THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE: HAWAIIAN AND GUAMANIAN CABOTAGE ANTITRUST LITIGATION	No. 08-md-1972 TSZ
This Document Relates to: ALL ACTIONS	SECOND AMENDED CONSOLIDATED CLASS ACTION COMPLAINT JURY TRIAL DEMANDED

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Plaintiffs complain and allege upon information and belief, except as to those paragraphs applicable to named Plaintiffs, which are based on personal knowledge, as follows:

I. INTRODUCTION

1. Plaintiffs, individually and on behalf of the class described below, bring this action against Defendants for treble damages and injunctive relief under the federal antitrust laws of the United States, in particular Sections 1 and 3 of the Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1, 3 ("Sherman Act"), and Sections 4 and 16 of the Clayton Antitrust Act of 1914, 15 U.S.C. §§ 15, 26 ("Clayton Act"). Defendants are providers of ocean shipping services. They conspired to fix, raise, and maintain the prices of ocean shipping services between the continental United States and the State of Hawaii ("Hawaii"), between the continental United States and the Territory of Guam ("Guam"), and between Hawaii and Guam (collectively, the "Hawaii/Guam market") from at least October 11, 1999 through at least April 19, 2008 (the "Class Period"). As a result of Defendants' unlawful conduct, Plaintiffs and members of the proposed Class suffered damages that they would not have suffered in a competitive market.

2. Hawaii is a chain of islands in the Pacific Ocean situated over 2,000 nautical miles from the west coast of the United States. Because of its location, Hawaii depends almost entirely on ocean shipping to import essential commodities like food, clothing, fuel, and building materials, as well as to export its local products like pineapple, sugar, molasses, and livestock. By one estimate, 98.6% of Hawaii's imports arrive by ocean shipping. Since 1997, according to the U.S. Department of Transportation ("DOT"), the Hawaii trade, in terms of tonnage, has been the largest of the noncontiguous domestic ocean shipping markets. Defendants generate more than $1.5 billion a year from the Hawaii trade.

3. Guam is comprised of several islands in the western Pacific Ocean. It is even farther from the continental United States than is Hawaii, lying approximately 6,000 nautical miles from the west coast of the United States. Guam contains a significant American military presence. The Guamanian economy depends on U.S. military spending, tourism, and the export

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of fish and handicrafts. Importation of goods and commodities from the continental United States constitutes the majority of the Guam cargo shipping trade.

4. Defendants are the two primary providers of ocean shipping services in the Hawaii market and the only carriers in the Guam market. Together, Defendants control slightly less than 100% of the carriage of cargo by sea between the continental United States and Hawaii, and 100% of the carriage of cargo by sea between the continental United States and Guam.

5. During the Class Period, Defendants used their power in the Hawaii/Guam market to impose unfair and illegal charges on individuals and businesses that ship between Hawaii, Guam, and the United States mainland. Defendants colluded to set and stabilize artificially high prices for the shipment of goods in the Hawaii/Guam market and accomplished their conspiracy by at least the following means: (1) coordinating fuel surcharges; (2) reducing and stabilizing the available shipping capacity; (3) allocating customers; and (4) refusing to enter into private contracts with freight forwarders as permitted by 49 U.S.C. § 14101(b)(1).

6. Plaintiffs' claims are within this Court's jurisdiction. In 1995, Congress passed the Interstate Commerce Commission Termination Act ("ICCTA"), with the intent to deregulate the domestic water trade. The ICCTA created a new agency, the Surface Transportation Board ("STB"), giving it limited jurisdiction over water carrier rates that fall outside of a defined "zone of reasonableness" ("ZOR"). The ICCTA deregulated all rates that fall *within* the ZOR, which includes all of the fuel surcharges and rates that form the basis of Plaintiffs' price-fixing claim. In addition, the ICCTA exempted certain areas of trade from the jurisdiction of the STB, including bulk cargo, forest products, and trade that occurs pursuant to private contracts. In all, the ICCTA did not grant the STB jurisdiction over the antitrust claims that Plaintiffs bring here. Indeed, the STB has neither reviewed nor approved of any of the rates at issue in this litigation.

7. Five shipping executives have already pled guilty to antitrust violations, including the fixing of base rates and surcharges, related to domestic shipping to and from Puerto Rico. Three of them are current or former executives of Defendant Horizon Lines, LLC, and the

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remaining two are from Sea-Star Lines ("Sea-Star"), which Defendant Matson Navigation Company, Inc. jointly operated with Seattle-based Saltchuk Resources, Inc. ("Saltchuk"), until 2004. The two Sea-Star executives pled guilty to antitrust violations committed between 2002 and 2008, which encompasses the period of time during which Matson Navigation Company, Inc. jointly owned and operated Sea-Star. According to the United States Department of Justice ("DOJ"), the entire domestic noncontiguous ocean shipping industry, including the Hawaii/Guam market, is under investigation. The Hawaii/Guam market is substantially similar in structure to the Puerto Rico market, and there is a high degree of overlap among Defendants that operate in these trade lanes. In light of the admitted antitrust violations in the Puerto Rico trade, and the similarities and overlap in the markets, a conspiracy in the Hawaii/Guam market is plausible.

II. JURISDICTION AND VENUE

8. This action is brought under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26, to obtain injunctive relief and to recover treble damages and the costs of this suit, including reasonable attorneys' fees, against Defendants for the injuries sustained by Plaintiffs and the members of the Class (defined herein at paragraph 112) by reason of Defendants' violations of Sections 1 and 3 of the Sherman Act, 15 U.S.C. §§ 1, 3.

9. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1337, and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26.

10. Venue is proper in this judicial district pursuant to Section 12 of the Clayton Act and 28 U.S.C. § 1391(b), (c), and (d) because during the Class Period a substantial part of the events giving rise to Plaintiffs' claims occurred in this District, a substantial portion of the affected interstate trade and commerce discussed below has been carried out in this District, and one or more of the Defendants resided, transacted business, was found, or had agents in this District. All Plaintiffs identified herein submit to the jurisdiction of this Court by the filing of this Second Amended Consolidated Class Action Complaint.

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11. No other forum would be more convenient for the parties and witnesses to litigate this case. By virtue of their contacts and activities, Defendants are subject to the jurisdiction of this Court.

12. Venue is also appropriate in this District because the Judicial Panel on Multidistrict Litigation has ordered that these cases be centralized in this District.

III. PARTIES

A. Plaintiffs

13. Plaintiff **50th State Distributors, Inc.**, d/b/a Santa's Christmas Trees, transports Christmas trees that are bundled and tied and as such constitute "forest products" which are exempt from tariffs under 49 U.S.C. § 13702(a)(1). During the Class Period, 50th State Distributors, Inc. purchased domestic ocean cargo shipping services on Defendants' west coast-Hawaii routes, paid fuel surcharges thereon, and suffered direct pecuniary injury and damages as a result of the antitrust violations alleged herein.

14. Plaintiff **Acutron Company, Inc.** is an insulation contractor. During the Class Period, Acutron Company, Inc. purchased domestic ocean cargo shipping services on Defendants' west coast-Hawaii routes, paid fuel surcharges thereon, and suffered direct pecuniary injury and damages as a result of the antitrust violations alleged herein.

15. Plaintiff **Aloha Agricultural Consultants, Inc.**, d/b/a Niu Nursery, is a horticultural products business and transports products such as mulch, plastic and clay flower pots, potting soils, potting mixes, coral chips, rocks, tree bark, wood chips, plants and Christmas trees that are bundled. A portion of Aloha Agricultural Consultants, Inc.'s business involves "bulk goods" and "forest products" that are exempt from tariffs under 49 U.S.C. § 13702(a)(1). During the Class Period, Aloha Agricultural Consultants, Inc. purchased domestic ocean cargo shipping services on Defendants' west coast-Hawaii routes, paid fuel surcharges thereon, and suffered direct pecuniary injury and damages as a result of the antitrust violations alleged herein.

