S E R V E D
January 10, 2013
FEDERAL MARITIME COMMISSION

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WASHINGTON, D.C.

DOCKET NO. 11-11

MARINE REPAIR SERVICES OF MARYLAND, INC.

v.

PORTS AMERICA CHESAPEAKE, LLC

INITIAL DECISION[1] BY PAUL B. LANG, ADMINISTRATIVE LAW JUDGE

I. STATEMENT OF THE CASE

Complainant Marine Repair Services of Maryland, Inc. ("MRS") filed the Complaint on July 11, 2011. In its Complaint MRS alleges that Respondent Ports America Chesapeake, L.L.C. ("PAC") has acted in violation of Section 10(d)(4) of the Shipping Act of 1984 ("Shipping Act"), 46 U.S.C. § 41106(2), by giving undue and unreasonable preference to itself and to Multimarine Services, Inc. ("Multimarine") with regard to the performance of maintenance and repair work on containers and chassis and on refrigerated containers (collectively "M&R work") at Seagirt Marine Terminal ("Seagirt") and Dundalk Marine Terminal ("Dundalk") in the Port of Baltimore. MRS further alleges that PAC has acted in violation of Section 10(d)(3) of the Shipping Act, 46 U.S.C. § 41106(3) by unreasonably refusing to deal and negotiate with MRS with regard to the performance of M&R work at Seagirt and Dundalk.

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[1]This decision will become the decision of the Commission in the absence of review by the Commission, Rule 227, 46 C.F.R. § 502.227.

On August 31, 2011, PAC filed its Answer in which it generally denied liability to MRS and raised affirmative defenses of limitations and/or laches; the justification of its actions pursuant to rights granted to it under a lease with the Maryland Port Administration ("MPA"); the failure of MRS to join a necessary party, *i.e.*, MPA; a lack of standing on the part of MRS; that MRS has unclean hands so as to bar its entitlement to equitable relief; and that MRS has failed to state a claim upon which relief can be granted. PAC also asserts the benefit of all applicable defenses under the Schedule of the Baltimore Marine Terminal Association ("BMTA"), maritime law, and the laws of the State of Maryland.[2]

On April 24, 2012, PAC filed a Motion for Summary Judgment or, in the alternative, for partial summary judgment. MRS filed an opposition to the motion on May 9, 2012, and, by Order of June 14, 2012, Administrative Law Judge Erin M. Wirth, who was then the presiding officer,[3] denied the motion for summary judgment. On the same date Judge Wirth issued a Briefing Schedule (which was subsequently amended) with which the parties have complied.

Upon review of the relevant evidence, applicable law, and the briefs submitted by the respective parties, I have concluded that the Complainant has not met its burden of proof of unlawful action by the Respondent. Accordingly, the Complaint is dismissed.

II. POSITIONS OF THE PARTIES[4]

A. THE COMPLAINANT'S INITIAL BRIEF[5]

The Complainant alleges that MRS is a corporation which is solely owned by the Vincent and Elaine Marino Family Partnership and is in the business of maintaining and repairing chassis and cargo containers for various steamship lines,[6] and inspecting and maintaining temperatures of refrigerated containers ("reefers" or "reefer boxes"). MRS further states that the Marino family has been in the business of marine repair services for forty years and has served the Port of Baltimore since 1974.

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[2]As will be shown, PAC has not pursued all of its defenses in its Reply Brief.

[3]This case was assigned to me by the Notice of Reassignment of October 24, 2012.

[4]For the sake of brevity, I will minimize the use of such phrases as, "according to ___" or "___ maintains". The summary of the positions of each party is not a judgment of their merits.

[5]On August 22, 2012, MRS filed a motion to strike PAC's brief and Proposed Findings of Fact on the grounds that it exceeded the allowable page limits. By Order of August 30, 2012, Judge Wirth granted the motion in part and denied it in part, while allowing MRS additional time to file a 120-page brief in addition to its responses to PAC's Proposed Findings of Fact.

[6]I will assume that the use of the term "steamship line" by either party is intended to include all ocean carriers regardless of their means of propulsion.

Seagirt and Dundalk are two of five public terminals in the Port of Baltimore. The terminals are connected by an inner connector bridge known as the Colgate Creek Bridge. MRS has conducted business operations at Dundalk and Seagirt since 1974 and 1990 respectively. MRS's main repair facility is located on the far eastern side of Dundalk and is leased from MPA. The lease with MPA, which is on a month-to-month basis, allows MRS to perform chassis and container work; the lease is for an on-dock facility.[7]

Until the allegedly unlawful actions by PAC as set forth in the Complaint, MRS had a customer base of around sixty for the inspection, repair, and/or maintenance of containers and reefers being discharged from ships at Seagirt and Dundalk. MRS would either make the repairs on-site at Seagirt or transport the containers and reefers by chassis to Dundalk via the Colgate Creek Bridge where it would perform the repairs at its Dundalk facility. If repairs were required to a chassis, MRS would either make the repairs on-site at Seagirt or arrange for a "yard hustler" (a vehicle used to move equipment or cargo within a marine terminal) to dray the chassis over the Colgate Creek Bridge to the MRS facility in Dundalk.

PAC is a marine terminal operator ("MTO") and is the only stevedore serving vessels calling at Seagirt. MRS and PAC "coexisted" at Seagirt for many years while competing for the work of maintaining and repairing dry containers.[8] By 2009 MRS and PAC each had about fifty percent of the M&R market. PAC does not perform repairs on reefers, so that, since at least 1996, MRS and Multimarine competed for reefer work at Seagirt and Dundalk, with each of the vendors splitting the amount of work fairly equally.

On December 16, 2009, PAC entered into a fifty-year Lease and Concession Agreement ("Master Lease") with MPA whereby PAC took over the day-to-day operation of Seagirt. PAC has used its powers under the Master Lease to achieve a monopoly on M&R work at Seagirt and has also used the Master Lease as a "tool to flex its competitive muscle" by tying stevedoring to M&R services, all to the financial detriment of MRS.

MRS bases its claim for relief on the proposition that PAC has violated the provisions of the Shipping Act at 46 U.S.C. § 41106 which states that a MTO may not:

> (2) give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person; or
>
> (3) unreasonably refuse to deal or negotiate.

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[7]Each of the parties uses the terms "on-dock" and "off-dock" to refer to locations that are either on or off of the marine terminals where the ocean-going vessels which they serve are berthed. I will use the same terminology.

[8]The term "dry containers" is used to distinguish them from reefers.

MRS need only prove its case by a preponderance of the evidence rather than beyond a reasonable doubt or by clear and convincing evidence.

MRS characterizes the following practices by PAC as unreasonable:

1. The creation of a monopoly over chassis and container repairs. Prior to the summer of 2011, MRS had access to the Colgate Creek Bridge to dray containers and chassis from Seagirt to its repair facility at Dundalk. The MPA monitored the movement of chassis over the bridge and imposed no charges to anyone for its use. MRS would notify PAC by e-mail as to the containers and chassis it intended to dray across the bridge. PAC would then generate a trailer interchange receipt ("TIR") for its records.[9] MRS was granted access to a portion of the "roadability lanes" at Seagirt where it could perform minor roadability repairs for its customers.[10] MRS was also permitted to perform maintenance and repair of reefers for its customers calling at Seagirt. (It is unclear whether such repairs were performed at Seagirt, at the MRS facility at Dundalk, or perhaps in both places depending upon the nature of the repairs.)

These practices "went on for years," thus contributing to a competitive environment at Seagirt for M&R work. The process came to an end when the Master Lease between PAC and MPA went into effect, thereby giving PAC control over daily operations at Seagirt.[11]

Although the Master Lease does not give PAC control over the Colgate Creek Bridge, PAC instituted a process whereby MRS could no longer use the bridge. PAC did so by instituting a new TIR process by which MRS was required to take containers and chassis out through the main gate of Seagirt. According to this process, MRS was required to obtain a TIR, and, if the chassis was damaged, to transport the chassis by flatbed truck through the main gate of Seagirt and onto

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[9]The TIR process provides a paper trail for the movement of the chassis and containers onto and off of marine terminals and other facilities. It also includes an inspection of equipment leaving the terminal. The operator of the TIR station charges a fee for equipment leaving the terminal.

[10]The parties agree that roadablility repairs are those that are needed to allow for the further movement of chassis on public highways. While they disagree as to whether such repairs should be described as "minor", that issue is of no consequence.

[11]MRS has stated repeatedly that it is not challenging the legitimacy of the Master Lease, but only the way in which PAC has used its power under the lease. The parties agree that the practices of which MRS complains, other than with regard to the terms of MRS's use of the Colgate Creek Bridge, have been suspended under the terms of a Standstill Agreement which was reached in connection with an action for injunctive relief which MRS brought against PAC in the United States District Court for the District of Maryland. The agreement will remain in effect during the pendency of this proceeding unless terminated earlier with the consent of the parties. PAC does not contend that the Standstill Agreement bars MRS from going forward with this proceeding or that any of the issues raised by MRS have been rendered moot.

Broening Highway (a public road), and then, presumably, through the main gate of Dundalk where it would complete the repairs at its facility. MRS would be subject to a TIR charge upon exiting Seagirt and again upon re-entry with the repaired container or chassis.

It is undisputed that, at the time the Master Lease went into effect, MRS leased space on Seagirt from the MPA and that, on January 8, 2010, the MPA informed MRS that, because of the Master Lease, MRS's lease was being assigned to PAC. It is also undisputed that, by e-mail messages of May 27, 2011, and thereafter, PAC informed MRS of its intentions as follows:

> a. That PAC would be moving all chassis[12] to the Canton Warehouse Property ("Canton")[13] and would be performing all maintenance and repair work on chassis both at Seagirt and at Canton.
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> b. That, as of June 6, 2011, chassis could no longer be drayed from Seagirt to Dundalk via the Colgate Creek Bridge.
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> c. That, as of June 8, 2011, PAC would be handling all drayage to and from Seagirt.
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> d. That no chassis were to be drayed across the Colgate Creek Bridge by MRS or any other vendor. If PAC were informed that chassis were moving across the bridge and avoiding the TIR lane (presumably at the Seagirt main gate) all privileges to enter Seagirt would be terminated.
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> e. That, as of October 1, 2011, all container repair work inside Seagirt would be performed by PAC, and that PAC would no longer allow vendors in its terminal.[14]

The purpose of the foregoing messages was, as reported by one of MRS's customers and as stated by a representative of PAC, to "kick [MRS] out of Seagirt." Following the announcement of its intentions in June of 2011, PAC began soliciting MRS's customers for their repair work.

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[12]It would appear that each of the parties has sometimes used the term "chassis" to refer to both chassis and containers. In any event, there is no evidence to suggest that chassis repairs are not typically performed at the same locations as are container repairs.

[13]PAC has emphasized repeatedly that, when the Canton facility is open, there will be a "level playing field" with regard to the repair of chassis since all vendors, and PAC itself, will be moving chassis off-dock for repairs. It is undisputed that the Canton facility has not yet opened; while implying that the facility will open in the near future, PAC has not provided a specific date. In any event, the opening of the Canton facility would not exonerate PAC from any prior violations of the Shipping Act.

[14]Presumably Multimarine is not included in this prohibition.

The net result of the above-stated actions, as intended by PAC, is to eliminate the ability of MRS to conduct any activity at Seagirt. PAC is now the only company that can perform marine repair services on-dock at Seagirt. Furthermore, PAC has eliminated what had once been easy access from Seagirt to the MRS facility at Dundalk over the Colgate Creek Bridge. The elimination of access to the bridge has increased MRS's cost of doing business; those costs must either be absorbed by MRS or passed along to its customers. All of the actions by PAC have resulted in an environment in which PAC will receive most, if not all, of the major chassis repair work and all of the minor, *i.e.* roadability, repair work.

MRS maintains that PAC has violated the Shipping Act by virtue of its status as the MTO at Seagirt. Specifically, PAC has given undue or unreasonable preference or advantage both to itself and to Multimarine. Furthermore, PAC has imposed undue and unreasonable prejudice and disadvantage against MRS and has unreasonably refused to deal and negotiate with MRS, all of which are in violation of the Shipping Act at 46 U.S.C. § 41106(2) and (3).

.MRS further maintains that, while antitrust principles are not strictly applicable to claims under the Shipping Act, they are instructive in the determination of the reasonableness of challenged practices. MRS cites antitrust decisions as indicating that, in order to support a violation of the Sherman Antitrust Act, a plaintiff must establish that the defendant possesses monopoly power and has engaged in the willful acquisition or maintenance of such power other than through superior products or historic accidents. MRS also cites the aforementioned cases for the proposition that a monopolist violates the Sherman Act when it acts to "foreclose competition, to gain a competitive advantage, or to destroy a competitor." MRS further cites antitrust precedent to the effect that exclusive dealing arrangements can be monopolistic.

MRS recognizes that while a party (such as PAC) does not have an unqualified duty to cooperate with a competitor (such as MRS), the failure to cooperate "may give rise to liability in certain circumstances." Such liability arises in the instant case where PAC, as a monopolist, has made important changes to the character of the market without demonstrating a valid business reason. The result of PAC's actions is to all but destroy MRS as an M&R vendor. This is true because MRS has not only lost customers, but employees as well.

2. The creation of a tying arrangement. PAC is the sole stevedore at Seagirt.[15] As such, PAC first bundled its stevedoring services with reefer services provided by Multimarine when, in 2006, it offered the bundled services to Atlantic Container Lines ("ACL"). The physical difference between stevedoring and M&R services is such that no efficiencies are achieved when they are bundled. Yet,

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[15]MRS has noted that PAC's revenue from M&R services is "insignificant" as compared to its revenue from stevedoring. According to MRS the approximate breakdown of PAC's income is 58% from terminal operations, 40% from stevedoring and about 2% from M&R services. Presumably, MRS is implying that, since M&R work is not a significant portion of PAC's business, its actions to promote that portion of its business are not economically justified. MRS has offered no legal support for this position.

in 2009 CSAV, another ocean carrier, accepted a bundling arrangement with PAC that included M&R services by PAC on its dry containers and reefer work by Multimarine. MRS alleges that PAC has entered into similar bundled arrangements with a number of MRS's former customers.

