

COMMONWEALTH OF MASSACHUSETTS

DUKES DIVISION

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

WOODS HOLE, MARTHA’S VINEYARD AND)
NANTUCKET STEAMSHIP AUTHORITY,)
))
Plaintiff,)
))
v.)
))
TISBURY TOWING & TRANSPORTATION)
CO., INC. and RALPH M. PACKER, JR.,)
))
Defendants.)

Civil Action No. DUCV2008-00051

VERIFIED AMENDED COMPLAINT

This is an action in equity for declaratory and injunctive relief pursuant to G.L. c. 231A, §§ 1-2, and St. 1960, c. 701, § 5 (as amended by St. 1962, c. 675, St. 1973, c. 942 and St. 1981, c. 584), as well as for damages, as well as for damages pursuant to G.L. c. 93A, § 9, in which plaintiff Woods Hole, Martha’s Vineyard and Nantucket Steamship Authority (the “Authority”) seeks redress and relief for defendants’ violation of section 5 of St. 1960, c. 701, as amended (the Authority’s “Enabling Act”), which prohibits any person from operating any vessel “for the carriage of vehicles or freight for hire or resale by water between the mainland and the island of Martha's Vineyard or the island of Nantucket or between said islands unless licensed or permitted in writing to do so by the Authority.” Such statutory prohibition against the carriage of vehicles or freight for hire or resale between the Massachusetts mainland and the Islands is essential to the Authority’s financial stability in order to ensure that it can continue its essential

governmental function of providing adequate transportation of persons and necessities of life for the islands of Martha's Vineyard and Nantucket.

Jurisdiction

1. This Court has jurisdiction over the subject matter of this action pursuant to G.L. c. 93A, § 9(1); G.L. c. 214, §§ 1-2; G.L. c. 231A, §§ 1-2; and St. 1960, c. 701, § 5 (as amended by St. 1962, c. 675, St. 1973, c. 942 and St. 1981, c. 584).

Parties

2. Plaintiff Woods Hole, Martha's Vineyard and Nantucket Steamship Authority is a public authority created pursuant to chapter 701 of the Acts of 1960 (as amended, the "Enabling Act"; printed by the West Publishing Company as M.G.L. c.159 App.) (A conformed copy of the Enabling Act was included in the Appendix to the Verified Complaint filed in this action as Exhibit A.) The Authority has offices in the towns of Falmouth, Mashpee and Barnstable, Barnstable County, Massachusetts; in the towns of Tisbury, Oak Bluffs and Edgartown, County of Dukes County, Massachusetts; in the town of Nantucket, Nantucket County, Massachusetts; and in the town of Fairhaven, Bristol County, Massachusetts.

3. Defendant Tisbury Towing & Transportation Co., Inc. ("Tisbury Towing") is a domestic profit corporation organized and existing under the laws of the Commonwealth of Massachusetts. Tisbury Towing is engaged in the business of tug boat and barge charters, and its principal office is located on Beach Road, Vineyard Haven, in the town of Tisbury, County of Dukes County, Massachusetts.

4. Defendant Ralph M. Packer, Jr. is an individual who lives and has a usual place of business in the town of Tisbury, County of Dukes County, Massachusetts. Mr. Packer is

President, Treasurer, Chief Executive Officer, Chief Financial Officer and a Director of Tisbury Towing.

Background

The Authority's Statutory Predecessor

5. The Authority is the successor to the New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Authority (the "New Bedford Authority"), an authority that had been created by chapter 544 of the Acts of 1948 (the "1948 Act") to acquire and continue to operate a boat line which theretofore had been owned and operated by Massachusetts Steamship Lines, Inc. ("MSLI") between the mainland ports of New Bedford and Woods Hole (a village within the Town of Falmouth) and the islands of Nantucket and Martha's Vineyard.

6. The Legislature passed the 1948 Act upon the report and recommendations of a Special Commission created by the Legislature to investigate the operation of steamships and other means of water transportation between New Bedford, Woods Hole, Martha's Vineyard and Nantucket (the "1948 Commission"). (A copy of the Report of the 1948 Commission was included in the Appendix to the Verified Complaint filed in this action as Exhibit B.)

7. The 1948 Commission observed "that the separation of the islands from the rest of the State lays upon the Commonwealth some obligation to furnish a road by water to the islands. The analogy of a highway is not destroyed by the accident that the intervening space is water, and a six-mile highway, even to the Vineyard, would cost the Commonwealth many times the moderate expense of rehabilitating the steamship line." (Report of the 1948 Commission [Appendix, Exh. B], at p. 10.)

8. The 1948 Commission employed engineers who "made a preliminary, but detailed, examination of the steamship line properties and records of the operation of the line,"

and “formulated plans for the rehabilitation of the line.” (Id. at p. 9.) The engineers noted that they had “completed a preliminary engineering reconnaissance of the associated problems of an adequate water transportation system connecting the islands of Martha's Vineyard and Nantucket with the mainland of the State of Massachusetts” (id. at p. 14), and stated:

- (a) “The people of the islands now rely upon water transportation for all food and other supplies, mail and personal contact with the mainland of Massachusetts, and even, though air transportation has been available for a number of years, the people continue to look upon water transportation as their life line.” (Id.)
- (b) “The islands of Martha's Vineyard and Nantucket, although separated by a long expanse of water, are a part of the Commonwealth of Massachusetts, and, due to the present status of transportation service, are experiencing a pressing need for the organization of a system assuring convenient and economical means of communication to and from the mainland.” (Id. at p. 15.)
- (c) “The islands of Martha's Vineyard and Nantucket, although physically separated from the mainland, are, nevertheless, an integral part of the Commonwealth of Massachusetts, and, as such, merit consideration of its transportation problem by the state as a whole. To the same extent as other areas of the Commonwealth, separated by streams, are connected by bridges constructed at general state expense, these islands should perhaps be connected to each other and to the mainland by an acceptable means of transportation. That means may well be a ferry system.” (Id. at p. 22.)

9. The 1948 Commission’s principal observations were summarized by the Supreme Judicial Court in City of New Bedford v. New Bedford, Woods Hole, Martha’s Vineyard and Nantucket Steamship Authority, 330 Mass. 422, 428, 429-30 (1953):

The islands of Martha's Vineyard and Nantucket both lie in the Atlantic Ocean south of Cape Cod. ... Neither island is industrialized. Neither can boast of any considerable amount of general agriculture or of natural resources. Neither produces enough to supply to its inhabitants more than a small fraction of the necessities of civilized living. But both islands enjoy a summer climate which, together with ample means of recreation on land and sea, has attracted a great many people as summer visitors, so that the entertainment of vacationists has become a large industry. ...

