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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

CLN PROPERTIES, INC., and MAEVERS MANAGEMENT COMPANY, INC., individually and on behalf of all those similarly situated, Plaintiffs, v. REPUBLIC SERVICES, INC. and ALLIED WASTE INDUSTRIES, INC. Defendants.	Case No. 2:09-cv-01428-DGV **FIRST AMENDED CLASS ACTION COMPLAINT** Jury Trial Demanded

Plaintiffs, on behalf of themselves and all others similarly situated, allege, upon their own knowledge (as to themselves and their actions) and otherwise upon information

and belief formed after a reasonable inquiry by counsel:

NATURE OF THE CASE

Plaintiffs bring this putative class action against defendant Republic Services, Inc. ("Republic") and defendant Allied Waste Industries, Inc. ("Allied Waste"), which merged into a single company in December 2008, with the survivor retaining the Republic name and Allied Waste's Phoenix, Arizona headquarters. Before the merger, Allied Waste had been the second largest publicly traded waste disposal company in the country. Allied Waste and Republic are hereinafter collectively referred to as "defendant" or "defendants."

1. In 2005, defendant began charging two so-called "cost recovery fees," one ostensibly to recover the company's rising fuel costs (the "fuel fee") and the other ostensibly to recover the company's rising environmental costs (the "environmental fee").

2. Defendant claimed that the purported cost recovery fees would correspond to and fluctuate with its actual fuel and environmental costs. The claims are and have been falsely and deceptively made. The contracts respecting them are illusory, and the contracts provisions have been, in any event, violated.

3. Defendant set the purported cost recovery fees at levels that did not correspond to defendant's changes in the defendant's fuel or environmental costs, and without the conferral of any additional consideration upon the customer. For example, at times when defendant's fuel ***cost decreased***, the purported cost recovery fees charged by defendant did not also decrease, but remained unchanged or ***increased***.

4. To illustrate the material nature of the defendant's deceptive and otherwise illegal conduct, between the time that the scheme complained of began and three years later in December 2008, the highest price for diesel fuel had declined slightly. Yet, defendant doubled the purported recovery fees, a manipulation that increased defendant's fee revenues by approximately 100%, from 8% of the customer's bill to 16%.

5. As further alleged herein, (a) the fees have not been tethered to actual changes in the company's fuel and environmental costs, but deceptively obtained increase in charges that were intended to and that did go to defendant's profit line; (b) the fees have been inconsistent with the expectations of the plaintiff contracting parties; (c) the fees have been unconscionable as they did not fall within the reasonable expectations of the plaintiff contracting parties, who were the weaker and adhering parties to the arrangements, as the existing agreements contained penalty provisions for refusal to accept the terms and carry on business with defendant; and (d) regardless, because the contract purports to give defendants the unilateral authority to increase the fees at will and without additional consideration to the plaintiff parties, the purported contract is illusory and without effect.

JURISDICTION AND VENUE

6. This court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(d)(2). This is a class action, and the matter in controversy exceeds $5,000,000, exclusive of interests and costs; members of the class are citizens of states other than the defendant's; the claims involve matters of national and interstate interest; less than two-thirds of the members

of the proposed class in the aggregate are citizens of Arizona; the number of members of the proposed class exceeds 100.

7. Venue is proper in this district pursuant to 28 U.S.C. § 1391, as the district of Arizona is where the defendant resides.

THE PARTIES

8. Plaintiff CLN Properties, is a New York corporation, with its principal place of business in West Islip, New York, which owns and operates a commercial property in DeKalb County, Georgia, upon which the fees complained of were imposed. Since prior to 2005, CLN Properties has contracted with Allied Waste and then Republic for waste removal services.

9. Plaintiff Maevers Management Company, Inc. ("MMC"), is a Missouri corporation, which owns and operates commercial property in that state. MMC has contracted with Allied Waste for waste removal since July 2005, when the fees were first imposed, and Republic thereafter. MMC has paid defendant the purported cost recovery fees challenged in this action.

