Nos. 04-4752, 04-4876, 04-4877

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant, Cross-Appellee
v.

GOSSELIN WORLD WIDE MOVING N.V. and THE PASHA GROUP,

Defendants-Appellees, Cross-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS APPELLANT

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JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. This Court has jurisdiction pursuant to 18 U.S.C. § 3731 and 28 U.S.C. § 1291.

The district court dismissed Count One of the Information in an order filed on August 16, 2004. The government filed a notice of appeal on September 15, 2004. The district court entered a judgment of conviction on Count Two on October 5, 2004. That order is the subject of defendants' cross-appeals.

ISSUES PRESENTED

1. Whether section 7(a)(4) of the Shipping Act, 46 U.S.C. app. § 1706(a)(4), immunizes an agreement to fix the through rate charged to the Department of Defense for the movement of military and civilian household goods from Germany to the United States as an agreement concerning "the foreign inland segment" of through transportation.

2. Whether section 7(a)(4) is sufficiently explicit to preclude application of the rule of lenity.

3. Whether sections 7(a)(2) and 16 of the Shipping Act, 46 U.S.C. app. §§ 1706(a)(2), 1715, which immunize agreements filed with the Federal Maritime Commission (FMC) or exempted by the FMC from filing, immunize an agreement that was neither filed nor exempted.

4. Whether section 7(c)(1) of the Shipping Act, 46 U.S.C. app. § 1706(c)(1), which states that no court or agency decision can remove or alter antitrust immunity retroactively, can retroactively immunize an agreement that never had immunity in the first place.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS

Defendants, Gosselin World Wide Moving, N.V. ("Gosselin") and The Pasha Group ("Pasha"), were charged in a two-count Information filed on February 18, 2004. JA 23. Count One charged a conspiracy to fix the prices that the Department of Defense ("DOD") paid for the shipment of military and civilian household goods from Germany to the United States, in violation of section l of the Sherman Act, 15 U.S.C. § 1. JA 23-32. Count Two charged a conspiracy to defraud the United States in violation of 18 U.S.C. § 371. JA 32-35.

Defendants agreed to plead guilty to both violations, unless the court granted their motions to dismiss the Information on the ground that their conduct was immune under the Shipping Act of 1984, 46 U.S.C. app. §§ 1701-19.[1] JA 37-66. The parties also agreed on a Statement of Facts ("SoF") as the factual basis for the plea agreements. JA 67-78. The SoF and the Information form the entire

[1] The Shipping Act of 1984 is reprinted as Addendum A to this Brief.

factual record for purposes of the defendants' motions to dismiss. JA 40, 54.

On August 16, 2004, the district court held that defendants' agreement was immune from antitrust prosecution under the Shipping Act, but that it was not immune from prosecution under the federal fraud statute. JA 173-210. The government appealed the dismissal of Count One. JA 213.

After holding a sentencing hearing on Count Two, the court on October 5, 2004, entered a judgment of conviction fining each defendant $4.6 million, as they had agreed in their Plea Agreements. JA 269. The defendants filed notices of appeal on October 13 and 14, 2004. JA 271, 275.

On October 20, 2004, this Court consolidated the defendants' and government's appeals.

B. STATEMENT OF FACTS

1. Overview of the Military Household Goods Program

DOD pays for the transportation of the household goods of its military and civilian personnel to and from foreign countries through the International Through Government Bill of Lading ("ITGBL") program.[2] DOD solicits bids for through rates from U.S. freight forwarders, companies that contract with DOD and

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[2] The program was managed by the Military Traffic Management Command which became the Surface Distribution Deployment Command on January 1, 2004. We refer to both as DOD in this Brief.

shoulder the ultimate responsibility for shipment. JA 68. A "through rate" is the rate bid by U.S. freight forwarders and paid by DOD (in dollars per hundredweight) for all the moving and transportation services provided in the door-to-door move from the foreign country to the U.S. JA 68. The bidding occurs twice a year for six-month cycles (summer and winter) in a two-step bidding process. SoF 4, 13. JA 68, 70-71. In the first step, or "initial filing," U.S. freight forwarders file a bid stating the through rate for each route – called a "channel."[3] The low bidder sets the "prime" through rate for that channel, and thereby captures the percentage of the household goods traffic which DOD reserves for the freight forwarder setting the prime rate. The second lowest rate in the initial filing is termed the "second-low rate." JA 71. In the second step of bidding, or "me-too filing," the other freight forwarders can match, or "me-too," the prime through rate or file a higher rate. In the Germany to United States channels, a freight forwarder typically must me-too the prime rate to receive any business. JA 72

Each bid submitted by a U.S. freight forwarder, whether initial or me-too, states a unitary through rate for door-to-door service, which actually comprises

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[3] Each "channel" is a route to or from a particular state and a specific foreign country (*e.g.*, Germany-Virginia). A majority of the Germany-U.S. household goods traffic moves to and from 20 high-volume states. JA 70-71.

five services: (1) local German agent services; (2) European port services; (3) ocean transport services; (4) U.S. port agent services; and (5) U.S. destination agent services. JA 68-69. In determining a through rate to bid, the U.S. freight forwarder must consider the costs for each of these services, plus the costs of a booking agent to monitor shipments, physical inputs such as liftvans and warehouses, and finally, overhead and profit.