In the [1948 Commission's] report it is stated that in spite of air transportation the people of the islands “rely upon water transportation for all food and other supplies, mail and personal contact with the mainland of Massachusetts...”; that

the peak period of four summer months “generates approximately 85 per cent of the total annual passenger and automobile traffic”; that during the remainder of the year “a very low traffic volume is experienced”; that the “largest volume of passenger traffic is between Woods Hole and Martha's Vineyard during the summer peak periods”....

It is apparent, however, from facts of common knowledge and may be taken as established, that the volume of business handled by the authority, as to both passengers and freight, is and will remain highly seasonal in character, varying from the needs of a small permanent population on the islands in the winter to the needs of a summer population many times larger. It is further apparent that steamboat service is vital to the economic survival of the islands at all seasons, but is not a matter of life or death to either Falmouth or New Bedford at any season.

The Supreme Judicial Court has stated as recently as 1999 that these observations by the 1948 Commission “remain relevant today.” Town of Bourne v. Plante, 429 Mass. 329, 334 (1999).

10. The 1948 Commission recommended that the Commonwealth create the New Bedford Authority. In doing so, the 1948 Commission concluded that it was essential to rehabilitate MSLI's existing boat line “to avoid damage to the economy of the Islands and damage to the interest which the Commonwealth has in keeping them as productive factors in producing income from the great body of summer residents and visitors who come to the islands.” Report of the 1948 Commission (Appendix, Exh. B, at p. 9).

11. The 1948 Commission also found that it was imperative to guarantee the financial strength of the New Bedford Authority and felt that a key component of the legislation was the granting to the New Bedford Authority of protection against competition. Specifically, the 1948 Commission declared:

The steamship line must operate in winter, when the revenue is relatively small, as well as in summer, when profits are made. The line, as a public utility, must therefore be protected from the diversion of its trust by casual adventurers in boat operation who would skim off the cream of the summer business and leave the

taxpayers and the public to bear the loss of the winter operation, and a provision for such protection has been placed in the proposed bill.

Report of the 1948 Commission (Appendix, Exh. B), at p. 11.

12. After receiving the report of the 1948 Commission, the Legislature created the New Bedford Authority “[i]n order to provide adequate transportation of persons and necessities of life for the islands of Nantucket and Martha's Vineyard.” 1948 Act, at § 1. For that purpose, the New Bedford Authority was authorized and empowered to, among other things, purchase all of MSLI’s assets (*id.* at § 13) and acquire and construct both replacements and new “vessels and other facilities required to provide adequate service” (*id.* at §§ 5(b) and 6).

13. The Legislature also included in the 1948 Act the provision recommended by the 1948 Commission to protect the New Bedford Authority from competition, but that protection was not absolute. Rather, it provided:

While any bonds issued by the Authority remain unpaid, no person shall operate a vessel of more than one hundred tons gross tonnage to carry by water passengers or freight between the mainland of the commonwealth and the islands of Martha's Vineyard and Nantucket, and the Authority shall be entitled to receive injunctive relief against such operation.

1948 Act, § 6, 5th paragraph.

14. Nearly a decade later, the Legislature established another Special Commission (the “1959 Commission”) to investigate and study the management, operation, control and finances of the New Bedford Authority. (A copy of the report of the 1959 Commission was included in the Appendix to the Verified Complaint filed in this action as Exhibit C.) In its Report, the 1959 Commission stated:

(a) “The Steamship Authority was established by chapter 544 of the Acts of 1948 for the stated purpose of providing ‘adequate transportation of persons and necessities of life for the islands of Nantucket and Martha's Vineyard.’ This emergency legislation was necessitated by the failure of the Massachusetts Steamship Lines, Inc., which had taken over the line from the New Haven

Railroad. After the first year of operation, the Authority proved unable to meet the cost of operations out of current revenues and began operating small annual deficits.” (Report of the 1959 Commission, Appendix, Exh. C, at p. 4.)

- (b) “The annual deficit of the Authority increased to \$111,918 in 1956, reached a peak of \$614,000 in 1957, and was budgeted for \$350,000 in 1958.” (Id. at p. 5.)
- (c) “In a general sense, the over-all problem faced by the Steamship Authority is similar to that confronting other modes of transportation within the Commonwealth: the recurrence of annual deficits due to increased costs of operation which are not met by adequate revenues. The problem is increased by the highly seasonal nature of the economy of the two islands. Approximately 80 per cent of the traffic on the line is carried during the peak period of June through September (hereinafter referred to as the ‘summer’ season), whereas a very low volume is experienced, consisting mostly of passengers and necessities of life, during the remaining eight months (hereafter referred to as the ‘winter’ season). Yet the responsibility of the Commonwealth for insuring adequate water transportation to the islands is apparent, since the boat line is the only means of transporting freight and automobiles to the islands, and therefore exists as their ‘state highway’ to the mainland.” (Id. at pp. 5-6.)
- (d) “Furthermore, since the burden of the line’s deficit operations is shared by the four communities served ..., the operation of the Authority has a vital effect upon their tax rates and financial stability. The problem is especially acute in the small island communities which have the greatest need for the Authority’s service, but are, due to their small tax base, most vulnerable economically.” (Id. at p. 6.)
- (e) “It has been said that the transportation to the islands is the most expensive in this country. It has also been said that this line is the only monopoly in the world which loses money. Despite the high rates charged, the revenues do not meet the cost of operation, and any increase in rates will, except in automobile transportation, price the Authority out of competition with the airlines and small private carriers. Since virtually everything used on the islands is carried by the Authority vessels, these freight charges add immensely to the cost of living on the islands, year round.” (Id. at p. 8.)

15. “In an attempt to clarify the mass of information, testimony, history, economics, personalities and comment” (id. at p. 8) which it had heard, the 1959 Commission submitted the following concerning the New Bedford Authority’s situation:

The fundamental purpose of the Steamship Authority is “to provide adequate transportation of persons and necessities of life for the islands of Nantucket and Martha’s Vineyard.” The line exists solely as a means of transportation and should be operated in the first instance for the benefit of the island communities

which are completely dependent upon it. Since their economy is seasonal, the line should operate as much as possible on a seasonal basis, giving the necessary service in the summer and reducing it to the bare minimum in the winter. As it is clear that the line carries only necessities of life during the winter and since the needs of the islands in this regard have not changed perceptibly for ten years, there is no practical way to increase business or revenues during the eight “winter” months of the year. The line must make its money, if at all, during the summer, and effect utmost economies during the winter season. Whether the summer revenues can offset the winter losses is problematical.

