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increase in transportation cost. The sole remedy for violation of section 6(g) provided under the Shipping Act is the issuance of an injunction by this Court pursuant to section 6(h) of the Shipping Act, 46 U.S.C. § 41307(b)(2).

The Commission requests a preliminary injunction pending the Court's decision on the merits of the Commission's Complaint seeking a permanent injunction under the standards set forth in section 6(g) of the Shipping Act. More specifically, this motion, pursuant to section 6(h) of the Shipping Act, 46 U.S.C. § 41307(b)(2), seeks on a preliminary basis to enjoin the exercise of certain agreement authorities and conduct of the Ports of Los Angeles ("POLA") and Long Beach ("POLB") in furtherance of authorities set forth in the Ports' amendment to the "Los Angeles and Long Beach Port Infrastructure and Environmental Programs Cooperative Working Agreement," designated as Agreement No. 201170-001.

On October 29, 2008, the Commission made the determination required by section 6(g) of the Shipping Act that Agreement No. 201170-001 is likely, by a reduction in competition, to result in an unreasonable decrease in transportation service or an unreasonable increase in transportation cost. The Defendants have been notified, through their separate counsel, on this date, November 17, 2008, that the Commission seeks a preliminary injunction pending such further proceedings deemed appropriate by this Court.

EXPEDITED HEARING REQUESTED

Pursuant to the Court's Local Rule, LCvR 65.1(d), the Commission requests that the hearing on its Motion for a Preliminary Injunction be expedited to the twentieth day after the filing of this motion, or to such date as the Court deems appropriate. Expedition of the hearing is made necessary by Defendants' ongoing implementation of their Clean Trucks Program ("CTP"), including recent expansion of the Ports' practices in furtherance of such CTP. As

determined by the Commission on October 29, 2008, elements of the Ports' agreement authorities will likely result in reductions in competition and corresponding increases in cost and reductions in service that violate the standards of section 6(g) of the Shipping Act.<sup>1</sup>

Defendants have put into place a Clean Trucks Program and Concession Plans (developed under the auspices of FMC-filed Agreement No. 201170-001), that will have the effect of, and are already giving rise to an adverse restructuring of the truck drayage market at POLA and POLB. As demonstrated in the attached declarations,<sup>2</sup> Licensed Motor Carriers ("LMCs") have commenced mandated changes to bring their operations into compliance with the Concession Agreements imposed by both Ports.

Prior to the Ports' concerted activities, concession agreements were not required as a prerequisite for LMCs to provide drayage service to private marine terminal facilities in the Ports. Beginning October 1, 2008, both Ports require an executed Concession Agreement to operate within the respective port area and upon public highways serving the port; only LMCs may execute a Concession Agreement with a Port. Supplanting the current drayage market where ocean containers are hauled predominantly by independent owner operators ("IOOs") contracted by the LMCs, the Ports, through their Concession Agreements, are creating a market which requires all LMC concessionaires to use only drivers directly employed by such LMCs (the "employee-driver mandate").

Although the employee-driver mandate is phased in over the next several years, the truck drayage market at POLA and POLB is already being adversely restructured in response to the mandate, as evidenced by signed declarations of port LMCs and shippers. Among the elements

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1 Following notice to the agreement parties that same day, the Commission filed its complaint for injunctive relief in the U.S. District Court for the District of Columbia on October 31, 2008. Venue lies with this court under 46 U.S.C. § 41307(b)(1).

2 The following declarations are attached as exhibits: Declaration of Dr. Roy J. Pearson ("Exhibit 1") and Declaration of Robert M. Blair ("Exhibit 2").

of the CTP and the Ports' respective Concession Agreements, the Commission determined that it is this employee-driver mandate that directly and demonstrably contravenes the section 6(g) standards of the Shipping Act. The Commission determined that the implementation of an employee-driver mandate in POLA, and the implementation of discriminatory clean truck fees exemptions, truck purchase incentives and subsidies will supplant those IOO drivers now permitted to serve POLB, even though the POLA Concession Agreement does not mandate the use of only employee-drivers at this time.

Expedition is necessary because, according to news reports and press releases issued by the respective Ports, marine container terminals will be required by the Ports to enforce electronic gate access at the Ports effective in the coming weeks to determine whether a truck entering the marine terminal is operating under a valid port concession. The Ports are also scheduled to require the terminal operators to commence collecting a Clean Truck Fee ("CTF") of \$70 per forty-foot container on containers moving through the marine terminal facilities located in their respective Port areas.<sup>3</sup>

Although the Commission does not directly challenge or propose to enjoin all aspects of this fee, the Commission has determined that certain incentives and subsidies offered by the Ports, in conjunction with exemptions from the CTF granted by the Ports to some drayage trucks, will contribute to an irreversible, and artificial, restructuring of the truck drayage market at the Ports of Los Angeles and Long Beach into an employee-driver only market. The combined effects will favor larger LMCs that have the economic wherewithal to take advantage of the

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<sup>3</sup> On November 13, 2008, the Port of Los Angeles announced that collection of the Clean Truck Fee at the Ports of Los Angeles and Long Beach will not begin on November 17, 2008, as previously scheduled. Port staff is said to be working expeditiously to resolve procedural issues and finalize the Program's gate administration and fee collection process.

Ports' programs adversely affecting smaller companies that will be likely be forced out of business, thereby reducing competition while opening the door to rate increases.

### STATUTORY BACKGROUND

The Commission is an independent administrative agency of the United States responsible for the regulation of oceanborne transportation in the foreign commerce of the United States pursuant to, inter alia, the Shipping Act of 1984, 46 U.S.C. § 40101 et seq. The Federal Maritime Commission was established in 1961, as the successor agency to the Federal Maritime Board.

Among other persons regulated under the Shipping Act, the Commission has jurisdiction over the rates, practices and agreements of marine terminal operators ("MTOs"). 46 U.S.C. §§40301(b), 40501(f)-(g), 41102(c), 41103, and 41106. The term "marine terminal operator" is defined, in pertinent part, in section 3(14) of the Shipping Act, 46 U.S.C. §40102(14), as "a person engaged in the United States in the business of providing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier."<sup>4</sup>

The Commission's jurisdiction over agreements between MTOs is provided pursuant to section 4(b) of the Shipping Act, 46 U.S.C. § 40301(b), which provides, in pertinent part:

This part applies to an agreement between or among marine terminal operators, or between or among one or more marine terminal operators and one or more ocean common carriers, to –

- (1) discuss, fix, or regulate rates or other conditions of service; or
- (2) engage in exclusive, preferential, or cooperative working arrangements, to the extent the agreement involves ocean transportation in the foreign commerce of the United States.

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<sup>4</sup> Under the predecessor Shipping Act, 1916, 46 U.S.C. § 801 et seq. (*repealed*), the Supreme Court held that states and their municipally-governed marine terminal operators are "persons" subject to regulation under the Shipping Act, 1916. California v. United States, 320 U.S. 577, 585-586 (1944). More recently the Supreme Court again underscored the Commission's authority over state port authorities. Federal Maritime Com'n v. South Carolina State Ports Authority, 535 U.S. 743, 768 (2002).

Agreements that are subject to the Shipping Act, including agreements entered into by MTOs, must be filed with the Commission pursuant to section 5 of the Shipping Act, 46 U.S.C. §40302. The Shipping Act prohibits any person, including a marine terminal operator, from operating under an agreement that has not become effective under 46 U.S.C. §40304 or that has been “rejected, disapproved or canceled.” 46 U.S.C. §41102(b)(1).<sup>5</sup>

Under the review process established by the Shipping Act, agreements filed with the Commission ordinarily “shall become effective on the 45th day after filing . . . or if additional information is required” by the Commission from the parties, “on the 45th day after the Commission receives all the additional information and documents” to allow the Commission to conduct its economic analysis of the agreement. 46 U.S.C. §40304(c). The Commission is required by section 6(d), 46 U.S.C. §40304(d), to request information from the filing parties before the 45th day after the agreement is filed.

Following review by the Commission, and the agreement’s becoming effective under section 6 of the Shipping Act, 46 U.S.C. §40304, such filed agreements are exempt from application of the antitrust laws pursuant to section 7 of the Shipping Act, 46 U.S.C. §40307. However, if the Commission’s review results in a determination that an agreement will, by a reduction in competition, result in an unreasonable reduction in transportation service or an unreasonable increase in transportation cost, section 6(g) of the Shipping Act, 46 U.S.C. §41307(b)(1), authorizes the Commission to seek “appropriate injunctive relief” in this Court. The Commission is limited to seeking injunctive relief as the exclusive relief available.

Pursuant to section 6(h) of the Shipping Act, 46 U.S.C. § 41307(b)(2), this Court may issue a temporary restraining order or a preliminary injunction, and may issue a “permanent

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<sup>5</sup> The Shipping Act also prohibits any person, including a marine terminal operator, from operating under an agreement required to be filed with the Commission if such operations are not in accordance with the terms of the agreement or any modifications to the agreement made by the Commission. 46 U.S.C. §41102(b)(2).

injunction after a showing [by the Commission] that the agreement is likely to have the effect” of unreasonably reducing transportation service or increasing transportation cost, as a result of a decrease in competition.

### STATEMENT OF FACTS

#### The Ports of Los Angeles and Long Beach

The San Pedro Bay port area comprises a single port area with a common boundary shared by the Cities of Los Angeles and Long Beach. The Port of Los Angeles and the Port of Long Beach comprise the portion of the San Pedro Bay within their respective eponymous City. The Ports of Los Angeles and Long Beach are located in Los Angeles County in the State of California.

