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To:	Office of the Secretary Federal Maritime Commission	**Date:**	February 1, 2013
Fax No.	202-523-0014	**Pages:**	43, including this cover sheet.
From:	Fernando Amarillas		

Subject: **Re: Marine Repair Services of Maryland, Inc. v. Ports America Chesapeake, LLC Docket No. 11-11**

Please see the attached letter enclosing a copy of Complainant Marine Repair Services of Maryland, Inc.'s Exceptions to Initial Decision Served January 10, 2013, Brief in Support of Exceptions, and Request for Oral Argument.

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February 1, 2013

Via Fax Only (202-523-0014)

Office of the Secretary
Federal Maritime Commission
800 North Capitol Street, NW
Washington, D.C. 20573

Re: Marine Repair Services of Maryland, Inc. v. Ports America Chesapeake, LLC
Docket No. 11-11

Dear Office of the Secretary:

Enclosed is a copy of Complainant Marine Repair Services of Maryland, Inc.'s Exceptions to Initial Decision Served January 10, 2013, Brief in Support of Exceptions, and Request for Oral Argument, which is due today in the above-referenced matter. I have attempted to submit the filing electronically on three separate occasions this evening, to the <secretary@fmc.gov> and <judges@fmc.gov> e-mail addresses. However, following each attempt, I received an "undeliverable error message," even though the e-mail addresses are valid and the attached PDF file is relatively small (1MB). *See* copies of e-mails attached hereto. Out of an abundance of caution, I am faxing a copy of the filing and also e-mailed a copy to Assistant Secretary Rachel E. Dickon <rdickon@fmc.gov>. I did not receive an undeliverable message following the e-mail transmission to Ms. Dickon. The paper original, along with five additional copies, will be submitted to the Secretary of the Commission on Monday, February 4, 2013.

Sincerely,

Fernando Amarillas

Encl.

BEFORE THE FEDERAL MARITIME COMMISSION
WASHINGTON, D.C.

MARINE REPAIR SERVICES OF MARYLAND, INC.,	)	
Complainant,	)	**Docket No: 11-11**
v.	)	**ORAL ARGUMENT IS REQUESTED**
PORTS AMERICA CHESAPEAKE, LLC,	)	
Respondent.	)	

COMPLAINANT MARINE REPAIR SERVICES OF MARYLAND, INC.'S EXCEPTIONS TO INITIAL DECISION SERVED JANUARY 10, 2013, BRIEF IN SUPPORT OF EXCEPTIONS, AND REQUEST FOR ORAL ARGUMENT

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Complainant Marine Repair Services, Inc. ("Marine Repair" or "MRS"), by and through its undersigned counsel respectfully submits its Exceptions to the January 10, 2013 Initial Decision ("I.D.") of Administrative Law Judge Paul B. Lang ("ALJ Lang"), Brief in support of exceptions, and Request for Oral Argument, and states as follows:

INTRODUCTION

Marine Repair, a Maryland corporation solely owned by the Vincent and Elaine Marino Family Limited Partnership, operates at the Port of Baltimore and is in the business of maintaining and repairing chassis and containers for various steamship lines, and inspecting and maintaining temperatures of refrigerated containers. I.D. Findings of Fact ("ALJ-FOF") Nos. 1, 2.[1] Respondent, Ports America Chesapeake, LLC ("PAC") is a marine terminal operator and stevedore and also maintains and repairs chassis and containers. ALJ-FOF No. 4. Until the events complained of in this action, a customer base numbering around sixty would hire Marine Repair to inspect, repair and/or maintain the containers and reefers being off-loaded from ships at Seagirt and Dundalk. MRS-PFOF ¶16 (citing CX837 (Olshefski Decl. ¶11)).[2] Prior to the summer of 2011, Marine Repair and PAC had coexisted at Seagirt for many years competing with each other for the dry container M & R work. MRS-PFOF ¶28 (Citing CX6 (Montgomery Tr.) at 18:8-14).[3] Montgomery testified that by 2009, PAC and Marine Services each had

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[1] The Marino family has been in the marine repair services for forty years and has served the Port of Baltimore since 1974. Complainant's Proposed Findings of Fact filed July 20, 2012 ("MRS-PFOF")) at ¶3 (citing Joint Stipulation of Facts ("JSF") No.1).

[2] All "CX" references are to Marine Repair's Appendix to Proposed Findings of Fact filed July 20, 2012.

[3] In addition to its M & R services at Seagirt, Marine Repair also provided TIR/roadabililty functions for PAC which was serving as the terminal operator for MPA. MRS-PFOF ¶30 (Citing CX837 (Olshefski Decl. ¶13). In 2001, however, PAC took over the TIR operations at Seagirt and hired away Marine Repair's inspector mechanics. *Id.* PAC's control of

approximately 50% of the marine repair market. MRS-PFOF ¶28 (Citing CX7 (Montgomery Tr.) at 23:11-14).

PAC entered into a Lease and Concession Agreement ("Master Lease") with the Maryland Ports Administration ("MPA") with a fifty year term running from January 12, 2010 to January 11, 2060 pursuant to which PAC was granted the exclusive right to use and operate Seagirt Marine Terminal ("Seagirt") and an additional 18 acres known as the Canton Property. ALJ-FOF Nos. 13, 14. Marine Repair has asserted that PAC has abused its rights granted under the Master Lease to achieve not only a monopoly of the maintenance and repair ("M & R") work at Seagirt, but also as a tool to flex its competitive muscle to increase the number of customers signing contracts by which PAC has tied stevedoring to M & R services, all to the financial detriment of Marine Repair. Marine Repair filed this action seeking to redress PAC's unreasonable actions which have all but destroyed Marine Repair's business. MRS-PFOF ¶¶141 (Citing CX821, 825 (Marino Decl. ¶¶6-7, 22)). In its Complaint, Marine Repair asserted that by its conduct, PAC has violated certain provisions of the Shipping Act of 184, as amended and codified at 46 U.S.C. §§41301 *et seq*. (the "Act"): "A marine terminal operator may not . . . (2) give any undue or unreasonable preference or advantage or impose ay undue or unreasonable prejudice or disadvantage with respect to any person; or (3) unreasonably refuse to deal or negotiate." 46 U.S.C. §41106. Marine Repair seeks both reparations and injunctive relief.

On April 24, 2012, PAC filed a Motion for Summary Judgment which, after full briefing, was denied by Administrative Law Judge Erin M. Wirth ("ALJ Wirth"), the original Administrative Law Judge in this matter. *See* Order served 6/14/12 (Docket No. 38).

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the TIR operations allowed it to shift the maintenance and repair work to itself. *Id.*

Concurrently with the order denying PAC's summary judgment motion, ALJ Wirth served the Briefing Schedule notifying the parties that, in lieu of an oral hearing,[4] the case would be submitted by written briefs. *See* Briefing Schedule served 6/14/12 (Docket No. 39). Briefs as well as proposed findings of fact and conclusions of law and appendices of Exhibits were filed by the parties in July and August, 2012. *See* Docket Nos. 43-45, 51-53, 55.[5] By Notice served October 24, 2012, the parties were notified that the case had been reassigned to ALJ Lang. Notice of ALJ Lang's Initial Decision was served January 10, 2013. *See* Docket No. 69.

In his Initial Decision, ALJ Lang makes several factual and legal conclusions in Marine Repair's favor. Ultimately, however, he rules against Marine Repair, ordering that the Complaint be dismissed. In essence, ALJ Lang concluded that because Marine Repair's business was not completely destroyed, it is not entitled to relief on its Complaint. That economic factual finding clouded the legal determinations ALJ Lang was required to make, such that the analysis of the unreasonableness of PAC's conduct was conflated with the economic injury and the fact that

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[4] Marine Repair requested a hearing in its Complaint (pp. 11-12); the Initial Order served July 25, 2011 referenced the scheduling of further proceedings and the submission of pre-hearing statements (at ¶19); Marine Repair filed a Request for Oral Hearing on December 23, 2011; the January 27, 2012 Order on Respondent's Motion to Modify Scheduling Order included a deadline by which the parties were to propose hearing dates (p.2); and pursuant to that January 27, 2012 Order, the parties, on February 13, 2012, filed their Joint Status Report and Proposed Schedule proposing hearing dates. Thus, although Marine Repair had contemplated throughout the proceedings that the merits of the dispute would be determined after a full evidentiary hearing, and even though ALJ Wirth denied PAC's Motion for Summary Judgment because of factual disputes (6/14/2012 Order Denying Respondent's Motion for Summary Decision at p.3), she decided to consider the merits by written submission instead of by oral hearing. 6/14/2012 Briefing Schedule.