(Id. at pp. 8-9.)

16. The 1959 Commission continued:

Unless and until the Authority can operate without incurring an annual deficit, there will exist a continuing threat to the economic life of the island communities. It is not the mere fact of the additional tax rate increase, but the realization that this increase is something over which these communities have absolutely no control and are utterly powerless to prevent, which poses the greatest threat. The attempt by the Authority to reduce the deficit by means of an increase in rates and fares again falls heaviest on the islands, as they are consignees of most the freight shipments. Either way the islands are in a precarious position. Nor only are their costs of living materially increased, but their attractiveness as summer resorts is visibly impaired by the deficit operation of the Authority.

(Id. at p. 9.)

The Authority and its Enabling Act

17. In 1960, after receiving the Report of the 1959 Commission, the Legislature passed the Enabling Act, in which it abolished the New Bedford Authority, created the current Steamship Authority, and vested all of the New Bedford Authority’s assets in the new Authority. See Enabling Act (Appendix, Exh. A), § 16. As stated by the Supreme Judicial Court in Barnstable v. Woods Hole, Martha's Vineyard and Nantucket Steamship Authority, 343 Mass. 674, 681-82 (1962), in enacting the Enabling Act in 1960, the Legislature thereafter authorized the current Steamship Authority to continue the public transportation to all of the ports that had been served by the predecessor authority except the port of New Bedford.

18. Succeeding to the responsibilities of the New Bedford Authority, the Authority's purpose is "to provide adequate transportation of persons and necessities of life for the islands of Nantucket and Martha's Vineyard...." Enabling Act at § 1. To that end, the Authority is empowered to "purchase, construct, maintain and operate necessary vessels, docks, wharves, other vessels, equipment, furniture and supplies...." Id.

19. In § 3 of the Enabling Act, the Legislature created the Authority as a "body corporate" which is "deemed to be a public instrumentality for the purposes of this act" The Authority's powers include the power to "acquire, maintain, repair and operate a boat line," to "acquire, hold and dispose of real and personal property ... for its corporate purposes," and to "do all acts and things necessary or convenient to carry out the powers expressly granted in this act." Enabling Act at §§ 4(a), (e) & (g). The Authority also is authorized to issue bonds "for the purpose of paying for replacements and new construction or acquisition of vessels and other facilities required to provide adequate service...." Id. at §§ 4(b) and 5.

20. The Authority is also empowered "[t]o fix, from time to time, such rates of fare and charges for service furnished or operated as in the judgment of its members are best adapted to insure sufficient income to meet the cost of the service," which includes its "operating expenses" and "all other expenditures and charges which are properly chargeable against income or surplus." Id. at § 4(c).

21. The Legislature expressly declared that "the operation and maintenance of the steamship line by the Authority will constitute the performance of essential governmental functions," and that the Authority's exercise of its powers under the Enabling Act "will be in all respects for the benefit of the people of the commonwealth, for the increase of their commerce

and prosperity, and for the improvement of their health and living conditions.” Id. at § 6. Accordingly, the Legislature also exempted the Authority from state and local taxation. Id.

22. The Legislature provided that the Enabling Act, “being necessary for the welfare of the Commonwealth and its inhabitants, shall be liberally construed to effect the purposes thereof.” Id. at § 17. The Legislature further provided that “[a]ll other general or special laws, or parts thereof, inconsistent herewith are hereby declared to be inapplicable to the provisions of this act.” Id. at § 19.

The Strengthening of the Authority’s Protection from Competition

23. In the Enabling Act, the Legislature also continued to protect the Authority from competition. The fifth paragraph of Section 5 of the Enabling Act, as it was originally enacted, provided:

Except as provided in this act no person shall operate a vessel of more than one hundred gross tons for the carriage of passengers, vehicles or freight for hire by water between the mainland of the commonwealth and the island of Martha’s Vineyard or the island of Nantucket or between said islands unless licensed or permitted in writing so to do by the Authority. The superior court shall have jurisdiction, on a petition in equity by the Authority, to enjoin any such operation.

24. In 1973, the Legislature enacted St. 1973, c. 942, which amended Section 5 of the Enabling Act by striking out the fifth paragraph and inserting in its place the following:

Except as provided in this act, no person shall operate a vessel with a Coast Guard approved capacity rating in excess of forty passengers or a vessel of more than seventy-five gross tons for the carriage of passengers, vehicles or freight for hire by water between the mainland of the commonwealth and the island of Martha’s Vineyard or the island of Nantucket or between said islands unless licensed or permitted in writing to do so by the Authority. The superior court shall have jurisdiction, on a petition in equity by the Authority, to enjoin any such operation. This section shall not apply to continuance of existing services by vessels or a replacement of similar capacity thereof, which were in service on a daily seasonal basis on or before May thirtieth, nineteen hundred and seventy-three, or which were under contract for construction or purchase therefor

executed on or before May thirtieth, nineteen hundred and seventy-three. The foregoing exclusion, however, shall not be applicable to vessels operating on a charter basis from a non-financial institution.

The provisions of the foregoing paragraph shall not apply to the continuance of the existing service from the port of New Bedford to the island of Martha's Vineyard by the motor vessel Manisee or a replacement of similar capacity, nor shall said provisions be construed to prohibit the operation of another motor vessel for a period of twenty days, in the event that the motor vessel Manisee or a replacement is unable to operate because of a breakdown or an emergency situation.

25. In 1981, the Legislature enacted St. 1981, c. 584, which further amended Section 5 of the Enabling Act by striking out the first sentence of the fifth paragraph (as it existed after the 1973 amendment, set forth in paragraph 24 above) and inserting in its place the following:

Except as provided in this act, no person shall operate a vessel with a Coast Guard approved capacity rating in excess of forty passengers or a vessel of more than seventy-five gross tons for the carriage of passengers for hire by water between the mainland and the island of Martha's Vineyard or the island of Nantucket or between said islands unless licensed or permitted in writing to do so by the Authority. Except as provided in this act, no person shall operate a vessel for the carriage of vehicles or freight for hire or resale by water between the mainland and the island of Martha's Vineyard or the island of Nantucket or between said islands unless licensed or permitted in writing to do so by the Authority.