The container port operations of the Port of Los Angeles have the greatest container traffic of any container port in the United States. Along with the Port of Long Beach, the Ports’ container business accounts for greater than 40% of all U.S. import and 25% of all export container load traffic. Combined, the two ports rank fifth among container ports in the world by volume. Declaration of Robert M. Blair (“Blair Decl.”) (Exhibit 2.) at ¶50, Attachment (“Att.”) 50 at p. 8.

Containers transiting the Ports move from and into the U.S. interstate and international commerce. The great majority of containers of cargo moving from the Ports are loaded onto trucks, then hauled, or as more commonly called “drayed,” by motor carriers directly to customers, off-dock terminals, or to railheads. Once the containers are drayed to one of these locations, the cargo may be loaded onto different trucks or railroads for a long-haul move across the U.S. Such containers may also be unstuffed from the ocean container and the cargo sorted into different trucks for carriage to final destination, as many shippers’ cargo is often loaded into

a single container. Export cargo is often subject to the process in reverse. These cargo movements by truckers, including drayage truckers, may be carried pursuant to contracts with cargo owners or pursuant to contracts between the motor carrier and ocean carriers in which the motor carrier serves as the ocean carriers' agent or subcontractor. Declaration of Dr. Roy J. Pearson ("Pearson Decl.") (Exhibit 1) at ¶30.

Container cargo that remains in the continuous flow of the interstate and foreign commerce of the United States and the drayage of cargo containers to and from the Ports constitutes "interstate commerce". See American Export-Isbrandtsen Lines, Inc. v. Federal Maritime Commission, 444 F.2d 824 (D.C. Cir. 1970).

#### Licensed Motor Carriers

Licensed motor carriers ("LMCs") provide port drayage services by utilizing either employee drivers or by contracting with independent owner operators ("IOOs") who are generally paid on a per trip basis. Some LMCs operate with a hybrid model combining employee-drivers and contract operators. Pearson Decl. at Att. B at p. 15.

Motor carriers serving the Ports often are registered motor carriers under the federal Motor Carrier Act, 49 U.S.C. chapter 139, as well as holders of Motor Carrier of Property Permits under the laws of the state of California. Under California Vehicle Code, section 34624, independent owner operators may obtain their own permits as property motor carriers. Such IOOs have valid commercial drivers' licenses and may own only one tractor and not more than three trailers. It is estimated that 800 - 1,300 licensed motor carriers provide drayage service at the Ports of Los Angeles and Long Beach using approximately 17,000 - 20,000 IOOs. Pearson Decl. at ¶52 -53.

For many years prior to the implementation of the Ports' Concession Plan (described below), any motor carrier, whether an IOO or LMC using employee drivers, could provide drayage services moving cargo containers at the POLA and POLB without pre-condition as to obtaining a concession to provide services over the public highways accessing terminal facilities within the Ports. Pearson Decl. at ¶12 fn.1.

Prior to the implementation of the Ports' Concession Plan, any motor carrier, whether an IOO or LMC using employee drivers, could provide drayage services moving cargo containers at the PO LA and POLB without restriction or mandate as to the employment status of the driver of the drayage truck. Pearson Decl. at ¶13, 15. Most of the LMCs serving the Ports were non-asset owning organizations that utilized IOOs (as opposed to LMCs utilizing employee drivers). LMCs arrange drayage service for their clients who need containers moved, usually cargo owners, ocean transportation intermediaries or ocean carriers. Pearson Decl. at ¶30. The Ports do not contract with LMCs or IOOs for the provision of drayage truck services.

#### Joint Actions Related to CARB Requirements and the "Clean Air Action Plan"

The California Air Resources Board ("CARB") adopted rules on December 7, 2007, limiting emissions from diesel trucks providing drayage services at California's ports and intermodal rail yards. The CARB regulations mandated phased-in limits upon trucks operating within port areas with deadlines of December 31, 2009 and December 31, 2013, respectively. By December 31, 2013, all drayage trucks must be equipped with an engine that meets or exceeds 2007 emissions standards. Blair Decl. at ¶44.

On April 4, 2008, the Ports acted jointly to submit a proposal to CARB to award \$211 million in Proposition 1B funds to replace older drayage diesel trucks. The Ports' Application emphasized that their administration of the grant funds would not restrict funding availability to

a preferred individual, company, business entity, or other group of equipment owners, and that it would involve participation of independent owner-operators. Blair Decl. at ¶44.

On May 22, 2008, CARB approved the Ports' funding for their CAAP program in the amount of \$98 million.

#### The Ports' Clean Truck Programs and Concession Plans

The Ports jointly unveiled their Clean Truck Program ("CTP") proposal on April 12, 2007. The Ports announced their intent to implement their CTP within months, albeit without any plans to conduct an economic impact study to gauge the effectiveness of the plan. The Ports also announced that the CTP included a common concession program.<sup>6</sup> Blair Decl. at ¶11, Att. 11.

The Ports' CTP at that time required that *all* drivers of trucks serving the Ports must be employees, resulting in the exclusion of IOOs, estimated to account for 85 to 90 percent or more of the container moves at the two ports. Blair Decl. at ¶11, Att. 11.

In September 2007, the Harbor Boards of both Ports announced that they had adopted "Clean Truck" standards applicable at both Ports. These standards were published in substantially identical fashion in their respective harbor tariffs. The Ports' joint standards would:

- a. Ban pre-1989 trucks from Port service by October 1, 2008;
- b. Ban 1989-1993 trucks from Port service by January 1, 2010;
- c. Ban un-retrofitted 1994-2003 trucks from Ports' service by January 1, 2010;
- d. Require all trucks providing service within the Ports to meet Model-year 2007 emissions standards by January 1, 2012. Blair Decl. at ¶33A, Att. 33A.

Provisions applicable to the rolling ban of pre-1989 trucks were jointly implemented by the parties on October 1, 2008. Blair Decl. at ¶83, Att. 83.

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<sup>6</sup> They have since characterized their concession plan as a "harmonized POLA & POLB concession agreement" as the Ports have incorporated certain program element differences.

The Ports jointly employed a consultant to conduct an economic impact study of their proposed CTP. Blair Decl. at ¶16, Att. 16 and at ¶27, Att. 27. Following release of their consultant's findings, the Ports' staffs jointly developed revisions to the CTP to mitigate potential problems identified by the consultants, as well as to finance further research on several options for reorganizing the CTP, Blair Decl. at ¶27, Att. 27. Revisions were later adopted by the Ports' Harbor Boards. Blair Decl. at ¶¶43-45, Att. 43-45.

The Ports agreed to adopt: (1) a set of deadlines for removing older trucks based on Environmental Protection Agency emissions standards; (2) a Clean Truck Fee on containerized cargo to be levied upon cargo interests (rather than levied on trucking companies) and to place such fees in a Clean Truck Fund to be used by the Ports to provide subsidies for the replacement and retrofitting of the to-be-excluded older trucks; and (3) concession programs that directly and indirectly restricted drayage service to LMCs. Blair Decl. at ¶46, Att. 46, ¶47 and at ¶47, Att. 47.

In its Concession agreement, POLA implemented a ban on LMCs utilizing IOOs, thereby forcing LMCs to use employee-drivers and to contractually commit to shift to exclusive use of employee drivers on a phased-in basis. This employee mandate, and the related requirement that LMCs own or control the trucks, will force LMCs to become asset-owning firms with drivers who are direct employees and bear the associated capital and labor costs. The execution of a POLA Concession Agreement has the *de facto* effect of terminating IOOs' ability to conduct drayage operations at POLA beginning on October 1, 2008 and progressively excluding such IOO operations until their complete elimination in December 31, 2013. Pearson Decl. at ¶15.

### The Ports' Concession Plans

On February 19, 2008, the Defendant POLB approved a plan requiring that only drayage trucks operated under the authority of a licensed motor carrier holding a POLB Concession Agreement would be permitted to enter the Port beginning on October 1, 2008. Blair Decl. at ¶61, Att. 61.

The POLA adopted an Order on March 20, 2008 that restricted entry to POLA to drayage trucks operated by a motor carrier holding a Concession Agreement with the City of Los Angeles:

Beginning October 1, 2008, at 8:00 am, no Terminal Operator shall permit access into any Terminal in the Port of Los Angeles to any Drayage truck unless such Drayage Truck is registered under a Concession from the Port of Los Angeles....

POLA reserved the right to amend the Concession requirements at any time, without the consent of those who had already signed a concession agreement, and stated that neither its ordinance nor the grant of a Concession created any property interest in a Concessionaire. Blair Decl. at ¶59, Att. 59.

On July 18, 2008, the POLA released its Concession Agreement and Application. The Concession includes an agreement that must be signed by motor carriers before they could serve the Port. Eligibility for obtaining a Concession Agreement with POLA required each motor carrier to submit an Application that, among other elements, requires an applicant to demonstrate, to the satisfaction of the Port's Executive Director, its financial capacity to meet obligations under the Concession Agreement. Blair Decl. at 69A, Att. 69A.

Also on July 18, 2008, the Long Beach Harbor Department released the Concession Agreement and Application (FMC Complaint Exhibit C, Blair Decl. at ¶69B, Att. 69B) that must be signed by any motor carrier wishing to access POLB. To be eligible, a motor carrier

must first submit an Application. The Long Beach application differs from Los Angeles in that Long Beach requires that only licensed motor carriers obtaining operating authority after June 1, 2008, need demonstrate their financial viability. Blair Decl. at ¶¶69A & B, Att. 69A & B.