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16. Plaintiff **Bluewater Marine & Dock Specialties, Inc.** is a modular dock specialist that ships equipment and materials required for dock construction and marinas. During the Class Period, Bluewater Marine & Dock Specialties, Inc. purchased domestic ocean cargo shipping services on Defendants' west coast-Hawaii, west coast-Guam, and Hawaii-Guam routes, paid fuel surcharges thereon, and suffered direct pecuniary injury and damages as a result of the antitrust violations alleged herein.

17. Plaintiff **Honolulu Hardwoods, Inc.** is a wholesale building products business and transports various products, including bundled lumber, hardwoods, plywoods and building materials that are "forest products" and are exempt from tariffs pursuant to 49 U.S.C. § 13702(a)(1). During the Class Period, Honolulu Hardwoods, Inc. purchased domestic ocean cargo shipping services on Defendants' west coast-Hawaii routes, paid fuel surcharges thereon, and suffered direct pecuniary injury and damages as a result of the antitrust violations alleged herein.

18. Plaintiff **Jeanne Thomas**, d/b/a Mr. Christmas Tree, transports Christmas trees that are bundled and tied and as such constitute "forest products" which are exempt from tariffs under 49 U.S.C. § 13702(a)(1). During the Class Period, Jeanne Thomas purchased domestic ocean cargo shipping services on Defendants' west coast-Hawaii routes, paid fuel surcharges thereon, and suffered direct pecuniary injury and damages as a result of the antitrust violations alleged herein.

19. Plaintiff **Next Transportation, LLC** was previously known as National Express Transportation. During the Class Period, Next Transportation, LLC purchased domestic ocean cargo shipping services on Defendants' west coast-Hawaii routes, paid fuel surcharges thereon, and suffered direct pecuniary injury and damages as a result of the antitrust violations alleged herein.

20. Plaintiff **SJ Venture Group, LLC**, d/b/a Pacific Imports International, is in the business of shipping wood flooring and lumber for decking and transports lumber and plywood

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that is bundled. These constitute "forest products" which are exempt from tariffs under 49 U.S.C. § 13702(a)(1). During the Class Period, SJ Venture Group, LLC purchased domestic ocean cargo shipping services on Defendants' west coast-Hawaii routes, paid fuel surcharges thereon, and suffered direct pecuniary injury and damages as a result of the antitrust violations alleged herein.

21. Plaintiff **T.J. Gomes Trucking Co., Inc.** is a trucking company and ships most of its trucks and truck parts from the mainland. During the Class Period, T.J. Gomes Trucking Co., Inc. purchased domestic ocean cargo shipping services on Defendants' west coast-Hawaii routes, paid fuel surcharges thereon, and suffered direct pecuniary injury and damages as a result of the antitrust violations alleged herein.

22. Plaintiff **Versa Dock Hawaii, LLC** is in the modular floating dock business and transports plastic modular docks. During the Class Period, Versa Dock Hawaii, LLC purchased domestic ocean cargo shipping services on Defendants' west coast-Hawaii routes, paid fuel surcharges thereon, and suffered direct pecuniary injury and damages as a result of the antitrust violations alleged herein.

23. Plaintiff **Winkler Woods, LLC** is a Hawaiian hardwood specialist that ships raw wood and finished wood products. These constitute "forest products" which are exempt from tariffs under 49 U.S.C. § 13702(a)(1). During the Class Period, Winkler Woods, LLC purchased domestic ocean cargo shipping services on Defendants' west coast-Hawaii routes, paid fuel surcharges thereon, and suffered direct pecuniary injury and damages as a result of the antitrust violations alleged herein.

B. Defendants

24. Defendant **Matson Navigation Company, Inc.** is a Hawaii corporation with its principal place of business in Oakland, California. It has participated in substantial business dealings in this District, including the provision of domestic noncontiguous ocean shipping

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services between the continental United States, Hawaii, and Guam. Matson Navigation Company, Inc. is a wholly-owned subsidiary of Alexander & Baldwin, Inc.

25. Defendant **Alexander & Baldwin, Inc.** is a Hawaii corporation with its principal place of business in Honolulu, Hawaii. It has participated in substantial business dealings in this District, including the provision of domestic noncontiguous ocean shipping services between the continental United States, Hawaii, and Guam.

26. Defendants **Matson Navigation Company, Inc.** and **Alexander & Baldwin, Inc.** are referred to collectively as **"Matson"** or as the **"Matson Defendants."**

27. Defendant **Horizon Lines Holding Co.** is a Delaware corporation with its principal place of business in Charlotte, North Carolina. It has participated in substantial business dealings in this District, including the provision of domestic noncontiguous ocean shipping services between the continental United States, Hawaii, and Guam. Horizon Lines Holding Co. is the holding company for Horizon Lines LLC.

28. Defendant **Horizon Lines, Inc.** is a Delaware corporation with its principal place of business in Charlotte, North Carolina. It has participated in substantial business dealings in this District, including the provision of domestic noncontiguous ocean shipping services between the continental United States, Hawaii, and Guam.

29. Defendant **Horizon Lines, LLC** is a Delaware corporation with its principal place of business in Charlotte, North Carolina. From 2001 to 2003, Defendant Horizon Lines, LLC was known as CSX Lines, LLC. CSX Lines, LLC was the successor to the domestic ocean shipping business of Sea-Land Corp., which itself was the successor to U.S. Lines. Horizon Lines, LLC operates a fleet of 21 U.S.-flag containerships and five port terminals linking the continental United States with Alaska, Hawaii, Guam, Micronesia, and Puerto Rico. Horizon Lines, LLC has participated in substantial business dealings in this District, including the provision of domestic noncontiguous ocean shipping services between the continental United States, Hawaii, and Guam.

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30. Defendants **Horizon Lines Holding Co., Horizon Lines, Inc., Horizon Lines, LLC, and their predecessor entities** are referred to collectively as **"Horizon"** or as the **"Horizon Defendants."**

IV. UNNAMED CO-CONSPIRATORS AND AGENTS

31. On information and belief, at all relevant times, other entities or individuals, not named as Defendants herein and presently unknown to Plaintiffs, participated as co-conspirators with Defendants and have performed acts and/or made statements in furtherance of the conspiracy and in furtherance of the anticompetitive, unfair or deceptive conduct as described in this Second Amended Complaint. All averments in this complaint against named Defendants are also averred against these unnamed co-conspirators as though set forth at length.

32. The acts alleged to have been done by Defendants were authorized, ordered, done, or condoned by their directors, officers, agents, employees, or representatives while actively engaged in the management and in furtherance of each of the Defendants' affairs.

V. INTERSTATE AND TERRITORIAL TRADE AND COMMERCE

33. Throughout the Class Period, there was a continuous and uninterrupted flow of domestic noncontiguous ocean shipping in commerce between the continental United States and the Hawaii, between the continental United States and Guam, and between Hawaii and Guam.

34. Defendants' unlawful activities, as described in this Second Amended Complaint, took place within the flow of interstate and territorial commerce involving domestic noncontiguous ocean shipping along the Hawaii and Guam routes and had a direct, substantial and reasonably foreseeable effect upon interstate and territorial commerce.

35. The business activities of the Defendants constitute interstate and territorial trade and commerce.

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VI. FACTUAL ALLEGATIONS

A. The Jones Act

36. Noncontiguous domestic ocean shipping takes place between the continental United States and Hawaii, Guam, Puerto Rico, and Alaska. The domestic noncontiguous ocean shipping industry is subject to the restrictions of the Merchant Marine Act of 1920, 46 U.S.C. § 55102 (the "Jones Act").

37. The Jones Act prohibits foreign competition in the domestic ocean shipping industry. The Jones Act requires that any goods "transported by water, or by land and water . . . between points in the United States . . . either directly or via a foreign port" be shipped by a vessel that "is wholly owned by citizens of the United States for purposes of engaging in the coastwise trade" and has been issued a "certificate of documentation" or is exempt from documentation. 46 U.S.C. § 55102(b).