10. Both plaintiffs were deceived by the practices complained of.

11. CLN Properties and MMC are collectively and severally referred to as plaintiffs.

12. Republic Services and Allied Waste merged on December 5, 2008. Republic is Allied Waste's successor-in-interest. The new company took Republic's name and

remained at Allied Waste's former headquarters in Arizona, at 18500 North Allied Way, Phoenix, Arizona 85054.

13. Republic is chiefly operated by former Allied Waste officers. The current chief operating officer of Republic had been the chief executive officer of Allied Waste.

FACTUAL ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

14. Defendant enters into service agreements for waste collection with customers nationwide, either directly or through franchisees, using a standardized form contract (the "service agreement") that establishes, among other terms and conditions, a basic price for the service based on the volume and type of waste collected. Plaintiff's purported agreements in 2005 are attached as Exhibit A.

15. In February 2005, defendant issued a notice (a copy of which is attached as Exhibit B) ("the Notice") announcing that it was imposing a unilateral purported fuel cost recovery fee to all existing and future clients' contracts. The Notice stated:

> **Important Notice Regarding Fuel Recovery Fee Price Increase and Other Cost Increases**
>
> The costs involved in providing solid waste management service have increased. In particular as you are undoubtedly aware, fuel prices are very unstable. You may also be aware that fuel represents a significant portion of our costs. As we have seen costs increase, we have managed to insulate you from some of the volatility in fuel prices through internal absorption of increased costs in the hopes that the spiraling costs would reduce over time.
>
> We have now reached the point where we can no longer absorb these costs. Given the volatility of fuel prices, we have chosen

to implement a Fuel Recovery Fee, which separates the fuel component of our overall rate into a separate item on our invoice; unfortunately, this will result in an overall price increase. ***However, the Fuel Recovery Fee will be guided by fluctuations in our costs of fuel. Hopefully we will see fuel prices return in time to more modest levels and a corresponding decrease in the Fuel Recovery Fee.***

Questions and Answers:

Why are you charging a Fuel Recovery Fee?
Our overall costs are increasing and by separating the fuel cost out into a separate line item, we are better able to isolate fluctuations that may occur in fuel prices.

Is this fee a permanent change?
The separate fuel cost line item will be a permanent fixture of our invoices; however, ***the amount of the Fuel Recovery Fee will fluctuate depending upon our cost of fuel.***

How is the Fuel Recovery Fee calculated?
The Fuel Recovery Fee is a percentage of the invoice amount. ***The percentage reflects a portion of the company's average cost for fuel. If our cost of fuel increases or decreases we will adjust the Fuel Recovery Fee accordingly.***

Will my cost of service increase beyond the Fuel Recovery Fee?
Fuel represents only a portion of the costs incurred in solid waste management. Other significant costs such as labor, insurance, the cost of our health programs for employees and disposal costs continue to rise. You may see on future invoices a price adjustment for these other costs, but we will take into account the Fuel Recovery Fee in determining any future changes.

If I have other questions regarding this notice, to whom should I speak?
If you have any further questions or concerns, please feel free to contact your company representative at the number indicated on your latest invoice. Your service representative will be happy to answer your questions.

> Please understand we regret that circumstances have reached the point where we must implement this increase. ***Your receipt and acceptance of this notice amends the service agreement between the parties.*** We look forward to your continued patronage.

Ex. B (emphasis added).

16. Defendant promised that, "if our cost increases or decreases we will adjust the Fuel Recovery Fee accordingly," and added that "hopefully we will see fuel prices return in time to more modest levels and a corresponding ***decrease*** in the fuel recovery fee." *Id*. (emphasis added).

17. Defendant unilaterally incorporated the purported fuel cost recovery fee into the service agreement by including the following language in the Notice: "[Y]our receipt and acceptance of this notice amends the [S]ervice [A]greement between the parties."

18. In August 2005, defendant similarly introduced the purported environmental cost recovery fee, which defendant described in 2006 as necessary to cover its supposedly increasing costs of complying with environmental regulations. *See* Exhibit C. Defendant initiated the purported environmental cost recovery fee at 4% of the base bill.

