BEFORE THE FEDERAL MARITIME COMMISSION
WASHINGTON, D.C.

MARINE REPAIR SERVICES OF MARYLAND, INC.,	*	
	*	
Complainant,	*	
		DOCKET NO. 11-11
v.	*	
PORTS AMERICA CHESAPEAKE, LLC,	*	
Respondent.	*	

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BRIEF OF RESPONDENT PORTS AMERICA CHESAPEAKE, LLC.

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BRIEF OF RESPONDENT, PORTS AMERICA CHESAPEAKE, LLC

I. INTRODUCTION AND OVERVIEW OF ARGUMENT

This suit arises out of a decision made by the State of Maryland in 2009, after a competitive bidding process, to enter into a public-private partnership with Ports America Chesapeake ("PAC") in connection with Seagirt Marine Terminal ("Seagirt") in the Port of Baltimore. The issue in this proceeding is whether Respondent, PAC, the exclusive lessee of Seagirt under the terms of a 50-year Lease and Concession Agreement ("Seagirt Lease") with the State effective January, 2010, may lawfully perform all of its own maintenance and repair work ("M&R work") for its own customers at Seagirt, or whether it is required by law to permit Complainant, Marine Repair Services of Maryland, Inc. ("MRS"), to come onto its leased premises to provide M&R work to PAC's customers there. M&R work consists of the repair of dry box containers, repair of chassis, and maintenance, repair, and monitoring of refrigerated containers, or "reefers." RPFOF[1] § § 1, 21.

PAC is a stevedore and marine terminal operator in the Port of Baltimore, and has been operating in Baltimore, through predecessors in interest, since 1921. JSF 2. PAC began offering M&R services to its steamship line customers in Baltimore beginning in 1999, at the request of customer Hapag-Lloyd. RPFOF §19. Through sister companies, PAC also operates in the Ports of Norfolk, VA, Wilmington, NC, Charleston, SC, Savannah, GA, and Jacksonville, FL in the South Atlantic range, although it does not provide M&R Services at any of those other ports. RPFOF § 18.

Prior to 2009, Seagirt was operated by the Maryland Port Administration ("MPA"), and the MPA had leases and other agreements with many different service providers to provide services to

[1] "RPFOF" refers to Respondent PAC's Proposed Findings of Fact.

steamship lines calling there, including PAC (as a stevedore and marine terminal operator), MRS (as an M&R vendor), Multimarine (as an M&R vendor specializing in reefer work), as well as tug companies, line handlers and others. The MPA also operated adjacent Dundalk Marine Terminal, where it granted similar leases and operating contracts to PAC and MRS, as well as to other stevedores, marine terminal operators, and third party vendors. Cargo flowed between the two MPA terminals over the connecting Colgate Creek Bridge, which the MPA solely monitored and maintained.

This arrangement suited MRS, a private company owned by the Marino family of New York and South Carolina, JSF 1, with operations, through wholly owned subsidiaries, in Baltimore, Norfolk, Wilmington, NC, Charleston, SC, Savannah, GA, Jacksonville, FL, Memphis, TN, and Huntsville, AL. RPFOF §3. In Baltimore, MRS had its main, on-dock repair facility at Dundalk Marine Terminal under a month to month lease with the MPA to perform chassis and container repairs there at a cost of $1770.00 per month. RPFOF §96. That lease was amended from time to time between 2005 and 2009 to take more space or give back space, as MRS' business at the time required. RPFOF §97.

Beginning on or about February 16, 2001, MRS also entered into a month to month lease with the MPA for a small space (approximately 1540 square feet) at Seagirt, mainly performing chassis inspection and container repair work on site there or draying damaged chassis and containers over to their main repair shop at Dundalk via the connecting Colgate Creek Bridge. RPFOF § §52-53. MRS was paying the MPA only $243.34 per month under its November 16, 2001 lease for space at Seagirt. RPFOF §54. To perform its work at Seagirt and Dundalk, MRS would routinely borrow top loaders, forklifts, and other major pieces of equipment from PAC (or its predecessors in interest)

or Ceres Marine Terminals free of charge, and MRS rarely paid to maintain or repair that equipment and rarely paid for gas for that equipment. RPFOF §§113-114. For many years, MRS enjoyed this "free ride" of cheap leases and free equipment in the Port of Baltimore and its business grew.

However, the winds of change were blowing in the U.S. maritime industry and in the U.S. and world economies beginning in 2008-2009. As a result of a burst in the real estate bubble and poor lending practices by banks worldwide, the U.S. and world economies began to go into a sharp nosedive toward the end of 2008, resulting in steeply falling housing prices, severe credit tightening, and bank, insurance company, and auto manufacturer bailouts by the Federal Government. RPFOF §25.

MRS, through its corporate designee, Vincent Marino, acknowledged that 2009 was a stormy time in the steamship industry, during which volumes were down, prices were up, and costs were up. RPFOF §109. During that time period, MRS had a decreased work volume "due to the normal slowdown in business" and they had to lay off some workers. RPFOF §110. In early 2009, MRS even had to cancel a lease with the MPA for shed space at Dundalk Marine Terminal due to a decrease in work volume for MRS. RPFOF §111.

State and local governments in the U.S. were not immune from the economic downturn that began in 2008. As housing values declined, so did revenues from State and local property taxes as well as Federal government funding to the States. RPFOF §26. Local governments began struggling to find money for needed infrastructure development and repairs and, in Maryland, the key source for such infrastructure funding for the Port of Baltimore, the Transportation Trust Fund, was running on empty. Id.

At the same time, maritime industry analysts were predicting a resurgence in trade volumes for U.S. ports, fueled in part by the effects of the outsourcing of U.S. manufacturing jobs to lower cost production facilities overseas, as well as "just in time" distribution models which altered the supply chain for delivery of foreign goods from the dock to U.S. consumers. RPFOF §27. In addition, by early 2009, the impending expansion of the Panama Canal, slated to come on line in 2014, was predicted not only to increase business for U.S. East Coast Port facilities, but the competition for such business as well. RPFOF §28. The Canal is being widened in order to allow larger ships with deeper drafts to transit the Pacific Ocean from the Middle East, Asia, and Africa and to ultimately reach the East Coast of the United States. Id. These larger ships will require deeper water at the berth, the channels leading to the berth, and will also require larger cranes to unload their cargo. Id.

By the beginning of 2009, the Port of Baltimore faced a dilemma. During the five preceding years, it had lagged behind some of its East Coast competitor ports in terms of growth in container traffic to the point that Seagirt Marine Terminal was under-utilized. RPFOF §29. This lag in growth was due partly to Baltimore's inland location, and partly to the fact that Seagirt needed infrastructure improvements. Id. In particular, the MPA determined that Seagirt would require a new 50 foot berth and larger, Super post-Panamax cranes to accommodate the larger ships following the re-opening of hte Panama Canal. RPFOF §§31-32. Without these improvements to Seagirt, the Port of Baltimore was not going to be able to compete with other East Coast container ports that already had deepwater berths, and it would lose a significant amount of container business and accompanying jobs to other ports. RPFOF §§ 30,33.

Consequently, the State of Maryland felt it had no other choice but to create a public-private partnership for Seagirt in order to fund the needed infrastructure improvements. RPFOF §36. The MPA had tried such partnerships on a smaller scale with marine terminal operators in Baltimore since the 1990's – entering into long-term leases in exchange for promises by the marine terminal operators to fund terminal infrastructure improvements, Id., but the public-private partnership that the State envisioned for Seagirt was ground-breaking in terms of the size of the required financial commitment by the operator and it set the standard for similar public-private partnerships at nearby competitor ports of Norfolk, Savannah, and Charleston, to name just a few. Id.

There has been an increasing trend in the marine terminal industry for states to provide long-term leases and concessions to ocean carriers, to terminal operators, and/or to partnerships involving carriers and terminal operators, and this is becoming a more common practice on the East and Gulf Coasts. RPFOF §34. Historically, a majority of the East Coast and Gulf Coast Ports were operating ports, where the Port Authorities actually operated the public marine terminals. Id. However, with the growth in the Asian container market, the trend has been towards the creation of long-term leases and concessions which allow these other entities, as opposed to the Port Authorities, to maintain operational control of the terminals. RPFOF §34. In exchange, the states and their Port Authorities receive much needed capital for infrastructure improvements. Id. While this has been the standard mode of operation for some time on the West Coast, it is now also becoming the trend on the East and Gulf Coasts. Id.

Against this background, in early 2009, the State of Maryland, through the MPA, issued a Request for Proposals for a public-private partnership to operate Seagirt Marine Terminal pursuant to a long-term lease. RPFOF §37. After initial bids by PAC and a competing stevedore/marine

terminal operator, Ceres Marine Terminals, the MPA entered into discussions with both parties towards a deal. RPFOF §38. Those discussions led to PAC being the only entity to submit a final bid for Seagirt. Id. On December 16, 2009, after months of arms length negotiations, the MPA entered into a 50-year Lease and Concession Agreement with PAC for Seagirt Marine Terminal. RPFOF §39. The Seagirt Lease, by its terms, went into effect on January 12, 2010. RPFOF §48.

Pursuant to the terms of the executed Seagirt Lease, PAC was required to make the following payments to MPA and investments at Seagirt Marine Terminal: A capital reinvestment payment of $140 million, concurrently with a bond issue; an annual use and operating fee of $3.2 million; and the construction of a 50-foot berth and delivery and installation of four Panamax Cranes at a cost of $105 million. RPFOF §40. Over the term of the Lease, PAC is expected to invest over $1.3 billion in improvements and payments for Seagirt. Id.

In exchange for the obligations undertaken by PAC, the Seagirt Lease in Section 1.6 thereof, granted PAC quiet enjoyment of, and the **exclusive** right to perform "permitted operations" at, Seagirt Marine Terminal and the Canton Warehouse Property. RPFOF §41. Among the operations that PAC is permitted to exclusively provide at the leased premises under the Seagirt Lease are "stevedore and maritime terminal operations, including container, *chassis and equipment storage and repair*, line handling, docking and undocking of vessels, and operations incidental thereto." RPFOF §42(emphasis added). The Seagirt Lease also precludes the MPA from leasing or operating, or permitting third parties to lease or operate new marine container terminals on State property for a period of fifteen (15) years. RPFOF §43.

In short, the Seagirt Lease, by its express terms, gives PAC the ***exclusive*** right to perform all M&R work at Seagirt and the ability to control all aspects of the container business in its facilities

since they negotiated for and bought the concession. RPFOF §45. This type of exclusive public-private partnership is not anticompetitive, unusual, or unreasonable, according to PAC's expert, and former steamship line executive, Peter Keller. In fact, similar deals are being struck by cash-strapped port entities in virtually every port in the United States. RPFOF §46. Moreover, the Seagirt Lease also does not confer an unreasonable monopoly upon PAC because it still allows others to compete for stevedoring, marine terminal services, M&R work, and other services at facilities in Baltimore other than Seagirt and at other ports in direct competition with Baltimore. Id.

MRS has known for years that the winds of change were blowing in the port industry and that its days of coming and going freely at an MPA-operated Seagirt were coming to an end. MRS' main repair yard had always been at Dundalk Marine Terminal. JSF 4. However, beginning in late 2008, MRS began looking at off-dock property to rent to start its own off-dock container and chassis repair yard. RPFOF §106. For a year and a half prior to March 2010, MRS tried to lease the old Serv-U property for this purpose. Id. When that deal fell through, MRS entered into negotiations with Birchwood Realty to lease a ten acre site at 4500 East Lombard Street near the terminals. RPFOF §102-103. The Birchwood lease was signed in March 2010 by MRS. RPFOF §102.

In August 2010, after four to five months of negotiations, MRS entered into a lease with the MPA for about ten additional acres of off-dock property on Broening Highway, very close to Seagirt, and otherwise known as the "former Duke Property." RPFOF §§102, 104, 107, 108. The Duke Property Lease permits MRS to perform container and chassis repair at that site and to store containers there. RPFOF §103. Hence, almost all of the work that MRS was formerly performing at Seagirt Marine Terminal could be performed now at its main repair facility at Dundalk Marine Terminal or at its two off-dock container and chassis repair yards. In fact, in June 2011, MRS hosted

a presentation at its Broening Highway off-dock facility to attract business for that facility from the various trucking companies and steamship lines that service the Port of Baltimore. RPFOF §164. Since that presentation, MRS has obtained new work from steamship lines Yang Ming, ACL, APL, and from a couple of non-steamship line customers, some of which work MRS has taken away from PAC. Id. At the same time, MRS has acknowledged that if customers do not want to work with MRS but would rather work with PAC, MRS is okay with that. RPFOF §82.

Historically, during the time when Seagirt was operated by the MPA from about 1990, when it first opened, until January 2010, MRS performed M&R work at Seagirt under its month to month lease with the MPA. RPFOF §57. The MPA could have cancelled MRS's work at Seagirt on a month's notice; thus, there was no guarantee of any continuing presence for MRS at Seagirt even during MRS' peak operations there. Id.

MRS was aware in 2009 of the RFP process initiated by the State for a Lease and Concession Agreement at Seagirt. RPFOF §58. In fact, prior to the Seagirt Lease being awarded by the State, MRS had conversations with representatives for both PAC and the other bidder about keeping MRS in mind for work at Seagirt once PAC or the other bidder got the contract. RPFOF §59. However, MRS never entered into any agreements with PAC about being a provider of services at Seagirt. Id.

Shortly after PAC signed the Seagirt Lease with the State, the MPA assigned to PAC the leases and other contracts between the MPA and other entities related to services provided at Seagirt Marine Terminal. RPFOF §55. Specifically, on January 8, 2010, Michael Miller, the MPA's contract manager, sent a letter to Anthony Marino of MRS in which Mr. Miller notified MRS that, in connection with the Seagirt Lease, the MPA had assigned to PAC "all of [MPA's] right, title, and interest" in the February 16, 2001 month-to-month Lease with MRS at Seagirt. RPFOF§55, JSF 7.

This assignment gave PAC the ability to administer the MRS lease pursuant to the terms contained therein. See RPFOF §56. PAC did not immediately evict MRS from Seagirt, in order to allow MRS sufficient time to transition its business to Dundalk and its off-dock facilities. However, when it became apparent that MRS was making no attempt to move, PAC eventually was forced to accelerate the process, beginning in about June 2011. RX 0802.

In the meantime, PAC gradually began to take over certain operations at Seagirt, either itself or through a subcontractor, Multimarine, such as reefer monitoring work, container repair work, and roadibility work[2] that had previously been done by MRS. When PAC took over operations at Seagirt pursuant to the Seagirt Lease, it became responsible for keeping track of all equipment and cargo moving in or out of that secure terminal under a process known as the Trailer Inter-Change Receipt, or TIR, process. RPFOF §66. The TIR process is an inspection and inventory control process that allows a terminal operator to check equipment in and out of a terminal, much the same way that books are checked into and out of a library. RPFOF §68. Since ILA longshore labor is employed to inspect the equipment before it goes out of the gate as a part of the TIR process, PAC does charge a TIR inspection fee for this service to re-coup the labor cost, called a "gate charge." RPFOF §73. The amount of the gate charge is set by the Baltimore Marine Terminal Association ("BMTA"), a

[2] Roadibility work is minor repair work done to a chassis to make it able to safely operate on the nation's highways, such as fixing broken taillights. As a part of the TIR process, an inspection of a chassis for inventory purposes will often reveal that minor work is needed to permit that chassis to go over the road. RPFOF §77. Under the new Federal Highway Motor Carrier Safety Regulations that just went into effect, PAC could have legal liability if a chassis leaves Seagirt in an unsafe condition and is later involved in an accident on the road caused by that condition. RPFOF §78. MRS acknowledges that this regulation gives the marine terminal operator an incentive to make sure the repairs are done properly themselves. Id.

marine terminal conference to which PAC belongs. Id. Under the latest published Schedule of the BMTA, the "gate charge" is $47.86 per unit. Id.

During the MPA's tenure as the operator of Seagirt, the MPA had allowed equipment and cargo to go in and out of Seagirt both via Seagirt's main gate and via the inner connector Colgate Creek Bridge between Seagirt and Dundalk. RPFOF §67. PAC decided that this was both inefficient from a staffing perspective and also less secure, as equipment passing over the Colgate Creek Bridge was by-passing the TIR process at Seagirt's main gate.[3] Id. MRS itself recognizes the importance of having a controlled TIR process at a terminal, as MRS has its own TIR procedure in place at its off-dock Broening Highway facility. RPFOF §§ 69-70.

To remedy this situation of uncontrolled access to and from Seagirt, PAC notified all Seagirt users, including MRS, on June 28, 2011 that it would no longer allow equipment to be drayed back and forth over the Colgate Creek Bridge into and out of Seagirt. CX 351. All equipment would have to go in and out of Seagirt through the Main Gate, and would have to go through the TIR process. RPFOF §§ 67-68. This decision was by no means directed solely at MRS – it applied equally to all users of Seagirt. CX 026-028 (Montgomery Dep. at 100-102, 107). MRS has acknowledged that it can dray chassis from Seagirt to its repair shop in Dundalk (a distance of less than a mile) by going out the Seagirt gate and then coming back in through the Dundalk gate. RPFOF§§ 71, 105. The

[3]Although the inner connector bridge itself is not part of the leased premises under the Seagirt Lease, PAC is required under the Lease to maintain the inter-connector bridge. RPFOF §74. In fact, PAC shares 50% of the maintenance of the bridge with the MPA. Id. Naturally, the more cargo that goes over the bridge, the more maintenance and repairs that have to be done to the bridge, thereby increasing PAC's costs to operate Seagirt. MRS does not pay anything for the maintenance of the Colgate Creek Bridge. RPFOF §75.

complaint MRS really has is not the distance but the cost of the TIR process. However that cost, if it applies at all, applies equally to all third parties using the Seagirt facilities.

