IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JENNIFER MIZELL, MARIA PAULDING, KATHLEEN PEAPPLES, VICTORIA ROSS, and NATHAN SIMPSON, individually and on behalf of those similarly situated, **Plaintiffs,** **v.** **THE UNIVERSITY OF PITTSBURGH MEDICAL CENTER,** **Defendant.**	**Civil Action No. 1:24-cv-00016-SPB** **Electronically Filed**

PLAINTIFFS' SUPPLEMENTAL FILING IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)

Plaintiffs submit this brief post-hearing filing in further support of their opposition to Defendant University of Pittsburgh Medical Center's ("UPMC's") Motion to Dismiss in order to supplement several points made during the Court's January 28, 2025 hearing.

I. Plaintiffs have plausibly alleged a product market composed of Skilled Healthcare Workers ("SHW").

A. Todd *and* Clarke *support finding Plaintiffs' proposed SHW market is plausible.*

At oral argument, Plaintiffs cited both *Clarke* and *Todd* as strongly persuasive authority that a category of workers who have obtained industry specific skills can comprise a relevant product (or services market). *See* *Todd v. Exxon Corp.*, 275 F.3d 191 (2d Cir. 2001); *Clarke v. Baptist Memorial Healthcare Corp.*, 2007 WL 9870961 (W.D. Tenn. May 17, 2007); Hearing Transcript ("Tr.") at 140-142. As *Todd* explained, in the Rule 12(b)(6) context, it is a reasonable and in fact a permissible and "common sense" inference that employees who are alleged to have obtained industry specific skills may be pled and defined as a separate market because those skills "renders them more valuable to employers in the oil and petrochemical industry than to employers in other industries." *Todd*, 275 F.3d at 203; Tr. at 141. In vacating the district court's order dismissing for failure to state a claim, the *Todd* court concluded that the extent to which less technical jobs require no industry-specific experience "involves a question of fact not resolvable on a 12(b)(6) motion." *Todd*, 275 F.3d at 202. In other words, *Todd* recognizes that a market definition in these circumstances "is a deeply fact-intensive inquiry . . . that generally requires discovery." *Id.* at 200, *quoting Found. for Interior Design Educ. Research v. Savannah Coll. of Art & Design*, 244 F.3d 521, 531 (6th Cir. 2001).

Similarly, *Clarke* found that the plaintiff had properly defined a "narrow" class limited only to registered nurses (RNs) who work in hospitals because "RNs employed by hospitals possess unique skills and gain industry-specific experience as they work, which renders them more valuable to hospitals than to non-hospital RN employers," a direct rebuke of UPMC's argument that the market cannot be limited only to nurses employed at hospitals. *See Clarke*, 2007 WL 9870961, *2; *see also* Tr., at 63, 66, 72, 141. Indeed, a cursory examination of the operative complaints considered by the *Todd* court and the *Clarke* court demonstrate why Plaintiffs' allegations here are equally sufficient (attached hereto as **Exhibits A** and **B)**.

At the hearing, UPMC attempted to distinguish *Todd* by arguing that the complaint there "has very express allegations about wage differentials. There's actually an allegation in the *Todd* Complaint specifically about cross-elasticity of demand." Tr. at 123. But that's wrong. The *Todd* complaint may have used the words "cross-elasticity" (Ex. A, ¶ 99) but nowhere does it provide "express allegations about wage differentials" to prove cross elasticity. Instead, the *Todd* complaint mentions cross-elasticity to explain that—from the defendant employer's standpoint—MPT employees with oil and petrochemical experience are preferred because the defendant oil and petrochemical companies set their salaries for MPT employees by reference to their own salary information exchanges (the practice that gave rise to the lawsuit itself) and, accordingly, the defendants' salary information exchanged "adversely affected compensation competition for the services of all MPT employees with experience in the oil and petrochemical industry." Ex. A. ¶¶ 99, 100; *see also Id*. at ¶¶ 108, 115.[1]

Moreover, there are two further points about *Todd* that show why Plaintiffs' allegations are sufficient. First, the detailed salary information included in the *Todd* complaint, and how the information was used by the defendants to depress wages, was the result of early discovery from Exxon (the largest of the defendants) before drafting their amended complaint, a point already raised by plaintiffs at the hearing. *See* Tr. at 141-142; *see also id*., p. 113. Second, the *Todd* complaint does not contain detailed econometric analysis regarding the effect the defendants conduct had on MPT wages. *See* Tr. at 141-142. Here, without discovery, Plaintiffs here relied upon government studies related to nursing wages and expert analysis specifically related to UPMC's own conduct to quantify the actual wage penalty UPMC was able to impose on the SHW class over a 10-plus year period, going beyond even the successful allegations in the *Todd*. Amended Complaint *See* ECF 31 (Amended Class Action Complaint), ¶¶ 88-89.

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1 UPMC has made no attempt to distinguish the complaint in *Clarke* where the court upheld antitrust allegations brought on behalf of a class of hospital RNs. It is worth noting that the *Clarke* complaint never uses the terms "cross-elasticity" or "substitutability" either. Instead, the *Clarke* complaint makes allegations similar to *Todd* about the fact that the defendants only exchanged information about compensation paid to RNs at other hospitals in the proposed geographic market (Ex. B, ¶ 45) and common sense allegations no more specific than Plaintiffs allege here, explaining why nurses employed at hospitals comprise a separate market based on the fact that they can earn more in a hospital setting based on their on-the-job training and experience. *See* Ex. B, ¶44.

II. Plaintiffs have adequately alleged the contours of a plausible Geographic Market.

UPMC argued that the proposed geographic market was not alleged with adequate specificity, claiming that Plaintiffs cannot rely on the Econ One statistical data to set the contours of the proposed geographic market. UPMC sets the bar too high.

A similar argument was rejected by the court in *U.S. v. Blue Cross Blue Shield of Mich.*, 809 F. Supp. 2d 665 (E.D. Mich. 2011), where the defendant, "Blue Cross argue[d] that use of statistical data is not appropriate in establishing the appropriate geographic markets. . . . The United States and Michigan respond that the Complaint sufficiently allege[d] the geographic markets at issue and that the Complaint need not detail specific facts to support the geographic markets at issue." *Id.* at 672-73. The Court agreed with the plaintiffs, noting that "Geographic markets need not be alleged or proven with 'scientific precision,' nor be defined 'by metes and bounds as a surveyor would lay off a plot of ground.'" *Id.* at 673 (quoting *United States v. Conn. Nat'l Bank*, 418 U.S. 656, 669 (1974)). The court then concluded that a "complaint need only present sufficient information to plausibly suggest the contours of the relevant geographic market." *Id.*

For the reasons stated at the hearing, Plaintiffs have plausibly suggested the contours of the relevant geographic market where UPMC has exercised monopsony power over the employment of SHWs.[2]

[2] As noted at the hearing, economic analysis can account for differences with regard to the effect UPMC's conduct had throughout the entirety of the geographic market by breaking the geographic market into regions or submarkets if necessary. Tr. at 61-62. However, to decide UPMC's pending motion to dismiss it is not necessary to prematurely consider the specifics of the economic modeling that Plaintiffs may present in support of class certification. Tr. at 79.

III. UPMC's Statute of Limitations Arguments Fail.

UPMC has advanced no compelling argument that any affirmative defense regarding the statute of limitations is apparent on the face of Plaintiffs' Amended Complaint that would warrant dismissal. Indeed, all of the named Plaintiffs were employed by UPMC within the four years prior to the filing of the first complaint. UPMC simply makes what amount to premature Rule 23 arguments regarding the temporal scope of the class the Court will eventually be asked to certify. Even these arguments, as Plaintiffs pointed out during the hearing, are both premature and unfounded due to Plaintiffs' plausible allegations regarding applicable tolling doctrines, particularly continuing violation. Tr. at 98, 145 (citing *Allen v. Dairy Farmers of Am., Inc.,* 748 F.Supp.2d 323, 350 (D. Vt. 2010) and *Turner v. McDonald's USA, LLC*, 2020 WL 3044086, *4 (N.D. Ill. April 24, 2020)).[3] Identical statute of limitations arguments have been rejected in the context of motions to dismiss Section 2 monopolization claims. *See, e.g.*, *Free Freehand Corp. v. Adobe Sys, Inc.*, 852 F. Supp.2d 1171 (N.D. Cal. 2012) (plaintiffs' claims were based not solely on acquisitions that occurred prior to 4-year period preceding complaint, but upon other new and

[3] *See also* *Amos Fin., LLC v. Kiebler*, No. 14CV0531, 2014 WL 3339586, at *2 (W.D. Pa. July 8, 2014) (noting it would be premature to decide facts underlying a defendant statute of limitations defense in connection with a motion to dismiss "because these are factual determinations that cannot be made without the benefit of discovery . . . Defendants' arguments may be re-raised in a Motion for Summary Judgment after discovery."); *Schmidt v. Skolas,* 770 F.3d 241, 249-251 (3d Cir. 2014) ("while a court may entertain a motion to dismiss on statute of limitations grounds, it may not allocate the burden of invoking the discovery rule in a way that is inconsistent with the rule that a plaintiff is not required to plead, in a complaint, facts sufficient to overcome an affirmative defense."); *Martin v. Ford Motor Co.,* 765 F.Supp.2d 673, 686-87 ("[T]he Motion to Dismiss is not the proper method for resolution of the statute of limitations defense. In accordance with the general rule, the statute of limitations defense may be raised in an Answer and litigated at a future date, not by this Motion.").

independent actions occurring during limitations period that helped defendant maintain its monopoly); *Smith v. eBay*, 2012 WL 27718 (N.D. Cal. Jan. 5, 2012) (same).