19. This percentage was not, however, related to changes in defendant's actual environmental costs incurred at that time. Subsequent increases in the environmental fee also have not been related to changes in environmental costs. Defendant never disclosed this fact, and plaintiffs and class members had no reason either to suppose the falsity of defendant's representation or to test its validity.

20. In October 2005, defendant made its first unilateral adjustment of the manner by which it calculated the fuel cost recovery fee, purportedly "to more closely capture the impact of fuel costs on its business." *See* Exhibit D.

21. The table set out fees/price per gallon. The table is misleading because it does not disclose and conceals that defendant has increased fees per cost of a gallon of fuel. The increase in fees without a corresponding increase in price of fuel/gallon demonstrates that the recovery fee was not related to changes in cost of fuel. Defendant never disclosed this fact, and plaintiffs and class members had no reason either to suppose the falsity of defendant's representations or to test their validity. Defendant did not even make historic fee/price per gallon information available on its website. The importance of fees that did not correspond to fluctuations in the price of fuel was a breach of contract, both explicitly and by implied covenants of good faith and fair dealing.

22. In May 2006, defendant again unilaterally increased the initial percentages by which the fuel cost recovery fee would be computed. By a notice issued in June 2006, (attached as Exhibit C), defendant substituted a new chart that again increased the recovery percentages applicable to the "peak weekly-published price per gallon in the preceding 31-day cycle," purportedly "to more appropriately align the fee with the total cost of diesel Allied Waste incurs nationwide."

23. The information on the table is at once misleading, confirmatory that the fees were not related to fuel price fluctuations, and represent breaches of contract, as previously

alleged. Defendant never disclosed this fact, and plaintiffs and class members had no reason either to suppose the falsity of defendant's representations or to test their validity. The impositions of fees that did not correspond to fluctuations in the price of fuel was a breach of contract, both explicitly and by implied covenants of good faith and fair dealing.

24. Also in June 2006, defendant announced that it would calculate the fuel cost recovery fee by using the "peak weekly-published price per gallon" anywhere in the nation "in the preceding 31-day cycle," as published by the U.S. Department of Energy. Defendant constructed a table of recovery percentages, which specified the fuel cost recovery fee to be imposed on customers as a percentage of their invoice ("recovery percentages"), based upon the peak per gallon price of diesel fuel. *Id.*

25. In the "Frequently Asked Questions" section of that notice, defendant represented that the increase was "necessary for Allied Waste to recover the significant increased cost of diesel today." *Id.* Defendant promised and undertook, again, that the fuel recovery percentages "will increase/decrease as the national average diesel price changes." *Id*. The promise was not kept, and the statement is misleading. Defendant never disclosed that it would manipulate the relationship between fees and fuel costs to assure that changes to the customer would remain above where they had been when this practice began. Defendant never disclosed this fact, and plaintiffs and class members had no reason either to suppose the falsity of defendant's promise on representation or to test their validity. The impositions of fees that did not correspond to fluctuations in the price of fuel was a breach

of contract, both explicitly and by implied covenants of good faith and fair dealing.

26. Defendant repeatedly manipulated the purported fuel cost recovery fee by unilaterally changing the "recovery percentages" without disclosing and by concealing that it was doing so. For example, the chart displayed on defendant's website on February 1, 2007 stated that at $3.00 dollars per gallon, the purported fuel cost recovery fee would be 9.33% of the customer's base price. By June 2007, the same $3.00 per gallon was charted to cost the customer 10.58%. The most current chart states that at $3.00 per gallon, the purported fuel cost recovery fee is up to 11.25%. Thus, defendant effectively increased the purported fuel cost recovery fee for reasons other than an upward fluctuation in fuel costs. Successive charts on the Allied Waste website do not reveal that the fee/cost of a gallon have changed, much less by how much, and prior tables are not accessible through its website, so the customer can not see the evolution of the charge.

