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FILED IN THE  
UNITED STATES DISTRICT COURT  
DISTRICT OF HAWAII

OCT 07 2009

at 3 o'clock and 15 min. P.M.  
SUE BEITIA, CLERK

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Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF HAWAII

CV 09-00473 DAE LEK

KAUA`I KUNANA DAIRY INC., )  
a Hawai`i corporation; )  
HAWAIIAN FRUIT )  
SPECIALTIES, L.L.C, a Hawai`i )  
corporation; JAMES MICHAEL )  
KEEFE formerly doing business as )  
O'KEEFE AND SONS, L.L.C, a )  
former Hawai`i corporation; )  
CRAIG T. MARUMOTO, L.L.C, a )  
Hawai`i corporation; PAUL )  
SMITH formerly doing business as )  
PACIFIC ALLIED PRODUCTS )  
L.L.C., a Hawai`i corporation;; and )  
all others similarly situated, )  
)  
Plaintiffs )  
vs. )

Civil No. \_\_\_\_\_  
COMPLAINT; DEMAND FOR  
JURY TRIAL; SUMMONS

UNITED STATES OF AMERICA,  
and DOES 1-100 inclusive,

Defendants

## **Complaint**

Comes now Plaintiffs KAUA'I KUNANA DAIRY INC., a Hawai'i corporation; HAWAIIAN FRUIT SPECIALIST, L.L.C, a Hawai'i corporation; JAMES MICHAEL KEEFE dba O'KEEFE AND SONS, L.L.C, a Hawai'i corporation; CRAIG T. MARUMOTO, L.L.C, a Hawai'i corporation; PAUL SMITH fdba PACIFIC ALLIED PRODUCTS L.L.C., a Hawai'i corporation; (hereinafter "the Class"), by and through their undersigned counsel, and for causes of action against Defendant UNITED STATES OF AMERICA and DOES 1 through 100 inclusive, allege and aver as follows:

### **I. Introduction**

1. The Class brings this action on behalf of themselves individually and behalf of a plaintiff class consisting of all persons and entities in the United States, and its territories and possessions, who have any personal, professional, or commercial relationship with the State of Hawai'i such that they are materially affected by the 46 U.S.C §55102, 55105, 12132, 55115, 12101, 55116, 55110, 55119, 55108, 55117, 55107, 55106 (formerly codified as 46 U.S.C §883) (hereinafter "the Jones Act") from at least September 1, 1959 ("Class Period").

2. Defendant UNITED STATES OF AMERICA (hereinafter “UNITED STATES”) is a sovereign nation which has consented to be sued.

3. The Jones Act's application to the State of Hawai`i results in unconscionable, inequitable harm and artificially inflated prices to the people and businesses of the State of Hawai`i to such an extent that its application is an unlawful restraint on trade and interstate commerce, thereby violating the Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3.

## **II. Jurisdiction and Venue**

4. Plaintiffs bring this action under Article I, Section 8 of the United States Constitution; 42 U.S.C §1983; and Fed.R.Civ.P.57, for a declaration that the Jones Act is invalid as it applies to interstate commerce involving the State of Hawai`i, and to recover costs of suit and reasonable attorneys' fees.

5. Jurisdiction is conferred upon this Court by 28 U.S.C. §1331, §1337, and §1346.

6. Venue is proper in this judicial district because, during the Class Period, the Defendant resided, transacted business, was found, or had agents in this district, and because a substantial part of the events giving rise to plaintiffs' claims occurred, and a substantial portion of the affected interstate trade and commerce described below has been carried out, in this district.

### **III. The Parties**

#### **A. Plaintiffs**

7. Plaintiff KAUA`I KUNANA INC., a Hawai`i corporation with its principal place of business in Kilauea, Hawai`i. During the Class Period, plaintiff was in compliance with the Jones Act. As a result, Plaintiff was injured in its business and property of constitutional violations alleged herein

8. Plaintiff HAWAIIAN FRUIT SPECIALTIES is a Hawai`i corporation with its principal place of business in Kalaheo, Hawai`i. During the Class Period, plaintiff was in compliance with the Jones Act. As a result, Plaintiff was injured in its business and property of constitutional violations alleged herein.