38. The Jones Act applies different domestic shipping standards to the Hawaii trade than to the Guam trade. The Hawaii trade requires ships to be wholly Jones Act compliant, meaning that they must be built, owned, flagged, crewed, and operated by citizens of the United States. The Guam trade, however, operates under an exception to the Jones Act, allowing for ships that are foreign-built, though they still must be owned, flagged, and crewed by U.S. citizens. *See* 46 U.S.C. §§ 12111(b) & 12115(b).

39. Businesses that operate in the domestic ocean shipping market, such as Defendants, are known as "Jones Act carriers." The Jones Act carriers annually transport approximately one billion tons of cargo.

40. Although the Jones Act is a protectionist regulation, it does not permit collusion, market sharing, market allocation, market manipulation or price fixing. Such anticompetitive conduct by Jones Act carriers is illegal under the Sherman Act, subject to certain exemptions not applicable here. *See* 46 U.S.C. § 40307 (listing exemptions).

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B. Market Overview

41. Matson and Horizon service Hawaii primarily on "turnaround" routes, in which Hawaii is the primary or only destination. Thus, the Hawaiian service operated by both Defendants has historically been self-contained. The bulk of the cargo on the Hawaii routes travels East to West, from the U.S. mainland to Hawaii. As a result, capacity is generally close to full on the Westbound route and relatively empty on the Eastbound route.

42. Matson and Horizon are the only two companies that provide ocean shipping services from the continental United States to Guam. Each company operates approximately five containerships on the Guam shipping route. Guam is serviced by these ships as part of the lucrative Transpacific trade route between the U.S. and Asia. Consequently, the opportunity cost of making a trip to Guam is very low. Because the Guam trade is subsumed within the Transpacific trade, it is difficult to allocate the costs of fuel, crew, and other expenses between items shipped to and from Guam and items shipped to and from Asia.[1]

C. Characteristics Of The Hawaii/Guam Market

43. The Hawaii/Guam market has several characteristics that made it easy for Defendants to conspire, including market concentration, significant barriers to entry, ease of information sharing, lack of viable alternatives to ocean shipping, and the commodity nature of ocean shipping services.

1. The market is highly concentrated

44. Together, Defendants control virtually the entire Hawaii/Guam market. For Hawaii, Matson controls approximately 65% of the market and Horizon controls approximately

[1] In spite of the fact that cargo is often delivered to Asia on the same ships that stop in Guam, the cost to ship cargo from the continental United States to Asia is significantly cheaper than the cost to ship to Guam or Hawaii. Indeed, in 2005, the cost to ship the same 40-foot container from the west coast of the United States was $4,250 to Japan, $3,575 to China, and $10,373 to Hawaii. On a per-mile basis, this equates to $0.439 to Tokyo, Japan; $0.280 to Hong Kong, China; and $2.328 to Honolulu, Hawaii. In other words, the per-nautical-mile price to ship to Hawaii was more than eight times the cost to ship to China and more than five times the cost to ship to Japan.

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35%. A very small percentage of the market is handled by specialized barges or auto carrier lines. Because of the greater distance between Guam and the continental United States, barge service is not a viable alternative to containership service. Consequently, Defendants control 100% of the shipping market to and from Guam. This high degree of concentration in the Hawaii/Guam market facilitated the anticompetitive conduct alleged here, because it is relatively easy to collude when there are only two carriers. In addition, with only two players in an industry, it is easy to monitor adherence to a conspiracy.

2. There are substantial barriers to entering the market

45. There are substantial barriers to entry into the Hawaii/Guam market. They include, but are not limited to: (1) the high costs of purchasing and maintaining an ocean transport fleet and supporting equipment (for example, it costs approximately $250 million to build a new Jones Act container ship and requires a lead time of at least one year); (2) constraints on port space; (3) expensive machinery and economies of scale; (4) a high ratio of fixed to variable costs; (5) the need to develop a customer base; (6) restrictions imposed by the Jones Act; and (7) the entrenched market positions of the incumbents. These barriers to entry facilitated the conspiracy because they enabled Defendants to agree not to compete without fear of new entrants undercutting their prices and taking away market share.

46. As Defendant Horizon explained in its 2007 Form 10-K filed with the SEC:

> Given the limited number of existing Jones Act qualified vessels, the high capital investment and long delivery lead times associated with building a new containership in the U.S., the substantial investment required in infrastructure and the need to develop a broad base of customer relationships, the markets in which we operate have been less vulnerable to over capacity and volatility than international shipping markets.

"Less vulnerable to over capacity and volatility" is a euphemism for less subject to price and capacity competition pressures.

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3. There is ease of information sharing

47. Both of the Defendants herein participate in trade association activities that have provided opportunities for information sharing. For example, both Defendants are members of the Maritime Cabotage Task Force ("MCTF"), a lobbying group founded in 1995 to oppose efforts to open the market for noncontiguous shipping. No shipper or consignee (*i.e.*, the parties paying ocean shipping bills) is represented in the MCTF. During at least part of the Class Period, Philip Grill of Matson was the Chairman of the MCTF's Board of Directors, and Chuck Raymond and Robert Zuckerman of Horizon were Board members. Horizon and Matson also belong to the Transportation Institute. The Transportation Institute is dedicated to, among other things, supporting Jones Act activities. During at least part of the Class Period, Charles Raymond of Horizon served on the Institute's Board of Directors. Thus, the executives of Matson and Horizon have maintained close relationships that fostered the conspiracy herein, and their trade association activities provided opportunities to exchange information and enter agreements.

48. Additionally, both Defendants here had ready access to industry data that allowed them to monitor the conspiracy. For example, the Port Import Export Reporting Service ("PIERS") collects and distributes, for a fee, data for the maritime industry. This data includes information from which pricing is readily ascertainable, including the size, weight, and type of container, and the type and value of cargo. By subscribing to PIERS and using other similar sources of information, Defendants were able to monitor their conspiracy and verify that it was working.

49. As another example, both Matson and Horizon utilized TAG/ICIB Services, Inc. to monitor each other's adherence to their conspiratorial agreements. TAG/ICIB offers "container inspection – cargo verification services" and "audits." Both Matson and Horizon employed TAG/ICIB to board one another's ships and to inspect the goods being shipped by each. TAG/ICIB then reported to each Defendant about the other's cargo. This was done to

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ensure that each was accurately reporting what was being shipped and to discourage cheating on the conspiracy.

4. There are no viable alternatives to ocean shipping

50. Ocean shipping is the only viable option for the Plaintiffs' and Class members' carriage because Hawaii and Guam are inaccessible by land. Competition from air transportation is limited due to the lack of large and affordable air cargo space, and the Jones Act prevents foreign-source competition. As such, demand for domestic noncontiguous ocean shipping is inelastic and near substitutes do not exist. The lack of viable economic substitutes facilitated the alleged conspiracy because it enabled the Defendants to set supra-competitive prices without fear that customers would switch to other alternatives.

5. Ocean shipping services are a fungible commodity

51. Domestic ocean shipping services are a fungible commodity because almost all shipping of general cargo (excluding certain bulk cargo) is containerized, and containers are interchangeable regardless of carrier.[2] Therefore, purchasers of ocean shipping services choose between carriers based on price, capacity, and sailing dates. Accordingly, Defendants only have to compete (or agree not to compete) on price, capacity, and sailing dates.

6. The economic structure of the Hawaii/Guam market is substantially similar to the economic structure of the Puerto Rico market

52. The economic structure of the Hawaii/Guam market is substantially similar to the economic structure in the Puerto Rico market. Both markets are highly concentrated with a

[2] Although ocean shipping services are a commodity, the ocean shipping industry itself is not homogeneous, and was not during the Class Period. Defendants operated different types of ships with different efficiencies, ran different schedules on different routes, operated at different capacities, and serviced different west coast locations. For example, Matson sailed from the ports of Seattle, Oakland, Los Angeles, and Long Beach while Horizon sailed from the ports of Tacoma, Oakland, and Los Angeles. Matson controlled roughly two thirds of the market, while Horizon controlled just under one third. Matson was vertically integrated, offering its own services for stevedoring and inter-island barge transportation, while Horizon was less vertically integrated, subcontracting almost everything but the shipping itself. Thus, although the containerized shipping services offered were similar, the market itself was never homogeneous.

