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July 23, 2012

Via Hand Delivery

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

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

Dear Office of the Secretary:

I have enclosed the original, and five additional copies, of the following documents which were electronically filed on July 20, 2012 in the above-referenced matter:

(1) Complainant Marine Repair Services of Maryland, Inc.'s Brief;

(2) Complainant Marine Repair Services of Maryland, Inc.'s Proposed Findings of Fact; and

(3) Complainant Marine Repair Services of Maryland, Inc.'s Appendix.

In accordance with 46 CFR §502.119, certain documents contained in the Appendix are marked "Confidential-Restricted" pursuant to the Confidentiality Agreement entered into by the Parties on or about October 6, 2011. The Confidentiality Agreement was submitted to the Commission on October 7, 2011. A separate Appendix with the confidential materials excluded is also enclosed, along with one additional copy. Thank you for your assistance.

Sincerely,

Fernando Amarillas

Encl.

ORIGINAL

BEFORE THE FEDERAL MARITIME COMMISSION
WASHINGTON, D.C.

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

BRIEF OF COMPLAINANT MARINE REPAIR SERVICES OF MARYLAND, INC.

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Complainant Marine Repair Services, Inc. ("Marine Repair"), by and through its undersigned counsel respectfully submits this Brief on the merits and states as follows:

INTRODUCTION

Marine Repair, a corporation solely owned by the Vincent and Elaine Marino Family Limited Partnership, operates at the Port of Baltimore and is in the business of maintaining and repairing chassis and containers for various steamship lines, and inspecting and maintaining temperatures of refrigerated containers. Complainant's Proposed Findings of Fact ("PFOF") ¶1,3 (citing Joint Stipulation of Facts ("JSF") 1). The Marino family has been in the marine repair services for forty years and has served the Port of Baltimore since 1974. PFOF ¶3 (citing JSF1). Seagirt Marine Terminal ("Seagirt") and Dundalk Marine Terminal ("Dundalk") are two of five public terminals at the Port of Baltimore. PFOF ¶5 (CX835-36 (Declaration of Shawn Olshefski ("Olshefski Decl.") at ¶5).[1] Dundalk, which opened in 1961, and Seagirt, which opened in 1990, are connected by an inner connector bridge, the Colgate Creek Bridge. PFOF ¶5 (CX836 (Olshefski Decl. ¶¶5, 6)); PFOF ¶7 (CX757-58 (maps)). Marine Repair has conducted operations at Dundalk and Seagirt since 1974 and 1990, respectively. PFOF ¶13 (CX821 (Declaration of Vincent Marino ("Marino Decl.") at *¶5).[2] Marine Repair's main repair facility is located on property at the far east side of Dundalk leased from the Maryland Ports Administration ("MPA"). PFOF ¶¶14, 15 (CX821 (Marino Decl. ¶25); JSF 4). Marine Repair's MPA lease allows it to perform chassis and container work at its on-dock facility at Dundalk on a month to month basis. PFOF ¶15 (citing JSF 4).

Until the events complained of in this action, a customer base numbering around sixty would

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[1] Shawn Olshefski is Marine Repair's General Manager. PFOF ¶5 n.2 (CX835 (Olshefski Decl. ¶2)).

[2] Vincent Marino is Marine Repair's President. PFOF ¶13 n.4 (CX820 (Marino Decl. ¶2)).

hire Marine Repair to inspect, repair and/or maintain the containers and reefers being off-loaded from ships at Seagirt and Dundalk. PFOF ¶16 (CX837 (Olshefski Decl. ¶11)). If the containers or reefers needed repairs, Marine Repair either repaired the containers and reefers on-site at Seagirt or transported the containers and reefers by chassis to Dundalk via the Colgate Creek Bridge and performed the repairs at its Dundalk repair facility. PFOF ¶17 (CX838 (Olshefski Decl. ¶14)). If the chassis itself was not in proper working condition, Marine Repair would either fix the chassis on-site at Seagirt or would arrange for a yard hustler to dray the chassis over the Colgate Creek Bridge to Marine Repair's Dundalk repair facility. PFOF ¶17 (CX838 (Olshefski Decl. ¶14)). Marine Repair would then repair the chassis for the chassis pool and/or its steamship line customers. PFOF ¶17 (CX838 (Olshefski Decl. ¶14)).

Respondent, Ports America Chesapeake, LLC ("PAC") is a marine terminal operator and stevedore. PFOF ¶4 (citing JSF 2). PAC is the sole stevedore serving Seagirt. PFOF ¶29 (CX004, CX020 (Transcript of 11/17/11 Deposition of Mark Montgomery ("Montgomery Tr.")[3] at 11:10-16;77:13-17). Marine Repair and PAC have coexisted at Seagirt for many years competing with each other for the dry container M & R work. PFOF ¶28 (CX6 (Montgomery Tr.) at 18:8-14).[4] Montgomery testified that by 2009, PAC and Marine Services each had approximately 50% of the marine repair market. PFOF ¶28 (CX7 (Montgomery Tr.) at 23:11-14). PAC does not inspect or

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[3] Mark Montgomery is PAC's President and CEO. PFOF ¶1n.1 (CX3 (Montgomery Tr. at 8:18-21)).

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

perform mechanical repairs on refrigerated units. PFOF ¶28 (CX007 (Montgomery Tr. at 22:7-8); CX837 (Olshefski Decl. ¶12)). Since at least 1996, Marine Repair and Multimarine Services Inc. ("Multimarine") have competed for the reefer work at Seagirt and Dundalk, with the two vendors splitting the amount of work fairly equally. PFOF ¶31 (CX840 (Olshefski Decl. ¶22)).

PAC entered into a fifty year Lease and Concession Agreement with the Maryland Ports Administration ("MPA") dated December 16, 2009 (CX114-202) pursuant to which PAC took over the day-to-day operations of Seagirt ("Master Lease"). PFOF ¶59 (CX123 at §1.3(a)). As will be discussed below, PAC has used the Master Lease to achieve not only a monopoly of the M & R work at Seagirt, but also as a tool to flex its competitive muscle to increase the number of customers signing contract by which PAC has tied stevedoring to M & R services, all to the financial detriment of Marine Repair. Marine Repair filed this action seeking to redress PAC's unreasonable actions which have all but destroyed Marine Repair's business. PFOF ¶¶141 (CX821, 825 (Marino Decl. ¶¶6-7, 22)). As shown below, by its conduct, PAC has violated certain provisions of the Shipping Act of 184, as amended and codified at 46 U.S.C. §§41301 *et seq.* (the "Act"). Marine Repair respectfully requests that judgment be entered in its favor on its Complaint.

ARGUMENT

I. JURISDICTION AND BURDEN OF PROOF

PAC is a marine terminal operator. PFOF ¶4 (citing JSF2). Marine Repair alleges that PAC has violated the following provisions of the Shipping Act of 1984: "A marine terminal operator may not . . . (2) give any undue or unreasonable preference or advantage or impose ay undue or unreasonable prejudice or disadvantage with respect to any person: or (3) unreasonably refuse to deal or negotiate." 46 U.S.C. §41106. The Commission has jurisdiction over this dispute. *See* 46

U.S.C. §41301(a) ("[a]ny person may file with the Federal Maritime Commission a sworn complaint alleging a violation of this part, except Section 41307(b)(1)"); *Seacon Terminals, Inc. v. Port of Seattle*, Docket No. 90-16, 1993 WL 197325 (F.M.C. 1993) ("a marine terminal operator . . .has a statutory obligation to . . . . 'refrain from undue or unreasonable preference, prejudice, or refusal to deal, under sections 10(d)(3), (b)(11), and (b)(12)'"). 1993 WL 197325, *18.

Marine Services must prove its case by a preponderance of the evidence. *See e.g., M Stallion Cargo, Inc. - Possible Violations of Sections 10(A)(1) and 10(B)(1) of the Shipping Act of 1984*, 2001 WL 379928, *15, (F.M.C. Docket No. 99-18) (Initial Decision F.M.C. 2001) ("the standard of proof in an administrative proceeding is not one of 'beyond a reasonable doubt' or even 'clear and convincing' evidence but rather a mere preponderance of the evidence"); *Universal Logistic Forwarding Co., Ltd. - Possible Violations of Sections 10(A)(1) and 10(B)(1) of the Shipping Act of 1984*, 2001 WL 503660, *7 (F.M.C. Docket No. 00-10) (Initial Decision 2001) ("BOE argues and I find that the evidence showing Universal's violations easily meets the standard of proof required in administrative proceedings, namely, a preponderance of the evidence").

II. PAC'S UNREASONABLE PRACTICES

A. Monopoly over Chassis and Container Repairs

Prior to the summer of 2011, Marine Repair had access to the Colgate Creek Bridge to dray containers and chassis from Seagirt to its repair facility at Dundalk.[5] PFOF ¶18 (CX838 (Olshefski Decl. ¶14)). Historically, the MPA monitored movement of chassis over the bridge and there was no charge to anyone for use of the bridge. PFOF ¶18 (CX009 (Montgomery Tr. at 30:1-17). Marine

[5] Although for years Marine Repair had conducted incoming and outgoing inspections of chassis, dry containers and reefers at Dundalk, and did repairs at the terminal itself, once PAC took control of Dundalk in 2007, all of that came to an end. *See* PFOF at Section II.A. (¶19-27).

Repair would send PAC an email notification for containers and chassis it intended to dray across the bridge and PAC in turn would generate a paper Trailer Interchange Receipt ("TIR") for its records. PFOF ¶18 (CX028-29 (Montgomery Tr. at 109:18-110:20).[6] Marine Repair was not required to exit through Seagirt's main gate and transport containers and chassis over the highway. PFOF ¶18 (CX029 (Montgomery Tr. at 110:21-111:3). This process, to which PAC agreed, went on for years. PFOF ¶18 (CX029 (Montgomery Tr. at 111:4-10). In addition, Marine Repair always had available to it a small area of the roadability lanes on Seagirt where it could perform minor roadability repairs for its customers. PFOF ¶114 (CX849 (Olshefski Decl. ¶56)). Finally, Marine Repair was also permitted to offer reefer maintenance and repair services to its customers calling at Seagirt. PFOF ¶31 (CX019 (Montgomery Tr. at 72:5-9). All of the foregoing practices contributed toward a competitive environment on Seagirt for the provision of maintenance and repair services (for both dry box and reefers), as well as chassis repair ("M & R"). All of these practices - and the competitive environment - came to an end, however, once PAC entered into the Master Lease with MPA.[7]

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[6] Montgomery described the TIR process as a "clerical function of denoting the container number and size and type of the container." PFOF ¶23 n.5 (CX007 (Montgomery Tr. at 25:18-21)). *See also* PFOF ¶23 n.5 (CX008 (Montgomery Tr. at 26:3-7 (the TIR process generates a document noting the "clerical activities"); CX028 (Montgomery Tr. at 109:15-17 (TIR is a clerking function)).