26. The Authority is not aware of any vessels that carried vehicles or freight for hire or resale between the mainland and the islands which were in service "on a daily seasonal basis" on or before May 30, 1973 or which were under contract for construction or purchase therefor on or before that date. Thus, the 1981 Amendment to Section 5 of the Enabling Act strengthened the Authority's protection from competition by prohibiting all vessels from carrying any vehicles or freight for hire or resale between the mainland and the islands, irrespective of their passenger capacity or gross tonnage, unless licensed or permitted in writing to do so by the Authority.

The Authority's Adoption of Its Licensing Policy

27. In March 1995, the Authority adopted a policy pertaining to the licensing of private vessel transportation services (the "Licensing Policy"), which was last amended in 1996. (A copy of the Licensing Policy was included in the Appendix to the Verified Complaint filed in this action as Exhibit D.) Since March 1995, the Licensing Policy has been generally followed by the Authority when issuing licenses for vessel transportation services between the Massachusetts mainland and the islands of Martha's Vineyard and Nantucket.

28. In summary, under the Licensing Policy:

- (a) the Authority does not grant a license for any proposed vessel transportation service between the Massachusetts mainland and the islands unless it is demonstrated that public convenience and necessity require the proposed service;
- (b) the Authority considers all requests for licenses on a case-by-case basis, although the Authority expressly adopted in the Licensing Policy certain policies, principles and standards to guide the exercise of its discretion in appraising the public interest;
- (c) before any request for a license is considered, the Authority's management staff holds public hearings thereon after due notice is given to all interested parties, and provides the Authority's governing members with a comprehensive analysis as to whether, in the staff's opinion based upon the information received, public convenience and necessity require the proposed service; and
- (d) each license agreement entered into by the Authority specifies the routes over which the licensee's vessels may operate, contains such terms and conditions as the Authority deems that public convenience and necessity require, are subject to revocation for cause, and are subject to revision at any time to the extent the Authority finds such action to be in the public interest.

Licensing Policy (Appendix, Exh. D), at p. 1.

29. As noted, the Licensing Policy contains a summary of the policies, principles and standards the Authority applies when evaluating individual license requests. (Licensing Policy [Appendix, Exh. D], at pp. 8-16.) The first policy enunciated by the Licensing Policy is that

“[t]he Authority must make certain that the islands are always provided with adequate transportation.” (Id. at p. 8). In this regard, the Licensing Policy provides:

- (a) “There should be no mistake in anyone's mind that the Authority's paramount interest is to ensure that the islands of Martha's Vineyard and Nantucket are provided with adequate transportation of persons and necessities of life on a year-round basis. The island economies are and will continue to be strongly affected by the cost of their transportation service to and from the mainland, whether it is paid for entirely through passenger, freight and automobile rates or through a combination thereof. Either inadequate service or unnecessarily expensive service will jeopardize their future. Frequency and reliability of service are still the key to their stability and well-being. Accordingly, the interest of the islands is paramount and must be the overriding consideration in evaluating the Authority's exercise of its licensing powers, present and future.” (Id. at p. 8.)
- (b) “[I]t is important to emphasize that providing a safe, efficient, economical and reliable means of transportation to and from the islands is akin to a fiduciary obligation and that there are a number of reasons why a public entity, as opposed to a private one, should be the one to undertake such a responsibility. ... Presently, the Authority must constantly re-evaluate its ability to provide year-round transportation services to the islands at a price which residents -- not tourists -- can afford. By contrast, private businesses generally evaluate their ability to provide seasonal service at a price which tourists -- not residents -- will pay.” (Id. at p. 9.)
- (c) “[T]he emphasis must clearly remain on providing for the needs of the islands, with due consideration for the concomitant burdens thereby placed upon the mainland port communities. In no event should the emphasis be allowed to shift to that of serving the needs or desires of private entrepreneurs and investors at public expense or subsidy.” (Id. at p. 10.)

30. The second policy stated in the Licensing Policy is that “[t]he Authority must make certain that additional licensed services do not adversely affect its financial situation.”

(Licensing Policy [Appendix, Exh. D], at p. 10). In this regard, the Licensing Policy provides:

- (a) “Charged by statute to provide the necessities of life to the islands on a year-round basis, the Authority can only fulfill this duty if it is financially sound. In this regard, the major impediment to the Authority's financial health was identified by the first Commission appointed by the Legislature in 1947. To provide the necessities of life on a year-round basis, it is crucial for the Authority to generate substantial revenues during the summer tourist season to defray the

deficits which must be incurred during the winter months of the year when it is not profitable to operate a boat line to the islands.” (Id.)

- (b) “[T]he fundamental economics of the vessel transportation business for the islands have not substantially changed since 1949. The Authority still is required to meet a large amount of fixed costs and expenditures which do not burden its commercial competitors as a result of its burden of maintaining year-round service to the islands. The Authority is also required to use larger, ferry-type vessels and employ union labor within strict Coast Guard regulations.” (Id.)
- (c) “Although some might feel that more competition may be an effective means to bring about improved service from the Authority, the more probable result would be the opposite, because the Authority would be less likely to have the financial resources to acquire modern vessels or engage in needed capital improvements to improve its service. ... Accordingly, the Authority's continued protection against competition is both necessary and appropriate to ensure the Authority's financial health, which is essential for the public interest. (Id.)
- (d) “Whenever the Authority is presented with a request for a license, it shall first consider whether adequate service already is being provided and, if not, whether the additional service should be provided by the Authority instead of a private carrier. If the answers to both of these questions are in the negative, the Authority shall then ask whether the service, if provided by a private competitor, would have an adverse financial impact on the Authority.” (Id. at p. 11.)
- (e) “This does not mean that the Authority necessarily should deny all new requests for licenses, since there may be situations where the Authority's financial position can be adequately protected by requiring the carrier to pay an appropriate license fee to compensate the Authority for its lost revenues. ... [B]ut the consistent principle is that the Authority's financial health must be protected, and the carrier should be precluded from profiting at the Authority's expense by means of diverting its patronage.” (Id.)