[5] Marine Repair made its Reply filings on September 13, 2012 but due to what appears to be an inadvertent oversight in the Secretary's Office, these four filings have not yet been assigned docket numbers. Marine Repair's counsel has advised the Secretary's office of the oversight.

although injured, Marine Repair is not yet destroyed. For the reasons explained below, ALJ Lang's decision is wrong and Marine Repair respectfully requests the Commission to reverse and award Marine Repair the full breadth of the relief it seeks, including both the monetary and injunctive relief.[6]

EXCEPTIONS TO FINDINGS OF FACT

Marine Repair excepts to ALJ Lang's Findings of Facts on two bases. The first is that some of the factual findings made by ALJ Lang are erroneous because they are unsupported by the record. The second is that ALJ Lang wholly ignored certain of Marine Repair's Proposed Findings of Fact ("MRS-PFOF") which were not only fully supported by evidence but which are material to a resolution of the issues in this matter.

> **ALJ-FOF NO. 11**: "The Colgate Creek Bridge does not have a TIR station. Since the commencement of the Master Lease, PAC has limited the use of the bridge to emergency movements between the [Seagirt and Dundalk] terminals."

EXCEPTION: The Master Lease term began January 12, 2010. *See* ALJ-FOF No. 14. PAC did not limit the use of the Colgate Bridge to emergency movements as of that date. Rather, it was not until much later, approximately 18 months later, that these restrictions went into effect. As Marine Repair explained in MRS-PFOF ¶18:

> MRS-PFOF ¶ 18. Prior to June 2011, when Marine Repair had to dray equipment from Seagirt to its repair facility at Dundalk, it did so across the Colgate Creek Bridge without restriction or inspection charge. CX009 (Montgomery Tr. at 30:1-17); CX 838 (Olshefski Decl. ¶14). Marine Repair would simply send PAC an

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[6] Marine Repair does not take exception to ALJ Lang's rulings finding that the Commission does have jurisdiction over this matter (I.D. at 25); denying PAC's Motion *in Limine* to Exclude the Testimony, Report and Declaration of David Deger (Marine Repair's damages expert) (I.D. at 29); denying PAC's Motion to Strike Marine Repair's Reply to PAC's Response to Marine Repair's Proposed Findings of Fact (I.D. at 31) (together referred to as "Preliminary Rulings").

email notification for containers and chassis it was draying across the Colgate Creek bridge and PAC in turn would generate a paper Trailer Inter-Change Receipt ("T.I.R.") for its records. CX028-29 (Montgomery Tr. at 109:18-110:20); *see also* CX 838 (Olshefski Decl. ¶14). Marine Repair would send another e-mail to PAC when the equipment was returned to Seagirt. CX 838 (Olshefski Decl. ¶14). Marine Repair was not required to exit through the main gate and transport the containers and chassis over the highway. CX 029 (Montgomery Tr. at 110:21-111:3). This process, to which PAC agreed, went on for years. CX 029 (Mongomery (sic) Tr. at 111:4-10).

ALJ-FOF NO. 33: A portion of the space acquired by PAC at Dundalk was formerly leased by Universal/APM. When Universal/APM relinquished its leased space it assigned its service contracts to PAC, at which time PAC began providing services to the former customers of Universal/APM. Prior to the transfer of its leased space to PAC, Universal/APM had a contract with MRS whereby MRS did M & R work on the leased space. PAC has informed MRS that it may not do M & R work on PAC's leased space at Dundalk.

EXCEPTION: Marine Repair takes exception to ALJ-FOF No. 33 because it is incomplete. As Marine Repair explained in MRS-PFOF ¶ 21, once PAC took over the lease, PAC told customers that Dundalk was a "closed" terminal and PAC's president, Mark Montgomery told Marine Repair it could no longer do repairs in the terminal area PAC controlled. Marine Repair's workshop is approximately 50-100 yards outside of this area, and when Universal/APM leased the terminal area, it allowed Marine Repair to do chassis and container repairs in that area, because under certain circumstances it is more efficient to do the repairs on the terminal, rather than in the shop. This is important because it allows Marine Repair to provide its customers and truckers with a much faster turn-around so that the equipment can immediately be returned to service. PAC's new restriction required Marine Repair to dray the equipment from the terminal area to the Marine Repair shop, which delays the return of the equipment to service. *See* MRS-PFOF at ¶21 (citing CX 839 (Olshefski Decl.

¶17)).

> **ALJ-FOF NO. 38:** "The distance from Seagirt to MRS's facility on East Lombard Street is 3.08 miles. The distance from Seagirt to MRS's facility on Broening Highway is 0.76."

EXCEPTION: ALJ-FOF No. 38 derives from PAC's Proposed Finding of Fact No. 105. While the distance calculation itself may be accurate, the statement and finding belie the fact that logistical and economic costs to Marine Repair of being forced by PAC to do its work off-dock unfairly puts Marine Repair at a competitive disadvantage.

> **ALJ-FOF NO. 40**: "MRS has lost a significant amount of business to PAC since PAC assumed control of Seagirt under the Master Lease and began offering bundling arrangements to its stevedoring and marine terminal customers."

EXCEPTION: ALJ-FOF No. 40 is accurate, but does not tell the whole story. The decline in Marine Repair's business has been precipitous. ALJ Lang's Findings of Fact should have included MRS-PFOF ¶¶134 through 136 which state as follows:

> MRS-PFOF ¶134. For the fiscal years ended April 30, 2006 through April 30, 2009, Marine Repair realized annual customer revenues ranging from $9,467,871 to $8,944,626. Marine Repair's customer revenues fell, however, to $6,354,777 for the year ended April 30, 2010 and to $6,106,810 for the year ended April 30, 2011. For the current year, which ended on April 30, 2012, Marine Repair's customer revenues fell to $3,068,196.90. CX 824 (Marino Decl. ¶19).
>
> MRS-PFOF ¶135. During fiscal years 2006 through 2009, Marine Repair's average adjusted book income was $1,900,000. As a result of the customer revenue losses described above, Marine Repair's adjusted book income fell to $761,000 for fiscal year 2010 and to $525,000 for fiscal year 2011. For the current 2012 fiscal year, the loss could be as much as $1,300,000. CX 825 (Marino Decl. ¶20).
>
> MRS-PFOF ¶136. The analysis and computation of Marine Repair's damages are set forth in the report and damages calculations of Marine Repair's damages expert, David Deger. (CX 790-815). Since 2010 (Master Lease executed in December 2009), and as a result of PAC's increasingly monopolistic behavior, Marine Repair has suffered damages resulting from lost business in the amount of

> $2,714,000. CX 787 (Deger Decl. ¶23); *see also* CX 825 (Marino Decl. ¶21). If PAC's practices continue, Marine Repair will lose the value of its business. CX 825 (Marino Decl. ¶22). Mr. Deger estimates these lost enterprise damages to be $9,000,000. CX 787 (Deger Decl. at ¶20-23)[footnotes omitted].

As ALJ Lang found, Mr. Deger was well-qualified to offer the opinions he did. I.D. at 28-29 (denying PAC's Motion *in Limine* to exclude Deger's opinions).

> **ALJ-FOF NO. 41**: "Upon the expiration of the bundling arrangements, the ocean carriers have the option of putting their M & R work out for competitive bidding, at which time MRS will have the option of submitting bids."

EXCEPTION: It is true that upon the expiration of the agreed tying arrangements,[7] the ocean carriers have the option of putting their M & R work out for competitive bidding. However, ALJ-FOF No. 41 fails to acknowledge that at least one of those tying arrangements apparently renews in perpetuity, as described in MRS-PFOF ¶ 47:

> MRS-PFOF ¶47. Pursuant to the CSAV Agreement, CSAV appointed PAB as "its exclusive provider of marine terminal services in the Port [of Baltimore] throughout the Term." CX260 at §2. The services provided are described in Schedule D of the Terminal Services Agreement, and include stevedore services, terminal services, maintenance and repair, and temperature control services. CX274-77. Under the CSAV Agreement, the "Initial Term" began on January 1, 2009 and expires on December 31, 2012. CX271. The agreement automatically renews in one-year increments. CX262 at §7.1. There is no end date for the automatic renewal provision and therefore the agreement renews in perpetuity. CX262 at §7.1. It appears that CSAV can *only* terminate the agreement for material breach by PAB, but that is subject to notice and cure. CX 263 at §7.3.

Moreover, the statement in ALJ-FOF No. 41 that upon expiration of the "bundling" agreements "MRS will have the option of submitting bids" for the ocean carriers' M & R work is not well

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[7] In his Findings of Fact and elsewhere in the I.D., ALJ Lang refers to the agreements by which PAC offered stevedoring and M & R services as "bundled" agreements or packages, and this is also the way they were described in some of the parties' proposed findings of fact. Clearly, however, "bundled" is nothing more than a euphemism for "tied." *See* I.D. at 44 ("the tying product is stevedoring services, while the tied product is M & R service").

taken because it is unlikely that Marine Repair's business will survive long enough for it do so. Even if it does survive, it is likely that PAC would offer the same tied packages against which Marine Repair cannot compete. Thus, the pertinent question is not whether Marine Repair could submit a bid in the future; the pertinent question is whether Marine Repair could submit a bid that can offer terms competitive with PAC. The answer is "no" if the current conditions continue to exist. As Marine Repair stated in its Proposed Findings of Fact:

> MRS-PFOF ¶141. If customer revenues continue to fall at the same rate they have been falling since PAC entered into the Master Lease and began imposing restrictions on Marine Repair's ability to conduct business, Marine Repair will not be able to sustain its operations in the Port of Baltimore. CX 825 (Marino Decl. ¶22); CX 852 (Olshefski Decl. ¶66).