27. A simple illustration shows the economic effect of how defendant's misrepresentations and broken promises had inflated customer costs. The same illustration provides undeniable quantitative evidence that, contrary to defendant's promises and representations, the amount of the fuel recovery fee did not fluctuate according to defendant's cost of fuel. August 2005 was the first month defendant showed a combined fuel/environmental recovery fee on its customers' statements. At that time, the highest price for diesel for any week in any region was $2.645. More than three years later, in December 2008, according to the Department of Energy, the price for diesel nationwide was nearly the

same at $2.615. Although the fuel costs were nearly identical, defendant doubled the purported recovery fees it charged its customers – charging only 8% of the base price in August 2005 (appearing in September 2005 statements), but by December 2008 (appearing in February 2009 statements), charging nearly 16%.

28. Defendant moreover pays and has paid considerably less than the average retail price charged in the region with the highest average retail price; indeed, due to its fuel hedging contracts, defendant pays considerably less than even the national average retail price. Defendant never disclosed this fact, and plaintiffs and class members had no reason either to suppose the falsity of defendant's representation or to test its validity.

29. In July 2007, defendant unilaterally announced that it had increased the purported environmental cost recovery fee from 4% to 5% effective June 2007. Exhibit E. According to defendant, the purported environmental cost recovery fee was "designed to recover the total annualized costs incurred on a nationwide basis associated with operating our facilities (landfill, transfer, material recovery facilities, and collection companies) in an environmentally safe manner." *Id.* Defendant reiterated: the fee "is based on the overall cost incurred by Allied Waste nationally." *Id.* Defendant did not provide prior notice to customers of its intention to increase the rate.

30. Defendant's notice did not reveal that the fee increase was not directly related to changes in its environmental costs. Defendant never disclosed this fact, and plaintiffs and class members had no reason either to suppose the falsity of defendant's representations or

to test their validity.

31. By July 2007, defendant began to impose a fuel fee on environmental fees.

32. According to the June 2006 notice, the two purported cost recovery fees had been calculated "by adding the percentage from the fuel recovery fee table and the environmental fee and applying it to the total invoice charges, excluding taxes." Exhibit C.

33. In July 2007 defendant changed how it calculated the two purported cost recovery fees. Henceforth, the environmental recovery fee was applied to the total standard invoice charges, and then the purported fuel cost recovery fee would be applied to the total standard charges, ***including the purported environmental cost recovery fee***. Exhibit E.

34. Beginning its notice issued in March 2008, and appearing since then is language stating that "The Fuel Recovery Fee or the Environmental Recovery Fee may be changed at the discretion of Allied Waste."

35. In March 2008, defendant summarized its practices regarding the two purported cost recovery fees in the online document attached as Exhibit F. Defendant reiterated that the purported fuel cost recovery fee was "based on the overall cost of fuel incurred by Allied Waste on a nationwide basis," by using the "peak weekly published price per gallon in the preceding calendar month." *Id.* Defendant reiterated that the purported fuel cost recovery percentages, "will increase/decrease as the national average diesel price changes." *Id.* Defendant reiterated that the purported fuel cost recovery fee was being applied to the total standard charges after the addition of the environmental cost recovery fee. These statements

were false and misleading, and, as promises, broken. Plaintiffs and class members had no reason either to suppose the falsity of defendant's representations or to test their validity.

36. Beginning in September, 2008, the United States experienced a precipitous fall in the price of diesel fuel. According to the Energy Information Agency of the U.S. Department of Energy, from August 2008 to March 2009, the peak weekly price per gallon dropped from $4.70 to $2.20.

37. In January 2009, in the midst of the fuel price decline, defendant announced that it had changed its practices concerning the two purported cost recovery fees. See Exhibit G.

38. First, to delay the impact of the falling prices, defendant unilaterally declared that the purported fuel cost recovery fee would be based on the rate "for the month preceding the month in which you are invoiced." *Id.* This change allowed defendant to impose a fuel fee as if costs of fuel had remained elevated when they actually were in decline.