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limited number of players, both are protected from foreign competition by the Jones Act's restrictions, both concern the same commodity service where few, if any, substitutes exist, and both have high barriers to entry. In addition, cargo fees are calculated by revenue ton in both markets.

53. In addition to the structural similarity of the markets, there is a high degree of corporate and individual overlap in the two markets. Horizon has participated in the Hawaii/Guam market since 1986, and it has participated in the Puerto Rico market for even longer. Recently, Horizon settled civil antitrust claims brought by shippers in the Puerto Rico trade for $20 million. In addition, three Horizon executives have pled guilty to engaging in price fixing violations in that market.

54. In addition to Matson's role in the Hawaii/Guam market, Matson has participated in other Jones Act markets. Until 2004, Matson, with partner Saltchuk, was an investor in Sea-Star. Together, Matson and Saltchuk operated Sea-Star in the Puerto Rico market. In addition to being an owner, Matson leased certain of its Jones Act ships from the Hawaii/Guam market to Sea-Star for operation in the Puerto Rico market. Two Sea-Star executives, Peter Baci and Andrew Chisholm, have pled guilty to engaging in a price-fixing conspiracy with Horizon in the Puerto Rico market starting in 2002, and during a time period when Matson owned and operated Sea-Star.

55. Matson, Horizon and Saltchuk (through its ownership and control over Sea-Star and Totem Ocean Trailer Express ("TOTE")) are the only three companies that own and operate Jones Act containerships. The ships that operate in the noncontiguous domestic ocean shipping markets are often leased and interchanged among the different markets. Due to the limited number of Jones Act qualified vessels, even minimal changes in the deployment of containerships have a profound influence on all of the Jones Act routes. The carriers in the Jones Act markets have used this interchangeability between markets as a way to artificially manipulate and curtail supply. For example, a carrier can take capacity out of one market and

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shift or "dump" it into another. The three Jones Act carriers communicate with one another to ensure that surplus ships in one trade route will not harm the profits of the carriers in the other Jones Act markets.

56. In 2002, a number of Horizon executives met with Matson executives in Honolulu, Hawaii and Charlotte, North Carolina, to discuss capacity in the Hawaii, Guam, and Puerto Rico markets. Among the attendees were Chuck Raymond, the CEO and President of Horizon, and Allen Doane, the Chairman of Matson. The executives discussed, *inter alia*, how Jones Act vessels would be distributed among the different Jones Act routes in order to control capacity in the markets.

D. Historical Background Of The Hawaii/Guam Market

57. Prior to 1986, two carriers operated in the Hawaii trade lane – Matson and U.S. Lines. U.S. Lines did not offer the same level of service as Matson and was not as popular with customers. Accordingly, U.S. Lines did not pose much of a threat to Matson. In 1986, U.S. Lines filed for bankruptcy protection and was purchased by what would eventually become Horizon.

58. After purchasing U.S. Lines, Horizon began an aggressive campaign to take market share from Matson. Between 1990 and 1995, Horizon's aggressive practices enabled it to capture an additional 6% of the market from Matson. Matson's market share declined from 73% to 67%. This 6% drop in market share was virtually unprecedented in Matson's long history, and it was perceived as a massive threat to the company's stability. In response, Matson began matching Horizon's lower prices to retain its business. By 1998, Matson was actively matching Horizon's rates, and the two companies were vigorously competing for business.

E. Defendants' Collusive Conduct During The Class Period

1. Defendants agreed to fix the price of ocean shipping services

59. In or about October 1999, Matson and Horizon's behavior changed dramatically. They began to implement their conspiracy to fix prices in the ocean shipping industry, imposing

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for the first time lockstep fuel surcharges on all cargo shipped in the Hawaii/Guam market. Defendants' first fuel surcharges that month were exactly the same: 1.75% of the base shipping fee. Thereafter, Matson and Horizon made at least 29 identical changes to their fuel surcharges, at least 24 of which were increases.

60. Initially, Defendants adjusted their fuel surcharges on a quarterly basis. Then, in May 2006, both Defendants announced they would adjust the fuel surcharges whenever they deemed necessary. By April of 2008, Defendants were both charging 33.75% of the base shipping fee as a fuel surcharge.

61. Defendants' lockstep fuel surcharges are detailed below:

Effective Date	Matson Fuel Surcharge (%)	Horizon Fuel Surcharge (%)
January-September 1999	0%	0%
October 1999	1.75%	1.75%
February 2000	2.25%	2.25%
March-April 2000	3.25%	3.25%
October 2000	4.25%	4.25%
November 2001	3.25%	3.25%
May 2002	4.75%	4.75%
October 2002	6.00%	6.00%
March 2003	7.50%	7.50%
May 2003	6.50%	6.50%
September 2003	7.50%	7.50%
March 2004	8.00%	8.00%
June 2004	8.80%	8.80%

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Effective Date	Matson Fuel Surcharge (%)	Horizon Fuel Surcharge (%)
October 2004	9.20%	9.20%
April 2005	10.50%	10.50%
July 2005	11.50%	11.50%
October 2005	13.00%	13.00%
January 2006	15.00%	15.00%
April 2006	18.50%	18.50%
June 2006	21.25%	21.25%
October 2006	19.75%	19.75%
November 2006	18.75%	18.75%
January 2007	17.50%	17.50%
March 2007	19.50%	19.50%
May 6, 2007	20.75%	20.75%
May 27, 2007	22.50%	22.50%
August 2007	24.00%	24.00%
December 2007	29.00%	29.00%
February 2008	31.50%	31.50%
April 2008	33.75%	33.75%

62. Remarkably, in the 15 months between January 2007 and April 2008, Defendants increased their fuel surcharges from 17.5% to 33.75%, an increase of almost 100%. It was only after the DOJ's antitrust investigation was announced in April 2008 that Defendants ceased their lockstep fuel surcharges and began to impose surcharges at different times and at different rates.

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63. Defendants justified their fuel surcharge increases by citing rising fuel costs. However, Matson and Horizon did not incur identical fuel expense increases on their Hawaii and Guam routes because of a number of unique factors impacting fuel costs. Moreover, Defendants' fuel surcharge increases far exceeded the actual increases in the costs of fuel during the Class Period. In reality, these surcharges had no relationship with actual increases in fuel costs, but instead were revenue generating and were the product of Defendants' collusion.

64. Fuel costs incurred by carriers vary significantly due to a number of unique factors, including: differences in vessels (which have different types of engines and fuel efficiencies); differences in type and weight of cargo; differences in operations; differences in routes and distances traveled; differences in cost and revenue structure; differences in the use of hedging against the increased cost of fuel; and, individual fuel conservation efforts undertaken by each carrier. Defendants' fuel surcharges were always calculated as a percentage of the base shipping fee, which is not reflective of the actual fuel expenditure due to the cargo shipped. Thus, there was no actual correlation between the fuel surcharge imposed and the cost of fuel incurred by Defendants.

65. Newer, more modern cargo ships use diesel fuel, whereas older ships, which are less fuel efficient, use residual fuel oil (sometimes called "bunker oil"). The stark differences in operational and fuel costs between the two Defendants can be discerned from a rough overview of Defendants' fleets. Throughout the Class Period, Matson operated a modern, fuel efficient fleet, with four ships built between 2003 and 2006 under a fleet upgrade program, one built in 1992, three diesel ships built in 1983, and two more diesel ships built in the late 1970s but retrofitted in 1993. Until 2007, Horizon never made any capital investments to upgrade or replace the vessels it purchased from U.S. Lines in 1986, and consequently operated an older, less efficient fleet than Matson.