The BMTA Schedule, to which PAC belongs, contains a charge for TIR inspections called a "gate charge" of $47.86 per unit. RPFOF §73. However, most steamship lines have a throughput rate under their service agreements with PAC, which includes the TIR charge as part of the stevedore charge and therefore there is no additional, separate TIR charge. Id. Hence, it follows that neither MRS nor its customer would have to pay this gate charge or any gate charge to have equipment TIR'd through the Seagirt main gate, if the steamship line requesting MRS' services was a party to an existing service contract with PAC for stevedoring/marine terminal services.

One of the last changes that PAC seeks to implement at Seagirt, which it is in the process of putting in place, is to have all chassis repair work performed outside of Seagirt and off-dock. Historically, chassis repairs had been done at Seagirt on-dock by MRS when the MPA controlled the property. RPFOF §60. However, the modern trend in the chassis repair business nationwide is to move all such work off-dock. Id. According to steamship line expert Peter Keller, in Baltimore, terminal operators are taking nonproductive assets like chassis and containers and moving them off the port into near port facilities in order to maximize the on-dock space. Id. Indeed, the entire maritime industry in the United States is moving away from the model where chassis are provided free to the beneficial owners of the cargo and the truckers for the movement of container goods. RPFOF §65. Instead, it is moving to a model, commonly referred to as the "trucker model" that exists virtually everywhere else in the world, where chassis are provided by the trucking companies, and trucking companies, rather than steamship lines, control chassis repairs. Id. MRS acknowledges that the industry in the U.S. is moving towards the trucker model for chassis. Id.

The Seagirt Lease also gives PAC the right to operate certain off-dock property adjacent to Seagirt, known locally as the "Canton Warehouse Property," which PAC has always anticipated will serve as an off-dock chassis depot for Seagirt proper. JSF 3, RPFOF § §44, 62. PAC initially entered into discussions with TRAC Intermodal, the largest chassis pool operator in Baltimore, about operating the Canton Warehouse Property as a chassis depot. MRS even submitted a bid to TRAC to be the M&R vendor for the Canton Warehouse property. RPFOF §61. However, TRAC eventually decided that it did not make sense for them to lease the Canton Warehouse property to operate a chassis pool from there. Id. As a result, PAC will soon be opening the Canton Warehouse Property itself as an off-dock chassis yard (to be called the "Seagirt Chassis Yard"). RPFOF §62. The Canton Warehouse Property will be the designated location for chassis repairs for all steamship line customers at Seagirt who have also engaged PAC to perform M&R work for them. Id.

In short, once the Canton Warehouse property is opened, MRS and PAC will be on a level playing field for chassis repairs, with PAC performing them at the Canton Warehouse Property and MRS performing them at its own off-dock properties located on Broening Highway and on East Lombard Street, and none will be done at Seagirt Marine Terminal. RPFOF §63. Indeed, under the coming "trucker model" for chassis ownership, it would not make logical sense for anyone to perform chassis repairs on-dock, because it always would be cheaper for truckers to have the repairs made off-dock, particularly if the repairs could be made by non-ILA labor. See RPFOF §§ 63, 115.

It is these collective changes to the operation of Seagirt - PAC doing its own M&R work at Seagirt, the creation of one secure gate at Seagirt at which TIR inspections and roadibility work are to be performed, and the moving of all chassis work off-dock - that have given rise to the instant Complaint by MRS. None of these changes by PAC to the former status quo is unreasonable and

none is aimed solely at MRS; rather, they all apply equally to every person doing business at Seagirt.

In essence, MRS' Complaint boils down to the fact that it wants to conduct business today the same way that it did three years ago, before the Seagirt Lease, RPFOF §88, when it essentially had a free ride from the MPA for rent at Seagirt, avoided gate charges by sneaking equipment to Dundalk out the back door of Seagirt via the Colgate Creek Bridge, CX 027 (Montgomery Dep. at 102-103), and had the free use of PAC's and Ceres' toploaders and forklifts. RPFOF §113-114. MRS seems unable to understand that in today's difficult economic climate, the paradigm has shifted and its "free ride" is over. Instead, it has to be able to compete for M&R business at its on-dock (Dundalk) and off-dock (East Lombard Street and Broening Highway) properties in new and different ways.

Although PAC would seem to have a competitive advantage over MRS given its exclusive control over Seagirt under the Lease, that control comes with a hefty price tag of $1.3 billion that PAC must pay to the State. In order to be able to afford that price tag, PAC must recoup those payments to the State from the fees it charges to its customers for the services it renders at Seagirt, including M&R services. RX 0558, Keller Report at 11. As MRS has no such huge overhead, it should be able to compete with PAC for customers on price and service if it was operating its business efficiently and carefully. Indeed, MRS has acknowledged that the time/task charges by PAC for M&R work are actually higher than MRS' time/task charges. RX 0394, Olshefski Dep (Vol II) at 113).

In essence, MRS is asking the Commission to force PAC to allow MRS to come onto PAC's leased premises and compete against PAC there for free – or for a nominal rent. PAC submits that not only would such a decision violate every principle of "quiet enjoyment" under established

landlord-tenant law, but it also would be setting a national precedent for the invalidation of every public-private partnership between a state and a marine terminal operator to fund port infrastructure maintenance and improvements via the means of an exclusive lease. It is the very "exclusivity" provisions of the Seagirt Lease that PAC bargained for in exchange for its $1.3 billion in payments to the State, RPFOF §47, and if the Commission rules that PAC is not entitled to the exclusive right to perform all services at Seagirt that are within the scope of its Lease, then PAC will have lost the benefit of its bargain and would have a basis to declare the Seagirt Lease to be in breach.

II. ARGUMENT OF PAC

A. Jurisdiction and Burden of Proof

1. The Commission Lacks Jurisdiction Over this Matter Because the Services at Issue, M&R Services, Are Not Marine Terminal Services

The Shipping Act governs "Marine Terminal Operators", which are defined under that Act as "a person engaged in the business of furnishing wharfage, dock, warehouse or other terminal *facilities* in connection with a common carrier. *See* 46 C.F.R. §525.1(13), definition of "Marine Terminal Operator," emphasis added. "Marine terminal services" are further defined for purposes of the Act as "practices related to or connected with the receiving, handling, storing, or delivering of [cargo] property." 46 U.S.C. §41102(c).

While PAC is a marine terminal operator and therefore subject to Commission jurisdiction[4], the inquiry does not stop there. To support the exercise of Commission jurisdiction in this case over

[4]By contrast, it is undisputed that MRS is a vendor of M&R services - not a marine terminal operator. MRS Complaint at ¶ 1; **RX 0361, (Olshefski Dep. at 8-9).** MRS has not registered as marine terminal operator with the FMC, nor does it publish a public schedule of its rates and charges.

the furnishing of M&R services, it must be determined that such services are "directly related to the delivery and handling of [cargo] property." Sea-Land Dominicana, S.A. et al. v. Sea-Land Service, Docket 91-30, 1992 WL 231208, *9 (F.M.C.) Feb. 21, 1992; Puerto Rico Ports Authority v. FMC, 919 F.2d 799, 803 (1st Cir. 1990). If not, then they are not "marine terminal services," and, therefore, are not subject to Commission jurisdiction. *See* Puerto Rico, 919 F.2d at 803.

In the Puerto Rico case, the Court held that an adversary proceeding challenging the collection of a "port service charge" from vessels by the Puerto Rico Ports Authority (PRPA) was not subject to FMC jurisdiction, even if the PRPA was a marine terminal operator, because the charge was not related to the receiving, handling, storing, or delivering of cargo. Id. at 804. In the context of this case, even though PAC is a marine terminal operator, MRS' claims are not related to the receiving, handling, storing, or delivering of cargo. They are related to the maintenance or repair of containers and chassis. Containers, whether of the dry box or reefer variety, are not themselves cargo and they can only be repaired when they are empty of cargo. Similarly, chassis are sets of wheels used to transport containers, and chassis are only repaired when they are not carrying cargo.[5] Hence, the overwhelming majority of M&R repair work is not directly related to the receiving, handling, storage, or delivery of cargo.

The only part of M&R work that has been held to be a marine terminal service is reefer monitoring work. Gulf Container Line v. Port of Houston Authority, 25 S.R.R. 1454 (1991). By its nature, such work has to be done on-dock, because it involves checking temperature levels of cargo-filled refrigerated containers that are plugged into shore power on the terminal itself. And,

[5] The one exception to this statement is roadabilty repairs, but once the Canton Warehouse Property opens, all roadability work for Seagirt chassis will be done off-dock.

as no reefer monitoring work is done directly by PAC, the only issue in this case arguably within the jurisdiction of the Commission related to such monitoring work is whether PAC has acted reasonably in choosing Multimarine, as PAC's subcontractor for that work at Seagirt, in order for PAC to meet the requirements of its steamship line customers. This issue was answered by the Commission's decision in White & Co. v. POMTOC, 31 S.R.R. 783 (July 28, 2009), *see* discussion at Section II.B.3.c., *infra*, and leads to the conclusion that PAC's decision to allow Multimarine to perform reefer monitoring work at Seagirt to the exclusion of MRS is not unreasonable under the Shipping Act, because it is being done for legitimate business reasons by PAC.

With respect to all of the other services that MRS has challenged in this case - dry box repairs, reefer maintenance and repairs, and chassis repairs - all of these services can be performed off-dock and, in fact, are currently being performed off-dock by MRS itself at its Broening Highway facility. RX 00366, 0038**(Olshefski Dep. at 35, 38).** For the Commission to assert jurisdiction over the performance of off-dock services just because they happen to be remotely related to ocean transportation would be improper and could open the door to attempted assertions of jurisdiction over other off-dock services not directly related to the receiving, handling, storage, or delivery of cargo but that have some tangential connection to ocean transportation, including ship agency services, marine surveying services, harbor dredging, storage of cargo in foreign trade zones, ship repairs, and cargo packaging. However, the drafters of the Shipping Acts never intended to grant the Commission a roving license to correct every inequity tangentially related to ocean transportation. Puerto Rico, 919 F.2d at 805.

2. Even if M&R Services are Marine Terminal Services, The Burden is on MRS to Prove By A Preponderance of the Evidence that PAC Acted Unreasonably in Violation of the Shipping Act

Even if the Commission were to find that M&R services are included within the scope of marine terminal operator services as defined under the Shipping Act and, therefore, that it has jurisdiction over the subject of MRS' Complaint, the burden is still on MRS to prove by a preponderance of the evidence that PAC is guilty of actual anti-competitive conduct with respect to such services, resulting in demonstrable harm to competition in the relevant market. In Atlantic Shipping Co., Inc. v. Di Nos Shipping, Inc., 32 S.R.R. 626 (Docket No. 11-13)(Initial Decision, April 17, 2012), Administrative Law Judge Guthridge stated:

> A complainant alleging a violation of the Shipping Act "has the initial burden of proof to establish the [] violation[]. The applicable standard of proof is one of substantial evidence, an amount of information that would persuade a reasonable person that the necessary premise is more likely to be true than to be not true." AHL Shipping Company v. Kinder Morgan Liquids Terminals, LLC, FMC No. 04-05, 2005 WL 1596715, at *3 (ALJ June 13, 2005). *See* 5 U.S.C. § 556(d) ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."); 46 C.F.R. § 502.155. "[A]s of 1946 the ordinary meaning of burden of proof [in section 556(d)] was burden of persuasion, and we understand the APA's unadorned reference to 'burden of proof' to refer to the burden of persuasion." Director, Office of Workers' Compensation Programs v. Greenwich Collieries, 512, U.S. 267, 276 (1944). The party with the burden of persuasion must prove its case by a preponderance of the evidence. Steadman v. SEC, 450 U.S. at 102. "[W]hen the evidence is evenly balanced, the [party with the burden of persuasion] must lose." Greenwich Collieries, 512 U.S. at 281. It is appropriate to draw inferences from certain facts when direct evidence is not available, and circumstantial evidence alone may even be sufficient; however such findings may not be drawn from mere speculation. Waterman Steamship Corp. v. General Foundries, Inc., 26 S.R.R. 1173, 1180 (ALJ 1993), *adopted in relevant part*, 26 S.R.R. 1424 (1994).

Atlantic Shipping, 32 S.R.R. 626.

MRS cannot meet its burden in this case, however, as it has no substantial evidence of any violation of the Shipping Act by PAC and it cannot prove any of the allegations in its Complaint by

a preponderance of direct evidence. The circumstantial evidence relied upon by MRS is wholly speculative or else contradicted by other evidence.

B. Exclusive Arrangements at Marine Terminals Are Not Presumptively Improper Under the Shipping Act

1. The Relevant Market

In this case, the parties agree that the relevant **product** market is M&R services. M&R services consist of dry box container repair work, refrigerated container work (maintenance, repairs and monitoring), and chassis repairs. RPFOF§ 21. The parties disagree, however, over the relevant **geographic** market for those services.

MRS contends initially that the relevant geographic market is Seagirt Marine Terminal, but later states that, at its widest, the relevant market should be limited to the Port of Baltimore. MRS Brief at 19-22. MRS' initial contention is clearly spurious, not only because MRS can and does perform M&R work both at Dundalk Marine Terminal and at its one of its off-dock facilities in Baltimore that is located less than a mile from Seagirt, RPFOF §§102, 105, but also because MRS does not have a single contract with a customer in which the customer requires that such M&R work be performed at Seagirt. RPFOF §89.

In arguing in its Brief at page 19 that, at its widest, the relevant market should be limited to the Port of Baltimore, MRS relies on the fact that the Presiding Officer issued a ruling early in the case limiting the scope of documents that MRS was required to produce to PAC in discovery to those pertaining to the Port of Baltimore or to multi-port contracts that included the Port of Baltimore. However, this discovery ruling was not a finding by the Presiding Officer on the merits as to the relevant geographic market for this case. Rather, it was merely a preliminary determination that, for

purposes of discovery, PAC had not demonstrated that information from other ports was relevant to these proceedings. See Judge Wirth's 12/20/11 Order at p. 3, ¶2.

Even with limited discovery by PAC of MRS' documents, however, the wider scope of MRS' operations and how they relate to the Port of Baltimore is clear. MRS is operated out of New York and South Carolina, and it does business in the following ports in the South Atlantic range in addition to Baltimore: Norfolk, Va., Wilmington, N.C., Charleston, S.C., Savannah, Ga., and Jacksonville, Fl. RPFOF§ 3. While the events complained of by MRS all involve the Port of Baltimore, the product at issue - repair work performed to highly portable chassis, dry boxes, and reefers - is highly fungible and can be performed at any container port where a particular ocean carrier happens to call, depending on costs and other efficiencies.

Discovery also revealed that MRS maintains consolidated financial records for all of its operations, regardless of Port location, RPFOF §16, so that, for example, a decline in MRS' revenues for M&R work in Baltimore could well be directly offset by an increase in MRS' revenues in another port for the same services if a carrier diverted its Baltimore M&R work to an MRS' entity in another port order to save money. Indeed, MRS testified through its corporate designee, Mr. Olshefski, that at least one of the steamship line customers that it claims to have lost to PAC in Baltimore, Mediterranean Shipping Company ("MSC"), had, in fact, "diverted" at least some of its Baltimore M&R work to MRS in Savannah, because of MRS' "cheaper rates" for M&R work there. RPFOF §124.

Moreover, even though MRS and its parent and sister companies may not file consolidated tax returns, they do keep consolidated financial reports, RPFOF §16 and RX 659, 664, 666, 667, 669, 670, and the tax returns that are filed for MRS clearly show that revenue from the MRS Baltimore

operation is regularly siphoned off to the MRS' parent company. CX 412-458. Finally, the officers of MRS who neither reside in nor regularly work in Maryland[6], but who reside in South Carolina and New York and who are also officers of the parent and sister MRS companies, draw salaries paid by MRS' Baltimore operation. RPFOF §§ 4-15.

All of the foregoing evidence shows that MRS' operations in Baltimore are closely related to and intertwined with its overall operations in other ports in the South Atlantic Range and that competition in the Port of Baltimore for steamship line customers is so fierce that any attempt to create monopoly pricing for any marine terminal-related services in one port can and will drive a line to a competitor port. Hence, there is no rational reason why the relevant geographic market for the repair of portable equipment such as containers, reefers, and chassis - which an ocean carrier can have done in any container Port in the South Atlantic Range in which MRS operates - should be limited to the Port of Baltimore. PAC submits, therefore, that the relevant geographic market for M&R work in this case should be the Ports in the South Atlantic Range where MRS does business.