Through means of the Ports' collusive activities conducted pursuant to their FMC filed Agreement, the Concession Agreements adopted by each of the Ports contain comparable, if not completely identical, conditions requiring motor carriers to:

- (a) Be licensed and in good standing on a continuing basis;
- (b) Maintain accurate information on each truck and driver in the Ports' Drayage Truck Registry;
- (c) Take responsibility for compliance and performance of drivers who access the Port;
- (d) Assure that all trucks comply with the Clean Trucks Program on an ongoing basis;
- (e) Comply with parking restrictions and submit for approval a parking plan for trucks accessing the Port;
- (f) Tender a truck maintenance plan;
- (g) Comply with truck safety and operations regulations;
- (h) Make available all records required for compliance with existing regulatory programs, including documents on driver qualifications;
- (i) Ensure that each driver has a valid Transportation Worker Identification Card (TWIC);
- (j) Ensure that each truck has a Radio Frequency Identification Device (RFID) connected to the Drayage Truck Registry so that the relevant information is available when the truck enters the Port;
- (k) Ensure that all trucks comply with security laws and regulations;
- (l) Ensure that all trucks post placards providing a phone number to allow the public to report emissions and safety concerns;
- (m) Implement necessary technology required by the Concession or the Clean Trucks Program; and,
- (n) Ensure that they have the financial capability to execute the concession agreements;

The two Ports' Concession Agreements differ in certain respects; however, those differences were not seen by either Port as detrimental to their CTP. The significant differences are: (1) POLA requires concessionaires to use employee drivers only whereas POLB permits concessionaires to use either independent owner operators as subcontractors or employee drivers; and (2) POLB allows the required parking plan for each drayage truck to include provisions for

parking at any legal parking space and is not restricted to off-street parking (as required by POLA). Pearson Decl. at ¶ 18, Table 1.

Agreements Filed With the Commission to Implement the Ports' CTP

FMC Agreement Number 201170-001 - the "Los Angeles and Long Beach Port Infrastructure and Environmental Programs Cooperative Working Agreement,"

The Ports filed their basic agreement, the "Los Angeles and Long Beach Port Infrastructure and Environmental Programs Cooperative Working Agreement," with the Commission in June of 2006. Blair Decl. ¶1, Att. 1. This Agreement authorizes the Parties to meet from time to time to confer, discuss, exchange information, and agree on a voluntary basis with respect to rates, charges, operating costs, practices, legislation, regulations, and terminal operations, including trucking, rail, and vessel operations. *Id.* The Ports included authority to confer, discuss, exchange information, and agree on a voluntary basis on the funding, establishment, and construction of port-related transportation infrastructure projects and environmental programs. The Agreement, as originally filed, indicates that "transportation infrastructure projects" may include, but are not limited to, truck and engine replacement programs, engine and equipment fuel use and emissions standards, and bridge, rail, and roadway improvements. *Id.*

The Ports were cautioned in a May 16, 2008 Commission letter that the Agreement, as originally filed, insufficiently set forth agreement authority to cover all of the discussions, agreements and actions taken by the Ports with respect to their CTP and concession agreements. The Ports were advised at that time that the Commission expected them to make amendments to the Agreement to cure those defects. Blair Decl. at ¶62A, Att. 62A. Two months later, on August 1, 2008, the Ports filed an amended Agreement No. 201170-001 (Blair Decl. at ¶71, Att. 71), the Agreement now the subject of this motion for a preliminary injunction.

Agreement No. 201170-001 amends and restates the agreement in its entirety. The amended Agreement provides more details related to their Clean Truck Program, as well as makes miscellaneous changes to the Purpose section of the original Agreement. Blair Decl. at ¶71, Att. 71.

Article 5 (E) of the amended Agreement would provide the Parties with specific authorities to discuss, exchange information, cooperate and coordinate with respect to: (1) the adoption of drayage truck deadlines, based on Environmental Protection Agency emissions standards; (2) the adoption of a Clean Truck Fee on containerized cargo to be paid by the beneficial cargo owner (“BCO”) and placed into a Clean Truck Fund used by the Parties to finance the replacement and retrofit of drayage trucks; and (3) the adoption of concession programs for LMCs. The amended Agreement provides that these concession programs may include requirements for environmental compliance, insurance, parking, and driver credentialing, among other requirements. Blair Decl., ¶83, Att. 83 at p. 3-4.

Article 5(H) of the amended Agreement would allow the Parties to “coordinate and cooperate” on the implementation of the Ports’ respective CTP requirements, including the creation of recordkeeping databases to assist with implementation of the Program. The amended Agreement would also authorize the Parties to retain a third party vendor for these purposes, where necessary. Blair Decl., ¶71, Att. 71.

FMC Agreement No. 201178 - Los Angeles/Long Beach Port/Terminal Operator  
Administration and Implementation Agreement

On February 14, 2008, the Ports of Los Angeles and Long Beach, along with the members of the West Coast Marine Terminal Operator Agreement (FMC Agreement No. 201143-008), filed the “Los Angeles/Long Beach Port/Terminal Operator Administration and Implementation Agreement.” This Agreement authorizes the Ports and MTOs to meet, discuss,

exchange information and agree on port security, safety, and environmental issues. It also allows for the development of databases concerning trucks serving the Ports, criteria and procedures to govern access to the Ports, the collection and uses of security and environmental fees, and procurement of funds for programs addressing clean air, security, and port and terminal infrastructure improvements. Blair Decl. at ¶ 51. Due to a lack of specific information surrounding the agreement authorities, the Commission requested additional information from the agreement parties through a formal Request for Additional Information (“RFAI”) on April 3, 2008. Blair Decl. at ¶¶66, Att. 66; ¶69, Att. 69.

Following the receipt of the Parties’ responses, on June 13, 2008, the Commission provided notice to the Ports that it did not wish to unnecessarily delay the implementation of those aspects of the programs which were most likely to improve air quality at the Ports; however, it noted that key requirements of the Ports’ CTP had not been reflected in the Ports’ Agreement No. 201170. Blair Decl. at ¶69, Att. 69. The Commission further advised the Parties that the complete agreement of the parties was required to be on file with the Commission and that any further agreements reached under Agreement No. 201178, as well as related agreements of the Ports, must be timely filed with the Commission for its review under section 6 of the Shipping Act. Id.

FMC Agreement No. 201196 - Los Angeles / Long Beach Marine Terminal Agreement

On September 30, 2008, the Ports of Los Angeles and Long Beach filed the “Los Angeles and Long Beach Marine Terminal Agreement.” This agreement sets forth terms and conditions under which drayage trucks are permitted access to Port owned and controlled facilities. This Agreement also includes a pro forma concession agreement containing joint terms and conditions to allow drayage trucks access to a port terminal. Blair Decl., ¶82. Att. 82. The Ports asserted

that the Agreement automatically became effective upon filing on September 30, 2008 pursuant to an exemption from the waiting period requirements under the Commission's regulations at 46 C.F.R. § 535.308(e). Blair Decl. at ¶82, Att. 82.

#### FMC Agreement No. 201199 – Port Fee Services Agreement

On November 3, 2008, the Ports of Los Angeles and Long Beach, thirteen named marine terminal operators (comprising the full membership of the WCMTOA agreement) and PortCheck LLC, a commercial entity created by the WCMTOA members, filed the Port Fee Services Agreement. The agreement provides for the collection of fees imposed by the Ports, and control by PortCheck of marine terminal access for purposes of ensuring collection of the container fee, identifying drayage trucks in accordance with the Drayage Truck Registry established under the Clean Trucks Program (CTP), and permitting access only to trucks and their owners or operators that meet the criteria and deadlines established by the Ports. Blair Decl. at ¶99, Att. 99.

The Ports asserted that the Agreement automatically became effective upon filing on November 3, 2008 pursuant to an exemption from the waiting period requirements under the Commission's regulations at 46 C.F.R. § 535.308(e). *Id.*

#### Collusive Effects of the Ports' Agreements in Combination

Agreement 201170-001 is before the Court for purposes of enforcing the standards found in section 6(g) of the Shipping Act, and is therefore central to the web of agreements that the Ports have created to ensure that their activities are immunized from the anti-trust laws during the formation, implementation and enforcement of their CTP. Nonetheless, the three related FMC-filed agreements, which the Ports have created, underscore how critical their combined discussions, agreements and implementation have become.