Prior to the bundling arrangements by PAC, MRS shared the reefer work at Seagirt with Multimarine on a fairly equal basis. However, MRS has since lost all of its major customers at Seagirt. In addition, its revenue from other customers who have entered into terminal services contracts with PAC has sharply declined.

According to MRS there is widespread customer dissatisfaction with PAC's practices in that a number of ocean carriers would prefer to use MRS for their repair work, but feel compelled to accept bundled service arrangements with PAC in order to receive discounted rates for stevedoring.[16] CSAV, for example, would allegedly like to continue to use MRS because of its expertise and good customer service. However, the logistical restrictions and additional TIR charges imposed by PAC make it too expensive for CSAV to allow MRS to continue to perform its repair work. CSAV has allegedly told MRS that, if it were no longer bound by the bundled contract with PAC, it would request open bids by all vendors, including MRS (and presumably PAC and Multimarine) to perform repair work on its dry boxes and reefers. However, the Terminal Services Agreement between CSAV and Ports America Baltimore ("PAB"), PAC's parent company,[17] provides for automatic renewal in one-year increments after the expiration of its initial three-year term on December 31, 2012. CSAV can only terminate the agreement for material breach by PAB subject to notice and the opportunity to cure the breach. Therefore, CSAV will be bound to the Terminal Services Agreement, and MRS excluded, "in perpetuity."

MRS also cites its experience with Hanjin Shipping ("Hanjin"), another of its former customers. Hanjin began using MRS in the 1990s when Seagirt opened. However, in June of 2011 Hanjin was advised by an employee of PAC that MRS had been "kicked off" of Seagirt and that PAC would be the sole vendor for on-dock repair service. Because the new procedures implemented by PAC, including a lift or handling fee for the movement of containers to be repaired by MRS, increased the cost of repair work other than by PAC, Hanjin has been using PAC for almost all of its repair work. Furthermore, Hanjin is likely to be forced to stop using MRS for reefer repair work if MRS is prohibited by PAC from performing the work on-dock.[18]

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[16] MRS has alluded to statements allegedly made on behalf of one of its former customers expressing fear that, if PAC eliminates all competition for stevedoring and repair work, it will be able to raise its rates without restriction. In any event, that situation has not yet arisen; this Initial Decision will address only past and current conditions.

[17] Since PAC has not alleged that PAB is a necessary party to this proceeding, I will treat the two entities as one in evaluating the alleged violations of the Shipping Act.

[18] MRS has alleged that Hanjin is concerned about what will happen if PAC is allowed to "solidify its monopoly" on all phases of the operation of Seagirt, including stevedoring, maintenance

Hanjin has not entered into a bundling arrangement with PAC. Nevertheless, Hanjin is concerned because other shippers have made such arrangements and because the bundling of services and other actions by PAC will put MRS out of the repair business. Hanjin will then have no ability to effectively negotiate prices or to insist on quality M&R work in what would be a one-vendor terminal.

MRS describes a similar experience with APL Limited ("APL"), a global transportation company which is primarily engaged in the container shipping business. MRS has performed all of APL's M&R work in Baltimore since 2007. APL is highly satisfied with the quality of work by MRS. When APL received the e-mail from PAC announcing that only PAC could perform M&R work at Seagirt, APL sent PAC its standard M&R contract. PAC thereupon informed APL that it would not agree to APL's contract, and instead sent APL its own contract which would require that PAC perform all M&R work, and that APL's reefer work would be performed by Multimarine, which was PAC's subcontractor. PAC told APL that, under the proposed contract, APL would receive a discount on M&R work of from 10 to 12%. Marc A. Compolongo of APL, who dealt with PAC, was under the impression that the discount offered by PAC was not a genuine savings because the costs would be "shifted to another location." Compolongo stated that he was also concerned because of possible union jurisdictional issues. APL has not entered into a bundling agreement with PAC and continues to do business with MRS while incurring additional charges imposed by PAC. Those charges will eventually make it cost prohibitive for APL to continue to use MRS for its repair work.

MRS also cites other of its former customers which have entered into bundling agreements with PAC whereby they are prohibited from using MRS for repair work. The contract between Maersk Lines and PAC prohibits Maersk Lines from using MRS's off-dock facility on Broening Highway.

The trucking community is unhappy with the prospect of having all chassis repairs moved off-dock. MRS does not allege that it is likely to suffer a competitive disadvantage or that PAC will enjoy an advantage because of the purported dissatisfaction of the trucking companies.

MRS contends that, by virtue of its bundling arrangements, PAC has made "a classic tying arrangement under the antitrust laws." In support of this contention, MRS cites the decision in *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 912 (9th Cir. 2008) ("*Cascade*"), which states that a tying arrangement occurs when a seller with market power over one product conditions the sale of that product on the buyer's purchase of a second product.

According to MRS, the unreasonableness of PAC's actions is to be evaluated in the context of the relevant product and geographic markets. MRS cites precedent to the effect that "a relevant product market defines the boundaries within which competition meaningfully exists" and that "a

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and repair. Since Hanjin is not a party to this proceeding and the events which it allegedly fears have not yet occurred, I will not address those concerns. It is significant to note that Hanjin has not entered into a bundled arrangement with PAC, although it is concerned about the lower stevedoring rates enjoyed by carriers which have such arrangements. It has not been alleged that Hanjin has been threatened with the loss of stevedoring services if it does not enter into a bundled contract with PAC.

geographic market is the area in which consumers can practically turn for alternative sources of the product and to which the antitrust defendants face competition."

MRS cites Judge Wirth's order of December 11, 2011, by which she denied PAC's motion to compel MRS to produce documents showing its business activities outside of the Port of Baltimore. In that Order, Judge Wirth determined that PAC had not demonstrated the relevance of such information and also determined that the relevant geographic market could not be larger than the Port of Baltimore. This is true because MRS does not operate outside of Baltimore. The geographic market in this case should be limited to Seagirt because of its status as the primary container terminal in the Port of Baltimore. Seagirt is one of five public terminals in Baltimore and is the only one which is devoted exclusively to containerized cargo. North Locust Point handles some containers but has been redeveloped to handle forest products. Dundalk handles containers, but also other types of cargo. None of the other publicly owned terminals handles any containers; MRS services customers only at Seagirt and Dundalk.

MRS proposes as an alternative that the geographic market could comprise the on-dock areas of both Seagirt and Dundalk. MRS's off-dock properties should not be included in the geographic market because PAC is in control of MRS's access to those properties inasmuch as PAC has denied MRS the ability to use the Colgate Creek Bridge to access its off-dock properties. Furthermore, PAC has "restricted" MRS's ability to perform roadability work at Seagirt and has restricted its ability to take roadability work off of Seagirt. The restrictions imposed by PAC have made MRS's use of its off-dock facilities *economically prohibitive. Therefore, PAC has, by its own actions, limited the* relevant geographic market to on-dock areas.

MRS does not contend that exclusive arrangements are invalid *per se*, but cites instances in which such arrangements have been ruled to be invalid. MRS sets forth the following rationale in maintaining that PAC has created an invalid exclusive arrangement:

1. The Master Lease between MPA and PAC has given PAC exclusive control of operations at Seagirt. MRS does not challenge the validity of the Master Lease, but only the way in which PAC has exercised its power under the lease. MRS further asserts that the Master Lease does not give PAC immunity with respect to its anti-competitive behavior and that the lease expressly states that PAC is prohibited from using the leased premises "for any unlawful purpose."

2. PAC has asserted its exclusive status under the Master Lease so as to eliminate stevedoring competition in Baltimore. A representative of PAC has allegedly stated that its goal is to drive Ceres (a stevedore at other terminals in Baltimore) out of business in the Port of Baltimore.

3. PAC has further solidified its control by offering bundled pricing packages by which customers receive discounted stevedoring rates for agreeing to contract with PAC for all M&R work.

4. By asserting its exclusivity, PAC achieves the advantages of volume which allows it to keep its stevedoring rates low. It then uses those low rates to tie M&R services to stevedore services.

MRS cites a number of cases in which exclusive arrangements were found to have violated the Shipping Act. MRS also cites Commission precedent to the effect that the power to control access to terminal facilities is subject to the greatest potential for abuse and that Commission oversight should focus on ensuring that there is reasonable and nondiscriminatory access to such facilities. The test of the reasonableness of terminal practices is that, in the words of the Commission, they "must be lawful, not excessive, and reasonably related, fit and appropriate to the ends in view." MRS further argues that the Commission has held that the reasonableness of a party's actions must be evaluated according to the parameters of the Shipping Act rather than standards established by other statutes or the terms of contracts.

According to MRS, it is not necessary for it to show a triangular relationship in order to establish that PAC has acted contrary to the Shipping Act. Even if that were not so, the circumstances of this case show that PAC, in its role as a MTO and a monopolistic stevedore, has preferred itself as the sole provider of M&R services at Seagirt. Furthermore, a triangular relationship clearly exists with regard to Multimarine.

After 36 years of successful operation, MRS has suffered the near destruction of its business because of PAC's anti-competitive activity and is therefore entitled to reparations. MRS refers to the report of its expert David Deger in support of its claim for reparations in the amount of $2,714,000.00 for lost business and $9,000,000.00 for loss of the value of its business if PAC's practices continue. Deger's methodology, which is the "before and after" approach, compares MRS's revenue before and since the commencement of PAC's activity; it is one of the two most common methods of quantifying damages arising out of anti-competitive conduct. Deger's calculations are supported by the figures shown in his report. MRS asserts that Deger is well qualified in the field of accountancy and that his calculations are based upon his examination of pertinent documentation and interviews of knowledgeable representatives of MRS.

B. THE RESPONDENT'S BRIEF

PAC is the exclusive lessee of Seagirt under the terms of a 50-year Lease and Concession Agreement with the State of Maryland ("State") which went into effect in January of 2010. PAC was selected by the State after a competitive bidding process. PAC further maintains that the issue in this proceeding is whether PAC may lawfully perform all of its own M&R work for its own customers at Seagirt or whether it is required to allow MRS to come onto Seagirt to perform M&R work for PAC's customers.

PAC identifies itself as a stevedore and MTO which has, through predecessors in interest, been operating in the Port of Baltimore since 1921. PAC began offering M&R services to its steamship line customers in 1999 at the request of its customer Hapag-Lloyd. PAC, through its sister companies, also operates in a number of other U.S. ports in the South Atlantic Range, but does not offer M&R services other than in Baltimore.

Seagirt was operated by the MPA prior to 2009, during which time it had leases and other

agreements with a number of companies which provided services to steamship lines calling at Seagirt. Among those entities were PAC (as a stevedore and MTO), MRS (as an M&R vendor), Multimarine (as an M&R vendor specializing in reefer work), and companies offering various other types of services such as tugs and line handling. Similar arrangements were also in effect at Dundalk, an adjacent marine terminal which was also operated by MPA; both PAC and MRS were among the companies operating at Dundalk. Cargo moved between Seagirt and Dundalk over the Colgate Creek Bridge, which MPA solely monitored and maintained.

Pursuant to the arrangement as described above, MRS had its main on-dock repair facility at Dundalk under a month to month lease with MPA at a cost of $1,770.00 per month. The lease was amended from time to time between 2005 and 2009 so as to adjust the amount of leased space in accordance with MRS's needs. On or about February 16, 2001, MRS also entered into a month to month lease with MPA for space at Seagirt. This space was primarily used by MRS for chassis inspection; MRS either performed repair work at Seagirt or drayed damaged chassis and containers over the Colgate Creek Bridge to its main repair facility at Dundalk.

With the inception of MRS's lease for space at Seagirt, it enjoyed a "free ride" at both Seagirt and Dundalk. In support of that contention, PAC states that, under its lease of November 16, 2001, MRS was paying MPA $243.34 a month for its space at Seagirt. Furthermore, in order to perform its work at Seagirt and Dundalk, MRS would routinely borrow heavy equipment from PAC or its predecessors or from Ceres free of charge. MRS rarely paid to maintain or repair that equipment and rarely paid for fuel.

Beginning in 2008 the worldwide economic recession, which affected the real estate market and financial institutions, also had an impact on the ocean shipping industry in that the volume of cargo was down while prices and costs went up. In 2009 MRS experienced a reduction in its work volume which forced it to lay off some of its employees and to cancel its lease with MPA for space at Dundalk. The weakened economy also affected the Port of Baltimore as a whole and, in 2009, MPA determined that, in order for the port to meet competition from its East Coast competitors, it would need to make major improvements to Seagirt. In particular, the MPA determined that Seagirt would require a new 50-foot deep berth and larger container cranes in order to accommodate the larger oceangoing cargo vessels that would be transiting the enlarged Panama Canal beginning in 2014. If those improvements were not made to Seagirt, the Port of Baltimore would not be able to compete with its East Coast competitors and would lose a significant amount of container business and jobs to the other ports.

In order to achieve the needed improvements to Seagirt, the State of Maryland sought to create a public-private partnership to finance the improvements. The MPA had previously entered into such partnerships on a smaller scale since the 1990s. In creating those partnerships, MPA had entered into leases with MTOs under which the MTOs were obligated to pay for terminal infrastructure improvements. However, the arrangement which the State contemplated for Seagirt was "ground-breaking" in view of the size of the financial obligation to be assumed by the MTO. The arrangement at Seagirt set the standard for similar public-private partnerships at other ports.