[7] Although during the pendency of this litigation the parties entered into a temporary Standstill Agreement (PFOF ¶125 (CX234-38), that Agreement will no longer be in effect once the Commission renders its final decision. "This Agreement shall be effective until the entry of a final decision by the Federal Maritime Commission in the FMC suit, unless terminated earlier by mutual agreement of the parties." (PFOF ¶127 (CX234 (Standstill Agr. at ¶1.1). Montgomery testified in U.S. District Court for the District of Maryland that absent the Standstill Agreement, he had dictated that no equipment (including chassis, containers and reefers) could be drayed across Colgate Creek Bridge. (PFOF ¶126 (CX050 (Transcript of 1/20/12 HearingTestimony, at 145:12-17 (CX 50)).

Although PAC does not lease and does not have control over Colgate Creek Bridge (PFOF ¶74 (CX008 (Montgomery Tr. at 29:9-17; 101:11-12), and although there is no provision in PAC's Master Lease which gives it control over the bridge, in the summer of 2011, emboldened by the terms of its Master Lease, PAC put into place a directive that Marine Repair would no longer have access to the bridge and imposed a new TIR process on Marine Repair that would require it to take all containers and chassis out through the main Seagirt gate, at additional costs to Marine Repair and its customers. PFOF ¶74 (CX868 (at Transcript of Deposition of Joseph Michel ("Michel Tr.") at 54:6 - 55:10; 88:18 - 89:9; CX845 (Olshefski Decl at ¶41)). PAC imposed a practice by which Marine Repair was required to obtain a TIR, and, if the chassis was damaged, to flatbed each chassis off of Seagirt by exiting the main terminal entrance and going onto a public road (Broening Highway), while being subject to a TIR charge upon exiting the terminal and again upon re-entry. PFOF ¶74 (CX845 (Olshefski Decl at ¶41); CX012 (Montgomery Tr. at 44:21- 45:22); CX017 (Montgomery Tr. at 63:9-14; 63:16-17)).

PAC also decided that it would no longer permit Marine Repair to perform container repairs on Seagirt. PFOF ¶88 (CX012 (Montgomery Tr. at 43:5-19).[8] PAC confirmed its intentions in a series of emails:

> "[PAC] will be moving all chassis to the Canton Warehouse Property ***and will assume all [maintenance and repair] for chassis activity on Seagirt proper as well as [Canton].***" 5/27/11 email from PAC's president Mark Montgomery to Shawn

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[8] For 9 years Marine Repair leased space on Seagirt from the MPA but on January 8, 2010 the MPA notified that because of the Master Lease, Marine Repair's lease was being assigned to PAC. PFOF ¶62 (citing JSF 7).

Olshefski of Marine Repair (PFOF ¶71 (CX335)) (emphasis added).[9]

> "As per our conversation ***starting June 6, 2011 chassis cannot be drayed out of Seagirt Marine Terminal to Dundalk Marine Terminal via the inner connector bridge***. Please return all units to Seagirt that are currently at Dundalk after repairs have been completed." 6/6/11 email from Bayard Hogans (PAC Assistant Terminal Manager) to Shawn Olshefski and Steve Rhone of Marine Repair (PFOF ¶80 (CX340, 341)) (emphasis added).
>
> PAC "handling all drayage to and from Seagirt from this point forward." 6/8/11 email from Bayard Hogans of PAC to several recipients including Shawn Olshefski of Marine Repair (PFOF ¶82 (CX343)).
>
> "This is to straight[en] out any confusion related to the bridge between Seagirt and Dundalk. ***No chassis are to be drayed by [Marine Repair] or any other vendor*** across the bridge. If Ports America is informed that chassis are being moved across the bridge avoiding the TIR lane, all privileges to enter Seagirt will be terminated. Effective October 1st [2011] ***all container repair inside Seagirt will be performed by Ports America.*** Effective October 1st [2011] Ports America ***will no longer allow vendors in its terminal.*** If chassis are to be drayed to off dock repair facilities, they must exit the main entrance of Seagirt. *See* 6/28/11 email from Mark Montgomery (PAC's President and CEO) to various recipients including Vincent Marino, Shawn Olshefski and Steve Rhone (of Marine Repair) (PFOF ¶101 (CX351)).

The import of the foregoing emails was clear. As one of Marine Repair's customers has confirmed, it was told by PAC that Marine Repair had been "kicked off" Seagirt, and that PAC would be the sole vendor for on-terminal M & R services. PFOF ¶88 (CX817 (Declaration of Dan Jackson at ¶7)). *See also* PFOF ¶88 (CX032 (Montgomery Tr. at 124:15- 125:14)(testifying about memo sent on or about May 27, 2011 by PAC's M & R manager, Shawn Vencill, to Mark Montgomery referencing the fact that Marine Repair was "going to be kicked out of Seagirt 6/3/11")). Once PAC announced its intentions in June 2011 regarding the changes at Seagirt, PAC solicited Marine Repair's

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[9] PAC initially told Marine Repair and its customers that Marine Repair would have access to the Canton Warehouse Property but later stated it would assume all M & R for chassis activity for both Seagirt property *and* Canton. PFOF ¶¶71-72. TRAC Intermodal uses Marine Repair for chassis M & R work but now its chassis must be drayed over to Dundalk for repairs. PFOF ¶72 (CX867 (Michel Tr. At 53:18-54:15); CX845 (Olshefski Decl. ¶39)).

customers to do their repair work. PFOF ¶19 (CX017 (Montgomery Tr.) at 65:6-12).

In addition to announcing to Marine Repair and its customers that Marine Repair would no longer be permitted to dray chassis or containers across the Colgate Creek Bridge to its repair facility on Dundalk (CX351), PAC eliminated Marine Repair's roadability lanes and PAC also instituted a new mandatory TIR process which eliminated the prior email notification process that had been in place for inventory control. Marine Repair provided minor roadability repairs until June 2011 when PAC took over the roadability work. PFOF ¶¶113, 115 (CX013 (Montgomery Tr.) at 47:8-48:5; (CX014 (Montgomery Tr.) at 50:8-22 (PAC is performing chassis repairs on-site at Seagirt)). Under the new procedures announced by PAC in June 2011, Marine Repair is prohibited from making any minor chassis repairs in the roadibility lanes (PFOF ¶114 (CX849-50 (Olshefski Decl. ¶¶56-58)), and thus PAC has taken 100% percent of the minor chassis repair business for itself. The TIR process imposed by PAC requires Marine Repair to go through Seagirt's main gate onto a public road (Broening Highway) and then back in on another public road to Dundalk. PFOF ¶74 (CX012 (Montgomery Tr. at 44:21- 45:11). In the case of a damaged chassis, the chassis has to be put on a flatbed truck and moved from Seagirt to Dundalk. PFOF ¶74 (CX012 (Montgomery Tr. at 45:12-22; (CX845, 847 (Olshefski Decl. ¶¶41, 47)). Even Mr. Montgomery, PAC's CEO and President, testified that this process increases costs. a cost to be borne not by PAC but by Marine Repair or its customers. PFOF ¶77 (CX013 (Montgomery Tr. at 46:9-19)). Mr. Montgomery acknowledged that once PAC imposed its restrictions on Marine Repair's use of the Colgate Creek bridge, those restrictions increased Marine Repair's costs of doing business. PFOF ¶77 (CX013 (Montgomery Tr. at 46:20-47:1)). Thus, PAC has also ensured that it will receive most, if not all, of the major chassis repair work. In fact, while prior to June 2011 Marine Repair and PAC performed 80% and

20% of TRAC Intermodal's chassis M & R work, respectively, after June 2011, because of all of the restrictions PAC imposed on Marine Repair to perform that work and the requisite cost increases for TRAC, PAC has now secured most of TRAC's chassis repairs. PFOF ¶78 (CX869 (Michel Tr. at 59:4-15)); PFOF ¶79 (CX869 (Michel Tr. at 59:16-60:7).

Mr. Montgomery acknowledged that as a result of all the decisions PAC was making in 2011, Marine Repair had no ability to conduct any activity at Seagirt and that was PAC's intention. PFOF ¶139 (CX016-17 (Montgomery Tr. at 61:10-62:3)). PAC was left as the only company that could perform marine repair services on-dock at Seagirt. PFOF ¶139 (CX017 (Montgomery Tr. at 62:4-8)). Once a container arrives at Seagirt, what had previously been easy access to Marine Repair's Dundalk repair facility via the bridge, has become more difficult access, especially if damage equipment is involved. PFOF ¶74 (CX017 (Montgomery Tr. at 63:9-14). It is PAC's intention that no cargo will go over the bridge. PFOF ¶74 (CX017 (Montgomery Tr. at 63:16-17)).

B. PAC's Tying Arrangements

In addition to its monopolization practices, PAC has engaged in tying. Except for a two year period, PAC has been the sole stevedore at Seagirt since 1990. PFOF ¶31 n.7 (CX005, CX020 (Montgomery Tr.) at 15:7-16; 77:13-17).[10] Stevedoring services are completely separate from marine repair services and reefer M & R services. PFOF ¶31 (CX840-41 (Olshefski Decl. ¶23)). PAC first bundled its stevedoring services with reefer services provided by Multi-Marine in 2006 when it offered the bundled services to Atlantic Container Lines. PFOF ¶35-36 (CX830-31

[10] PAC's revenue from its M & R services is insignificant (approximately 2% of total revenues) compared to revenue from stevedoring. PFOF ¶31 n.2 (CX020-021 (Montgomery Tr. at 77:18-78:6; 79:8-13)). PAC's income breaks down approximately as follows: 58% is derived from terminal operations; 40% is derived from stevedoring; and 2% is derived from M & R services. PFOF ¶31 n.2 (CX021 (Montgomery Tr. at 80:15-81:1)).