66. In 2007, Horizon purchased five new Korean-built ships to be used in the Transpacific trade, including service to Guam. In spite of the increased efficiency of its fleet due

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to these new ships, not to mention the cost advantages of buying cheaper, foreign-built ships, Horizon continued to increase fuel surcharges for Guam routes through the end of the Class Period. This once again demonstrates that Defendants' fuel surcharge increases were the product of their collusive dealings, and did not represent the actual fuel costs incurred.

67. Fuel cost differences between Defendants were especially pronounced in the Guam trade where, until 2006, Matson provided shipping services to Guam using ships operated by American President Lines ("APL"). Between 1998 and 2006, pursuant to a long-term agreement with Matson, APL incurred all of the costs and expenses related to the operation of those vessels, including fuel costs. Matson's costs did not vary with the price of fuel on the Guam route. Nevertheless, during the Class Period, both Matson and Horizon imposed, and then continued to set, the same fuel surcharges for Guam. Again, this demonstrates that the fuel surcharges were not a cost recovery mechanism, as Matson had no fuel expenses for Guam. In a truly competitive environment, Matson would have taken advantage of this significant cost savings to compete against Horizon on price on the Guam route.

68. In the Transpacific and other international trades, fuel surcharges, if any, are imposed on a dollar-per-container basis. In the Hawaii and Guam trades, however, the fuel surcharge is imposed as a percentage of the base rate. This method of calculation assures that most customers pay a fuel surcharge that is not related to the cost of carrying their freight.

69. During the Class Period, Defendants even raised their fuel surcharges for the Hawaii/Guam market at the same time they reduced fuel surcharges from Asia to the United States, where they had other competitors.

70. Furthermore, fuel is only one of many components of the cost of shipping, and an increase in fuel alone would not justify the radical price increases imposed by Matson and Horizon. For example, in November 2007, terminal handling costs comprised 40% of Matson's operating expenses. Other major costs included repairs and maintenance (which, under the Jones Act, must be performed largely in the U.S.), crew salary, loan repayments, and administrative

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and operational costs. Thus, fuel was only a small component of the overall cost of doing business. Under these circumstances, even a large spike in fuel prices would not result in an equally large spike in the cost of doing business. Nor would that rise in fuel costs logically be connected to the overall base price of shipping services. Nonetheless, Defendants calculated fuel surcharges as a percentage of the base price of shipping services, and imposed massive increases in those surcharges throughout the Class Period.

71. Horizon stated in its 2005 Annual Report that "at times [it] may incorporate these fuel surcharges into [its] basic transportation rates." Likewise, a Matson spokesman stated in April 2007, "We do build in fuel to our pricing structure, but when it's beyond a reasonable amount, we do need to pass on those costs as a separate line item on the bill." It defies explanation that the radical increases in Defendants' fuel surcharges were caused by an increase in only one of many significant cost factors, and a cost factor that is ordinarily incorporated into the basic transportation rate. If Defendants' fuel surcharges were intended to be a legitimate cost recovery mechanism, these fuel surcharges would not have been exactly the same for both companies, at every moment, through at least 29 changes over nine years.

72. Defendants' fuel surcharges were not based on true cost and revenue factors. Rather, they were the result of collusion, generating astounding excess profits for the carriers during the Class Period.

2. Defendants agreed to reduce capacity

73. Another aspect of the conspiracy was an agreement between Defendants to reduce the shipping capacity in the Hawaii/Guam market. Due to the requirements of the Jones Act and the limited number of qualified Jones Act-certified vessels in service, the removal of even one vessel has a dramatic effect on supply for a given route. As stated above, the ships that operate in the noncontiguous domestic shipping industry are interchangeable among the different trades, and Defendants have used this interchangeability between markets as a way to artificially manipulate and curtail supply.

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74. In or about July of 2001, Matson and Horizon entered into an agreement whereby Horizon would cancel one of its mid-week sailings to Hawaii, removing a ship from the Hawaii market. In exchange, Matson agreed to carry significant volumes of Horizon's cargo at a reduced rate. Matson charged Horizon about one-half the price charged to other Matson customers for the same amount of freight. Under this arrangement, Matson provided Horizon with 140 container slots per sailing. This was a naked agreement between competitors to reduce shipping capacity and frequency of sailing, and a *per se* violation of the antitrust laws, thereby allocating the majority of the off-week market and driving up prices. Matson spokesman Jeff Hull said "the two companies have a long history of cooperation, and . . . the agreement was an 'extension' of that cooperation."

75. Shortly thereafter, and pursuant to the agreement, Matson removed one of its ships from the Hawaii/Guam market, further reducing capacity. Defendants used this contrived reduction in capacity to increase prices to shippers.[3]

76. In 2002, as described at paragraph 56, executives from Matson and Horizon met to discuss capacity on the Jones Act routes and how vessels in the Hawaii/Guam market might be transferred to the other Jones Act trades in order to limit capacity in the Hawaii/Guam market.

77. In addition to sharing and manipulating capacity, Defendants used their stranglehold over the Hawaii/Guam market to block potential competitors from entering the market and adding capacity. Anytime a new entrant attempted to enter the market, or was even rumored to be entering, Defendants took steps to eliminate them. For example, in 2004, Kvaerner, a Norwegian company, purchased a former U.S. naval shipyard in Philadelphia. Kvaerner converted the Philadelphia shipyard for commercial, non-military use and agreed to

[3] This arrangement between Defendants is strikingly similar to an arrangement between Horizon and Sea-Star (when it was jointly operated by Matson and Saltchuk) in the Puerto Rico trade. In 2002, Sea-Star and Horizon entered into an agreement where Sea-Star purchased cargo space from Horizon in order to reduce capacity in that market. As discussed herein, three employees of Horizon and two employees of Sea-Star have pled guilty to antitrust violations in the Puerto Rico trade.

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produce five Jones Act-compliant containerships. Matson initially bought three of those ships. Then, a potential competitor, Ocean Blue Express, entered into negotiations to purchase the remaining two. Pursuant to its agreement with Horizon to limit capacity in the Hawaii/Guam market, Matson quickly bought up the last two containerships from Kvaerner, precluding Ocean Blue Express from acquiring the vessels. The sale also included a right of first refusal for Matson on additional containerships, thus preserving Defendants' control of the market pursuant to their conspiracy.

78. Also pursuant to its conspiracy with Horizon, Matson chartered the Great Land, a ro-ro (roll-on/roll-off) vessel that competitor The Pasha Group ("Pasha") was trying to obtain from TOTE. By preventing Pasha from using the Great Land, Matson limited Pasha's auto barge competition in the Hawaii market.

79. Similarly, Defendants have blocked potential competitors from acquiring Defendants' used Jones Act vessels. Pursuant to their agreement to limit capacity in the Hawaii and Guam trades, when Matson and Horizon sold their Jones Act ships for scrap, the contracts specified that the vessels could not be resold by the scrap yard or operated by potential competitors.

3. Defendants allocated customers

80. During the Class Period, Matson and Horizon allocated customers between themselves in the Hawaii/Guam market. Certain customers were referred to as "Matson" customers, and others were referred to as "Horizon" customers. Each Defendant agreed not to deal with the other's customers. For example, despite Matson's industry dominance and more efficient fleet, Horizon retained Wal-Mart as a stalwart customer, with no apparent attempt by Matson to take the business. Horizon was even selected as Wal-Mart's "Jones Act Carrier of the Year" in at least 2001, 2005, 2007, and 2008.

81. As a result of this customer allocation, Matson and Horizon's respective market shares of the westbound trade to Hawaii remained virtually unchanged during the Class Period.

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After the announcement of the DOJ investigation, however, both Matson and Horizon began doing business with customers who had traditionally been allocated to the other Defendant.

4. Defendants refused to compete against each other or enter into private contracts with freight forwarders

82. Another aspect of the conspiracy involved a refusal by Horizon and Matson to enter into private contracts with freight forwarder customers as permitted by 49 U.S.C. § 14101(b)(1). Despite repeated requests from freight forwarders who could purchase large volumes of cargo space, both Defendants steadfastly refused to give freight forwarders contract pricing in the Hawaii/Guam market. This was a departure from their pre-conspiracy practices.