39. Second, defendant stated that the purported fuel cost recovery fee was "based on the overall cost of fuel incurred by Allied Waste on a nationwide basis," and declared that it was "*designed to achieve an acceptable operating margin.*" *Id.* (emphasis added). Defendant also stated that the purported environmental cost recovery fee had been increased to 6%. *Id.* The statements were, in the context made, deceptive and misleading. They appeared to continue to try to prevent erosion of operating margins by passing through certain fluctuations in fuel prices when in truth they sought to expand margins by imposing fees without regard to fluctuations in fuel prices. Defendant did not disclose that the goal of

"acceptable operating margins" was independent of actual increases in fuel or costs of environmental compliance.

40. Since the initial imposition of recovery fees in 2005 and at every subsequent point when they have been adjusted (and adjusted always upward), customers have not received any additional consideration.

41. When defendant first introduced the fuel cost recovery fee, it stated in its notice that "the amount of the Fuel Recovery Fee will fluctuate depending upon our cost of fuel. *** If our cost of fuel increases or decreases we will adjust the Fuel Recovery Fee accordingly." Ex. B. Recently, the average price of diesel is less than the highest price of diesel in August 2005, when it was $2.645 a gallon. According to Republic CFO Tod Holmes, defendant pays approximately $2.08 a gallon for its fuel. (Q4 2008 Republic Services, Inc. Earnings Conference Call - Feb. 29, 2009.) Despite this savings, defendant charges plaintiffs and class members 6% more for its purported cost recovery fees than it charged in August 2005 when fuel was more expensive. As a result, plaintiffs and the class recently paid 16% above their base contract price for the purported cost recovery fees.

42. Defendant introduced its purported environmental cost recovery fee at 4% without explanation and unilaterally added to onto customers' bills in 2005. In 2006, it described the charge as a "component" of the fuel/environmental fee charge "designed to recover the total annualized costs associated with environmental compliance incurred nationwide by Allied Waste." In 2007, defendant increased the fee to 5%, shading it as

environmental compliance by "operating our facilities in an environmentally safe manner." In 2009, defendant increased the fee to 6% – stating on the website, that the fee is "designed to achieve an acceptable operating margin. The environmental fee recovery fee charged on your invoice is not associated with any explicit direct or indirect cost associated with your account...This fee may change at the discretion of Allied Waste."

43. Defendant's environmental fee is therefore none at all, and regardless, without provision of any additional consideration, represents the grant to itself of unilateral power to amend material contractual provisions without limitations, a paradigmatic illusory contract.

44. Having begun dealings with defendant, plaintiffs and class members found themselves in a weakened and adherent position by virtue of a purported penalty provision.

45. Defendant's form contracts contained a penalty provision that effectively obliged plaintiffs and class members to adhere to defendant's demand for increased charges by making it cost prohibitive for the customer to object to the charges by moving their business elsewhere:

> **Payment upon Termination**: If customer terminates agreement before its expiration other than as a result of a breach by Company, or if Company terminates this agreement as a result of a breach by the customer (including nonpayment), Customer shall pay Company an amount equal to the most recent month's charges multiplied by the lesser of (a) six months or (b) the number of months remaining in the term...

46. Thus, customers who opposed the fees could not terminate their dealings with defendant without suffering significant financial penalty.

CHOICE OF LAW

47. Arizona law applies nationwide on a most substantial contacts basis to the determination of the contract and unjust enrichment issues in this case.

48. The determination of the UDAP claims are appropriate for nationwide class certification because of an absence of conflicts among them.

49. The scheme complained of originated, was planned, orchestrated, and continues to be supervised by defendant in and from Arizona.

50. Defendant Republic Services is domiciled in and a resident of Phoenix, Arizona, and through its predecessor in interest, Allied Waste, has been throughout the class period.

51. The nature and amount of the purported cost recovery fees challenged herein were imposed on a company-wide basis by defendant from its Phoenix, Arizona, headquarters and continue to be applied consistently across the nation by defendant from those Arizona headquarters.

52. Allied Waste corporate officials, including its CEO, COO, and CFO, who created and implemented the scheme did so from the Allied's Headquarters in Phoenix, Arizona.