MPA implemented its decision to create a public-private partnership at Seagirt by issuing a Request for Proposals to operate Seagirt pursuant to a long-term lease. Bids were submitted by PAC and Ceres, after which MPA entered into discussions with each company. Those discussions led to PAC being the only entity to submit a final bid to operate Seagirt. On December 16, 2009, after extensive arms-length negotiations, MPA entered into the 50-year Lease and Concession Agreement with PAC.[19] The Master Lease went into effect on January 12, 2010; under its terms PAC was required to make a capital reinvestment payment of $140 million (backed by a bond issue) as well as an annual use and operating fee of $3.2 million. PAC is also obligated to finance the construction of a 50-foot draft berth and to install four new Panamax cranes at a cost of $105 million. PAC is obligated to "invest" over $1.3 billion in improvements and payments over the 50-year term of the Master Lease.

In return for its assumption of the financial obligations set forth above, PAC has been granted the exclusive right to perform certain "permitted operations" at Seagirt and on the Canton Warehouse Property. The permitted operations 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." The Master Lease also prohibits the MPA from leasing or operating, or permitting third parties to lease or operate, new maritime container terminals on State property for fifteen years.

In entering into the Master Lease, PAC effectually purchased the powers of which MRS is complaining. This kind of public-private partnership is neither anti-competitive, unusual, nor unreasonable as shown by the expert opinion of Peter Keller who is a former steamship line executive. Similar arrangements have been made by "cash-strapped" port entities in virtually every port in the United States. Furthermore, the Master Lease does not give PAC a monopoly since the lease does not prevent other companies from competing for all of the permitted services at locations in Baltimore besides Seagirt, or at other ports which are in direct competition with Baltimore.

MRS has known for years that, due to changing conditions in the maritime industry, its ability to come and go freely at Seagirt was coming to an end. MRS anticipated the changes in 2008 when it began looking at off-dock rental property where it could establish its own container and chassis repair facility. Finally, in March of 2010, MRS leased ten acres at 4500 East Lombard Street which is near Seagirt and Dundalk. In August of 2010, MRS leased about ten acres from MPA at Broening Highway ("former Duke property"), which is very close to Seagirt. The lease for the former Duke property permits MRS to perform container and chassis repair work and to store containers at that site. The result of MRS's leases is that almost all of the work that it formerly performed at Seagirt can now be performed at its main repair facility at Dundalk or at its two off-dock facilities. Since the opening of its two off-dock facilities, MRS has obtained new repair work from a number of steamship lines as well as from customers other than steamship lines; some of this work was taken away from PAC.

Prior to the effective date of the Master Lease, MRS operated at Seagirt under a month to month

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[19]This is the agreement which MRS has cited as the Master Lease. I will continue to use that terminology.

lease which could have been terminated by either party on a month's notice. Therefore, MRS had no guarantee that it could have continued its presence at Seagirt. When the Master Lease went into effect, MPA assigned MRS's lease to PAC along with other leases and contracts between MPA and other entities that were providing services at Seagirt. MPA informed MRS of the assignment by letter of January 8, 2010. PAC did not immediately evict MRS so as to allow MRS time to transfer its operations to Dundalk and to its off-dock facilities. When it eventually became apparent to PAC that MRS was making no attempt to move, PAC was forced to "accelerate the process" beginning in around June of 2011.

After the Master Lease went into effect, PAC gradually began to take over certain operations at Seagirt, either directly or through its subcontractor Multimarine. Such operations included reefer monitoring, container repair, and roadability work which had been performed by MRS. PAC also took over the TIR process in order to meet its responsibility for keeping track of equipment moving onto and off of Seagirt. Because the International Longshoremens Association ("ILA") has jurisdiction over the work of inspecting equipment as part of the TIR process, PAC charges a fee, or "gate charge", to recoup the cost of ILA labor. The amount of the gate charge is set by the Baltimore Marine Terminal Association ("BMTA") which is a marine terminal conference to which PAC belongs.

On June 28, 2011, PAC notified all Seagirt users, including MRS, that it would no longer allow equipment to be drayed onto and off of Seagirt across the Colgate Creek Bridge. (The notice did not specifically state that PAC itself would no longer use the bridge.) Henceforth all equipment would have to exit and enter Seagirt through the main gate and go through the TIR process. MRS has acknowledged that, under this procedure, it is able to dray chassis from Seagirt to its repair facility at Dundalk, which is a distance of less than one mile, by going through the main gates at Seagirt and Dundalk. PAC acknowledges that the Colgate Creek Bridge is not part of the leased premises, but states that, under the Master Lease, it is required to maintain the bridge and is responsible for half of the cost of its maintenance. It therefore follows that PAC has an interest in minimizing traffic over the bridge so as to cut down on wear and tear which would affect the cost of maintenance. Neither MRS (nor presumably any of the other vendors or users of Seagirt and Dundalk) pay any part of the maintenance cost.

While the BMTA Schedule includes a gate charge (currently $47.86 per unit), most steamship lines have a throughput rate under their service agreements with PAC which includes the TIR charge. The throughput rate eliminates the requirement for the payment of an additional TIR charge. This means that, when MRS is providing repair services to a steamship line which has a service contract with PAC, neither MRS nor the steamship line would be required to pay a gate charge or any gate charge upon leaving Seagirt.[20]

PAC is in the process of requiring that all chassis repair work be performed outside of Seagirt and off-dock. This change is in accordance with the modern trend throughout the country. According

[20]It is unclear whether a gate charge would be assessed upon entering or leaving Dundalk or an off-dock facility.

to Keller's expert opinion, terminal operators are moving nonproductive assets, such as chassis and containers, off-dock so as to increase the availability of productive on-dock space. Furthermore, the maritime industry in the United States is moving away from the practice of providing free chassis to the beneficial owners of cargo and to truckers for the movement of containerized cargo. Instead, the industry is adopting the "trucker model" whereby chassis are provided by trucking companies. Under this model, the trucking companies rather than the steamship lines control chassis repairs. Under the trucker model it would not make sense to perform chassis repairs on-dock because it would always be cheaper for truckers to make the repairs off-dock, particularly if the repairs could be made by non-ILA labor.

The Complaint by MRS is the result of the changes described above. None of those changes are unreasonable, nor have any of them been directed solely against MRS. On the contrary, the changes apply equally to each entity doing business at Seagirt. The essence of the Complaint is that MRS wants to do business the way it did before the Master Lease went into effect. According to PAC, MRS is unable to accept the fact that its "free ride" is over and that it must now learn to compete for M&R business in new ways at its on-dock facility at Dundalk and its off-dock facilities on East Lombard Street and Broening Highway. Any apparent advantage enjoyed by PAC is the result of the fact that it has incurred obligations to the State in the amount of $1.3 billion. PAC must recoup its payments to the State through fees for the services it provides at Seagirt, including M&R services. MRS has no such overhead and should be able to effectively compete with PAC if it were to run its business efficiently and carefully.

PAC makes the following arguments in support of the proposition that MRS has not shown that PAC has acted unlawfully:

1. The Commission lacks jurisdiction over the subject matter of this proceeding. The Shipping Act governs actions by MTOs. While PAC is a MTO, the furnishing of M&R services is not "directly related to the delivery and handling of property" within the meaning of the Shipping Act and, consequently, does not fall within the definition of "marine terminal services." Since M&R services are not within the statutorily defined functions of a MTO, the Commission lacks jurisdiction in this case.[21]

In support of its jurisdictional argument PAC notes that MRS, which performs only M&R work, is not a MTO. MRS has not registered with the Commission as a MTO and does not publish a public

[21]PAC acknowledges that roadability repairs and reefer monitoring are marine terminal services. However, PAC maintains that the roadability work will move off-dock from Seagirt when the Canton Warehouse Property opens. Reefer monitoring is a marine terminal service since, by its nature, it must be performed on-dock because it involves the monitoring of temperatures inside of reefers that are plugged into shore power in the terminal. Since PAC does not do reefer monitoring, the only issue which may be within the jurisdiction of the Commission is whether PAC has acted reasonably in selecting Multimarine as its subcontractor in order to meet the needs of its steamship line customers.

schedule of its rates and charges. Neither containers nor chassis are cargo. Containers can only be repaired when empty of cargo, and chassis can only be repaired when they are not carrying cargo. All M&R services, with the exceptions noted, can be performed off-dock and are currently being performed off-dock by MRS at its Broening Highway facility.

PAC further asserts that the drafters of the Shipping Act did not intend to grant the Commission a "roving license" to address matters that are only tangentially related to ocean transportation. The Commission's assertion of jurisdiction in this case would open the door to its attempt to regulate other off-dock services such as ship agency, marine surveying, and dredging.

2. Even if M&R services are within the jurisdiction of the Commission, MRS must prove by a preponderance of evidence that PAC has acted unreasonably in violation of the Shipping Act. In order to prevail, MRS must show by a preponderance of evidence that PAC has engaged in anti-competitive conduct which has resulted in demonstrable harm to competition in the relevant market. MRS is unable to meet its burden of proof in view of the lack of any substantial evidence that PAC has violated the Shipping Act.

PAC maintains that the relevant geographic market is comprised of all South Atlantic ports in which MRS, directly or through its corporate parent and affiliates, does business. Judge Wirth's Order of December 11, 2011, was not a determination that the relevant market was no larger than the Port of Baltimore. Rather it was no more than a ruling on the permissible scope of discovery at an early stage of this proceeding. MRS's contention that the relevant market is confined to Seagirt is spurious because MRS performs M&R work at its off-dock facility which is less than a mile from Seagirt. Furthermore, none of MRS's current customers requires that its M&R work be performed at Seagirt.

PAC further argues that MRS is relying on an artificial separation of its Baltimore operations from its activities in other South Atlantic ports. MRS shares common corporate officers with its affiliates in other ports and regularly transfers revenue from its Baltimore operation to its corporate parent which is located out of state. The fierce competition between ports is such that any attempt to create a monopoly in Baltimore would cause steamship lines to divert to competing ports; in fact, a representative of MRS has stated that one of its customers diverted to another port where it is using a MRS affiliate for its M&R work. In addition, containers and chassis are portable and can readily be sent to other ports for repairs.

Even if the relevant market were limited to the Port of Baltimore, MRS has not met its burden of showing that PAC has a monopoly on M&R work. Besides PAC, MRS also considers its competitors to be Multimarine for reefer work and Picorp, Inc. of Baltimore ("Picorp") for off-lease container and chassis repair work. The market shares of Multimarine and Picorp must be taken into account in determining the relative market shares of MRS and PAC. MRS has offered no reliable or non-speculative evidence regarding the market shares of Multimarine and Picorp and, consequently, cannot present a *prima facie* case that PAC has engaged in unlawful practices.

PAC maintains that, while antitrust principles may be helpful in assessing alleged violations of the Shipping Act, they are not controlling. Stated otherwise, actions which might be found unlawful by the Department of Justice or the Federal Trade Commission are not automatically in violation of the Shipping Act. Furthermore, exclusive arrangements under a lease or other contract are not necessarily unreasonable within the meaning of the Shipping Act and the nature of the exclusive dealing in this proceeding is not such as to trigger "burden shifting" such as would require PAC to justify its actions.

MRS has acknowledged that PAC's exclusive status at Seagirt arises out of the Master Lease. MRS is not challenging the validity of the Master Lease, but only the legality of PAC's exercise of its contractual right of exclusivity. The Commission's adoption of MRS's position would call into question the enforceability of all "quiet enjoyment" leases of space in marine terminals regulated by the Commission and would require that their exclusivity provisions be affirmatively justified by the parties to the leases. Such an expansion of Commission precedent is unsupported by applicable law.

In arguing that current federal policy does not disfavor exclusive arrangements, PAC acknowledges long-standing Commission precedent to the effect that respondents bear the burden of justifying exclusive arrangements. According to PAC, the Commission's policy is outdated and is a "plain error of law." PAC cites more recent judicial decisions and Commission rulings stating that exclusive arrangements are not disfavored and that such arrangements must be judged on their individual merits. The shifting of the burden of proof to PAC would violate the requirement of the Administrative Procedure Act, *5 U.S.C. § 556, that the proponent of an order carry the burden of* proof by substantial evidence.

PAC argues that the Supreme Court has ruled that the mere possession of monopoly power is not unlawful. While PAC is not a monopolist, it has made a substantial investment in the development of Seagirt and the Port of Baltimore. If the Commission accepts MRS's attempt to achieve the "enforced sharing" of PAC's facilities, it will discourage similar private investment in port development.

According to PAC, there is no triangular relationship in this case since there is nothing in the Shipping Act to require PAC to allow MRS to use its leased facilities to compete with it. MRS has tried to manufacture a triangular relationship after the close of discovery by claiming that various steamship lines are dissatisfied with PAC's policies. In support of its position, MRS has submitted affidavits from lower level employees of the steamship lines who were not the ultimate decision-makers in their employers' decision to shift their business to PAC. Those affidavits are "filled with hearsay" and are contradicted by affidavits of other employees of the same steamship lines to the effect that the lines chose PAC because they wanted an "all-in" contract to cover all of their stevedoring, marine terminal, and related work in Baltimore. They also wanted to take advantage of the lower rates offered by PAC and were satisfied with the quality of the services provided by PAC. They did not feel compelled to use PAC as their M&R vendor.

PAC maintains that its operations at Seagirt are not unreasonable in view of the benefits

arising out of its substantial improvements to Seagirt. Those improvements would not have been possible without the public-private partnership between PAC and the State through MPA. PAC would not have agreed to the partnership if it had not been granted exclusivity at Seagirt because, without that exclusivity, its private investors would not have pledged the $1.3 billion in capital to fund the improvements. A ruling by the Commission in favor of MRS would create a serious obstacle to current and future public-private partnerships and would run counter to governmental policy and legislation encouraging such partnerships.