(Declaration of Brian McBride ("McBride Decl.") at ¶¶11-13));[11] CX841 (Olshefski Decl. ¶24)). Because stevedoring services are physically different from M & R services (whether dry box or reefer), no efficiencies are achieved when they are bundled. PFOF ¶33 (CX23-24 (Olshefski Decl. ¶23)). In 2009 CCAV also accepted a package deal offered by PAC that included M&R and reefer repair work. PFOF ¶44 (CX023 (Montgomery Tr. at 89:3-17)); PFOF ¶¶39-41, 44, 46 (CX833, 834 (Declaration of Allen T. Muller ("Muller Decl.") at ¶¶7-10, 12).[12] That reefer work was tied to a pricing package that included M & R services by PAC on CSAV's dry containers. PFOF ¶40 (CX833 (Muller Decl. ¶8). PAC has entered into similar agreements with other former Marine Repair customers, including CCNI, Hapag Lloyd and Hamburg Sud which appointed PAC as the carriers' exclusive service provider and bundle stevedoring with M & R. PFOF ¶54 (CX279, CX301), ¶57 (CX823 (Marino Decl. ¶11). Prior to PAC's tying reefer services with stevedoring, Multimarine and Marine Repair had shared the reefer market at Seagirt fairly equally. PFOF ¶31. Now, however, Marine Repair has only one main reefer customer remaining (APL), having learned just recently that it is losing its only other remaining major reefer customer (Maersk) to PAC within the next thirty to sixty days. PFOF ¶112 (CX823 (Marino Decl. ¶12).[13] Marine Repair's sales to the customers who have entered into the Terminal Services Contracts have steeply declined. *See* PFOF ¶¶37, 48, 49, 56, 57.

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[11] Brian McBride is ACL's Vice President of Corporate Logistics. PFOF ¶34 n.8 (CX829 (McBride Decl. ¶2)).

[12] Muller, a fomer Vice President of Operations at CSAV, was employed with CSAV from 2005 to 2010. PFOF ¶109 n.17 (CX832 (Muller Decl. ¶¶3, 4)).

[13] PAC plans to take *all* reefer work away from Marine Repair. PFOF ¶123 (CX349; CX850 (Olshefski Decl. ¶61)).

Prior to PAC's June 2011 decisions, there were two competitors for reefer work at Seagirt: Marine Repair and Multimarine. PFOF ¶31 (CX019 (Montgomery Tr. at 72:5-9)). PAC has admitted that when it made its decisions in June 2011, its intention was to restrict Marine Repair's ability to do reefer work at Seagirt[14] and to have only one vendor (Multimarine) providing reefer work at Seagirt. PFOF ¶118 (CX019 (Montgomery Tr. at 72:15-21; 73:1-5)). Also prior to PAC's June 2011 decisions, there were two competitors for M & R services at Seagirt - both PAC and Marine Repair. Just as PAC has tied its stevedoring services to reefer services performed by Multimarine, so to has it tied its stevedoring services to M & R services.

C. Customer Dissatisfaction With PAC's New Policies

As discussed in Section V below, PAC's unreasonable practices have significantly damaged Marine Repair. In addition, however, the practices have been met with customer dissatisfaction. Although CSAV, which signed a bundled package agreement with PAC in September 2009, had used PAC for stevedoring services for many years, CSAV had contracted with Marine Repair for M & R services. PFOF ¶38 (CX833 (Muller Decl. ¶5)). Allen T. Muller (at the time CSAV's Vice President of Operations) was told by Mr. Montgomery that the only way PAC would give CSAV a stevedoring discount would be if CSAV also gave PAC the contracts for M & R of both dry containers and reefers. PFOF ¶40 (CX833 (Muller Decl.) at ¶8). Eugene Cascio, CSAV North America's Maintenance and Repair Manager fought this change, because, unlike Marine Repair, PAC was not set up to perform M & R work, and he was not comfortable with PAC's subcontractor (Multimarine) doing the reefer work. PFOF ¶42 (CX779 ((Declaration of Eugene Cascio, Jr.

[14] Reefer repairs and monitoring cannot be performed off-dock; such services must be performed on-dock. PFOF ¶93 (CX020 (Montgomery Tr. at 75:12-13; 76:16-21; 77:2-4)).

("Cascio Decl.") at ¶7).[15] Ultimately, CSAV had no choice but to agree to the bundled package, because giving PAC the M & R work was the price of getting PAC to agree to reduce its stevedoring rates. PFOF ¶43 (CX779 (Cascio Decl. ¶7)). In their discussions about M & R services, Montgomery told Cascio that CSAV would receive a 12% discount reduction on the total M & R costs yearly in Baltimore. PFOF ¶42 (CX779-80 (Cascio Decl. ¶8)). This was also based on PAC accepting liability to empty repoed damaged containers by vessel coded (V) during inbound gate inspection, and repaired elsewhere. PFOF ¶42 (CX779-80 (Cascio Decl. ¶8)). Although CSAV would like to continue to give Marine Repair work because of its expertise, the quality of its work, and its good customer service, the logistical restrictions and charges imposed by PAC (*e.g.*, additional T.I.R. charges, and all work off dock) make it too expensive and inefficient for Marine Repair do the work. PFOF ¶50 (CX780 (Cascio Decl. at 10)). If CSAV were no longer bound by the bundled contract with PAC, CSAV would request an open bid to all vendors, including Marine Repair, to perform CSAV's dry container and reefer M & R work. PFOF ¶51 (CX780 (Cascio Decl. ¶11)). However, CSAV will be bound, and Marine Repair excluded, in perpetuity. Under PAC's "Terminal Services Agreement" with CSAV (signed by PAC's parent Ports America Baltimore) PAC is CSAV's "exclusive provider of marine terminal services in the Port [of Baltimore] throughout the Term." PFOF ¶47 (CX260 at §2). Under the agreement, the "Initial Term" began on January 1, 2009 and expires on December 31, 2012. PFOF ¶47 (CX271). The agreement automatically renews in one-year increments. PFOF ¶47 (CX262 at §7.1). Pursuant to the "Term" provisions of the agreement (contained in Section 7), and the yearly automatic renewals, the

[15] Mr. Cascio is the Maintenance and Repair Manager for the CSAV Group, North America, at its United States headquarters in Iselin, New Jersey. PFOF ¶39 n.10 (CX778-79 (Cascio Decl. ¶¶4, 6)).

agreement renews in perpetuity. PFOF ¶47 (CX262 at §7.1). CSAV can only terminate the agreement for material breach by PAB, but that right is subject to notice and cure. PFOF ¶47 (CX263 at §7.3).

Another former M & R customer of Marine Repairs is Hanjin Shipping ("Hanjin"). PFOF ¶87 (CX817 (Declaration of Dan Jackson ("Jackson Decl.") at ¶6)).[16] In the 1990s when Seagirt first opened, Hanjin began using Marine Repair for its container and chassis M & R. *Id.* In June 2011, Pat Collins, a supervisor in Atlanta, advised Jackson that he had been told by a PAC employee that Marine Repair had been "kicked off" Seagirt, and that PAC would be the sole vendor for on-terminal M & R services. PFOF ¶88 (CX817 (Jackson Decl. ¶7)).

As a result of PAC's decision to "kick Marine Repair" off Seagirt, Marine Repair must transport any equipment being repaired to Dundalk or to an off-terminal location. PFOF ¶89 (CX817 (Jackson Decl. ¶8)). Once it became terminal operator in 2010, PAC started charging a lift (or handling) fee to move damaged containers for repair, if they were being repaired by Marine Repair. PFOF ¶89 (CX817 (Jackson Decl. ¶8)). In addition, PAC also began charging a modified TIR charge (a toll) when Marine Repair transported the equipment over the Colgate Creek Bridge to Dundalk for repairs. PFOF ¶89 (CX817 (Jackson Decl. ¶8)). The new charges imposed by PAC make it more expensive for Hanjin to use Marine Repair for M & R services. PFOF ¶90 (CX818 (Jackson Decl. ¶9)). If PAC performs the repairs, these costs are not added. PFOF ¶90 (CX818 (Jackson Decl. ¶9)). Thus, nearly all of Hanjin's container M & R work in the Port of Baltimore is now performed by PAC, and has been since PAC began imposing the additional charges on Marine

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[16] Dan Jackson is Hanjin's Corporate Maintenance/Repair Manager - Logistics Team. PFOF ¶86 (CX816 (Jackson Decl. ¶4)).

Repair. PFOF ¶90 (CX818 (Jackson Decl. ¶9)).

PAC has made no secret of its intent to eliminate the area at Seagirt where Marine Repair is currently performing reefer work, and to forbid any on-terminal reefer work by Marine Repair. PFOF ¶93 (CX818 (Jackson Decl. ¶12)). Despite Hanjin's long relationship with Marine Repair, and its confidence in the quality of Marine Repair's work, if Marine Repair is no longer able to perform reefer work at Seagirt, and instead begins to offer that service at an off-terminal location, Hanjin will likely be forced to use PAC's on-terminal subcontractor, Multimarine. PFOF ¶93 (CX818 (Jackson Decl. ¶12)). This is because of the logistical complications (and increased costs) in having any kind of reefer repairs performed off the terminal. PFOF ¶93 (CX818 (Jackson Decl. ¶12)). In addition, because of the nature of reefer repairs, they typically must be done quickly, which is why they should be performed at the terminal. PFOF ¶93 (CX818 (Jackson Decl. ¶12)); PFOF ¶93 (CX020 (Montgomery Tr. at 75:12-13; 76:16-21; 77:2-4) (reefer repairs and monitoring cannot be performed off-dock; such services must be performed on-dock)).

As a shipper, Hanjin is concerned about what will happen if PAC is allowed to solidify its monopoly on all phases of the operation at Seagirt, including stevedoring, maintenance, and repair. PFOF ¶94 (CX818 (Jackson Decl. ¶13)). In Jackson's experience in another port, where there was only one reefer vendor, there was a down grade in service, and without price competition, the prices were on a take it or leave it basis. PFOF ¶94 (CX818 (Jackson Decl. ¶13)). When repairs have to be done for the load to leave the terminal, there is no option but to take the price. PFOF ¶94 (CX818-19 (Jackson Decl. ¶13)). Particularly for a shipping line which is not major shipper into Baltimore (as Hanjin is), a lack of vendor competition gives the shipper absolutely no leverage in contracting for maintenance or repair services, or to ensure that the services are of good quality.