31. The fourth policy stated in the Licensing Policy is that “[t]raffic growth is a concern that the Authority shall consider when evaluating license requests.” (Licensing Policy [Appendix, Exh. D], at p. 13.) In this regard, the Licensing Policy provides:

Over the past several years, the call has become increasingly louder from both islands for the Authority to limit what has heretofore been a persistent growth of vehicular traffic during the busy summer seasons, and a consensus has begun to emerge that such growth, if unchecked, will negatively impact the quality of life for both permanent and seasonal island residents. Although some persons may desire a more extended discussion of this subject, suffice it to say that the Authority shall **not**, for the foreseeable future, license any private carriers

to transport any vehicles to the islands. To the extent it is warranted and possible, all such vehicle service shall continue to be provided by the Authority alone.

(Id.)

32. The Licensing Policy also requires that all license agreements entered into by the Authority contain adequate provisions to protect the public interest. (Licensing Policy [Appendix, Exh. D], at pp. 15-17.) The Licensing Policy lists a number of such provisions that generally should be included in such agreements, although it also explicitly recognizes that in some situations a carrier may demonstrate that good cause exists for not including certain provisions in its license agreement which the Authority otherwise may feel are necessary to protect the public interest. (Id.)

The 2001 Report of the Governor's Task Force

33. In 2000, Executive Order No. 425 established the Governor's New Bedford, Cape and Islands Ferry Service Task Force (the "Governor's Task Force"), whose Chairperson was retired Massachusetts Appeals Court Justice Rudolph Kass. The Governor's Task Force issued its written report to the Governor on or about April 12, 2001. (A copy of the 2001 Report of the Governor's Task Force was included in the Appendix to the Verified Complaint filed in this action as Exhibit E.) In its 2001 Report, the Governor's Task Force declared that "[t]wo fundamental sets of observations came to guide the Task Force in this report" (Appendix, Exh. E, at p. 1), the first of which they stated as follows:

Establishment of the SSA in 1948 by the Legislature was a response to the failure of private carriers to provide reliable year-round service to Martha's Vineyard and Nantucket. We understand that the SSA is the transportation lifeline for the island communities. There are other options: air transportation and licensed private carriers; but the vessels of last resort upon which the islanders rely after September and before June are those of the SSA. Under its enabling statute, St. 1960, c. 701, the SSA is "to provide adequate transportation and necessities of

life for the islands of Nantucket and Martha's Vineyard.” The SSA is to fulfill that mission “without cost to the Commonwealth.”

For the last 40 years, the SSA has provided reliable service to the islands without running a deficit. Overall, the SSA has been responsibly run in the public interest. Its constituency recognizes that and supports the SSA; criticism from users - inevitable for any transportation system - most frequently concerns operational details. Tinkering with what has been a successful public authority needs, therefore, to be approached with reluctance and, certainly, with caution.

Id. at pp. 1-2 (footnote omitted).

34. In its 2001 Report, the Governor’s Task Force also specifically addressed the Authority’s licensing powers, stating:

It is the SSA’s responsibility to run year round freight and passenger service to the Islands. October through April are lean months, when the service runs at a loss. The Legislature foresaw that and conferred on the SSA the power to license vessels from Massachusetts ports. Were it otherwise, private operators could skim the cream off the fat summer season. We think the SSA must retain its licensing authority if it is to discharge its basic responsibility of providing year round service without deficits (or off-season rates) that would impose a hardship on the participating communities, particularly those on the Islands.

The SSA has in place a statement of policy relating to the licensing of private vessel service to the Islands. Within the broad criterion of public convenience and necessity, it considers: a) whether there is a demand for the additional service, i.e., is there demand for transportation from a new location or from an existing location; b) is the proposal a cream skimming operation, i.e., will it impair the fiscal soundness of the SSA’s operation; c) recognition of the grandfather status of certain private carriers running service to the Island in 1973 (Hy-Line out of Hyannis and the Island Queen out of Falmouth); d) impact [of] the license applied for on traffic on the Islands; e) ability of the applicant to provide the service described in the application, e.g., is there an adequate landing site; f) physical impact of the service applied for on the affected communities.

The Task Force considered whether there should be some sort of administrative review of SSA licensing decisions. We concluded that this would only encumber the procedure. Not only has the SSA established procedures for licensing, its statement of policy requires it to articulate in writing its reasons for grant or denial of a license, or the conditions places on a license, in light of those policies. There would be no basis for overturning such a decision unless the SSA’s findings and rulings showed that it had acted arbitrarily or capriciously.

The remedy of a complaint in the nature of certiorari is already available to correct arbitrary and capricious conduct.

2001 Report of the Governor's Task Force (Appendix, Exh. E), at pp. 5-6.

***The Defendants' Barging of Rental Cars
between New Bedford and Martha's Vineyard***

35. In the fall of 2003, the Authority was informed that the defendants had transported a fleet of rental cars from Martha's Vineyard to New Bedford, Massachusetts by barge. Accordingly, Fred C. Raskin, the Authority's Chief Executive Officer at that time, wrote a letter to Mr. Packer, dated October 3, 2003, in which he advised him that it was the Authority's belief that all of the recent transportation services provided by him in this regard were prohibited by Section 5 of the Authority's Enabling Act and asked him to contact Mr. Raskin if he planned any additional car movements within the Commonwealth. (A copy of Mr. Raskin's October 3, 2003 letter to Mr. Packer was included in the Appendix to the Verified Complaint filed in this action as Exhibit F.)

36. In the spring of 2007, the Authority was once again informed that the defendants had transported rental cars by barge, this time from New Bedford to Martha's Vineyard. Accordingly, Wayne C. Lamson, the Authority's General Manager, wrote another letter to Mr. Packer, dated May 22, 2007, in which he stated:

From time to time we have received reports of your company transporting rental cars by barge between Martha's Vineyard and the Massachusetts mainland. If those reports are true, it appears that your activities are subject to the Authority's licensing jurisdiction. In this regard, I note that Section 5 of the Authority's Enabling Act (chapter 701 of the Acts of 1960, as amended) provides, in pertinent part, as follows:

“Except as provided in this act, no person shall operate a vessel for the carriage of vehicles or freight for hire or resale by water between the mainland and the island of Martha's Vineyard or the

island of Nantucket or between said islands unless licensed or permitted in writing to do so by the Authority.”