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[6]Vincent Marino, Jr., the President of all the MRS companies, lives in Daniel Island, South Carolina. RPFOF §4. He testified in his deposition that the last time he came to Baltimore on business was April 2011. RPFOF §5. In 2008, he drew a salary from MRS of $100,000. CX 511. Anthony Marino, the Executive Vice President of all of the MRS companies lives in New York City, New York. RPFOF §7. Anthony testified in his deposition that he comes down to Baltimore once every one to two months. RPFOF §8. In 2008, he drew a salary of $250,000. CX 511. Vincent Marino, Sr., the Owner and Chairman of all of the MRS companies, lives in Charleston, South Carolina. RPFOF §10. Anthony Marino testified in his deposition Vincent, Sr.'s duties with respect to MRS consisted of occasionally making some phone calls and opening mail in the Charleston office of MRS. RPFOF §11. In 2008, Vincent, Sr. drew a salary from MRS of $272,500. CX 511. Elaine Marino, the Secretary of all of the MRS companies, lives in Charleston, South Carolina. RPFOF §13. Anthony Marino testified in his deposition that her duties with respect to MRS consisted of taking notes at the annual meeting held outside of Maryland. RPFOF §14. In 2008, Elaine drew no salary from MRS, CX 511, but she did draw a salary in 2007 of $50,000. CX 476. All of MRS' Baltimore corporate books and records are kept outside of Maryland; originally they were kept in New York and then later moved in South Carolina. RPFOF§ 16.

However, even if the relevant market in this case is determined to be the Port of Baltimore, the market is not just on-dock terminals and facilities, but also includes facilities and providers in the off-dock areas around the port, as demonstrated by the actual use of off-dock properties by PAC (at the Canton Warehouse Property), by MRS (at its Broening Highway and East Lombard Street properties), by Multimarine (at its 1111 Frankfurst Ave. property) and by Picorp Inc. Baltimore ("Picorp") (at its 6508 E. Lombard St. property) for M&R work.

There is no legal precedent for defining a relevant market as a single property operated by a single competitor. The Commission has considered "a wider market than [a] single facility focus." All Marine Moorings, 27 S.R.R. at 546. In fact, in the case of R.O. White & Co. et.al v. POMTOC (Docket 06-11) 31 S.R.R. 783 (ID) (July 28, 2009), while the activity at issue was focused on the POMTOC terminal, the geographic market used by the FMC in its opinion was Miami and Port Everglades, which was considerably broader than just the POMTOC terminal. See POMTOC, at page 41-42 of case as it appears on the Commission's website.

In the antitrust context, the Supreme Court has stated that a geographic market must "'correspond to the commercial realities' of the industry and 'be economically significant.'" Brown Shoe Co. v. U.S., 370 U.S. 294, 336-337, 82 S.Ct. 1502 (1962). "Thus, although the geographic market in some instances may encompass the entire Nation, under other circumstances it may be as small as a single metropolitan area." Id. Similarly, the Commission has ruled that markets are not defined by a single facility where a competitor such as MRS may seek clients. As the Commission has noted:

> "The purpose for market definition in an antitrust analysis is to see whether the alleged monopolist has power to maintain a price substantially higher than costs; whether a firm can do this turns on whether buyers have alternatives to which they

> can turn when the seller raises prices above the competitive level of cost plus a reasonable return. Lawrence A. Sullivan, Handbook of the Law of Antitrust (West 1977) at 56.

River Parishes Company, Inc. v. Ormet Primary Aluminum Corporation, 28 S.R.R. 751, 766 n.19 (1999) (hereinafter "RIVCO"). Hence, MRS' suggestion in its Brief that the relevant market should be defined as just the terminal facilities leased by PAC at Seagirt and Dundalk or that it is limited solely to Seagirt itself is inconsistent with the Shipping Act and with antitrust principles controlling market definition.

In this case, MRS is not arguing that PAC has market power and can set prices substantially higher than costs; rather, MRS is arguing that PAC can charge lower prices than competitors operating nearby off-dock repair facilities. Clearly, if PAC sought to raise its equipment repair rates to above-market monopoly levels, robust competition from nearby (and more remote) competitors would result. Thereis such steep competition between East Coast Ports for steamship line business, that any attempt by a marine terminal in Baltimore to gain an unfair advantage would be met by a switch of business to a competitor port. See RPFOF §149.

The antitrust case of McCabe Hamilton & Renny, Co., Ltd. v. Matson Terminals, Inc., dba Oahu Stevedoring, 2009-1 Trade Cases (CCH) ¶76,460 (D.Hawaii 2008) is also relevant. In that case, the complaint alleged a market for "the provision of stevedore services on Oahu." Id. at 113,089. The complaint was dismissed because no facts were alleged that "explain why the market is limited to Oahu, such as whether the parties or other competitors (to the extent any exist) provide stevedoring services on other islands or geographic areas." Id.

The burden of proving the relevant market is on MRS as the Complainant, Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp., 79 F.3d 182, 197 (1st Cir. 1996), and MRS has not alleged sufficient facts to establish why the relevant market for repairs of easily portable equipment should be limited to just a single facility in Baltimore, or even to the Port of Baltimore.

If the relevant market is the South Atlantic Range of ports at which MRS operates, then MRS market share for M&R repairs in the market would far exceed that of PAC, since PAC only does M&R work in Baltimore, RPFOF §18, even though PAC also provides marine terminal and stevedoring services in most of the other ports at which MRS operates. If the relevant market is the Port of Baltimore, then MRS has not met its burden of showing that PAC has a monopoly on M&R services in Baltimore.

In addition to MRS and PAC, MRS also considers its competitors in Baltimore to be Multimarine, Inc. (for reefer work) and Picorp Inc. Baltimore ("Picorp") for off-lease container and chassis repair work. RPFOF 80. Hence, the market shares of Picorp and Multimarine have to be taken into account in calculating the respective market shares of PAC and MRS for all M&R work in Baltimore. MRS has no economist expert in this case, nor can it present a scintilla of evidence as to the market shares of Picorp and Multimarine for M&R work here. Hence, MRS cannot offer this tribunal any reliable and non-speculative evidence of PAC's market share for all M&R work in the Port. Without proof of a monopoly by PAC for M&R work in the relevant market, no *prima facie* case can be made, and the burden remains on MRS to show that PAC's practices are unlawful under the Shipping Act. Seacon Terminals v. Seattle, 26 S.R.R. 886, 1993 WL 197325, *18 (F.M.C.).

2. Role of Antitrust Principles in Shipping Act Cases

Although it may be tempting to assume that antitrust principles are always applicable to cases involving the Shipping Act, that assumption is incorrect. As the Commission has pointed out, the Commission is not the Department of Justice, nor is it the Federal Trade Commission, and it is not tied down to strict analysis under the principles of antitrust. All Marine Moorings, Inc. v. ITO Corp. of Baltimore, 1995 WL 610825 (F.M.C. 1995). While antitrust principles may serve as guidance, and often times can provide a helpful framework with which to analyze reasonableness, the Commission applies the Shipping Act standards and is not required to strictly apply antitrust analysis. Canaveral Port Authority-Possible Violations of Section 10(B)(10), Unreasonable Refusal to Deal or Negotiate, 2003 WL 723336, at fn.15 (F.M.C. 2003) *citing* Gulf Container Line v. Port of Houston Auth., 25 S.R.R. 1454, 1459 (F.M.C. 1991). A course of conduct that is in violation of antitrust laws, is not, by default, in violation of the Shipping Act. RIVCO, 28 S.R.R. 751, 1999 WL 125991 (F.M.C. 1999). While antitrust law is often helpful in Shipping Act cases, it is, by no means, the law of the land.

Complainant places great weight on an antitrust case, Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601 (1985), which states that under certain circumstances, a refusal to cooperate with rivals can constitute anti-competitive conduct and violates §2 of the Sherman Act. However, the Supreme Court has narrowed Aspen to make it clear that it extends only to situations where a competitor – in an effort to monopolize - refuses to sell products to a competitor even at full retail price. In the MRS case, however, MRS is not seeking to purchase a product; rather, it is demanding to utilize PAC's valuable property and facilities in order to operate its own business.

The Supreme Court explained this distinction in Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004), in which it declined to compel Verizon to share essential facilities with competitors:

> Aspen Skiing is at or near the outer boundary of §2 liability. The Court there found significance in the defendant's decision to cease participation in a cooperative venture. See id., at 608, 610-611. The unilateral termination of a voluntary (and thus presumably profitable) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end. Ibid. Similarly, the defendant's unwillingness to renew the ticket even if compensated at retail price revealed a distinctly anticompetitive bent.
>
> The refusal to deal alleged in the present case does not fit within the limited exception recognized in Aspen Skiing. The complaint does not allege that Verizon voluntarily engaged in a course of dealing with its rivals, or would ever have done so absent statutory compulsion. Here, therefore, the defendant's prior conduct sheds no light upon the motivation of its refusal to deal—upon whether its regulatory lapses were prompted not by competitive zeal but by anticompetitive malice. The contrast between the cases is heightened by the difference in pricing behavior. In Aspen Skiing, the defendant turned down a proposal to sell at its own retail price, suggesting a calculation that its future monopoly retail price would be higher. Verizon's reluctance to interconnect at the cost-based rate of compensation available under §251(c)(3) tells us nothing about dreams of monopoly.
>
> The specific nature of what the 1996 Act compels makes this case different from Aspen Skiing in a more fundamental way. In Aspen Skiing, what the defendant refused to provide to its competitor was a product that it already sold at retail - to oversimplify slightly, lift tickets representing a bundle of services to skiers. Similarly, in Otter Tail Power Co. v. United States, 410 U.S. 366 (1973), another case relied upon by respondent, the defendant was already in the business of providing a service to certain customers (power transmission over its network), and refused to provide the same service to certain other customers. Id., at 370-371, 377-378. In the present case, by contrast, the services allegedly withheld are not otherwise marketed or available to the public.

Verizon Communications, 540 U.S. at 409-410.

3. The Commission Has Upheld Exclusive Arrangements at Marine Terminals as Not Unreasonable

The mere fact that a lease or other contract gives special or exclusive treatment to one entity over another does not amount to a violation of the Shipping Act and is not unreasonable ***per se***. *See* Palmetto Shipping & Stevedoring Co., Inc. v. Georgia Port Authority, 24 S.R.R. 50 (1987)Petchem, Inc. v. Canaveral Port Authority, 23 S.R.R. 974, 988 (1986); *aff'd sub nom* Petchem, Inc. v. Federal Maritime Commission, 853 F.2d 958 (D.C. Cir. 1988). The Commission does not automatically disfavor exclusive arrangements. Instead, the Commission has held a number of these agreements to be reasonable and just under the Shipping Act, particularly where it is shown that the arrangement was necessary to advance economic efficiency or produce other benefits.

In Seacon Terminals v. Seattle, 26 S.R.R. 886, 1993 WL 197325 (1993), terminal operator Seacon brought a complaint against the Port of Seattle claiming that the Port had violated the Shipping Act by granting an exclusive lease to one of Seacon's competitors, Matson. As a result of this exclusive arrangement, Seacon argued that the Port had unfairly excluded Seacon from the Port, that these dealings amounted to an unlawful refusal to deal with Seacon, and that the lease in favor of Seacon's competitor created a monopoly that was unreasonable. After consideration of the justification offered by the Port for its exclusive lease to Matson, including the fact that the Port faced keen competition from other West Coast ports and needed a terminal operator whose strong financial backing was congruent with the Port's long-term development strategy, the Commission held the lease was not unreasonable under the Act, even though it effectively excluded Seacon from the Port. 1993 WL 197325 at 19.

In Petchem, Inc. v. Canaveral Port Authority, 23 S.R.R. 974 (1986), *aff'd sub nom* Petchem, Inc. v. Federal Maritime Commission, 853 F.2d 958 (D.C. Cir. 1988), the Commission found that even though the exclusive franchise agreement between the Canaveral Port Authority ("Port") and Hvide Shipping, Inc. for the provision of tug and towing services in the Port created a monopoly for tug and tow services by Hvide, it nevertheless upheld as reasonable under the Shipping Act the Port's denial of Petchem's application to compete with Hvide. The Commission found that the lease agreement in favor of Hvide was reasonable because of the limited market for tug and tow services in the Port, because of Petchem's more limited services, and because of the Port's desire to promote reliable and continuous tug and tow services. 23 S.R.R. at 990-91. The Commission further found that increased competition would not necessarily benefit the Port, because any increase in Petchem's business would be at the expense of Hvide. Id.

In Agreements T-3310 and T-3311, 20 S.R.R. 712 (1980), the Commission also ruled that an exclusive terminal contract between the Indiana Port Commission and Ceres, Inc., a stevedore/marine terminal operator, was reasonable under the Shipping Act, even though the agreement gave Ceres control of every berth adequate to service ocean vessels at the Indiana Port. The Commission found that this exclusive arrangement was necessary and reasonable in order to give the Indiana Port a better competitive advantage over the Port of Chicago, even though the arrangement created a preference for one terminal operator over another. 20 S.R.R. at 719.

Finally, in the case of Agreement - Port Canaveral and Luckenbach S.S. , 17 F.M.C. 286 (1974), the Commission ruled that an exclusive franchise agreement given by Port Canaveral in favor of respondent Eller to operate the Port's marine terminals was reasonable under the Shipping Act and did not grant an undue preference or prejudice in favor of Eller. The complainant,

Luckenbach, sought access to the Port to perform terminal services on a non-exclusive basis, but Luckenbach's application was denied by the Port on the ground that there was insufficient business in the Port to support two operators and that a division of the work between two operators would cause inefficiencies and deterioration in the quality of the existing service.

In each of the foregoing four cases - Seacon, Petchem, Agreements T-3310 and T-3311, and Luckenbach - the Commission upheld as reasonable under the Shipping Act an exclusive lease or contract given by a Port to one operator, where the operator then enjoyed a monopoly for the provision of services in the Port, and where financial benefits or other efficiencies flowed to the Port as a result. Likewise, in this case, the State of Maryland determined that in order to compete with other East Coast ports for container business coming from larger ships after the widening of the Panama Canal in 2014, it needed a deeper berth and new cranes at Seagirt to accommodate such larger ships. Lacking the financial wherewithal to finance the new berth and cranes, the State determined that its best course was to enter into a public-private partnership for Seagirt under which a private company would provide funding for the necessary infrastructure improvements. In exchange, the private company would receive an exclusive lease and concession to provide marine terminal services at Seagirt, expressly including the exclusive right to perform all M&R work at Seagirt. RPFOF §§31-33, 36-39, 41-42, 45.

In this matter, MRS has not sued the MPA directly to challenge the reasonableness of the Seagirt Lease under the Shipping Act, undoubtedly realizing that it is barred from doing so by Ceres Marine Terminals, Inc. v. Maryland Port Administration, Docket No. 94-01, 2004 WL 5015487 (F.M.C.) (August 16, 2004), which held that the Maryland Port Administration, as an arm of the State, was entitled to sovereign immunity from an adversary proceeding before the Federal Maritime

Commission. However, by seeking the right, through this proceeding, to perform M&R services on Seagirt in competition with PAC, notwithstanding the exclusive rights conferred by the 50-year Seagirt Lease, MRS is seeking to challenge that Lease indirectly, through the "back-door."

If the Commission were to rule as MRS asks, then the exclusivity provisions of the 50-year Lease would be meaningless. PAC would lose the benefit of its bargain with the State, and PAC would then potentially be subjected to other competitors claiming an equal right to perform services such as stevedoring and line handling at Seagirt in direct competition with PAC.

a. This case does not involve the sort of "exclusive dealing" that triggers burden-shifting

As argued above, the Commission has made clear that not all "exclusive" arrangements constitute a *prima facie* violation of the Shipping Act. *See, e.g.,* RIVCO, 28 S.R.R. 751 (1999). The issue currently before the Presiding Officer is whether the instant set of facts, in which PAC has declined to permit MRS to utilize PAC's privately leased facility for MRS' business purposes, are the sort of practices that constitute a *prima facie* violation of the Shipping Act.

No *prima facie* violation should be found in this instance. First, the Commission's line of cases invalidating "exclusive dealing" have involved port authorities, grain elevators, or other entities that have entered into an exclusive contract or concession with one service provider (most commonly, a tug boat operator).[7] The Commission has never expanded this *prima facie* test to shift the burden of going forward to a terminal operator that acquires land and other assets and attempts to use them for their own business purposes.

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[7]See Agreements Nos. 8225 and 8225-1, 5 FMB 648 (1959); Canaveral Port Auth.-Possible Violations of Section 10(b)(10), Unreasonable Refusal to Deal or Negotiate, 29 S.R.R. 1436 (2003); RIVCO, 28 S.R.R. 751 (1999); Petchem, Inc. v. Federal Maritime Comm'n, 853 F.2d 958 (D.C. Cir. 1988).