9. Plaintiff JAMES MICHAEL KEEFE, formerly doing business as O'KEEFE AND SONS L.L.C was a Hawai`i corporation with its principal place of business in Hilo, Hawai`i. During the Class Period, plaintiff was in compliance with the Jones Act. As a result, Plaintiff was injured in its business and property of constitutional violations alleged herein.

10. Plaintiff CRAIG T. MARUMOTO L.L.C, a Hawai`i corporation with its principal place of business in Honolulu, Hawai`i. During the Class Period, plaintiff was in compliance with the Jones Act. As a result, Plaintiff was injured in its business and property of constitutional violations alleged herein.

11. Plaintiff PAUL SMITH, formerly doing business as PACIFIC ALLIED PRODUCTS L.L.C, is a Hawai`i corporation with its principal place of business in Kapolei, Hawai`i. During the Class Period, plaintiff was in compliance with the Jones Act. As a result, Plaintiff was injured in its business and property of constitutional violations alleged herein.

**B. Defendant**

12. Defendant UNITED STATES is a sovereign nation which has consented to be sued. During the Class Period, Defendant through its agents has impaired interstate commerce to the State of Hawai`i. The Class purchased products which were shipped in compliance with the Jones Act. This has created a situation in which arose a monopoly of ocean freight and automobiles between the continental United States, Hawai`i, Guam, and the Mid-Pacific. Due to the State of Hawai`i's geographic location and size, Plaintiffs had to comply with the Jones Act whenever business was conducted. The net result of this government created monopoly is the State of Hawai`i receiving 67 percent of goods imported from the continental United States through Matson Navigation, a subsidiary of Alexander and Baldwin, a Hawai`i corporation with its principal place of business in Honolulu, Hawai`i. The remaining 33 percent is carried by Horizon Lines, Inc, a Delaware corporation with its principal place of business in Charlotte, North

Carolina. Plaintiffs acknowledge that Matson Navigation and Horizon Lines, Inc have operated legally under current federal law.

**C. Agents and Doe Defendants**

13. The acts alleged against UNITED STATES in this Complaint were authorized, ordered, or done by their officers, agents, employees, or representatives, while actively engaged in the management and operation of Defendant's businesses and affairs.

14. The officers, agents, employees, and representatives of UNITED STATES should have known that the Jones Act violated the basic tenants of the Commerce Clause of the United States Constitution.

15. Certain other persons, firms, corporations, and entities have participated as unnamed DOE DEFENDANTS in the violations alleged herein. In order to engage in the offenses charged and violations alleged herein, these DOE DEFENDANTS have performed acts and made statements in furtherance of the constitutional violations alleged herein. All averments in this Complaint against UNITED STATES are also averred against these unnamed DOE DEFENDANTS as though set forth at length.

#### **IV. Class Action Allegations**

16. Plaintiff brings this action on behalf of itself and as a class action under the provisions of Rule 23(a) and (b)(2) and (b)(3) of the Federal Rules of Civil Procedure on behalf of the following Class:

All persons and entities in the United States, and its territories and possessions, who purchased services between the continental United States and Hawai`i in compliance with the Jones Act from at least September 1, 1959 to the present. This class excludes any judicial officer who is assigned to hear any aspect of this action, governmental entities, defendants, other agents of UNITED STATES, and the present and former parents, predecessors, subsidiaries, and affiliates of the foregoing.

17. Plaintiff believes that there are hundreds, if not, thousands of Class members as above described, the exact number and their identities being known by Defendant.

18. The Class is so numerous and geographically dispersed that joinder of all members is impracticable.

19. There are questions of law and fact common to the Class, which questions relate to the existence of the damages alleged, and the type of injury sustained as a result thereof, including, but not limited to:

- a. The loss of agriculture, business, and tourism to the State of Hawai`i;
- b. The adverse economic impact alleged in this Complaint;
- c. Whether the enforcement of the Jones Act to the State of Hawai`i violated Section 1 of the Sherman Act;
- d. Whether the conduct of Defendant and its agents, as alleged in this Complaint, caused injury to the business and property of plaintiffs and other members of the Class;
- e. The effect of Defendant's enforcement of the Jones Act on prices during the Class Period;
- f. The appropriate measure of damages sustained by Plaintiffs and other members of the Class.