UPMC's cases to the contrary relied upon at the hearing (Tr. at 46) are readily distinguishable. In *Midwestern Mach. Co. v. Nw. Airlines, Inc.,* 392 F.3d 265, 271 (8th Cir. 2004), there were no Section 2 monopolization claims—plaintiffs' only claim there was under Section 7, an area where the *Midwestern Machinery* court found use of continuing violation doctrine is disfavored. And in *Z Techs. Corp. v. Lubrizol Corp.,* 753 F.3d 594 (6th Cir. 2014), the court made clear that the basis for the statute of limitations dismissal was its rejection of plaintiffs' argument that price increases post-merger would toll the statute. Importantly, the *Z Techs* court expressly distinguished situations like the case at bar where tolling might occur due to the presence of new and overt post-merger acts. *Z Techs Corp.*, 753 F.3d at 598 n. 4.

The Court asked about the reasonableness of allowing Plaintiffs to seek discovery going all the way back to UPMC's first acquisition in 1996. Tr. at 99. Plaintiffs emphasized the need to ascertain from discovery "when [UPMC's] acquisition went from being merely an acquisition, to being part of a scheme or an intent to monopolize markets." *Id*. This type of discovery would simply serve to support the well-pleaded allegations of the Amended Complaint, and the permissible inferences that may be drawn therefrom, regarding the fact that UPMC's anticompetitive schemes to monopolize health care markets in Pennsylvania date back many years. *See* ECF 31 at ¶¶ 107-11 (alleging UPMC anticompetitive conduct dating back to 1999). Indeed, Plaintiffs' allegations are bolstered by statements by the Third Circuit that indicate that UPMC's anticompetitive behavior, tactics and conduct have been alleged to have begun as far back as 1998. *See W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 93, 108 (3d Cir. 2010) ("In 1998, UPMC offered a 'truce' to Highmark. Under the terms of the truce, each entity would use its market power to protect the other from competition. Highmark initially rejected UPMC's offer, criticizing it as an illegal "attempt to form a 'super' monopoly for the provision of health care in Western Pennsylvania in which [UPMC], the leading provider of hospital services, and Highmark, the leading health insurer, would combine forces.'").[4]

Plaintiffs should be afforded the opportunity to obtain discovery regarding when and how UPMC began to implement and expand its scheme to acquire monopoly power over the provision of healthcare services and, relatedly when and how it leveraged that monopoly power to unfairly exercise monopsony power over SHWs.

Dated: February 4, 2025

Respectfully submitted,

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[4] This opinion is also helpful to rebut UPMC's assertion that all of plaintiffs' claims are time barred because Plaintiffs allege its anticompetitive scheme began more than four years before Plaintiffs filed suit. Tr. at 47 ("so … that's the question, is do mergers that closed years ago, but that allow you to … pay lower wages today or in the last four years, is that a continuing violation. The answer is no"). The *W. Penn* Court rejected this argument, holding there that "West Penn's conspiracy claims are not time-barred because the complaint adequately alleges that the defendants performed injurious acts in furtherance of the conspiracy within the limitations period." *W. Penn*, 627 F.3d at 106-108 (3d Cir. 2010). Here, Plaintiffs allege that UPMC has engaged in numerous continuing and new injurious overt acts in furtherance of its anticompetitive scheme.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was served on this 4th Day of February, 2025 via the Court's electronic notification system.

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PLAINTIFFS' SUPPLEMENTAL FILING IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK*

ROBERTA TODD, individually and on behalf of herself and all others similarly situated, Plaintiff, - against - EXXON CORPORATION, AMOCO CORPORATION, ATLANTIC RICHFIELD CO., BP AMERICA, CHEVRON CORP., CONOCO INC., MARATHON OIL COMPANY, MOBIL CORPORATION, OCCIDENTAL PETROLEUM CORPORATION, PHILLIPS PETROLEUM COMPANY, SHELL OIL COMPANY, SUN CO., INC. (R&M), TEXACO INC., and UNOCAL CORP., Defendants.	97 Civ. 4557 (JES) **SECOND AMENDED COMPLAINT** **JURY TRIAL DEMANDED**

Plaintiff, Roberta Todd, for her Amended Class Action Complaint, alleges as follows:

NATURE OF THE ACTION

1. Since at least the latter part of the 1980's, and in each year since, Defendants have exchanged with each other detailed information concerning salaries, bonuses, and benefits paid to their employees. The purpose of these exchanges of information was and is to eliminate or minimize competition among Defendants with respect to the monetary compensation paid to their employees. The effect of these exchanges of information

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is and has been to keep the monetary compensation of the MPT employees (defined in paragraph 7 hereof) of each Defendant lower than if the exchanges did not occur.

2. The methods used by Defendants in furthering their conspiracy, in violation of federal antitrust law, include the exchange among Defendants of massive amounts of extremely detailed information concerning job classifications, salaries, bonuses, and benefits paid, or to be paid, to categories of employees within the different job classifications; starting salaries of new employees; "signing bonuses"; relocation expenses; stock options; and related information. This information is exchanged, analyzed, discussed, and compiled at periodic meetings that take place among various representatives of Defendants throughout the year. Updated information on salaries is exchanged in oral and written communications throughout the year.

3. The information so exchanged is for the most part not disclosed to the public or employees generally nor to those other than those contributing the information. The confidential treatment of the information exchanged impedes the ability of employees to bargain intelligently and competitively with the members of the information exchange.

4. Each Defendant uses the information obtained from its competitors to adjust the salaries that it pays to its MPTs with the effect that those salaries are lower than they would be but for these information exchanges.

5. On information and belief, certain of the information that is exchanged, specifically the competitive factor data discussed at paragraphs 108 to 114 hereof, is

exchanged for the sole purpose of stabilizing and harmonizing the compensation each Defendant pays to its MPTs with that paid by the other Defendants to their MPTs.

6. This case is brought on behalf of Exxon MPTs, who have been damaged by the agreement, combination, and conspiracy alleged herein. Exxon categorizes its employees, for salary purposes, pursuant to a system not unlike the United States Government's pay grade system.

7. Exxon classifies its salaried managerial, professional, and technical ("MPT") employees at levels ranging from CL20 to CL29 and executive level employees, other than top echelon, at CL30-48. The salary control conspiracy that Defendants have engaged in for at least ten years has adversely affected and continues to adversely affect all employees of Exxon at levels CL20 through CL29. These salary ranges and all of the Exxon MPTs within them were adversely (from the MPTs' perspective) affected by the information exchanges described herein and uses to which those exchanges were put by Exxon. During the Class Period, Plaintiff was an Exxon MPT employee at level CL24.

8. This action is brought on behalf of all non-union (exempt) managerial, professional, and technical (MPT) employees of Exxon Corporation, or any of its divisions or subsidiaries, ("Exxon") whose job classification is or was in Exxon's salary range of CL20-29 and who were employed at any time between January 1, 1990 and the date of this Amended Complaint (the "Targeted Employees" and the "Class Period").

9. As a result of the agreement, conspiracy, and combination described herein, the Targeted Employees received compensation that was lower than they would have been paid had such agreement, conspiracy, and combination not occurred, and were therefore damaged within the meaning of section 1 of the Sherman Act of 1890, 15 U.S.C. § 1, for which Defendants are jointly and severally liable.

10. The conspiracy alleged herein consisted, *inter alia*, of an agreement among Defendants to exchange information concerning the compensation paid, and to be paid, to their MPT employees. The only business purpose of the agreed-upon information exchanges was to achieve coordination among Defendants of the compensation they paid to those employees and reduce that compensation. Pursuant to this agreement, Defendants exchanged such information, which exchanges were intended to, and had the effect of, reducing or eliminating competition among Defendants with respect to compensation paid, or to be paid, to their MPT employees. This information was exchanged before, during, and after meetings among the various Defendants. The exchanged information was used by Exxon to set compensation levels for its Targeted Employees, including Plaintiff, at levels that were lower than they would have been but for that information.

JURISDICTION AND VENUE

11. This Amended Complaint alleges violations of section 1 of the Sherman Act of 1890, 15 U.S.C. § 1. It arises under sections 4 and 16 of the Clayton Act of 1914, 15 U.S.C. §§ 15 and 26, and seeks to recover treble damages and the costs of suit,

including reasonable attorneys' and expert fees, for the injuries sustained by Plaintiff and the other members of the Class that she represents as a result of Defendants' Sherman Act violations.

12. The jurisdiction of this Court exists pursuant to section 4 of the Clayton Act, 15 U.S.C. § 15, and sections 1331 and 1337 of the United States Judicial Code, 28 U.S.C. §§ 1331 and 1337.