> **ALJ-FOF NO. 42**: "The inability of MRS to perform M & R work at Seagirt, thus necessitating the drayage of containers and chassis through the main gate of Seagirt, has increased MRS's operating costs, some or all of which may be passed on to customers."

EXCEPTION: The evidence proffered by Marine Repair demonstrates that it is unlikely that such costs can be passed on to Marine Repair's customers in a way that is economically reasonable:

> MRS-PFOF ¶77. Mr. Montgomery testified that the T.I.R. process increases costs, a cost that is borne not by PAC, but by Marine Repair or its customers . CX013 (Montgomery Tr. at 46:9-19). Mr. Montgomery acknowledged that once PAC imposed its restrictions on Marine Repair's use of the bridge, those restrictions increased Marine Repair's costs of doing business. CX013 (Montgomery Tr. at 46:20-47:1). *See also* CX 846 (Olshefski Decl. ¶44).

> MRS-PFOF ¶78. Historically TRAC had most of its repairs performed by Marine Repair, because of Marine Repair's expertise and the quality of its work. Until June 2011, Marine Repair was performing about 80% of TRAC's chassis repairs, and PAC was performing 20%. CX 869 (Michel Tr. at 59:4-15). In Mr. Michel's experience with both Marine Repair and PAC for maintenance and repair services, Marine Repair has a cheaper labor rate, although the task rate (i.e.,

the time it takes to complete a task pursuant to the schedule) is the same. CX 860 (Michel Tr. at 25:14 - 26:10).

MRS-PFOF ¶79. Starting in June 2011, PAC began to impose so many restrictions on Marine Repair that PAC ultimately has secured most of TRAC's chassis repairs. As a result of the additional logistical restrictions and costs imposed by PAC on Marine Repair, including the fact that Marine Repair has to do the work off-dock, it is no longer economically or logistically viable for TRAC to continue to have Marine Repair do most of the chassis work for the Seagirt terminal. PAC is now doing about 80% of TRAC's chassis repairs. CX 869 (Michel Tr. at 59:16 - 60:7). Although Mr. Michel is more comfortable with Marine Repair because of the two companies' long relationship, as a result of the logistical and monetary costs now imposed by PAC if Marine Repair does the work, nearly all of TRAC's chassis repairs are performed by PAC. CX 860, 869 (Michel Tr. at 26:17 - 27:4, 59:16 - 60:7).

MRS-PFOF ¶105. Despite the initial discussions in June/July 2011, APL has not entered into a written agreement requiring PAC to perform its maintenance and repair work. APL continues to conduct business with Marine Repair, but is incurring additional charges imposed by PAC which will eventually make it cost prohibitive for APL to continue doing business with Marine Repair. CX 776 (Campolongo Decl. ¶10).

MRS-PFOF ¶106. Currently, in doing business with Marine Repair, APL incurs additional charges to reposition equipment from Dundalk Marine Terminal to Marine Repair's Broening Street repair facility, and other off-dock locations. This constitutes approximately $200 more per unit for stacking, handling and transporting containers, including TIR fees. The charges imposed by PAC make it more expensive for APL to use Marine Repair for maintenance and repair services. If PAC performs the repairs, the costs would not be added. CX 776 (Campolongo Decl. ¶11).

MRS-PFOF ¶107. The additional costs imposed on APL when it chooses to do business with Marine Repair will eventually make it impossible from a cost perspective, and APL will be forced to solely use PAC for its maintenance and repair work. CX 776 (Campolongo Decl. ¶12).

MRS-PFOF ¶108. If this occurs, and PAC becomes the sole maintenance and repair vendor at the Port of Baltimore, competition for these services will be eliminated, which will eventually impact cost and quality of service. CX 776 (Campolongo Decl. ¶12).

MRS-PFOF ¶112. On or about June 19, 2012, Tom Weisberg of Maersk Lines

("Maersk"), one of Marine Repair's long-standing customers, told Vincent Marino that Maersk would no longer be using Marine Repair, because Maersk had entered into an exclusive service agreement with PAC which bundled stevedoring services with maintenance and repair services. Mr. Weisberg also advised Mr. Marino that as part of Maersk's contract with PAC, it also had to agree not use Marine Repair's Broening Highway facility. CX 823 (Marino Decl. ¶12).

MRS-PFOF ¶130. The situation has gotten progressively worse over the years as more customers have agreed to the exclusive bundled contracts. In addition, once PAC executed the Master Lease between PAC and the MPA in late 2009, PAC has, at every opportunity, imposed costs and restrictions which make it virtually impossible for Marine Repair to compete for maintenance and repair business in the Port of Baltimore. CX 821-22 (Marino Decl. ¶7).

MRS-PFOF ¶140. . . . After the Master Lease was executed, PAC began engaging in increasingly monopolistic and unreasonably restrictive behavior, which results in increased costs and logistical problems for Marine Repair to the point where it is becoming nearly impossible to serve its customers. CX 852 (Olshefski Decl. ¶66).

ALJ-FOF NO. 44: "MRS has repair facilities at Dundalk and at off-dock facilities on Broening Highway (otherwise known as the "former Duke Property") and on East Lombard Street. MRS services ocean carriers calling at Seagirt and Dundalk. MRS does not service ocean carriers calling at the other three publicly owned terminals in Baltimore. (It has not been alleged that MRS is prohibited or otherwise prevented from offering M & R services to ocean carriers calling at North Locust Point.)"

EXCEPTION: Although ALJ-FOF No. 44 is accurately stated (except for the parenthetical), it is incomplete. While Marine Repair does have repair facilities at Dundalk and two others off-dock, as explained above, it can no longer offer competitive prices because of the restrictions to access which PAC has instituted. Moreover, the parenthetical is not wholly accurate. Although Marine Repair is not "prohibited" from offering M & R services to ocean carriers calling at North Locust Point, it makes no business sense for it to do so. North Locust Point handles some containers, but has been "redeveloped to enhance the Port's forest products capabilities." *See* MRS-PFOF at ¶11 (citing CX761-62). Seagirt is the preeminent container

terminal at the Port of Baltimore, not North Locust Point or any of the other Baltimore terminals.

Marine Repair takes further exception to ALJ Lang's factual findings in that the he failed to make findings on several factual issues, all of which were proposed by Marine Repair in its Proposed Findings of Facts, in opposition to PAC's Proposed Findings of Fact, or in Reply to PAC's Responses to Marine Repair's Proposed Findings of Fact, and supported by the evidence. These facts are discussed below in conjunction with Marine Repair's exceptions to the ALJ's discussion and analysis.

DISCUSSION AND ANALYSIS

I. OFF-DOCK AREAS SHOULD NOT BE INCLUDED IN THE RELEVANT GEOGRAPHIC MARKET

ALJ Lang correctly determined that the relevant geographic market does not extend beyond the Port of Baltimore. He erred, however, in including Marine Repair's off-dock locations within the relevant geographic market. *See* I.D. at 39-40. ALJ Lang reasoned as follows:

> The evidence clearly shows that ocean liners calling at Baltimore, or even only at Seagirt, have the option of obtaining M & R services at Seagirt, Dundalk, or at either of two off-dock facilities operated by MRS (Findings of Fact 34, 44, 47). Shippers of freight coming off of railroad lines have the additional option of obtaining M & R services at Picorp's off-dock facility, thus availing themselves of the presumably lower wages paid to non-ILA labor (Findings of Fact 45, 47). Accordingly, there is no factual basis for MRS's contention that the relevant geographical market is limited to Seagirt, or to Seagirt and Dundalk.
>
> * * * *
>
> In making this determination, I am mindful that M & R services can only be performed for ocean carriers transporting containerized cargo and that those carriers can only call at one of the three marine terminals in Baltimore that can accommodate container ships. Nevertheless, the evidence shows that M & R services are performed in various on-dock and off-dock locations throughout the

> Port of Baltimore. I further note that, although the determination of the relevant geographic market must be based on current economic conditions, there apparently is nothing to prevent any entities from establishing additional off-dock facilities for M & R work.