From its inception, Agreement No. 201170 has framed its purpose in terms that reflect an overriding objective to “promote cooperation” and to provide for “joint action” and the “development of consensus and agreement between the Cities of Los Angeles and Long Beach.” Blair Decl. at ¶1, Att. 1 at p.17. In Agreement No. 201178, that same purpose is expressed in terms reflecting the Ports’ desire to “explore the possibility that terminal operators assist or cooperate in the administration of certain CAAP programs or initiatives on [the Ports’] behalf,” Blair Decl. at ¶51, Att. 51 at p.1, and to “reach agreement with respect to the administration and operation of programs in a manner that will benefit the entire Los Angeles/Long Beach port community.” *Id.* These programs were said to include “mandatory or voluntary port or other legal or regulatory requirements with respect to air quality,” *Id.*, Att. 51 at 3; the “foregoing” to include “establishment, implementation and administration of a database of information relating to trucks and/or their owners and operators,” *Id.*

Through the instant Agreement, No. 201170-001, the parties agree to “discuss,” “cooperate” and “coordinate the adoption and implementation of programs” which comprise the Ports’ Clean Trucks Program. Blair Decl., ¶71, Att. 71 at p.3. These latter programs include the adoption of the “clean truck fee,” *Id.*, Att. 71 at p.4, as well as adoption of “concession programs with Licensed Motor Carriers” to “coordinate concession requirements” including such port mandates as “driver credentialing,” and “driver licensing, qualifications and requirements.” *Id.* Under Agreement No. 201196, the Parties agreed to a common set of requirements for their concession agreements, described by the Ports themselves as “a condition of the right to provide drayage services” under any Concession, Blair Decl. at ¶82, Att. 82 at p.11. The Ports jointly

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<sup>7</sup> Notably, in Article V(D) of the Agreement, the Parties stated:

The Parties contemplate entering into joint agreements before undertaking any joint projects and programs, which shall, to the extent required by the Shipping Act of 1984, as amended, be filed with the Federal Maritime Commission.

require Concessionaires to comply with concession agreements which “completely set forth terms and conditions under which drayage trucks are permitted access to Port owned and controlled properties.” *Id.*, Att. 82, at 1. These joint purposes are again restated in Agreement No. 201199, which describes the Ports’ common objectives by which they “seek to exclude certain trucks from port property, provide financing to replace such trucks with environmentally cleaner trucks, and impose a truck fee on certain cargo leaving and/or entering the Ports,” Blair Decl., ¶99, Att. 99 at p.1.

### ARGUMENT

#### The Federal Maritime Commission Is Entitled To a Preliminary Injunction Pursuant To Section 6(H) of the Shipping Act of 1984

This is the first time the Commission has sought an injunction under section 6(h) since the authority was enacted twenty-four years ago. As a result, this Court is presented with a matter of first impression, which requires a review of the express requirements governing injunctions under section 6 (recodified as 46 U.S.C. §41307(b)(1) & (2)) and the corresponding legislative history.

If the Commission were seeking an injunction for a violation of any provision of the Shipping Act other than section 6, 46 U.S.C. §41307(b)(1) & (2)), the Court would apply the traditional equitable standards for such injunctions, e.g. those expressly provided in section 11(h) of the Shipping Act, 46 U.S.C. §41307(a) (requires showing that “the standards for granting injunctive relief by courts of equity are met”). The equitable standards that the Court would need to assess in such event would be: 1) a substantial likelihood of success on the merits; 2) that it would suffer irreparable injury if the injunction is not granted; 3) that an injunction would not substantially injure other interested parties; and 4) that the public interest would be furthered by

the injunction. CityFed Financial Corp. v. Office of Thrift Supervision, 58 F.3d 738, 746 (D.C. Cir. 1995).

However, the injunction standards of section 6(h) are applicable here, not section 11(h). Congress established a narrower, yet more flexible, standard by which section 6 injunctions are to be assessed. The sole remedy provided to the Commission under section 6(h) of the Shipping Act is the issuance of an injunction by this Court.

Section 41307(b)(1) authorizes the Commission seek an injunction of an agreement “[i]f . . . [the Commission] determines that the agreement is likely, by a reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost.” Further, “after a showing that the agreement is likely to have [these] effect[s],” this Court is authorized to issue a temporary restraining order, a preliminary injunction and a permanent injunction. Section 41307(b)(2). In the plain words of the statute, a motion for preliminary injunction requires the Court to assess only whether there is a likelihood that the Commission will succeed on the merits of its section 6(g) determination.

Though the statute indicates Congress’ intent to replace traditional equitable standards for injunctions, the legislative history of the Shipping Act provides additional confirmation that Congress created a different standard for the grant of injunctions under section 6(h). Congress signaled its intent to create a “flexible general standard to be applied by the regulatory agency with expertise in this industry.” H. R. Conf. Rep. No. 98-600, at 32, *reprinted in* 1984 U.S.C.C.A.N. 283, at 288. Further, the Commission’s experience in applying the section 6 standard led Congress to include authority for the Commission to represent itself before this Court when seeking an injunction under section 6(h) because of “the likely need for prompt action to stop threatening [anticompetitive] conduct.” Id.

Congress again addressed the Court's injunction options in the process of enacting the Ocean Shipping Reform Act of 1998 ("OSRA"), Pub. L. 105-258, 112 Stat. 1902, which substantially amended the Shipping Act. Although it declined to amend sections 6(g) or (h) through OSRA, Congressional review of the agreement process and its attendant grant of antitrust immunity for filed agreements under section 7 of the Shipping Act, 46 U.S.C. § 40307, made clear that the Court should not be "limited to the simple binary choice of enjoining or not enjoining an agreement in its entirety." S. Rep. 105-61 at 17. Congress noted the growing complexity of agreements required "a more surgical approach," either upon the Commission's request or upon the Court's own motion, to bar certain agreement authorities while leaving other authorities intact. *Id.* Consistent with this Congressional intent, the Commission seeks to enjoin those authorities of the Agreement, and conduct thereunder, which gives rise to the greatest anti-competitive concerns while allowing other agreement authorities which do not give rise to competitive concern to proceed.

#### Statutory Injunctions Standard Applies to Section 6(g)

That the Commission needs only to demonstrate a likelihood of success on the merits is supported by the line of cases that deal with "statutory" injunctions. Those cases have held that agencies invested with express authority to obtain statutory injunctions, i.e. those framed by specified statutory standards and purposes rather than in equity, need only demonstrate a *prima facie* case showing that the agency's determination is correct.<sup>8</sup> Courts addressing such injunctions have consistently applied the principles of statutory injunctions irrespective of the industry regulated by the agency involved. See, e.g., Parker v. Ryan, 959 F.2d 579 (5th Cir.

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<sup>8</sup> In contrast, where Congress intended inclusion of a requirement to show that the "standards for granting injunctive relief by courts of equity are met," the Shipping Act was expressly so annotated, as in the case of section 11(h)(1) injunctions, 46 U.S.C. 41307.

1992); Commodity Futures Trading Commission v. British American Commodity Options, 560 F.2d 135 (2nd Cir. 1977); SEC v. General Refractories Co., 400 F. Supp. 1248, 1254-55 (D.D.C. 1975).

The statutory injunction under consideration in British American, *supra*, involved authority to seek an injunction pursuant to Section 13a-1(b) of the Commodities Exchange Act, 7 U.S.C. §13a-1(b).<sup>9</sup> The showing required for an injunction, as set forth in section 13a-1(a) of the Commodities Exchange Act, authorizes the Commodities Futures Trading Commission (“CFTC”) to seek a restraining order or injunction “[w]henver it shall appear to the [CFTC] that any registered entity or other person has engaged, or is engaging . . . in any act or practice constituting a violation of any provision of this chapter or any rule, regulation, or order thereunder, or is restraining trading in any commodity for future delivery.” *Id.*

The British American court determined that the CFTC was required to make only a *prima facie* showing that the alleged trading advisor was violating, and likely to continue violating, the Exchange Act for an injunction to issue. *Id.* at 142. The court expressly noted the role of the agency as a guardian of the public interest entrusted to enforce the statutory scheme created by Congress, and that the agency had expertise to conduct the analysis and investigation necessary to make its determination. *Id.*

For a statutory injunction to lie under section 6(g) of the Shipping Act, the Commission is required to show that its determinations were regularly made and that the Defendants’ agreement authorities, and conduct pursuant to those authorities, are likely by a reduction in competition to result in an unreasonable reduction in transportation service or an unreasonable increase in

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<sup>9</sup> Section 13a-1(b) of that Act provides simply: “Upon proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.” 7 U.S.C. §13a-1(b).

transportation cost. Following substantial analysis of the Ports' agreement and activities,<sup>10</sup> the Commission has determined that the Ports are currently engaging in, and are likely to continue engage in, a course of conduct violative of the section 6(g) standards of the Shipping Act. Unless the agreement authority and conduct identified in the Commission's Motion for Preliminary Injunction is enjoined, the Ports will continue to engage in such violative conduct, causing the artificial restructuring of the port drayage trucking industry serving the dominant United States portal for U.S. foreign-borne ocean shipping commerce.

The public interest in prohibiting the anti-competitive impacts of the Ports' agreement pursuant to the Shipping Act outweighs the Ports' interest in implementing an employee-driver mandate as an element of the Ports' CTP. That this balance tips in favor of granting the section 6(h) injunction is especially evident where, as here, the employee-driver mandate is shown to be unnecessary to the Ports' stated goals of their CTP of reducing air pollution and obtaining related health benefits. Moreover, the Commission has reviewed and analyzed the Ports' assertions that the employee-driver mandate is necessary to sustain the CTP are shown by the Commission and found in the Commission's analysis to be without foundation.<sup>11</sup> Even if the employee mandate were necessary, the issuance of preliminary injunction pending this Court's review of the merits of a permanent injunction would not negate the long-term sustainability of the program.

Dr. Pearson's declaration, signed under penalty of perjury, reflects the determinations made by the Commission on October 29, 2008 in adopting the content and recommendation presented to it. Dr. Pearson's declaration, therefore, serves as the necessary predicate for the Court to determine that the Commission has made the necessary showing that the Port

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<sup>10</sup> See generally, Declaration of Robert M. Blair, Exhibit 2, for a chronology of actions and events relating to the development and implementation of the Ports' CTP.