83. If freight forwarders had been given access to contract pricing (which would have been lower than the rates they paid), freight forwarders would have been able to compete in the Full Container Load ("FCL") market with Defendants and thereby offer their customers lower prices. In other words, it would have resulted in a competitive market because shippers would have had the option of shipping FCLs through a freight forwarder. Shippers would have been given an alternative for their FCL shipping needs and would not have been forced to pay Defendants' artificially high rates. The result of Defendants' conduct was that by controlling access to contracts in a concerted fashion, they were able to maintain high prices across the board.

84. At the same time that Defendants were refusing to offer private contracts to freight forwarders, Defendants entered into private contracts with certain "proprietary purchasers" that posed no threat of competition to Defendants.[4]

[4] One source estimates that approximately 20% of the Hawaii/Guam market operates under private contract but, without discovery, the true amount of business that operated under these contracts during the Class Period, how pricing was determined for these contracts, and the dates of these contracts cannot be determined.

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F. The Success Of The Price-Fixing Conspiracy

85. The conspiracy was easy to create and maintain and had its intended effect. By January 2008, the cost of ocean shipping goods to Hawaii had risen as much as 40% compared to 2005. This was in large part a result of Defendants' conspiracy as alleged herein.

86. Horizon's former Chief Financial Officer, Mark Urbania, acknowledged as much in a conference call discussing the 2007 fourth quarter financial results, stating that price increases had been sustained in a difficult economic environment because all competitors had shown "good discipline" on pricing. "Discipline" is a term frequently used for characterizing a well-policed conspiracy.

G. The DOJ Investigation And Guilty Pleas

87. On April 17, 2008, Horizon's headquarters in Charlotte, North Carolina, were raided by FBI agents armed with search warrants. The same day, the DOJ announced that it was investigating the domestic noncontiguous ocean shipping industry for violation of the federal antitrust laws.

88. Since the announcement of the investigation, five shipping executives have pled guilty to antitrust violations for their conduct in the Puerto Rico trade lane. Three of them are from Defendant Horizon Lines, LLC, and the other two are from Sea-Star, which Matson jointly operated with Saltchuk until 2004. The Puerto Rico guilty pleas involved, among other things, "agreeing to fix the prices of rates, surcharges, and other fees charged to customers." Under the terms of the plea agreements, each individual agreed to serve a jail term to be determined by the court, pay a $20,000 criminal fine and cooperate fully in the DOJ's ongoing antitrust investigation. One of the shipping executives received the "longest jail term ever imposed for a single antitrust violation."

89. John Terzaken, the DOJ prosecutor leading the investigation, told the court presiding over the criminal prosecutions that the DOJ is conducting a "nationwide investigation that involves other trade lanes."

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90. Three of the five executives that pled guilty were former executives of Defendant Horizon: Kevin Gill, Gregory Glova, and Gabriel Serra. Notably, Kevin Gill was responsible for marketing in both the Puerto Rico and the Hawaii/Guam trades.

91. It is plausible, then, that Horizon colluded not only in the Puerto Rico trade, but also in the Hawaii/Guam trade, because, as Horizon stated in its 2006 Annual Report, it is "one integrated organization serving Alaska, Hawaii, and Puerto Rico." The Annual Report further states: "We oversee our operations in all three noncontiguous Jones Act markets and Guam from our headquarters in Charlotte, North Carolina." Moreover, "[a]ll pricing activities are also centrally coordinated from Charlotte and Renton, Washington, enabling us to manage our customer relationships." Indeed, where "one integrated organization" operated with the same competitors in three different markets, employing executives who concurrently oversaw crucial aspects of all three trades, it is not plausible that collusion could occur in only one of the three trades.

92. The remaining two executives that have already pled guilty, Peter Baci and Alexander Chisholm, were executives of Sea-Star. The conduct that was the subject of their guilty pleas includes the time period when Sea-Star was jointly owned and operated by Matson.

93. As set forth above, Matson participated in the Puerto Rico trade. From 1999 to 2004, Matson and Saltchuk jointly owned and operated Sea-Star in the Puerto Rico market. Matson leased certain of its Jones Act ships from the Hawaii/Guam market to Sea-Star for use in the Puerto Rico market. Saltchuk also owns TOTE, and as stated above, Matson leased a vessel from TOTE to prevent competitor Pasha from adding more capacity to the Hawaii trade.

94. Further, in a quarterly report filed with the United States Securities and Exchange Commission on May 2, 2008, Alexander & Baldwin stated that "Matson understands that while the investigation currently is focused on the Puerto Rico trade, *it also includes pricing practices in connection with all domestic trades, including the Alaska, Hawaii and Guam trades*."

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(Emphasis added.) Indeed, the DOJ has moved to intervene in this case and has acknowledged that the grand jury which it is supervising is investigating the Hawaii/Guam route.

95. It stands to reason that the antitrust violations admitted to in the Puerto Rico trade extend to the Hawaii/Guam market because they have substantially similar structures, and there is a high degree of overlap in the carriers that service the trades. As stated before, all of the trades are highly concentrated with a limited number of players, all are protected from foreign competition by the Jones Act, all concern the same commodity product where few, if any, substitutes exist, and all have high barriers to entry.

H. The STB Does Not Have Jurisdiction Over Plaintiffs' Claims

1. Deregulation of the ocean shipping industry by the ICCTA

96. Prior to 1996, regulation of ocean shipping was divided between the Federal Maritime Commission ("FMC") and the Interstate Commerce Commission ("ICC"). The FMC had regulatory authority over the operations of carriers serving the "noncontiguous domestic trade" and regulated all water carriers who operated outside of the continental United States. The ICC had regulatory authority over intermodal commerce and water carriers which operated along the coasts of the continental United States or on inland waterways.

97. Under the prior system, the FMC performed an annual review of carriers' revenues, expenses, and rate of return on invested capital. In conjunction with this annual review, carriers could (and would) request a General Rate Increase ("GRI"), which had to be approved by the FMC. The FMC would review the rate increase to determine if it was justified. If the GRI were excessive, the FMC would require rollbacks to a lower rate. Indeed, the FMC found Defendants' rates excessive by more than 20% in 1988, 1989, and 1990.

98. In 1995, Congress passed the ICCTA, which eliminated the ICC and transferred many of its functions to the STB, a newly created agency within the DOT. The ICCTA also transferred to the STB some of the FMC's functions with respect to port-to-port traffic for noncontiguous domestic ocean shipping.

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99. Unlike the STB's jurisdiction over railroad transportation, which "is exclusive" (49 U.S.C. §10501(b)), the STB's jurisdiction over ocean shipping is not. The ICCTA's provision regarding ocean shipping, at 49 U.S.C. § 13103, states that: "[e]xcept as otherwise provided in this part, the remedies provided under this part are in addition to remedies existing under another law or common law." Accordingly, the STB has declared that tariff filing does not relieve carriers of liabilities imposed by courts for violations of law, such as the antitrust laws.

2. The ICCTA exempts certain cargo and private contracts

100. Under 49 U.S.C. § 13101, Defendants are permitted to file tariffs for certain aspects of the domestic ocean shipping industry. The statute also provides that some trade is excluded from the filing of tariffs (and outside the STB's jurisdiction), including bulk cargo and forest products, under 49 U.S.C. § 13702(a)(1) and private contracts, under 49 U.S.C. § 14101(b)(1).[5] While the statute allows for private contracts, it does not regulate them. These contracts are not required to be filed with the STB. The STB has disclaimed any authority over these contracts or jurisdiction over any Sherman Act claims that arise from these contracts. Moreover, with respect to any tariffs filed by Defendants during the Class Period, the STB never reviewed or approved them.