20. Plaintiffs are members of the Class. Plaintiffs' claims are typical of the claims of Class members and Plaintiffs will fairly and adequately protect the interests of the members of the Class. Plaintiffs comply with the Jones Act and its interests are consistent with and not antagonistic to those of the other members of the Class. In addition, Plaintiffs are represented by counsel who are competent and experienced in the prosecution of constitutional law and class action litigation.



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

22. Defendant has acted, and have refused to act, on grounds generally applicable to the Class, thereby making appropriate final injunctive relief with respect to the Class as a whole.

23. The questions of law and fact common to the members of the Class predominate over any questions affecting only individual members, including legal and factual issues relating to liability and damages.

24. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. The Class is readily definable and is one for which records should exist in the files of the Defendant and its agents. Prosecution as a class action will eliminate the possibility of repetitious litigation. 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 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 a constitutional violation claim such as is asserted in this Complaint. This class action presents no difficulties of management that would preclude its maintenance as a class action.

## **V. Trade and Commerce**

25. During the Class Period, Defendant impaired the flow of interstate commerce to customers throughout to the State of Hawai`i.

26. The actions of Defendant that are the subject of this action were within the flow of, and impaired, hindered, and substantially affected and completely cut off Hawai`i from interstate commerce. In the absence of highways and railways, the Jones Act promises to nullify interstate commerce to the State of Hawai`i.

## **VI. Factual Allegations**

### **A. Importance of Ocean Transport**

27. Ocean shipping is a highly effective method of moving large quantities of non-perishable goods and raw materials. The major commodities shipped through ocean shipping include crude petroleum, refined petroleum products, chemicals, manufactured goods, farm products, and coal. Hawai`i is separated by 2,300 miles of ocean and is almost fully dependent on ocean shipping for at least 90 percent of every substance used and consumed.

28. The shipping industry has been protected by the laws of the United States of America because of the industry's importance to national security, defense, and international trade. Since the 1800's, ship owners have participated in

liner conferences to coordinate service, exchange market information, and to agree upon rates. In the international ocean shipping industry, these liner conferences, which have many cartel-like characteristics, have been exempt from U.S. antitrust laws.

29. The domestic ocean trade is comprised of the following three sectors: (a) noncontiguous trade between the continental United States and Puerto Rico, Alaska, Hawai`i, Guam, and other U.S. Pacific Islands; (b) coastwise trade along the Atlantic, Gulf, and Pacific coasts, as well as trade between coasts and the St. Lawrence Seaway; and (c) intercoastal trade between the Atlantic or Gulf and Pacific coasts by way of the Panama Canal. This action relates solely to noncontiguous trade between the continental United States and Hawai`i.

30. Because of its location, the State of Hawai`i depends almost entirely on ocean shipping to import its essential commodities like food, clothing, fuel, building materials, and automobiles, as well as to export its local products like pineapple, sugar, molasses, and livestock, to and from the neighbor islands, the continental United States, and various foreign countries. By one estimate, 98.6 percent of all Hawai`i's imports arrive by ocean shipping. In 2003, over 5 million metric tons of cargo was shipped in noncontiguous domestic trade with Hawai`i.

31. In January 2008, *Pacific Business News* reported that the cost of

shipping goods to Hawai`i had risen as much as 40 percent since 2005. This is the ongoing result of Defendant's enforcement of the Jones Act.

**B. The Jones Act**

32. The Jones Act is a protectionist statute that prohibits any goods “transported by water, or by land and water... between points in the United States... either directly or via a foreign port,” from being shipped unless the vessel “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.

33. The purpose of the Jones Act is to protect American shipping companies. It grants an exclusive privilege to certain U.S.-made, U.S.-manned, U.S.-flagged, and U.S. Coast Guard approved vessels to engage in ocean shipping of merchandise or goods to and from U.S. Territories, possessions, or non-contiguous states. These laws are restrictive, prohibiting all other vessels, such as foreign-flagged, foreign-built, foreign-crewed, or even foreign-refurbished vessels, from engaging in American domestic trade.