The exclusivity provisions of the Master Lease are reasonable inasmuch as they allow PAC to derive sufficient revenue from its operations at Seagirt to meet its debt obligations to the State of Maryland. If MRS were to prevail, PAC's revenues from Seagirt would be "siphoned off" by other vendors, thus preventing PAC from meeting its obligations to the State. If PAC is forced to allow other vendors to operate on its leased premises, the covenant of quiet enjoyment to which it is entitled under the Master Lease would be voided and PAC would have grounds to terminate the Master Lease.

The M&R services provided by PAC do not have a material effect on the relevant market, since MRS is the dominant provider of M&R services in the South Atlantic range. Even if the relevant market were limited to the Port of Baltimore, MRS's inability to operate at Seagirt would have a minimal effect on competition since MRS already operates at Dundalk (which is next door to Seagirt) and at two off-dock properties near Seagirt. Once the Canton Warehouse Property opens as the off-dock chassis yard for Seagirt, all chassis repairs in Baltimore will be performed off-dock;[22] MRS has admitted that there will then be a level playing field.

The ability of MRS to compete with PAC for M&R work is further demonstrated by MRS's acknowledgment that its time/task rates are lower than those of PAC (impliedly allowing MRS to offer lower prices to current and potential customers) and that, even after the filing of its Complaint, MRS took some business away from PAC. Steamship lines such as Yang Ming and APL prefer to use MRS, and some lines that currently use PAC for M&R work have indicated that they will be accepting bids for M&R work after the expiration of their contracts with PAC. This will allow MRS to bid for that work.

PAC cites various examples of inadequacies and inefficiencies in MRS's service which resulted in MRS billing steamship lines at higher rates than the bills submitted by PAC in spite of the fact that PAC's time/task rates are higher. In summary, MRS has all the tools it needs to compete in Baltimore, but needs to find new and more efficient ways of doing so.

MRS has failed to meet its burden of proof that PAC has unlawfully tied its M&R work to its stevedoring work because there is no credible evidence either that PAC has conditioned its provision of stevedoring services or marine terminal services at Seagirt upon the use of PAC's M&R

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[22]It is unclear whether PAC is referring to chassis repair work from Dundalk as well as from Seagirt.

services or that M&R services are not wanted by steamship lines calling at Seagirt. PAC cites a number of instances when steamship lines solicited PAC to bid on M&R work after which PAC submitted competitive bids. Those steamship lines sought out PAC for "one-stop shopping" and lower overall costs. There was never any attempt by PAC to precondition its stevedoring or marine terminal services on the acceptance by the steamship lines of PAC's M&R services. Furthermore, there is no evidence that any steamship line has entered into an M&R contract with PAC which prevents the line from using MRS for M&R work at locations other than Seagirt.

In offering bundling arrangements, PAC is merely offering M&R services to its customers that already want and need such services.[23] There is no credible evidence that PAC's customers have complained of the quality or price of the M&R services provided by PAC.

MRS has failed to prove that PAC has engaged in unlawful discriminatory conduct at Seagirt. There is nothing in the Shipping Act that requires PAC to allow MRS to come onto PAC's leased premises, including the Canton Warehouse Property, so as to compete with it. Similarly, PAC has not acted unlawfully in selecting Multimarine as its preferred vendor for reefer work.

PAC maintains that it has sound business reasons for performing M&R services itself or through Multimarine as part of its overall operation of Seagirt. By doing so, PAC is offering its customers cost savings and efficiency through single contracts covering all of their needs for stevedoring, marine terminal services and M&R work in Baltimore. Among PAC's sound business reasons are quality control and safety issues for itself and its customers. MRS has a poor safety record, while Multimarine is, in PAC's estimation, the safest provider of reefer services in Baltimore.

PAC also maintains that the Shipping Act does not empower the Commission to require a lessee of a container terminal to permit a third party to "intrude" into the terminal to conduct business. Such an order by the Commission would constitute an unlawful and unconstitutional taking of PAC's property rights. The Takings Clause of the Fifth Amendment prohibits the federal government from taking private property for public use without just compensation, thus protecting the rights of private owners and lessees.[24]

According to PAC, an order by the Commission requiring that MRS be allowed to enter PAC's leased property could expose the Commission to liability for damages for the value of PAC's "investment-backed" expectations. Such liability on the part of the Commission could arise out of

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[23]MRS has not alleged that PAC is providing M&R services to entities other than its current or prospective customers for stevedoring and marine terminal services. Furthermore, MRS has not alleged that Multimarine is providing, or has attempted to provide, reefer services out of its Seagirt facility to entities other than PAC's customers at Seagirt.

[24]PAC does not specifically state that an order allowing MRS to operate on its leased premises would amount to a taking for public use. It has not argued that MRS is either a government agency or a surrogate for any level of government.

an inverse condemnation action before the Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491. The Commission could also be found to have violated the Antideficiency Act, 31 U.S.C. § 1341, which prohibits the incurring of obligations or expenditures in excess of or in advance of appropriations.

The Commission has no power of eminent domain or of condemnation and thus no authority to engage in "constitutionally protected takings." Neither has the Commission been authorized to acquire real property, which is a prerequisite to general condemnation authority.

PAC raises the following points in response to the arguments of MRS that, supposedly, it has not already addressed:

1. MRS has not proven that PAC has a monopoly over container and chassis repairs in Baltimore. The fact that MRS's cost of doing business may have increased due to the Master Lease does not render PAC's M&R operations in Baltimore a monopoly. MRS admits that, under the Master Lease, PAC was entitled to set its own rules for operations at Seagirt. However, PAC did not immediately terminate MRS's month to month lease, but gradually implemented changes.

Among the changes made by PAC was to "try" to close the Colgate Creek Bridge to all traffic so that equipment entering or leaving Seagirt would be required to pass through a TIR inspection at the main gate. There were two reasons for this change: one was to prevent theft since historically the Colgate Creek Bridge had been used to "spirit away" equipment through the "back door" of Seagirt. Secondly, the TIR inspection ensured that equipment leaving Seagirt met federal roadability standards. PAC wanted to avoid liability for traffic accidents on the highway. It was inefficient "from a staffing perspective"[25] and less secure for PAC to man a second TIR gate at the Colgate Creek Bridge, particularly as there was no space for roadability inspections. MRS has acknowledged the need for a TIR process at Seagirt and has, in fact, established its own TIR procedure at its off-dock facility on Broening Highway.

The revised TIR process does not always result in additional costs to MRS and its customers since, if the customer had a stevedoring and marine terminal contract with PAC for services at Seagirt, that customer would probably have arranged for a throughput rate, thus relieving it of additional TIR charges. Even if that were not so, the additional charges were applied to all Seagirt users in accordance with the BMTA Schedule. In addition, the fact that the actions of one competitor increase the costs of another competitor does not, in itself, mean that those actions are unreasonable. Any competitive advantage which PAC now enjoys will be eliminated with the opening of the Canton Warehouse Facility, at which time all chassis repairs in Baltimore will be performed off-dock.[26]

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[25]Presumably this means more costly.

[26]PAC sometimes refers to the Canton Warehouse Facility as the Canton Warehouse Chassis Yard. It is unclear if this facility will only be used to repair chassis and, if so, whether PAC intends to continue repairing containers on-dock at Seagirt.

PAC's decision to move all chassis repairs off-dock was not made to penalize MRS, but to conform to modern trends toward maximizing the availability of on-dock space for cargo handling and storage.

PAC denies that it began to solicit MRS's customers shortly after it announced its intention to move MRS off of Seagirt. PAC began doing M&R work in 1999 when it was first approached by its customers to add M&R work to the marine terminal and stevedoring services that it was already providing.

2. MRS performs container and chassis repairs at Dundalk and at its off-dock facilities. MRS does not deny that it competes with PAC for container and chassis repairs at its Dundalk facility and at its off-dock facilities at East Lombard Street and Broening Highway. Since June of 2011 MRS has obtained new M&R work from APL and Yang Ming and from non-steamship line customers at its Broening Highway facility. MRS admits that all of its major customers that have transferred their business to PAC had the option not to make the transfer, but chose to do so after MRS failed to match the offers made by PAC. MRS declined to match PAC's offers because MRS felt that it would be "subsidizing the repairs." Customers such as ACL shifted their M&R work to PAC because of cost savings, but continue to give some of that work to MRS and would be willing to consider MRS upon the expiration of their contracts with PAC.

The planned closing of the Colgate Creek Bridge for other than an emergency exit does not prevent MRS from doing business in Baltimore. In order to move a container from Seagirt to Dundalk, MRS need only dray it out of Seagirt's main gate and travel less than a half mile to the Dundalk main gate, and from there to its repair facility at Dundalk. The fact that this process might increase MRS's costs does not render PAC's operations illegal.

In 2010 and 2011 MRS made a substantial investment in purchasing toploaders and yard hustlers for use at its facilities at Dundalk and Broening Highway. MRS would not have made this investment if it did not envision that it had a future in Baltimore in spite of the fact that it could no longer perform M&R work at Seagirt.

3. If M&R services are subject to regulation under the Shipping Act, they must be marine terminal services. PAC repeats its assertion that it is "questionable" whether M&R services are within the jurisdiction of the Commission. However, if its jurisdictional argument is rejected, then M&R work must fall within the definition of marine terminal services. There can be no tying as a matter of law since PAC, as a marine terminal operator, is simply adding an additional marine terminal service to those which it already provides to its steamship line customers.

4. Since PAC is a MTO, there can, as a matter of law, be no unlawful tying of the two products at issue since they are of the same type. PAC asserts that MRS's allegation of unlawful tying of stevedore services to marine terminal services is factually untrue. Furthermore, PAC has no contracts with steamship lines calling at Seagirt which are strictly for stevedoring services; rather, all of its contracts are for both stevedoring and marine terminal services. If any of PAC's customers choose to use PAC for M&R work, that work would be a "product" related to marine terminal

services rather than to stevedoring. Accordingly, the allegedly tied services are not separate and distinct and cannot, as a matter of law, give rise to a finding of unlawful tying.

5. The affidavits submitted by MRS as to illegal tying are hearsay, incomplete, incorrect, and/or contradicted by higher level or more knowledgeable personnel from the same steamship lines.

6. MRS has failed to prove that 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 relied on Commission rulings that stand for the proposition that exclusive arrangements must meet the standards for reasonableness under the Shipping Act. PAC agrees with that proposition, but maintains that those cases are either not factually on point or are otherwise distinguishable from the facts in this proceeding.

7. Even if MRS could meet its burden of showing that PAC has engaged in unlawful conduct, it is not entitled to reparations. PAC restates its argument that Deger is not qualified to give expert testimony as to MRS's entitlement to reparations and incorporates by reference its motion to strike Deger's testimony. Deger lacks the requisite familiarity with the shipping industry as well as the appropriate experience and training necessary for a calculation of damages arising out of lost profits in this case.

PAC further argues that MRS has failed to prove its entitlement to reparations with a reasonable degree of certainty. MRS has presented no evidence in support of its claim for reparations other than Deger's report and opinion. There is no reliable evidence that PAC's conduct was the proximate cause of the decline in MRS's revenue after 2008, which is when the U.S. economy went into a "free fall" and when, by MRS's own admission, the steamship industry in general was experiencing difficulties which were the result of a decrease in the volume of cargo, the lowering of freight rates, and an increase in costs. None of those factors were taken into account by Deger. Deger's opinion is based on erroneous factual assumptions and inappropriate methodology.

III. COMPLAINANT'S REPLY BRIEF[27]

MRS asserts that the Commission has subject matter jurisdiction in this proceeding. Even though MRS is not a MTO, it has standing to pursue its claim by virtue of the provision of the Shipping Act, 46 U.S.C. § 4301, which states that "any person" may file a complaint. PAC is a proper respondent since, by its own admission, it is a MTO. Accordingly, PAC is subject to the provisions of 46 U.S.C. § 41106 which prohibits MTOs and others from imposing undue or unreasonable prejudice or disadvantage and from unreasonably refusing to deal or negotiate. PAC's jurisdictional argument and case citations involve the application of 46 U.S.C. § 41102(c) which requires common carriers, MTOs, and ocean transportation intermediaries to maintain "just and reasonable regulations and practices relating to or connected with receiving, handling, storing or

[27]I will not summarize the portions of MRS's Reply Brief in which it restates the arguments contained in its Initial Brief or goes beyond a rebuttal of PAC's Brief.

delivering property." Section 41106 of the Shipping Act is considerably broader and requires no nexus with the handling, storing, or delivery of property.

In order to prevail in this proceeding, MRS must meet the burden of proof by the preponderance of the evidence. PAC no longer contends that the burden of proof is by clear and convincing evidence.

MRS argues that PAC has cited no legal support for its contention that MRS is relying on inadmissible hearsay. PAC should not be heard to complain about MRS's reliance on declarations when PAC has also relied on such declarations. When, as here, the parties are to present their cases by written submissions, Commission procedure contemplates the use of the declarations of witnesses whose statements have not been subject to cross-examination.[28]

In advocating that the relevant market encompasses all container ports in the South Atlantic Range where MRS does business, PAC does not specify which ports should be included. In any event, PAC's omission is immaterial since MRS operates only in Baltimore. This fact is not contradicted by evidence that MRS's sister corporations operate in other ports or that MRS's officers live outside of Maryland. Contrary to PAC's assertion, MRS and its sister corporations do not file consolidated financial reports or tax returns.

According to MRS, PAC has failed to effectively refute the evidence as to monopolization. Specifically, PAC admits that the Master Lease does not give it control over the Colgate Creek Bridge. PAC's alleged justification for closing the bridge, *i.e.*, to prevent theft of equipment, is belied by the fact that MRS has never been accused of theft and has never been notified by PAC that equipment had been stolen.