MRS acknowledges at page 26 of its Brief that MPA entered into an agreement to give PAC exclusive use of Seagirt; however, MRS does not challenge the lawfulness of MPA's exclusive grant. Instead, MRS challenges the lawfulness of PAC's "asserting its exclusivity." Under this argument, MRS would have the FMC adopt the position that when a private terminal operator leases property and uses it itself for its own business purposes – rather than throwing it open freely to the public – that such action is "exclusionary," and is therefore *prima facie* unlawful. This argument is a dangerous distortion of the Commission's exclusive dealing line of cases. MRS' position would explicitly call into question the enforceability of all "quiet enjoyment" leases and property rights held by FMC-regulated terminals, potentially invalidating any such rights unless they are affirmatively justified by the property holders. Such an expansion of the Commission's anti-exclusive dealing precedent is unsupported by applicable law.

b. Current federal policy does not disfavor exclusive arrangements

The FMC has long employed a burden-shifting approach in exclusive dealing cases, requiring respondents to carry the burden of justifying exclusive arrangements. This historical practice of declaring "exclusive" dealings *prima facie* unlawful, adopted in the 1960's, was not based on any particular findings, studies, or evidence that exclusive dealings caused any actual anti-competitive harm. Rather, as MRS' citation of the 1961 Greater Baton Rouge case on page 34 of its Brief illustrates, the burden-shifting approach was based on national anti-monopoly policies that are erroneous and outdated. While such conclusory policy statements on federal competition policy may have had some resonance a half-century ago, they clearly are at odds with modern jurisprudence, and cannot be invoked as a basis for declaring private parties' lease rights *prima facie* invalid.

Accordingly, the Commission should continue its recent trend of narrowing, rather than expanding, its *prima facie* line of exclusive dealing cases.

The FMC's practice of declaring exclusive arrangements *prima facie* unlawful dates back to the early 1960's, in cases such as California Stevedore and Ballast Co. v. Stockton Port District, 7 F.M.C. 75, 1 S.R.R. 563 (1962) ("California Stevedore and Ballast"). In that case, the Commission found an exclusive stevedoring contract to be unlawful because, *inter alia*, it "runs counter to the anti-monopoly tradition of the United States" and "opens the door to evils which are likely to accompany monopoly, such as poor service and excessive costs." This practice of holding exclusive dealings to be "contrary to the nation's policies" was repeated in rote fashion without justification or support through several FMC cases, some of which are relied upon by MRS in its Brief.[8]

The FMC's older approach of burden-shifting and invalidating exclusive arrangements based on a perceived national anti-monopoly "tradition" or "policy" is, by contemporary standards, plain error of law. The lawfulness of exclusive dealings, as embodied in the antitrust laws, has been confirmed recently by the First Circuit, which stated that "[d]espite some initial confusion, today exclusive dealing contracts are not disfavored by the antitrust laws." Eastern Food Servs., Inc. v. Pontifical Catholic Univ. Servs. Ass'n. Inc., 357 F.3d 1, 8 (1st Cir. 2004); *see also* Geneva Pharms. Tech. Corp. v. Barr Labs., Inc., 386 F.3d 485, 508 (2d Cir. 2004). Exclusive dealings are not *per se* illegal in vertical relationships but rather are judged under the rule of reason; as the Second Circuit noted, they are "presumptively legal." Electronics Communs. Corp. v. Toshiba Am. Consumer

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[8] *See, e.g.*, A.P. St. Philip, Inc. v. Atlantic Land & Improvement Co. et al., 13 F.M.C. 166, 11 S.R.R. 309 (1969) (exclusive tug contract found unlawful); Agreement No. T-2598, 17 F.M.C. 286, 14 S.R.R. 573 (1974) (exclusive stevedoring franchise justified); and Petchem, Inc. v. Federal Maritime Comm'n, 853 F.2d 958 (D.C. Cir. 1988) (exclusive tug franchise justified).

Prods., 129 F.3d 240, 245 (2d Cir. 1997). Moreover, it is understandable why courts uphold many exclusive dealing contracts. As the D.C. Circuit explained, "exclusive contracts are commonplace —particularly in the field of distribution — in our competitive, market economy, and imposing upon a firm with market power the risk of an antitrust suit every time it enters into such a contract, no matter how small the effect, would create an unacceptable and unjustified burden upon any such firm." U.S. v. Microsoft Corp., 253 F.3d 34, 70 (D.C. Cir. 2001)

Most importantly, the Supreme Court has weighed in emphatically on the question of whether there is a national policy against monopolies:

> The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices--at least for a short period--is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.
>
> Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities. Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing--a role for which they are ill suited. Moreover, compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion. Thus, as a general matter, the *Sherman Act* "does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." United States v. Colgate & Co., 250 U.S. 300, 307 (1919).

Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 407-408 (2004).

While PAC is not a monopolist and does not charge monopoly prices, it has made an extraordinary(in terms of both dollars and longevity) investment in Maryland port infrastructure.

If the Commission adopts the unprecedented approach that MRS urges (mandating "enforced sharing" of PAC's facilities), it will have the effect of severely discouraging "risk taking that produces innovation and economic growth" in the port sector, that is, long-term development and operation of terminal facilities by private investors.

In light of these principles, the Commission should resist MRS' efforts to extend by accretion the principles of California Stevedore and Ballast to private parties' use of their own property.[9]

c. Under its more recent jurisprudence, the Commission has embraced the modern view of exclusive arrangements at marine terminals

The Commission has moved away from its earlier policy stands toward upholding exclusive arrangements in more recent cases such as RIVCO, POMTOC, and All Marine Moorings, and the Presiding Officer should reaffirm the need for Complainant to prove, by a preponderance of the evidence, actual anti-competitive conduct and demonstrable harm to competition in the relevant market.

In RIVCO, 28 S.R.R. 751, 1999 WL 125991 (F.M.C. 1999), the Commission upheld an exclusive contract between a marine terminal operator, Ormet, and a tugboat company, Bisso, whereby Bisso would be the sole provider of tug services for vessels calling at the terminal, Burnside. The Commission found that RIVCO failed to meet its burden as complainant of demonstrating that the practice of awarding an exclusive contract to an assist tug company is unreasonable. Id. at 23. They reiterated that not all exclusive arrangements are unreasonable. Id.

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[9]A mechanical designation of Respondents' property rights as *prima facie* unlawful would also violate the APA's requirement that the proponent of an order must carry the burden, and the order must be supported by and in accordance with the reliable, probative, and substantial evidence. 5 U.S.C. §556.

at 24. Reasonableness is assessed based on whether or not the practice is "otherwise lawful, not excessive, and reasonably related, fit and appropriate to the ends in view." Id. The Commission pointed out that, generally, in instances where an exclusive agreement is unreasonable, there are indicia of other anticompetitive arrangements or monopolistic conditions. Id. at 28. However, no vessel interests had made any complaints concerning the inability to select a particular tug company, poor service, or higher costs. Id. at 29. In fact, vessels actually paid lower prices for tug services at Burnside than at other ports. Id. Additionally, the Commission found incredibly significant to their conclusions, "the silence of the very parties who RIVCO claims will suffer the greatest harm." Id. at 32.

In this case, as in RIVCO, the overwhelming weight of the evidence is that steamship lines are actually paying lower prices for M&R work (average savings of 10-12%) by choosing PAC. This fact is supported not only by the affidavits of PAC's steamship line witnesses, Mr. Poltrack for ACL, RPFOF §129, and Mr. Gonzalez for CSAV, RPFOF §§137, 138, 146, 148, but also by the Declarations of MRS' own steamship line witnesses, Mr. Cascio for CSAV, CPFOF 42, and Mr. Campolongo for APL, CPFOF 104.

In addition, in RIVCO, the Commission rejected RIVCO's claim that Ormet was illegally tying the use of Bisso's tugs to the use of other terminal services. Id. at 31. Citing to antitrust principles and earlier FMC cases, the Commission noted that tying arrangements are only improper when they force consumers to make purchases that would not otherwise be made. Id. at 30. Vessels calling into Burnside, the purported victims of this illegal tying arrangement according to RIVCO, required the use of tug services, so they were not being forced into making an unwanted purchase. For these reasons, the Commission rejected the claim that a tying arrangement in which a customer

must engage a specific service provider to obtain the services of another provider is inherently improper. Id. at 31.

Here, as in RIVCO, there is not a scintilla of evidence that customers are being forced to make purchases of M&R services that they would not otherwise make. In Complainant's Proposed Finding of Fact 39, Ted Muller opines that [container] shipping lines have fairly consistent costs for M&R services that cannot be avoided because they impact roadibility or third party damage. Hence, customers are not being forced to purchase an unwanted service, M&R services, in order to get a wanted service, stevedoring or marine terminal services. All of these services are needed by container lines–the only issue for them is the cost they have to pay for those services–and hence MRS cannot prove unlawful tying under the precedent in RIVCO.

In POMTOC, 31 S.R.R. 783 (July 28, 2009), Administrative Judge Lang found that a marine terminal operator consortium, POMTOC, which leased land for its terminal from Miami-Dade County, did not violate the Shipping Act by denying White and Ceres the opportunity to stevedore vessels at the POMTOC terminal, while simultaneously denying ocean carriers the right to choose White/Ceres as their stevedore. Id. The ALJ framed the issue, similar to the one in this case, as whether, in prohibiting White/Ceres from accessing the POMTOC terminal at virtually no charge, the POMTOC respondents had unreasonably refused to deal or negotiate with White/Ceres within the meaning of §10(b) of the Shipping Act. Id.

In answering that question in the negative, the ALJ found that one of the advantages of membership in POMTOC was the ability of the members to use the facilities for stevedoring, directly or through affiliates, and there was no authority that would compel the POMTOC members to "share the wealth" because they could afford to do so. Id. at 36. The ALJ noted that White/Ceres could not

legitimately claim the right to operate in the terminal of another company on their own terms and that it was not unreasonable for POMTOC to reserve its facilities for its own members. Id. at 45. Finally, the ALJ found that there had been no violation of the Shipping Act by POMTOC because White/Ceres had not been excluded from the relevant market for stevedoring services in the Port of Miami area, although their access to the market had been curtailed. Id. at 40-42. As the ALJ concluded:

> For the reasons stated above, I have concluded that [White/Ceres] have failed to present a prima facie case of a lack of adequate competition among stevedores in the relevant market area of Miami and Port Everglades. Accordingly, the [POMTOC] Respondents will not be required to justify their practices. Even if that were not so, the Respondents' practices are justified.

Id. at 46.

One of the practices that White/Ceres claimed was discriminatory in the POMTOC case was the fact that the POMTOC respondents allowed other non-member stevedores - but not White/Ceres - the right to operate at the POMTOC terminal. This argument is similar to the one made in this case by MRS that PAC has discriminated against MRS by allowing Multimarine to have access at Seagirt to perform reefer monitoring services.

However, in the POMTOC case, the Commission held that the preferred stevedores were not given "blanket access" to the terminal, but were only allowed there to perform a limited function, in return for a benefit to POMTOC that would allow POMTOC to satisfy the requirements of its own customers. Similarly, in this case, the undisputed facts show that PAC allows Multimarine access to Seagirt only to perform the reefer services for PAC's steamship line customers that PAC itself does not perform, thereby allowing PAC to fulfill its "all-inclusive" contracts with its customers that

include stevedoring services, marine terminal services, and M&R work. The relationship between PAC and Multimarine is therefore a reciprocal one. RPFOF § 84.

In All Marine Moorings, 27 S.R.R. 539, 1996 WL 264720 (May 15, 1996), the Commission found no violation of the Shipping Act where I.T.O., the sole operator of South Locust Point Marine Terminal pursuant to a written lease between the MPA and I.T.O., refused to let a line handling vendor, All Marine Moorings, perform line handling work at that terminal where I.T.O. itself was performing all of the line handling for its own customers. The Commission found that the impact on competition in the Port of Baltimore due to I.T.O.'s decision to do all of its own line handling there was minimal, that there was a benefit to ocean carriers conferred by "one-stop shopping," and that there was no evidence that I.T.O.'s practices harmed its carrier customers or caused inefficiencies at its terminals. 1996 WL 264720, *13. Rather, I.T.O. was entitled to rely on its own experienced opinion that it was better for I.T.O.'s business to do all of its own line-handling, to the exclusion of All Marine Moorings. Id. Similarly, it is appropriate in this case for PAC to use its experienced business judgment in selecting Multimarine as its vendor for reefer work in order to maintain quality control over such services at Seagirt and in order to offer an all-inclusive "one-stop shopping" product to its customers.

In All Marine Moorings and POMTOC, the Commission made it clear that exclusive arrangements similar to those between the MPA and PAC, and between PAC and Multimarine, are not presumptively improper. In both cases, the Commission first determined the relevant market and then determined whether the challenged practices were in violation of the Shipping Act by examining their impact on competition in the relevant market area - an issue on which the complainant has the burden of proof. If the practices did not have a significant impact on

competition, then the respondent need not justify them and the inquiry is at an end. If there is a significant impact, then the burden shifts to the respondent to show that the practices are justified. POMTOC 31 S.R.R. 783 (at p. 39 of the Commission's opinion). The Commission does not conduct a strict antitrust analysis in determining the legality of the challenged practice. Id.

More importantly, the Commission found that in All Marine Moorings, as in the 1980 Puerto Rico Ports Authority case, the parties lacked the triangular relationship necessary to support the findings requested by All Marine as to violations of Sections 10(b)(11) and (12) of the 1984 Act or to find I.T.O.'s self-preference unreasonable under Section 10(d)(1). As the Commission in All Marine Moorings concluded: "Nothing in the Shipping Act obligates I.T.O. to allow competing marine terminal operators or stevedores or line handlers to use its leased facilities to compete with it." 1996 WL 264720, *14 . The same analysis follows in this case – there is no triangular relationship between PAC and MRS, and there is nothing in the Shipping Act that obligates PAC to allow an M&R vendor to use its leased facilities to compete with it.

MRS has engaged in a transparent attempt, after the close of discovery, to try to "manufacture" such a triangular relationship by claiming that steamship line customers at the Port of Baltimore are "dissatisfied" with PAC's "new policies." *See* MRS' Brief at 11-18. In support of that position, MRS has submitted affidavits from lower level steamship line personnel from CSAV and ACL[10] who were not the ultimate decision-makers on those lines' decisions to switch their business to PAC. CX 778-781, 829-831. Not only are these affidavits filled with hearsay, but they are directly contradicted by the Affidavits of Guillermo Gonzalez of CSAV and Michael Poltrack

[10]An affidavit from Dan Jackson of Hanjin Line was withdrawn by MRS, via a Motion to Withdraw that was granted by Judge Wirth via Order dated August 15, 2012.

of ACL, which aver that these steamship lines approached and ultimately chose PAC for their M&R work because they wanted an "all-in" contract that offered them "one-stop shopping" for all of their stevedoring, marine terminal, and related work in Baltimore, they wanted the overall lower prices offered by PAC, and they were satisfied with the quality of PAC's services. RPFOF §§129, 131, 145, 148. At no time did these lines feel compelled to take PAC as their M&R vendor. RPFOF §131, 147.

C. PAC's Operations at Seagirt are Not Unreasonable in Light of the Benefits Conferred by PAC Upon the People of Maryland, the Port of Baltimore, And Ocean Carriers Serving the Port of Baltimore

1. PAC's Overall Operations Under the Seagirt Lease Have Brought Needed Infrastructure Improvements to the Port of Baltimore, Expanded Business in the Port, and Offered One Stop Shopping to Ocean Carriers Calling at the Port

As the Affidavit of Michael Miller attests, as a direct result of the Seagirt Lease, Baltimore now has a new 50-foot berth and four new Super post-Panamax cranes that will allow it to compete for business from the larger ships once the widened Panama Canal opens in 2014. RPFOF §§ 31, 32, 40. These needed infrastructure improvements to the Port would not have been possible without the public-private partnership for Seagirt[11], and PAC would never have agreed to that partnership

[11]An FMC decision vitiating property and exclusivity rights in a public-private partnership would be a serious obstacle to current and future public-private partnerships for port infrastructure. As such, it would run counter to well-established Administration and Congressional policy strongly encouraging public-private partnerships. For example, most recently, on June 29, 2012, Congress enacted the "Moving Ahead for Progress in the 21st Century Act," ("MAP-21") to re-authorize transportation funding through the end of 2014. P.L. No. 112-141. Among other things, MAP-21 requires the Secretary of Transportation to identify impediments to the greater use of public-private partnerships and to address them by developing procedures similar to those used in FHWA's "SEP-15" process, whereby the Secretary can waive statutory and regulatory requirements on a case-by-case basis to attract private capital and increase project delivery.

without the exclusivity rights it conferred, because it was those exclusivity rights that persuaded the private investors for PAC to pledge the $1.3 billion in capital needed to fund the improvements at Seagirt. RPFOF §47.

A recent article in The Daily Record for August 4, 2012, entitled "Ro-ro increases help port set cargo record," reported that cargo increased in the Port of Baltimore in 2011 by 15% over 2010, the greatest growth experienced that year by any major U.S. port and that the Port had handled a record tonnage of cargo for the first half of 2012, on a pace to shatter the previous all-time record set by the Port in 2008. RPFOF §51. According to officials interviewed for the article, much of the credit for the Port of Baltimore's resurgence is given to the MPA's decision to enter the public-private partnership with PAC. Id. Moreover, it was PAC that was chiefly responsible for bringing Hapag-Lloyd to the Port in late February, 2012. RPFOF §159. Hapag-Lloyd is the fifth largest container shipping company in the world and is expected to bring about 30,000 additional containers to the Port of Baltimore annually. RX 924.

