

STATE OF NORTH CAROLINA  
MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION

PATRICK SMITH, Derivatively on Behalf of  
Nominal Defendant HORIZON LINES, INC.,

Plaintiff,

v.

CHARLES G. RAYMOND, M. MARK  
URBANIA, GABRIEL SERRA, R. KEVIN  
GILL, GREGORY GLOVA, NORMAN Y.  
MINETA, DAN A. COLUSSY, JAMES G.  
CAMERON, WILLIAM J. FLYNN, VERN  
CLARK, ALEX J. MANDL, THOMAS P.  
STORRS, JOHN V. KEENAN, ROBERT  
ZUCKERMAN, BRIAN W. TAYLOR and  
JOHN HANDY

Defendants,

and

HORIZON LINES, INC.

Nominal Defendant.

Case No. 10 CVS 5321

**PLAINTIFF'S OPPOSITION TO**  
**OUTSIDE DIRECTOR DEFENDANTS' MOTION TO DISMISS**

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Plaintiff Patrick Smith (“Plaintiff”), by the undersigned attorneys, respectfully submits this opposition to the Outside Director Defendants’ Motion to Dismiss (the “Outside Director Defendants’ Motion to Dismiss”).

## I. INTRODUCTION

Plaintiff brings this shareholder derivative action (the “Action”) for the benefit of nominal defendant Horizon Lines Inc. (“Horizon” or the “Company”) to recover the substantial damages the Company has suffered as a result of the Individual Defendants’<sup>1</sup> illegal and improper business practices. At this initial pleading stage, the standard is clear – the Court must deny a motion to dismiss unless the Court determines with “reasonable certainty” that a plaintiff could not prevail on *any set of facts* that may be inferred from the allegations in the complaint. In doing so, the Court is required to assume as true the well-pleaded allegations in the complaint and grant a plaintiff all reasonable inferences that may be drawn from those facts contained within the four corners of the complaint. The complaint here easily meets this standard as it sets forth sufficient facts to plead claims for breaches of fiduciary duties by the Individual Defendants for knowingly permitting Horizon to engage in a wide-spread, multi-year antitrust price-fixing conspiracy that pervaded all three of the Company’s principal trade routes.

Moreover, the Outside Director Defendants’ Motion to Dismiss attempts to turn Delaware law on its head. First, Defendants do not apply the correct legal standard as their

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<sup>1</sup> “Individual Defendants” refers to President and Chief Executive Officer (“CEO”), and Chairman of the Board Charles G Raymond (“Raymond”), Executive Vice President and Chief Financial Officer (“CFO”) M. Mark Urbania (“Urbania”), President and Chief Operating Officer (“COO”) of Horizon Lines, LLC John V. Keenan (“Keenan”), Vice President and General Counsel Robert Zuckerman (“Zuckerman”), President of Horizon Logistics Holdings, LLC Brian W. Taylor (“Taylor”), Executive Vice President John Handy (“Handy”), former Senior Vice President and General Manager of Puerto Rico Gabriel Serra (“Serra”), former Vice President of Marketing of Puerto Rico R. Kevin Gill (“Gill”), former Marketing and Pricing Director for Horizon Lines LLC, Puerto Rico division, Gregory Glova (“Glova”), and directors Norman Y. Mineta (“Mineta”), Dan A. Colussy (“Colussy”), James G. Cameron (“Cameron”), William J. Flynn (“Flynn”), Vern Clark (“Clark”), Alex J. Mandl (“Mandl”), and Thomas P. Storrs (“Storrs”). “Officer Defendants” refers to Keenan, Urbania, Handy, Taylor and Zuckerman. “Outside Director Defendants” refers to Cameron, Clark, Colussy, Flynn, Mandl, Mineta and Storrs. “Defendants” refers to Horizon, Officer Defendants and the Outside Director Defendants.

motion is replete with citations to cases applying a heightened pleading burden either in the context of demand futility or pursuant to the federal securities laws. These cases and their analysis simply do not apply to the case at bar and should be ignored. Second, in analyzing Plaintiff's claims for breach of fiduciary duty, Defendants incorrectly rely on North Carolina cases when Delaware law applies. The Court must ignore these cases because they do not apply to the instant motion.

For the reasons set forth below, the Outside Director Defendants' Motion to Dismiss should be denied.