<sup>11</sup> The results of a survey conducted for the Gateway Cities Council of Governments in 2007 refutes the contention that IOO drivers lack the resources to maintain and purchase clean trucks. Pearson Decl. at ¶60.

Defendants' Agreement and their concerted conduct thereunder, is likely, by a reduction in competition, to result in an unreasonable reduction in transportation service and an unreasonable increase in transportation cost. The Commission's finding that the agreements are likely to violate section 6 standards is a forward-looking finding that a significant ongoing injury to the public is likely. "The public interest, when in conflict with private interest, is paramount." SEC v. Culpepper, 270 F.2d 241, 250 (2d Cir. 1959).

As noted *supra*, the limited nature of the preliminary injunction at issue here would restrain only those elements of the Ports' CTP that would implement employee-driver mandates or prohibitions on the use of IOOs at the Ports' terminal facilities. The requested injunction would not halt those parts of the Ports' CTP that generate the environmental and health benefits sought by the Ports.

#### The Commission Has Demonstrated Its Likelihood of Success on the Merits

The Commission is likely to succeed on the merits by showing that the Ports' Agreement No. 201170-001 contravenes the standards of section 6 and will result in anti-competitive effects from which Congress sought to protect the public through a single, exclusive remedy where the Commission makes the necessary determination: to pursue an injunction from this Court under section 6(g) standards.

Through both the legislative history of the Shipping Act of 1984 and the Ocean Shipping Reform Act of 1998, Congress recognized that "[a]s new and evolving forms of cooperative conduct develop," the Commission would be in the best position to "assess an agreement's benefits and detriments in light of the objectives" of the Shipping Act. H. R. Conf. Rep. No. 98-600, at 32, *reprinted in* 1984 U.S.C.C.A.N. 283, at 288. The Commission was granted the authority, and the corresponding responsibility, to "stop schemes that go beyond what is

necessary to obtain” such benefits from agreements that would otherwise give rise to “substantial anticompetitive effects.” Id. at 33, 1984 U.S.C.C.A.N., at 289. In furtherance of this responsibility, the Commission must determine whether an agreement is “likely to cause concrete competitive harm” or, alternatively, to permit such agreement to go into effect. Id.

In the legislative history to the Shipping Act of 1984, Congress instructs that the Commission can obtain “injunctive relief only if the likely net result will be an unreasonable increase in costs to shippers, or an unreasonable reduction in the frequency or quality of service available to shippers.” H. R. Conf. Rep. No. 98-600, at 35, reprinted in 1984 U.S.C.C.A.N., at 291. The Commission, says Congress, should consider two aspects of this requirement: (1) whether the harm was unreasonable in “a commercial context” as the “likely change in costs or services must arise from the agreement and be material and meaningful;” and, (2) whether negative impacts may be offset by the benefits of an agreement. Id. Moreover, the Commission is directed that it can weigh in its decision calculus any “reasonable and commercially proven alternative arrangements” that provide most or all of the essential benefits of the agreement but “without the same anticompetitive impact.” Id. at 36, 1984 U.S.C.C.A.N., at 292.

From this legislative history, it is clear that Congress expected the Commission to use a comparative approach in analyzing the impacts and effects of an agreement. The Commission must carefully weigh the potential benefits against the potential burdens of an agreement in conducting its review pursuant to section 6 of the Shipping Act. Evidence of lower cost or less anticompetitive alternatives are a touchstone in determining whether the instant Ports’ agreement gives rise to “unreasonable” effects.

As it did in the 1984 legislative history, Congress reinforced its emphasis upon the importance of carefully weighing benefits and burdens presented by an agreement within the

legislative history of the Ocean Shipping Reform Act of 1998. Congress forcefully advocated that the Commission take quick action under section 6 whenever necessary to prevent anticompetitive agreements.

In its OSRA review, Congress underscored that the word "likely" in section 6(g) "clearly indicates that the agency is expected to act prospectively to block substantially anti-competitive carrier plans before they result in adverse effects on shippers and foreign trade." S. Rep. 105-61 at 14 (1997). Congress observed that section 6(g) "contemplates the use of reasoned projections and forward-looking analyses by the agency, based on its substantial industry expertise." *Id.* Discounting equitable injunctive standards, Congress cautioned that the Commission should not consider it necessary to have "direct evidence of actual commercial harm" in order to obtain an injunction, noting that a blanket requirement for such evidence would "undermine the agency's ability to take necessary preventive action." S. Rep. 105-61 at 14. Indeed, the Senate Commerce Committee expressly "directs the agency not to allow the disruption of ocean borne commerce while it seeks to quantify such disruptions for evidentiary purposes." *Id.*

In making determinations whether a decrease in service or an increase in cost is "unreasonable" under section 6, no further definition is found in the statute to provide extrinsic guidance to the Commission. The process "entails a balancing of the scope or magnitude of the cost increase or service decrease against the likely benefits to be derived from the carrier agreement." *Id.* at 15. Further, it may entail the weighing of a number of difficult-to-quantify costs and benefits, *Id.*, at 16, a process likened by Congress to "comparing short term 'apples' to an array of medium-term and long-term 'oranges.'" *Id.*

### The Commission's Authority Extends to Port Trucking Practices

Although the Ports' stated goal to obtain environmental and health benefits through the implementation of their CTP and Concession Agreements represents a new and possibly evolving type of agreement among MTOs, regulating port drayage trucking is within the traditional sphere of expertise of the Commission. Over forty years ago, the Commission addressed the matter of truck congestion and detention practices by Marine Terminal Operators ("MTOs") operating in the Port of New York pursuant to an agreement approved by the Commission under the Shipping Act, 1916. In wording instructive as to the breadth of Commission's broad role in maritime matters, the U.S. Court of Appeals for the District of Columbia Circuit twice affirmed the Commission's authority to find the MTOs' agreement practices related to truck detention practices violated the 1916 Act. American Export-Isbrandtsen Lines, Inc. v. Federal Maritime Commission, 444 F.2d 824 (D.C. Cir. 1970); American Export-Isbrandtsen Lines, Inc. v. Federal Maritime Commission, 389 F.2d 962 (D.C. Cir. 1968):

[I]t is apparent that the Commission properly determined that the responsibility for labor shortages came within that range of activities properly determined to be within the Terminals' responsibility. So, considering all these factors and recognizing the special knowledge, experience and ability of the Commission to deal with these Terminal problems, which the statute has made their special responsibility, we find that the Commission acted properly in rejecting the Terminals' proposed detention rule in its entirety, FN19 that its stated reasons for so doing fully justified the action taken, and that the detention rule, as ordered by the Commission is a just and reasonable exercise of the power of regulation in the public interest. Businesses affected with a public interest and subject to governmental regulation may be required by the regulatory agency to improve their service even though some added expense may result.

Id., at 444 F.2d 835-836. See also Petition of the Association of Bi-State Motor Carriers, Inc. to Investigate Truck Detention Practices of the New York Terminal Conference, 30 SRR 104

(FMC, 2004) (Commission has jurisdiction to determine lawfulness of truck detention practices by marine terminal operators at the New York/New Jersey port district.).

The Commission's Determination as to Agreement No 201170-001

Applying the statute and legislative directives under section 6(g), as well as the Commission's expertise with port practices, the Commission made a determination on October 29, 2008 that Agreement No. 201170 violated section 6 standards. As an expert administrative agency charged by Congress with regulating Agreements among marine terminal operators, the Commission determined that Agreement No. 201170, as amended, is likely, by a reduction of competition, to result in an unreasonable reduction in transportation service or an unreasonable increase in transportation cost. This determination compels the Commission, as the sole regulatory body responsible for administering the Shipping Act, and for oversight of anti-trust immunity granted to concerted activity among marine terminal operators, to seek an injunction of such agreement authorities and conduct giving rise to the anti-competitive impacts of the agreement.

In pursuit of an injunction from this Court under the applicable section 6(g) standards, the Commission submits the Declaration of Dr. Roy J. Pearson as Exhibit No. 1, demonstrating to this Court the methodology, findings and reasoning supporting the Commission's determination to seek injunctive relief. As the Commission's section 6 determinations to seek injunctive relief are, at bottom, findings of fact by the agency, those findings reflected in the Declaration of Dr. Pearson, should be accorded great weight. Drexel Burnham Lambert Inc. v. Commodity Futures Trading Com'n, 850 F.2d 742, 749 (D.C. Cir. 1988).

### The Anti-Competitive Effects of the Ports' Agreement and Their Concerted Actions

The Commission's determination that the Agreement violated section 6(g) was based on an extensive economic impact study performed by the Commission's chief economist, Dr. Roy Pearson. The study weighed information and data from a multitude of sources, including the ports' responses to the Commission's Request for Additional Information (RAFI), other confidential material filed by the Ports, available public sources and comments, as well as third party experts (many of whom were hired by the Ports). Pearson Decl. at ¶8, 12, 35. The study, consistent with guidelines of the pertinent legislative history, measured the net benefits of the Ports' CTP against the net benefits achievable under readily available alternatives. Id.

The Commission's analysis ultimately focused upon one particular aspect of the CTP that raised substantial anti-competitive concerns: the implementation of a concession program by the Ports that, explicitly or implicitly, mandates the use of only employee drivers to furnish drayage services and reduces the number of LMCs serving the Ports. Pearson Decl. at ¶13. On a net basis (i.e. added cost minus offsetting benefits) the net cost impact of the explicit POLA employee mandate, as presently confined to that port alone, likely will range between \$3.0 billion and \$4.6 billion through 2025 – without offsetting benefits. Pearson Decl. at ¶51. While POLA insists that the employee mandate is essential to meet its objectives, the adjacent Port of Long Beach, having the same CTP objectives, determined that it would not be necessary to implement an employee-driver mandate. Pearson Decl. at ¶16.