PFOF ¶94 (CX819 (Jackson Decl. ¶13)). When there are no vendor options, if a shipper is dissatisfied with a repair or a cost, the shipper is limited in how far it can go in pressing for better prices or service out of fear of jeopardizing future services from that vendor, or risk being put "at the back of the line" for needed repairs. PFOF ¶94 (CX819 (Jackson Decl. ¶13)).

Although Hanjin has not entered into a bundled pricing package with PAC, it is concerned that because other shippers have, these bundled pricing packages (and other actions by PAC) will put Marine Repair out of the M & R business at the Port of Baltimore and then customers like Hanjin and the other shipping lines will suffer, because they will have no real ability to negotiate prices or to insist on quality M & R in a one vendor terminal. PFOF ¶¶95-96 (CX819 (Jackson Decl. ¶14)).

APL Limited ("APL") is a global transportation and logistics company which is primarily engaged in the container shipping business. PFOF ¶97 (CX774 (Declaration of Marc A. Campolongo ("Campolongo Decl.") at ¶3).[17] Marine Repair has performed APL's M & R work at the Port of Baltimore since 2007. PFOF ¶99. As stated by Mr. Campolongo, "[b]ecause of Marine Repair's expertise, the quality of its work, and its superior customer service, APL has consistently provided business to Marine Repair at the Port of Baltimore. I have worked with Marine Repair throughout my career. Marine Repair has always provided excellent service, and I consider Marine Repair to be trustworthy and reliable." PFOF ¶99 (CX775 (Campolongo Decl. ¶6)). APL was one of the recipients of PAC's June 9, 2011 email announcing that as of June 6, 2011 all repairs must be done by PAC. PFOF ¶100 (CX345; CX775 (Campolongo Decl. ¶7)). Mr. Campolongo was surprised at this directive because although APL had been pleased with Marine Repair as its vendor,

[17] Marc Campolongo is APL's Maintenance & Repair Superintendent for the Eastern Region of the United States, including the Port of Baltimore. PFOF ¶97 n. 15 (CX774 (Campolongo Decl. ¶2)).

it was now being told that it could no longer conduct business with Marine Repair. PFOF ¶100 (CX775 (Campolongo Decl. ¶7)).

Shortly thereafter, Campolongo sent APL's standard M & R contract to Dave Bugda of PAC. PFOF ¶102 (CX775 (Campolongo Decl. ¶8)). On June 9, 2011, Montgomery sent Campolongo an e-mail stating "We also have attached a boiler plate contract that includes M&R services and we recently were able to reduce costs on fringe benefits in Baltimore and have attached your revised rates per our agreed formula for increases." PFOF ¶102 (CX775 (Campolongo Decl. ¶8)). Montgomery informed Campolongo that PAC would not sign the APL contract and, instead, PAC would require APL to sign PAC's standard M & R contract, which would require that PAC perform those services exclusively. PFOF ¶103 (CX775-76 (Campolongo Decl. ¶8)). Under PAC's contract, APL would have no option to negotiate with another vendor for M & R services, and reefer work would have to be performed by PAC's subcontractor, Multimarine. PFOF ¶103 (CX776 (Campolongo Decl. ¶8)). Although Montgomery represented that under PAC's proposed contract APL would receive a 10-12% discount on the cost of M & R in the Port of Baltimore, Campolongo was aware that similar "savings" offered to other carriers do not really constitute savings because costs are simply shifted to another location. PFOF ¶104 (CX776 (Campolongo Decl. ¶9)). APL would not be comfortable with this cost savings solution because of possible union jurisdictional issues. PFOF ¶104 (CX776 (Campolongo Decl. ¶9)).

Despite the initial discussions in June/July 2011, APL has not entered into a written agreement requiring PAC to perform its M & R work. PFOF ¶105 (CX776 (Campolongo Decl. ¶10)). APL continues to conduct business with Marine Repair, but is incurring additional charges imposed by PAC which will eventually make it cost prohibitive for APL to continue doing business

with Marine Repair. PFOF ¶105 (CX776 (Campolongo Decl. ¶10)). Currently, in doing business with Marine Repair, APL incurs additional charges to reposition equipment from Dundalk Marine Terminal to Marine Repair's Broening Street repair facility, and other off-dock locations. PFOF ¶106 (CX776 (Campolongo Decl. ¶11)). This constitutes approximately $200 more per unit for stacking, handling and transporting containers, including TIR fees. PFOF ¶106 (CX776 (Campolongo Decl. ¶11)). The charges imposed by PAC make it more expensive for APL to use Marine Repair for M & R services. PFOF ¶106 (CX776 (Campolongo Decl. ¶11)). If PAC performs the repairs, the costs would not be added. PFOF ¶106 (CX776 (Campolongo Decl. ¶11)). The additional costs imposed on APL when it chooses to do business with Marine Repair will eventually make it impossible from a cost perspective, and APL will be forced to solely use PAC for its M & R work. PFOF ¶107 (CX776 (Campolongo Decl. ¶12)). If this occurs, and PAC becomes the sole M & R vendor at the Port of Baltimore, competition for these services will be eliminated, which will eventually impact cost and quality of service. PFOF ¶108 (CX776-77 (Campolongo Decl. ¶12)).

Atlantic Container Line ("ACL"), is an international steamship line that has conducted business at the Port of Baltimore since 1967, currently operating at Dundalk Marine Terminal. PFOF ¶34 (CX829, 830 (McBride Decl. at ¶¶2, 8)). ACL began to do business with Marine Repair at the Port of Baltimore in or about 2003. PFOF ¶34 (CX830 (McBride Decl. at ¶9)). From 2003 to 2006, ACL paid Marine Repair approximately $1,000,000 to perform ACL's M & R work for dry containers, chassis and reefers and ACL describes the quality of Marine Repair's work and customer service as excellent. PFOF ¶34 (CX830 (McBride Decl. ¶¶9, 10)).

At the end of 2006, due to increased volumes of work, ACL's then head of procurement began negotiations with Montgomery that eventually resulted in an overall contract between ACL

and PAC for stevedoring services and M & R work. PFOF ¶35 (CX830 (McBride Decl. ¶11)). During the negotiations, PAC offered to reduce its rates for stevedoring services conditioned on ACL's agreement to an overall contract which bundled stevedoring and M & R work, including reefer repair. PFOF ¶36 (CX830-31 (McBride Decl. ¶12)). The reduced rate for stevedoring, and the savings that would result, was dependent on ACL agreeing that PAC would be its exclusive vendor for both stevedoring services and M & R work. PFOF ¶36 (CX830-31 (McBride Decl. ¶12)). In the end, ACL agreed to the bundled package, because giving PAC the M & R work was the price of getting PAC to agree to reduce its stevedoring rates. PFOF ¶36 (CX831 (McBride Decl. ¶13)). ACL did not choose PAC over MRS based on any dissatisfaction with MRS's level of service or the quality of MRS's work. PFOF ¶36 (CX831 (McBride Decl. ¶14)). In fact, MRS's customer service for M & R work was superior. PFOF ¶36 (CX831 (McBride Decl. ¶14)). The level of Marine Repair's sales to ACL declined significantly by May 2010 due to PAC's pricing packages and other restrictions placed on Marine Repair's ability to do business in the Port of Baltimore. PFOF ¶37 (CX822 (Marino Decl. ¶8)).

On or about June 19, 2012, Tom Weisberg of Maersk Lines, one of Marine Repair's long-standing customers, informed Marine Repair that Maersk would no longer be using Marine Repair because it had entered into an exclusive service agreement with PAC bundling stevedoring services with M & R services. PFOF ¶112 (CX823 (Marino Decl. ¶12). As part of its contract with PAC, Maersk also had to agree not use Marine Repair's Broening Highway facility. *Id.*

The shipping companies and chassis pool are not the only customers unhappy with the changes imposed by PAC. When PAC announced its decision on May 3, 2011that all chassis repairs would be moved off-dock, the trucking community was not happy because they preferred to

be on-dock. PFOF ¶120 (CX015 (Montgomery Tr. at 55:7-12; 56:4-6).

III. THE RELEVANT PRODUCT AND GEOGRAPHIC MARKETS

The unreasonableness of PAC's actions which are described above is to be evaluated in the context of the relevant product and geographic markets. "A relevant product market defines the product boundaries within which competition meaningfully exists." *Federal Trade Commission v. OSF Healthcare System*, __ F. Supp.2d __, 2012 WL 1134731, *4 (N.D. Ill. 2012). "'A geographic market is the area in which consumers can practically turn for alternative sources of the product and in which the antitrust defendants face competition.'" *OSF*, 2012 WL 1134731, *5 (quoting *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1052 (8th Cir. 1999)). Thus, the product market is determined first, and the geographic market is defined second. The relevant product market is service and repair work performed to chassis, dry boxes, and reefers.

The Administrative Law Judge has already determined that the relevant geographic market should not extend beyond the Port of Baltimore. During discovery, PAC moved to compel Marine Repair to produce documents regarding business activities outside the Port of Baltimore. That request was denied by Order served December 20, 2011. The Order states in pertinent part:

> PAC seeks documents and information for all of Marine Repair's operations, yet Marine Repair limited its responses to the Port of Baltimore. . ..
>
> The Complaint alleges violations at the Port of Baltimore by a Maryland corporation. PAC has not demonstrated that information from other ports is relevant to these proceedings. . ..

(12/20/11 Order at p.3, ¶2). Accordingly, it has already been determined that the relevant geographic market is no larger than the Port of Baltimore. There would be no basis on which to extend the geographic market beyond the Port of Baltimore because Marine Repair does not service

customers outside of the Port of Baltimore or Maryland. Marine Repair submits, however, that the appropriate geographic market should be more narrowly defined, as either Seagirt alone or Seagirt together with Dundalk.