I.D. at 39, 40. The underlying flaw in ALJ Lang's determination is that it fails to account for the practicalities of the situation. That is, while it may be theoretically possible for M & R services to be performed off-dock, the evidence, as explained above, shows that it is not cost effective. Moreover, while it is true that there may be no physical or legal barrier to "prevent any entities from establishing additional off-dock facilities for M & R work," there is no evidence that such an option is economically feasible or could be competitive with PAC's on-dock facilities. In its Reply to PAC's response to MRS-PFOF at ¶11, Marine Repair stated:

> Marine Repair denies that the chassis repair work in Baltimore is evenly split between Marine Repair and PAC, and denies any inference that because certain M&R work can be performed off-dock, PAC and MRS operate on a "level playing field." Seagirt alone, where PAC controls the chassis work, represents roughly 90% of the chassis repair work in Baltimore. CX 900 (Olshefski Rebuttal Decl. ¶20). PAC's actions constitute an attempt to create a monopoly for M&R work based upon its control of stevedore services at Seagirt.
>
> Moreover, as a result of the additional logistical restrictions and costs imposed by PAC on Marine Repair, including the fact that Marine Repair has to do the work off-dock, it is no longer economically or logistically viable for customers to use Marine Repair for chassis repair work for the Seagirt terminal. MRS-PFOF ¶¶78-79. For example, PAC is now doing about 80% of TRAC's chassis repairs. MRS-PFOF ¶¶ 78-79. As a result of the logistical and monetary costs now imposed by PAC if Marine Repair does the work, nearly all of TRAC's chassis repairs are performed by PAC. MRS-PFOF ¶¶ 78-79.

ALJ Lang also ignored evidence demonstrating that PAC's increasingly restrictive practices have reached all the way to the off-dock facilities. In its MRS-PFOF at ¶112 Marine Repair stated:

> On or about June 19, 2012, Tom Weisberg of Maersk Lines ("Maersk"), one of Marine Repair's long-standing customers, told Vincent Marino that Maersk would no longer be using Marine Repair, because Maersk had entered into an exclusive

> service agreement with PAC which bundled stevedoring services with maintenance and repair services. ***Mr. Weisberg also advised Mr. Marino that as part of Maersk's contract with PAC, it also had to agree not use Marine Repair's Broening Highway facility.*** CX 823 (Marino Decl. ¶12) (emphasis added).

In its Reply to PAC's response to Paragraph 112 Marine Repair stated:

> MRS-PFOF ¶112 remains undisputed. Because MRS-PFOF ¶112 refers to statements made by PAC, those statements are party admissions, and are non-hearsay. *See* Marine Repair's Reply Brief, Section II. PAC does not dispute that Maersk entered into an exclusive service agreement with PAC (which bundles stevedoring with maintenance and repair services), and that it advised Maersk that it had to agree not use Marine Repair's Broening Highway facility as part of the exclusive agreement. In addition, Jim Davis (Maersk) also stated to Shawn Olshefski (Marine Repair) that Marine Repair was losing Maersk as a customer due to a "package deal" with PAC. CX 912 (Olshefski Rebuttal Decl. ¶62). *See also* Responses to PAC's Proposed Findings of Fact at ¶¶152-58, which are incorporated by reference herein.

In MRS-PFOF at ¶120, Marine Repair stated that "[w]hen PAC announced its decision that chassis repairs would be moved off-dock, the trucking community was not happy because they preferred to have their equipment repaired on-dock. CX015 (Montgomery Tr. at 55:7-12; 56:4-6)." In response, PAC accused Marine Repair of mis-stating Mr. Montgomery's deposition testimony. As Marine Repair explained in its Reply:

> MRS-PFOF ¶120 does not misrepresent Mr. Montgomery's deposition testimony. Mr. Montgomery testified as follows:
>
> Q. Tell me, if you would – let's go back to this truckers meeting. What if any reaction was there from the assembled group to your announcement of your plans?
>
> A. Well, the trucking community doesn't want to be off-dock. They would prefer to be on-dock.
>
> CX015 (Montgomery Tr. at 55:7-12; 56:4-6).

All the foregoing evidence, which demonstrates that the off-dock facilities *do not* provide a

feasible competitive alternative, was ignored by ALJ Lang.

As Marine Repair demonstrated through its Proposed Findings of Fact, its off-dock facilities do not afford it with the opportunity to compete on the same level as PAC is able to compete with its on-dock facilities. The services Marine Repair can perform off-dock have little overall significance compared to the services PAC is able to perform on-dock.

II. ALJ LANG SHOULD HAVE FOUND A MONOPOLY OR ATTEMPTED MONOPOLY

Whether PAC's conduct is unreasonable under the Shipping Act can be informed by the antitrust laws, although the federal antitrust laws are not strictly applicable to evaluating a claim arising under the Shipping Act. *Gulf Container Line v. Port of Houston Authority*, Order Partially Adopting Initial Decision, Docket No. 89-18 (F.M.C.). I.D. at 38, 44. However, "the concepts, terminology, and framing and analysis of issues involved in antitrust cases are frequently useful in such determinations." *All Marine Moorings, Inc. v. I.T.O. Corporation of Baltimore*, 1996 WL 264720, *12 (1996). *See* I.D. at 44. In evaluating the state of competition in the geographic market, ALJ Lang erred in concluding that "an actual or virtual[8] monopoly" does not exist. I.D. at 40. Even if an actual monopoly does not exist, anticompetitive conduct in the nature of an attempted monopoly certainly does exist.

A. There is Evidence of an Actual Monopoly

Under the antitrust laws, a plaintiff alleging a monopolization offense "must establish two elements: (1) the possession of monopoly power; and (2) willful acquisition or maintenance of that power – as opposed to simply superior products or historic accidents." *E.I. du Pont De*

[8] It is not clear what ALJ Lang means by the use of the term "virtual" monopoly.

Nemours and Co. v. Kolon Industries, Inc., 637 F.3d 435, 441(4th Cir. 2011) (citing *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 480 (1992). A monopolist violates the Sherman Act when it acts to "'foreclose competition, to gain a competitive advantage, or to destroy a competitor.'" *du Pont*, 637 F.3d at 441 (quoting *Eastman Kodak Co.*, 504 U.S. at 482-83. "[E]xclusive dealing arrangements can constitute an improper means of acquiring or maintaining a monopoly." *du Pont*, 67 F.3d at 441.

There is ample evidence to demonstrate that PAC has a large market share. Even if Marine Repair's off-dock areas are included in the relevant market, that portion of the market is very small compared to PAC's market share in light of the fact that PAC has virtually 100% market share for work performed on Seagirt itself for reefer work, chassis repair,[9] and M & R services. Not only does PAC have a large market share, it has the ability to maintain its market share by virtue of the Master Lease, its control of the Colgate Creek Bridge, its T.I.R. charges, its exclusive use of the roadabililty lanes and its role as sole stevedore.

To the extent ALJ Lang concluded that Marine Repair could compete by offering services off-dock, he erred because there is no evidence that Marine Repair's off-dock business constitutes and effective means of competition with PAC. In *United States v. Dentsply International, Inc.*, 399 F.3d 181, 193 (3rd Cir. 2005), the Court explained that the fact that "some manufacturers resort to sales and are even able to stay in business by selling directly is insufficient proof that direct selling is an effective means of competition. The proper inquiry is not whether direct sales enable a competitor to 'survive' but rather whether direct selling 'poses a

[9] PAC does 90% of the chassis repair work. *See* Marine Repair's Response to PAC's Proposed Finding of Fact No. 24.

real threat' to defendant's monopoly." The fact that the defendant's two closest competitors had managed to "eke out" "minuscule" market shares of 3% and 5% revealed that direct selling "pose[d] little threat" to defendant. 399 F. 3d at 193. "The mere existence of other avenues of distribution is insufficient without an assessment of their overall significance to the market." *Id.* at 196. The *Dentsply* Court rejected an analysis based on "theoretical feasibility," stating:

> Dentsply's grip on its 23 authorized dealers effectively choked off the market form artificial teeth, leaving only a small sliver for competitors. The District Court erred when it minimized that situation and focused on a theoretical feasibility of success through direct access to the dental labs. While we may assume that Dentsply won its preeminent position by fair competition, that fact does no permit maintenance of its monopoly by unfair practices.

Id. at 196.

In *LePage's Incorporated v. 3M (Minnesota Mining and Manufacturing Company)*, 1999 WL 346223 (E.D. Penn. 1999), the fact that the plaintiff had not yet been driven out of business did not foreclose an anti-trust finding:

> 3 M asserts that, "here we are, after six years of supposedly anticompetitive conduct, LePage's is still in business, it still has most of the U.S. private label tape sales, prices have gone down, quality and quantity have gone up, and the only 'injury' has been to LePage's." [citation to record omitted]. LePage's has produced some evidence that some sole source arrangements between 3M and LePage's former customers affect the quantity of low-cost tape available to consumers and that, if it is driven out of business, the arrangements are likely to affect the quantity of low-priced tape available to consumers. The Court cannot rule out a genuine issue of material fact as to the present or probable negative effects of 3M's challenged conduct on the price and quantity of tape.
>
> * * * *
>
> 3M maintains that, in order to prevail, LePage's must show not only that it was injured, but that its injury was attributable to an anticompetitive aspect of 3M's conduct. It reasserts that there can be no antitrust injury if LePage's cannot show that 3M's pricing was below an appropriate measure of 3M's cost, a position this Court has already rejected. If LePage's can show that it lost customers directly

> because of 3M's unlawful bundled rebate offers or unlawful exclusive dealing agreements, and that there is a resulting decline in and danger to competition in the market, then it can show an antitrust injury attributable to 3M's anticompetitive conduct.