As Dr. Pearson has indicated that the employment status of the trucks' drivers is in no way critical to sustaining the CTP's environmental and public health benefits: a CTP without an employee-driver mandate not only produces all the relevant public health benefits, but does so at substantially lower cost and with greater net benefits overall. Pearson Decl. at ¶16.

The Ports have utilized the authorities in their agreements, and the corresponding anti-trust immunity, to collude with one another to reach agreement on the essential terms of the CTP, including the explicit and implicit employee mandates. Therefore, it is appropriate for this Court to enjoin the Ports from engaging in activity seeking to discuss, agree or implement, whether jointly and/or severally, any portion of the Ports' Concession Program or CTP having the effect of requiring use of employee-drivers by LMC concessionaires.

Agreement No. 201170-001 is central to the web of agreements the Ports have created to assure that their activities are fully immunized from anti-trust laws while enabling them to discuss, agree and implement their concerted CTP. Provided that the Agreement authorities do not violate section 6(g), it is lawful for MTOs to engage in such activity. However, where the determination is made that section 6(g) is violated, Congress has provided a remedial measure to redress the anti-competitive impacts of such authorities.

Pursuant to these agreement authorities, the Ports met repeatedly, discussed, exchanged information, collaborated and cooperated in the process of compiling a harmonized CTP and concession plans which restrict access to the Ports to authorized trucks and drivers. Since the Ports initial filing of the agreement in June, 2006, the Ports have worked closely together to harmonize their efforts to produce clean air as expediently as possible. These efforts have included preparing for and holding joint meetings to adopt a joint Clean Air Action Plan (Blair at ¶ 5); jointly selecting advisors to serve on, and establishing, a joint implementation task force (Blair at ¶ 7); jointly commissioning economic studies of the initial jointly proposed CTP (Blair at ¶ 16, 27); jointly meeting with the Commission to discuss their CTP proposals (Blair at ¶ 20, 27); preparing and jointly submitting comments to the Commission (Blair at ¶ 32); preparing for and jointly holding meetings to solicit stakeholder views on proceeding with the CTP; and

preparing and approving identical tariff provisions establishing a progressive ban on dirty trucks, creation of a Clean Truck Fee (“CTF”) and a variable cargo fee (via both joint and independent votes of the Harbor Boards) (Blair at ¶ 38-39, 46-49). The underlying discussions, exchange of information and agreements reached pursuant to these collaborative activities are lawful under anti-trust statutes only because they are immunized under the Shipping Act.

At the culmination of these joint activities, the Ports approved concession plans harmonized to the extent that each port’s plan closely mirrors one another. In a comparison of 20 key elements of the Ports’ respective CTP, 14 of those elements are common between the Ports. Pearson Decl. at ¶29. Such uniformity of the CTP indicates that the Ports effectively utilized their agreement authority to collectively formulate their CTP despite the fact that certain provisions in the respective programs ultimately vary. Pearson Decl. at ¶18 fn4.

Following joint discussions, the Ports diverged on the implementation of an explicit employee mandate. Ultimately, this arrangement is found to offer a distinction without a difference: On the one hand, POLA implemented a concession plan explicitly prohibiting access to its terminals by Independent Owner Operators; POLB, on the other hand, does not have an explicit prohibition against IOOs, but the harmonized concession plan disadvantages LMCs’ IOO drivers. Pearson Decl. at ¶18 fn 4. Although POLB has determined not to institute a ban on Independent Owner Operators (“IOOs”) at this time, the agreement authority contained in Agreement 201170-001 is sufficiently comprehensive to allow these Defendants, without precondition of further filing with the Commission, to further discuss with its closest port competitor the adoption of new or revised proposals for employee mandates as a component of the Ports’ CTP and concession programs; to reach agreement with its counterpart port on the terms, conditions or effective date for such changes, whether limited to employee mandate

requirements or as part of ongoing modifications to the CTP and concession programs; and thereafter to implement any such changes, whether jointly or severally as between the Ports.

Where one view of concerted behavior among agreement members might fixate only upon those collective decisions made upon an identical set of actions, Pearson Decl. at ¶4 fn. 5, structural changes in maritime agreements over recent years have caused uniform actions by agreement members in many instances to be replaced by coordinated but non-identical actions. Id. The Ports' CTP, inclusive of the employee mandate, is an example of the new and evolving forms of concerted action amounting to collusive, coordinated actions by the Ports.

The Ports should no longer be heard to argue, after so assiduously pursuing their joint CTP process, that any discrepancy between their respective concession plans cannot be the result of joint effort. Whatever distinctions may be drawn by the Ports, those efforts were legitimized by the agreement authorities, coordinated over time between the Ports and with their respective private MTOs, and implemented under the immunities conferred by the Shipping Act pursuant to the Ports' filing of their agreement with the Commission. As the fruit of the Parties' concerted and collusive activities in setting in motion Agreement No. 201170, the Ports cannot now disclaim responsibility for their respective efforts to accomplish the known and intended outcomes of their agreements and programs.

The Anti-Competitive Effects of the Ports' Agreement and Conduct Were Determined to Exist After Carefully Considering the Benefits and Burdens of the Ports' Clean Truck Program

The Commission's review of the effects of the Ports' Agreement, as reflected in the declaration of Dr. Pearson, led the Commission to seek injunctive relief. The Commission found that the Ports' harmonized concession plans will artificially restructure the current port drayage trucking market from one where IOOs are able to freely compete to serve the Ports' terminal

facilities into a market where only employee drivers (and not IOOs) will be able to serve the Port of Los Angeles and where IOOs are disadvantaged. Pearson Decl. at ¶85. The Commission further found that the restructuring of the POLB port drayage trucking market has already commenced in earnest, even though the employee driver mandate will not operate so as to bar IOO drivers until the end of next year. Similarly, the Commission has determined that *de facto* conversion of drayage service at POLB will commence as soon as the Ports' uniform CTF begins to be collected, which is expected imminently. Pearson Decl. at ¶75. The drayage market at POLB will diverge from POLA's because beneficial cargo owners will seek out trucks that qualify for POLA's exemptions and subsidies in order to avoid paying the \$70 per container CTF. Pearson Decl. at ¶¶88-89. Declarant Meylor, Manager of Carmichael International Service, a Customs Broker, corroborates Dr. Pearson's conclusions, attesting that the Ports' concession requirements will raise the cost of drayage to smaller shippers (BCOs) because they will not be able to compete to employ newer trucks exempt from the CTF, as those trucks will be commanded by the large shippers. Meylor Declaration at ¶4.

The Commission made its findings only after carefully weighing the benefits and burdens of the Ports' CTP and harmonized concession agreements with LMCs. Dr. Pearson details that he performed a "comparative benefit and cost analysis" using the estimates of the Port consultants' estimates on the costs and cost savings of the Ports' CTP. Pearson Decl. at ¶¶34-35. Dr. Pearson also incorporated estimates of economic studies by other groups. For example, the \$1.25 billion benefit derived from the "avoidance of anti-poverty payments" that stems directly from the POLA employee-driver mandate was derived from the study conducted by the Los Angeles Alliance for a New Economy ("LAANE") on behalf of the Coalition for Clean and Safe Ports ("CCSP"). Dr. Pearson then adjusted the \$1.25 billion amount to reflect factors not

incorporated in the LAANE study, such as the fact that 20 percent of drayage truck drivers are unmarried and likely did not qualify for welfare payments. Pearson Decl. at ¶¶ 43–44.

Dr. Pearson performed similar analyses and made necessary adjustments to the totals used in various studies to derive the dollar benefits and costs related to: reduced traffic congestion in the Los Angeles area; the ability of LMCs to match containers (for example, a truck with a container to be dropped-off at one of the Ports with a container waiting for on-carriage to the greater Los Angeles area or further inland); the estimated reduction in premature deaths if the Ports' Clean Air Action Plans reduced emissions to expected levels; higher wages and fringe benefits employee-drivers will earn than IOOs. Pearson Decl. at ¶¶45-46.

Throughout this rigorous analytical process, Dr. Pearson used available data (data developed largely by the Ports' own experts and by groups largely supportive of the Ports' CTP) to provide the Commission with the comparative benefit and cost analysis anticipated by Congress. Pearson Decl. at ¶35, 50.

Dr. Pearson compiled data using this methodology for two models relevant to the Commission's review: one based upon the CTP actually being implemented by the Ports (referenced therein as "CTP-Actual"), e.g., the employee-driver mandate, CTF fee exemptions, and truck subsidies at POLA; but without similar elements required at POLB at this time). The other model is based upon the benefits and costs if both Ports implemented the CTP employing the less burdensome and costly requirements found in POLB's approach. Pearson Decl. at ¶34. Dr. Pearson provides a detailed breakdown of the benefits and costs of the two models. Pearson Decl. at ¶34, Att. D. The net benefits of the Ports' CTP-Actual produced net benefits that are between \$2.5 billion less favorable than if both Ports implemented the POLB model. Pearson Decl. at ¶38. If the Ports experienced the CTP-Actual "worst-case" outcome, the difference

would be approximately \$6 billion favoring application of the POLB model across both Ports. Pearson Decl. at ¶41.