Not only are new lines like Hapag-Lloyd being drawn to the Port by the Seagirt public-private partnership, but existing steamship line customers of the Port, like ACL and CSAV, are also enjoying the benefits of "one-stop shopping" with PAC for all of their stevedoring, marine terminal and related services, which the Seagirt Lease is able to afford. In addition to these lines, MSC solicited a bid for M&R work from PAC in Baltimore in 2010, accepted that bid, and agreed to incorporate that work into MSC's existing stevedoring and marine terminal agreement with PAC in order to reduce its overall costs in Baltimore. RPFOF §119. Most recently, Maersk Line ("Maersk") contacted PAC and asked PAC to bid on Maersk's M&R work. The bid was accepted, and on or about May 17, 2012, Maersk and PAC signed a new "all inclusive" contract, including M&R

services. RPFOF §§ 157-158.

2. The Exclusivity Provisions of the Lease Are Reasonable In That They Allow PAC to Derive Sufficient Revenue from its Overall Operations at Seagirt to Meet its Debt Obligation to the State

These exclusivity provisions of the Seagirt Lease are eminently reasonable in that they provide PAC with the ability to generate a revenue stream sufficient to be able to pay its $1.3 billion debt obligation to the State through fees for its services at Seagirt. See RX 0558, Keller Report. If PAC was not able to operate at Seagirt as the exclusive provider of services, or if the Commission were to rule that PAC had to allow MRS or anyone else into Seagirt who wanted to compete against PAC there, then PAC's revenues from its Seagirt operations would be siphoned off by other vendors and PAC would be unable to deliver on its commitment to the State. Indeed, if PAC is forced to allow other vendors to operate on its privately-leased premises, then the Covenant of Quiet Enjoyment owed to PAC under the Seagirt Lease would be null and void, and PAC would have grounds to terminate the Seagirt Lease.

3. PAC's M&R Services At Seagirt Do Not Have a Material Effect on Competition in the Relevant Market

As previously argued, PAC contends that the relevant geographic market for the repair of portable containers and chassis should be the South Atlantic Port range in which MRS operates. In that relevant market, PAC only does M&R work at the Port of Baltimore and MRS is the dominant player for such work, so there would be little to no impact on competition in that wider market due to the fact that MRS could not operate at only one terminal in Baltimore.

However, even if the Port of Baltimore is found to be the relevant market, MRS' inability to perform services at Seagirt should also be deemed to have a minimal impact on competition in

the Baltimore port area. The undisputed facts are that MRS already has an on-dock container repair operation at Dundalk Marine Terminal - located next door to Seagirt - and two off-dock properties near Seagirt that it is leasing for the express purpose of performing container and chassis repairs. RPFOF §§91, 102. Moreover, as soon as the Canton Warehouse Property opens as the off-dock Seagirt Chassis Yard, ALL chassis repairs in Baltimore will be performed off-dock, and MRS has admitted that there will then be a level playing field. RPFOF §63.

MRS' has conceded that its time/task rates for M&R work are lower than those of PAC, RX 0044, 0394 (Olshefski Dep.(Vol. I) 43, (Vol II) 113), and even after MRS filed its Complaint in this matter, it was able to compete with PAC and take some business away from PAC. RPFOF § 134, RX 0430, 0440 (Olshefski Dep. at 257-258, 296-297). In fact, some steamship lines, such as Yang Ming and APL, prefer to do business with MRS and have not made a switch to PAC for M&R work, RPFOF § 164, and even those lines currently using PAC for M&R work have indicated that once their present contract with PAC is up, they will once again be going out to bid for the work, thereby opening the door for MRS to bid. RPFOF §§ 135, 149.

In summary, with space both on-dock and off-dock to do M&R work, time/task prices that are lower than PAC's, an eventual even playing field for off-dock chassis repairs and roadibility work with the opening of the Canton Warehouse Chassis Yard, and new and old customers interested in doing business with MRS, there is no reason why MRS should not be able to continue to compete with PAC for M&R work in Baltimore. For years, MRS did business in Baltimore by overly inspecting equipment, coding minor repairs as major ones, and overcharging customers for work that was unnecessary. CX021-022, Montgomery Dep. at 81-85. MRS also did not have the proper equipment to handle containers, resulting in excessive flooring damage to them that necessitated

expensive repairs by the lines. RPFOF §127. These issues resulted in overall larger M&R bills to the steamship lines than PAC is submitting, even though PAC's time/task rates are higher. Id.; RPFOF §126. As previously argued, MRS has all the tools it needs to compete in Baltimore–it just has to find new and more efficient ways of doing so.

4. PAC Does Not Engage in Price-Tying, and Its Provision of Its Own M&R Services At Seagirt Is Not Unlawfully Discriminatory

a. MRS Has Failed to Prove that PAC Has Engaged in Unlawful Price-Tying

MRS' Complaint alleges that PAC has improperly tied its M&R work to its stevedoring work in acquiring MSC, ACL, and CSAV as customers, but here MRS has not met its burden of proof. As previously argued, there is no credible evidence that PAC has conditioned its provision of stevedoring services or marine terminal services to steamship lines calling at Seagirt Marine Terminal upon the use of PAC's M&R services there AND that M&R services are a service that is not wanted by the lines.

The record indicates that the largest container line in the Port, MSC, already had an existing contract with PAC for both stevedoring and marine terminal services when MSC's Geneva office solicited a bid from PAC in 2010 for M&R work, which PAC submitted and which MSC accepted. RPFOF § 119. Similarly, both Michael Poltrack of ACL and Allen "Ted" Muller, formerly of CSAV, two of the other steamship customers specifically referenced in MRS' Complaint, testified that both companies approached PAC about bidding on work, that PAC submitted competitive bids, that those steamship lines voluntarily sought out PAC for one-stop shopping and lower overall costs, that ACL and CSAV had options when negotiating and accepting the proposed bids, that there was never any attempt by PAC to require them to take PAC's M&R services as a pre-condition to being able to use

PAC as their stevedore or marine terminal operator and that, as far as they were aware, PAC has not claimed that either company cannot also work with MRS. RPFOF §§126-140, 145-149.

Finally, there is certainly no evidence that any steamship line that has entered into agreements with PAC for M&R services at Seagirt Marine Terminal has been prevented from still working with MRS at locations other than Seagirt Marine Terminal. In fact, Mr. Poltrack of ACL testified that in 2010, ACL awarded some work to MRS, notwithstanding its contract with PAC. RPFOF §134. As in the POMTOC case, even if MRS' access to Seagirt has been curtailed by PAC's 50-year Lease, MRS has not been excluded from the relevant market in Baltimore for M&R Services, which includes off-dock facilities and other on-dock terminals in Baltimore.

The seminal Supreme Court case on unlawful tying arrangements, Jefferson Parish Hospital District No. 2 v. Hyde , 466 U.S. 2, 104 S.Ct. 1551 (1984), is particularly instructive here. In Jefferson Parish, an anesthesiologist who was denied admission to a hospital's staff brought suit claiming that an exclusive contract between that hospital and a firm of anesthesiologists, which required all anesthesiological services for the hospital's patients to be performed by that firm, violated the anti-tying and anti-monopoly provisions of the Sherman Act. Although the Court found that anesthesiological services and hospital services were two separate services, it held that the fact that the hospital's exclusive contract required the purchase of two services that could otherwise be purchased separately did not make the contract illegal. 466 U.S. at 11, 104 S.Ct. at 1558. As the Court stated:

> If each of the products may be purchased separately in a competitive market, one seller's decision to sell the two in a single package imposes no unreasonable restraint on either market, particularly if competing suppliers are free to sell either the entire package or its several parts. For example, we have written that "if one of a dozen

> food stores in a community were to refuse to sell flour unless the buyers also took sugar it would hardly tend to restrain competition if its competitors were ready and able to sell flour by itself." [cite omitted] Buyers often find package sales attractive; a seller's decision to offer such packages can merely be an attempt to compete effectively -- conduct that is entirely consistent with the Sherman Act.

Id. The Court went on to note that if patients did not want to use the hospital's anesthesiologist firm, they were free to select from a number of other competing hospitals in the area. 466 U.S. at 24, 104 S.Ct. at 1565.

As in Jefferson Parish, the Commission in the RIVCO case has also specifically refused to find unlawful price-tying even where a customer must engage one specific service provider to obtain the services of another provider, but where the alleged "tied service" was one that customers wanted. RIVCO, 28 S.R.R. 751, 1999 WL 125991 (F.M.C. 1999).

Here, as in the Jefferson Parish and RIVCO, PAC is merely attempting to offer M&R services to its steamship line customers that already want and need such services, in addition to the stevedoring and marine terminal operator services that PAC already provides, as part of a single, "one-stop shopping" package. There is no credible evidence in the Record that steamship line customers are not free to use MRS for dry box/reefer repairs or chassis work outside of Seagirt. Moreover, similar to the situation in RIVCO, there have been no credible complaints as to M&R service or prices from any of PAC's customers, as the testimony by affidavit of Mr. Poltrack of ACL and Mr. Gonzalez of CSAV attests. RPFOF§ § 126-140, 145-149. These Affidavits contradict others obtained by MRS from the same lines who are less knowledgeable. *See* discussion at Section III.B.3, *infra*. Finally, PAC's conduct is even less like a price-tying arrangement than the exclusive agreement that was upheld in RIVCO, as PAC's customers still have the option of contracting with

MRS for their M&R work, and some customers still do have their M&R work done by MRS. In RIVCO, customers only had the option of using one specific tug company, yet the Commission still refused to strike down the arrangement as illegal price-tying. For all of the foregoing reasons, MRS has not met its burden of proving that PAC has engaged in price-tying at Seagirt.

b. MRS Has Failed to Prove that PAC Has Engaged in Unlawful Discriminatory Conduct at Seagirt

In addition to MRS' failure to meet its burden on alleged price-tying, MRS has also failed to show that PAC is guilty of any discriminatory conduct at Seagirt, as defined by the applicable law. As previously discussed in the context of the All Marine Moorings case, *supra*, there is nothing in the Shipping Act that obligates PAC to allow MRS to use its leased facility at Seagirt to compete with it. Hence, MRS' allegations in the Complaint about PAC not allowing MRS to access Seagirt via the Colgate Creek Bridge, or to access the Canton Warehouse property, or to access PAC's leased premises at Dundalk Marine Terminal are not violations of the Shipping Act under the All Marine Moorings case. Nor is MRS' allegation that PAC has violated the Shipping Acts by performing its own M&R work at Seagirt actionable under All Marine Moorings. Finally, PAC's actions in referring reefer work at Seagirt to Multimarine as its preferred vendor also does not constitute a violation of the Shipping Act under the RIVCO case, as previously discussed.

A case factually similar to the instant one is D.J. Roach, Inc. v. Albany Port District, 5 F.M.B. 333 (1957). In the D. J. Roach case, the Commission considered a complaint that the Port of Albany and Cargill had agreed to employ only one stevedore, a competitor of the complainant, D.J. Roach, at the public grain terminal facility owned by the Port of Albany and operated by Cargill, in violation of Sections 16 and 17 of the Shipping Act of 1916. The Commission found that,

although competing stevedores had served that facility on a rotating basis in the past, in March 1955, the Port of Albany and Cargill decided that Cargill would be the contracting stevedore for all future work at that terminal and would subcontract the work to J.W. McGrath Corporation, the only stevedore in the Port that owned modern grain trimming machines. The reason offered by the Port of Albany and Cargill for this change was that it was necessary in order to improve the competitive position of Albany as a grain handling port by providing stevedoring at as low a cost as possible.

D. J. Roach objected to the exclusive subcontract to J.W. McGrath on the basis that it created an unreasonable monopoly. The Commission held that the subcontract did not violate any section of the Shipping Act, because Cargill was merely subcontracting for auxiliary services within the overall provision of stevedoring services under the contracts between Cargill and its customers. The Commission stated:

> This record reflects a situation in which Cargill held itself out to perform, and through contracts with vessels agreed to perform, stevedoring services, and merely subcontracted certain stevedoring operations to other stevedoring contractors who, in turn, performed the work for Cargill and not for the vessel or the cargo. We are unable to find, therefore, that the refusal to employ complainant was a violation of section 16, First, of the Act. Likewise, on this record, we are unable to find the employment of one stevedoring subcontractor to the exclusion of complainant an unreasonable regulation or practice in connection with the receiving, handling, or storing of property, under section 17 of the Act.

D.J. Roach, 5 F.M.B. at 335.

Like Cargill in the D.J. Roach case, PAC is merely "subcontracting" to itself or to Multimarine the provision of M&R services to its steamship line customers as a part of its overall operation of Seagirt Marine Terminal. And, like Cargill, PAC has sound business reasons for performing M&R work for its customers, in order to give them the opportunity to realize cost

savings and efficiencies by having an "all inclusive" contract covering all of their needs for stevedoring, marine terminal, and M&R services in Baltimore.

Included among those sound business reasons are quality control issues and safety for PAC and its customers. For instance, under the new Federal Highway Motor Carrier Safety Regulations, PAC could have legal liability if a chassis leaves Seagirt in an unsafe condition and is later involved in an accident on the road caused by that condition. Consequently, PAC clearly has an incentive to make sure that these repairs are done properly. RPFOF §78. And, as to safety, MRS' safety record in recent years has been poor, including the deaths of several of its employees in job-related accidents at Seagirt and at least four "serious" OSHA violations and related fines. RPFOF §§ 85-86. In PAC's opinion, Multimarine, on the other hand, is the "safest, best provider of reefer services in the port and [they] have been for many years." RPFOF §87.

D. The Commission Has No Authority to Require Competitors to Have Access to Private Marine Terminal Property

The Shipping Act grants the FMC broad authority to proscribe failures to "establish, observe, and enforce just and reasonable regulations and practices." However, it does not empower the FMC to require the lessee of a container terminal to permit a third party to intrude into that terminal and make use of it for the purposes of conducting business.[12] Hence, the Commission lacks the authority to require PAC to provide MRS with access to PAC's leased facilities at Seagirt.

The Commission never has held that the Shipping Act can compel nonconsensual invasion

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[12] *Compare* 49 U.S.C. §11102, empowering the Surface Transportation Board to mandate access by competitors to terminal facilities in the rail context, and tying computation of compensation payable therefor to the principles employed in the condemnation context. If Congress wished to empower the FMC to require "open access" to private terminal facilities, it would have done so expressly, as it did with the STB.

and use of privately-held shoreside facilities. Even in its earliest cases addressing selection of dry-bulk stevedores in the pre-containerization era, the Commission and its predecessor were careful to emphasize that its regulatory actions were undertaken to foster competition for stevedoring activities taking place onboard ships (e.g., grain trimming), and not activities taking place in shoreside facilities.[13]

An order by the FMC granting MRS a right to perform services on PAC's terminal would not only be unprecedented, it would also constitute an unlawful and unconstitutional taking of PAC's property rights. The Shipping Act cannot be read to authorize such an expansive and unconstitutional exercise of authority. United States v. Delaware & Hudson, 213 U.S. 366, 408 (1909) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.").

The Takings Clause of the Fifth Amendment to the U.S. Constitution expressly prohibits the federal government from taking private property for public use without just compensation. The

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[13] For example, in California Stevedore and Ballast Co. v. Stockton Port District, 7 F.M.C. 75, 1 S.R.R. 563 (1962), the Commission found that all the stevedoring work at issue would take place on the vessel, because "[i]n loading grain the functions of the stevedore begin only after grain leaves the loading spout." Similarly, in Greater Baton Rouge Port Commission v. U.S., 287 F.2d 86, 94 (5th Cir. 1961), the circuit court explained: "stevedoring is traditionally maritime. . . . There is no physical connection between vessel and elevator except guide lines to hold the spout discharging grain into a hatch. The elevator workers perform no services on the vessel; the longshoremen perform no services in the elevator or on the wharf." In the 1959 agency case below, the Commission stressed that it was disapproving the subject agreement based on the fact that it would create "a monopoly over activities that take place exclusively on the vessel and not on terminal property." Agreements Nos. 8225 and 8225-1, 5 FMB 648, 656 (1959). Similarly, a long line of FMC exclusive tug franchise cases have dealt with the ability of competitors to operate in the nation's navigable waters, not on privately leased dry land, including Petchem, Port Canaveral, and RIVCO.

Supreme Court has recognized a broad range of instances where regulatory actions constitute a taking of private property rights; however, the clearest and most extreme cases of such takings involve instances where, as here, the government would physically invade, or authorize third parties to invade, real property. In those "physical invasion" cases, a *per se* rule is applied; no balancing of interests is needed before holding the government liable for the taking. These principles were explained in Nollan v. California Coastal Commission, 483 U.S. 825 (1987), in which the Court invalidated a requirement that a waterfront homeowner allow non-owners to traverse the waterside edge of its property:

> To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest, but rather (as JUSTICE BRENNAN contends) "a mere restriction on its use," post at 483 U. S. 848-849, n. 3, is to use words in a manner that deprives them of all their ordinary meaning. . . . Perhaps because the point is so obvious, we have never been confronted with a controversy that required us to rule upon it, but our cases' analysis of the effect of other governmental action leads to the same conclusion. We have repeatedly held that, as to property reserved by its owner for private use, "the right to exclude [others is] one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982), quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979). In Loretto, we observed that, where governmental action results in "[a] permanent physical occupation" of the property, by the government itself or by others, see 458 U.S. at 432-433, n. 9, "our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner," id. at 434-435. We think a "permanent physical occupation" has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.