13. Each Defendant is found or transacts business in the Southern District of New York, and venue in this Court therefore exists pursuant to section 12 of the Clayton Act, 15 U.S.C. § 22. In addition, each Defendant has sufficient contacts with the Southern District of New York so as to make it subject to personal jurisdiction in this District were the Southern District of New York a separate state, and venue in this Court therefore exists pursuant to section 1391 of the Judicial Code, 28 U.S.C. § 1391(c). Among other things, each Defendant submitted its salary and other information to a third-party located in the Southern District of New York and received from that third-party detailed salary information, which submissions and receipts were a significant element of the violations complained of herein.

PLAINTIFF

14. Roberta Todd was a salaried, non-union MPT employee of Exxon's chemical division or subsidiary during the Class Period, in job classification CL24, and one of the Targeted Employees. She brings this Action individually and on behalf of herself and all other Targeted Employees of Exxon during the Class Period.

DEFENDANTS

15. Defendant Exxon Corporation is a multi-national corporation currently and throughout the Class Period engaged, *inter alia*, in the petroleum and chemical businesses in the United States. It is incorporated under the laws of New Jersey and has its corporate headquarters in Irving, Texas.

16. Defendant Amoco Corporation is, and during the Class Period was, engaged in the petroleum and chemical businesses in the United States. It is incorporated under the laws of Delaware and has its corporate headquarters in Chicago, Illinois.

17. Defendant Atlantic Richfield Company (Arco) is, and during the Class Period was, engaged in the petroleum and chemical businesses in the United States. It is incorporated under the laws of Delaware and has its corporate headquarters in Los Angeles, California.

18. Defendant BP America Inc. is, and during the Class Period was, engaged in the petroleum and chemical businesses in the United States. It is a wholly-owned subsidiary of British Petroleum Co. p.l.c., a United Kingdom corporation, and has its corporate headquarters in Cleveland, Ohio.

19. Defendant Chevron Corp. is, and during the Class Period was, engaged in the petroleum and chemical businesses in the United States. It is incorporated under the laws of Delaware and has its corporate headquarters in San Francisco, California.

20. Defendant Conoco Inc. is, and during the Class Period was, engaged in the petroleum business in the United States. It is a wholly-owned subsidiary of E.I. du

Pont de Nemours and Co., a Delaware corporation, and has its corporate headquarters in San Francisco, California.

21. Defendant Marathon Oil Company is, and during the Class Period was, engaged in the petroleum business in the United States. It is a subsidiary and part of the Marathon Group of USX Corp., a Delaware corporation, and has its corporate headquarters in Houston, Texas.

22. Defendant Mobil Corporation is, and during the Class Period was, engaged in the petroleum and chemical businesses in the United States. It is incorporated under the laws of Delaware and has its corporate headquarters in Fairfax, Virginia.

23. Defendant Occidental Petroleum Corp. is, and during the Class Period was, engaged in the petroleum and chemical businesses in the United States. It is incorporated under the laws of Delaware and has its corporate headquarters in Los Angeles, California.

24. Defendant Phillips Petroleum Company is, and during the Class Period was, engaged in the petroleum and chemical businesses in the United States. It is incorporated under the laws of Delaware and has its corporate headquarters in Bartelsville, Oklahoma.

25. Defendant Shell Oil Company is, and during the Class Period was, engaged in the petroleum and chemical businesses in the United States. It is incorporated under the laws of Delaware and has its corporate headquarters in Houston, Texas.

26. Defendant Sun Co., Inc. (R&M) is, and during the Class Period was, engaged in the petroleum and chemical businesses in the United States. It is incorporated under the laws of Pennsylvania and has its corporate headquarters in Philadelphia, Pennsylvania.

27. Defendant Texaco Inc. is, and during the Class Period was, engaged in the petroleum business in the United States. It is incorporated under the laws of Delaware and has its corporate headquarters in White Plains, New York.

28. Defendant Unocal Corp. is, and during the Class Period was, engaged in the petroleum and chemical businesses in the United States. It is incorporated under the laws of Delaware and has its corporate headquarters in El Segundo, California.

29. Each Defendant competes with each other Defendant for hiring and retaining the Targeted Employees and other MPT employees.

PLAINTIFF'S CLASS ALLEGATIONS

30. Plaintiff brings this action on her own behalf and as a class action pursuant to rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure on behalf of the Targeted Employees of Exxon, as defined in paragraph 8 hereof, at any time since January 1, 1990.

31. The members of the Class are so numerous that joinder of all members is impracticable. While the exact number of members of the Class can only be determined by appropriate discovery, the Class members number in the tens of thousands.

32. Plaintiff's claims are typical of the claims of the other members of the Class. Plaintiff and all other members of the Class sustained damages as a result of the wrongful conduct complained of herein.

33. Plaintiff will fairly and adequately protect the interests of the other members of the Class, and has retained counsel competent and experienced in class and antitrust litigation.

34. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Because the damages suffered by individual Class members may be relatively small, the expense and burden of individual litigation make it virtually impossible for Class members individually to seek redress for the wrongful conduct alleged herein.

35. Common questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting individual members of the Class. Among the questions of law and fact common to the Class are:

(a) whether Defendants agreed among themselves to exchange information concerning compensation paid, or to be paid, to their MPT employees;

(b) whether Defendants participated in meetings at which information was exchanged concerning compensation paid, or to be paid, to their MPT employees;

(c) whether Defendants obtained information from each other, directly or indirectly, concerning compensation paid, or to be paid, to their MPT employees;

(d) whether and to what extent Defendants used information concerning compensation paid, or to be paid, to their MPT employees;

(e) whether and to what extent Exxon used information concerning compensation paid, or to be paid, by the other Defendants to their MPT employees in a manner that adversely affected the Targeted Employees;

(f) whether the members of the Class have sustained damages and, if so, the appropriate measure thereof; and

(g) whether Defendants should be enjoined from continuing to violate the Sherman Act.

36. Plaintiff knows of no difficulty that will be encountered in the management of this litigation that would preclude its maintenance as a class action.

37. The names and addresses of the Targeted Employees are available from Exxon. Notice can be provided to such individuals using techniques and a form of notice similar to those customarily used in class actions.

INTERSTATE TRADE AND COMMERCE

38. The conduct of Defendants described in this Amended Complaint was in, and has affected, interstate trade and commerce. Defendants' collective annual revenues are measured in billions of dollars. Their products are sold throughout the United States, and they employ people throughout the United States.

39. The conduct of Defendants alleged herein was within and had a substantial effect upon interstate trade and commerce.

FACTS

40. Defendants are the largest oil companies in the United States, and most are extensively involved in the chemical and petrochemical industries as well.

SALARY STRUCTURE

41. There are three broad ranges of employees within Exxon. The lowest level are non-exempt (entitled to overtime under the Fair Labor Standards Act) support staff employees. The second level is termed the MPT Salary Range; this range consists of MPT Employees in Exxon's 20 through 29 classification levels, and Class members are or were such employees during the Class Period. The third range is the Executive level, which are the Exxon classification levels 30 through 52. The other Defendants use similar classification structures.

42. The other Defendants' salary structures are similar to Exxon's. All Defendants have a single core salary structure for exempt employees. All employees fit within a grade or salary level band with a numerical designation, which permits inter-company comparison.

DATA EXCHANGES

43. At some time before the beginning of the Class Period, Exxon and the other Defendants agreed to exchange information concerning the salaries that they paid to large groups of their employees. Eventually, Exxon and the other Defendants exchanged detailed information concerning the salaries paid, and to be paid, *inter alia*, to MPTs in the form of direct and indirect data exchanges and periodic meetings of repre-

sentatives of the companies' respective human resources departments.

44. These information exchanges were prepared and distributed under the auspices of a group of fourteen major oil companies. One such group is known as the Oil Industry Survey Group (the "Survey Group"), and during the Class Period, the Survey Group consisted of Defendants: Amoco, Arco, BP America, Chevron, Conoco, Exxon, Marathon, Mobil, Occidental Petroleum, Phillips, Shell, Sun, Texaco, and Unocal.

45. To be a member of the Survey Group, a company had to match at least 40% of the Chevron benchmark jobs, described below. Each member had to submit complete and accurate historical compensation data including salaries, differentials, bonuses, incentives, allowances, supplements, stock, stock unit overrides, and participation agreements and to allow that information to be audited if asked.

46. Each member of the Survey Group was required to and agreed to participate in the Oil Industry Job Match Survey, the Oil Industry Job Family Survey, the Exxon Technical and Professional Starting Salary Survey, the Job Match Long-Term Incentive Survey, and any other surveys designated as "regular" by the Survey Group.

47. Survey Group members were entitled to obtain compensation data from as few as three other members, and throughout the Class Period Exxon received compensation data from as few as three of its competitors.

48. The Steering Committee of the Survey Group consisted of those companies that coordinated the Oil Industry Group surveys – Exxon, Chevron, Unocal, and

from 1985 through 1992 Phillips and for 1993 through 1996 Shell – as well two other companies. The Steering Committee reported the goings-on and results of its meetings to the other members of the Survey Group and solicited their agreement to the Steering Committee's proposals.

SURVEYS

49. During the Class Period, Exxon participated with the other Defendants in (i) biennial Job Match Surveys, (ii) annual Job Family Surveys, and (iii) annual Above Base Compensation, or ABC, Surveys. These are described below.

Job Match Survey

50. The Job Match Survey is an important element of a system to achieve a common denominator with respect to compensation of the participants' MPT Employees. Since such employees of Defendants number in the tens, and perhaps hundreds, of thousands, with scores of different job titles, job descriptions, and job responsibilities, Defendants realized it was not functionally efficient simply to know what each others' employees were being paid unless they were able to horizontally match the various job classifications.