The relevant geographic market should be limited to Seagirt Terminal because within the Port of Baltimore, Seagirt has developed as the primary container terminal. The Port of Baltimore consists of five public terminals. Fairfield Terminal handles and processes automobiles, light trucks and equipment including farm equipment and similar roll-on roll-off cargo. *See* mpa.maryland.gov/content/fairfield-marine-terminal. PFOF ¶11 (CX763-64). In fact, the MPA's website identifies Fairfield as "Fairfield Marine Automobile Terminal." *Id.* at CX764. North Locust Point does handle some containers, but it has been "redeveloped to enhance the Port's forest products capabilities." *See* mpa.maryland.gov/content/north-locust-point. PFOF ¶11 (CX761-62). South Locust Point includes a dedicated cruise ship terminal. *See* mpa.maryland.gov/content/south-locust-point. PFOF ¶11 (CX759-60). The only cargo listed for South Locust Point is forest products. PFOF ¶11 (CX759). Montgomery testified that containers shut down at South Locust Point in 2002 and moved to Seagirt. PFOF ¶11 (CX007 (Montgomery Tr. at 24:6-9)). Marine Repair does not have any customers at any of the previous three identified terminals (Fairfield, South Locust Point and North Locust Point). PFOF ¶12 (CX836 (citing Olshefski Decl. ¶9)). Marine Repair serves its Baltimore customers only at Seagirt and Dundalk. PFOF ¶10 (CX836-37 (citing Olshefski Decl. ¶10)). Dundalk Terminal does handle containers, but it is not limited to containers. In addition to containers, Dundalk handles breakbulk, wood pulp, roll-on/roll-off, automobiles, project cargo, farm and construction equipment. *See* mpa.maryland.gov/content/dundalk-marine-terminal. PFOF ¶8 (CX767-69). Of the five public terminals, Seagirt is the only one which handles

containers only. *See* mpa.maryland.gov/content/seagirt. PFOF ¶9 (CX765-66). Seagirt is equipped with "seven 20-story high-speed computerized cranes" which average 35 containers per hour. *Id.* at 765. The other four terminals simply are not equipped to handle containers in the way that Seagirt is. PFOF ¶9 (CX836 (Olshefski Decl. ¶8)).[18] Thus, the relevant geographic market is Seagirt.[19]

An alternative geographic market would include both Seagirt and Dundalk. Even if Dundalk is included within the relevant market, however, the market should be limited to on-dock areas. The relevant geographic market should not include any of Marine Repair's off-dock properties because, as demonstrated above, PAC is in control of Marine Repair' access to its off-dock properties. PAC refuses to allow Marine Repair to dray chassis across the Colgate Creek bridge to access those off-dock properties and therefore it is unfair to include those properties within the relevant geographic market. PAC has restricted Marine Repair ability to perform roadability work at Seagirt and has restricted its ability to take the roadability work off Seagirt. PFOF ¶117 (CX014-015 (Montgomery Tr. at 53:20-54:6)) (only PAC, to the exclusion of Marine Repair, is to perform any chassis work on dock at Seagirt). Thus, PAC has preserved for itself 100% of the chassis repair work at Seagirt and

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[18] There is no possibility that any new container terminals will be opening at the Port of Baltimore or anywhere within the state of Maryland in the near future. Under the Master Lease, the MPA, the Maryland Department of Transportation, and the Maryland Transportation Authority have agreed that for "15 Contract Years" they will not "lease or operate, or permit third parties to lease or operate new marine container terminals on State property, or any other property" they own, lease, operate or manage. PFOF ¶9 n.3 (CX126 (Master Lease at §2.2(a)(i))). Thus, there is no possibility for a 15 year period, that there will be any new marine container terminals in Maryland.

[19] If the Commission agrees that Seagirt is the relevant geographic market, Marine Repair's access to Dundalk to perform its repair services certainly remains important. It is Seagirt, however, that is providing the container shipping traffic which fuels the relevant product market.

has restricted Marine Repair's access to Dundalk for chassis repairs. By its own actions, PAC has limited the relevant geographic market to on-dock services.

There is no chassis work being done other than at Seagirt and Dundalk. PFOF ¶7 (CX836 (Olshefski Decl. ¶6)). Beginning in May 2011, PAC sent several email directives to Marine Repair and its customers advising that PAC was taking over ***all*** drayage, chassis repairs and M & R work, and that Marine Repair would no longer have roadability lanes at Seagirt or access across the inner-connector bridge. PFOF ¶115 (CX845 (Olshefski Decl. ¶38)); PFOF ¶117 (CX015 (Montgomery Tr. at 55:1-6; 57:7-11)). The practical result of these directives is to make Marine Repair's use of its off-dock areas economically prohibitive. *See* CX846-47, 848 (Olshefski Decl. ¶¶45, 59)). Not having access to the Colgate Creek Bridge to access these properties means a substantial increase in the cost of doing business that prevents Marine Repair from offering its customers prices which are competitive with PAC's, effectively reducing Marine Repair's market share for drayage, chassis repairs, dry box M & R work to zero. PFOF ¶121 (CX850 (Olshefski Decl. ¶59)). Moreover, as discussed *supra*, Marine Repair has lost several customers altogether.

IV. PAC'S PRACTICES VIOLATE THE SHIPPING ACT

PAC's practices described above violate the Shipping Act because PAC, as the marine terminal operator at Seagirt, has given undue or unreasonable preference or advantage to itself and to Multi-Marine; has imposed undue and unreasonable prejudice or disadvantage with respect to Marine Repair; and has unreasonably refused to deal and negotiate with Marine Repair, all in violation of 46 U.S.C. §41106 (2), (3).

A. Antitrust Principles Can Aid In Determining Unreasonableness

Whether PAC's conduct is unreasonable under the Shipping Act can be informed by the

antitrust laws. The federal antitrust laws are not strictly applicable to evaluating a claim arising under the Shipping Act. *Gulf Container Line v. Port of Houston Authority*, Order Partially Adopting Initial Decision, Docket No. 89-18 (F.M.C.). However, "the concepts, terminology, and framing and analysis of issues involved in antitrust cases are frequently useful in such determinations." *All Marine Moorings, Inc. v. I.T.O. Corporation of Baltimore*, 1996 WL 264720, *12 (1996).

Under the antitrust laws, a plaintiff alleging a monopolization offense "must establish two elements: (1) the possession of monopoly power; and (2) willful acquisition or maintenance of that power – as opposed to simply superior products or historic accidents." *E.I. du Pont De Nemours and Co. v. Kolon Industries, Inc.*, 637 F.3d 435, 441(4th Cir. 2011) (citing *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 480 (1992). A monopolist violates the Sherman Act when it acts to "'foreclose competition, to gain a competitive advantage, or to destroy a competitor.'" *du Pont*, 637 F.3d at 441 (quoting *Eastman Kodak Co.*, 504 U.S. at 482-83. "[E]xclusive dealing arrangements can constitute an improper means of acquiring or maintaining a monopoly." *du Pont*, 67 F.3d at 441.

Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985) involved a monopolist's decision to end what had been a voluntary cooperative relationship with a competitor. During a several year period, two skiing companies marketed and jointly offered a six day multi-area ski ticket that could be used at any of the three mountains operated by the defendant, or by the one mountain operated by the plaintiff. Eventually the defendant decided it should discontinue the joint pass, one of the reasons being its belief that the pass was "siphoning off revenues that could be recaptured by [defendant] if the ticket was discontinued." 472 U.S. at 592. In lieu of an outright discontinuation, however, the defendant offered to the plaintiff that it would continue the four area

pass if the plaintiff would agreed to a 12.5% fixed percentage of revenue, an amount considerably lower than plaintiff's historical average. 472 U.S. at 592. Plaintiff would not agree, and offered an alterative that would distribute revenues based on usage which would be monitored at each of the four mountains. 472 U.S. at 592-93. Defendant refused and plaintiff rejected the defendant's fixed percentage offer. 472 U.S. at 593. Defendant then began to market its own multi-day 3 mountain pass. 472 U.S. at 593. Defendant aggressively marketed its pass and made it "extremely difficult for [plaintiff] to market it own multiarea package" and refused to sell plaintiff tickets to include in its own multiarea offering. 472 U.S. at 593. Plaintiff's share of the market for downhill skiing in Aspen declined from 20.5% to 11%. 472 U.S. at 593. Plaintiff sued defendant for violating Section 2 of the Sherman Act alleging defendant had monopolized the downhill skiing market in Aspen. 472 U.S. at 595. The jury found in plaintiff's favor, and the court of appeals affirmed. In the Supreme Court, the defendant argued, as it had below, that it did was not required to cooperate with the plaintiff. While there is no unqualified duty to cooperate, that "does not mean that every time a firm declines to participate in a particular cooperative venture, that decision may not have evidentiary significance, or that it may not give rise to liability in certain circumstances." 472 U.S. at 601. The Supreme Court stated:

> [The] monopolist elected to make an important change in a pattern of distribution that had originated in a competitive market and persisted for several years. The all-Aspen, 6-day ticket with revenues allocated on the basis of usage was first developed when three independent companies operated three different ski mountains in the Aspen area. [internal citation omitted]. It continued to provide a desirable option for skiers when the market was enlarged to include four mountains, and when the character of the market was changed by Ski Co.'s acquisition of monopoly power. Moreover, since the record discloses that interchangeable tickets are used in other multimountain areas which apparently are competitive [footnote omitted], it seems appropriate to infer that such tickets satisfy consumer demand in free competitive markets.

472 U.S. at 603. The defendant's "decision to terminate the all-Aspen ticket was . . . a decision by a monopolist to make an important change in the character of the market." 472 U.S. at 604. Although such a decision was not "necessarily anticompetitive," it was in that case because the defendant failed to demonstrate a valid business reason for the decision. 472 U.S. at 604-05. Considering the effect of the defendant's decision on the defendant, on the plaintiff, and on consumers, the decision was exclusionary. 472 U.S. at 605.

Just like the defendant in the *Aspen* case, PAC as monopolist, has made decisons making "an important change in the character of the market." PAC has foreclosed any competition for M & R services of chassis, dry box containers and reefers; has gained a competitive advantage over Marine Repair; and has, in fact, all but destroyed Marine Repair as M & R vendor.[20]

As noted above, in addition to its monopoly, PAC has tied its stevedoring services to both its own marine repair services and to Multi-Marine's reefer services. The arrangement is a classic tying arrangement under the antitrust laws:

> A tying arrangement is a device used by a seller with market power in one product market to extend its market power to a distinct product market. *Paladin Assocs., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1159 (9th Cir.2003). To accomplish this objective, the seller conditions the sale of one product (the tying product) on the buyer's purchase of a second product (the tied product). [footnote omitted]. *See Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 461, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992); [additional citation omitted]. Tying arrangements are forbidden on the theory that, if the seller has market power over the tying product, the seller can leverage this market power through tying arrangements to exclude other sellers of the tied product.

Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 912 (9th Cir.2008). Although Marine Repair need not prove a violation of the antitrust laws (*Gulf Container Line v. Port of Houston*

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[20] Marine has lost not only customers, but also a concomitant loss of employees. PFOF ¶131 (CX823-24 (Marino Decl. ¶14); ¶138 (CX825 (Marino Decl. ¶23)).

Authority, Order Partially Adopting Initial Decision, Docket No. 89-18 (F.M.C.)), the tying arrangements at issue here would constitute a *per se* violation of the Sherman Act:

> A tying arrangement will constitute a *per se* violation of the Sherman Act if the plaintiff proves "(1) that the defendant tied together the sale of two distinct products or services; (2) that the defendant possesses enough economic power in the tying product market to coerce its customers into purchasing the tied product; and (3) that the tying arrangement affects a not insubstantial volume of commerce in the tied product market." *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 913 (9th Cir.2008) (quoting *Paladin Assocs., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1159 (9th Cir.2003)) (internal quotation marks omitted).

Brantley v. NBC Universal, Inc., 675 F.3d 1192, 1197 n. 7 (9th Cir. 2012).

Stevedoring is distinct from M & R of dry box containers and reefers. PFOF ¶31 (CX840 at Olshefski Decl. ¶22). As the sole stevedore at Seagirt, PAC has sufficient market power to coerce its stevedoring customers into purchasing PAC's dry box M & R services and Multimarine's reefer services. This arrangement effects all shipping lines calling at Seagirt in need of M & R services. PAC has exercised its economic power with regard to stevedoring (the tying service) to force its customers to accept PAC as the provider of M & R services, and to accept the reefer services of Multimarine. *POMTOC*, 31 S.R.R. 783 at 40.

B. Exclusive Arrangements Have Been Invalidated

Here, the MPA has entered into an exclusive agreement with PAC such that it is exclusively in control of operations at Seagirt. By asserting its exclusivity, PAC has essentially eliminated stevedoring competition[21] and further solidified its control in the Port of Baltimore by offering bundled pricing packages which give discounted rates for stevedoring services as long as the customer agrees to contract with PAC for all M & R work. PFOF ¶67 (CX843 (Olshefski Decl.

[21] Montgomery has stated that his "goal is to put Ceres [a stevedore at another terminal in Baltimore] out of business in the Port of Baltimore." PFOF ¶65 (CX843 (Olshefski Decl. ¶32)).

¶33)). By asserting exclusivity, PAC achieves volume allowing it to keep its stevedoring prices low and then uses the low stevedoring prices to tie the maintenance and repair services to the stevedoring. PFOF ¶66 (CX843 (Olshefski Decl. ¶33)). That agreement, however, does not cloak PAC with impunity with respect to its anticompetitive behavior. In fact, the Master Lease expressly provides that PAC "shall not use the Premises for any unlawful purpose." PFOF ¶61 (CX126 (Master Lease at ¶2.1(a)). In *Exclusive Tug Arrangements in Port Canaveral, Florida*, Docket No. 02-03, 2003 WL 1017732 (FMC 2003) the Commission reviewed the Canaveral Port Authority's ("CPA") requirement that vessels use the tug services of just one tug operator (Seabulk) and CPA's aggressive efforts to preserve Seabulk's exclusive commercial tug franchise. 2003 WL 1017732, *2; *see also id.* at *24 (at BFF115). The Commission found that "[t]he inability of tug users to select the tug company of their choosing [ ] created problems for some of those users, and potential problems for others." 2003 WL 1017732, *24-*25 (at BFF116-121); *see id.* at *34. As the FMC observed, "[i]t is a well-established and fundamental economic tenet that free and open competition can best satisfy consumer demand at the lowest price with the sacrifice of fewest resources." 2003 WL 1017732, *25 (at BFF122). The FMC found that the FMC's Bureau of Enforcement ("BOE") (a party to the proceeding) had easily met its burden of demonstrating the unreasonableness of the Port's actions:

> BOE's burden was easily met, as the unreasonableness of CPA's actions was blatant. In 1999, CPA stepped-up its efforts and achieved success in its sixteen-year campaign to have the military abandon its contract with Petchum [Seabulk's competitor]. The evidence was clear that CPA officials wanted Seabulk to have a monopoly over all of the tug service in the port. CPA succeeded by attacking the small business set-aside program, an approach that it did not take when [Seabulk] had the port's military work under the same program.
>
> * * * *

> The harm to Petchem was clear. CPA's actions succeeded in forcing Petchem out of the port entirely. First, in 1999, CPA officials succeed in convincing military officials not to renew their contract with Petchem. This required Petchem to renew its application for a commercial tug franchise. After CPA denied that request on July 21, 2000, Petchem made a futile attempt to compete with [Seabulk]. However, Petchem was at an economic disadvantage and could not compete effectively. Thereafter, [Seabulk] resumed its pre-1984 status as the sole provider of military and commercial tug services at Port Canaveral.

2003 WL 1017732, *36 (record citations omitted). After finding that CPA's actions constituted a violation of the Shipping Act, the FMC assessed a $214,000 civil penalty and ordered CPA to "immediately cease and desist from operating a tug assist franchise system. Vessels calling at the port shall be permitted to use the tug operator of their choosing and CPA shall not prohibit or restrict a vessel from using a tug operator in any way." 2003 WL 1017732, *42.

In *Exclusive Tug Franchises-Marine Terminal Operators Serving the Lower Mississippi River*, 2001 WL 865704 (Docket No. 01-06) (F.M.C. 2001) the Commission issued an order to sixty-seven ocean common carriers serving the lower Mississippi in response to the growing number of terminal operators entering into exclusive arrangements for tug services. *Exclusive Tug Franchises*, 2001 WL 865704 at *1. The FMC found several indicia that "an appropriate competitive business environment" did not exist, including a "reduction in customer choice, complaints from shippers or carriers, and a showing of higher prices with no improvement in the level of service." 2001 WL 865704, *4. Finding violations of 46 U.S. C. Section 1709(d)(4) (§10(d)(4) of the 1984 Shipping Act), the FMC stated:

> It appears that [§10(d)(4)] has been violated by the imposition of undue and unreasonable prejudice or disadvantage upon vessel operators by each of the contracting [Marine Terminal Operators] as a result of their having entered into arrangements with a single tug company. These arrangements remove vessel operators' ability to seek competitive tug assist services at the closed terminal facilities and mandate the tug company to be used and charges to be paid as a

condition of being permitted to call.

* * * *

> *Section 10(d)(4) also appears to have been violated with respect to [RIVCO], the sole tug company which has been awarded none of the exclusive contracts,* as the contracting MTOs have preferred the other three tug assist companies competing on the lower Mississippi to RIVCO's prejudice or disadvantage. *The exclusive arrangements have distorted the competitive market for tug assist services from one where RIVCO was able to compete for any and all of the business of dry bulk vessel operators on the lower Mississippi, to one where it is totally precluded from serving any vessel which calls at one of the closed terminals.*

2001 WL 865704 at *4 (emphasis added). The Commission entered an order on each of the terminal operators to show cause why the Commission should not find the exclusive tug arrangements in violation of the Shipping Act. 2001 WL 865704 at *5.

Carolina Marine Handling, Inc. v. South Carolina State Ports Authority, Docket No. 99-16, 2000 WL 722274 (FMC 2000) discussed the economic power that accompanies an entity's control of access to terminal facilities: "'The ability to control access to terminal facilities is the economic power subject to the greatest potential for abuse, as the railroads demonstrated early in this century. Regulatory oversight which ensures reasonable, non-discriminatory access to those facilities should be the primary focus of the Commission's regulation of marine terminal operators.'" 2000 WL 722274 (quoting *Fact Findings Investigation No. 17 Rates, Charges and Services Provided at Marine Terminal Facilities*, 24 S.R.R. 1260, 1280 (8/31/1988)). Regarding the "unreasonable practices" component of the 1984 Act, the FMC in *Carolina Marine* stated as follows:

> The Commission's test for reasonableness was set forth in *West Gulf Maritime Assn. v. Port of Houston Authority*, 18 S.R.R. 783, 790 (FMC 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), stating that "[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."

> The conclusion can be reached on the basis of facts thus far presented that at the Naval Complex, RDA, SPA and CIP are engaged in "excessive" and discriminatory terminal practices through the unfair and unreasonable granting of exclusive use of terminal facilities that have produced and will continue to produce "unreasonable" and harmful consequences to CMH, to the shipping public and to other potential port users. Thus the conclusion could also be reached that RDA, SPA and CIP have failed in their responsibilities as marine terminal operators to establish, observe and enforce just and reasonable practices relating to the use of terminal facilities in connection with common carriage at the Naval Complex.

2000 WL 722274, *41. The FMC found that the same set of facts could support a finding of a violation of the Act's prohibition against unreasonable preference and unreasonable prejudice or disadvantage. 2000 WL 722274, *41. As noted above, Marine Repair customers are not happy with PAC's announcement that they can no longer use Marine Repair to perform these services.

In *Gulf Container Line (GCL), BV v. Port of Houston Authority*, Docket No. 89-18, 1990 WL 427506 (F.M.C. 1990), GCL, an ocean carrier, for a time used the Port Authority's reefer monitoring service. After it became dissatisfied with the quality of service, GCL notified the Port that it would begin performing its own monitoring of its reefers. 1990 WL 427506, *2. The Port, however, insisted that GCL use the Port's services. *Id.* The Port continued to provide and charge GCL for its services. *Id.* The Port asserted that the Port's Terminal Service Tariff required all carriers, including GCL to use, and pay for, the Port's reefer monitoring services. *Id.* at 3. GCL contended that the Port's requirement was unreasonable and violated Section 10 of the Shipping Act. *Id.* at 3. The Port Authority refused to "provide access to shore power for reefers (with or without plug-in services) to an ocean carrier which does not agree also to use the Port Authority's reefer monitoring services." *Id.* at 3. Thus, GCL argued that "tying a carrier's access to electricity to the same carrier's agreement to purchase reefer monitoring services is commercial extortion." *Id.* at 3. *Cf. Credit Practices of*

Sea-Land Service, Inc. and Nedlloys Lijnen, B.V., Docket 90-07, 1990 WL 427463, *10 (F.M.C. 1990) (extension of credit only to shippers of wine, spirits and other beverages was a "valuable business 'preference' or 'advantage' without any justification of record to support the reasonableness of the practice" and therefore the preference or advantage was "'undue or unreasonable' within the meaning of section 10(b)(11)").