Although this prohibition does not apply to the “continuance of existing services by vessels or a replacement of similar capacity thereof, which were in service on a daily seasonal basis on or before [May 30, 1973], or which were under contract for construction or purchase therefor executed on or before [May 30, 1973],” I do not have any information upon which to conclude that your barging of rental cars between Martha's Vineyard and the Massachusetts mainland would constitute such a continuance of service that existed on a daily seasonal basis on or before May 30, 1973. Therefore, I believe that the Authority's Enabling Act would prohibit you from engaging in such activities without a license from the Authority or the Authority's permission in writing to do so.

I would appreciate it if you could call me so that we can discuss this subject. Ideally I would like to be able to review the situation with you and, hopefully, have the entire matter resolved before the Authority's next meeting on June 19, 2007.

Thank you for your anticipated response to my request. ...

(A copy of Mr. Lamson's May 22, 2007 letter to Mr. Packer was included in the Appendix to the Verified Complaint filed in this action as Exhibit G.)

37. Mr. Packer did not respond to Mr. Lamson's May 22, 2007 letter. However, in a meeting on August 1, 2007, Mr. Lamson personally discussed this matter with Mr. Packer and told him that the Authority's Enabling Act prohibited him from barging rental cars between Martha's Vineyard and the Massachusetts mainland without a license from the Authority or the Authority's permission in writing to do so.

38. Nevertheless, on August 30, 2007, a barge owned and operated by the defendants was again observed transporting a full load of cars from Martha's Vineyard to New Bedford. As a result, Mr. Lamson wrote yet another letter to Mr. Packer, dated September 5, 2007, in which he stated:

I have received another report of your company transporting cars by barge, apparently between Martha's Vineyard and the Massachusetts mainland. On Thursday, August 30, 2007, your tug was observed pushing a deck barge

through Woods Hole passage with a full load of cars on board heading toward the New Bedford area.

This activity appears to be subject to the Authority's licensing jurisdiction. In a letter dated May 22, 2007, I informed you that the Authority's Enabling Act (Chapter 701 of the Acts of 1960, as amended) provides, in pertinent part, as follows:

“Except as provided in this act, no person shall operate a vessel for the carriage of vehicles or freight for hire or resale by water between the mainland and the island of Martha's Vineyard or the island of Nantucket or between said islands unless licensed or permitted in writing to do so by the Authority.”

Although this prohibition does not apply to the continuance of existing services by vessels or a replacement of similar capacity thereof, which were in service on a daily seasonal basis on or before May 30, 1973, you have not provided any information to the Authority upon which we can conclude such activity is a continuance of service that existed on a daily seasonal basis on or before May 30, 1973.

After sending a letter to you on May 22, 2007 and then personally discussing this matter with you in a meeting on August 1, 2007, I was disappointed to learn that you have apparently decided to continue to engage in such activities without a license from the Authority or the Authority's permission to do so.

I am now requesting that you refrain from transporting cars by barge between the mainland of Massachusetts and the islands of Martha's Vineyard and Nantucket or between said islands unless licensed or permitted to do so by the Authority. Any continuation of such activity without being licensed or permitted to do so by the Authority will leave the Authority with no other alternative than to seek a judicial resolution of this matter.

(A copy of Mr. Lamson's September 5, 2007 letter to Mr. Packer was included in the Appendix to the Verified Complaint filed in this action as Exhibit H.)

39. Mr. Packer did not respond to Mr. Lamson's September 5, 2007 letter either. Since that time one or more barges owned and operated by the defendants have been observed

transporting rental cars or other vehicles between Martha's Vineyard and the mainland on the following occasions:

- (a) December 11, 2007, when a barge owned and operated by the defendants was observed transporting two trucks from Martha's Vineyard. (See photographs included in the Appendix to the Verified Complaint filed in this action as Exhibit I.)
- (b) June 24, 2008, when a barge owned and operated by the defendants was observed transporting around 40 cars from New Bedford to Martha's Vineyard. (See photographs included in the Appendix to the Verified Complaint filed in this action as Exhibit J.)
- (c) August 5, 2008, when a barge owned and operated by the defendants was observed transporting five trucks to Martha's Vineyard. (See photographs included in the Appendix to the Verified Complaint filed in this action as Exhibit K.)
- (d) September 4, 2008, when a barge owned and operated by the defendants was observed transporting around 40 cars from Martha's Vineyard. (See photographs included in the Appendix to the Verified Complaint filed in this action as Exhibit L.)
- (e) September 17, 2008, when a barged owned and operated by the defendants was observed transporting around 40 cars from Martha's Vineyard. (See photographs included in the Appendix to the Verified Complaint filed in this action as Exhibit M.)

40. At no time has either of the defendants ever requested the Authority for a license or its written permission to carry rental cars or other vehicles for hire by water between Martha's Vineyard and the Massachusetts mainland; nor has the Authority ever given either of the defendants a license or its written permission to do so. Specifically, on none of those occasions listed in paragraph 39 above had the Authority given a license or its written permission to either of the defendants to carry any of those cars or other vehicles between the island of Martha's Vineyard and the Massachusetts mainland.

The Damages and Irreparable Harm Suffered by the Authority

41. The defendants' repeated operation of a barge to carry rental cars and other vehicles between the island of Martha's Vineyard and the Massachusetts mainland without a license or permission by the Authority in writing to do so is a blatant violation of the Section 5 of the Authority's Enabling Act, which expressly grants this Court "jurisdiction, on a petition in equity by the Authority, to enjoin any such operation."

42. The Authority has had the ability to carry all of the rental cars and other vehicles that the defendants have transported by barge between Martha's Vineyard and the mainland. Thus, defendants' actions have deprived the Authority of the revenues it would have received if the Authority had carried those rental cars and other vehicles on its own vessels. Further, the Authority would not have been required to incur any significant incremental expenses in order to carry those additional rental cars and other vehicles. The Authority has had more than sufficient vessel capacity to carry those additional rental cars and other vehicles at all times of the year and it would have been able to carry them with little, if any, additional labor cost. Therefore, for each rental car and other vehicle that was transported by the defendants instead of the Authority, the Authority has suffered damages in the amount of the standard vehicle fare that the Authority would have charged for the transportation of that vehicle, plus the passenger fares that the Authority would have charged for any individuals traveling with the vehicle. Since April 2008, such one-way standard vehicle fares have ranged from \$ 67.50 for a passenger vehicle under 17 feet in length to \$ 266.00 for a 65-foot commercial truck, and the Authority's one-way passenger fares have been \$7.50 (including the \$0.50 town-mandated embarkation fee).

