographically dispersed across the State of

Florida. While the exact number and identities of the Class members are unknown at this time, such information can be ascertained through appropriate investigation and discovery. The disposition of the claims of the Class members in a single class action will provide substantial benefits to all parties and to the Court.

52. Common Questions of Law and Fact Predominate: There are many questions of law and fact common to the representative Plaintiffs and the Classes, and those questions substantially predominate over any questions that may affect individual Class members. Common questions of fact and law include, but are not limited to, the following:

- a. whether Defendants' ethanol blended gasoline is defective as designed when sold for use in boats and similar watercraft;
- b. whether the use of ethanol blended gasoline as fuel for boats is an intended and reasonably foreseeable use;
- c. whether Defendants had actual or constructive knowledge of the propensity of their ethanol gasoline to cause damage to boats and similar watercraft;
- d. whether a reasonable consumer would know Defendants' ethanol blended gasoline was and is defective when used for boats and similar watercraft and stored in an intended and reasonably foreseeable manner;
- e. whether Defendants failed to warn of the propensity of their ethanol blended gasoline to cause damage particular to boats and similar watercraft;
- f. whether Defendants should be required to warn of the propensity of their ethanol blended gasoline to be unsuitable for use in boats and similar watercraft; and
- g. whether Plaintiffs and the members of the Classes have been damaged by the wrongs complained of herein, and if so, the measure of those damages and the nature and extent of other relief that should be afforded.

53. **Typicality:** Plaintiffs' claims are typical of the claims of the members of the classes. Plaintiffs and all members of the Class have been similarly affected by Defendants' common course of conduct.

54. **Adequacy of Representation:** Plaintiffs will fairly and adequately represent and protect the interests of the Classes. Plaintiffs have retained counsel with substantial experience in prosecuting complex and class action litigation. Plaintiffs and their counsel are committed to vigorously prosecuting this action on behalf of the Classes, and have the financial resources to do so. Neither Plaintiffs nor their counsel have any interests adverse to those of the Classes.

55. **Superiority of a Class Action:** Plaintiff and the members of the Classes suffered, and will continue to suffer, harm as a result of Defendants' unlawful and wrongful conduct. A class action is superior to other available methods for the fair and efficient adjudication of the present controversy. Individual joinder of all members of the Classes is impractical. Even if individual Class members had the resources to pursue individual litigation, it would be unduly burdensome to the courts in which the individual litigation would proceed. Individual litigation magnifies the delay and expense to all parties in the court system of resolving the controversies engendered by Defendants' common course of conduct. The class action device allows a single court to provide the benefits of unitary adjudication, judicial economy, and the fair and equitable handling of all class members' claims in a single forum. The conduct of this action as a class action conserves the resources of the parties and of the judicial system, and protects the rights of the class. Furthermore, for many, if not most, class members, a class action is the only feasible mechanism that allows them an opportunity for legal redress and justice.

56. **Adjudication of individual class members' claims with respect to the Defendants** would, as a practical matter, be dispositive of the interests of other members not parties to the adjudication, and could substantially impair or impede the ability of other class members to

protect their interests.

COUNT I – NEGLIGENT FAILURE TO WARN

57. Plaintiffs reallege paragraphs 1-56 as if fully set forth herein and, to the extent necessary, plead this cause of action in the alternative.

58. Plaintiffs and Classes A, B, and C members used Defendants' ethanol blended gasoline.

59. Defendants have no reasonable or good faith basis to assume that Plaintiffs and the members of Classes A, B, and C would know of and appreciate the risks associated with the use of ethanol blended gasoline in boats and similar watercraft, including dissolving the resin that bonds together the fiberglass fuel tanks, weakening the fuel tanks and causing damage to the fuel systems, and undergoing phase separation causing significant damage.

60. Defendants had a duty to warn Plaintiffs and the members of Classes A, B, and C of foreseeable risks associated with the use of ethanol blended gasoline in boats and similar watercraft which include ethanol blended gasoline dissolving the resin that bonds together the fiberglass fuel tanks, weakening the fuel tanks and causing damage to the fuel systems, and undergoes phase separation causing significant damage.

61. Defendants knew or should have known that the ethanol is unsuitable for use in many boats and similar watercraft.

62. Defendants knew or should have known that the use of ethanol blended gasoline in boats and similar watercraft often causes the ethanol blended gasoline to dissolve the resin that bonds together the fiberglass fuel tanks, weakening of the fuel tanks and causing damage to the fuel systems, and phase separation, causing significant damage which would develop after normal use by Plaintiffs and the members of Classes A, B, and C.

63. Defendants breached their duty to warn by failing to provide any warning or

notice to Plaintiffs and the members of Classes A, B, and C of the foreseeable risks associated with use of Defendants' ethanol blended gasoline product and the manner in which the product should be used.

64. Defendants' failure to warn is the actual and proximate cause of the damage suffered by Plaintiffs and the members of Classes B and C members as they lacked knowledge of the potential harmful effects of using blended gasoline in their boats and similar watercraft.

65. Without adequate warnings, members of Class A are likely to suffer similar damage in the future as the proximate result of their use of ethanol blended gasoline marketed, supplied, and sold by the Defendants. Therefore, injunctive relief should be afforded to prevent future violations.

66. Plaintiff Kelecseny and the members of Class B have been damaged in an amount to be shown at trial.

67. Plaintiffs Egizi and Jessup the members of Class C have been damaged in an amount to be shown at trial.

68. Plaintiff Terrell and the members of Class B have been damaged in an amount to be shown at trial.

WHEREFORE, Plaintiffs and members of the Classes request that the Court enter an order or judgment against the Defendants as follows:

- a. certification of the proposed classes and notice thereto to be paid by Defendants;
- b. adjudge and decree that Defendants have engaged in the conduct alleged in Count I in violation of Florida law;
- c. injunctive relief in Count I for the benefits of the members of Classes A, B, and C, which shall require adequate warnings to be supplied by the Defendants;
- d. for compensatory and general damages for Count I as to the members of Classes

B and C;

e. prejudgment and post-judgment interest on all damages awarded in Count I as to members of classes B and C;

f. costs of the proceedings herein; and

g. any and all such other and further relief that this Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a trial by jury in the instant action for all issues so triable.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 31, 2009, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record in the attached Service List via transmission of Notice of Electronic Filing generated by CM/ECF.

Respectfully submitted,

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