## **II. STATEMENT OF FACTS**

### **A. Horizon's Widespread Antitrust Conspiracy**

Horizon Lines, Inc. is a domestic ocean shipping and integrated logistics company. ¶5.<sup>2</sup> At all times, Horizon was obligated to comply with the Merchant Marine Act of 1920, 46 U.S.C. § 100, et seq., commonly referred to as the Jones Act. ¶37. The purpose of the Jones Act is to protect United States shipping companies by restricting, within the relatively small size of the domestic trades routes, the transport of domestic ocean cargo to United States-made, United States-flagged, predominantly United States-crewed, and United States-owned ships. ¶38. These restrictions result in an oligopolistic but competitive market where a number of carriers control a particular route. ¶38. As a result, the ocean shipping industry is *highly regulated* by antitrust laws and regulations. ¶39. All Jones Act carriers are subject to the full extent of the United States antitrust laws. ¶40.

The Individual Defendants, because of their ability to control the business and corporate affairs of the Company as directors and/or officers of Horizon, owe Horizon and its shareholders

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<sup>2</sup> Paragraph references (¶) are to the Plaintiff's Verified Shareholder Derivative Complaint (the "Complaint"), filed on March 9, 2009.

traditional fiduciary duties of good faith, trust, loyalty, and candor. ¶23. As part of their duties as fiduciaries to Horizon, the Individual Defendants are responsible for ensuring that Horizon complies with all applicable federal and state rules and regulations. ¶24. Moreover, the Individual Defendants were required to adhere to Horizon's Code of Business Conduct and Ethics, which provides that the Individual Defendants are to, *inter alia*, comply with all applicable laws including antitrust and shipping laws, fair trade laws and securities laws. ¶¶26-27. Horizon's Audit Committee Charter imposes additional fiduciary obligations on its members (defendants Cameron, Mandl and Storrs) to ensure that Horizon complies with all laws and regulations. ¶¶28-29. The charter specifically obligates the Audit Committee members to assist Horizon's board of directors (the "Board") in fulfilling its responsibilities with respect to the oversight of the Company's compliance with all legal and regulatory requirements. ¶28.

Since at least 2005, the Individual Defendants breached their fiduciary duties by knowingly causing the Company to engage in a multi-year, wide-spread conspiracy to eliminate and suppress competition in the ocean shipping trade routes between Alaska and the continental United States (the "Alaska Cabotage Market" or "Alaska Trade Route"), Hawaii and/or Guam and the continental United States (the "Hawaii/Guam Cabotage Market" or "Hawaii/Guam Trade Route"), and Puerto Rico and the continental United States (the "Puerto Rico Cabotage Market" or "Puerto Rico Trade Route"). ¶¶2, 30. The Individual Defendants caused Horizon to do so by allocating customers between Horizon and its competitors, rigging bids to customers, and fixing the prices of its shipping rates, surcharges and other fees charged to its customers in cooperation with the other companies that dominate the industry in each of Horizon's three primary markets. ¶30.

## **1. The Alaska Cabotage Market Conspiracy**

For several years, the Individual Defendants knowingly caused Horizon to engage in a conspiracy to suppress and eliminate competition within the Alaska Cabotage Market.<sup>3</sup> ¶59. Specifically, Horizon conspired with Totem Ocean Trailer Express, Inc. (“TOTE”) to keep their fuel surcharges in lockstep with each other in order to increase their revenues along the trade route. ¶¶31, 69. Horizon and TOTE accomplished this by systematically increasing their respective fuel surcharges by identical, or almost identical, percentages within days or even on the same day as each other. ¶69. This history of identical fuel surcharges confirms the conspiracy between Horizon and TOTE, because, among other things: (1) fuel surcharges are calculated as a percentage of revenue and the revenue generated depends upon the underlying revenues generated per container and container utilization, both of which vary between the two companies; and (2) the increase in cost as a percentage of revenue cannot possibly be the same for both carriers as both companies use different technologies, different operations, and different cargo. *Id.*

## **2. The Hawaii/Guam Cabotage Market Conspiracy**

The Individual Defendants knowingly caused Horizon to engage in a conspiracy to suppress and eliminate competition within the Hawaii/Guam Cabotage Market. ¶70. Horizon and Matson Navigation Company, Inc. (“Matson”) illegally conspired to eliminate competition by price-fixing shipping rates, coordinating fuel surcharges and restricting shipping capacity within the Hawaii/Guam Cabotage Market in violation of Section I of the Sherman Act.<sup>4</sup> ¶70. Similar to the anticompetitive conduct in the Alaska Cabotage Market, Horizon and Matson

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<sup>3</sup> Collectively, Horizon and TOTE control more than 80% of the Alaskan trade route, and Horizon alone accounts for approximately 41% of ocean shipping services within the Alaska Cabotage Market. ¶31.