Dr. Pearson's analysis reveals that the disparity between the two models is attributable to the POLA employee driver mandate and that, overall, the employee-driver mandate is not necessary to achieve the health and environmental benefits posited by the Ports. Pearson Decl. at ¶49-51.

#### Applications of Section 6(g) Standard

##### Reduction of Competition

Section 6 requires the Commission to determine whether the Agreement results in a reduction in competition, as well as whether it is likely, by that reduction, to cause an unreasonable decrease in transportation service or unreasonable increase in transportation cost. The Commission determined that a reduction in competition results from the Ports' requirement that only LMCs that have signed concession agreements may serve their facilities. Pearson Decl. at ¶12 fn1, 91.<sup>12</sup> The concession agreements will give surviving LMC concessionaires more market power since the concession programs are designed to, and will reduce the number of competitor LMCs serving the Ports by raising the costs of participating in the drayage market. Pearson Decl. at ¶80-81. Some LMCs and IOOs will be unable to afford to pay the higher costs associated with the entry barriers that the Ports have put in place and will, therefore, abandon port drayage at the Ports. Pearson Decl. at ¶57. By substantially reducing the number of competitors, the remaining LMC concessionaires will be able to substantially raise prices and increase profit margins above previously competitive levels. Pearson Decl. at ¶81. Accordingly, the concession plans reduce the number of LMCs from which cargo owners or other users of port

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<sup>12</sup> IOOs are not permitted to sign Concession Agreements at either Port.

drayage services may choose, which is a predicate under section 6(g), and a condition “likely” to unreasonably increase the costs of drayage service.

#### Unreasonable Increase in Transportation Cost

The Commission’s determination that the Ports’ CTP is likely to result in an unreasonable increase in transportation cost is based upon analysis of the Ports’ harmonized concessions plan, with specific focus upon the following CTP elements: (1) the requirement that LMC concessionaires must own or lease the trucks in their fleet and hire full-time employee-drivers; (2) structuring of the CTP fee and corresponding fee exemptions; and (3) structuring of subsidies to certain trucks which qualify under Port criteria directly related to truck ownership and source of vehicle financing (public vs. private), rather than comparative air quality emission standards. Pearson Decl. at ¶16. As a result of these initiatives, the drayage truck market will artificially restructure from a perfectly competitive market with a severely constrained market that will allow the surviving LMCs to unreasonably increase prices while offering inferior service. Pearson Decl. at ¶81.

The Ports’ contend that the more stringent emissions requirements and safety and security standards they want to impose on the port drayage trucking industry can be achieved only by reducing the total number of LMCs operating at the Ports. Pearson Decl. at ¶54. Such consolidation would enhance the market power of the remaining LMCs. Exemptions and subsidies structured to promote the Ports’ collusive schemes will indeed enable the remaining CTP-qualified truckers to obtain and keep lower emission trucks. However, the disadvantage to cargo owners in a Port-sponsored environment which intentionally stifles competition in drayage services is that the surviving LMCs are likely to substantially raise prices above levels that

would exist without the CTP. Pearson Decl. at ¶ 59. No countervailing public or environmental benefits outweigh these significant economic impacts.

In his verified declaration, Dr. Pearson explains that drayage costs among the San Pedro Bay ports will hereafter vary by employee-driver status, truck type, financing method and the port served. Under the Ports' CTP, LMCs must closely monitor which of the two Ports their truckers serve, a requirement not existing prior to the Ports' joint imposition of their Concession Plans. The remaining LMCs may enjoy greater business opportunities (due in no small part to the reduction of available LMCs), but will have to develop new subsidiaries or business collaborations for each of the Ports, because they will no longer be able to rely on IOOs to serve POLA. Conversely, use of employee-drivers to call at POLB will not be an efficient use of the higher cost labor. This fragmentation of the current highly competitive and responsive drayage market at the Ports will also reduce service as LMCs will be unable to meet the periodic surges in Port volumes because their operations will be more rigid. This rigidity stems from the inability of drivers to freely access the two contiguous ports.<sup>13</sup> The net effect is unreasonable increases in costs to BCOs (the shipping public), as well as an unreasonable decreases in service. Pearson Decl. at ¶67.

Dr. Pearson's analysis also indicates that that transportation costs will also be driven up by the employee driver mandate's cost through additional wages, benefits and decreased productivity. Pearson Decl. at ¶49. The net effects of the employee-driver mandate will likely

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<sup>13</sup> It is impractical for LMCs to serve just one of the two ports because that would create operational inefficiencies and increase costs, and perhaps cause them to lose customers who ship into or out of both Ports. Pearson Decl. at ¶74. Industry representatives have provided declarations verifying that they have no practical or operational choice but to sign concession agreements with both Ports. Joshua Matthew Owen Declaration ("Owen Decl.") at ¶10; Mary Lou Hendricks Declaration ("Hendricks Decl.") at ¶5; Michael J. Lightman Declaration ("Lightman Decl.") at ¶¶7 & 8; Thelma Standart Declaration ("Standart Decl.") at ¶¶9 & 11. In signing concession agreements with both Ports, LMCs necessarily must comply with the requirements of the more stringent Port concession agreement, POLA's mandate for employee-drivers. Hendricks Decl. at ¶5; Lightman Decl. at ¶8; Standart Decl. at 11.

exclude or divert some cargo from the Ports due to these increased transportation costs. Pearson Decl. at ¶49; Linder Decl. at ¶5. Increased labor costs attributable to hiring employee-drivers will also create problems in coping with the peak and off-season container volumes. LMCs in the artificially restructured port drayage market will need to hire sufficient employee-drivers to cover the peak season; however, those employee-drivers will not be efficiently used during the slow months. These additional costs will likewise be recouped by the remaining LMCs by exacting higher rates. Pearson Decl. at ¶76.

As demonstrated by Dr. Pearson and determined by the Commission, the increased burden of the employee-mandate on the economics of port drayage trucking is both pervasive and highly costly. As the Ports' CTP is now configured, Dr. Pearson has determined (using the Ports' own figures as a primary data source) that implementation of the employee-driver mandate and directly-related components of the Ports' CTP produce net benefits that are \$2.5 billion less favorable than if both Ports implemented the less restrictive drayage model. The less restrictive drayage model eliminates the intrusive employee-driver requirement and adopts the overall less costly concession requirements in the POLB concession plan. In the "worst-case" scenario the difference in net benefits could balloon to approximately \$6 billion dollars over simply implementing the POLB concession model across both Ports.

It is indeed sobering that Dr. Pearson's analysis reveals that the disparity between the two models is predominantly attributed to the POLA employee-driver mandate. Under the section 6(g) statutory standard as to whether increases of transportation costs should be deemed "unreasonable," it is dispositive that the Ports' collaborative efforts and to control drayage services and mandate employee-drivers do not achieve greater health and environmental benefits than those benefits posited by the Ports to be gained without use of an employee-driver mandate.

Acting within its statutory mandate, the Commission has determined that the “disconnect” between the desired environmental and public health benefits and the costs and market-distorting employee-driver mandate is clear and too great. The Commission and this Court are equally prompted by the statute to stop these anti-competitive effects before the destruction of the local port drayage market and attendant effects upon shippers is made irreversible.

#### Unreasonable Reduction in Transportation Service

Upon the Commission’s determination that the Agreement and the Ports’ conduct will likely produce an unreasonable increase in transportation cost, the Commission may proceed to court for injunctive relief under section 6(g). The Commission also may, but is not strictly required to, address the second, or alternative, leg of the 6(g) analysis: whether the agreement, or activities conducted thereunder, are likely to produce an unreasonable reduction in transportation service.

In its review of the instant agreement, the Commission determined that the Agreement was likely to cause the (pre-existing) perfectly competitive and unified drayage markets in the Ports of LA and LB to split into separately served markets with different truck fleets conducting operations in each Port. Pearson Decl. at ¶88-90. This split of the drayage market is unavoidable provided the employee mandate and the discriminatory application of the clean truck fees are allowed to be implemented. Separating the markets into two, smaller, more rigid markets introduces operating inefficiencies and reduces surge capacities.<sup>14</sup> Pearson Decl. at ¶ 74 fn 54, ¶89. Ultimately, this effect is likely to lead to a decrease in transportation service. Id.

IOOs currently operate approximately 90-95% of the drayage trucks serving both POLA and POLB. Thus, LMCs will be forced hire employee-drivers in order to provide drayage

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<sup>14</sup> Dr. Pearson has explained that surge capacity is the ability of the drayage market to increase or decrease the amount of drayage services (trucks and drivers) available to accommodate swings in demand. Pearson Decl. at 67 fn 50.

service at POLA, while they will continue to utilize IOOs at POLB. In hiring employees, LMCs will hire employee-drivers based on the number of drivers needed to cover anticipated demand, and no more, given the added expense of sustaining the employees. This limits the LMCs ability to flexibly adjust the amount of drayage capacity during unanticipated increase in demand (i.e., surge capacity). Pearson Decl. at ¶76. Given the seasonal and unexpected variations in container volumes, the employee mandate is therefore likely to produce short term driver shortages resulting in a reduction in available service relative to demand. Pearson Decl. at ¶77.