1999 WL 346223 at *12,*13. In a later *LePage's* decision, the Third Circuit affirmed a judgment against the defendant 3M. The Court found that as a result of the defendant's conduct, "LePage's manufacturing process became less efficient and its profit margins declined and its market share dropped 35% in five years and it closed one of its two plants. *LePage's Inc. v. 3M*, 324 F.3d 141, 161-62 (3d Cir. 2003). "Had 3 M continued with its program it could have eventually forced LePage's out of the market." 324 F.3d at 162. Here, as discussed above, Marine Repair's revenues have declined dramatically. In addition, Marine Repair has had to significantly reduce its labor force as a result of PAC's anticompetitive actions. *See* MRS-PFOF at ¶138.

PAC's conduct is anti-competitive for the additional reason that the conduct has reduced customer choice, and reduced customer choice is harmful to competition. *Conwood Company, L.P. v. United States Tobacco Company*, 290 F.3d 768, 789 (6th Cir. 2002); *Abbott Laboratories v. Teva Pharmaceuticals USA, Inc.*, 432 F. Supp.2d 408, 420-23 (D. Del. 2006); *Deborah Heart and Lung Center v. Penn Presbyterian Medical Center*, 2011 WL 6935276, *7 (D. N.J. 2011). In *Exclusive Tug Arrangements in Port Canaveral, Florida*, Docket No. 02-03, 2003 WL 1017732 (FMC 2003) the Commission reviewed the Canaveral Port Authority's ("CPA") requirement that vessels use the tug services of just one tug operator (Seabulk) and CPA's aggressive efforts to preserve Seabulk's exclusive commercial tug franchise. 2003 WL 1017732, *2; *see also id.* at *24 (at BFF115). The Commission found that "[t]he inability of tug users to select the tug company of their choosing [ ] created problems for some of those users, and

potential problems for others." 2003 WL 1017732, *24-*25 (at BFF116-121); *see id.* at *34. Here, PAC has eliminated choices. For example, "It is PAC's anti-competitive activity, including bundled pricing packages, its assertion of exclusive control, and the unreasonable restrictions placed on Marine Repair's ability to do its work at Dundalk and Seagirt (including handling and drayage fees), that have caused customers to "switch" to PAC. CX 823 (Marino Decl. ¶13). For example, customers, such as TRAC, have stated that they are "stuck" with PAC given that PAC is the only M&R vendor at Seagirt. CX 869 (Michel Tr. at 59:16 - 60:7)." *See also* Marine Repair's Responses to PAC's Proposed Findings of Fact at ¶¶128-129, 137-138. Another of Marine Repair's customers, APL, was one of the recipients of PAC's June 9, 2011 email announcing that as of June 6, 2011 all repairs must be done by PAC. MRS-PFOF ¶100 (citing CX345; CX775 (Campolongo Decl. ¶7)). Mr. Campolongo of APL was surprised at this directive because although APL had been pleased with Marine Repair as its vendor, it was now being told that it could no longer conduct business with Marine Repair. MRS- PFOF ¶100 (citing CX775 (Campolongo Decl. ¶7)). *See also* MRS-PFOF ¶111 ("In addition, because PAC effectively controls all of the maintenance and repair at both Seagirt and Dundalk, customers are deprived of any ability to negotiate the costs of those services. See CX 834 (Muller Decl ¶ 13)."

"To show that conduct has an anticompetitive effect, 'it is not necessary that all competition be removed from the market. The test is not total foreclosure, but whether the challenged practices bar a substantial number of rivals or severely restrict the market's ambit.' *United States v. Densply Int'l, Inc.*, 399 F.3d 181, 191 (3rd Cir. 2005). Competitors need not be barred 'from all means of distribution,' if they are barred 'from the cost-efficient ones.' *[United States v.]Microsoft*, 253 F.3d [34,] at 64 [(D.C.Cir. 2001)]." *Abbott*, 432 F. Supp.2d at 423.

PAC has attained monopoly power and ALJ erred in concluding otherwise.

B. PAC's Conduct Constitutes Attempted Monopolization

In concluding that PAC does not have an "actual or virtual" monopoly, ALJ Lang stated as follows regarding competition in the relevant market:

> There *can be no doubt* that, as the *only* stevedore at the largest container terminal in Baltimore, *PAC has a significant competitive advantage* over MRS, and that *PAC has aggressively used that advantage* to secure M & R work, often from former customers of MRS. It may be, as MRS suggests, *that PAC's ultimate goal is to eliminate all competition for M & R work in Baltimore* and to establish itself as the only stevedore in Baltimore which handles containerized cargo. That intention, if it exists, *has not yet been achieved, in spite of PAC's allegedly unlawful practices. The fact that MRS still has customers at Seagirt* indicates that, *while the volume of its business at that terminal may have declined sharply, it has not been either actually or effectively shut out and that as stated above, it continues to perform M & R work at Dundalk and at its two off-dock facilities.*
>
> For the reasons stated above, I have concluded that, *while competition for M & R services in the relevant geographic marked has shifted in PAC's favor, it has not been restricted to the extent that an actual or virtual monopoly exists.*

I.D. at 40 (emphasis added) . Thus, although recognizing PAC's significant competitive advantage, its aggressive use of that advantage, and its ultimate goal of eliminating all competition, ALJ concluded that there is no monopoly. However, the fact that Marine Repair is hanging on and has not shut its doors is not the test. *Dentsply*, 399 F.3d at 193. Even conduct which does not rise to the level of monopoly may constitute attempted monopoly and Marine Repair submits that such conduct is "unreasonable" under the Shipping Act. In *River Parishes Company, Inc. v. Ormet Primary Aluminum Corp.*, 28 S.R.R. 751, 1999 WL 125991, *25 n.21 (1999) (F.M.C. 1999), the Commission expressly stated that "the level of harm can also be satisfied by a showing of *potential* harm." (emphasis added). In support, *River Parishes* cited to the Commission's earlier decision in *California Stevedore and Ballast Co. v. Stockton Port Dist*,

7 F.M.C.75, 83 n.4 (1962) in which it stated: "It is not significant that these evils [those which are likely to accompany monopoly, such as poor service and excessive costs] have not been proved to actually exist yet . . . Healthy competition for business which is the best known insurance against such evils has been destroyed." (alterations by *River Parishes*).

ALJ Lang, although finding that PAC taken steps to solidify its competitive position in the Port of Baltimore, stopped short of finding an actual monopoly because Marine Repair remains in business. Even if, under a strict antitrust analysis ALJ Lang were correct (which Marine Repair disputes), PAC's conduct easily constitutes attempted monopolization. In the words of the Fourth Circuit, "[a]ttempted monopolization employs 'methods, means, and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it.'" *E.I. du Pont de Nemours and Co. v. Kolon Industries, Inc.*, 637 F.3d 435, 453 (4th Cir. 2011) (quoting *M & M Med. Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc.*, 981 F.2d 160, 166 (4th Cir. 1992)). *Cf. United States v. American Airlines, Inc.*, 743 F.2d 1114, 1119 (5th Cir. 1984) ("[i]f a defendant has the requisite intent and capacity, and his plan if executed would have had the prohibited market result, it is no defense that the plan proved to be impossible to execute"). Three elements must be established to demonstrate attempted monopolization: "(1) the defendant engaged in predatory or exclusionary conduct, (2) the defendant had a specific intent to monopolize, and (3) there was a dangerous probability that the defendant would successfully attain monopoly power." *Taylor Publishing Company v. Jostens, Inc.*, 216 F.3d 465, 474 (5th Cir. 2000). In the instant case, there is evidence of each of these elements.

Regarding the first element, PAC has clearly engaged in exclusionary conduct. It has

prohibited Marine Repair's use of the Colgate Creek bridge; prohibited Marine Repair from continuing to perform roadability repairs; and has prohibited Marine Repair from performing reefer work on Seagirt. The second element requires specific intent, which can be inferred from the anticompetitve conduct including conduct taken to protect the defendant's market position. Ample evidence demonstrates PAC's specific intent to protect its market position. As Marine Repair stated in its Proposed Findings of Fact:

- MRS Reply to PAC response to MRS-PFOF at ¶17. " . . . .The record herein reflects that the restrictions placed on Marine Repair's ability to do business at Seagirt were implemented almost immediately, including PAC's directive to Marine Repair in late May 2011 that Marine Repair had to vacate Seagirt by the first week of June 2011. *See* MRS-PFOF ¶88 (CX032 (Montgomery Tr. at 124:15- 125:14) (testifying about memo sent on or about May 27, 2011 by PAC's M&R manager, Shawn Vencill, to Mark Montgomery referencing the fact that Marine Repair was "going to be kicked out of Seagirt 6/3/11")).