<sup>4</sup> In the Hawaii/Guam Cabotage Market, Horizon and Matson collectively share slightly less than 100% of the ocean cargo between Hawaii and the United States and 100% of the cargo between Guam and the United States. ¶32.

conspired to impose illegal fuel surcharges on all cargo shipped on the Hawaii/Guam Trade Routes. ¶74. Over the years, Horizon and Matson initiated the exact same fuel surcharges, and both increased the frequency with which they increased fuel surcharges. ¶75. This history of simultaneous and identical fuel surcharge proves the conspiracy between Horizon and Matson because, among other things: (1) Horizon and Matson have different routes, very different cost and revenue structures, different strategies for hedging against increases in the cost of fuel, and their different ships have different fuel consumption characteristics; thus, actual fuel costs are very different for the two companies; and (2) fuel surcharge increases grossly exceeded the actual increases in the cost of fuel and generated collusive profit for the carriers; thus if Horizon and Matson's fuel surcharges were intended to approximate a legitimate cost recovery mechanism, it is highly unlikely that these fuel surcharges would be exactly the same for both companies, particularly at every moment through 29 changes over nine years. ¶76.

Moreover, the Individual Defendants knowingly caused Horizon to conspire with Matson to suppress and eliminate competition in the Hawaii/Guam Cabotage Market by limiting the shipping capacity on the two trade routes. ¶77. Specifically, Horizon and Matson entered into a capacity-sharing agreement whereby Matson agreed to carry significant volumes of Horizon's shippers' cargo, at substantially lower rates than either would charge to other shippers. *Id.* This capacity sharing conspiracy provided an illegal benefit to Horizon because otherwise the Company and Matson would have had to add additional or larger ships or additional sailings to this route to handle excess capacity, or lower rates. ¶78.

### **3. The Puerto Rico Cabotage Market Conspiracy**

By the early 2000s, the Puerto Rico shipping market had experienced a steady and significant decline in its shipping rates. ¶84. Seeking to take advantage of this market, the Individual Defendants knowingly caused Horizon to engage in an illegal price-fixing conspiracy

with Crowley Liner Services, Inc. (“Crowley”), Sea Star Line, LLC (“Sea Star”) and Trailer Bridge, Inc. (“Trailer Bridge”) which allowed Horizon to raise its shipping rates despite a “soft” market for its shipping services in Puerto Rico.<sup>5</sup> ¶85. From 2004 until 2007, despite a continuous “soft” market for its shipping services in Puerto Rico, Horizon steadily reported high revenue and profitability. *Id.* Specifically, Horizon increased its shipping rates across all of its lines despite equally steady and significant decrease in the volume of containers being shipped in Puerto Rico. *Id.* Absent a collusion of setting prices with its competitors, Horizon’s financial results would have been unattainable and the Individual Defendants were well aware of that fact. ¶86. In fact, when certain Individual Defendants were questioned by analysts as to how prices could be rising while demand in that market was falling, in breach of their fiduciary duties, the Individual Defendants gave false explanations for these increases, knowing that the unlawful antitrust conspiracy was the source of the improbable rate increases. ¶88. Notably, *only* in 2008, the year that the DOJ Investigation occurred, did the Company’s rate increases fail to offset its losses in volumes. ¶91. Moreover, since the DOJ Investigation, Horizon’s rate increases have steadily declined in accordance with the rest of the market. *Id.*

**B. Horizon’s Conspiracy Comes to Light and Defendants Serra, Gill and Glova Plead Guilty to Antitrust Violations**

The market was shocked when, after years of engaging in the unlawful conspiracy, Horizon’s illegal actions were finally revealed. On April 17, 2008, the Company and several of its competitors were revealed as the targets of a lengthy covert investigation by the DOJ and the Federal Bureau of Investigation (“FBI”) in which the FBI raided Horizon’s headquarter in Charlotte, North Carolina. ¶45. While the DOJ Investigation was initially focused on the