PAC's second rationale for closing the bridge and implementing the TIR process is to ensure compliance with the Federal Highway Motor Carrier Safety Act ("FHMCSA") and its implementing regulations, 49 C.F.R. § 385.1, *et seq.* However, PAC has not established that, as a MTO, it is subject to the regulations. Even if that were not so, the regulations provide no justification for PAC's conduct. PAC did not cite the FHMCSA regulations when it informed MRS that it no longer would be allowed to perform roadability work at Seagirt. In addition, PAC has misused its control over Seagirt by giving its guards and union employees "monetary incentives" to impact the inspection, maintenance, and repair services at Seagirt. PAC's guards prohibit chassis from leaving Seagirt until they are inspected by ILA longshoremen who are being instructed by PAC. The inspections are perfunctory; chassis are allowed to pass inspection in order to eliminate repair work for MRS. PAC has stated its intention to ultimately prevent MRS from draying any chassis across the Colgate Creek Bridge, even if MRS has been authorized by steamship lines or chassis pools to make the necessary repairs.

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[28]The arguments of the parties as to the weight and admissibility of the evidence will, if relevant to material issues, be addressed in the portion of this Initial Decision which deals with findings of fact.

The fact that MRS is leasing off-dock property does not mean that it is competing with PAC for M&R work since the logistical and economic costs of performing chassis repairs off-dock puts MRS at a competitive disadvantage. The only reefer repair work that MRS is performing at its Broening Highway facility is for NYK Line ("NYK"). NYK uses trucks to transport cargo to Baltimore; its cargo never goes on-dock so that off-dock repairs are appropriate. In contrast, a reefer coming off of a ship must be checked on-dock; it will not be released at the main gate if the temperature controls are not checked and the problems corrected.

MRS denies PAC's allegation that MRS is to blame for its own business difficulties. MRS denies that its customers were dissatisfied with the quality of its work or with its safety record. MRS also asserts that, while it is technically possible that ACL will put its M&R work out for bids upon the expiration of its contract with PAC, it is virtually certain that this will not occur because of the financial advantages offered by PAC through its bundled service contracts. MRS also denies that there is any effective competition with PAC and Multimarine in view of the bundling arrangements.

MRS also denies that there is a realistic option for steamship lines to use Ceres as their stevedore. The Master Lease prohibits MPA from opening new container terminals on State property for fifteen years except for container operations currently conducted at Dundalk by PAC or one of its affiliates. It is the perception of those doing business in Baltimore, including Ceres, that the Master Lease appears to protect PAC from any competition in container terminal operations and stevedoring in Baltimore. Stevedores, including Ceres, have not challenged PAC's "dominance" in Baltimore.

MRS does not dispute the general benefits of public-private partnerships, nor does it dispute the proposition that PAC's investments at Seagirt will strengthen the competitive position of the Port of Baltimore. However, those benefits do not justify PAC's exercise of its exclusive rights in a way that "crushes" MRS's business. PAC has submitted no evidence in support of its assertion that the denial by the Commission of the exclusive powers that it now exercises would eliminate its ability to meet its financial obligations under the Master Lease and would force PAC to terminate the lease. Furthermore, PAC entered into the Master Lease with the "associated risks" that its conduct would be found unreasonable under the Shipping Act.

PAC's stated reasons for choosing Multimarine over MRS are pretextual. The evidence does not support PAC's allegation that the quality of MRS's work or its safety record is substandard.

A ruling in favor of MRS would not constitute an unlawful taking of PAC's property rights. The Commission has found violations of the Shipping Act where the practices at issue were carried out pursuant to exclusive arrangements which were approved by a port authority. The logical conclusion to PAC's argument is that the Commission has no authority to restrain anti-competitive conduct. An order by the Commission which restrains PAC's exercise of its powers under the Master Lease would not affect a "legally cognizable property interest" (an essential element in a wrongful taking) because the Master Lease cannot authorize a violation of the Shipping Act.

There is no valid basis for PAC's assertion that, if the Commission were to rule in favor of MRS,

such an order would frustrate its economic expectations. PAC had no reasonable expectation that it would be allowed to exclude competitors from Seagirt, since any such right of exclusion would be in violation of the Shipping Act. Furthermore, an order by the Commission in this case would not amount to a physical taking of PAC's property. MRS also challenges PAC's assertion that, if an order by the Commission were eventually found to be an unlawful taking, the Commission could be subject to damages for the fair market value of the property taken.

Deger is qualified to give expert testimony as to MRS's claim for reparations and restates the arguments contained in its opposition to PAC's Motion *In Limine*. MRS has proven that it is entitled to reparations inasmuch as it has shown that it suffered actual damage and that the damages were proximately caused by PAC's actions. Finally, MRS has proven the amount of reparations to which it is entitled.

IV. JURISDICTION

In its Complaint MRS alleges that PAC granted itself undue and unreasonable preference in violation of the Shipping Act, 46 U.S.C. § 41106(2), and has unreasonably refused to deal with MRS in violation of 46 U.S.C. § 41106(3). Each of those provisions of the Shipping Act apply only to MTOs. PAC acknowledges that it is a MTO, but maintains that M&R work, with the exception of reefer monitoring, does not fall within the definition of marine terminal services. Therefore, according to PAC, the statutory provisions upon which MRS relies are inapplicable to PAC's activities as a MTO and the Commission lacks jurisdiction over the subject matter of this proceeding.

The central issue in this proceeding is whether PAC has unlawfully used its powers as the MTO at Seagirt to the detriment of MRS. It is undisputed that PAC, acting as a MTO under the powers granted by the Master Lease, has limited MRS's access to and activities at Seagirt. It is also undisputed that the M&R services that are at the heart of this proceeding are provided to ocean carriers calling at Seagirt.

PAC has correctly cited Commission precedent to the effect that it does not have jurisdiction over all activities of MTOs and that its jurisdiction does not extend to activities that have only a remote connection with the services provided by a MTO. PAC also has cited 46 U.S.C. § 41102(c), which provides that:

> A common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices
>
> *relating to or connected with* receiving, handling, storing, or delivering property. (Emphasis supplied.)

MRS argues that, since the above qualifying language is not part of 46 U.S.C. § 41106, the Commission's jurisdiction is not limited by that language. While that may be true, the language is instructive in demonstrating that the obligations of a MTO under the Shipping Act, while not unlimited, are not

confined to the actual handling of cargo. As PAC has observed, chassis and containers are not cargo and, aside from roadability repairs, M&R work is performed on containers and chassis when they are not carrying cargo. Nevertheless, cargo moves in containers and those containers move alongside and away from oceangoing vessels on chassis. It therefore follows that containerized cargo cannot be loaded onto or discharged from oceangoing vessels if the containers and chassis are not in operating condition. Although the Commission has not specifically dealt with the issue of its jurisdiction over M&R work, there can be little doubt that the maintenance and repair of chassis and containers, as well as the maintenance and repair of reefers in which perishable cargo is moved, has a sufficient relation to and connection with receiving, handling, storing, or delivering property to fall within the jurisdiction of the Commission. PAC has tacitly admitted as much. In its response to Complainant's Proposed Finding of Fact 31, PAC states that, "M&R services are certainly related to and perhaps even a subspecies of marine terminal services" (PAC Reply, p.16).

In further support of its argument that M&R services do not fall within the functions of a MTO, PAC points to the fact that MRS, although a vendor of M&R services, has not registered with the Commission as a MTO and has not published a schedule of its services and rates. The simple answer to that argument is that MRS does not operate a marine terminal. The same may be said of stevedores whose functions involve the actual receiving, handling, or delivering of property.

Contrary to PAC's prediction, the assertion of Commission jurisdiction under the circumstances of this proceeding would not be tantamount to the Commission's granting itself a "roving license" to regulate activities only tangentially related to ocean transportation. M&R services have a direct and close connection to the cargo operations of oceangoing vessels. The same would not be true of all activities of MTOs or other persons, even if those activities were essential to the movement of cargo.

For the reasons stated above, I have determined that the Commission has jurisdiction over the subject matter of this proceeding.

V. RESPONDENT'S PRELIMINARY MOTIONS

A. MOTION *IN LIMINE*[29]

1. ARGUMENT BY PAC

PAC has filed a Motion *In Limine* to Exclude the Testimony, Report and Declaration of David Deger. PAC cites *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) ("*Daubert*") and Rule

[29]Although the issue of damages will only be material if I find that PAC has violated the Shipping Act, I will address the Motion *In Limine* so that there will be no doubt as to the admissibility of the evidence as to damages. A determination of the weight of that evidence will only be necessary if MRS prevails on the issue of PAC's liability.

702, Federal Rules of Evidence ("Fed. R. Evid.")[30] in support of the proposition that I have wide discretion to exclude expert testimony and that I have "gatekeeping responsibility" to determine whether an expert's opinion validly supports a particular cause of action. PAC argues that under Rule 702, Fed. R. Evid., trial judges have a special obligation to ensure that expert testimony is not only relevant, but reliable. Deger's testimony fails both of those tests.

Deger is unfamiliar with the shipping industry and lacks the appropriate experience and training to offer testimony as to damages. While Deger is an accountant, he has prepared only two or three business valuation reports over his entire 35 year career, and no business valuations over the past ten to fifteen years. In addition, Deger has not taken continuing education courses relating to lost profit damage calculations, and has not taken a class in business valuation since 2002 or before.

Deger's opinions are not based upon any reliable methodology. He has admitted that his report is based solely on information obtained from "insiders" at MRS. He did not conduct an independent investigation, such as interviewing shipping line customers.

Deger has based his opinions as to MRS's loss of future business on an unsupported determination that a multiplier of 10 is a valid method of calculation. He has improperly "double counted" MRS's alleged loss by not taking into account its actual profits and losses.

Deger's use of the "before and after" method of calculating damages may be generally acceptable in certain situations. However, it is not valid in this case because he has not established the necessary causation. Deger's failure to consider outside factors affecting damages renders his analysis scientifically and economically flawed. Deger has proceeded on the premise that all of MRS's damages are due to PAC's allegedly discriminatory conduct. He has failed to consider that reduced demand in the shipping industry would also account for MRS's loss of revenue.

Another reason for the exclusion of Deger's evidence is that it "usurps" rather than assists my role as the finder of fact. Neither judicial precedent nor the Federal Rules of Evidence require the admission of opinion evidence which is connected to pertinent data only by the *ipse dixit* of the expert. During the period covered by Deger's report MRS was subject to business risks, industry risks, government regulatory risks, competitive risks, credit risks, and business cycle risks among others. It was unreasonable of Deger to dismiss most of those risks, including safety risks in view of MRS's record of safety violations as found by the Occupational Safety and Health Administration ("OSHA"). Deger's opinion is based on the conclusory assumption that all of the allegations in the Complaint are true and that MRS's loss of customers is solely the result of the actions of PAC.

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[30]Rule 156, 46 C.F.R. § 502.156, provides, in pertinent part, that, "Unless inconsistent with the requirements of the Administrative Procedure Act and these Rules, the Federal Rules of Evidence will also be applicable."

2. ARGUMENT BY MRS

PAC's reliance on *Daubert* is misplaced since this is a non-jury proceeding. Accordingly, the safeguards established by *Daubert* are less important. Commission precedent recognizes the more liberal standards of admissibility applicable to administrative proceedings. Technical evidentiary standards and exclusionary rules were developed in contemplation of deliberations by lay juries rather than by judges and administrative agencies which are presumed competent to assign the appropriate weight to the evidence.

In denigrating Deger's qualifications, PAC significantly overstates the necessary qualifications for expert witnesses. It is not necessary that an expert possess the highest possible or most appropriate qualifications. Deger has a BA degree in accounting, a Master's degree in Professional Accountancy, and over 35 years of accounting experience. A regular part of his practice has been in damage calculations and in valuations of companies. Therefore, he is qualified to offer expert testimony on damages arising out of MRS's loss of business as well as on the lost enterprise damages that MRS will suffer if PAC's practices continue.

MRS maintains that Deger's opinions are based on valid methodology and will assist me in the finding of facts. Contrary to the criticism by PAC, Deger did not presume that all of MRS's damages were caused by PAC's discriminatory conduct. He reduced his damage calculation by $1,000,000 to account for the loss by MRS of Mediterranean Shipping Company ("MSC") as a customer. Furthermore, Deger did consider other possible causes for MRS's loss of business, but found no evidence to show that the damages were caused by factors other than PAC's conduct and the loss of business from MSC.

Deger's use of the "before and after" method of calculating damages is appropriate because causation has been established. PAC erroneously maintains that Deger is proceeding on speculative and unfounded assumptions because Deger himself has not established causation. The factual basis for Deger's assumptions has been established by other evidence. The sufficiency of that evidence is a matter of weight rather than of admissibility.

Deger's method of calculating MRS's lost enterprise damages is reliable. Deger took into account MRS's historical profits, as adjusted for the loss of MSC, and applied a multiplier of 10. The use of a price/earnings multiplier is consistent both with Deger's experience and with the generally accepted method of valuing businesses.

3. DISCUSSION AND ANALYSIS

In determining whether Deger's evidence is so unreliable as to be inadmissible, I am guided by Rule 156, 46 C.F.R. § 502.156, which provides, in pertinent part, that, ". . . all evidence that is relevant, material, reliable and probative, and not unduly repetitious or cumulative, shall be admissible."

Rule 702, Fed. R. Evid., states that:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Deger's degree in accountancy and his experience in reviewing financial documents and calculating the value of clients' businesses qualifies him to offer expert testimony on the value of MRS's business both before and after PAC's allegedly unlawful practices. His opinion is based upon facts which he obtained from representatives of MRS who are purportedly knowledgeable concerning its business operations. PAC has conceded that the "before ane after" method of calculating damages can be appropriate, although it maintains that the method has not been properly employed by Dreger. The quality of Dreger's experience as well as the reliability, or even the admissibility,[31] of the information upon which he relies goes to the weight of his evidence.