43. Further violations of Section 5 of the Authority's Enabling Act by the defendants will cause the Authority irreparable harm and interfere with the Authority's statutory mission.

The defendants' activities are siphoning off revenues from the Authority that are needed to defray the deficits which the Authority must incur during the winter months of the year. The more revenues that the defendants siphon off from the Authority, the more the Authority is forced to increase its rates of fare that are paid by the rest of the public to insure that there it has sufficient income to meet the cost of its service. Such increases in its rates of fare impair the Authority's ability to provide a convenient and economical means of transportation between the islands of Martha's Vineyard and Nantucket and the Massachusetts mainland, which is vital to the islands' economic survival.

44. The Authority is required by statute to provide ferry service to both the island of Nantucket and the island of Martha's Vineyard on a year-round basis. Pursuant to Section 16 of the Authority's Enabling Act, the Authority is required to "provide ferry runs or such transportation of passengers, vehicles or freight" between Woods Hole and Martha's Vineyard and between the Massachusetts mainland and Nantucket "except in cases of emergency or necessity"; and, further, the ferry runs or such transportation provided between the Massachusetts mainland and Nantucket must be provided to and from inner Lewis Bay, in the Town of Barnstable, for no less than the period of April 1st to December 31st of each year.

45. The Authority continues to incur substantial deficits during the non-tourist season months (October through April), when its operating costs greatly exceed the revenues it derives from its service. Illustrative of this pattern are the monthly losses that the Authority has incurred during the most recent non-tourist season (October 2007 through April 2008), which totaled \$16,024,017, as follows:

October 2007	\$ 4,619
November 2007	\$ 1,721,507
December 2007	\$ 4,551,003
January 2008	\$ 2,601,645

February 2008	\$ 2,865,314
March 2008	\$ 2,728,503
April 2008	<u>\$ 1,551,426</u>
TOTAL	\$ 16,024,017

46. The loss of revenues by the Authority due to increased unlawful competition by the defendants will also make it more difficult for the Authority to continue to make its long-term debt repayments. If the Authority cannot make such payments as they fall due, it will be forced to borrow money at interest rates substantially higher than it is now paying. Such borrowings would increase the Authority's expenses, reduce its already limited surpluses and jeopardize its ability to defray the large operating losses that it must sustain throughout the winter months. As the reports of the 1948 and 1959 Commissions recognized, this is precisely the kind of treadmill that led to the financial instability of the Authority's predecessors.

47. Currently the Authority has \$55,850,000 of Steamship Bonds outstanding. The annual scheduled debt service requirements of those Steamship Bonds (exclusive of Steamship Bonds that have been defeased) are as follows:

<u>Year</u>	<u>Principal Payments</u>	<u>Interest Payments</u>	<u>Total Payments</u>
2009	\$ 4,320,000	\$ 2,398,570	\$ 6,718,570
2010	\$ 4,490,000	\$ 2,215,278	\$ 6,705,278
2011	\$ 4,260,000	\$ 2,026,325	\$ 6,286,325
2012	\$ 4,440,000	\$ 1,844,579	\$ 6,284,579
2013-2017	\$ 22,865,000	\$ 6,251,508	\$ 29,116,508
2018-2021	<u>\$ 15,475,000</u>	<u>\$ 1,419,300</u>	<u>\$ 16,894,300</u>
TOTAL	\$ 55,850,000	\$ 16,155,560	\$ 72,005,560

48. In addition to the above Steamship Bonds, the Authority currently has \$5,000,000 of Bond Anticipation Notes outstanding, which bring the Authority's total long-term debt to \$60,850,000. Further, the Authority anticipates that it will need to borrow more money over the

course of the next few years, potentially up to its current bond limit of \$75,000,000 (see Enabling Act, § 4(b)), in order to maintain an adequate program of improvements to and acquisition of vessels, docks, and other real and personal property.

49. The defendants' violations of Section 5 of the Authority's Enabling Act, which are not only blatant and deliberate on their part but also in complete and willful disregard of the Authority's repeated requests that the defendants stop their unlawful conduct, also send a clear signal across the open water to other vessel operators that they too can compete against the Authority in the same manner as the defendants. Such an open invitation jeopardizes all the more the Authority's protection against such competition, and would undermine an essential element of the Legislature's statutory scheme to ensure the Authority's financial stability. The Authority must be protected from this diversion of its trust by private entrepreneurs who leave the taxpayers and the public to bear the Authority's resultant losses.

COUNT I
**(Declaratory Judgment that the Defendants' Operations
are in Violation of Section 5 of the Authority's Enabling Act)**

50. The Authority repeats and re-alleges paragraphs 1 through 49 of this Verified Amended Complaint as if herein set forth in full.

51. An actual controversy exists between the Authority and the defendants concerning whether the defendants may operate a barge to carry rental cars or other vehicles between the island of Martha's Vineyard and the Massachusetts mainland for hire by water without a license or permission by the Authority in writing to do so.

52. The Authority is entitled to a declaration that the defendants are prohibited by Section 5 of the Authority's Enabling Act from operating a barge to carry rental cars or other vehicles between the island of Martha's Vineyard and the Massachusetts mainland for hire by

water without a license or permission by the Authority in writing to do so, and that the defendants' actions as described herein are in violation of Section 5 of the Authority's Enabling Act.

COUNT II
**(Judgment that the Defendants Intentionally Interfered with
the Authority's Contemplated Contractual and Advantageous Relations)**

53. The Authority repeats and re-alleges paragraphs 1 through 52 of this Verified Amended Complaint as if herein set forth in full.

54. The Authority believes that, before the defendants began operating a barge to carry rental cars and other vehicles between the island of Martha's Vineyard and the Massachusetts mainland, the owners of those cars and other vehicles transported their cars and other vehicles on the Authority's vessels and paid the Authority the standard vehicle fare that the Authority charged for the transportation of each car or other vehicle, plus the passenger fares that the Authority charged for any individuals traveling with each car or other vehicle.

55. At all relevant times, the defendants knew that, if they did not operate a barge to carry rental cars or other vehicles between the island of Martha's Vineyard and the Massachusetts mainland, the owners of those cars and other vehicles would transport their cars and other vehicles on the Authority's vessels and would pay the Authority the standard vehicle fare that the Authority charges for the transportation of each car or other vehicle, plus the passenger fares that the Authority charges for any individuals traveling with each car or other vehicle.