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<sup>5</sup> Horizon controls approximately 35% of the Puerto Rican Cabotage Market; Crowley accounts for approximately 30%; Sea Star accounts for approximately 21%; and Trailer Bridge accounts for approximately 14% of the market. ¶33.

pricing practices of carriers operating in the Puerto Rico Cabotage Market, the government's investigation has since expanded to include the rest of the Company's trade routes. *Id.*

On October 1, 2008, in the District Court for the Middle District of Florida, the DOJ charged defendants Serra, Gill, Glova with criminal conspiracy to suppress and eliminate competition by rigging bids, fixing prices and allocating customers in violation of the Sherman Act – the same facts and misconduct that forms the basis of the Puerto Rico Cabotage Market Conspiracy alleged in this case. ¶47. Notably, during their employment at Horizon, defendants Gill and Glova had responsibilities not only for the Puerto Rico trade route, but also for the Alaska and Hawaii/Guam Trade Routes. ¶48.

On October 20, 2008, defendants Serra, Gill and Glova pleaded guilty for entering into and engaging “in a combination and conspiracy to suppress and eliminate competition in the market coastal water freight transportation services between the United States and Puerto Rico (“Puerto Rico freight services”), which began at least as early as May 2002 and continued as late as April 2008...by agreeing to allocate customers; agreeing to rig bids submitted to government and commercial buyers; and agreeing to fix the prices of rates, surcharges, and other fees charged to customers.” ¶48. At a hearing on January 16, 2009, DOJ prosecutor John Terzaken disclosed that, “[t]here are numerous *other* individuals and entities who remain to be prosecuted for the charged offence that's pending against these defendants.” (Emphasis added). ¶¶53-54. In fact, in each of the sentencing hearings for defendants Serra, Gill, and Glova, it was stated that each of these defendants had given information to the DOJ regarding *other senior Horizon executives, i.e.* the Individual Defendants that had also been involved in the conspiracy. ¶¶55-58.

On July 8, 2009, Horizon announced an agreement to settle claims in *In re Puerto Rican Cabotage Antitrust Litigation*, 08-MD-1960 (DRD) (D.P.R.) (the “Puerto Rico Antitrust Litigation”), a class action premised upon the same misconduct of the Puerto Rico Cabotage Market Conspiracy alleged in the Complaint. ¶93. To settle the Puerto Rico Antitrust Litigation, Horizon has agreed to a generous cash payment of \$20 million, in addition to, “cooperat[ing] with Plaintiffs in litigating their claims against the remaining Defendants” named in the action. ¶94.

As a direct result of the Individual Defendants’ breaches of fiduciary duties, Horizon has expended and will continue to expend significant sums of money, including, but not limited to: (i) costs from the ongoing DOJ investigation pursuant to which at least \$22.9 million has already been incurred; and (ii) the \$20 million settlement payment in connection with the Puerto Rico Antitrust Litigation. ¶3.

### III. ARGUMENT

#### A. Legal Standard for a Motion to Dismiss Under Rule 12(b)(6)

It is well established that:

On a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the standard of review is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. The complaint must be *liberally construed*, and the court should not dismiss the complaint unless it appears *beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief*.

*Block v. County of Person*, 141 N.C. App. 273, 277-78, 540 S.E.2d 415, 419 (2000) (internal citations omitted). The court must evaluate all facts alleged and permissible inferences therefrom in the light most favorable to plaintiff. See *Goodman v. Holmes & McLaurin*, 192 N.C. App. 467, 473 (N.C. Ct. App. 2008). Here, virtually all of the cases cited by the Defendants contradict this clear standard as the Defendants apply a heightened pleading burden

either in the context of demand futility (*e.g.*, *Guttman v. Huang*, 823 A.2d 492 (Del. Ch. 2003); *In re Dow Chem. Co. Derivative Litig.*, No. 4349-CC, 2010 Del. Ch. LEXIS 2 (Del. Ch. Jan. 11, 2010); *Stone v. Ritter*, 911 A.2d 362 (Del. 2006)), or securities class action cases (*e.g.*, *City of Roseville*).<sup>6</sup> Outside Director Defendants Memo at 1, 4, 11, 8-15.<sup>7</sup> Thus, the Court should disregard the authorities cited by the Defendants as the standards applied in those cases do not apply to the instant motion.<sup>8</sup>