PAC's reliance on *Daubert* is misplaced. In *Daubert* the Court was reviewing the admissibility of scientific evidence in a jury trial. A central issue in that case was whether the scientific theory espoused by the expert was so far-fetched and unsupported as to confuse rather than assist the jury in its fact-finding function. Such is not the situation in this proceeding. It cannot validly be maintained that the testimony of Dreger, an accountant who has reviewed MRS's financial records, would not be of at least some assistance in the calculation of the reparations, if any, to which MRS may be entitled. It need hardly be stated that I will not be obliged to unquestioningly accept Deger's conclusions, either in whole or in part. In the words of the Court in *Daubert*, 509 U.S. at 596:

> Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.

The other cases cited by PAC stand for the proposition that the presiding judge has a duty to prevent the introduction of the opinions of purported experts having no valid credentials and claiming

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[31]Rule 703, Fed R. Evid., states that an expert may base an opinion upon inadmissible facts so long as those facts are those upon which he could reasonably rely.

expertise in pseudo-scientific fields having no basis in fact. This is especially important when there is a jury. There is no jury in this proceeding, and Dreger has both the credentials and experience to qualify him as an accountant. The field of accountancy is clearly relevant to the calculation of business valuations. Therefore, regardless of the weight which I ultimately assign to his evidence, its introduction would not detract from the integrity of this proceeding.

For the reasons stated herein, it is **ORDERED** that the Respondent's Motion *In Limine* be **DENIED**.

B. MOTION TO STRIKE MARINE REPAIR SERVICES' REPLY TO PORTS AMERICA CHESAPEAKE, LLC'S RESPONSE TO MARINE REPAIR SERVICES' PROPOSED FINDINGS OF FACT

1. ARGUMENT BY PAC

On September 13, 2012, MRS filed a Reply to [PAC's] Response to [MRS's] Proposed Findings of Fact ("Reply"), along with its Reply Brief and its Responses to [PAC's] Proposed Findings of Fact. PAC argues that MRS's Reply was not contemplated by the Briefing Schedule of June 14, 2012.[32] To allow the Reply would result in unfair prejudice to PAC by affording MRS the opportunity to "reply to its own proposed findings of fact without giving a similar opportunity to PAC."

According to PAC, the allowance of the Reply would unfairly prejudice PAC by allowing MRS to create additional disputes of fact. PAC cites the following portions of the Reply in support of this contention:

> Reply 86-96: The introduction of the hearsay testimony of Shawn Olshefski to compensate for MRS's withdrawal of the affidavit of Dan Jackson of Hanjin.
>
> Reply 17, 121: Misrepresentation of MRS's status at Seagirt after PAC and MPA entered into the Master Lease in 2010.
>
> Reply 103: Misrepresentation of PAC's concerns about MRS's safety record and OSHA violations.
>
> Reply 31: Introduction of new alleged facts regarding the classification of reefer repair work.

PAC also cites the general introduction of additional declarations by Olshefski and Vincent Marino

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[32]*Certain of the deadlines in the Briefing Schedule were extended by Orders of August* 14, 2012, and September 13, 2012. The extension of the deadlines is of no consequence to the disposition of this motion.

that cannot be subject to cross-examination concerning the purported sources of the above allegations.

PAC cites the Order of August 30, 2012, in which Judge Wirth allowed MRS to file a 120-page reply brief "in addition to its response to Respondent's proposed findings of fact." The omission of a reference to a reply by MRS to PAC's response to MRS's proposed findings of fact demonstrates that MRS's reply was not authorized by the Briefing Schedule.

2. ARGUMENT BY MRS

The Briefing Schedule does not preclude the filing of MRS's Reply, nor has PAC cited any authority in support of its motion. The Reply is a legitimate rebuttal to points raised in PAC's response to MRS's proposed findings of fact; many of PAC's responses refer to its own proposed findings of fact.

The Commission's Rules of Procedure, the Administrative Procedure Act, and Commission precedent establish liberal standards of admissibility as well as a presumption in favor of the admission of questionable or challenged evidence. In addition Rule 154, 46 C.F.R. § 501.154, and the Administrative Procedure Act ("APA"), 5 U.S.C. § 556(d), allow for the submission of rebuttal evidence.

MRS characterizes its Reply as "the very essence of rebuttal;" it is a legitimate response to arguments and evidence submitted by PAC. It does not contain unauthorized arguments and does not create new factual disputes.

3. DISCUSSION AND ANALYSIS

Rule 154, 46 C.F.R. § 502.154, provides, in pertinent part, that:

> Every party shall have the right to present its case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

This language duplicates that of the APA at 5 U.S.C.§ 556(d).

The distinction between a party's proposed findings of fact and its responses to the proposed findings of fact of the adverse party, as well as the format for each submission, is a matter of form rather than substance. The required format, as set forth in the Briefing Schedule, is not designed to limit the ability of the parties to present their cases, but to promote clarity in the statement of their cases so as to facilitate the formulation of findings of fact by the presiding officer. There is nothing in the language of the Briefing Schedule to suggest that Judge Wirth intended to circumvent the Rules of Procedure or the APA, even if she could validly have done so.

PAC has not challenged MRS's right to submit rebuttal evidence, but, by its motion, implies that

MRS's Reply goes beyond the limits of such rebuttal. Contrary to PAC's position, the proposed factual findings and supporting evidence submitted by MRS in response to PAC's proposed findings of fact and to PAC's response to MRS's proposed findings of fact are "rebuttal evidence" within the meaning of Rule 154 and the APA. PAC does not contend that MRS's Reply Brief contains any arguments or legal theories not set forth in its Initial Brief.

For the reasons stated herein, it is **ORDERED** that the motion to strike be **DENIED**.

VI. FINDINGS OF FACT

The proposed findings of fact submitted by the respective parties, as well as each of their responses thereto, indicate that there are very few disputes as to the pertinent facts. As will be shown, many of the factual disputes concern nonmaterial issues.

A. THE PARTIES

1. MRS is a corporation organized under the laws of the State of Maryland. MRS conducts business in the Port of Baltimore. Its business is maintaining and repairing chassis and containers for various steamship lines, and inspecting and maintaining temperatures of reefers.[33]

2. The Vincent and Elaine Marino Family Limited Partnership ("Marino Partnership") is the sole owner of MRS.

3. The Marino Partnership is the sole owner of Marine Repair Services, Inc., which is a New York corporation and an affiliate of MRS. Marine Repair Services, Inc. owns various entities which perform maintenance and repair services in seven ports in addition to Baltimore.

The parties have raised factual disputes as to the residence and activities of members of the Marino family who are involved with the partnership and with the entities which are owned by the partnership. Neither that issue nor the issue as to the location of certain financial records is material to the controlling issues in this proceeding.

4. PAC is a limited liability company organized under the laws of the State of Delaware, and is authorized to do business in Maryland. PAC's principal place of business in Maryland is in the Port of Baltimore. PAC is a MTO and a stevedore, and also is in the business of maintaining and repairing chassis and containers for steamship lines requesting such services from PAC.

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[33]There is no dispute as to the structure and ownership of the parties. However, PAC maintains that the various corporations owned by the Marino Family Limited Partnership should be treated as a single business entity for the purpose of determining the relevant geographic market. I will address that contention in due course.

5. PAC is a subsidiary of Ports America Baltimore, Inc., which is a subsidiary of Ports America, Inc. Ports America, Inc., through its subsidiaries or sister companies, is a MTO and/or stevedore in more than 40 ports and 84 marine terminals throughout the United States.

6. PAC is the only stevedore and MTO serving Seagirt.

B. MARINE TERMINALS IN THE PORT OF BALTIMORE

7. Seagirt and Dundalk are two of the five publicly owned marine terminals in the Port of Baltimore. Four of the publicly owned terminals are operated by the State of Maryland through the Maryland Port Administration. Seagirt is operated by PAC under the terms of a 50-year lease with MPA.

8. Seagirt is the only marine terminal in Baltimore that is dedicated exclusively to containerized cargo. Dundalk and North Locust Point Marine Terminal, which is another publicly owned terminal in Baltimore, handle containerized cargo as well as other types of cargo. Information as to the types of cargo handled at Dundalk and North Locust Point is derived from websites of the Maryland Department of Transportation, www.mpa.maryland.gov/content/dunda[illegible] and www.mpa.maryland.gov/content/nort[illegible]

9. Seagirt and Dundalk are adjacent to each other. The main entrances to each terminal are through their respective main gates on Broening Highway, which is a public road. The two terminals are connected by the Colgate Creek Bridge. The Colgate Creek Bridge is not part of the space leased by PAC from MPA.

10. Containers, chassis, and other equipment entering and leaving Seagirt and Dundalk through the main gates are required to go through a trailer interchange receipt ("TIR") process. The TIR process involves the checking of equipment onto and off of the terminals and the performance of safety inspections of the equipment before it leaves the terminals.

11. The Colgate Creek Bridge does not have a TIR station. Since the commencement of the Master Lease, PAC has limited the use of the bridge to emergency movements between the terminals.

C. THE MASTER LEASE[34]

12. Prior to the effective date of the Master Lease, MPA solicited proposals and competitive bidding for the operation of Seagirt. Initial pre-bids were submitted by PAC and by its competitor

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[34]A portion of the lease is set forth on pages 114 through 330 of the Complainant's Appendix ("CX 114-330"), some of which has been designated as confidential. None of the portions cited herein have been so designated.

Ceres Marine Terminals. MPA thereupon entered into discussions with PAC and Ceres, after which PAC was the only entity to submit a final bid.

13. Recitals:[35] The leased premises include Seagirt and approximately 18 acres known as the Canton Property. (CX 122)

14. Section 1.3(a): PAC is granted the exclusive right to use and operate the premises during the term of the lease, which is from January 12, 2010, to January 11, 2060. (CX 123)

15. Section 1.6: PAC is given the exclusive right to perform the Permitted Operations on the leased premises and, except as otherwise provided, to bill, collect, and retain all revenues derived from the Permitted Operations. (CX 124)

16. Section 2.1(a): PAC is authorized to use the leased premises for "Permitted Operations" and no other operations without the prior written consent of MPA, which may be withheld for any reason or granted upon such conditions as MPA may require in its sole discretion. Permitted Operations are defined as including "container, chassis and equipment storage and repair." PAC is prohibited from using the leased premises for any unlawful purpose. (CX 125, 126)

17. Section 2.1(c): PAC may cause Permitted Operations to be performed by any parent, subsidiary of affiliate, including any member of the Ports America Group, including PAB, provided that PAC remains responsible to MPA for the performance of the operations in accordance with the terms of the lease. (CX 126)

18. Section 2.2(a)(I): Except for certain defined exceptions at Dundalk, there are to be no new container terminals on State property, or on property owned, leased, operated, or managed by MPA, the Maryland Department of Transportation, or the Maryland Transportation Authority, for 15 Contract Years following the commencement of the lease. (CX 126)

19. Section 2.2(a)(ii): For a period of 16 Contract Years following the commencement of the lease, and subject to the terms of existing leases, the MPA, the Maryland Department of Transportation, and the Maryland Transportation Authority are not to conduct, or allow third parties to conduct, container marine terminal operations at Dundalk, other than such operations conducted at Dundalk by PAB. This restriction shall not apply if throughput (volume of container traffic) at DMT exceeds eighty percent of designed throughput capacity for two consecutive Contract Years. (CX 127)

20. Section 2.3: PAC is to conduct its operations at Seagirt in a manner so as to promote "peace and harmony in the commercial community in which it operates." PAC is to comply with applicable collective bargaining agreements and avoid labor disturbances which would disrupt labor

[35]Findings of Fact 13 through 22 refer to portions of the Master Lease.

harmony in the Port of Baltimore. PAC shall use the ILA or its successor for the handling of all cargo within the terminal in accordance with applicable collective bargaining agreements. (CX 127)

21. Section 2.4(a): PAC is responsible for securing the terminal including, without limitation, "protection of cargo, personal property, and Leasehold Improvements on the Premises." (CX 127)

22. Sections 3.1 through 3.7: PAC is obligated to make a Capital Reinvestment Payment to MPA of between $120 million and $140 million. Additional payments include a Use Fee of $3.2 million per year as well as certain Incremental Fees based on the number of loaded or empty container lifts. (CX 129-131)

D. THE BUSINESS OPERATIONS OF THE PARTIES

23. Since entering into the Master Lease, PAC is the only stevedore at Seagirt. With the exception of the monitoring and repair of reefers, PAC offers to perform M&R work at Seagirt for ocean carriers calling at that terminal. Reefer work is performed at Seagirt by Multimarine Services, Inc. ("Multimarine").. PAC has selected Multimarine to perform reefer repair and monitoring for PAC's customers at Seagirt who request such services.

24. PAC offers discounts on stevedoring rates to ocean carriers who agree to refer all of their M&R work to PAC and Multimarine. Such arrangements are commonly known as "bundling arrangements" or "all in" contracts. One or more of the ocean carriers calling at Seagirt has declined to enter into a bundling arrangement with PAC, but continues to receive terminal and stevedoring services from PAC at Seagirt.

25. From February 16, 2001, until January of 2010 MRS leased space at Seagirt under a month to month lease. On January 8, 2010, MPA informed MRS that, pursuant to the Master Lease, MRS's lease had been assigned to PAC.

26. After taking over the operation of Seagirt in 2010, PAC informed MRS that it would eventually be required to move its operations off of Seagirt. MRS did not actually move its operations off of Seagirt until some time in 2011.

27. During the period when Seagirt was operated by the MPA, MRS was allowed to use the Colgate Creek Bridge to dray containers and chassis from Seagirt to its repair facility in Dundalk without restriction or inspection charge. Under that arrangement MRS would inform PAC by e-mail of the movement of containers and chassis to and from its repair facility; PAC would generate the TIR paperwork.