56. The defendants, through the use of unlawful and improper means in violation of Section 5 of the Authority's Enabling Act as described herein, intentionally and maliciously interfered with the Authority's relationships with the owners of those cars and other vehicles

that, in the absence of such interference, would have resulted in substantial economic benefit to the Authority in the form of additional revenues for the Authority.

57. The Authority has suffered damages in the form of lost revenues from the owners of those cars and other vehicles as a direct result of the defendants' intentional and malicious interference with the Authority's relationships with those owners through the use of unlawful and improper means in violation of Section 5 of the Authority's Enabling Act.

COUNT III
(Judgment that the Defendants Have Been Unjustly Enriched)

58. The Authority repeats and re-alleges paragraphs 1 through 57 of this Verified Amended Complaint as if herein set forth in full.

59. The defendants have been unjustly enriched by their operation of a barge to carry rental cars or other vehicles between the island of Martha's Vineyard and the Massachusetts mainland for hire by water without a license or permission by the Authority in writing to do so, in violation of Section 5 of the Authority's Enabling Act, and the Authority is entitled to restitution of the monies by which the defendants have been so unjustly enriched.

COUNT IV
**(Judgment that the Defendants' Actions are Unfair Methods
of Competition and Unfair or Deceptive Acts or Practices in
the Conduct of Trade or Commerce in Violation of G.L. c. 93A, § 2)**

60. The Authority repeats and re-alleges paragraphs 1 through 59 of this Verified Amended Complaint as if herein set forth in full.

61. The Authority, as well as each of the defendants, is a "person" as that word is defined in G.L. c. 93A, § 1(a). At all relevant times herein, the defendants also have been engaged in the conduct of "trade" or "commerce," as those terms are used in G.L. c. 93A, § 2.

62. The Authority's Enabling Act, including Section 5 thereof, is an existing statute meant for the protection of the public's health and welfare promulgated by the Commonwealth and intended to provide the consumers of this Commonwealth protection. Therefore, pursuant to 940 CMR 3.16(3), which is a regulation promulgated by the Office of the Attorney General pursuant to G.L. c. 93A, § 2(c), for purposes of determining whether conduct involves unfair methods of competition or unfair or deceptive acts or practices in violation of G.L. c. 93A, § 2, the defendants' conduct in violation of Section 5 of the Authority's Enabling Act is also an act or practice in violation of G.L. c. 93A, § 2.

63. The regulations promulgated by the Office of the Attorney General pursuant to G.L. c. 93A, § 2(c), are not intended to be all inclusive as to the types of activities declared unlawful by G.L. c. 93A, § 2. Therefore, even if the Court were to find that 940 CMR 3.16(3) does not apply to the defendants' conduct, the defendants' actions, as described herein, still constitute unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce, as those terms are used in G.L. c. 93A, § 2.

64. The Authority is a person other than a person entitled to bring action under G.L. c. 93A, § 11, and has been injured by the defendants' actions which have been declared to be unlawful by G.L. c. 93A, § 2, and/or the regulations issued under that statute by the Office of the Attorney General.

65. On October 6, 2008, which was more than thirty days prior to the filing of this Verified Amended Complaint, a written demand for relief, identifying the Authority as the claimant and reasonably describing the unfair or deceptive act or practice relied upon and the injury suffered, was mailed to the defendants. Neither of the defendants, within thirty days of the mailing of the demand for relief, made a written tender of settlement that was reasonable in relation to the injury actually suffered by the Authority.

FOR THESE REASONS, the Woods Hole, Martha's Vineyard and Nantucket Steamship Authority asks that this Court:

- A. Issue a preliminary injunction enjoining and prohibiting the defendants and all persons acting in concert with them from operating a barge to carry rental cars or other vehicles between the island of Martha's Vineyard and the Massachusetts mainland for hire by water without a license or permission by the Authority in writing to do so;
- B. Enter judgment in favor of the Authority and against each of the defendants on each of the Counts (Counts I, II, III and IV) of this Verified Amended Complaint;
- C. Determine and declare that the defendants are prohibited by Section 5 of the Authority's Enabling Act from operating a barge to carry rental cars or other vehicles between the island of Martha's Vineyard and the Massachusetts mainland for hire by water without a license or permission by the Authority in writing to do so, and that the defendants' actions as described in this Verified Amended Complaint are in violation of Section 5 of the Authority's Enabling Act;
- D. Issue a permanent injunction enjoining and prohibiting the defendants and all persons acting in concert with them from operating a barge to carry rental cars or other vehicles between the island of Martha's Vineyard and the Massachusetts mainland for hire by water without a license or permission by the Authority in writing to do so;

- E. Award the Authority its damages due to the defendants' wrongful conduct, including but not limited to the standard vehicle fares that the Authority would have received for the transportation of each rental car and other vehicle that was transported by the defendants between the island of Martha's Vineyard and the Massachusetts mainland, plus the passenger fares that the Authority would have received for any individuals who would have traveled with those vehicles;
- F. Order the defendants to restore to the Authority all of the monies by which the defendants have been unjustly enriched;
- G. Find that the defendants' actions as described in this Verified Amended Complaint constitute a willful or knowing violation of G.L. c. 93A, § 2; that neither of the defendants, within thirty days of the mailing of the Authority's demand for relief, made a written tender of settlement that was reasonable in relation to the injury actually suffered by the Authority; and that the defendants' refusal to grant the Authority relief upon its demand was made in bad faith with knowledge or reason to know that the defendants' conduct complained of violated G.L. c. 93A, § 2;
- H. Based upon the findings in Prayer G above, award the Authority up to three but not less than two times its actual damages due to the defendants' wrongful conduct, and also award the Authority its reasonable attorney's fees and costs incurred in connection with this action; and
- I. Grant such other and further relief as the Court deems just and proper.

WOODS HOLE, MARTHA'S VINEYARD AND
NANTUCKET STEAMSHIP AUTHORITY

By its attorney,

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VERIFICATION

I am the General Manager of the Woods Hole, Martha's Vineyard and Nantucket Steamship Authority. I have read the allegations set forth in the above Verified Amended Complaint, and I verify that those allegations are true and accurate of my own knowledge and my review of records kept in the ordinary course of the Authority's operations, except as to those matters stated to be on information and belief. As to those matters, I believe them to be true.

Signed under penalties of perjury this first (1st) day of December, 2008.

Wayne C. Lamson