53. Form contracts used by Allied affiliates in the field were developed in and disseminated from Phoenix.

54. Communications with customers were developed in Phoenix. Amounts charged

in recovery fees were determined in Phoenix. Affiliates told inquiring customers that the charges are non-negotiable because they originate from headquarters.

55. Regardless of where customers paid their bills, the improper conduct had been primarily devised and undertaken at defendant corporate headquarters, the proceeds of the improperly garnered payments flowed into defendant treasury in Arizona, defendant maintained control in Arizona of those funds, and the court will impose a constructive trust upon these funds from which class members will enjoy ratable disgorgements.

CLASS ACTION ALLEGATIONS

56. Plaintiffs bring all claims herein as class claims pursuant to Federal Rules of Civil Procedure 23(b)(2) and (3). The two classes are:

> (A) (contract class) persons and entities in Arizona, Alabama, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin. who from February 1, 2005 through the present paid fuel/environmental recovery fees to defendant in connection with contracts for waste removal services.
>
> (B) (UDAP class) persons and entities in Arizona, Arkansas, California, Colorado, Delaware, Florida, Idaho, Illinois, Kentucky, Maryland, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oklahoma, Oregon, Rhode Island, Utah and Wisconsin.

57. Excluded from these classes are all Allied Waste or Republic executives, their legal and immediate family members; any entity in which Allied Waste or Republic has a

controlling interest; any of Allied Waste or Republic parents, subsidiaries, and affiliates; all employees of plaintiffs' counsel; and the heirs, successors, and assigns of any excluded entity.

58. Numerosity. Defendant has 13 million customers in forty states, with millions of customers nationwide who have paid the purported cost recovery fees. The proposed class is therefore so numerous that the individual joinder of all its members is impractical. The exact number and identities of class members are unknown at this time, but can be ascertained through appropriate discovery, including defendant's own records.

59. Predominance. Questions of law or fact of common and general interest to the class exist as to all members of the class, and predominate over any questions affecting only individual members of the class. Questions include:

a) Whether defendant had an actual contractual entitlement to the fees, or whether the contract was illusory and unenforceable.

b) Whether plaintiff and class members were weak, adhering persons so that the contract became unconscionable.

c) Whether defendant fulfilled or breached the provisions whose stated purpose was to reimburse defendant for certain fuel and environmental fees.

d) Whether defendant violated implied covenants of good faith or fair dealing.

e) Whether a constructive trust should be imposed on the monies

improperly obtained by the defendant.

f) Whether injunctive relief should be granted, and if so, what.

g) Whether the class' contract claims should be heard under Arizona law.

h) Whether Arizona's consumer fraud statute is in accord with the consumer fraud statutes of the named states such that A.R.S.§ 44-1522 shall be the choice of law applied to the class' deceptive practice claim.

60. Typicality. Plaintiffs' claims present class-wide legal and factual issues, that arise out of defendant's uniform course of conduct under a standardized service contract. All members of the class have sustained economic damages similarly arising out of defendant's alleged common course of conduct.

61. Adequate Representation. Plaintiffs will fairly and adequately protect the interests of the members of the class and have no interests antagonistic to those of the class members. Plaintiffs have retained counsel experienced in the prosecution and successful settlement of nationwide and statewide class actions. A review of class cases in which undersigned counsel is acting as lead counsel can be found at their websites: www.kmllp.com and www.bffb.com.

62. Certification under Rule 23(b)(2). Defendant has acted on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief would be appropriate respecting the class as a whole.

63. Certification under Rule 23(b)(3). Given the predominance of common

questions arising out of defendant's imposition of the purported cost recovery fees, class action is an appropriate, if not superior, method, which will fairly and efficiently adjudicate this controversy. Given their number and geographical dispersion, individual joinder of all members of the class is impractical, if not impossible. Furthermore, as the compensatory damages suffered by many individual members of the class are relatively small, the expense and burden of individual litigation would make it difficult, if not impossible, for those individual members to redress the wrongs done to them by a major corporation like defendant.