28. PAC allowed MRS to continue to use the Colgate Creek Bridge until June of 2011, after which MRS was required to dray containers and chassis through the main gates of Seagirt and

Dundalk and to go through the TIR process. No other vendors at Seagirt are allowed to use the Colgate Creek Bridge. MRS now uses the Colgate Creek Bridge pursuant to the Standstill Agreement (see footnote 11).

29. MRS has not complained to MPA about the loss of access to the Colgate Creek Bridge.

30. PAC is a member of BMTA. The BMTA Schedule[36] provides that a MTO has the right to require the payment of a "Gate Charge" (among other charges) for each container or chassis before it is delivered from a terminal.[37] (RX 1371)

31. Most ocean carriers calling at Seagirt have a "throughput rate" in their contracts with PAC. The throughput rates include the TIR charge, so that those carriers are not required to pay individual gate charges.

32. At all times pertinent to this proceeding PAC has leased space at Dundalk from the MPA. The amount of space leased by PAC at Dundalk has varied from 90 acres to 60 acres out of a total of 570 acres in the entire terminal.[38] PAC uses its leased space at Dundalk to provide marine terminal and stevedoring services as well as maintenance and repair of dry boxes and chassis.

33. A portion of the space acquired by PAC at Dundalk was formerly leased by Universal/APM. When Universal/APM relinquished its leased space it assigned its service contracts to PAC, at which time PAC began providing services to the former customers of Universal/APM. Prior to the transfer of its leased space to PAC, Universal/APM had a contract with MRS whereby MRS did M&R work on the leased space. PAC has informed MRS that it may not do M&R work on PAC's leased space at Dundalk.

34. MRS leases its repair facility at Dundalk from the MPA under a month to month lease which allows MRS to perform chassis and container repair work.

35. None of MRS's customers call at Fairfield, South Locust Point, or North Locust Point.

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[36]The entire BMTA Schedule, effective as of October 31, 2011, is set forth in the Respondent's Appendix ("RX") pages 1350 to 1378. MRS does not challenge the validity of the schedule because of its effective date. The BMTA agreement and amendments are registered with the Commission as Agreement No. 001941.

[37]The terms "gate charge", "gate fee," and "TIR charge" all refer to the same fee which is intended to offset the cost of the TIR process.

[38]Under the Master Lease, PAC is obligated to relinquish 20 acres of its leased space by December 31, 2012.

E. THE EFFECT ON MRS OF PAC'S OPERATIONS AT SEAGIRT

36. Since PAC began offering M&R services at Seagirt, directly and through Multimarine, a number of MRS's customers calling at Seagirt have given all of their M&R business to PAC. All or most of those customers transferred their M&R work to PAC so as to take advantage of the lower stevedoring rates provided by bundling arrangements. Some of MRS's former customers have informed MRS that they would have preferred to continue to use MRS, but felt compelled to enter into the bundling arrangements so as to obtain reduced stevedoring rates. Certain of MRS's former customers have also cited the advantages of "one-stop shopping" and a single invoice for stevedoring, marine terminal, and M&R services.

I will not address the conflicting assertions of the parties as to which of them has a better safety record, has the lowest rates, or provides the highest quality and most efficient M&R services. Presumably ocean carriers take all of those factors into account in deciding whether to use MRS or PAC.

37. MRS continues to service customers calling at Seagirt, although it is no longer permitted to perform roadability inspections or M&R work at Seagirt. Instead, MRS is required to dray chassis and containers through the main gate at Seagirt where it is required to go through the TIR process, including an inspection and, if applicable, the payment of a gate fee. MRS performs the repair work either at its Dundalk facility or at one of its two off-dock facilities.

38. The distance from Seagirt to MRS's facility on East Lombard Street is 3.08 miles. The distance from Seagirt to MRS's facility on Broening Highway is 0.76 miles.

39. PAC does not pay a TIR charge for moving containers and chassis off of Seagirt since it would be a payment to itself. In addition, PAC does not undergo a 24-hour waiting period as does MRS.

40. MRS has lost a significant amount of business to PAC since PAC assumed control of Seagirt under the Master Lease and began offering bundling arrangements to its stevedoring and marine terminal customers.

41. Upon the expiration of the bundling arrangements, the ocean carriers have the option of putting their M&R work out for competitive bidding, at which time MRS will have the option of submitting bids.

The parties have raised factual disputes as to the nature of their relationships and communications with certain of the ocean carriers calling at Seagirt. It is not necessary to resolve those disputes since there is no credible evidence that any of the ocean carriers have been denied marine terminal or stevedoring services by PAC because they declined to enter into bundling arrangements, nor is there credible evidence that PAC has threatened to withhold such services. Purported statements by representatives of PAC that MRS has been "kicked off" of Seagirt or that

PAC intends to run Ceres out of Baltimore are of no consequence. The former statement is no more than a simplification of the limitations which PAC has imposed on MRS. The latter statement is, at the most, a description of aspirations which have not been fulfilled.

42. The inability of MRS to perform M&R work at Seagirt, thus necessitating the drayage of containers and chassis through the main gate of Seagirt, has increased MRS's operating costs, some or all of which may be passed on to customers.

F. COMPETITION IN THE PORT OF BALTIMORE

43. PAC and MRS have historically competed for M&R work in Baltimore. MRS has also historically competed with Multimarine for reefer work, and with Picorp, Inc. of Baltimore ("Picorp") for off-dock container and chassis work as well as for some reefer work.

44. MRS has repair facilities at Dundalk and at off-dock facilities on Broening Highway (otherwise known as the "former Duke Property") and on East Lombard Street. MRS services ocean carriers calling at Seagirt and Dundalk. MRS does not service ocean carriers calling at the other three publicly owned terminals in Baltimore. (It has not been alleged that MRS is prohibited or otherwise prevented from offering M&R services to ocean carriers calling at North Locust Point.)

45. Approximately four years ago MRS began looking for off-dock property in order to compete with Picorp. MRS eventually leased both of its off-dock facilities for that purpose. On June 29, 2011, MRS renewed its lease on the Broening Highway property for three years.

46. MRS's principal purpose in leasing its off-dock facilities was an attempt to obtain M&R work from APL which was using Picorp to repair equipment coming off of railroad lines.

47. Picorp is not allowed to perform on-dock work because it does not employ ILA labor.

VII. DISCUSSION AND ANALYSIS

A. THE CONTROLLING LAW

Sections 10(d)(4) and 10(d)(3) of the Shipping Act, 46 U.S.C. §§ 41106(2) and (3), state that a MTO may not:

> (2) give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person; or
>
> (3) unreasonably refuse to deal or negotiate.

The parties have correctly agreed that MRS has the burden of proving its case by a preponderance

of the evidence, *i.e.*, that the weight of the evidence upon which it relies is of greater weight than the opposing evidence. See, for example, *Petition of South Carolina State Ports Authority for Declaratory Order*, 27 S.R.R. 1137, 1161 (1997).

The parties also agree that exclusive arrangements, such as the arrangement between PAC and MPA, are to be evaluated on the basis of specific applicable facts. Each of the parties has cited cases such as *All Marine Moorings, Inc. v. ITO Corp. of Baltimore*, 27 S.R.R. 539 (1996) ("*All Marine*"), and *River Parishes Co. v. Ormet Primary Aluminum Corp.*, 28 S.R.R. 751 (1999) ("*RIVCO*") and their progeny to argue that the holdings of those cases either are applicable to or distinguishable from the facts in this proceeding.

The common thread in both *All Marine* and *RIVCO* is that, in evaluating the legality of exclusive arrangements, the Commission must first determine the relevant market and then assess the effect of the respondent's practices on competition in that market. If the practices do not have a significant effect on competition, the respondent need not justify its practices and the inquiry is at an end. If there is a significant impact, then the burden shifts to the respondent to justify its practices. The extent of the respondent's burden of justification will depend on the anti-competitive effect of its practices.

Commission precedent as to the validity of exclusive arrangements is of limited value. MRS does not challenge the provisions of the Master Lease which created the exclusive arrangement, nor has MRS named MPA, the other party to the Master Lease, as a co-respondent. Thus, the central issue in this proceeding is not the reasonableness of the exclusive arrangement, but the reasonableness of PAC's practices as a result of the arrangement.

Each of the parties have cited numerous federal antitrust cases, but agree that the Commission is not to conduct a strict antitrust analysis in determining whether the challenged practices are in violation of the standard of reasonableness under the Shipping Act. This is in keeping with the holding in *Gulf Container Line v. Port of Houston Authority*, 25 S.R.R. 1454, 1491 (1991). In the context of this case, MRS need not show that the curtailment of its access to Seagirt totally shut it out of the relevant market.

B. THE RELEVANT GEOGRAPHIC MARKET

Since there is no dispute that the relevant product market is M&R services, the extent of the relevant geographic market must be determined in that context. The parties have proposed vastly different definitions of that market. MRS maintains that the relevant market is limited to Seagirt, possibly Seagirt and Dundalk, but, in any event, is no greater than the Port of Baltimore. PAC argues that the relevant market is comprised of all of the ports in the South Atlantic range in which MRS and its affiliates do business. According to PAC those ports are, in addition to Baltimore: Norfolk, Virginia; Wilmington, North Carolina; Charleston, South Carolina; Savannah, Georgia; and Jacksonville, Florida.

Contrary to the contention of MRS, I am not constrained in my determination of the relevant geographic market by Judge Wirth's Order on Respondent's Motion to Compel Discovery of December 20, 2011. In that Order, Judge Wirth denied the portion of PAC's motion in which it sought to compel answers to interrogatories and requests for production related to the operations of MRS's corporate affiliates outside of the Port of Baltimore. The stated rationale for that ruling was that PAC had not shown the relevance of the requested information in view of the fact that MRS, an entity doing business only in Baltimore, had only alleged that PAC had violated the Shipping Act by its operations in Baltimore.

The determination of the relevant geographic market is dependent upon factors other than the permissible scope of discovery. The parties have cited antitrust decisions of federal courts as well as Commission precedent which, taken together, stand for the proposition that the determination of the relevant geographic market is dependent upon facts concerning the actual state of competition in the relevant product market, which, in turn, is based upon the realistic options open to consumers of the relevant product market. In the context of this proceeding, the determination of the relevant geographic market must be derived from the realistic options for obtaining M&R services which are available to ocean carriers calling at the Port of Baltimore.

The evidence clearly shows that ocean carriers calling at Baltimore, or even only at Seagirt, have the option of obtaining M&R services at Seagirt, Dundalk, or at either of two off-dock facilities operated by MRS (Findings of Fact 34, 44, 47). Shippers of freight coming off of railroad lines have the additional option of obtaining M&R services at Picorp's off-dock facility, thus availing themselves of the presumably lower wages paid to non-ILA labor (Findings of Fact 45, 47). Accordingly, there is no factual basis for MRS's contention that the relevant geographical market is limited to Seagirt, or to Seagirt and Dundalk.

The thrust of PAC's position is that, because of the common ownership, common officers, and consolidated financial records of MRS and its corporate affiliates (Findings of Fact 2, 3), they should be treated as a single business entity which competes for M&R services in various South Atlantic ports in addition to Baltimore. It may well be that there is considerable cross-marketing between MRS and its corporate affiliates, or even multi-port contracts with carriers calling at the South Atlantic ports where MRS and its affiliates are located. Even if that were so, it begs the question of whether, because of this commonality and cooperation, ocean carriers calling at Baltimore would seriously consider the option of sending containers and chassis to the other South Atlantic ports rather than having them inspected or repaired in Baltimore. I take official notice that the South Atlantic ports compete for business from ocean carriers and that carriers have been known to transfer their operations, including their need for M&R services, from one port to another.[39] However, simple logic suggests that ocean carriers would not, except under unusual

[39]Official notice is broader than judicial notice and may be taken, not only of public records and generally accepted facts, but also of matters within an agency's area of special expertise, *Union Electric Co. v. F.E.R.C.*, 890 F.2d 1193, 1202 (D.C. Cir. 1989). The Commission has approved the taking of official notice in Rule 226(a), 46 C.F.R. § 502.226(a).

circumstances, accept the delay and loss of use of containers or chassis while they were being repaired at other ports, much less that they would dedicate cargo space to the transportation of damaged containers and chassis. PAC has offered no evidence that this has actually occurred.

In *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 336-337, 8 L.Ed.2d 510 (1962), a case cited by PAC, the Court noted that a relevant geographic market must correspond to the "economic realities" of the industry in question. As shown above, the economic realities of the market for M&R services for ocean carriers calling at Baltimore is the Port of Baltimore itself. It is not confined to a single terminal or terminals and does not extend to other ports.

In making this determination, I am mindful that M&R services can only be performed for ocean carriers transporting containerized cargo and that those carriers can only call at one of the three marine terminals in Baltimore that can accommodate container ships. Nevertheless, the evidence shows that M&R services are performed in various on-dock and off-dock locations throughout the Port of Baltimore. I further note that, although the determination of the relevant geographic market must be based on current economic conditions, there apparently is nothing to prevent any entities from establishing additional off-dock facilities for M&R work.

For the reasons stated above, I have determined that the relevant geographic market is the Port of Baltimore.

C. COMPETITION IN THE RELEVANT GEOGRAPHIC MARKET

PAC and MRS have been, and still are, actively competing for M&R business in Baltimore (Findings of Fact 23, 24, 32, 34, 37, 43, 44). Picorp is, to a lesser extent, also competing for with MRS for M&R work (Findings of Fact 45, 47).

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

For the reasons stated above, I have concluded that, while competition for M&R services in the relevant geographic market has shifted in PAC's favor, it has not been restricted to the extent that an actual or virtual monopoly exists.

D. THE REASONABLENESS OF PAC'S PRACTICES

1. THE RESTRICTION ON MRS'S OPERATIONS AT SEAGIRT

Under the Master Lease, PAC has gained exclusive operational control over Seagirt other than with regard to certain security functions which are subject to oversight by MPA. In return for that control, PAC has assumed substantial financial obligations to the MPA (Finding of Fact 22). PAC's right of exclusivity at Seagirt includes the right to perform M&R work on the leased premises (Finding of Fact 16).