51. Of the fourteen Defendants that participate in this job match process, Chevron takes the lead role in coordinating the biennial Job Match Survey. Defendants agreed to, and did, provide to each other full, accurate, and relevant information on jobs by means of job descriptions, organization charts, and other documents, so that evaluations of job comparability could be made among the Defendant companies. Defendants

have agreed to and do provide to each other information on jobs in each of their companies, so that the jobs are most nearly comparable to the benchmark jobs provided by Chevron in order that they can be matched. A "match" is defined as a similar job in a similar organization whose combined reporting functions and scope adjustments are not more than two survey salary grades above or below the benchmarked job.

52. Every other year, each Defendant submits detailed information with respect to the various job categories in its structure, and an effort is then made to match these job categories to the benchmark jobs. Chevron sends to each Defendant an elaborate survey request, including job match sheets, organization charts, and a computer diskette. Chevron's jobs are used as industry benchmarks. Chevron and Unocal each meet with half of the other companies to seek to develop job-to-job matches to the Chevron benchmarks. They then compile the information, reconstruct it in written and diskette form, and submit it to the Valhalla, New York office of Towers Perrin, a TP&C company, a third party consultant ("Towers Perrin"), which is also sent salary information from each Defendant. Towers Perrin then compiles the information and analyzes, refines, and distributes it to Defendants, in diskette form and hard copy.

53. Since not all jobs can be matched precisely, there are agreed upon offsets that reflect responsibility differences for each job, assigning a premium to the employee in a particular position who had greater responsibility to the comparable Chevron employee and discounting the salary of those with fewer responsibilities than their Chevron counterparts. This process was reflected as a percentage figure. Defendants

agreed that the salary for each grade shall differ at their midpoints by 14% for purposes of the job match survey. Having leveled the playing field, so to speak, Defendants are then in a position to divulge meaningful information concerning compensation paid, or to be paid, to the MPTs.

54. As a part of this process, then, every two years, a Chevron representative visits Exxon to match Chevron jobs with Exxon jobs. Compensation and functional (line management) representatives attend each session. An evaluation is assigned to each job and an appropriate "offset" is agreed upon for each job. The offset is a means for accounting for the different responsibilities between the Exxon jobs and similar Chevron jobs. Each grade level is assumed to have a salary difference of 14%, which roughly corresponds with the difference of the midpoints in the Exxon classification levels. The jobs then are compared by assigning a fraction of 14% to the different job responsibilities to equate the matched jobs. There is an agreed upon maximum of two grade levels, or 28%, for jobs to "match."

55. The actual salaries of the incumbents are apparently not discussed by the participants at the Job Match Meetings, but the percentage figure or adjustment factor is agreed upon between the Exxon and the Chevron job matchers. The Job Match Survey information "agreed to at our meetings," as an Exxon employee put it, is sent in diskette form to all participants. The adjustment or offset factor for each of the jobs on the Job Match Survey and the actual salary information is then transmitted to Towers Perrin, which applies the percentage figure adjustments to the actual salary.

56. Salaries of the Defendant companies other than Exxon are also job matched through a similar process. These matched jobs are grouped by Towers Perrin to accord with Exxon's classification level and arranged from the highest to lowest salary with each of ten 3-5 year age categories. The 50th percentile of pay is determined for each of the ten distributions of salaries within the age categories. This thus displays for Exxon how its competitors are paying their employees for comparable jobs.

57. The comparable Exxon salaries for the matched jobs are arrayed by classification levels and by age groups at the 50th percentile ranking. The competitors' data are then compared for each age group within each classification level by weighted averaging based on the Exxon age distribution within the classification level, thus enabling Exxon to compare its pay levels to those of its competition at the 50th percentile across all classification levels. This process enables Exxon to develop its "competitive position" which determines, to a large extent, its annual salary budget which in turn determines how much individual MPT employees are paid.

58. Exxon determines its salary level position by comparing its salaries to those paid for comparable (i.e. matched) jobs by six selected companies known as the Six Majors. Exxon's goal is to have its salary level for its jobs at an index that is 101 percent of the Six Majors and below that of the three highest paying companies. The Job Match Survey, coordinated by Chevron, is the primary industry survey for determining Exxon's "competitive position" and the associated competitive factor for each year's salary program.

59. Exxon uses the Job Match Survey to set its baseline salary levels.

60. The Job Match Surveys are a major source of information for determining Exxon's salary level at a particular point in time based on historical salary survey data.

61. Exxon spends a significant amount of time and effort in assembling and forwarding its data for the Job Match Survey.

62. Throughout the Class Period, Exxon was able to match from 70 to 80% of its MPT jobs to the Chevron benchmarks.

63. The Job Match Survey collects salaries and short-term incentives for approximately 155 positions which are "matched" to benchmark positions provided by one of the participants (Chevron). Each participant is able to compare what it pays its matched jobs to every other company (albeit not by name) and to the industry average, or the average of the "Six Majors" or the average of the "High Three."

64. Throughout the Class Period, Exxon received Job Match data for all participating companies, from the three highest payers (other than Exxon), and from the six other major oil companies.

65. The data Exxon obtained in the Job Match Surveys were an important factor in developing the Company's salary position vis-à-vis its competitors.

66. The Job Match Survey provides the basis for Exxon to determine its overall pay corporate-wide relative to its oil industry competitors and determine what its salary budget should be in the future. Further, Exxon uses it to develop its position

regarding the salaries that it pays to its MPT employees, i.e. the Targeted Employees. It serves a similar purpose and function for the other Defendants.

<u>The Grade Average Survey</u>

67. The Job Match Survey is done every two years. It is supplemented by the Grade Average Update which is done for the "off years," i.e. those years in which a full Job Match Survey is not prepared.

68. The Grade Average Salary data enable Exxon to compare its MPT salaries with those of the Six Majors and the High Three. But in the off years, Exxon bases the assessment of its salary level position both on the previous year's Job Match Survey and on the one-year review of the grade average data. It first calculates the change in grade average salaries since the last Job Match Survey and then adjusts its salary level from the previous year's survey by this change. It also weighs the data based on the number of Exxon survey data points, not the total employee population. Using that method, in 1991, for example, it was positioned just slightly above the Six Majors (0.4%) and approximately 3% below the High Three companies.

<u>Job Family Survey</u>

69. The Job Family Surveys are administered by Towers Perrin, again through that company's Valhalla, New York office. Each of the participating companies (including Exxon) provides Towers Perrin with information on salaries paid for particular types of work. The data include the year of birth for family members, as a rough proxy for work experience, and the level of education of family members.

70. Each participating company receives from Towers Perrin information from other participants both in written and computer disk form. Each participating company could receive a break-down of data from as few as three of its competitors, and throughout the Class Period Exxon did that.

71. The three other companies whose data are received by Exxon are the highest paying companies in the oil industry, sometimes referred to as the High Three.

72. In addition, Exxon designates and receives data grouped by six other (i.e. non-Exxon) major oil companies, Amoco, Arco, Chevron, Conoco, Mobil, and Shell, also referred to as the Six Majors.

73. The Job Family Surveys are prepared annually, with each participating company providing its data annually.

74. Exxon spends a significant amount of time and effort in assembling and forwarding its data for the Job Family Survey. The Survey provides data as to the salary, experience level, and academic level of MPT employees by job level classification.

75. The Job Family Survey is coordinated by Exxon. The Job Family Survey gathered information on approximately thirty job families. The Exxon salaries are compared with those of the Six Majors as a group in the 10th, 50th, and 90th percentile performance grade ranking. For the period 1987 through 1994, Exxon salaries dropped 4.1% as compared to the Six Majors.

76. The data provided by the Job Family Survey are utilized by each Defendant to determine if the announced budgets of its competitors were implemented in whole or in part so that each could consider what compensation action should be undertaken to coordinate the salaries with those of the participants in the information exchange.

Advancement Guides

77. Advancement Guides establish requirements for advancement with the salary grade of employees and thus control the timing of salary increases.

78. As a result of lower "competitive factors" and changes in the Advancement Guides in 1987 that resulted from data exchanges of the sort described herein, Exxon's Job Family Index moved closer to Exxon's competition and the indices of over 80% of the families were lower than they had been in 1987.

79. By slowing the rate of advancement (increasing the interval between pay raises), Exxon lowers the annual cost of employee salaries and thus achieves a salary level more in line with competitors' pay. The result has slowed the advancement rate at Exxon by two to eight years.

ABC Survey

80. In about 1990 it became apparent to Defendants that the accuracy of the salary comparisons they exchanged was adversely impacted by the fact that companies were paying amounts above base compensation. At the initiative of Shell, Defendants agreed to exchange data concerning variable pay amounts. This survey became

known as the ABC Survey (Above Base Compensation). It captures the amounts that Defendants pay that were not captured in the Job Match and Job Family Surveys. These variable-pay amounts impacted salaries by 0.05% to almost 3% over the period 1990–1993.

81. The reports of these data identified the individual companies and the amount of Above Base Compensation each was paying. The data exchanged in the ABC Survey enable Defendants to more accurately compare the levels of pay each Defendant is paying.