In its Report and Order on the "'50 Mile Container Rules' Implementation by Ocean Common Carriers Serving U.S. Atlantic and Gulf Coast Ports," Docket No. 81-11 (8/3/97), 1987 WL 209053 (1987), the FMC reviewed Rules on Containers incorporated by carriers in their tariffs. Under the Rules, shippers were 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. 1987 WL 209053, *70. Although the Rules were lawful under the collective bargaining agreements and federal labor statutes, the FMC found certain of their provisions "unreasonable and unjustly discriminatory and therefore violat[ive] [of] the 1916 Act, the 1984 Act and the Intercoastal Act." 1987 WL 209053, *3. The FMC summarized as follows:

> Evidence sufficient to find violations of the Shipping Acts can be found in the provisions of the Rules themselves, which are facially discriminatory and burdensome as applied to certain classes of shippers and cargo consolidators. These discriminations and burdens are not justified by transportation circumstances properly cognizable under the Shipping Acts. The evidence provided by the text of the Rules themselves is supported by other evidence of record provided by shippers, warehousemen and consolidators, who testified that the carriers' application of the Rules resulted in specific instances of lost business, unnecessary costs and other types of economic harm to them traceable to the Rules.

1987 WL 209053, *3. The Rules took away the shippers' freedom of choice:

> If a particular shipper cannot take full advantage of the benefits of containerization, that must result from the economies of his particular business and location in the marketplace. It should not result from the provisions of agreements between the

> carriers and their employees that preclude entire classes of shippers from fully utilizing containerization. Shippers must be allowed a free choice among different methods of transportation, so that they can discover for themselves whether off-pier container loading will result in cost savings and efficiencies fo service. By preventing certain shippers from having such freedom of choice, the Rules on Containers harm the commerce of the United States.

1987 WL 209053, *71. In rejecting the argument of the proponents of the Rules that the FMC must take into account labor and collective bargaining considerations and find that the Rules do not violate the Shipping Act, the FMC stated that its duty was to evaluate the lawfulness of the Rules under the Shipping Act, not under labor laws:

> [T]he Commission rejects the argument of certain parties that, in determining the lawfulness of the Rules on Containers under the ocean transportation statutes the Commission is responsible for enforcing, we are obliged to reach beyond those statues and attempt to take into account evidence of "labor considerations" stemming from the collective bargaining agreements between the carriers and the ILA. After a searching analysis of the applicable statutes and case law, the Commission has concluded that no such obligation is placed upon us. On the contrary, our review of the twenty-year history of efforts by this agency the National Labor Relations Board . . ., the courts and Congress to reconcile the demands fo the federal maritime and labor statutes indicates that any effort by the Commission to balance "labor considerations" against the clear evidence of unreasonable transportation burdens and discriminations before us would represent a failure by the Commission to discharge the duties assigned to us by Congress, and would undermine the balance between labor and shipping interests devised by Congress when it enacted the Maritime Labor Agreements Act. . ..We believe that our responsibility to take "labor considerations" into account is limited to ensuring that the appropriate remedy for violations of the Shipping Acts is drawn no more broadly than necessary, so as to avoid any unwarranted impact on the legitimate collective bargaining interest of the carriers and the union.

1987 WL 209053, *3.[22] Similarly, here, the Commission should reject PAC's argument that as long

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[22] Carriers, the ILA, and shipping associations filed a petition with the District of Columbia Circuit Court for review of the FMC's decision. *New York Shipping Ass'n v. Federal Maritime Commission*, 854 F.2d 1338 (D.C. Cir. 1988). The Circuit Court denied the Petition for Review and affirmed the FMC's decision finding the Rules unreasonable and unjustly discriminatory. 854 F.2d at 1344.

as its actions are permitted under Master Lease with the MPA they cannot be unlawful under the Shipping Act. [23]

"The Supreme Court has consistently construed the reach of exemptions from antitrust laws narrowly, even when Congress confers these exemptions in terms. *See, e.g., Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 [parallel citations omitted] (1982). This narrow construction of antitrust immunity is appropriate because the robust marketplace competition that antitrust laws protect is a 'fundamental national economic policy.'" *U.S. v. Gosselin World Wide Moving , N.V.*, 411 F.3d 502, 508 (4th Cir. 2005). The narrow construction applied to antitrust immunity applies with equal force to the antitrust immunity granted by the Shipping Act of 1984. *Gosselin*, 411 F.3d at 508-09, 511, 513.

In *Greater Baton Rouge Port Commission v. United States*, 287 F.2d 86 (5th Cir. 1961), the Fifth Circuit denied a petition to review a report and order of the Maritime Board finding that a lease amendment providing for a restrictive stevedoring arrangement violated the 1916 Shipping Act. The lessee had been granted exclusive rights under its agreement with the Port to operate the grain elevator for delivery of grain to the vessels. Each vessel, however, was permitted to select its own

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[23] Even in *All Marine Moorings, Inc. v. I.T.O. Corporation of Baltimore*, 1996 WL 264720, *4 (1996), a case relied on by PAC in these proceedings, the FMC noted that the Administrative Law Judge "concluded that, notwithstanding the authority granted ITO by the lease to determine how to have line-handling services performed at its leased premises, the lawfulness under the Shipping Acts of ITO's practice of restricting or excluding its competitors was to be determined by" Commission precedent relating to preferential practices at ports. Similarly, in *RO. White and Company and Ceres Marine Terminals, Inc. v. Port of Miami Terminal Operating Company ("POMTOC")*, Docket No. 06-11, 31 S.R.R. 783 (FMC 2009), another case on which PAC has relied, the ALJ stated that "[a]s the lessee of the terminal, POMTOC has a property right which allows it to exercise control over the leased premises ***subject to the prohibitions of the Act.***" 31 S.R.R. 783 at 43 (emphasis added).

stevedore for the stevedoring of the grain which involves inspecting the ship, devising a plan for stowage of the grain, and execution of the plan - essentially all aspects involved in the vessel's receiving the grain. 287 F.2d at 94. The Port and the lessee subsequently amended their lease to reserving exclusively to the lessee the right to provide all stevedoring services for vessels calling at the grain elevator and allowing the lessee to "condition the loading and unloading of vessels on their using [lessee's] stevedoring services exclusively." 287 F. 2d at 88. As a result of the amendment, vessels would be prohibited from selecting their stevedores. 287 F. 2d at 94. A competitor of the lessee challenged the amendment and the Board found that the amendment violated the Shipping Act. The Fifth Circuit agreed with the Board, rejecting the lessee's justifications based on assertions that the amendment would "result in a 'more efficient and economical over-all operation.'" 287 F.2d at 94. In these proceedings, PAC has attempted to justify its actions in the same way - asserting it just wants to offer all-inclusive packages to its customers. That, however, is not an acceptable justification for PAC's conduct. Rejecting the justification offered in *Greater Baton Rouge*, the Fifth Circuit stated:

> Efficiency is not enough. It is not a cure-all. Not in our system of law.
>
> * * * *
>
> National policy favors free and healthy competition; monopoly is the exception.

287 F.2d at 94, 95. Marine Repair requests the ALJ to similarly reject PAC's proffered justification.

Although in some cases a complainant alleging a violation of the Shipping Act is required to show a triangular relationship, showing such a relationship is not always required. *Puerto Rico*

Port Authority v. FMC, 642 F.2d 471 (D.C. Cir. 1980).[24] Moreover, where, as here, the violator has two roles at the port, the violator can be both the violator and the preferred party. 642 F.2d at 483.[25] That is exactly the circumstances in the present case. PAC, as marine terminal operator and monopolistic stevedore (violator), has preferred itself in its role as sole provider of M & R services to the injury of Marine Repair, the party suffering the discrimination. PAC's roles as terminal operator, stevedore and M & R service provider are distinct.[26] Accordingly, even if showing a triangular relationship is a requirement of demonstrating a violation of 46 U.S.C. Sections 41106(2) and (3), such a relationship does exist here.

PAC's practices materially affect competition. Through its actions, PAC has prevented Marine Repair from accessing its facilities in an economically feasible way. By preventing Marine Repair from accessing Dundalk via the Colgate Creek bridge as it has in the past, and by removing the roadabililty lanes that Marine Repair has traditionally had access to, PAC has caused an increase in Marine Repair's cost of doing business and has assured itself a monopoly of M & R work. When those costs are passed along to customers of Marine Repair, Marine Repair cannot compete because PAC is offering a lower priced packaged resulting from tied services provided on-dock.

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[24] A case alleging "undue or unreasonable prejudice or disadvantage . . . normally involves a 'triangular relationship' between the violator, the preferred party, and the party suffering discrimination." *Puerto Rico*, 642 F.2d at 483 (analyzing issue under the 1916 Act).

[25] *See also Puerto Rico*, 642 F.2d at 489-90 (Lumbard, J. *dissenting*) (explaining that the "Commission's case law has long recognized the possibility that a 'preference of a carrier for itself in other capacities (for example, as a terminal operator) involves preferring, preferred and deferred parties'").

[26] In addition, the Multimarine issue clearly involves a triangular relationship.

V. MARINE REPAIR IS ENTITLED TO REPARATIONS

PAC perceived that the changes it wanted to put into place in June 2011 would have a negative impact on Marine Repair's business. PFOF ¶139 (CX033 (Montgomery Tr. at 127:6-13). Its perceptions have proven to be true. After 36 years of a successful operation, Marine Repair has suffered the near destruction of its business as a result of PAC's anti-competitive activity, including the bundled pricing packages, its assertion of exclusive control, and the unreasonable restrictions placed on Marine Repair's ability to do its work at Dundalk and Seagirt. PFOF ¶¶128-29 (CX823, 824 (Marino Decl. ¶¶13, 17). Marine Repair now serves only 32 customers, approximately 10 of whom have registered sales of less than $1,000 per month. PFOF ¶131 (CX823-24 (Marino Decl. ¶14). In addition to its loss of customers Marine Repair has suffered increased labor costs. PFOF ¶132 (CX824 (Marino Decl. ¶15).