The employee mandate will also lead to decreases in service by making it more difficult for LMCs to ‘match’ inbound and outbound truck loads. Pearson Decl. at ¶ 46, 88. Where certain trucks are prohibited from accessing certain ports, either due to the express employee mandate, or due to the financial considerations associated with the application of the CTF, the practical ability of the LMC to match inbound and outbound trucks with corresponding loads, and thereby creating operational efficiencies, is jeopardized. This impairment is another example of the inefficiencies surrounding the CTP which will lead to a reduction in drayage service, documented in the Commission’s analysis.

The Public Will Suffer Irreparable Harm if a Preliminary Injunction is Not Entered

The standards for assessing preliminary injunction requests by the government under section 6(h) of the Shipping Act are not the requirements imposed by the traditional equity standard that the common law applies to private litigants. An agency acting to enforce a federal statute is not tied to the same thresholds and balancing tests applicable to private parties seeking injunctive relief in aid of essentially private interests.<sup>15</sup>

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<sup>15</sup> See, e.g., Dendy v. Washington Hosp. Center, 581 F.2d 990, 992 (D.C.Cir.1978) (citing Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921 (D.C.Cir.1958)); Riggs Nat'l Bank v. Allbritton, 516 F.Supp. 164, 170 (D.D.C.1981) (prerequisites for preliminary injunction: irreparable harm; probability of success on the merits; balance of equities favoring plaintiff; public interest served by provisional relief). See also, Federal Trade

Most importantly, case law has lightened the agency's burden by eliminating the evidentiary burden of showing irreparable harm.<sup>16</sup> It is not required that the Commission to demonstrate the precise manner in which violation of the law will result in injury to the public interest; it is sufficient to show only that an act or threatened act is within the prohibition set forth in the statute. U.S. v. Ingersoll-Rand Co., 218 F.Supp. 530, 545 (W.D.Pa., 1963), aff'd, 320 F.2d 509 (3d Cir. 1963).

Nonetheless, proof of likelihood of success on the merits does not relieve a court of equity of the duty to balance the equities. The court must determine whether the harm to defendants outweighs the likelihood that adequate relief will be available to the government if the injunction is not issued. Once the Commission has shown a reasonable likelihood of success on the merits, the equities usually tip in its favor, since private interests must be subordinate to public ones. "Thus, the district court must first determine the Government's likelihood of success on the merits and then, if necessary, balance the equities." U.S. v. Siemens Corp., 621 F.2d at 506 (2<sup>nd</sup> Cir. 1980). Here, the Commission has made a strong showing that the Agreement and conduct thereunder by the Ports contravenes the standards set forth in section 6 of the Shipping Act. The Commission has further shown that the Ports' Agreement and conduct, through a reduction in competition, is likely to result in unreasonable increases in transportation cost or an unreasonable reduction in transportation service.

In addition to the strong showing of likelihood of success on the merits, the Commission has demonstrated that the balance tips strongly in favor of enforcement of the Shipping Act and

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Commission v. Whole Foods Market, 533 F.3d 869, 875 (DC Cir. 2008).

16 See, e. g., U.S. v. Siemens Corp. 621 F.2d 499, 506 (2<sup>nd</sup> Cir. 1980); United States v. Hayes Int'l Corp., 415 F.2d 1038, 1045 (5<sup>th</sup> Cir. 1969) (employment discrimination in violation of civil rights laws); SEC v. Globus Int'l, Ltd., 320 F.Supp. 158, 160 (S.D.N.Y.1970) (stock manipulation in violation of securities laws); United States v. Ingersoll-Rand Co., 218 F.Supp. at 544-45 (merger in violation of antitrust laws).

issuance of an injunction. The public interest is best served through grant of preliminary injunctive relief, as enforcement of Shipping Act standards can be observed without any diminution of the environmental objectives at the core of the Ports' combined CTP. The Commission has shown that the employee-mandate is not a necessary element of the Ports' CTP because it does not contribute to the sought-after environmental and public health benefits; hence, neither the Ports nor any interest founded in environmental benefits or public health concerns will be harmed by the relief requested by the Commission. Conversely, without the relief requested, injunction of the Ports' Agreement and conduct thereunder, there is no adequate remedy to reconstruct the drayage industry once it is destroyed.

While not strictly required under statutory injunction standards, irreparable harm to a broad segment of the public is demonstrated in the declarations of seven industry participants who directly provide, arrange for, or directly utilize drayage trucking services within the San Pedro Bay ports area. Attached to this motion are five declarations by representatives of trucking companies affected by the Ports' CTP, one declaration from a customs broker/ocean transportation intermediary, and one from a large shipper of containerized goods that must transit through the Ports.

These industry representatives indicate that they are being harmed in several ways by the adverse restructuring of their business models in order to comply with the Ports' harmonized concession requirements. Declarants Hendricks, Lightman and Standart indicate 100 percent of the drivers they currently use are IOOs. Hendricks Decl. at ¶4; Lightman Decl. at ¶6; Standart Decl. at ¶4. Declarant Owen indicates that 95 percent of his drivers are IOOs. Owen Decl. at ¶9. These LMCs have had to sign concession agreements with both Ports because their customers move cargo through both Ports; they must now revise their operating plans and business models

to meet the requirements of POLA because it has the more stringent concession requirements. Owen Decl. at ¶10; Hendricks Decl. at ¶5; Lightman Decl. at ¶¶7-8; Standart Decl. at ¶11. As Dr. Pearson points out, these LMCs will have to employ at least enough drivers so that they can adequately serve their customers' needs at POLA. Pearson Decl. at ¶78.

Several of the declarants attest that they have already begun to raise rates in order to cope with increased costs they have incurred as a result of the adverse restructuring of the port drayage market being imposed by the Ports. Owen Decl. at ¶¶14-15; Hendricks Decl. at ¶7; Lightman Decl. at ¶¶13-14; Standart Decl. at ¶11. Declarant Meylor also indicates that the Ports' CTP is increasing direct costs that his customers must pay as well as increasing costs that his own company incurs and must pass on to the customers; Mr. Meylor points to the increased complexities of dealing with the Ports' requirements as creating additional indirect costs. Meylor Decl. at ¶¶2, 4-5.

Declarant Linder indicates that True Value, as a cargo owner or BCO, is actively trying to avoid paying the CTF at the Ports. True Value already is trying to find LMCs that have compliant trucks that are exempt from the \$70 per forty-foot container CTF, or alternatively, LMCs that have non-exempt trucks capable of absorbing the CTF cost. Linder Decl. at ¶4. The Ports' exemption of LMCs trucks that are compliant with the Environmental Protection Agency's 2007 emissions standards is causing shippers of cargo to scramble for those trucks, and undercutting LMCs that do not have 2007-compliant trucks from competing with those LMCs that do. Dodd Decl. at ¶6; Hendricks Decl. at ¶8; Lightman Decl. at ¶15; Standart Decl. at ¶9, 13; Meylor Decl. at ¶5; Linder Decl. at ¶4. In addition, three LMCs and Mr. Meylor attest that the Ports' fee exemptions for compliant trucks favor larger LMCs that own, or been able to, purchase 2007-compliant trucks. The advantage given to those larger LMCs makes it very

difficult for them to compete against those who are favored. Dodd Decl. at ¶¶6-7; Lightman Decl. at ¶15; Standart Decl. at ¶¶9, 13; Meylor Decl. at ¶4.

All of the LMC declarants are making efforts to comply with the Ports' CTP requirements in order to protect their businesses and retain their customers; several attest that they have already lost, or are certain that they will lose, customers based on the availability of exemptions from the Clean Truck Fees to the customers of LMCs eligible for such exemptions. Owen Decl. at ¶10; Dodd Decl. at ¶7; Hendricks Decl. at ¶8; Lightman Decl. at ¶8; Standart Decl. at ¶9, 13. In addition, Mr. Meylor provides a customer's perspective of the Ports' artificial restructuring of the drayage market indicating, that in the future, he will not be able to rely on LMCs in the future that do not comply with POLA's requirements (i.e., employee-driver mandate). Meylor Decl. at ¶3.

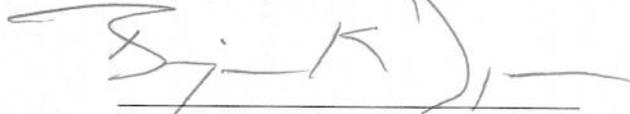
It is clear that these LMC declarants are being irreparably harmed. With regard to the LMC declarants, the existence of their businesses is being threatened by the effects of not being able to compete with larger LMCs, i.e. those favored by the Ports' fee exemptions and whose customers do not have to pay the CTF. These LMCs are in danger of going out of business because the Ports are altering the drayage market to favor certain LMCs. The consequent reductions in competition will enable the larger LMCs to demand and exact higher rates from the marketplace. In short, these declarants are already suffering from harm the anti-competitive effects of the Ports' adverse restructuring of the drayage trucking market. The requested injunction would provide relief from these anti-competitive effects.

#### CONCLUSION

Accordingly, Plaintiff's Motion should be granted. Defendants, and their officers, agents, employees, and attorneys, should be preliminarily enjoined from giving effect to or otherwise

taking action to discuss, agree or implement, jointly or severally, any portion of the Plaintiffs' Concession Program or Clean Truck Programs ("CTP") that: (1) requires use of employee drayage truck drivers to serve the Ports of Los Angeles or Long Beach or prohibits independent owner operators from serving the Ports; and/or (2) establishes the use of truck purchase incentives, subsidies, or clean truck fees or exemptions from such fees imposed upon some but not all EPA-compliant drayage trucks which disadvantage independent owner operators that provide drayage service at the Ports of Los Angeles and Long Beach.

Respectfully submitted,



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