<u>B-1 and B-2 Surveys</u>

82. Under the auspices of the Survey Group, additional information is collected from Defendants as to bonuses and other non-standard payments and disseminated among Defendants. These surveys are known by the code names B-1 and B-2, and they enable each Defendant to more accurately compare what they are paying certain of their high ranking employees than they would otherwise be able to and thus to avoid overpaying them.

<u>Long Term Incentive Survey</u>

83. An additional refinement in the information exchanged is the Long Term Incentive Survey. This survey captures the economic impact of certain benefits that are granted by Defendants to their employees that were not immediately equal to cash. Defendants agreed that these would be accounted for at 40 percent of their face value.

Starting Salary Survey

84. The Starting Employee Salary Survey information exchange was organized by Exxon. The information is gathered and submitted to Towers Perrin. Exxon has engaged in an exchange of information with a number of other large companies in which information is exchanged on number of hires and the salaries paid. The starting salary survey is reported by the Six Majors. They have four tiers of schools. For example, Harvard, MIT, Stanford, and Pennsylvania are tier 1 and Penn State, Rice, and Wisconsin are in tier 4.

85. The Starting Salary Survey is intended to measure starting salaries of college graduates entering MPT positions. Invitations to participate were sent to the fourteen companies of the Oil Industry Survey Group plus four additional companies.

VCC

86. Those Defendants with chemical plants in Louisiana and Texas formed (with other companies), more than ten years ago, an association known as the VCC, meaning Various Chemical Companies. VCC representatives have met twice a year since to implement a plant level conspiracy, which is used to stifle or eliminate competition with respect to compensation paid to plant employees at VCC chemical plants. Each member of the VCC takes a turn in hosting these meetings. Each VCC member is required to submit to the host committee well before each meeting detailed information with respect to the compensation paid, or to be paid, to its plant employees, including salaries, bonuses, paid holidays, and other benefits. The host committee then compiles

this information, and distributes it in written form to the other participants at each meeting.

MEETINGS

87. Throughout the Class Period and under the aegis of the Survey Group, Exxon human resources representatives have met regularly with human resources representatives from some or all of the other thirteen member companies. These meetings of groups including the Oil Industry Salary Survey Group Steering Committee (of which Exxon was a member) and the Oil Industry Compensation Roundtable, and meetings referred to as Committee meetings, Planning meetings, Job Family Survey meetings, and Analyst meetings. These various groups met at least three times a year during the Class Period, and sometimes more frequently. The Planning and the Roundtable meetings were held annually, and the Steering Committee meetings were held from one to four times a year. Exxon actively participates, as it has throughout the Class Period, in the meetings of all these groups.

88. Among the information exchanged at these meetings are current and future increases in Defendants' salary budgets. This information is company-specific, i.e., all participants learn where each other participant is going with its salary budget for the upcoming year or, if a participant's salary year had only recently begun, for that new year.

89. By 1993, Exxon had used the data it received through the various information exchanges that it had with its competitors to "slow down" its employee

advancement rates, reduce the payments made to the uppermost members of some of its employee classifications, and lower the top classification levels for most of its job families. This information enabled Exxon to reduce its pay vis-à-vis its competitors from 110.7% in 1987 to 107.0% in 1993.

90. In addition to their merit budgets, Defendants also revealed their structure adjustment and other targeted percentage increases to each other. These figures are not made publicly available. Many of the companies (including Exxon) do not reveal to their own affected employees the detail that is revealed to their competitors at these meetings.

<u>Oil Industry Compensation Roundtable</u>

91. Another major meeting is the Oil Industry Compensation Roundtable, which is held between August and October of each year. The Roundtable is a meeting of compensation executives from the fourteen companies that participate in the Oil Industry Survey Group plus Amerada Hess and Saudi Aramco.

92. At these meetings, the participants discuss the salary budgets broken down for executive employees, exempt employees (i.e. MPTs), and non-exempt employees. They reveal the percent of any merit increase, the percent of structure change, and the effective date and the implementation schedule, whether rolling or common date, for the various salary adjustments for the year. Other details are also revealed, such as whether a particular company has set aside an additional amount for merit exceptions and

whether a company is going from a rolling (employment anniversary) date to a common date (or vice versa) for salary adjustments.

93. The meeting participants also prepare in advance certain topics for discussion, and these are printed out in the form of questions and distributed at the meetings on a sheet set up so that the response of each company can be conveniently recorded, e.g., Exxon can record Mobil's and Chevron's responses. Among the questions that have been directed to and answered by all meeting participants at these meetings are, "is there a special compensation program for new hires?," "do any companies use lump sum merit increases on an ongoing basis?," "is there any move to consider non-oil companies in the competitor group and/or changing percentile target?," and "does the participant communicate its competitive salary position to its employees?" (most do not).

94. Among the topics discussed at these meetings are the nature and amount of discretionary awards programs, the practice for setting nonexempt salary ranges, the number and some examples of different professional ladders that exist, the trending of traditional bonuses available to entry level employees, and the promotional increases that are given.

The Job Family Survey Meeting

95. This meeting information is used by Exxon to assess the range of competitors' salary movements over the prior twelve months so that it can achieve the desired alignment with competition.

THE RELEVANT MARKETS

Geographic Market

96. The activities complained of herein affected and continue to affect the market for salaried, non-union employees with experience in the oil and petrochemical industry and performing services throughout the continental United States and various submarkets therein.

Product Market

97. The relevant product market is that for the services of experienced salaried, non-union, managerial, professional and technical (MPT) employees in the oil and petrochemical industry, in the continental United States and various submarkets thereof. MPT employees with experience in this industry have industry-specific knowledge which renders their services more valuable to oil and petrochemical companies than to other companies. Competition for their services is thus effectively limited to the oil and petrochemical companies.

98. The wages and salary levels for MPT employees experienced in the integrated oil and petrochemical market are as a practical matter set to the levels determined by the major oil companies, virtually all of which are Defendants herein.

99. The oil companies, Defendants herein, perceive and recognize the relatively low level of cross-elasticity of demand for the services of MPT employees with experience in the oil and petrochemical companies as between the oil and petrochemical industry and other industries because they rely primarily on integrated oil and petrochem-

ical industry salary information in setting salary and wages for the experienced MPT employees of Exxon, who make up the Class of plaintiffs herein.

100. The information exchanges here challenged substantially and adversely affected compensation competition for the services of all MPT employees with experience in the oil and petrochemical industry.

101. The major oil companies, Defendants herein, have substantial collective market power vis-à-vis MPT employees with experience in the oil and petrochemical industry because these companies control a substantial number and a substantial percentage of job positions that are available for those with experience in the oil and petrochemical industry. Defendants perceive their competitors as the other Defendants, with which they compete for business. They also perceive the market in which they compete for the quality, experienced personnel they need to be comprised of the MPT employees of each other. The companies named as Defendants herein employ approximately 80-90 percent of the MPT employees in this market. Defendants also account for approximately 80-90 percent of the revenue garnered by integrated oil and petrochemical companies. Barriers to entry into the integrated oil and petrochemical industry are exceptionally high.

ADVERSE EFFECT ON COMPETITION

102. The activities complained of herein have had an adverse effect on competition for the services of MPT employees in the integrated oil and petrochemical industry in that the salary levels for all employees within that market and various sub-

markets thereof have been substantially lower than if it were not for the agreements, combination, and conspiracies and conduct set forth herein.

103. Absent the conduct complained of herein, each Defendant would have an incentive to bid up the salaries of experienced employees to retain employees who might leave because of higher compensation elsewhere in the integrated oil industry.

104. Detailed knowledge of what their competitors pay for labor, an important component of each Defendant's total cost structure, has caused a general acceptance in the industry of relatively standardized wage rates and lessened competitive efforts to bid up wage levels. The reliance of employers in the integrated oil industry upon the information exchanged facilitates the tendency toward wage stability, thereby encouraging "tacit" wage fixing.

USE OF INFORMATION EXCHANGED

105. The information exchanges complained of herein are utilized by Defendants herein to set their salary levels at levels lower than would be the case if the information were not so exchanged. Although various Defendants primarily use different subsets of the information exchanged to determine their salary levels, the total information exchanged among Defendants and the information supplied by Defendants and certain others including but not limited to Amerada Hess and Saudi Aramco contribute to the assurance and understanding among the conspirators that maintaining a low level of salary increases runs little competitive risk.

106. The information exchanges herein were accompanied by assurances from Defendants herein that they would primarily utilize salary information exchanged among themselves in setting the salary for their MPT employees. The subsets of that information that each company primarily used varied from company to company but there is substantial overlap among the companies selected for the subsets.

EFFECTS

107. As a result of the exchanges of detailed information on a regular basis throughout each year described herein, each Defendant knows what each other Defendant is paying to its MPTs at various job levels and adjusts its compensation package accordingly. The net effect of this anti-competitive conspiracy has been to chill, to stifle, or to eliminate competition with respect to compensation paid by Exxon to the Targeted Employees as well as by each other Defendant to its MPT employees.

108. Defendants base their salary increases and structure primarily on the information exchanged among themselves. The effect of the information exchanged is illustrated by Exxon's Competitive Factor history, which is the minimum amount Exxon would have to pay its employees to maintain alignment with the other employers participating in the exchanges of information.