The analysis and computation of Marine Repair's damages are set forth in the report and damages calculations of Marine Repair's damages expert, David Deger. (CX 790-815).[27] Since 2010 (Master Lease executed in December 2009), and as a result of PAC's increasingly monopolistic behavior, Marine Repair has suffered damages resulting from lost business in the amount of $2,714,000. PFOF ¶136 (CX 787 (Deger Decl. ¶23); *see also* CX 825 (Marino Decl. ¶21). If PAC's practices continue, Marine Repair will lose the value of its business. PFOF ¶136 (CX 825 (Marino Decl. ¶22)). Mr. Deger estimates these lost enterprise damages to be $9,000,000. PFOF ¶136 (CX

[27] Deger has over thirty-five years of accounting experience and is well-qualified to render his expert opinion in this case. CX 782 (Declaration of David Deger ("Deger Decl." at ¶¶2-4).

787 (Deger Decl. at ¶20-23)).[28]

In reaching his opinion as to the amount of damages suffered by Marine Repair, Deger reviewed and summarized Marine Repair's financial and accounting information including tax returns, income statements and customer sales data. PFOF ¶137 (CX783 (Deger Decl. ¶8)). He analyzed Marine Repair's damages based on a "before and after" approach, which compared Marine Repair' sales in the three-year period prior to the Master Lease to the period following implementation of the Master Lease. PFOF ¶137 (CX784 (Deger Decl. ¶10)). As Mr. Deger states in his Declaration, the sales were steady, and then fell significantly after the Master Lease was in place. PFOF ¶137 (CX784-85 (Deger Decl. ¶¶12-13)). Specifically, while annual sales for the three year period 2006 through 2009 ranged from $9,467,871 to $8,944.626, respectively, annual sales in the next two fiscal years (ending April 30, 2010 and 2011) when the Master Lease had already gone into effect dropped to $6,354,777 and $6.106,810, respectively. PFOF ¶137 (CX784 (Deger Decl. ¶12)). Revenues continued to decline, totaling just $1,037,985 in the four months ended August 31, 2011. PFOF ¶137 (CX784-85 (Deger Decl. ¶13)). For the current fiscal year which just ended on April 30, 2012, Marine Repair's customer revenues fell to just $3,068,196.90. PFOF ¶137 (CX785 (Deger Decl. ¶13)). Deger projects a loss for the current fiscal year of approximately $1,300,000.00. PFOF ¶137 (CX785 (Deger Decl. ¶14)). As Deger concluded:

> It is clear that prior to the Master Lease and the various restrictions imposed by PAC on Marine Repair, Marine Repair was consistently profitable. Marine Repair had a

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[28] As set forth in his Declaration, Mr. Deger reached this conclusion by applying a price/earnings multiplier of 10 to Marine Repair's average adjusted book income of $900,000. Mr. Deger determined that given Marine Repair's length of time in business, its history of profits, and that absent PAC's activities it faced few business risks (and when it did, it adjusted to them), the multiplier was reasonable. PFOF ¶136 n.20 (CX 787 (Deger Decl. ¶20-22)).

> long history at the Port of Baltimore, and enjoyed a steady stream of revenue from multiple customers. Immediately following the effective date of the Master Lease, and PAC's imposition of restrictions based on its position of superior power by virtue of the Master Lease, Marine Repair's sales took a precipitous fall. Except for the loss of Mediterranean Shipping Company (which I have dealt with in my Revised Report), I have not seen evidence of any other possible factor that would have had a significant impact on Marine Repair's revenues in the period following the Master Lease other than PAC's conduct.

PFOF ¶137 (CX18 (Deger Decl. ¶18)).

The "before and after" approach used by Mr. Deger is one of the two most common methods of quantifying damages from anti-competitive conduct. *See Eleven Line, Inc. v. N. Texas State Soccer Ass'n, Inc.*, 213 F.3d 198, 206-07 & n. 17 (5th Cir. 2000)("two most common methods of quantifying antitrust damages are the 'before and after' and 'yardstick' measures of lost profits")(*citing Lehrman v. Gulf Oil Corp.*, 500 F.2d 659, 667 (5th Cir.1974)); *Harris Wayside Furniture Co., Inc. v. Idearc Media Corp.*, CIV. 06-CV-392-JM, 2008 WL 7109357 (D.N.H. Dec. 22, 2008)(expert applied the "before and after" methodology); *see also* PFOF ¶137 (CX784 (Deger Decl. ¶10)).

In *Elyria-Lorain Broadcasting Co. v. Lorain Journal Co.*, 358 F.2d 790, 792-94 (6th Cir. 1966), the Sixth Circuit reversed a district court judgment prohibiting plaintiffs from estimating their damages based upon a comparison between plaintiff's advertising revenues in an unrestricted market and its lesser revenues in a restricted market. Indeed, as the court stated in *White & White, Inc. v. Am. Hosp. Supply Corp.*, 540 F. Supp. 951, 1040-43 (W.D. Mich. 1982) *rev'd on other grounds*, 723 F.2d 495 (6th Cir. 1983), "[the expert's] estimate of plaintiffs' loss of its expected share of sales is less speculative than that approved in *Elyria-Lorain*. Unlike the later case, [the expert's] analysis rests on actual experience before the illegal restraint in the affected [market], and not on estimates

derived from plaintiffs' performance in another geographic area." Like the analysis in *White & White*, Mr. Deger's analysis also rests on a comparison of Marine Repair's actual experience in the market before and after the illegal restraints. *See also, Gaines v. Carrollton Tobacco Bd. of Trade, Inc.*, 496 F.2d 284, 286-87 (6th Cir. 1974)(comparisons of plaintiff's sales in the two years operated under restrictions compared to subsequent years operated without them may be used to compute damages).

Deger's conclusions easily meet the test for proving damages in a case asserting anti-competitive claims. "[I]n an action for damages for violation of the antitrust laws plaintiff is [not] limited to recover only for specific items of damage which he can prove with reasonable certainty. On the contrary, the trier of the facts may make a just and reasonable estimate ... based on relevant data and may act upon probable and inferential ... proof." *Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 784 (6th Cir. 2002)(citing *Elyria-Lorain*, 358 F.2d 790 at 793). As the Third Circuit stated in *Bonjorno v. Kaiser Aluminum & Chem. Corp.*, 752 F.2d 802, 812 (3d Cir.1984), "[i]n constructing a hypothetical world free of the defendants' exclusionary activities, the plaintiffs are given some latitude in calculating damages, so long as their theory is not wholly speculative." *Id.*; *accord LePage's Inc. v. 3M*, 324 F.3d 141, 166 (3d Cir. 2003)("once a jury has found that the unlawful activity caused the antitrust injury, the damages may be determined without strict proof of what act caused the injury, as long as the damages are not based on speculation or guesswork") (*citing Bonjorno*, 752 F.2d at 813).

Deger is well-qualified in the field of accountancy;[29] he reviewed all the necessary financial

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[29] Deger has over thirty-five years of accounting experience and is well-qualified to render his expert opinion in this case. *See* PFOF ¶136 n.19 (CX782 (Deger Decl. ¶¶2-4)).

documentation and interviewed various representatives of Marine Repair (Vincent Marino, Anthony Marino, Shawn Olshefski and Melissa Wiegel); he applied an accepted methodology (the "before and after" approach); and he reached a reasonable estimate of Marine Repair's damages. Thus, Marine Repair has proven its damages and is entitled to a recovery therefor.

CONCLUSION

PAC has violated the Shipping Act of 1984. It has given undue and unreasonable preference and advantage to both itself (as provider of maintenance and repair services at Seagirt) and to Multi-Marine (as provider of reefer services at Seagirt); has imposed undue and unreasonable prejudice or disadvantage with respect to Marine Repair; and has unreasonably refuse to deal or negotiate with Marine Repair. Therefore, Complainant Marine Repair Services, Inc. respectfully requests the Commission to grant it the following relief:

(A) an order requiring Respondent Ports America Chesapeake, LLC to pay Complainant reparations in the amount of $2,714,000;

(B) an order requiring Respondent to cease and desist from any further violations of the Shipping Act of 1984 (as amended and codified);

(C) an order requiring Respondent to cease and desist from interfering with Complainant's business relationships with its customers at the Seagirt and Dundalk Terminals;

(D) an order requiring Respondent to cease and desist from excluding or restricting Complainant's access between the Seagirt and Dundalk Terminals via the Colgate Creek Bridge; and

(E) an order directing Respondent to allow Complainant to dray chassis and/or containers across the Colgate Creek Bridge to its repair facilities at the Dundalk terminal without utilizing the Trailer Interchange Receipt lane and directing Respondent to reinstate the system which was in place

prior to June 2011 by which Complainant notified Respondent by email of each chassis and container being drayed to Dundalk and notified Respondent by email when the chassis or container is being returned to the Seagirt terminal;

(F) an order directing Respondent to permit Complainant to resume competing for maintenance and repair work (including with respect to chassis and both dry and refrigerated container work) and to permit Respondent unrestricted free access to the Colgate Creek Bridge;

(G) an order directing Respondent to allow Complainant to again use the space it previously had access to at the Seagirt terminal for container repairs (both dry box and refrigerated);

(H) an order directing Respondent to permit Complainant to compete for roadability work by making space available at the Seagirt terminal at which Complainant can perform minor chassis repairs;

(I) an order directing Respondent to offer to release all customers (including CSAV, CCNI, Hapag Lloyd and Maersk) from their exclusive and bundled Terminal Services Agreements so that Complainant may compete for those customers' maintenance and repair business;

(J) alternatively, in the event the relief requested in foregoing paragraphs B through I is not awarded, lost enterprise damages in the amount of $9,000,000; and

(K) such other and further relief as the Commission deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY certify that on this 20th day of July, 2012, a copy of the foregoing COMPLAINANT MARINE REPAIR SERVICES OF MARYLAND, INC.'S BRIEF was served by e-mail transmission on:

JoAnne Zawitoski
Alexander M. Giles
Semmes, Bowen & Semmes LLC
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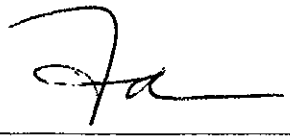

Fernando Amarillas