64. The cost to the court system of such individualized litigation would be substantial. Individualized litigation would also present the potential for inconsistent or contradictory judgments and would magnify the delay and expense to all parties and the court system in multiple trials of identical or similar complex factual issues of the case. By contrast, the conduct of this action as a class action presents fewer management difficulties, conserves the resources of the parties and the court system, protects the rights of each class member and maximizes recovery to them. Most importantly, without this class action, plaintiffs and class members will effectively be left without a remedy.

CAUSES OF ACTION

COUNT I

INJUNCTIVE RELIEF

65. Plaintiffs reallege the foregoing paragraphs.

66. Defendant should be enjoined from charging recovery fees:

a. the purported cost recovery fees unilaterally imposed by defendant upon plaintiffs are procedurally and substantively unconscionable, and as such unenforceable by defendant;

b. unilateral amendments to existing agreements are illusory, and ineffectual for want of consideration;

c. even if enforceable, defendant is obligated to reduce the fees (i) when the actually costs incurred by defendant decreased, or at least (ii) when the proxies used by the defendant decreased.

67. The wrongs complained of are ongoing.

68. Plaintiffs are accordingly entitled to injunctive or other equitable relief, terminating or otherwise rectifying defendant's imposition of the purported cost recovery fees and ordering restitution of such fees collected to date.

COUNT II

RESTITUTION

69. Plaintiffs reallege the foregoing paragraphs.

70. Defendant wrongfully obtained monies from plaintiff's and class members under illusory contracts.

71. Plaintiffs and the class were injured thereby.

72. Plaintiffs and the class are entitled to have those monies restored to them.

COUNT III

BREACH OF EXPRESS CONTRACT

73. Plaintiffs reallege the foregoing paragraphs.

74. Defendant's conduct constitutes repeated breaches of contract.

75. Defendant's breaches have injured plaintiffs and the class in amounts to be determined at trial.

COUNT IV

BREACH OF GOOD FAITH AND FAIR DEALING

76. Plaintiffs reallege the foregoing paragraphs.

77. Defendant have owed plaintiffs and the class an implied duty of good faith and fair dealing in respect of the service agreement, including the manner by which defendant calculated and assessed the purported cost recovery fees.

78. Defendant breached its implied duty by, among other things,

a. calculating the purported fuel cost recovery fee using pricing proxies that did not reflect changes in its actual fuel costs;

b. failing to adjust the purported fuel cost recovery fee to reflect decreases in defendant's pricing proxies;

c. calculating the purported environmental cost recovery fee using a fixed percentage that did not reflect changes in its actual environmental costs;

d. combining the purported cost recovery fees to disguise defendant's

failure to fluctuate the purported fuel cost recovery fee;

e. unilaterally changing the recovery percentages and disguising that fact;

f. unilaterally adjusting the cost of fuel benchmark in a manner that permitted defendant to impose fees without regard to falling fuel prices; and

g. charging a fee purportedly for the increase cost of fuel on a fee purportedly for environmental changes.

79. Defendant's breaches have injured plaintiffs and the class in amounts to be determined at trial.

COUNT V

DECEPTIVE PRACTICE

80. Plaintiffs reallege the forgoing paragraphs.

81. This claim is brought under the Arizona Consumer Fraud Statutes A.R.S. et. Seq. § § 44-1521 and those states whose UDAP statutes are substantially in accord with it, Arkansas, California, Colorado, Delaware, Florida, Idaho, Illinois, Kentucky, Maryland, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oklahoma, Oregon, Rhode Island, Utah and Wisconsin.[1]

[1] Ark. Code Ann. § § 44-1521 to 44-1534 Consumer Fraud Act; Cal Civ Code § § 1750 to 1784 Consumer Legal Remedies Act; Colo. Rev. Stat. § § 6-1-101 to 6-1-155 Consumer Protection Act; Del. Code Ann. Tit. 6 § § 2531-2536 Uniform Deceptive Trade Practices Act; Fla. Stat. Ann. § § 501.201. to 501.213 Deceptive and Unfair Trade Practices Act; Idaho Code § § 48-601 to 48-619 Consumer Protection Act; Ill Comp. Stat. Ann. § § 501/1 to 501/12 Consumer Fraud and Deceptive Business Practices Act and § § 510/1 to 510/7 Uniform Deceptive Trade Practices Act; Ky Rev. Stat.