- MRS- PFOF at ¶22: After PAC took control of the Universal APM leased property, PAC superintendent John Fick told Marine Repair's customers (who were also PAC's stevedoring customers) that the steamship lines would be "hit with a T.I.R. charge" to dray the equipment from the terminal area to the repair shop. CX 839 (Olshefski Decl. ¶18).

- MRS Reply to PAC response to MRS-PFOF at ¶65: Mark Montgomery of PAC has stated that his "goal is to put Ceres out of business in the Port of Baltimore." CX 843 (Olshefski Decl. ¶32).[10]

- MRS-PFOF ¶66: Because PAC has asserted its exclusive right to terminal operations and stevedoring under the Master Lease, other stevedores, like Ceres, have not challenged PAC's dominance in the Port of Baltimore. By asserting its exclusivity, PAC has essentially eliminated stevedoring competition. PAC has farther solidified its control in the Port of Baltimore by offering bundled pricing packages which give discounted rates for stevedoring services, provided that the shipper also contracts with PAC for all of its maintenance and repair work. By asserting exclusivity, PAC achieves volume, which allows it to keep its stevedoring prices low, and it then uses those low stevedoring prices to tie the maintenance and repair services to the stevedoring.

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[10] ALJ Lang found this statement inconsequential, characterizing it as merely a "description of aspirations which have not been fulfilled." I.D. at 37. Marine Repair disagrees. It demonstrates PAC's anticompetitive intent. The statement was not disputed by PAC. *See* Marine Repair's Reply to PAC's Response to MRS-PFOF ¶65.

CX 843 (Olshefski Decl. ¶32).

•MRS-PFOF ¶71. In May 2011, PAC advised Marine Repair that it was taking over all maintenance and repair of chassis at Seagirt and moving all chassis to Canton. Mark Montgomery confirmed this in a May 27, 2011 email to Shawn Olshefski, in which Mr. Montgomery stated: "[PAC] will be moving all chassis to the Canton Warehouse Property and will assume all [maintenance and repair] for chassis activity on Seagirt proper as well as Canton." CX 335.

•MRS-PFOF ¶79. Starting in June 2011, PAC began to impose so many restrictions on Marine Repair that PAC ultimately has secured most of TRAC's chassis repairs. As a result of the additional logistical restrictions and costs imposed by PAC on Marine Repair, including the fact that Marine Repair has to do the work off-dock, it is no longer economically or logistically viable for TRAC to continue to have Marine Repair do the most of the chassis work for the Seagirt terminal. PAC is now doing about 80% of TRAC's chassis repairs. CX 869 (Michel Tr. at 59:16 - 60:7). Although Mr. Michel is more comfortable with Marine Repair because of the two companies' long relationship, as a result of the logistical and monetary costs now imposed by PAC if Marine Repair does the work, nearly all of TRAC's chassis repairs are performed by PAC. CX 860, 869 (Michel Tr. at 26:17 - 27:4, 59:16 - 60:7). *See also* Marine Repair's Reply to PAC's Response to MRS-PFOF ¶79 (when asked at his deposition who was making the decision to use Ports America instead of Marine Repair, Mr. Michel answered "Ports America" and in response to the follow up question "So you're not making that decision?" he responded: "We are stuck with the one vendor that is there." In response to the next follow-up question "Well, I mean, you can move your stuff off dock to MRS; Is that correct?" Mr. Michel responded: "At this point, it's not a good business decision, no.") (quoting CX 869 (Michel Tr. at 59:16 - 60:7)).

•MRS-PFOF ¶100. On June 9, 2011, Mr. Campolongo [of APL] received an e-mail from Bayard Hogans, Assistant Terminal Manager for PAC, stating that "all repairs as of 6/6/11 must be done by Ports America unless drayed prior to that date." CX345. This directive from PAC was surprising because APL was pleased with Marine Repair as its vendor, and was being told that it could no longer conduct business with Marine Repair. CX 775 (Campolongo Decl. ¶7).

PAC's actions constitute an attempt to create a monopoly for M&R work based upon its control of stevedore services at Seagirt. Moreover, as a result of the additional logistical restrictions and costs imposed by PAC on Marine Repair, including the fact that Marine Repair has to do the work off-dock, it is no longer economically or logistically viable for customers to use Marine Repair for chassis repair work for the Seagirt terminal. MRS-PFOF ¶¶78-79. For

example, PAC is now doing about 80% of TRAC's chassis repairs. MRS-PFOF ¶¶ 78-79. As a result of the logistical and monetary costs now imposed by PAC if Marine Repair does the work, nearly all of TRAC's chassis repairs are performed by PAC. MRS-PFOF ¶¶ 78-79.

The third element of a claim for attempted monopolization, a dangerous probability of successfully attaining monopoly power, is met where the defendant "'currently has market power and that such market power will tend to approach monopoly power if the alleged unlawful conduct remains unchecked.'" *Organ Recovery Systems, Inc. v. Preservation Solutions, Inc.*, 2012 WL 2577500, *12 (N.D. Ill. 2012) (quoting *Walter Kidde Portable Equip., Inc. v. Universal Sec. Instruments, Inc.*, 669 F. Supp.2d 895, 901 (N. D. Ill. 2009)). As noted in *Taylor Publishing Company v. Jostens, Inc.*, 216 F.3d 465 (5th Cir. 2000), "[a]n attempted monopolization claim *necessarily involves conduct which has not yet succeeded*; otherwise, the plaintiff would bring an actual monopolization claim." 216 F.3d at 474 (emphasis added). Under these standards, ALJ Lang erred in finding in PAC's favor based on the fact that it has not yet succeeded in fully shutting down Marine Repair's business.[11]

In *Lincoln Elec. Co. v. National Standard, LLC, Corp.*, 2012 WL 2130954 (N.D. Ohio 2012), counterclaim plaintiffs alleged that counterclaim defendants attempted to monopolize the market by fraudulently obtaining patents so they could bring enforcement lawsuits against

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[11] At the conclusion of the I.D., ALJ Lang leaves the door open for Marine Repair to return to the FMC for relief should the day come when "competition in the relevant geographic market and the practices of PAC [ ] have changed to the extent that a different result would be indicated." I.D. at 46. ALJ Lang's statement further indicates that his analysis was, mistakenly, driven by the question of damage rather than an assessment of the reasonableness of PAC's conduct. Because the ultimate damage of total business destruction has not yet been inflicted upon Marine Repair, it appears that ALJ Lang perceived, incorrectly, that he had no choice but to find in PAC's favor on liability.

competitors to drive them out of business. 2012 WL 2130954 at *2. The counterclaim defendants defended in part on the ground that none of the companies it sued had, in fact, gone out of business. *Id.* at *8. The court rejected this defense:

> These arguments fail to prove that Lincoln does not have a dangerous probability of monopolizing the market if it were to succeed in its alleged scheme to use its patents in a fraudulent and/or predatory manner.
>
> * * * *
>
> Also, as pointed out by National Standard, a company claiming potential monopolization need not show that any competitors have, in fact, been forced out of business. [citations omitted]. Just because their competitors have not gone out of business does not mean that Lincoln does not have the ability to exercise monopolistic control over the relevant market.

2012 WL 2130954 at *8, *9. Here, there is a dangerous probability that if PAC's conduct is allowed to continue, Marine Repair will shut its doors. As discussed above, the evidence shows the decline in Marine Repair's revenues as a result of PAC's conduct has not only been consistent, it has been precipitous. *See supra* Exception to ALJ-FOF No. 40.

Marine Repair ***has*** been effectively shut out of the competition and PAC stands alone as the only stevedore for Seagirt and the only M & R service provider with on-dock service facilities. *See* Marine Repair's Reply to PAC's Response to MRS-PFOF ¶111 ("Seagirt alone, where PAC controls the chassis work, represents roughly 90% of the chassis repair work in Baltimore. CX 900 (Olshefski Rebuttal Decl. ¶20)). ALJ Lang clearly erred in concluding that PAC has neither an actual nor a virtual monopoly. It seems that Marine Repair would have been better off to have closed its doors months ago than to continue to try to "eke out" an existence.