109. The "competitive factor" is a percentage figure utilized to align Exxon's salaries with those of its major competitors. The determination of the "competitive factor" is based on the results of the industry information exchanges and information received as to competitors' future salary movements. Exxon's "competitive factor"

declined during a portion of the period as follows: 1991 - 6.5%; 1992 - 5.5%; 1993 - 2.5%; 1994 - 1%; 1995 - 0%. The information exchanged is the primary basis for determining the Advancement Guides and similar guides adopted by Defendants.

110. By use of the information exchanged, Exxon moderated its salary structure over the period since 1990 to more closely align it with competition.

111. The adjustments made by Exxon to its "competitive factor" as a result of the data it received about the salaries paid by companies that were parties to the various information exchanges described herein had an effect on the salaries paid to every one of the Targeted Employees, including Plaintiff, throughout the Class Period. In other words, had Exxon's "competitive factor" been higher than it was, *all* Exxon MPT salaries would have been higher than they were, and Exxon's "competitive factor" was in the event reduced *because* it received information concerning its competitors' salaries in the information exchanges described herein.

112. Defendants exchange their planned "competitive factor" with each other and with Amerada Hess, Ashland, and Saudi Aramco. The "competitive factor" is the amount by which the salary structure of each of the companies is intended to be changed – or not changed – in order to maintain the alignment of the salary structures of the other companies. On information and belief, the only purpose of the exchange of "competitive factor" information, which is separately stated for managerial, professional, and technical (i.e. MPT) employees, and its effect, is to stabilize and harmonize the

compensation to be paid to the MPT employees of the companies exchanging this information.

113. From 1987 to 1993 Exxon's salary index versus its competitors declined 3.6%. With a budget of $800 million this represents a savings of $20 million per year. This does not take into account that the group as a whole (the fourteen companies) experienced a decline in the rate of salary growth that would otherwise have been experienced but for their agreed exchanges.

114. When the 1993 Job Family Survey Data indicated the pay levels for several job families were above the competition's, an 0.0% "competitive factor" was approved at Exxon to help correct the situation. To achieve coordination with the salary levels of other participants, Exxon officials recommended changes in the Advancement Guide. The phrase "achieve competitive level" when read in context means to reduce salaries to the level of competition generally defined as the Six Majors (Amoco, Arco, Chevron, Conoco, Mobil, and Shell) other than Exxon.

115. Defendants are in the labor market for MPT salaried, non-union employees in the integrated oil and petrochemical industry in the United States. Plaintiff, and the other members of the Class, were/are salaried, non-union employees in the oil and petrochemical industry, and therefore are part of the market in which Defendants obtained labor. Defendants, employers in the oil and petrochemical industry, have market power over their employees because the workers' marketability, taking into account the knowledge accumulated as a worker in the industry, is of more value to employers in

the integrated oil and petrochemical industry. The MPT employees gain industry-specific knowledge as they work in the integrated oil industry, and this knowledge is of greater value to those employers in this industry. The value of industry-specific knowledge to the companies is shown by the recognition that more experienced workers are paid more and that Defendants generally consider only other integrated oil companies when determining their salary levels. As the employees gain experience, the only practical outlets to sell their services at an amount reflecting the value of their experience are the integrated oil and petrochemical companies, i.e., Defendants.

116. In addition, Defendants were of the view that they competed chiefly with each other for MPT employees as expressed by the lengths to which they all went to assemble, process, and exchange information among themselves about how much they paid their respective MPT employees.

117. Throughout the Class Period, Defendants conspired to avoid competition in that market in violation of the antitrust laws by exchanging compensation information with each other so as to depress compensation levels of their MPT employees, including the Targeted Employees.

118. As a direct and proximate result of the actions of Defendants, Plaintiff and the other members of the Class suffered damages to their business and property interests.

THE CONSPIRACY

119. Acts in furtherance of the conspiracy include, but are not limited to:

(a) Before and throughout the Class Period, Defendants agreed to a conspiracy pursuant to which they periodically exchanged specific information concerning the compensation each pays to its MPT employees, including, for Exxon, the Targeted Employees. The information concerning compensation of the MPT employees exchanged at these meetings is distributed to each Defendant, and each Defendant then proceeds to use that information to set the compensation packages for its own MPT employees.

(b) Before and throughout the Class Period, Defendants participated in a series of regular meetings during which there was an exchange of information concerning the compensation paid, and to be paid, to their respective MPT employees, including, for Exxon, the Targeted Employees. The information exchanged at these meetings was distributed to each Defendant, which proceeded to use that information to set the compensation packages for its own MPT employees, including, for Exxon, the Targeted Employees. The salary systems of the companies are administered on a common system with salary grades and midpoints.

(c) As part of the agreement, the exchanged information identified which company was paying how much for particular positions. This provided a mechanism for policing and enforcing the agreement to fix the compensation packages that Defendants paid. The conspirators even agreed, upon request of the Steering Committee, to instruct the outside auditors of their companies to verify the pay data submitted and to certify as to its completeness and accuracy.

(d) The meetings and related communications act as a conduit for information with regard to the compensation paid, and to be paid, by Defendants to their MPT employees, including, for Exxon, the Targeted Employees.

(e) Throughout the time period relevant to this Second Amended Complaint, Defendants exchanged information concerning the compensation they paid, or would pay, to their MPT employees, including, for Exxon, the Targeted Employees.

120. The above-described agreement and conspiracy resulted in the elimination of a competitive compensation structure among Defendants, and the payment of compensation to Targeted Employees at amounts that were materially below what they would have been in a competitive market.

121. As a result of the conspiracy alleged herein, Plaintiff and the other members of the Class received compensation that was materially less than would have been paid in a competitive market.

FRAUDULENT CONCEALMENT

122. Defendants fraudulently concealed the existence of the wrongful acts alleged above and of the violations alleged herein. The conspirators generally have not disclosed to their employees the information they exchanged, other than to top management and human resources managers. Plaintiff was ignorant of such wrongful acts, and exercised due diligence to learn of her legal rights and, despite such diligence, could not have uncovered the existence of the violations alleged herein until January of 1997. Given its nature, the conspiracy was inherently self-concealing.

123. As a result of the foregoing, Plaintiff could not have had knowledge of the violations alleged herein until 1997. Plaintiff exercised due diligence to learn of her legal rights and, despite the exercise of due diligence, could not have discovered the antitrust violations alleged herein until 1997.

VIOLATIONS ALLEGED

124. The aforesaid agreement, combination, and conspiracy consisted of a continuing agreement, understanding, and concert of action among Defendants, the substantial terms of which were to lower, stabilize, and maintain at deflated levels the compensation packages that Defendants paid to their MPT employees, including, for Exxon, the Targeted Employees.

125. For the purpose of forming and effectuating the aforesaid agreement, combination, and conspiracy, Defendants have done those things that they agreed, combined, and conspired to do. In furtherance of the aforesaid agreement, combination, and conspiracy, Defendants have committed one or more overt acts, including:

(a) Exchanging data throughout each year concerning compensation paid, or to be paid, to their MPT employees, including, for Exxon, the Targeted Employees;

(b) Participating in numerous meetings each year among representatives of Defendants at which there was an exchange of data about the compensation paid by them to their MPT employees, including, for Exxon, the Targeted Employees;

(c) Exchanging compilations of the data obtained at these meetings; and

(d) Using the data obtained from each other to establish the compensation paid by Defendants to their respective MPT employees, including, for Exxon, the Targeted Employees, at non-competitive levels.

AS A FIRST
CLAIM FOR RELIEF
(Damages: Section 1, Sherman Act)

126. Plaintiff repeats the allegations of paragraphs 1 through 125 herein.

127. Beginning at a time uncertain, but at least before the beginning of the Class Period, and continuing through the present time, Defendants entered into and engaged in a conspiracy in unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Sherman Antitrust Act of 1890, by combining among themselves to fix the compensation paid, or to be paid, to their respective MPT employees, including, for Exxon, the Targeted Employees.

128. As a result of this unlawful conduct, the Targeted Employees of Exxon received compensation materially below what they would have received but for such conduct.

129. As a result of the foregoing, Plaintiff and the other members of the Class have been injured in their business and property by Defendants' violation of section 1 of the Sherman Act in an amount as yet unascertained, but believed to be at least in the tens of millions of dollars, to be trebled pursuant to the provisions thereof, with interest, for which damages Defendants are jointly and severally liable.

bers of the Class, plus attorneys' fees, costs, and interest as allowable by law, for violations of the Sherman Antitrust Act;

(iii) Enjoining each Defendant from agreeing, conspiring, or combining with each other, or with other companies in their industry, to exchange information regarding, or to establish, the compensation that Exxon pays to the Targeted Employees;

(iv) Awarding Plaintiff the costs and expenses in this action, including reasonable attorneys', accountants', and experts' fees; and

(v) Granting such other relief as the Court may deem just and proper.

JURY DEMAND

Plaintiff hereby requests a trial by jury on all issues triable by jury.

Dated: New York, New York
October 29, 1998

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AS AND FOR A SECOND CLAIM FOR RELIEF
(Injunction: Section 1, Sherman Act)

130. Plaintiff repeats the allegations of paragraphs 1 through 129 herein.

131. The unlawful conduct described herein constitutes a violation of section 1 of the Sherman Act of 1890.

132. Defendants' unlawful conduct is continuing, and unless equitable relief is granted, the salaries paid to the current and future Targeted Employees will be lower than they would be in an uncontaminated marketplace.