3. Matson's tariffs do not comply with tariff filing regulations

101. Tariffs filed with the STB must satisfy certain "essential criteria," such as providing "the specific applicable rates (or the basis for calculating the specific applicable rates) and service terms." 49 C.F.R. § 1312.3(a). Additionally, "[a]mbiguous terms and complex methods of presentation shall not be used." 49 C.F.R. § 1312.3(c). Some of Matson's tariffs in the Hawaii/Guam market were set using the National Motor Freight Classification ("NMFC")

[5] To the extent that Defendants voluntarily filed tariffs for exempt cargo, such filing does not confer jurisdiction on the STB. On information and belief, Defendants filed tariffs that were not required in order to signal each other and communicate with each other regarding prices for particular customers. This allowed Defendants to negotiate private contracts while still alerting each other as to the price charged and, due to the specific geographic references in the filed tariff, to the customer involved.

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standard. A carrier, however, may not utilize the NMFC standards in establishing its rates unless the carrier is a participant in the National Motor Freight Tariff Association, Inc. ("NMFTA"). Matson is not, and has not been, a participant in the NMFTA.

102. Despite the fact that Matson has not been a participant in the NMFTA, it has filed rates with the STB based on the NMFC. For example, Matson Tariff No. 14-F, otherwise known as STB MATS 034, purports to govern Matson's "Westbound Container freight (CY Store Door) to Hawaii," effective April 1, 2006. Rule 100 of Tariff No. 14-F states that one of the tariff's "Governing Publications" is the NMFC.

103. Plaintiffs shipped freight under Matson Tariff No. 14-F during the Class Period. For example, in one shipment, Plaintiff T.J. Gomes Trucking Co., Inc. shipped 20,786 pounds of pneumatic tubes and tires under 14-F at a total cost, including surcharge, of $3,605.66.

104. As explained by the NMFTA, use of the NMFC by a nonparticipating carrier can lead to "uncertainty" and "confusion." Matson's tariffs that reference the NMFC are thus not a reliable calculator of charges, and do not satisfy the "essential criteria" for being valid tariffs.

4. The STB does not have jurisdiction over rates that fall within the so called Zone of Reasonableness

105. In addition to the exempt categories of trade, the ICCTA deregulated the domestic ocean shipping industry for rate increases that are within the ZOR. The ZOR is calculated as 7.5% plus the annual change in the Producer Price Index ("PPI"). The STB has no jurisdiction over rate increases or decreases whenever "the aggregate of increases and decreases in any such rate or division is not more than 7.5 percent above, or more than 10 percent below, the rate or division in effect 1 year before the effective date of the proposed rate or division." 49 U.S.C. § 13701(d)(1). This exempt ZOR is subject to adjustment for changes in the PPI during the most recent one-year period before the date the rate or division in question first took effect. 49 U.S.C. § 13701(d)(2).

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106. The conspiratorially set fuel surcharges alleged in this Second Amended Complaint all fall within the ZOR. If Plaintiffs had filed a complaint with the STB regarding Defendants' fuel surcharges, the STB could not have granted any relief. Accordingly, the relief sought in this Second Amended Complaint poses no conflict with the STB's jurisdiction or with actions that the STB could or might have taken.

5. Even beyond the ZOR, the STB does not review or approve rates

107. Rates filed with the STB are not subject to any affirmative approval process. Under this regime, there is no antecedent review of rates, nor is there any requirement that the STB affirmatively approve of, or even state its non-disapproval of, the rates filed. The STB does not publish any comments or findings about the rates. The rates simply take effect and may be utilized the moment after they are filed with the STB.

108. Because there is neither antecedent review nor an affirmative approval process, the STB does not apply any system of review to the tariffs filed by Defendants. Furthermore, in the case of rates that fall within the ZOR, the STB is barred from reviewing the rates.

6. The STB's lack of review or approval demonstrates that it does not have jurisdiction over Plaintiffs' claims

109. Prior to the passage of the ICCTA, the FMC had required the ocean carriers to file their revenues and expenses and rate of return on invested capital on a form commonly referred to as the "G.O.-11." Since passage of the ICCTA, the STB has not required a filing of revenues, expenses, or rate of return on invested capital in any domestic noncontiguous ocean trade.

110. The STB has not acted in any manner to review or regulate the domestic, noncontiguous ocean shipping industry, in general, or the Pacific Ocean shipping routes, including Hawaii and Guam, specifically. Nor, has the STB made any effort to review or ascertain whether the fuel surcharges imposed by the Defendants are a legitimate cost recovery mechanism or the product of collusion. The STB has never exercised any review of the Pacific Ocean domestic noncontiguous ocean shipping trade and does not even have in place a

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methodology for ascertaining the reasonableness of the rates of that trade. The first investigation into this industry since the passage of the ICCTA was the criminal investigation initiated by the DOJ in 2008.

111. The statute that governs STB jurisdiction over domestic ocean cargo shipping transportation services provides that "it is the policy of the United States Government … in overseeing transportation by water carrier, to encourage and promote service and price competition in the noncontiguous domestic trade." 49 U.S.C. § 13101(a). The application of the federal antitrust laws to conduct in the Hawaii/Guam market furthers this policy.

VII. CLASS ACTION ALLEGATIONS

112. Plaintiffs bring this action on their own behalf and on behalf of all others similarly situated (the "Class") pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(3). The Class is defined as follows:

> All individuals or entities (excluding governmental entities, Defendants, and their parents, predecessors, subsidiaries, affiliates, and their co-conspirators) who purchased domestic noncontiguous ocean shipping services between the continental United States, the State of Hawaii and/or the Territory of Guam, directly from any of the Defendants or any predecessor, subsidiary, or affiliate of each, at any time during the period from October 11, 1999 through April 19, 2008.

113. Plaintiffs do not know the exact size of the Class, and believe such information to be in the exclusive control of the Defendants. Due to the nature of the trade and commerce involved, however, Plaintiffs believe that the Class includes at least thousands of purchasers. Plaintiffs believe that the number of potential Class members is sufficiently large and geographically dispersed so that joinder of all Class members is impracticable.

114. There are questions of law or fact common to the Class, including:

(a) Whether Defendants engaged in a contract, combination and/or conspiracy among themselves to fix, raise, maintain, and/or stabilize the price of domestic ocean shipping

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between the continental United States and Hawaii, between the continental United States and Guam, and between Hawaii and Guam;

(b) Whether Defendants engaged in a contract, combination and/or conspiracy among themselves to limit and control shipping capacity on the Hawaii and Guam shipping routes in order to manipulate the price of ocean shipping services to the detriment of purchasers of ocean shipping services;

(c) Whether Defendants engaged in a contract, combination and/or conspiracy to not enter into private contracts with freight forwarders pursuant to 49 U.S.C. § 14101(b)(1).

(d) The duration of the conspiracy alleged in this Second Amended Complaint and the nature and character of the acts performed by Defendants in furtherance of the conspiracy;

(e) Whether the alleged conspiracy violated the Sherman Act;

(f) Whether the conduct of Defendants, as alleged in this Second Amended Complaint, caused injury to the businesses or property of the Plaintiffs and the other members of the Class;

(g) The effect of Defendants' conspiracy on the price of domestic ocean shipping between the continental United States and Hawaii, between the continental United States and Guam, and between Hawaii and Guam during the Class Period; and

(h) The appropriate measure of damages sustained by Plaintiffs and other members of the Class.

115. Plaintiffs are members of the Class. Plaintiffs' claims are typical of the claims of the Class because Plaintiffs purchased domestic ocean shipping services between the continental United States and Hawaii, between the continental United States and Guam, and between Hawaii and Guam from one or both of the Defendants during the Class Period.

116. Plaintiffs will fairly and adequately protect the interests of the Class. Plaintiffs sustained direct financial injury in connection with domestic ocean shipping services, and their

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interests are coincident with and not antagonistic to those of other members of the Class. Plaintiffs are represented by counsel who are highly competent and experienced in the prosecution of antitrust and class action litigation. The questions of law and fact common to the members of the Class predominate over any questions affecting only individual members.

117. The prosecution of separate actions by individual Class members would create the risk of inconsistent or varying adjudications.