C. PAC'S Practices Are Unreasonable

1. PAC's restrictions on Marine Repair's Seagirt Operations are unreasonable.

Initially, ALJ Lang recognizes, correctly, the severity of PAC's practices: "My examination of the evidence leaves little doubt that MRS can no longer compete as effectively as it could when Seagirt was operated by MPA." I.D. at 41. ALJ Lang then states, however, that the "exclusivity [in the Master Lease] which PAC employs to enhance its competitive position is exactly what it bargained for." I.D. at 41. PAC has presented no evidence to demonstrate that allowing competition from Marine Repair in the dry box, chassis repair and reefer repair is going to strip PAC of the benefit of its bargain. Moreover, PAC entered into the Master Lease with the associated risk of a finding that its conduct is unreasonable under the Shipping Act. Section 18.14 of the Master Lease provides: "Severability. Should any provision in this Agreement be illegal or not enforceable, it shall be considered separate and severable from this Agreement and the remaining provisions shall remain in force and be binding upon the parties as though the said provision had never been included." CX 186. There is a difference between "enhancing" one's competitive position and eliminating all other competition. ALJ Lang rationalizes that "a ***significant*** level of competition for M & R services exists in Baltimore in spite of PAC's exclusive status at Seagirt." I.D. at 41. There is no evidence, however, to support the conclusion that the level of competition off-dock is *significant*. ALJ Lang reached this conclusion notwithstanding the fact that his "examination of the evidence [left] little doubt that MRS can no longer compete as effectively as it could when Seagirt was operated by MPA. . . . MRS has correctly stated that the Master Lease does not vest PAC with immunity for violations of the

Shipping Act, and that language in the lease prohibits the use of the premises for unlawful purposes." I.D. at 41. ALJ also found, however, that the exclusivity employed by PAC "to enhance its competitive position is exactly what it bargained for." I.D. at 41. ALJ Lang recognizes that the Master Lease restricts PAC's activities to those with a "lawful" purpose but then seems to just use the exclusivity provision to deem all conduct lawful. Marine Repair submits that the proper analysis is to evaluate PAC's conduct in isolation of the lease to determine whether the Shipping Act has been violated. If there is a violation, as Marine Repair alleges there is, then the exclusivity provision cannot provide a defense to PAC.

At pages 42-43 of the I.D., ALJ Lang discusses the restrictions PAC has placed on Marine Repair at Seagirt. He distinguishes *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), a case relied on by Marine Repair in its merits Brief. ALJ finds as significant the fact that in *Aspen*, the parties had shared in a marketing scheme but the defendant had never, and was not required to, give the plaintiff access to its physical property. I.D. at 42. *Aspen* is pertinent, however, to the extent it is a refusal to deal case. Here, Marine Repair has not argued that it must be given space for free. In addition, because the Master Lease does not give PAC any authority over Colgate Creek Bridge, the distinction noted by ALJ Lang is not applicable.

ALJ Lang also discusses PAC's selection of Multimarine. ALJ Lang sees PAC's relationship with Multimarine as nothing other than a perfectly reasonable economic decision and a service to PAC's customers, even stating that it is "not clear whether PAC derives any revenue from the reefer work performed by Multimarine[.]" I.D. at 42. ALJ Lang has ignored a very significant fact - that mechanical reefer work must be performed on-dock. *See* MRS-PFOF

at ¶93 (citing deposition testimony of Mark Montgomery). By prohibiting Marine Repair from performing any on-dock services, PAC has necessarily reserved for itself (through Multimarine) all reefer work. As Marine Repair stated in MRS-PFOF at ¶123:

> Although PAC has allowed Marine Repair to use a small area on Seagirt for mechanical repairs on reefers, it appears that eventually PAC will prohibit Marine Repair from performing *any* reefer services for *any* steamship line calling at Seagirt. PAC intends to allow only its subcontractor, Multimarine, to perform such services. On June 23, 2011 Pat Ciociola, a Marine Repair reefer mechanic, advised Mr. Olshefski about a conversation that he had with Bayard Hogans of PAC, in which Mr. Hogans stated that "as of Oct. 1st PAC would be doing all of the work and everyone would be gone. ... I asked if PAC would be doing the reefer work and he said yes. They want to do it all." CX 349 (e-mail from "reeferbalt@mrs-cmc.com"); CX 850 (Olshefski Decl. ¶61).

ALJ Lang states that "PAC has no duty to *facilitate* MRS's efforts to obtain M & R work from ocean carriers" and therefore its choice of a reefer repair company (Multimarine) that does not also provide M & R work was reasonable. I.D. at 42 (emphasis added). Marine Repair has not asserted that PAC has an affirmative duty to *facilitate* Marine Repair's ability to obtain business; Marine Repair contends that PAC should not be allowed to *prohibit* Marine Repair from competing. *Deborah Heart and Lung Center v. Penn Presbyterian Medical Center*, 2011 WL 6935276, *8 (D. N.J. 2011) (defendants argued that there was no anticompetitive harm because there is no duty to cooperate but as Court noted the alleged anticompetitive harm was the exclusion of plaintiff as a choice for patients, not that defendants had an affirmative obligation to direct patients to plaintiff or give plaintiff access to defendants' patients).

Another restriction PAC has placed on Marine Repair is the prohibition to use the Colgate Creek Bridge. As ALJ notes, PAC controls the bridge even though it is not part of the leased premises under the Master Lease. I.D. at 42. ALJ Lang described PAC's stated reasons

(prevention of theft of wear and tear on the bridge) for the restrictions as "strained." Although clearly troubled by the prohibition, ALJ Lang ultimately concluded that Marine Repair did not submit sufficient evidence to demonstrate harm from the prohibition. I.D. at 43. ALJ Lang also found however, that:

> It is reasonable to assume that PAC's decision to close access to Seagirt over the Colgate Creek Bridge was partially, *or even solely*, influenced by a desire to curtail competition from MRS. It is also reasonable to assume that PAC would have maintained access over the bridge if its own operations were unduly restricted by the necessity of using the main gates of Seagirt and Dundalk. Nevertheless, the controlling issue is whether the loss of use of the bridge, whether considered alone or in connection with PAC's other challenged practices, has unduly restricted MRS's ability to compete for M & R work in the Port of Baltimore. As shown above, it has not.

I.D. at 43 (emphasis added).[12] ALJ Lang misunderstands the fact that the use of the bridge was crucial to Marine Repair's operations, but not to PAC. The reason why PAC's operations are not "unduly restricted by the necessity of using the main gates at Seagirt and Dundalk" is that PAC is able to perform all of its services on-dock at Seagirt. *Carolina Marine Handling, Inc. v. South Carolina State Ports Authority*, Docket No. 99-16, 2000 WL 722274 (FMC 2000) discussed the economic power that accompanies an entity's control of access to terminal facilities: "'The ability to control access to terminal facilities is the economic power subject to the greatest potential for abuse, as the railroads demonstrated early in this century. Regulatory oversight which ensures reasonable, non-discriminatory access to those facilities should be the primary

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[12] ALJ Lang minimized Marine Repair's concern over the bridge because Marine Repair did not complain to the MPA even though the MPA retained legal control over the bridge. Marine Repair submits that this is irrelevant. That Marine Repair instead chose to both file its Complaint and negotiate a standstill for the pendency of this litigation so that it could continue to have some use of the bridge instead of contact MPA is irrelevant to an assessment of the reasonableness of PAC's conduct.

focus of the Commission's regulation of marine terminal operators.'" 2000 WL 722274 (quoting *Fact Findings Investigation No. 17 Rates, Charges and Services Provided at Marine Terminal Facilities*, 24 S.R.R. 1260, 1280 (8/31/1988)). Moreover, ALJ Lang found that PAC was motivated by a desire to curtail competition from Marine Repair, yet concluded that Marine Repair's ability to compete was not unduly restricted - because of the off-dock facilities. As discussed above, this conclusion is incorrect because the off-dock facilities provide very little in the way of competition.

Another restrictive practice imposed by PAC is the T.I.R. system. ALJ Lang concluded that PAC's implementation of the T.I.R. did not constitute an unreasonable or anticompetitive practice because there was no evidence that Marine Repair was treated differently from any other entity, *including PAC*, entering and leaving Seagirt. I.D. at 43. Marine Repair is treated differently from PAC, however, because PAC does not pay itself the T.I.R. charge and also because PAC has reserved to itself, to the exclusion of Marine Repair, the opportunity to perform roadabililty repairs before going through the T.I.R. process. MRS-PFOF ¶¶76, 114. There is no other entity to compare Marine Repair to on this issue because no other entity is performing chassis repairs at Seagirt. Marine Repair proffered evidence that the imposition of the T.I.R. charge did adversely effect its ability to compete with PAC. *See e.g.*; MRS-PFOF ¶50 ("Although CSAV would like to continue to give Marine Repair work because of its expertise, the quality of its work, and its good customer service, the logistical restrictions and charges imposed by PAC (*e.g.*, additional T.I.R. charges, and all work off dock) make it too expensive and inefficient for Marine Repair do the work.") (citing CX780 (Cascio Decl. at 10)); MRS-PFOF ¶106 (" Currently, in doing business with Marine Repair, APL incurs additional charges to

reposition equipment from Dundalk Marine Terminal to Marine Repair's Broening Street repair facility, and other off-dock locations. This constitutes approximately $200 more per unit for stacking, handling and transporting containers, including TIR fees.") (citing CX776 (Campolongo Decl. ¶11)); MRS-PFOF ¶105 ("APL continues to conduct business with Marine Repair, but is incurring additional charges imposed by PAC which will eventually make it cost prohibitive for APL to continue doing business with Marine Repair") (citing CX776 (Campolongo Decl. ¶10)).