This Takings Clause analysis applies broadly, not just to ownership -- leaseholds or lesser

possessory property interests are also protected. *See, e.g.*, United States v. General Motors Corp., 323 U.S. 373, 377-78 (1945) (holding that the Fifth Amendment protects rights to possess, use and dispose of physical property; to the extent that the government permanently occupies physical property, it effectively destroys each of these rights); Kirchdorfer v. United States, 6 F.3d 1573 (Fed. Cir. 1993)(even possessory rights in a temporary building on government property are protected property rights under Takings Clause).

The Supreme Court took a similar approach, using the *per se* test to strike down a regulatory authorization of an invasion of property, in Loretto v. Teleprompter Manhattan CATV Corp., cited above. InLoretto, the Court invalidated a statute that required landlords to allow installation of cable companies' cables and equipment on their rental properties without compensation for access to the property. In a lengthy opinion that provides a useful guide to constitutional issues relevant here, the Court held that when the physical intrusion constitutes a permanent physical occupation, a taking has occurred. The Court defended the rationale behind the traditional*per se* rule for finding takings in physical occupation cases, holding that "an owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property" and that "property law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property."

Even in cases where the character of the physical invasion has not amounted to a permanent occupation, the Supreme Court (employing the rule of reason set forth in the case of Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978)) has held that a taking has occurred when the government authorized a physical invasion that disrupted the property owners' "investment-backed expectations." *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164 (1979) (federal imposition of a navigational servitude requiring public access to new marina's pond was a taking).

In that case, the Court held that the property owners had relied on their right to exclude the public ("one of the most essential sticks in the bundle of rights that are commonly characterized as property") in developing a marina. The Court explained:

> This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioner's private property; rather, the imposition of the navigational servitude in this context will result in an *actual physical invasion* of the privately owned marina. . . . And even if the Government physically invades only an easement in property, it must nonetheless pay compensation.

Id. at 180 (emphasis added).

E. Even if the Commission Had Such Authority, Public Policy Favors Upholding the States' Ability to Enter into Public-Private Partnerships That Results in Exclusive Arrangements

An FMC order mandating that MRS be allowed to operate on PAC's leased property clearly would be unfair and disruptive to PAC's investment-backed expectations, and could potentially expose the FMC itself to liability to pay the fair market value of the property interests taken. If its action were found to be a taking of PAC's property rights, the Commission would be liable to PAC for the value of the property interests taken in an inverse condemnation action before the Court of Federal Claims pursuant to the Tucker Act, 28 U.S.C. §1491.[14] Moreover, an agency that engages in such a taking without acting pursuant to proper authority may violate the Antideficiency Act, 31 U.S.C. §1341, which prohibits making obligations or expenditures in excess or advance of appropriations. *See Principles of Federal Appropriations Law, Third Edition,* Volume III, United States Government Accountability Office, September 2008, pp. 13-36 and 13-57.

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[14] In such a proceeding, the FMC could stand liable not just for compensation for taken property, but also for costs and attorneys' fees pursuant to 42 U.S.C. §4654(a)(authorizing costs for unauthorized condemnation actions).

The Shipping Act must be construed consistently with mandates from both Congress and the Executive Branch that federal agencies are to avoid taking actions that result in constitutionally cognizable takings without formal condemnation proceedings. *See, e.g.*, 42 U.S.C. §4651(8) ("[n]o Federal agency head shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property) and Executive Order 12630 ("[a]ctions undertaken by governmental officials that result in a physical invasion or occupancy of private property, and regulations imposed on private property that substantially affect its value or use, may constitute a taking of property").

The FMC has no power of eminent domain or legislative authorization of condemnation power, and thus no authority to engage in constitutionally protected takings. (*Compare* 33 U.S.C. §§591-594, authorizing the Army Corps' condemnation power in connection with harbors). Nor has the FMC been authorized by Congress to acquire real property, a prerequisite to general condemnation authority under 40 U.S.C. §257.

Accordingly, the Shipping Act cannot be read to afford the agency power to mandate physical invasions or occupations of marine terminals and, therefore, the FMC should either find it has no authority to regulate access to private marine terminal property or else decline to exercise that authority for public policy reasons.

III. OPPOSITION TO ARGUMENTS OF MRS

In its Brief, MRS argues that PAC has given an undue and unreasonable preference to itself and to Multimarine, or an unreasonable and undue disadvantage and prejudice to MRS, in alleged violation of the Shipping Act, 46 USC §41106(2), and has also unreasonably refused to deal and negotiate with MRS, in alleged violation of 46 USC §41106(3) of the Shipping Act. PAC has

already addressed many of the arguments made by MRS in MRS' Brief in the context of making its own case, above, that it has acted reasonably at Seagirt. In this part of the Brief, PAC will address the remaining substantive arguments of MRS and show that PAC has acted at all times within the allowed parameters of the Shipping Act.

A. MRS Has Not Proven that PAC Has a Monopoly Over Container and Chassis Repairs in Baltimore

1. The Mere Fact that MRS' Costs of Doing Business May Have Increased As a Result of PAC's Lease at Seagirt Does Not Render PAC's M&R Operations in the Port of Baltimore a Monopoly

In its Brief at pages 4-9, MRS' argument that PAC has a monopoly over container and chassis repairs in Baltimore is based on a misleading and "creative" version of the facts. Prior to January, 2010, when the Seagirt Lease took effect, MRS did have unfettered access across the Colgate Creek Bridge between Seagirt and Dundalk, because the MPA was in charge of Seagirt then and the MPA set the rules. Once PAC became the 50-year lessee of Seagirt, it was assigned MRS' month to month lease at Seagirt by the MPA, RPFOF §55, by MRS' own admission, PAC became entitled to set its own rules for the operation of Seagirt. RPFOF §72. Even then, PAC did not move to immediately terminate MRS' month to month lease, but gradually began implementing certain changes to the Seagirt operation that would allow PAC to control Seagirt in a safe and effective way.

One of the changes PAC made was to try to close the Colgate Creek Bridge to all traffic so that equipment coming into or out of Seagirt would have to pass through a TIR inspection at Seagirt's main gate. This TIR inspection served two roles. First, it was a way to better monitor the flow of equipment for which PAC was now the bailee, to prevent theft and pilferage, as, historically, equipment had been "spirited away" through the back door of Seagirt via the Colgate Creek Bridge

by MRS and others. CX 0027, Montgomery Dep. at 102-103. MRS has acknowledged the need for a TIR process at Seagirt, RPFOF §69, and, in fact, MRS has its own TIR procedure in place at its off-dock Broening Highway facility, RPFOF § 70, so having to go through a TIR process should be nothing new for MRS.

Secondly, the TIR inspection also served as a way to ensure that equipment leaving Seagirt met the roadability requirements of the new regulations under the Federal Highway Motor Carrier Safety Act (FHMCSA), 49 C.F.R §385.1 *et seq*. PAC had concerns that if a chassis left Seagirt in an unsafe condition and was later involved in an accident on the road caused by that condition, then PAC might be liable under FHMCSA. RPFOF §78. MRS has acknowledged that FHMCSA gives a marine terminal operator an incentive to make sure that the repairs are done properly themselves. RPFOF §78. It was also inefficient, from a staffing perspective, and less secure, for PAC to man a second TIR gate at the Colgate Creek Bridge, particularly as there was no space at the Bridge to perform roadibility inspections. RPFOF §67; CX 0011, 0026 (Montgomery Dep. at 40-41, 100-101).

MRS claims that this TIR process results in additional costs to MRS and its customers, *see* MRS Brief at 6, 8-9, but this is not always true. If the steamship line at issue has a stevedoring and marine terminal service agreement with PAC for Seagirt, then the chances are very good that the TIR, or "gate charges," applicable under the BMTA Schedule would be part of the agreed "throughput rate" with the line, such that no separate TIR charge would be incurred. RPFOF § 73. However, even if this practice were to result in an occasional additional equipment charge for MRS, that charge applies evenly across the board to all Seagirt users under the rates established in the BMTA Schedule - MRS is not being singled out. The mere fact that a practice by one competitor results in additional costs to another competitor does not make that practice unreasonable *per se*.

See Western Parcel Service v. United Parcel Service, 65 F. Supp. 2d 1052, 1065 (N.D. Cal. 1998)

With respect to chassis repairs, it is true that, as of this moment, PAC can do chassis repairs on-dock at Seagirt while MRS may have to incur extra costs to dray those chassis to either its off-dock facilities or to its repair shop at Dundalk. It is also true that its current ability to perform on-dock chassis repairs at Seagirt may give PAC a competitive advantage for that business. However, PAC will lose that advantage when the Canton Warehouse Chassis Yard opens. Once that happens, MRS admits that there will then be a level playing field between MRS and PAC, as all chassis repairs in Baltimore will be performed off-dock. RPFOF § 63.

Again, the decision to move all chassis repairs off-dock was not made by PAC to penalize or single out MRS, but to recognize the fact that the modern trend among ports everywhere is to move chassis repairs off-dock in order to maximize on-dock space for cargo handling and storage. RPFOF § 60. PAC had hoped to have the Canton Warehouse Chassis Yard up and running sooner, but it has run into major problems trying to harmonize its NAVIS software system used at Seagirt with the very different software system used by the major chassis pool operators in Baltimore. CX 0013-0014, (Montgomery Dep. at 49-50).

Finally, MRS' allegation that shortly after PAC announced its intention to move MRS off of Seagirt, PAC began to solicit MRS' customers for M&R work, is completely false. MRS Brief at 7. There is no support in the record whatsoever for that statement. Rather, the record shows that PAC began doing M&R work for its customers as early as 1999, when it was first approached by Hapag Lloyd, then later NSCSA and Evergreen, to add M&R work to the stevedoring and marine terminal work that PAC was already doing for them. RPFOF § 19. MSC approached PAC in 2010 about having PAC do its M&R work, RPFOF §119, and both ACL and CSAV approached PAC

about bidding on M&R work. RPFOF § 128-129, 137.

2. It is Undisputed that MRS Can and Does Perform Container and Chassis Repairs at Dundalk and at Its Off-Dock Facilities in Baltimore

Although MRS may not be able to compete with PAC for M&R work performed on Seagirt Marine Terminal itself, MRS cannot deny that it can and does compete with PAC for container and chassis repairs that can be performed at MRS' Dundalk Marine Terminal repair shop and at MRS' off-dock properties located near Seagirt at East Lombard St. and Broening Highway. RPFOF § 80; RX 0374-0374 (Olshefski Dep. 37-38, 111-114, 257-258); RX 0263 (A. Marino Dep at 202). Since June 2011, MRS has obtained new M&R work from steamship lines APL and Yang Ming and from other non-steamship line customers at its off-dock Broening Highway yard. RPFOF § 164. MRS also admits that all of its main customers that have shifted from MRS to PAC had options in terms of whether to stay with MRS or to transfer their business to PAC, but that in many cases MRS declined to match offers made by PAC because MRS felt that they would be subsidizing the repairs. RPFOF §119, 141; RX 0301(V. Marino Dep. at 118-119). Indeed, even in the case of customers like ACL who did shift most of their work to PAC for better cost savings, those customers are continuing to give M&R business to MRS, RPFOF §134, and are willing to consider MRS again once their current contracts with PAC expire. RPFOF § 135, 149.

PAC's intention not to allow the Colgate Creek Bridge to be used as a regular means of ingress and egress from Seagirt, but to leave it as an "emergency exit" only, does not stop MRS from doing business in the Port of Baltimore. If MRS wants to move a container from Seagirt to its repair shop at Dundalk Marine Terminal, MRS would simply dray the container out of Seagirt's main gate, travel less than a half of a mile to the Dundalk gate, and enter there to take the container to its repair

shop. The fact that this may add to MRS' costs does not make PAC's operation at Seagirt illegal. *See* Western Parcel Express, 65 F.Supp. at 1065.

In 2010, MRS purchased two toploaders (otherwise known as empty handlers) for $206,000 and located them at its two off-dock properties, RPFOF § 112, and, in 2011, MRS was in the process of purchasing two yard hustlers from Ceres Marine Terminals for use at Dundalk and at MRS' off-dock Broening Highway facility. RPFOF § 114. This substantial investment in container handling equipment by MRS for its Dundalk and off-dock facilities would not have been made if MRS did not envision a future for itself in the Port of Baltimore, notwithstanding the fact that performing M&R work on Seagirt was closed to it.

B. MRS Has Not Proven that PAC Unlawfully Tied Its Provision of M&R Services to Its Provision of Stevedoring Services

1. If M&R Services are Subject to Regulation Under the Shipping Act, Then They Must Be Marine Terminal Services.

As argued previously in Section II.A.1 of this Brief, *supra*, it is questionable whether M&R Services are in fact "marine terminal services" subject to regulation under the Shipping Act, because they are not "directly related to the delivery and handling of [cargo] property.Sea-Land Dominicana, S.A. et al. v. Sea-Land Service, Docket 91-30, 1992 WL 231208, *9 (F.M.C.) Feb. 21, 1992. However, if M&R services are found by the Presiding Officer in this case to be marine terminal services, then there can be no unlawful tying here as a matter of law, because PAC is a marine terminal operator and it is simply adding an additional marine terminal service to the repertoire of marine terminal services that it already provides to its steamship line customers.

2. It is Undisputed that PAC is a Marine Terminal Operator and, As A Matter of Law, There Can Be No Unlawful Tying If The Two Products At Issue Are of the Same Type and not Distinct

MRS claims in its Brief at pages 9-11 that PAC has unlawfully tied its performance of stevedoring services to the performance of M&R work. However, this allegation is not only factually untrue but disingenuous. It is undisputed that PAC is a marine terminal operator. RPFOF 17. By definition under the Shipping Act, a "marine terminal operator" is one who is "engaged in the United States in the business of providing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier..." 46 U.S.C. §40101(14). That PAC also provides stevedoring services is irrelevant, because PAC has no contracts with steamship lines that are purely stevedoring contracts – all of its contracts at Seagirt are for both stevedoring and marine terminal services. Hence, to the extent that any new or existing steamship line customer of PAC's chooses to use PAC at Seagirt for M&R work, such M&R work would not be a "product" connected with stevedoring in any way, but one related to "marine terminal services."

Under Jefferson Parrish, as well as under the cases cited by MRS, the first element of proving the existence of an illegal tying arrangement is to show that the tied products are separate and distinct. Jefferson Parrish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 7 (1984); Paladin Assocs., Inc. v. Mon. Power Co., 328 F.3d 1145 (9th Cir. 2003). MRS has failed to demonstrate that M&R work is a distinct and separate product from marine terminal services. If it is subject to FMC regulation at all, then M&R work must be viewed as part and parcel of the overall product provided by a marine terminal operator. When products are integral parts of a single operation, the products are not separate and distinct for antitrust purposes. *See* Rick-Mik Enterprises, Inc. v. Equilon Enterprises LLC, 532 F.3d 963, 975 (9th Cir. 2008).

In Rick-Mik Enterprises, Equilon, doing business as Shell Oil Products, required its franchises to also use Equilon to process its credit-card transactions. Id. at 966. Plaintiffs asserted that Equilon was improperly tying its oil product franchise business to its credit-card processing business. Id. at 967. However, the Court rejected this argument, finding that credit-card processing was not a separate and distinct product from a franchise operation. Id. at 974. The Court reasoned that "[f]ranchises . . . necessarily consist of 'bundled' and related products or services—not separate products. Id. Credit-card processing was an integral part of the singular product, the franchise. Id. at 975. Therefore, there could be no illegal tying because the two products were not separate and distinct.

Similar to the situation in Rick-Mik, marine terminal operators offer a number of different "bundled" services related to the business of providing wharf, dock, warehouse, or other terminal facilities. Viewed in this light, M&R work is not a separate product from the other marine terminal services that PAC offers as a marine terminal operator. Therefore, PAC cannot be guilty of improper tying, as alleged by MRS, as a matter of law.

3. The MRS Affidavits from Lower Level Steamship Line Personnel as to Alleged Illegal Tying Are Hearsay, Incomplete, Incorrect and/or Contradicted by Higher Level or More Knowledgeable Steamship Line Personnel

MRS has provided several affidavits from lower level steamship line personnel in which such personnel purport to opine that PAC tied its provision of stevedoring services to the provision of M&R services. CX 832-834, CX 829-831, CX 778-781 and CX 774-777. The information contained within these affidavits, however, is either hearsay, incomplete, incorrect, or has been directly

contradicted by higher level and/or more knowledgeable personnel with the same steamship line. Therefore, these should not be considered by the Court as credible on the subject of alleged "tying."

MRS offers the affidavit of Eugene Cascio in an attempt to prove that PAC coerced CSAV into contracting with PAC for both stevedoring and M&R work. CX 779 at ¶ 6. Mr. Cascio, however, has absolutely no personal knowledge of any of the discussions or negotiations that occurred between PAC and CSAV prior to the completion of the contract, as, admittedly, he was not privy to any of those conversations. Id. In the Cascio affidavit, there is only one statement asserting that PAC engaged in illegal tying, and that statement is not only hearsay, but it is directly contradicted by the affidavit of Mr. Cascio's superior, Guillermo Gonzalez, as described below. According to Mr. Cascio, "I was advised by Allen T. Muller that Mark Montgomery of PAC told him that the only way PAC would give CSAV a stevedoring discount would be if CSAV also gave PAC the contracts for maintenance and repair of both dry containers and reefers." Id. Obviously, statements that may have been made by Mr. Montgomery to Mr. Muller to Mr. Cascio are hearsay and should not be admissible. *See* FED. R. EVID. 801.