At the risk of undue repetition, I again note that MRS has not challenged the validity of the Master Lease, but only the legality of PAC's exercise of its rights under the lease. According to MRS, PAC has exercised its right of exclusivity so as create a virtual monopoly over M&R services. My examination of the evidence leaves little doubt that MRS can no longer compete as effectively as it could when Seagirt was operated by MPA The obvious reason for the change in the competitive environment at Seagirt is that MPA, as an instrument of the State of Maryland, does not compete with MRS. PAC, on the other hand, is a private entity which is entitled to do so. MRS has correctly stated that the Master Lease does not vest PAC with immunity for violations of the Shipping Act, and that language in the lease prohibits the use of the premises for unlawful purposes (Finding of Fact 16). However, the language of the lease is relevant to the issue of the reasonableness of PAC's practices. The exclusivity which PAC employs to enhance its competitive position is exactly what it bargained for.

Inherent in MRS's position is the proposition that Seagirt is a separate relevant geographic market or, alternatively, that Seagirt is such a significant part of a larger market as to render PAC's practices unreasonable and monopolistic. As stated above and contrary to MRS's position, the relevant geographic market is the Port of Baltimore, and a significant level of competition for M&R services exists in Baltimore in spite of PAC's exclusive status at Seagirt.

The parties have presented conflicting arguments over the existence of a triangular relationship. The triangular analysis was first enunciated in *Volkswagenwerk v. FMC*, 390 U.S. 261, 279, 19 L.Ed.2d 1090 (1968) ("*Volkswagenwerk*:).[40] Under the triangular analysis, a finding of unlawful discrimination is not dependent upon a showing that the allegedly favored entity was in direct competition with the complainant. It need only be shown that a third party has enjoyed an unfair advantage over the complainant with regard to a benefit (in this case, access to customers for M&R work) that both were seeking. A triangular analysis was applied by the Commission in cases such as *Credit Practices of Sea-Land Service, Inc. and Nedlloyd Lijnen, BV*, 25 S.R.R. 1308, 1313 (1990). A triangular analysis is not required in this proceeding since the favored entities, PAC and Multimarine, are both in competition with MRS.

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[40] *Volkswagenwerk* was decided in the context of Section 16 of the Shipping Act of 1916. Nevertheless, the precedent is still valid because of the close similarity of Section 16 to Section 10(d)(4), 46 U.S.C. § 41106(2) of the current Shipping Act.

In order to find that PAC has unreasonably favored itself over MRS, I would have to conclude that PAC is under a duty to provide MRS with the opportunity to use PAC's leased premises to facilitate its competition with PAC. None of the antitrust or Shipping Act cases cited by MRS support such a conclusion. MRS has placed particular reliance on *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) (*Aspen*). In *Aspen* the plaintiff did not seek to use the defendant's premises for competitive purposes. Rather, the plaintiff challenged the defendant's termination of a longstanding cooperative scheme for the sale of ski lift tickets for various locations operated by different entities. The defendant's refusal to continue the arrangement had the effect of establishing a monopoly in violation of the Sherman Antitrust Act. *Aspen* is distinguishable from the instant case in that the plaintiff in *Aspen*, unlike MRS, was not claiming a right to operate on its competitor's premises.

PAC's preferred treatment of Multimarine for reefer work is not self-preference. PAC refers to Multimarine as a subcontractor, but has not offered evidence of the exact arrangement between the two entities. The contract between PAC and ACL states that "Ports America will provide reefer services through Multi Marine" (*RX 0996*). Multimarine is not a party to that contract. The contract between PAC and Compañia Libra de Navigacion (Uruguay) S.A. provides for "Container maintenance and repair services," including reefer repair and monitoring, but does not mention Multimarine (RX 0979-82). In both contracts PAC has assumed the responsibility to the ocean carrier for the performance of all M&R work, but has chosen to delegate the performance of reefer work to Multimarine.

In view of the foregoing evidence, it would appear that PAC's relationship with Multimarine is a reasonable commercial arrangement. It is not clear whether PAC derives any revenue from the reefer work performed by Multimarine, but the availability of reefer repair services for PAC's customers at Seagirt presumably makes its terminal services more attractive to ocean carriers than if they were required to seek a vendor outside of their contractual relationship with PAC.

PAC contends that it chose Multimarine as its subcontractor because of its superior quality of work and better safety record as compared to that of MRS. According to MRS, the stated reasons are no more than a contrived rationale by PAC in an attempt to justify an unreasonable preference for Multimarine. PAC's stated reasons for choosing Multimarine may be, as MRS suggests, an afterthought. It is possible that PAC has selected Multimarine as its subcontractor, at least partially, because Multimarine, unlike MRS, does only reefer work and is not in a position to lure away PAC's customers for dry box and chassis repairs. Even if that were so, PAC has no duty to facilitate MRS's efforts to obtain M&R work from ocean carriers calling at Seagirt. It may use its leased premises to its own advantage so long as its actions are not unreasonable. Regardless of PAC's motivation, its selection of Multimarine as its subcontractor is a reasonable economic decision.

The issue of the Colgate Creek Bridge is less clear. While the bridge is not part of the leased premises, PAC effectively controls the bridge by barring its use to enter or leave Seagirt except in undefined emergencies. Some of PAC's stated reasons for this practice are somewhat

strained. PAC's concern over "wear and tear" on the bridge due to traffic is unsupported by any engineering reports or similar surveys. Its desire to prevent the theft of equipment could be satisfied with the establishment of a TIR station. Nevertheless, MRS has offered no substantial evidence that it has been subjected to significantly increased costs or substantial delays because of its inability to use the bridge to dray containers and chassis between Seagirt and Dundalk. There is no evidence as to the increased distance over which MRS must travel because of the closing of the bridge, but it is undisputed that Seagirt and Dundalk are adjacent to each other. I also note that MRS's concern over the loss of use of the bridge was not so great that it submitted a complaint to MPA, in spite of the fact that MPA has retained at least legal control of the bridge (Finding of Fact 29).

The additional time and expense of which MRS complains is actually caused by the TIR process from which it was exempted by MPA when it operated Seagirt, and by PAC during a grace period of approximately one year after the Master Lease went into effect (Findings of Fact 26-28). During that time there was no TIR station on the bridge. The fact that MPA chose to exempt MRS from the TIR process is not binding on PAC, especially in the absence of evidence that MRS is treated differently than other entities, including PAC itself, entering and leaving Seagirt.[41] The fact that PAC does not pay a gate fee to itself is of no consequence. I also note that most of the ocean carriers calling at Seagirt, including customers of MRS, have negotiated throughput rates which obviate the necessity of paying separate gate fees (Finding of Fact 31).

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

2. THE ALLEGED TYING ARRANGEMENTS

MRS maintains that PAC has made unlawful tying arrangements with ocean carriers calling at Seagirt by offering bundling arrangements whereby they receive discounted rates for stevedoring services if they agree to refer all of their M&R work to PAC or, through PAC, to Multimarine. According to MRS, PAC's status as the only stevedore at Seagirt leaves its customers with no effective choice but to accept the bundling arrangements in spite of the fact that a number of MRS's former customers have stated that they would otherwise have preferred to stay with MRS. MRS

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[41]PAC has not disputed MRS's allegation that it is subject to a 24-hour waiting period as part of the TIR process (Finding of Fact 39). However, with the exception of the statement in ¶ 56 of the Olshefski Rebuttal Declaration (CX 910), neither of the parties have presented additional evidence or other than a passing reference to this issue. Therefore, any legal conclusions based on the waiting period would be the result of pure speculation.

also points to the fact that, since M&R services are distinct from stevedoring, there are no efficiencies to be gained by the use of PAC and Multimarine for M&R work.

Tying is a concept which was developed under antitrust laws. As shown above, antitrust principles, while not controlling, are instructive in assessing possible violations of the Shipping Act. MRS has cited *Cascade Health Solutions v. PeaceHealth, 515 F.3d 883* (9th Cir. 2002), which defines a tying arrangement as:

> . . . a device used by a seller with market power in one product market to extend its market power to a distinct product market. . . . . To accomplish this objective, the seller conditions the sale of one product (the tying product) to the buyers's purchase of a second product (the tied product). . . . . 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. (*Id.* at 912; citations omitted.)

In this case, the tying product is stevedoring services, while the tied product is M&R services.

PAC maintains that, in order to prove the existence of a tying arrangement, MRS must show that the tied product is distinct from the tying product. According to PAC, if M&R services fall within the jurisdiction of the Commission, they must be a form of marine terminal services, and, therefore, there can be no tying as a matter of law.

In *Jefferson Parish Hospital District No. 2, et al. v. Hyde*, 466 U.S. 2, 80 L Ed.2d 2 (1984) (*Jefferson Parish*), a case cited by MRS, the Court considered the legality of an alleged tying arrangement which linked hospital and anesthesiological services. In the words of the Court:

> No tying arrangement can exist here unless there is a sufficient demand for the purchase of anesthesiological services separate from hospital services to identify a distinct product market in which it is efficient to offer anesthesiological services separately from hospital services. The fact that the exclusive contract requires purchase of two services that would otherwise be purchased separately does not make the contract illegal. Only if patients are forced to purchase the contracting firm's services as a result of the hospital's market power would the arrangement have anticompetitive consequences. If no forcing is present, patients are free to enter a competing hospital and to use another anesthesiologist instead of the firm. (*Id.* At 14.)

The above language makes it clear that, contrary to PAC's position, a tying arrangement, whether or not lawful, can exist if there are separate markets for the tying and the tied products, regardless of whether one product is an extension of the other. It is undisputed that MRS markets and performs M&R services only, and that PAC markets and performs stevedoring services for customers who use MRS for all or some of their M&R work. It therefore follows that there are separate product markets for stevedoring and M&R services in spite of the fact that, with the

exception of M&R work for customers other than ocean carriers, each service is marketed to the same customers. The same was true with the services which the Court considered in *Jefferson Parish*.

Jefferson Parish is distinguishable from the instant case in other ways. In that case the Court held that the challenged arrangement was not illegal in spite of the fact that both services, by necessity, were performed at the same location. With the exception of reefer monitoring and roadability repairs, stevedoring and M&R work need not be performed at the same location and frequently are not (Findings of Fact 37, 44).

The opinion in *Cascade, supra*, 515 F.3d at 894, contains a highly instructive discussion of bundling arrangements. The court noted that, "Bundled discounts generally benefit buyers because the discounts allow the buyer to get more for less." The court, in footnote 6, cited *Jefferson Parish* in support of the proposition that "package pricing" is generally considered to be procompetitive . The opinion also quotes *Mitsubishi Electric Industrial Co. Ltd., et al. v. Zenith Radio Corporation, et al.*, 475 U.S. 574, 594, 89 L.Ed.2d 538 (1986), in which the Court stated that, "cutting prices in order to increase business often is the very essence of competition."

This is not to say that bundling arrangements cannot be anticompetitive. In *Ortho Diagnostic Systems, Inc. v. Abbott Laboratories, Inc.*, 920 F. Supp. 455, 467 (S.D.N.Y. 1996), the court described a hypothetical situation in which one competitor, which enjoyed a monopoly on one product offered packaged pricing of that product and another product in order to force a competitor, which offered only one of the products, out of business.

The situation in the instant case does not meet the above-mentioned standard for illegality. While PAC is the only stevedore at Seagirt, it is undisputed that it is not the only stevedore in the Port of Baltimore, which is the relevant geographic market. In addition, PAC has not forced MRS out of business, and, in spite of MRS's dire predictions, there is no evidence that its demise is either imminent or inevitable.

Finally, there is no credible evidence that PAC has conditioned its provision of stevedoring services on a customer's acceptance of its M&R services or the reefer repair services of Multimarine, or that it has threatened to withhold stevedoring services if a customer does not accept a bundling arrangement. Indeed, MRS has named two of PAC's customers (Hanjin and APL) which have declined to enter into bundling arrangements. Arguably, MRS has shown that some of its former customers have felt economically compelled to accept bundling arrangements because of the cost savings for stevedore services, and that those customers would otherwise have preferred to continue using MRS for their repair work. The fact remains that those customers have made voluntary business decisions to put cost savings above their loyalty to MRS; there is no evidence that the M&R services provided by PAC and Multimarine are unsatisfactory, even if they are no better, or even inferior, to the services offered by MRS.

The totality of the evidence leaves little doubt that, through its challenged practices, PAC has achieved its goal of enhancing its competitive position for all of its services in the Port of

Baltimore. The nature of competition is such that gains by one competitor are accompanied by losses to others. The business income lost by MRS, while possibly significant, is the result of legitimate competition. Such competition is not prohibited by the Shipping Act.

It is to be emphasized that this Initial Decision, and the Findings of Fact from which it is derived, are based on the relevant and credible evidence of circumstances as they currently exist. There may come a time when competition in the relevant geographic market and the practices of PAC, have changed to the extent that a different result would be indicated.

In the words of Rule 223, 46 C.F.R. § 502.223, "Initial decisions should address only those issues necessary to a resolution of the material issues presented on the record." Accordingly, I will not address either PAC's constitutional argument or its mention of the possibility of a damage action against the Commission except to say that I did not consider those issues in reaching my decision.

VIII. ORDER

For the reasons stated herein, it is **ORDERED**:

1. That the Respondent's Motion *In Limine* be ***DENIED.***

2. That the Respondent's Motion to Strike Marine Repair Services' Reply to Ports America Chesapeake, LLC's Response to Marine Repair Services' Proposed Findings of Fact be **DENIED**.

3. That the Complaint be **DISMISSED**.

Paul B. Lang
Administrative Law Judge