**B. The Complaint Sufficiently States a Claim Against the Individual Defendants Under Rule 12(b)(6)**

**1. Defendants' Motion to Dismiss Under Rule 12(b)(6) Should Be Denied Because Plaintiff Has Adequately Alleged Demand Futility**

For the reasons set forth in Plaintiff's opposition to Horizon's Motion to Dismiss, the Complaint sets forth particularized allegations which demonstrate that Plaintiff was not required to make a pre-suit demand on the Board as such a demand would have been futile. Therefore, once the Court determines that demand is excused, as a matter of law, Plaintiff has met his pleading burden by adequately stating a claim for breaches of fiduciary. *See In re Atmel Corp. Derivative Litig.*, Case No. 06-4592, 2008 U.S. Dist. LEXIS 91909, at \*\*26-27 (N.D. Cal. June 25, 2008) (“[C]ourts have held that where a plaintiff has alleged facts sufficient to prove demand futility they have also satisfied the burden under Rule 12(b)(6).”); *Malpiede v. Townson*, 780 A.2d 1075, 1082 (Del. 2001) (the “notice pleading” standard is a less stringent standard than the

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<sup>6</sup> As discussed in Plaintiff's opposition to Nominal Defendant Horizon Lines, Inc. and defendants Charles G. Raymond, M. Mark Urbana, John V. Keenan, Robert Zuckerman, Brian W. Taylor and John Handy's Joint Motion to Dismiss (“Horizon's Motion to Dismiss”), filed contemporaneously herewith, the heightened pleading burden applicable to a securities class action is inapplicable when analyzing demand futility. Similarly, the heightened pleading burden applicable to a securities class action is also inapplicable to a motion to dismiss under Rule 12(b)(6).

<sup>7</sup> “Outside Director Defendants' Memo” refers to Outside Director Defendants' Memorandum of Law in Support of Their Motion to Dismiss.

<sup>8</sup> Defendants' also try to re-write Plaintiff's claims of breach of fiduciary duty claims against the Individual Defendants as “failure to exercise oversight” under *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 967 (Del. Ch. 1996). *See* Plaintiff's Opposition to Horizon's Motion to Dismiss.

standard applied when evaluating a pre-suit demand). “In the context of a motion to dismiss for failure to state a claim, however, the pleading standard does not reach so high a bar as Rule 23.1. Thus, where plaintiff alleges particularized facts sufficient to prove demand futility under the second prong of *Aronson*, that plaintiff *a fortiori* rebuts the business judgment rule for the purpose of surviving a motion to dismiss pursuant to Rule 12(b)(6).” *Ryan v. Gifford*, 918 A.2d 357 (Del. Ch. 2007). Therefore, the Outside Director Defendants’ Motion to Dismiss should be denied.

## 2. Plaintiff States a Claim for Breach of Fiduciary Duty

Plaintiff adequately states a claim for breach of fiduciary duties and each element thereof. Under Delaware law, “[t]he elements of breach of fiduciary duty that must be proven by a preponderance of evidence by the plaintiff are: (i) that a fiduciary duty exists; and (ii) that a fiduciary breached that duty.” *Heller v. Kiernan*, Case No. 1484, 2002 Del. Ch. LEXIS 17, at \*9 (Del. Ch. Feb. 27, 2002).<sup>9</sup> The Complaint clearly contains allegations sufficient to meet these elements.<sup>10</sup>

The Individual Defendants, as officers and directors of Horizon, owed fiduciary duties to the Company and its shareholders. It is well-established that the officers and directors of a Delaware corporation have a fiduciary relationship with the corporation they serve and its

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<sup>9</sup> While Defendants concede that Horizon is a Delaware corporation and Delaware law governs the Action (Outside Director Defendants’ Memo at 7) practically all of the cases relied on by Defendants in analyzing a claim for breach of fiduciary duty are North Carolina cases and apply North Carolina law. Once again, Defendants erroneously apply the wrong legal standard and thus, Defendants’ analysis and their authorities simply do not apply and should be ignored.