MRS provides a similar affidavit from Allen T. Muller, former Vice President of Operations for CSAV, who has worked for Zim Line for the past two years. CX 832 at ¶ 2-3. In his Declaration, Mr. Muller asserts that, "Mark Montgomery made it clear that PAC was not going to reduce its rates for stevedoring services unless CSAV agreed to an 'all-inclusive' package." CX 833 at ¶8. Unfortunately for MRS, Mr. Muller's Declaration for MRS is contradicted by his own testimony in open court in this matter on January 20, 2012, during which he stated, under oath and subject to cross-examination, that CSAV approached PAC in 2009 about reducing CSAV's costs because the

shipping industry was facing tough economic times and across the board cost savings was CSAV's number one priority. RX 0092-0093, 0097 (Transcript of 1/20/12 hearing at 91-92, 96).

Muller testified that CSAV asked PAC to propose a new contract and that the new contract offered by PAC for stevedoring and marine terminal services also included M&R rates, which Muller said were "not the main focus of discussions" and were "a minor aspect to CSAV." RX 0093-0095. (Id. at 92-94). As an aside, MRS was also approached by CSAV in this same general timeframe to bid on M&R work for CSAV, but MRS elected not to provide a competitive bid to CSAV for such work. RPFOF §141. Muller acknowledged that besides entering into a new, restructured contract with PAC, CSAV could have stayed with its existing contract with PAC that did not include M&R work or it could have entered into an agreement with another stevedore/marine terminal operator in Baltimore. RX 0099-0100 (Transcript of 1/20/12 hearing at 98-99).

In addition to the fact the Muller Declaration is contradicted by Mr. Muller's own in-court testimony, both the Muller and Cascio Declarations are directly contradicted by the Declaration of Guillermo Gonzalez, Senior Vice President of Operations for CSAV, and the superior of both Mr. Cascio and Mr. Muller. RX 0959-0960 (Gonzalez Declaration at ¶ ¶ 2,3, 6, 8) . As a Senior Executive of CSAV, Mr. Gonzalez was in a better position than either of these lower level men to know CSAV's decision-making process, including the negotiations and behind-the-scenes dealings that resulted in the new agreement between PAC and CSAV that included M&R work. Mr. Gonzalez, in his declaration, avers that he has read the declarations of Messrs. Muller and Cascio and that they are "not entirely complete or entirely accurate," and he states that he is giving his declaration to "correct the record and to clarify several points." RX 0959 (Gonzalez Declaration at ¶¶ 2,3).

Specifically, Mr. Gonzalez insists that CSAV "did not feel compelled to enter into any 'all in' contract with PAC nor did CSAV ever feel that it was forced to take PAC [as] its M&R vendor in order to be able to use PAC as its stevedore or marine terminal operator. CSAV always had the option of using Ceres Marine Terminals as its stevedoring and marine terminal services vendor. However, CSAV liked the idea of 'one-stop shopping', that is, getting all of its port services from a single vendor under one invoice and PAC offered that option." RX 0960 (Gonzalez Declaration at ¶ 6). Moreover, Mr. Gonzalez rejects any implications or suggestions made by Mr. Muller and Mr. Cascio that CSAV is anything but pleased with its agreement with PAC and the resultant services, stating that CSAV is "pleased with the quality and price of all the services it is receiving from PAC in Baltimore, including M&R services" and that CSAV is also "satisfied with the reefer services that it is receiving from PAC's subcontractor, Multimarine." RX 0960 (Gonzalez Declaration at ¶ 8).

MRS offers similar misleading testimony in the form of the Declaration of Brian McBride, the Vice President of Corporate Logistics for Atlantic Container Line ("ACL"). It is clear from paragraph 11 of Mr. McBride's Declaration that he has no personal knowledge of the negotiations between PAC and ACL for stevedoring, marine terminal, and M&R work at the end of 2006, because such negotiations were handled, he says, by "Scott Polin, ACL's head of procurement at the time." CX 830 at ¶11. Hence, McBride's next averment that, during those negotiations, "PAC offered to reduce its rates for stevedoring services on the condition that ACL agree to an overall contract which bundled stevedoring and maintenance and repair work, including reefer repair", offering a reduced rate for stevedoring "dependent on ACL agreeing that PAC would be its exclusive

vendor for both stevedoring and maintenance and repair services" is also clearly hearsay, since he did not participate in those negotiations. CX 831 at ¶ 12.

Mr. McBride's Declaration is directly contradicted by the Affidavit of Michael Poltrack of ACL, its Vice President of Operations, who avers that he was responsible for negotiating all of the contracts for ACL in Baltimore over the past 10 years. RX 0984 (Poltrack Aff. at ¶ 3). Mr. Poltrack avers that he has read the affidavit of McBride and finds it to be incomplete and is therefore giving his own affidavit to complete the record and clarify several points in it. Id. Mr. Poltrack clarifies that ACL management made the decision in 2006 to enter into an "all in" contract for all of its stevedoring, marine terminal, and related work in Baltimore with a single vendor, after seeing its overall spending on M&R work in Baltimore, then being performed by MRS, rise by about 20%. RX 0984-0985 (Poltrack Aff. at ¶4-5).

In addition to PAC, ACL sent out bid solicitations in 2006 to Mid-Atlantic Terminals, Ceres Marine Terminals, Universal Maritime Services, and MRS. RX 0985 (Poltrack Aff. at ¶ 6) In response to that solicitation, PAC offered an "all in" contract, and ACL accepted it. Id. According to Mr. Poltrack, ACL never felt compelled to accept PAC's "all in" contract, nor did it ever feel forced to take PAC as its M&R vendor in order to be able to use PAC as its stevedore and marine terminal operator in Baltimore. RX0985 (Poltrack Aff. at ¶7). Rather, ACL liked the idea of "one stop shopping" – getting all of its port services from a single vendor under one invoice. Id. ACL is pleased with the services it has been getting from PAC, and, since entering into the contract with PAC, has seen its M&R costs in Baltimore decline by 15%. RX 0985-0986 (Poltrack Aff. at ¶ 8,10).

MRS also offered a Declaration from Dan Jackson, a maintenance and repair manager of Hanjin Shipping, in support of similar arguments in its Brief at pages 13-15, but at the request of

Hanjin Shipping's Senior Management, MRS filed a Motion to Withdraw the Jackson Declaration and it was withdrawn by Order of the Presiding Officer on August 15, 2012. As that Declaration has been withdrawn, none of the arguments made by MRS on pages 13-15 of its Brief related to Hanjin Shipping and none of MRS' Proposed Findings of Fact Nos. 86-96 should be considered by this tribunal, as they are based solely on the Jackson Declaration.

Finally, MRS offers the Declaration of Marc Campolongo, the maintenance and repair supervisor for APL, Ltd. ("APL"). However, this Declaration appears to be wholly irrelevant to any alleged tying issue in this case, because APL has never entered into any contract for M&R services with PAC. In his Declaration, Mr. Campolongo states that, after receiving an email from PAC to the effect that PAC would be doing all M&R repairs at Seagirt after June 6, 2011, he sent APL's standard maintenance and repair contract to PAC. CX 775 at ¶ 7,8. PAC refused to sign that contract, but, as a counterproposal, offered its own boilerplate Stevedoring and Marine Terminal Contract that included M&R services at a 10-12% discount off of what APL was paying to MRS. CX 775-776 at ¶8. APL rejected the PAC proposed contract and, according to Mr. Campolongo, chose to stay with MRS for its M&R work, despite the fact that it was apparently paying a premium to do so. CX 776 **at** ¶ 9-10. The remaining parts of Mr. Campolongo's Declaration, which purport to express his opinions on what APL "might" do in the future in Baltimore with regard to its M&R work, *see* CX776-777 at ¶10-12, are purely speculative and should not be given any weight.

C. MRS Has Failed to Prove the PAC Acted Unreasonably in Preferring Itself (Either Directly, or Through its Subcontractor, Multimarine) as the Exclusive Provider of Marine Terminal Services at Seagirt

MRS has failed to offer any analogous case support for its position that PAC has acted unreasonably, and in violation of the Shipping Act, by preferring itself (either directly or through its

subcontractor, Multimarine) as the exclusive provider of all marine terminal services at Seagirt, including M&R services.

1. MRS has Failed To Distinguish the Commission Cases Relied Upon by PAC to Support Its Position that PAC Has Acted Reasonably at Seagirt

In its argument at pages 26-35 of its Brief, dedicated ostensibly to showing that the Commission has invalidated exclusive arrangements, MRS relegates the Commission cases most closely on point with this one, All Marine Moorings and POMTOC, to a footnote (MRS Brief at 33 n.23), and fails to address the RIVCO case at all. Moreover, MRS' brief reference to All Marine Moorings and POMTOC in its footnote fails to address the facts and holdings of those cases, and cites them only for the proposition that exclusive contracts have to meet the reasonableness standards of the Shipping Act – a proposition with which PAC does not disagree.

2. The Cases Relied Upon by MRS As Ostensible Support for its Unreasonableness Argument Are Not Factually On Point or Are Otherwise Distinguishable

The several Commission decisions cited by MRS in which exclusive arrangements were struck down are either not factually on point or are otherwise distinguishable from the instant case.

The first "exclusive arrangement" case relied upon by MRS is Exclusive Tug Arrangements in Port Canaveral, Florida, 29 S.R.R. 1199, 2003 WL 1017732 (I.D.), *dismissed on settlement*, 29 S.R.R. 1455 (2003). However, to properly analyze this case and its application to the instant case, it is important to review the Commission's decision in an earlier case, Petchem, Inc. v. Canaveral Port Authority, 28 F.M.C. 281, 293, 1986 WL 170038 (1986), *aff'd*, 853 F.2d 958 (D.C. Cir. 1988). In Petchem, the Commission upheld the decision of the Canaveral Port Authority ("CPA") to award a tug franchise to Seabulk, to the detriment of Petchem, a rival tug company. In so ruling, the

Commission noted that: (1) there was a limited market for tug and towing services at the small port; (2) the complaining tugboat company lacked experience and equipment; and (3) the Port of Canaveral was concerned about its ability to promote reliable and continuous service. The Commission acknowledged that exclusive terminal arrangements:

> may be necessary to provide adequate and consistent service to a port's carriers or shippers, to insure attractive prices for such services and generally to advance the port's economic well-being.

Id., 1986 WL 170038 *15.

Nearly 15 years later, Petchem renewed its application to operate at Port Canaveral. After Petchem was initially denied access by the CPA, the FMC launched its own investigation, which lead to the decision in Exclusive Tug Arrangements in Port Canaveral, Florida, where the ALJ found that the factors that had supported the exclusive franchise in the 1980's no longer applied. The matter was settled prior to a final decision by the FMC.

Exclusive Tug is distinguishable from the instant case on several grounds. First, the party granting the exclusive franchise, the CPA, was "a public authority created by the State of Florida" and "an arm of the State of Florida." 2003 WL 1017732 at *2, 4. Port authorities that operate terminal facilities that are open to the general shipping public should be held to a different standard than private marine terminal operators who have paid $1.3 billion for an exclusive lease.

Second, in Exclusive Tug, several shipping lines had complained about having to use Seabulk tugs (the exclusive tug provider) for a variety of reasons, including the fact that Seabulk charged rates ranging from 17% to 67% higher than those rates charged by ITS, a smaller tug provider. In the instant case, by contrast, the record (including the Declarations of Campolongo and Cascio) overwhelmingly indicates that PAC's charges for M&R work features 10-12% cost ***savings***

over the comparable services of MRS.

MRS cites the case of Exclusive Tug Franchises-Marine Terminal Operators Serving the Lower Mississippi River, Docket No. 01-06, 2001 WL 865704 (F.M.C. June 11, 2001) as standing for the proposition that an exlusive arrangement will be struck down where it has been shown to have caused a "reduction in customer choice, complaints from shippers or carriers, and a showing of higher prices with no improvement in the level of service." MRS' Brief at page 28. However, none of those circumstances exist in the instant case.

Customers in the Port of Baltimore, if that is found to be the relevant market, have a choice between PAC, MRS, Multimarine, and Picorp for various M&R services, and steamship lines including APL, Yang Ming, CSAV, and ACL are still making recent choices to use MRS for certain work at Dundalk or off-dock, even in cases where those lines have a written contract to use PAC for M&R work at Seagirt. RPFOF §§ 134, 164. Moreover, other than the Declarations of Cascio, Muller, and McBride, which are directly contradicted by the Affidavits/Declarations of Poltrack and Gonzalez, there is no evidence in the record that any steamship line currently using PAC is unhappy with PAC's services.

MRS cites to Carolina Marine Handling, Inc. v. South Carolina State Ports Authority, et al., Docket No. 99-16, 2000 WL 722274, *41 (F.M.C. May 2, 2000) on page 29 of its Brief for the test of reasonableness to be applied to PAC's operations at Seagirt in this case. In Carolina Marine Handling, Inc., the Commission stated: "[t]he test of reasonableness as applied to terminal practices is that the practice must be otherwise lawful, not excessive, and reasonably related, fit and appropriate to the ends in view," 2000 WL 722274, at *41, *citing* West Gulf Maritime Ass'n. v. Port of Houston Authority, 18 S.R.R. 783, 790 (F.M.C. 1978), *aff'd without opinion sub nom* West Gulf

Maritime Ass'n. v. Federal Maritime Comm'n, 610 F.2d 1001 (D.C. Cir.), *cert. denied*, 449 U.S. 822 (1980). The Commission found that the respondents in that case had engaged in discriminatory practices at the Charleston Naval Complex by refusing to negotiate with and make available to Carolina Marine Handling adequate and suitable terminal and storage facilities, harming the shipping public or potential port users. The Commission went on to simply deny the respondents' various motions to dismiss finding that a conclusion could be reached on the basis of facts presented in that case that the respondents engaged in "excessive" and discriminatory terminal practices.

In this case, by contrast, MRS has not established by a preponderance of the evidence that any harm to the shipping public or potential port users has resulted from PAC's performance of all of its own M&R work at Seagirt. To the contrary, by MRS' own admission, the lines using PAC for their M&R work at Seagirt are seeing 10-12% savings in their M&R costs over what they used to pay MRS.

As was pointed out in the All Marine Moorings case, a case decided six years after the Commission established its test for reasonableness in West Gulf Maritime Ass'n, there are certain circumstances when exclusive terminal arrangements, like exclusive franchises for example,

> [M]ay be necessary to provide adequate and consistent service to a port's carriers or shippers, to ensure attractive prices for such services and generally advance the port's economic well-being. The burden of adducing evidence of such circumstances falls upon the port and the other parties to the exclusive arrangement, both because they are the arrangement's proponents and because evidence of that nature usually lies within their control. Nevertheless, the ultimate burden of proof in any Shipping Act challenge to an exclusive terminal arrangement or franchise rests with the party wishing to overturn the franchise.

All Marine Moorings, Docket No. 94-10, 1995 WL 610825 at *20 (F.M.C. Oct. 6, 1995). In this case, the Affidavits of Michael Poltrack, Guillermo Gonzalez, and Mark Montgomery explain why

ACL, CSAV, and MSC have entered into contracts with PAC rather than MRS for M&R work. RX 984-1001, 959-983, 1342-1344, respectively. These affidavits support PAC's argument that PAC's M&R services provide the "adequate and consistent service to [the] port's carriers or shippers, ensure[s] attractive prices and generally advance[s] the port's economic well-being," while passing the lower cost savings onto the shipper, as was contemplated in All Marine Moorings. Id.

MRS cites Gulf Container Line (GCL), BV v. Port of Houston Authority, Docket No. 89-18, 1990 WL 427506 (F.M.C. 1990) on page 30 of its Brief to support its argument that tying a carrier's access to a service or product is a violation of Shipping Act because it is "undue or unreasonable" within the meaning of §10 of the Shipping Act. Id. at 3. The Gulf Container Line case, decided five years before All Marine Moorings, involved a situation in which the complainant, GCL, alleged that the Port of Houston's refusal to provide access to shore power for reefers to any ocean carrier that refuses to use the Port of Houston's reefer monitoring services was a violation of the Shipping Act. In support of GCL's allegations, it offered the affidavit of Kathleen O'Leary, the General Manager of Marine Operations for ACL, which was GCL's sister company. Although the Commission decided that the Port of Houston's "tying" of shore electricity and reefer servicing violated "antitrust precepts," Gulf Container Line (GCL), BV, 1990 WL 427506 at *9, the Commission's decision was based on the fact that the Port of Houston failed to present counter-affidavits or other evidence refuting the factual contentions contained in the affidavit of Kathleen O'Leary. This fact is not present in the instant case, in which PAC has rebutted each of MRS' relevant affidavits.