118. A class action is superior to other methods for the fair and efficient adjudication of this controversy. Treatment as a class action will permit a large number of similarly situated persons to adjudicate their common claims in a single forum simultaneously, efficiently, and without the duplication of effort and expense that numerous individual actions would engender. Class treatment will also permit the adjudication of relatively small claims by many Class members who otherwise could not afford to litigate an antitrust claim such as is asserted in this Second Amended Complaint. This class action presents no difficulties of management that would preclude maintenance as a class action. Finally, the Class is readily definable and is one for which records of the names and addresses of the members of the Class exist in the files of the Defendants.

VIII. FRAUDULENT CONCEALMENT

119. Throughout the relevant period, Defendants affirmatively and fraudulently concealed their unlawful conduct against Plaintiffs and the Class.

120. Plaintiffs had no knowledge of the combination and conspiracy alleged herein, or of any facts that might have led to the discovery thereof in the exercise of reasonable due diligence because of the deceptive practices and techniques of secrecy employed by the Defendants and their co-conspirators to avoid detection and their affirmative concealment of such violation. Plaintiffs and the members of the Class did not discover, and could not discover through the exercise of reasonable diligence, that Defendants were violating the antitrust laws as alleged herein until shortly before this litigation was commenced. Nor could Plaintiffs and the

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members of the Class have discovered the violations earlier than that time because Defendants conducted their conspiracy in secret, concealed the nature of their unlawful conduct and acts in furtherance thereof, and fraudulently concealed their activities through various other means and methods designed to avoid detection. The conspiracy was by its nature self-concealing.

121. Defendants concealed their conspiracy in at least the following respects:

(a) By agreeing not to discuss publicly, or otherwise reveal, the nature and substance of the acts and communications in furtherance of their illegal schemes;

(b) By engaging in secret meetings and telephone calls; and

(c) By giving false and pretextual reasons for the pricing of domestic ocean shipping, the fuel surcharges thereon, and the increases during the Class Period. The pricing and increases were falsely described as being the result of external costs rather than collusion. Defendants hid their conspiracy behind the fact of increasing oil and fuel prices. They implemented a scheme that generated increased profits that did not correlate to increasing costs.

122. Based on Defendants' fraudulent concealment of their conspiracy, Plaintiffs and the Class assert the tolling of any applicable statute of limitations.

IX. INJURY TO THE CLASS

123. During the Class Period, Plaintiffs and the members of the Class, because of Defendants' antitrust violations, suffered economic damages, including but not limited to the payment of high and unjustified fuel surcharges and other shipping charges, and the manipulation of the supply of ocean shipping services through illegal reductions in capacity. Plaintiffs and the Class would not have suffered these damages absent the antitrust violations of the Defendants. As a result, Plaintiffs and the Class they seek to represent have been injured and damaged in their business and property in an amount to be determined according to proof.

X. CLAIM FOR VIOLATIONS OF 15 U.S.C. §§ 1 AND 3

124. Plaintiffs incorporate by reference as if fully set forth herein the allegations contained in the preceding paragraphs of this Second Amended Complaint.

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125. During the Class Period, the exact dates being unknown to Plaintiffs, Defendants engaged in a continuing contract, combination, or conspiracy in unreasonable restraint of trade of commerce among the several states and Guam in order to manipulate and control the market for domestic ocean shipping between the continental United States, Hawaii, and Guam, including but not limited to artificially raising, fixing, maintaining, and/or stabilizing the prices of domestic ocean cargo shipping services on the Hawaii and Guam shipping routes in violation of Sections 1 and 3 of the Sherman Act, 15 U.S.C. §§ 1, 3.

126. In formulating and effectuating the alleged contract, combination, or conspiracy, Defendants engaged in anti-competitive activities, the purpose and effect of which were to manipulate and control the market for domestic noncontiguous ocean shipping between the continental United States and Hawaii, between the continental United States and Guam, and between Hawaii and Guam, including but not limited to artificially raising, fixing, maintaining, and/or stabilizing the prices of domestic ocean shipping services on the Hawaii and Guam shipping routes, reductions in capacity, and refusing to enter into private contracts. These activities included the following:

(a) Agreeing to fix, raise, maintain, and/or stabilize the prices charged in the United States domestic shipping routes between the continental United States, Hawaii, and Guam;

(b) Pricing domestic ocean shipping at the agreed-upon prices;

(c) Announcing their increases simultaneously or within days of each other;

(d) Limiting and reducing the supply of ocean shipping between the continental United States, Hawaii, and Guam; and

(e) Agreeing not to enter into private contracts with freight forwarders.

127. During the Class Period, the Defendants increased the fuel surcharges they charged. These increases in fuel surcharges were the result of anticompetitive conduct.

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Defendants policed their illegal agreement by communicating and colluding on price increases and not entering into certain private agreements that would weaken the illegal conspiracy.

128. During the Class Period, to Plaintiffs, Defendants engaged in a continuing contract, combination or conspiracy in unreasonable restraint of trade or commerce among the several states and Guam to restrict capacity on the Hawaii and Guam shipping routes, thus limiting and controlling supply, in violation of Sections 1 and 3 of the Sherman Act, 15 U.S.C. §§ 1, 3.

129. During the Class Period, Defendants engaged in a continuing contract, combination, or conspiracy in unreasonable restraint of trade or commerce among the several states and Guam by colluding to manipulate the market for domestic noncontiguous ocean shipping by taking anticompetitive actions to eliminate any potential competitors.

130. During the Class Period, Plaintiffs and members of the Class purchased domestic ocean shipping services directly from Defendants, and/or from their agents, subsidiaries, and/or controlled affiliates.

131. The illegal combination and conspiracy alleged herein has had the following effects, among others:

(a) Competition in the pricing of domestic ocean shipping services on the Hawaii and Guam routes has been restrained, suppressed, and/or eliminated;

(b) Competition in the contracting of domestic shipping services on the Hawaii and Guam shipping routes has been restrained, suppressed, and/or eliminated;

(c) Prices for domestic ocean cargo shipping services and the fuel surcharges charged by Defendants on the Hawaii and Guam routes have been fixed, raised, maintained, and/or stabilized at artificially high, non-competitive levels; and

(d) Members of the Class have been deprived of the benefit of free and open competition, and have been injured in their business and property in that they have paid more for domestic cargo shipping services than they would have paid without the Defendants' conspiracy.

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XI. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that the Court enter judgment on their behalf and on behalf of the Class herein, adjudging and decreeing that:

A. This action may proceed as a class action, with Plaintiffs as the designated Class representatives and Interim Lead Counsel as Class Counsel;

B. Defendants have engaged in a contract, combination and conspiracy in violation of Sections 1 and 3 of the Sherman Act, 15 U.S.C. §§ 1, 3, and that Plaintiffs and the members of the Class have been injured in their business and property as a result of Defendants' violations;

C. Plaintiffs and the members of the Class recover damages sustained by them, as provided by the federal antitrust laws, and that a joint and several judgment in favor of Plaintiffs and the Class be entered against the Defendants in an amount to be trebled in accordance with such laws;

D. Defendants, their subsidiaries, affiliates, successors, transferees, assignees and their respective officers, directors, partners, agents and employees thereof and all other persons acting or claiming to act on their behalf be permanently enjoined and restrained from continuing, maintaining or renewing the combination, conspiracy or agreement alleged herein, or adopting any practice, plan, program or design having a similar purpose of effect in restraining competition;

E. Plaintiffs and members of the Class be awarded pre-judgment and post-judgment interest, and that such interest be awarded at the highest legal rate from and after the date of service of the initial complaint in this action;

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

G. Plaintiffs and members of the Class receive such other or further relief as may be just and proper.

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Dated: May 28, 2010.

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Interim Lead Counsel for Plaintiffs and the Class

CERTIFICATE OF SERVICE

On May 28, 2010, I caused to be electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to ECF participants.

Executed this 28th day of May 2010, in Seattle, Washington.

HAGENS BERMAN SOBOL SHAPIRO LLP

By: s/ Steve W. Berman
Steve W. Berman, WSBA #12536

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