<sup>10</sup> In support of their motion to dismiss for failure to state a claim, Defendants rely on *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52 (N.C. Ct. App. 2001). This case is inapplicable for many reasons. First, the Court evaluated the defendants, as directors of a company, pursuant to North Carolina General Statute § 55-8-30. *Id.* at 56. Here, the defendants are directors of a Delaware company and Plaintiff’s fiduciary claims are analyzed under Delaware law. Second, and more importantly, the court dismissed the case for failure to state a claim because it was a *creditor* bringing a breach of fiduciary claim. *Id.* at 57. The court held that a director did not have a fiduciary duty to a creditor because “the duties and liabilities of directors . . . run directly to the corporation and indirectly to its shareholders; they do not run to third parties, such as creditors.” *Id.*

stockholders. See *Jackson Nat'l Life Ins. Co. v. Kennedy*, 741 A.2d 377, 386 (Del. Ch. 1999) (directors); *Arnold v. Society for Sav. Bancorp*, 678 A.2d 533, 539 (Del. 1996) (officers). “This duty has been consistently defined as ‘broad and encompassing,’ demanding of a director ‘the most scrupulous observance.’” *BelCom, Inc. v. Robb*, Case No. 14663, 1998 Del. Ch. LEXIS 58, at \*10 (Del. Ch. Apr. 28, 1998) (citing *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993)). Plaintiff has further alleged how the Individual Defendants breached their fiduciary duties by knowingly allowing the antitrust conspiracies in the Alaska, Hawaii/Guam and Puerto Rico Cabotage Markets to continue, in spite of the fact that as early as October 2005 the Defendants knew through CEO Monthly Letters and Board and Audit Committee meetings that the Company was engaging in conspiracies in these markets. ¶¶100-118; See Plaintiff’s Opposition to Horizon’s Motion to Dismiss. Based on the foregoing, Plaintiff has adequately alleged the elements of his claim for breach of fiduciary duty of loyalty and good faith.

In further support of their argument, Defendants cite to *Bridgeport Holdings Inc. Liquidating Trust v. Boyer (In re Bridgeport Holdings, Inc.)*, 388 B.R. 548, 573 (Bankr. D. Del. 2008) in arguing that the Action should be dismissed because, similar to the complaint in *Bridgeport*, the Complaint “fail[s] to identify each Officer Defendants’ particular duties.” Horizon Memo at 32. In *Bridgeport*, the court held that “[w]hile alleging that Boyer, Rullman, Wilson, York, and Midler were “officers,” except as to York, ***the Complaint never identifies which offices any of these individuals supposedly held.***” (Emphasis added). *Id.* at 573. Thus, the *Bridgeport* court held it could not even ascertain whether a defendant was the Company’s vice president of marketing or its general counsel. *Id.* However, in this case, the Complaint, without question, specifically states each of the Individual Defendants’ position and/or office

within the Company, the time period for which each Individual Defendant has held that office, in addition to, the specific subsidiary of Horizon the Individual Defendant works for. ¶¶6-21.

Moreover, Defendants ignore Plaintiff's well-pled allegations detailing the Individual Defendants' knowledge of the improprieties at the Company and their breach of their fiduciary duties by allowing these improprieties to occur. Once again, Defendants misstate Plaintiff's allegations as *Caremark* claims, arguing that Plaintiff fails to allege the elements of either failure to implement controls or failure to oversee operations. Horizon Memo at 32-33; Outside Director Defendants' Memo at 7-9. Defendants argue that there are "no factual allegations in the Complaint that the Defendants actually knew of the alleged price-fixing." Outside Director Defendants' Memo at 9. However, that is exactly what Plaintiff alleges. Defendants' incorrect argument about Plaintiff's claims completely ignores Plaintiff's well-pled allegations that the Defendants knowingly failed to act despite actual knowledge of the wrongdoing. Plaintiff has clearly pled a claim for fiduciary duty against the Defendants and not oversight and due care claims under *Caremark*. Accordingly, Plaintiff has satisfied the pleading requirements for his claim for breach of fiduciary duty of good faith against the Individual Defendants.

#### **IV. CONCLUSION**

For all the reasons set forth herein, Plaintiff respectfully requests that the Court deny the Outside Director Defendants' Motions to Dismiss in all respects.<sup>11</sup>

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<sup>11</sup> Plaintiff also requests that the Court grant Plaintiff leave to replead in the event the Court grants any part of the Outside Director Defendants' Motions to Dismiss. *See* Plaintiff's Opposition to Horizon's Motion to Dismiss.



**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Opposition to Outside Director Defendants' Motion to Dismiss was served upon each of the parties in this action by depositing it in the U.S. mail, postage prepaid, in envelopes addressed as follows:

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This the 23<sup>rd</sup> day of July, 2010.

/s/ Gary W. Jackson