Next, on page 31 of its Brief, MRS cites 50 Mile Container Rules Implementation by Ocean Common Carriers Servicing U.S. Atlantic and Gulf Coast Ports, Docket No. 81-11, 1987 WL 209053 (F.M.C. August 3, 1987). In this case, the Commission had to reconcile federal labor policy

with the requirements of the Shipping Acts, and found that ILA Rules requiring the use of ILA labor to load or unload containers within 50 miles of a port "[were] indeed unreasonable and unjustly discriminatory and therefore violated the 1916 [Shipping] Act, the 1984 [Shipping] Act and the Intercoastal Act." 50 Mile Container Rules, 1987 WL 209053, *3. In making its ruling, the FMC took exception not so much to the actual practice of shippers being required to bring their cargo to the pier for loading and off-loading by longshoreman (rather than take advantage of off-pier containerization and intermodal services), but with the fact that the 50 Mile Container Rule designated certain shippers and consignees as "qualified shippers" and "qualified consignees."[15] Id., 1987 WL 209053 (F.M.C.) at *65. The FMC found that various distinctions drawn by the 50 Mile Container Rules were not caused or justified by transportation circumstances or conditions. Id.

In the instant case, PAC's terminal rules and terminal charges are not being applied solely to MRS, but rather, are being uniformly applied to all users of Seagirt, and they are aimed at promoting a more efficiently run terminal that affords customers the ability to enjoy one-stop shopping and to lower their overall M&R costs. RPFOF §67, 117; RX 1346, 1347, (Montgomery Supp. Aff. at ¶9, 14.

With respect to MRS' reliance on the case of Greater Baton Rouge Port Commission v. United States, 287 F.2d 86 (1961), such reliance is misplaced because in later cases, including All

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[15] To be "qualified," a shipper or consignee must have a "proprietary interest" in the cargo (other than in its transportation or physical consolidation or deconsolidation), and the loading or unloading must be done only at its own facility and only by its own employees. A shipper loading cargo within the 50-mile zone who does not have a "proprietary interest" in the cargo, i.e., a non-vessel-operating common carrier ("NVO"), cannot avoid stripping and stuffing at the pier. A shipper or consignee within the zone who does have a "propriety interest" in the cargo but who nevertheless is too small to have its own cargo facility and employees is denied the option of contracting such work to off-pier warehouses or deconsolidators and must use pier facilities (consignees are permitted the option of paying for 30 days of storage in a public warehouse). Id.

Marine Moorings, the Commission found that:

> [I]n certain circumstances, such arrangements may be necessary to provide adequate and consistent service to a port's carriers or shippers, to ensure attractive prices for such services and generally to advance the port's economic well-being.
>
> ***
>
> However, if there is no showing in the first place of a monopoly or something akin to a monopoly or an inadequate level of competition, there is no automatic requirement of justification, and a less restrictive practice that does not constitute a monopoly but only a lesser degree of invasion of the national philosophy favoring free and open competition requires less justification.

All Marine Moorings, 1995 WL 610825 at * 20, 22 (F.M.C. Oct. 6, 1995).

In Greater Baton Rouge, an exclusive lease arrangement between Cargill, Inc. ("Cargill") and the Baton Rouge Port Commission for Cargill to control a grain elevator at the Greater Baton Rouge Port area was invalidated when Cargill attempted, by amendment to the lease, to control all stevedoring business at the elevator. The Fifth Circuit upheld that decision, finding that "there is a rational foundation in law and in fact for the Board's conclusion that [the agreement] would be unjustly discriminatory, unfair, and unreasonable, and therefore detrimental to commerce in the United States." For almost the same reason as articulated by the Commission in the All Marine Moorings case, Greater Baton Rouge is also distinguishable because in that case the record did not support Cargill's claims that the agreement to control all stevedoring was lawful.

Finally, MRS cites Puerto Rico Ports Authority v. Federal Maritime Comm'n, 642 F.2d 471 (D.C. Cir. 1980) in support of its argument that a complainant in a Shipping Act case is not always required to show a triangular relationship. However, this decision stands for the opposite proposition that "normally" such a triangular relationship is involved in a case involving a claim for

undue or unreasonable preference or disadvantage. Puerto Rico Ports Authority, 642 F.2d at 483. The language that MRS relies upon in that case actually comes from the dissent of Judge Lombard, which does not accurately represent the current law. The current law is found in the Commission's holding in All Marine Moorings, that a violation of Sections 10(b)(11) and (12) and section 10(d)(1) of the 1984 Act could not be made without proof of a triangular relationship between the parties. All Marine Moorings, 27 S.R.R. 539. As the Commission concluded: "Nothing in the Shipping Act obligates I.T.O. to allow competing marine terminal operators, or stevedores or line handlers to use its leased facilities to compete with it." Id.

As stated previously, there is no triangular relationship between PAC and MRS, and nothing in the Shipping Act obligates PAC to allow an M&R vendor to use its leased facilities to compete with it. MRS makes a strained argument in its Brief at page 35 that such a triangular relationship can be found in PAC's alleged dual role as "marine terminal operator and monopolistic stevedore (violator)". However, this alleged distinction is spurious. PAC does not have any "stevedoring only" contracts with steamship lines calling at Seagirt - it serves as both stevedore and marine terminal operator with respect to all of those lines.

Furthermore, if the provision of M&R services at off-dock locations (as soon will be the norm in the Port of Baltimore) are subject to Commission regulation under the Shipping Act, it can only be based on a finding that such services are a form of marine terminal service. In such an event, there would be no real distinction between PAC performing M&R services at Seagirt and PAC performing any other marine terminal service at Seagirt. Therefore, MRS' attempt to create a triangular relationship where none exists must be rejected.

D. Even if MRS Could Meet Its Burden, MRS is Not Entitled to Reparations

1. Mr. Deger is Not Qualified Under Daubert to Give Testimony As to MRS' Damages

MRS asserts that Mr. Deger is qualified to assess MRS's alleged damages, both realized and future, based solely on his thirty-five years of experience as an accountant. However, Mr. Deger's testimony fails to meet the requirements of FED. R. EVID. 702, and those requirements as specified by the Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Pursuant to Rule 702 and Daubert, federal tribunals have a "gatekeeping responsibility" in determining whether an expert opinion validly supports a particular cause of action. Daubert, 579 U.S. at 589. Trial judges must ensure that expert testimony is both relevant and reliable. Id. Concurrently with the filing of this brief, PAC has filed a Motion to Strike the testimony of Mr. Deger based on Daubert and its progeny, and any arguments in that Motion not repeated herein for reasons of brevity are incorporated herein by reference.

Relevant and reliable expert testimony must be based on "scientific, technical or other specialized knowledge and not on belief or speculation, and inferences must be derived using scientific or other valid methods." Oglesby v. General Motors Corp., 190 F.3d 244, 250 (4th Cir. 1999) (emphasis in original) *citing* Daubert, 509 U.S. at 592-93. Additionally, to be qualified to offer an expert opinion, a witness must have appropriate expertise tied to the nature of the issue. Adams v. NVR Homes, Inc., 141 F.Supp.2d 544, 560 (D.Md. 2001). Although it is true that a lack of specialization in the specific relevant market merely goes to weight and not admissibility, Mr. Deger is not only unfamiliar with the shipping industry, he lacks the appropriate experience and training necessary to calculate lost profit damages in this instance.

While perhaps some accountants are qualified to testify as to lost profit damages, a career in accounting alone, absent specific accreditation and training, is not necessarily sufficient to allow such expert opinion. *See* In re Med Diversified, Inc., 334 B.R. 89 (Bankr.E.D.N.Y. 2005)(holding that despite more than twenty years of experience as an accountant, witness was not qualified to provide expert opinion as to business damages due to his lack of formal education and training in specific field of business valuations); Sun Ins. Marketing Network, Inc. v. AIG Life Ins. Co., 254 F.Supp.2d 1239, 1245 (M.D.Fla. 2003)(disallowing lost profits testimony by a forensic accountant because he lacked experience as a business appraiser); *Cf.* Utility Trailer Sales of Kansas City v. MAC Trailer Mfg., 267 F.R.D. 368, 371 (D.Kan. 2010)(admitted expert testimony as to lost profit damages from an accountant who was a specialist in business valuations and had performed over 400 business valuations of closely-held companies); Physicians Dialysis Ventures, Inc. v. Griffith, 2007 WL 3125197 (D.N.J. Oct. 24, 2007)(finding CPA qualified to provide expert testimony as to business damages, because she had been involved in business valuations for seven years, and was accredited in business valuation from the American Institute of Certified Public Accountants); Industrial Hard Chrome, Ltd. v. Hetran, Inc., 92 F.Supp.2d 786, 794 (N.D.Ill. 2000)(allowing testimony by CPA on lost profits as he had been a certified public accountant for over 20 years and, more importantly, he had specialized in business valuations and damage calculations for over seven years).

MRS fails to consider Mr. Deger's lack of experience with regard to business valuations and lost profit damages calculations when asserting that he is qualified to testify in this case. Mr. Deger has not completed a single business valuation within the last ten to fifteen years, and, moreover, he has not taken any continuing legal education courses in business valuations or lost profit damages

calculations. RX 0478 (Deger Deposition at p. 37). Throughout his entire thirty-five-year career, Mr. Deger has performed only two or three business valuations (more than ten years ago) and it does not appear from his credentials or deposition testimony that any of these were for businesses in the shipping industry. RX 0478-0479 (Deger Deposition at p. 36-39).

This lack of experience particularly impacts Deger's ability to render an opinion as to the alleged loss of future business for MRS based on his unsupported determination that using a multiplier of 10 would be reasonable in calculating MRS' lost future earnings, without ever having performed a business valuation of a private shipping industry company like MRS. RX 0476,0478-0479 (Deger Deposition at 29, 37-38.) Mr. Deger's sweeping conclusion that a multiplier of 10 is appropriate due to the long-term success of MRS was made in the absence of performing any business valuation for MRS, and without having any significant experience in performing business valuations in general.

Moreover, even if Deger is purporting to calculate a complete loss in value using this"multiplier of 10" method, he has double counted the financial damages resulting from loss of business for the fiscal years of 2010 through 2012. To reach to an accurate conclusion, Deger should have calculated the loss in business value as of the date of the alleged action and then subtracted the actual profits or added the actual losses if they exist. RX 0575 (Estabrook's Report at 10).

In short, it is evident that Mr. Deger lacks the accreditation and training appropriate in this instance to provide an accurate assessment as to MRS' alleged damages, and therefore his testimony is unreliable under Daubert and should not be considered by this tribunal.

2. In Any Event, MRS Has Failed to Prove Its Entitlement to Reparations With a Reasonable Degree of Certainty

Even if MRS could meet its burden of proving that PAC's conduct violated the Shipping Act, MRS has failed to prove its alleged damages to a reasonable degree of certainty. Therefore, MRS is not entitled to recover any reparation damages. The only evidence MRS provides to support its claim for reparations is the report and opinion of its lone expert witness, David Deger. However, Mr. Deger's report is replete with broad, unsupported assertions, and his conclusions are based on flawed and incorrectly-applied methodologies. Moreover, Mr. Deger's testimony and calculations are premised on the misguided and unsupported assumption that all of the losses of revenue experienced by MRS were caused entirely by the alleged improper acts of PAC. Not only is this assumption lacking in evidentiary support, due in part to Mr. Deger's lack of due diligence, but it is also directly contradicted by the evidence in the record.

The Commission has held that an award of damages under the Shipping Act must "rest on reliable evidence that shows that the violation of law was the proximate cause of the damages." William R. Adair v. Penn-Nordic Lines, Inc., 26 S.R.R. 11 (1991); 1991 WL 383091 (F.M.C.). MRS fails to provide any reliable evidence that PAC's conduct was the proximate cause of the entire decline in MRS' revenue after 2008, at a time when the U.S. economy was in a free fall and when, by MRS' own admission, the steamship industry in general was experiencing "a stormy time" during which "volumes were down, prices were down, and costs were up." RPFOF § 109. During that same time period, MRS admittedly experienced a decreased work volume "due to the normal slowdown in business" , resulting in a lay off of workers, RPFOF § 110, and MRS even had to cancel a lease with the MPA for shed space in late January, 2009 due to a decrease in its work volume. RPFOF § 111. None of these economic factors were taken into account by Mr. Deger in

calculating the cause and amount of MRS' alleged losses. Rather, in his report and testimony, Mr. Deger claims that MRS' decline in revenues after 2008 was caused solely by PAC's bundled pricing packages, exclusive control, and other alleged unreasonable restrictions on MRS, and that he could find no other outside factors having a substantive impact on MRS' revenue. Such an opinion also ignores this Commission's Order of Investigation in Vessel Capacity and Equipment Availability in the United States Export and Import Liner Trades, FF No. 26 (March 17, 2010), in which the Commission stated:

> Like many sectors of the global economy, in 2009 shippers and ocean carriers experienced one of the worst years in the more than fifty-year history of international containerized shipping. During this economic downturn, U.S. liner exports fell by 14 percent and imports fell by 16 percent. Freight rates dropped precipitously, and carriers laid up more than 500 vessels worldwide, or roughly 10 percent of the global fleet capacity.

MRS, through Mr. Deger, also contends that PAC wrongfully took ACL, CSAV, and Hanjin away from MRS as customers. The loss of these customers is included in Mr. Deger's calculated damages. However, these customers actually left MRS because they wanted to take advantage of PAC's "one stop shopping" for marine terminal and related services, as well as the resultant lower prices for M&R work. RPFOF §§ 126-128, 137, 140, 145. These customers were not stolen away as Mr. Deger and MRS allege. They chose to work with PAC because they wanted a savings on the cost of services and because they were dissatisfied with MRS' overall costs and/or quality of work. Therefore, it is improper to attribute the loss of revenues from these customers to PAC's conduct.

Mr. Deger also continues to include in his calculations certain alleged "lost customers" who either went out of business or left the Port of Baltimore for reasons wholly unrelated to PAC, such as CMA. RX 0256-0257, 0258 (A. Marino Dep. at. 177-178, 182); RX 0439 (Olshefski Dep. (Vol. II) at 292; and RX 0571 (Estabrook Report at 6). Other customers that, according to Mr. Deger,

MRS allegedly lost to PAC, such as CP Ships, Emirate, Lyke Lines, Wallenius Wilhemsen and P&O Nedlloyd, are no longer even in the container and chassis business anymore, through no fault of PAC. RX 0439 (Olshefski Dep. at 292) ; RX 0256-0257, 0258 (A. Marino Deposition at 177-178, 182).

In short, Mr. Deger incorrectly assumes that every customer MRS has lost is a direct result of PAC's conduct. These assumptions are based almost solely on the Complaint filed by MRS before the Federal Maritime Commission. RX 0494, 0501, 0505 (Deger Dep. at 99, 126, 143-144). MRS has failed to provide any support for its assertion of damages other than Mr. Deger's unfounded and unsupported opinions. Furthermore, Mr. Deger's assumptions are directly refuted by the customers themselves. Thus, the damages calculated by Mr. Deger are based on incorrect factual information and do not portray an accurate representation of why MRS' business has declined since 2009.

MRS also unsuccessfully attempts to argue that Mr. Deger's selection and subsequent application of the "before and after" method are appropriate in this case. MRS cites to two cases, Elyria-Lorain Broadcasting Co. v. Lorain Journal Co., 358, F.2d. 790 (6th Cir. 1966), and White & White, Inc. v. Am. Hosp. Supply Corp., 540 F.Supp. 951 (W.D.Mich. 1982), to support this assertion. MRS' reliance on these cases, however, is severely misguided. In Elyria-Lorain, the court held that the outside factors the defendants alleged caused the damages were actually, themselves, results of the anti-competitive conduct, which was an illegal boycott. 358 F.2d at 793. In White & White, the court noted that the consideration of outside factors would be speculative where, according to the record in that case, "prior to the contract, all of the Plaintiffs were growing, viable concerns in a highly competitive market." 540 F.Supp. at 1042. In this case, by contrast, MRS itself has admitted that outside economic factors contributed to its economic decline and, therefore,

consideration of such outside factors is not speculative. In the case of In re Aluminum Phosphide Antitrust Litigation, 893 F.Supp. 1497 (D.Kan. 1995) , the Court found Dr. Hoyt's analysis flawed because he ignored evidence of a general decrease in demand for aluminum phosphide and an increase in competition within the relevant market when calculating damages. Id. at 1504. "Because Dr. Hoyt's opinion [was] based on unjustified assumptions and [did] not account for changes in other relevant market conditions, it would not assist a trier of fact to determine the fact or amount of plaintiff's damages. Id. at 1507.

Ignoring clear, and not merely speculative, evidence of outside economic factors affecting damages, as Mr. Deger did, renders his testimony irrelevant and inadmissible. Hence, because MRS has failed to prove its entitlement to reparations with a reasonable degree of certainty, any such award of reparations as damages would not be appropriate in this case.

IV. CONCLUSION

For of all of the foregoing reasons, PAC respectfully requests that the Presiding Officer find that the Complaint of MRS in this matter has not been proven and that PAC is entitled to judgment in its favor on the Complaint.

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CERTIFICATE OF SERVICE

I hereby certify that on this *21th* day of *August*, 2012, I served a copy of the foregoing Brief of Ports America Chesapeake, Inc. by electronic delivery and by first class mail to Dale. A. Cooter, Esq., and Fernando Amarillas, Esq., Cooter, Mangold, Deckelbaum & Karas, LLP, 5301 Wisconsin Avenue, NW, Suite 500, Washington, D.C. 20015.

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