133. Defendants have continuously violated section 1 of the Sherman Act, and will continue to do so unless enjoined by the Court.

134. Plaintiff and the other members of the Class have no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of herself and the other members of the Class, prays for judgment as follows:

(i) Declaring this action to be a proper Plaintiff class action pursuant to rule 23(b) of the Federal Rules of Civil Procedure on behalf of the Class defined in paragraph 8 hereof, declaring Plaintiff to be a proper representative of that Class, and declaring Plaintiff's counsel to be counsel to the Class;

(ii) Awarding judgment jointly and severally against each Defendant in an amount to be proved at trial in treble the amount of damages suffered by the mem-

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PLAINTIFFS' SUPPLEMENTAL FILING IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
MEMPHIS DIVISION

Suzanne C. Clarke and
Conise P. Dillard,
on behalf of themselves and all others
similarly situated,
Plaintiffs,
v.

Baptist Memorial Healthcare Corporation;
Methodist Healthcare

Defendants.

Civil Action No. ___
CLASS ACTION COMPLAINT
JURY TRIAL REQUESTED

Plaintiffs, by and through counsel, on behalf of themselves and all others similarly situated, bring this action against defendants for damages, and demand trial by jury, complaining and alleging as follows:

NATURE OF THE ACTION

1. Defendants, which own and operate hospitals in the Memphis Metropolitan Statistical Area ("Memphis MSA" or "Memphis area"), have for years conspired among themselves and with other hospitals in the Memphis MSA to depress the compensation levels of registered nurses ("RNs") employed at the conspiring hospitals, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

2. In furtherance of their conspiracy, defendants and their co-conspirators also agreed to regularly exchange detailed and non-public information about the compensation each is paying or will pay to its RN employees. The agreement to exchange such information has facilitated the formation, implementation and

enforcement of defendants' wage-fixing conspiracy. Pursuant to this agreement defendants and their co-conspirators in fact have exchanged such information, through meetings, telephone conversations and written surveys. The exchange of this information itself has suppressed competition among Memphis-area hospitals in the compensation of RN employees, and has depressed the compensation they have paid to such employees, in violation of Section 1 of the Sherman Act.

3. Defendants' conspiratorial conduct has occurred in the context of a national nursing shortage. Absent their conspiracy, Memphis-area hospitals would have responded to the nursing shortage by, among other things, substantially increasing RN compensation in an effort to attract a sufficient number of RNs to their respective hospitals. The history of hospital RN compensation and vacancy rates in the Memphis MSA, however, reveals that hospital RNs are not being compensated at competitive levels. Despite years of high vacancy rates, compensation for hospital RNs in the Memphis MSA has remained low and surprisingly stagnant. The few compensation increases in the past several years have been far too small to substantially decrease the area's nursing shortage.

4. Plaintiffs, on their own behalf and on behalf of the Class defined below, seek to recover for the compensation properly earned by RNs employed at Memphis-area hospitals but unlawfully retained by such hospitals as a result of the conspiracy alleged herein. Plaintiffs also seek costs, including reasonable attorneys' fees and interest, as allowed by law.

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JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1337(a).

6. Venue is proper in this District pursuant to 15 U.S.C. §§ 15(a) and 22, and 28 U.S.C. § 1391(b), (c).

PARTIES

7. Plaintiff Suzanne C. Clarke is an RN who worked as an RN at hospitals operated by Methodist Healthcare from 1979 until 2006. She resides in Memphis, Tennessee.

8. Plaintiff Conise P. Dillard is an RN who worked as an RN at Baptist Memorial Hospital in Memphis from 1998 until 2004 and from 2005 until March 2006. She resides in Cordova, Tennessee.

9. Defendant Baptist Memorial Healthcare Corporation ("Baptist Memorial") is a Tennessee corporation with its principal place of business located at 350 North Humphreys Boulevard, Memphis, Tennessee 38120. Baptist Memorial is a healthcare system that operates hospitals and health care facilities within the Memphis MSA, including the following hospitals: Baptist Memorial Hospital – Memphis ("Baptist Hospital"), located at 6019 Walnut Grove Road, Memphis, Tennessee 38120, which has a 625 bed capacity and employs approximately 840 RNs; Baptist Memorial Hospital for Women ("Baptist for Women"), located at 6255 Humphreys Boulevard, Memphis, Tennessee 38120, which has a 140 bed capacity and employs approximately 203 RNs; Baptist Memorial Hospital – DeSoto ("Baptist DeSoto"), located at 7601 Southcrest Parkway, Southaven, Mississippi 38671, which has a 199 bed capacity and employs

approximately 284 RNs; Baptist Rehabilitation – Germantown ("Baptist Germantown"), located at 2100 Exeter Road, Germantown, Tennessee 38131, which has a 51 bed capacity and employs approximately 50 RNs; Baptist Memorial Hospital – Tipton, ("Baptist Tipton") located at 1995 Highway 51 South, Covington, Tennessee 38019, which has a 54 bed capacity and employs approximately 98 RNs.

10. Defendant Methodist Healthcare is a Tennessee corporation with its principal place of business located at 1265 Union Avenue, Suite 700, Memphis, Tennessee 38104. Methodist Healthcare is a healthcare system, which operates hospitals within the MSA, including Methodist University Hospital ("Methodist Hospital"), which is located at 1265 Union Avenue, Suite 700, Memphis, Tennessee 38014. Methodist Hospital is a private hospital located within the Memphis MSA. It has a 1281 bed capacity and employs approximately 2676 RNs. Methodist Healthcare also operates other hospitals within the Memphis MSA, including the following hospitals: Methodist North Hospital ("Methodist North"), located at 3960 New Convington Pike, Memphis, Tennessee 38128; Methodist South Hospital ("Methodist South"), located at 1300 Wesley Drive, Memphis, Tennessee 38116; and Methodist LeBonheur Germantown Hospital ("Methodist Germantown"), located at 7691 Poplar Avenue, Germantown, Tennessee 38138; and Methodist Fayette Hospital ("Methodist Fayette"), located at 214 Lakeview Drive, Somerville, Tennessee 38068.

CO-CONSPIRATORS

11. Various other hospitals and individuals not named as defendants in this complaint have participated as co-conspirators with defendants in the violations alleged herein.

CLASS ACTION ALLEGATIONS

12. Plaintiffs bring this action under Federal Rule of Civil Procedure 23(b)(3) on their own behalf and on behalf of the following Class:

> All persons employed by any defendant or co-conspirator to work in a hospital in the Memphis MSA as an RN at any time from June 20, 2002 until the present.

13. Plaintiffs do not know the exact number of Class members because such information is in the exclusive control of defendants. As of 2005, there were more than 6,000 full-time-equivalent RNs employed by Memphis area hospitals.

14. Questions of law and fact that are common to the plaintiffs and other members of the Class predominate over questions that affect only individual members. The questions of law and fact that are common to the Class include:

a. Whether Memphis-area hospitals, including defendants, have conspired to depress the compensation they paid to their RN employees during the Class period;

b. Whether the alleged conspiracy has been effective in depressing RN compensation;

c. Whether Memphis-area hospitals, including defendants, have agreed to share regularly with each other detailed and non-public data about current and prospective RN employee compensation;

d. Whether defendants and the other Memphis-area hospitals have regularly exchanged detailed and non-public information about current and future RN employee compensation;

e. Whether the exchange of such information suppressed competition among Memphis-area hospitals in the compensation of RN employees, and depressed the compensation paid to such employees; and

f. The formula and data for estimating the amount by which Class members' compensation was depressed.

15. Plaintiffs' claims are typical of the claims of the members of the Class because plaintiffs, like all Class members, are RNs who have been employed by one or more of the Memphis-area hospitals during the Class period and have been damaged by the unlawful conduct alleged herein. Plaintiffs, by advancing their own claims, will also advance the claims of all members of the Class.

16. Plaintiffs and their counsel will fairly and adequately protect the interests of all Class members. There are no material conflicts between plaintiffs' interests in this litigation and those of Class members that would make class certification inappropriate. Counsel for plaintiffs are experienced in antitrust class actions, and will vigorously assert plaintiffs' claims and those of the other Class members.

17. Class action treatment is superior to the alternatives for the fair and efficient adjudication of the causes of action alleged herein. Such treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently, and without the duplication of effort and expense that numerous individual actions would entail. No difficulties are likely to be encountered in the management of this case that would preclude its maintenance as a class action.

INTERSTATE TRADE AND COMMERCE

18. Each of the hospitals named as a defendant herein provides patient care for persons coming to that hospital from states other than Tennessee.

19. Each defendant named herein compensates the RNs it employs within the Memphis MSA in part with funds provided by insurance carriers and other health care providers that are located in states other than Tennessee. These carriers and providers render payments to each named defendant by mailing funds across state lines.

20. Each defendant named herein also compensates the RNs it employs within the Memphis MSA in part with Medicare funds paid to each defendant by the United States; these payments to each named defendant are mailed across state lines.