34. The Jones Act's restriction on the carriage of domestic cargoes to U.S.-made, U.S.-flagged, U.S.-crewed, and U.S.-owned ships control, combined

with the relatively small size of these trade routes, has resulted in an essentially monopolistic Hawaiian ocean shipping market.

35. The enforcement of the Jones Act opposes the Commerce Clause of the U.S. Constitution, as well as creating a climate that is illegal under the Sherman Act. An actual case and controversy exists.

36. Matson Navigation and Horizon, Inc have imposed identical fuel surcharges during the Class Period. They both introduced fuel surcharges for the first time in October 1999. Both liners charged the same fuel surcharge – 1.75 percent of revenue. Since then, each liner has adjusted fuel surcharges 27 times – each adjustment occurred within days of the competitor's adjustment and was for the same amount. The following chart illustrates this lockstep behavior:

<b>Effective Month &amp; Year</b>	<b>Matson Navigation</b>	<b>Horizon, Inc.</b>
October 1999	1.75	1.75
February 2000	2.25	2.25
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	6.0	6.0
March 2003	7.5	7.5
May 2003	8.0	8.0

June 2004	8.8	8.8
October 2004	9.2	9.2
April 2005	10.5	10.5
July 2005	11.5	11.5
October 2005	13.0	13.0
January 2006	15.0	15.0
April 2006	18.5	18.5
June 2006	21.25	21.25
October 2006	19.75	19.75
November 2006	18.75	18.75
January 2007	17.5	17.5
March 2007	19.5	19.5
May 2007	22.5	22.5
August 2007	24.0	24.0
December 2007	29.0	29.0
February 2008	31.5	31.5
April 2008	33.75	33.75

37. Although Matson Navigation and Horizon, Inc. claimed that these fuel surcharges were necessary to recoup increased costs, the surcharges did not reflect actual fuel cost increase. Fuel costs among ocean liners vary significantly due to a number of unique factors, such as differences in vessels and fuel efficiency, differences in routes, the use of hedging, and individual fuel conservation efforts. It is highly unlikely, if not impossible, that Matson Navigation and Horizon, Inc. incurred identical fuel expense increases. Furthermore, the revenue generated by the fuel surcharges depends on the underlying revenues generated per container

and container utilization, both of which vary between the two carriers. Thus, there is a no way that these fuel surcharges only raised enough additional revenue to cover the increased costs that each carrier experienced.

### **VIII. Causes of Action**

38. Plaintiff incorporates and re-alleges each allegation set forth in the preceding paragraphs of this Complaint.

41. Defendant's unlawful conduct has resulted in artificially high prices, a de facto duopoly operated by Matson Navigation and Horizon Inc.

42. Plaintiffs and members of the Class have suffered extreme economic hardship, bankruptcies and had to pay far more to conduct business in the State of Hawai'i than they would have in the absence of the Jones Act restrictions. Every business, all agricultural production and consumers are adversely affected economically by the restrictions of the Jones Act provisions complained of hereinabove.

43. Plaintiffs seek to recover for these overcharge damages.

44. As a direct and proximate result of Defendant's actions, Plaintiffs and the members of the Class have been injured and financially damaged in their respective businesses and property, in amounts which are presently undetermined. Plaintiffs' injuries consist of paying higher prices to conduct business.

### **IX. Prayer for Relief**

WHEREFORE, Plaintiff prays as follows:

A. That the court determine this action be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure.

B. That judgment be entered for Plaintiffs and members of the Class against Defendant for the amount of damages sustained by Plaintiffs and the Class as allowed by law, together with the costs of this action, including reasonable attorneys' fees.

C. That Defendant, their affiliates, successors, transferees, assignees, and the 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, in any manner enforcing the provisions of the Jones Act as it relates to or otherwise impairs the State of Hawai'i's equal access to U.S. interstate commerce.

D. That Plaintiff and members of the Class have such other, further and different relief as the case may require and the Court may deem just and proper under the circumstances.