82. As alleged, defendants have violated these substantially uniform UDAP provisions of the act, including, but not limited to the following misleading and deceptive practices:

a. by concealing and misrepresenting that, in calculating the purported fuel cost recovery fee using pricing proxies, the fee did not reflect changes in its actual fuel costs;

b. by concealing that they were increasing the purported fuel cost recovery fee despite decreases in defendants' pricing proxies, and by engaging in deceptive practices to accomplish their objectives;

c. by concealing and misrepresenting that the purported environmental cost recovery fees using fixed percentages did not reflect changes in its actual environmental costs, and by engaging in deceptive practices to accomplish their objectives;

d. by concealing that they combined the fuel and environmental recovery

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§ § 367.110 to 367.990 Consumer Protection Act; Md. Com. Law Code Ann. § § 13-101to 13-501 Maryland Consumer Protection Act; Mich.Comp. Laws Ann. § § 445.901 to 445.922 Consumer Protection Act; Minn. Stat. Ann. 8.31; and Minn. Stat. Ann. § § 325D.43 to 325D.48 Uniform Deceptive Practices Act 325F.68 to 325F.70 Prevention of Consumer Fraud Act; Mo Rev. Stat. § § 407.010 to 407.307 Merchandising Practices Act; Neb Rev. Stat. § § 56-1601 to 59-1623 Consumer Protection Act; Nev. Rev. Stat. § § 598.0903 to 598.0999 and 41.600 Trade Regulation and Practices Act; N.H. Rev. Stat. Ann § § 358-A:1 to 358-A:13 Consumer Protection Act; N.J. Stat. Ann. § § 56-8-1 to 56-8-91; N.Y. Gen. Bus. Law § 349; N.C. Gen. Stat. § § 75-1.1 to 75-35; Okla Stat. Ann. tit. 15 § § 751 to 763 Consumer Protection Act and 78 § §51 to 55 Deceptive Trade Practices Act; Or Rev. Stat. § § 646.605 to 646.656 Unlawful Trade Practices Law; R.I. Gen Law § § 6-13-1-1 to 6-13-1-27 Unfair Trade Practice and Consumer Protection Act; Utah Code Ann § § 13-2-1 and 13-5-1 Unfair Practices Act; and Wis. Stat. Ann. § § 100.20 to 100.264.

fee in order to prevent a decrease in revenues from a decrease in the price of fuel, and by engaging in deceptive practices to accomplish their objectives.

83. Defendant's conduct injured plaintiffs and class members in an amount to be determined at trial.

UNJUST ENRICHMENT

84. Plaintiffs reallege the foregoing paragraphs.

85. In the event plaintiffs lack an adequate remedy at law, defendants have been unjustly enriched, and plaintiffs unjustly impoverished, by the payment of purported cost recovery fees in the manner assessed by defendants, warranting restitution or such other equitable relief as the court deems just.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request that the court enter judgment in plaintiffs' favor and against defendants:

A. ruling that this action is properly maintainable as a class action, and appointing plaintiffs and their undersigned counsel to represent the class;

B. awarding compensatory damages and all monetary relief authorized by law or referenced in this complaint;

C. an order requiring disgorgement of all improperly received recovery fees into a constructive trust, or common fund, for the benefit of the named plaintiffs and the

class;

D. awarding prejudgment and post judgment interest;

E. awarding costs of this action, including reasonable attorney's fees and reimbursement of expenses, reasonably incurred, including experts' fees; and

F. awarding such other and further relief as this court may deem just, equitable, or proper.

JURY DEMAND

Plaintiffs demand a jury trial of all issues triable of right by jury.

Dated: August 31, 2009

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