21. The defendants named herein also operate hospitals in states other than Tennessee.

22. The unlawful conduct alleged herein directly involves and substantially affects interstate trade and commerce.

FACTUAL BACKGROUND

The Memphis MSA Hospital RN Market

23. The Memphis MSA is comprised of Fayette County, Tennessee, Shelby County, Tennessee, and Tipton County Tennessee, as well as neighboring counties in Arkansas and Mississippi.

24. Hospitals in the Memphis MSA currently employ more than 6,000 full-time-equivalent RNs.

25. This market is heavily concentrated. The named defendants employ approximately 68% of the hospital RNs in the Memphis MSA.

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Conspiracy to Suppress RN Compensation

26. Beginning before June 2002 and continuing to the present, defendants have conspired with each other and with other Memphis-area hospitals to depress the compensation paid to RNs employed at hospitals within the Memphis MSA.

27. In furtherance of their conspiracy, defendants and their co-conspirators have done those things they agreed to do, including:

a. Agreeing to regularly exchange, and regularly exchanging, detailed and non-public data concerning the compensation each is paying or will pay to its RN employees;

b. Agreeing not to compete, and not competing, with each other in the setting of RN employee compensation;

c. Paying RN employees at the same or nearly the same rate as each other; and

d. Jointly recruiting RNs at job fairs and elsewhere to avoid competing to attract new RNs to their respective hospitals.

28. In particular, during and before the Class period, the actions of defendants and their co-conspirators taken in furtherance of the conspiracy have included the following.

29. Human resources employees working at defendant and co-conspirator hospitals have regularly surveyed each other to determine the compensation for RNs at competing hospitals, including any scheduled increases in RN compensation. These information exchanges have increased in frequency and detail at the end of each fiscal year when hospitals draft budgets and decide on RN compensation levels for the following year. Hospital administrators in the Memphis MSA have used this information

to set RN compensation. Human resources employees have been evaluated by their superiors on their ability to accomplish this RN compensation coordination.

30. During the class period, hospitals within the Memphis MSA have paid very similar RN compensation.

31. Defendants' unlawful conspiracy has had the following effects, before and during the Class period:

a. Competition among defendants and their co-conspirators in the recruitment and compensation of hospital RN employees in the Memphis area has been restrained;

b. Compensation for hospital RN employees in the Memphis MSA has been at artificially low levels; and

c. Memphis-area hospitals have underutilized RNs, yielding low nurse-to-patient ratios, forcing RNs to work harder for longer hours, and reducing patient quality of care.

32. Defendants' conspiracy to depress RN wages raises a serious healthcare issue. The Antitrust Division of the U.S. Department of Justice noted in its "Statements of Antitrust Enforcement Policy in Health Care" that "[a] collusive restriction on the compensation paid to health care employees, for example, could adversely affect the availability of health care personnel." Similarly, numerous studies have shown a strong correlation between the numbers of RNs that a hospital employs per patient and the hospital's morbidity and mortality rates. Although defendants and their co-conspirators, like hospitals across the country, complain about the RN shortage, they have not taken

the most basic remedial action to alleviate it – they have not offered RNs competitive wages.

Injury to Plaintiffs and the Class

33. During the Class Period (and before), plaintiffs have suffered substantial economic harm in the form of lost compensation as a direct result of defendants' and their co-conspirators' unlawful agreement to depress RN compensation and their unlawful agreement to exchange RN compensation information.

COUNT I

CONSPIRACY TO DEPRESS WAGES IN VIOLATION OF SECTION 1 OF SHERMAN ANTITRUST ACT

34. Plaintiffs re-allege the allegations in paragraphs 1-33 as if set forth fully herein.

35. Beginning before June 2002 and continuing until the present, defendants and their co-conspirators have engaged in a continuing conspiracy in restraint of trade to depress the compensation of RNs employed at hospitals in the Memphis MSA, in violation of Section 1 of the Sherman Act, 15 U.S.C. §1.

36. Pursuant to this unlawful conspiracy, defendants and their co-conspirators have set the compensation of RNs employed at hospitals in the Memphis MSA at artificially low levels.

37. As a result of the unlawful conspiracy alleged in this Count, plaintiffs and the other members of the Class have been injured in their business or property by receiving artificially depressed compensation during and before the Class period.

COUNT II

CONSPIRACY TO EXCHANGE COMPENSATION INFORMATION IN VIOLATION OF SECTION 1 OF SHERMAN ANTITRUST ACT

38. Plaintiffs re-allege the allegations in paragraphs 1-37 as if set forth fully herein.

39. Beginning before June 2002 and continuing until the present, defendants and their co-conspirators have engaged in a continuing agreement to regularly exchange detailed and non-public information about the compensation being paid or to be paid to their RN employees. This agreement is an unreasonable restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. §1.

40. This information-exchange agreement has reduced competition among Memphis-area hospitals in the compensation of their RN employees and has depressed the compensation of such employees.

41. The relevant geographic market for the claim alleged in this Count is the Memphis MSA, and the relevant service market consists of the services provided to hospitals by RN employees.

42. A slight decrease in RN compensation from a competitive level could be imposed collectively by the conspiring hospitals in the Memphis MSA without causing too many RNs to move to any non-conspiring hospitals within the Memphis MSA, to non-hospital employers within the Memphis MSA or to employers outside the Memphis MSA.

43. RNs often are constrained from moving to another geographic area because of region-specific licensing requirements, as well as other professional and familial obligations.

44. Hospital RNs possess unique skill sets and gain industry-specific experience as they work, which renders them more valuable to hospitals than to non-hospital RN employers. As they gain experience, hospitals become the only practical outlets for hospital RNs to sell their services at an amount reflecting their skills and knowledge. Other potential employers, such as doctors' offices, nursing homes and outpatient clinics, offer RNs compensation substantially below that offered by hospitals.

45. Memphis-area hospitals expend significant resources accumulating information about compensation paid to RNs at other hospitals in the Memphis MSA, but not about compensation paid to non-hospital RNs or RNs working outside the Memphis MSA. Memphis-area hospitals rely on this compensation information to set RN compensation levels, reflecting their own understanding that the relevant market involves only hospital RN employees in the Memphis area.

46. Defendants and their co-conspirators comprise nearly 100% of the hospitals within the Memphis MSA. Collectively, they have substantial market power within the relevant market, including the power jointly to set hospital RN employee compensation below competitive levels. This joint power clearly exists because it in fact has been used to pay Class members sub-competitive compensation. Moreover, RNs, like most laborers, cannot withhold their services until a later date as a means of negotiating for a higher compensation rate. They depend on a regular income. This weakens their negotiating position with hospitals and enhances the hospitals' market power.

47. The information-exchange agreement has had the effect of suppressing competition among Memphis-area hospitals in the compensation of their RNs. The agreement's anticompetitive effect is apparent from the following facts, among others:

a. The information regularly exchanged by Memphis-area hospitals pursuant to the agreement has been detailed and non-public information about current and future RN compensation. An agreement to exchange information of this type eliminates a major incentive of hospitals to increase RN compensation. The advantage of raising RN compensation is to attract more and better RN candidates by exceeding the compensation (as estimated from properly available competitive intelligence) paid by competing hospitals. But if a hospital knows that it cannot keep its superior compensation confidential from competitors, it will not offer such compensation in the first place. Without confidentiality, a hospital knows that most or all competing hospitals will match its higher compensation levels. The result is higher labor costs with no competitive advantage. An agreement to regularly exchange detailed and non-public information about current and prospective RN compensation assures that superior compensation will be timely and specifically known by competitors. Such an agreement, therefore, eliminates the incentive of hospitals to outbid their competitors.

b. Hospitals view RNs, within a few basic categories of experience and specialization, as fungible, permitting hospitals readily to compare and match each other's compensation.

c. The exchange of compensation information increases the relative bargaining power of hospitals in setting RN wages. With such information, hospitals know what others are paying their RN employees, while RN employee applicants, who lack access to most or all of such (non-public) information, know much less about the competitive landscape.

d. The regularity and detail of the information exchanged, the relationships of trust developed among the individuals exchanging the information, and the assurances given that the information would not be used for competitive advantage, encouraged defendants and their co-conspirators to use the information to match and not exceed each other's RN employee compensation levels.

48. For these reasons, the effect of the information-exchange agreement, before and during the Class period, has been to reduce competition among hospitals in the compensation of RN employees and to depress such compensation.

49. As a result of the unlawful agreement alleged herein to exchange RN compensation information, plaintiffs and the other members of the Class have been injured in their business or property by receiving artificially depressed compensation during and before the Class period.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs, on behalf of themselves and the Class, pray that:

A. The Court declare, adjudge, and decree this action to be a proper class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of the Class defined herein;

B. Defendants' actions alleged herein be adjudged and decreed to be in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1;

C. Plaintiffs and the other members of the Class recover their damages against each defendant, jointly and severally, in an amount to be determined, and that this damage amount be trebled pursuant to 5 U.S.C. §15(a);

D. Plaintiffs and the other members of the Class, to the greatest extent allowed by law, be awarded interest at the highest legal rate from and after the date of service of this Complaint;

E. Plaintiffs and the other members of the Class recover their costs of this suit, including reasonable attorneys' fees, as provided by law; and

F. Plaintiffs and the other members of the Class be granted such other relief deemed proper to this Court.

JURY TRIAL DEMAND

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiffs demand a trial by jury of all issues so triable in this case.

Dated: June 20, 2006

s/Gary K. Smith (#1824)

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