All of the foregoing practices must be considered together with PAC's other practices. It is important to look at the totality of PAC's conduct - not each episode in isolation. *Abbott Laboratories v. Teva Pharmaceuticals USA, Inc.*, 432 F. Supp.2d 408, 428 (D. Del. 2006) (plaintiffs were entitled to claim that individual acts taken together as a group "have an anticompetitive effect even if the acts taken separately do not"). As the Third Circuit stated in *LePage*:

> The relevant inquiry is the anticompetitive effect of 3M's exclusionary practices *considered together*. As the Supreme Court recognized in *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699, 82 S. Ct. 1404, 8 L.Ed. 2d 777 (1962), the courts must look to the monopolist's conduct taken as a whole rather than considering each aspect in isolation. The Court stated: "in a case like the one before us . . . the duty of the jury was to look at the whole picture and not merely at the individual figures in it. . . . This court, when considering the anticompetitive effect of a defendant's conduct under the Sherman Act, has looked to the increase in the defendant's market share, the effects of foreclosure on the market, benefits to customers and the defendant, and the extent to which customers felt they were precluded from dealing with other manufacturers. [citation omitted].
>
> The effect of 3M's conduct in strengthening its monopoly position by destroying competition by LePage's in second-tier tape is most apparent when 3M's various activities are considered as a whole. The anticompetitive effect of 3M's exclusive dealing arrangements, whether explicit or inferred, cannot be separated from the

> effect of its bundled rebates. 3 M's bundling of its products via its rebate programs reinforced the exclusionary effect of those programs.

324 F.3d at 162. Viewed in their totality, the ALJ should have concluded that PAC's practices are unreasonable.

2. The Tying Arrangement is Unreasonable.

ALJ Lang correctly concluded that PAC's practices constitute a tying arrangement because stevedoring and M & R services present separate product markets. I.D. at 44. ALJ Lang incorrectly concludes, however, that the arrangement is not unlawful because Marine Repair is still in business. I.D. at 45. ALJ Lang found that "PAC has not forced MRS out of business, and, in spite of MRS's dire predictions, there is no evidence that its demise is either imminent or inevitable." I.D. at 45. "The business income lost by MRS, while possibly significant, is the result of legitimate competition." I.D. at 46. The notion that a complainant cannot recover if it is still in business simply is not supported by case law. In fact, as ALJ Lang noted in denying the Respondent's motion to strike the opinions of Mr. Deger, "PAC has conceded that the 'before an[d] after' method of calculating damages can be appropriate. . . ." I.D. at 28. *See Storage Technology Corp. v. Custom Hardware Engineering & Consulting, LTD.*, 2006 WL 1766434, *21 (D. Massachusetts 2006) (the "before and after" approach is an accepted methodology for proving antitrust lost profits); *Harris Wayside Furniture company, Inc. v. Idearc Media Corp.*, 2008 WL 710957, *1 (D. New Hampshire 2008) (same). The "before and after" approach is utilized in cases where the complainant is *not* out of business. *See Harris*, 2008 WL 710957, *3 ("[t]he 'before and after' method of estimating lost profits applies to ongoing businesses, like plaintiffs here, by comparing plaintiffs' profits before defendants' offending conduct with their

profits following it"). In *Carter-Wallace, Inc. v. Hartz Mountain Industries, Inc.*, 1983 WL 1805 (S.D.N.Y. 1983), the Court discussed an alternative damages theory of going concern value, which also assumes that the plaintiff is still in business:

> Defendants' argument that plaintiff is barred from seeking damages for diminished going concern value because Carter-Wallace is still in business strikes me as unsound. An antitrust plaintiff who at the time of trial still operates a going concern should be able to recover damages for the going concern value of the business (generally referred to as diminution of assets) so long as such damages do not overlap with damages for lost profits. The cases do not support defendants' contention, although in almost all the cases cited, the plaintiff had either left or been driven from the market by the time of trial. One case, *Atlas Building Products Co. v. Diamond Block & Gravel Co.* [parallel citation omitted], 651 F.2d 76 , 95 n.30 (2nd Cir. 1981), *cert. denied*, 455 U.S. 943 (1982).

Carter-Wallace, 1983 WL 1805, *4. *See Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.*, 175 F.3d 18, 27 (1st Cir. 1999) (comparing available damages remedies depending on whether or not antitrust plaintiff is still in business).

In his concluding paragraph on tying (I.D. at 45), ALJ Lang recognizes that PAC is the only stevedore at Seagirt. He also notes that "[a]rguably, MRS has shown that some of its former customers have felt economically compelled to accept bundling arrangements because of the cost savings for stevedore services, and that those customers would otherwise have preferred to continue using MRS for their repair." I.D. at 45. ALJ Lang makes two additional statements, however, which indicate a misunderstanding of the totality of the evidence. He states: (1) "there is no credible evidence that PAC has conditioned its provision of stevedoring services on a customer's acceptance of its M & R services or the reefer repair services of Multimarine, or that it has threatened to withhold stevedoring services if a customer does not accept a bundling arrangement;" and (2) "The fact remains that those customers [of Marine Repair's] have made

voluntary business decisions to put costs savings above their loyalty to MRS; there is no evidence that the M & R services provided by PAC and Multimarine are unsatisfactory, even if they are no better, or even inferior, to the services offered by MRS." I.D. at 45. These may be economic decisions, but they are being made in an anticompetive environment carefully orchestrated by PAC whose superior position as sole stevedore, coupled with its refusal to permit Marine Repair on-dock access to perform mechanical reefer work, leaves Marine Repair's customers little choice but to accept PAC's tied services package. This was PAC's plan from the outset. *See* MRS-PFOF ¶118 ("PAC has admitted that when it made its decisions in June 2011, its intention was to restrict Marine Repair's ability to do reefer work at Seagirt and to have only its subcontractor Multimarine provide the reefer work. CX019 (Montgomery Tr. at 72:15-21; 73:1-5)").

For forty years Marine Repair successfully competed at Seagirt and Dundalk and for the last 20 years it had successfully competed with PAC. As Vincent Marino stated in his Declaration: "If customer revenues continue to fall at the same rate they have been falling since PAC entered into the Master Lease and began imposing restrictions on Marine Repair's ability to conduct business, Marine Repair will not be able to sustain its operations in the Port of Baltimore." CX825 (V. Marino Decl. at ¶22). In addition to its decline in revenues, Marine Repair has had to decrease its work force. *See* CX825 (V. Marino Decl. at ¶23 ("In 2009, Marine Repair had 37 employees, including seven mechanics. The number of Marine Repair employees has since decreased to 33 employees in 2010, 28 employees in 2010, and 15 employees in 2011. Currently, Marine Repair has only 12 employees, including 4 mechanics") (discussed in MRS-PFOF at ¶138). The significant business losses Marine Repair has recently suffered have not

resulted from "legitimate competition" as concluded by ALJ Lang. They are not losses due to being out-performed by a competitor's better run operations or a competitor's superior service. They are the direct result of a calculated plan by PAC to drive away its competitors and to leave shippers with no choice of vendor except for PAC itself.

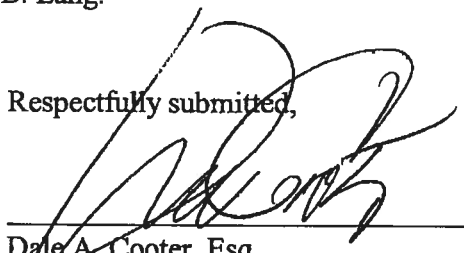
CONCLUSION

For all the foregoing reasons, Marine Repair respectfully requests the Commission to reverse ALJ Lang's decision (except with respect to the Preliminary Rulings[13]) and to find in favor of Marine Repair and award it the injunctive relief and reparations it seeks.

REQUEST FOR ORAL ARGUMENT

Pursuant to 46 C.F.R. §502.241(a), Complainant Marine Repair Services of Maryland, Inc. respectfully requests the Commission to hear oral argument on its exceptions to the Initial Decision of Administrative Law Judge Paul B. Lang.

Respectfully submitted,



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[13] *See supra* n.6.

CERTIFICATE OF SERVICE

I HEREBY certify that on this 1st day of February, 2013, a copy of the foregoing COMPLAINANT MARINE REPAIR SERVICES OF MARYLAND, INC.'S EXCEPTIONS TO INITIAL DECISION was served by e-mail transmission on:

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