As subcontractors for U.S. freight forwarders, defendants Gosselin and Pasha offer a "landed rate," which bundles the local German agent services, European port services, and ocean service, and includes the landed rate providers' mark-up. JA 70. In providing a landed rate from Germany, therefore, defendants Pasha and Gosselin (or subcontractors of their choosing) handle the shipment from its German origin to the U.S. port of destination. *Id.*[4]

Defendants also act as the exclusive co-agents of the International Shipper's Association ("ISA"), an association of freight forwarders organized to consolidate household goods for shipment on ocean-going vessels. Thus, U.S. freight forwarders also buy ocean carriage from defendants, either as part of the landed rate, or as a separate service as agents of ISA. JA 72. Additionally, Pasha

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[4] As part of the landed rate, defendants may act as the general or booking agent for their U.S. freight forwarder customers, or the freight forwarders may pay another entity to handle those responsibilities. JA 68-69.

participates in the ITGBL program as a freight forwarder through its wholly-owned subsidiary, Gateways International, Inc., and Gosselin provides local agent services in Germany through its subsidiary, Gosselin GmbH. JA 67-68, 70. Through their combined involvement in the ITGBL program, defendants affect each household goods shipment, either as a landed rate provider, an ocean carriage vendor, a freight forwarder, a local German agent, or, more often, by providing a combination of these services. JA 70.

2. The Conspiracy

Defendants admitted that, in the summer cycle of 2002, they agreed with U.S. freight forwarders to raise the through rates filed by the U.S. freight forwarders in 12 channels from Germany to the U.S.

In the initial filing for the summer cycle of 2002, a U.S. freight forwarder, referred to as "FF-1" in the criminal Information, filed prime through rates – *i.e.*, submitted the lowest price – in 26 of the 52 channels from Germany to the United States. JA 72. FF-1 did not use the landed rate provided by either defendant but, by negotiating separately with various subcontractors for each step in the transportation, was able in 12 of the 26 channels to bid through rates that were approximately $3.00 per hundredweight lower than those of freight forwarders using defendants' landed rates. JA 72. In December 2001, DOD published FF-1's

prime bids, along with those of the next four lowest bidders. U.S. freight forwarders then had until January 16, 2002 to file their second-round me-too bids. JA 72.

On December 26, 2001, Gosselin's managing director sent an email to a landed rate competitor (an unindicted co-conspirator ("UCC")), which, like Gosselin, also operated a local German agency), identifying 12 channels "with quite some money on the table." The email contained a spreadsheet targeting those channels for elimination. The email explained to the UCC that, by "not taking the low into consideration we would increase the rate level with an average of [$]3.63 Usd. . . . This is the only thing that in my mind can happen." JA 72-73. The head of the UCC replied: "[A]gree to your position . . . . You know if we do not react and give [the] industry a clear message which rate to base the m/2 [me-too] on, then everyone will use the low [prime] rate and later expect us [the landed rate providers] to reduce our rates so those carriers can work under their m/2 rates." JA 72-73.

Gosselin promptly forwarded these emails to the chief executive of Pasha, the remaining landed rate provider, in the U.S. In that email, Gosselin's managing director noted the 12 targeted channels and stated: "I don't know where you are at this moment with [another freight forwarder that filed prime rates in Germany to

U.S. channels], but what rate levels would you be able to support if those states would go to the second level? I think it is important we move rather quickly now. Maybe when you have a chance we can talk in the next days." JA 73. Pasha thereafter agreed with Gosselin to eliminate the prime through rates in 12 of the 26 channels and replace them with higher rates at the second-low level. JA 74.

Defendants did several things to implement their agreement. First, Gosselin's managing director agreed to pay a specified rate to twelve of the largest German packing and hauling agents (including its own subsidiary, Gosselin GmbH). In return, those agents agreed not to "handle business" for freight forwarders in the 12 channels unless those freight forwarders filed me-too rates at or above the second-low level. JA 73-74. On January 8, 2002, in a fax letter edited and approved by Gosselin's managing director, the agents informed U.S. freight forwarders that they "will offer their capacity only to those carriers me-tooing the second rate level into the [enumerated 12] states . . . . It was emphasized strongly that business to these states will only be handled at the second low rate level, so, me-too can only happen at this level." JA 74. Gosselin sent a copy of this fax to Pasha on January 9, 2002. *Id.*

Defendants then persuaded FF-1 to agree to cancel its prime rates in the 12 targeted channels, on the understanding that no other U.S. freight forwarder would

me-too those prime through rates or file a rate below the second-low level. JA 74-75. To keep their promise to FF-1, defendants obtained the agreement of most of the other U.S. freight forwarders not to me-too the prime through rates in those 12 channels, but instead to file me-too rates at or above the second-low level. JA 75. The other U.S. freight forwarders overwhelmingly filed me-too through rates at or above the second low level in the 12 targeted channels. *Id.* In the few instances where a U.S. freight forwarder ignored or misunderstood the instructions and filed me-too rates lower than the second-low level, defendants persuaded them to cancel those lower rates. JA 75-76. In addition, before the cancellations were effective, defendants provided misleading information to DOD personnel in Germany to ensure that DOD did not tender any shipments to a freight forwarder with a me-too rate on file below the second-low level. JA 75-76.

Defendants admitted that they engaged in a conspiracy to eliminate competition by fixing and raising through rates filed with DOD, and that they unlawfully, willfully and knowingly conspired to defraud the United States, increasing the rates paid by DOD for the transportation of military household goods during the summer 2002 cycle by $ 1 million over what DOD would have paid in the absence of their conspiracy. JA 76, 78.

3. The District Court's Opinion

The district court ruled that defendants' price-fixing agreement was immunized from antitrust prosecution by Shipping Act sections 7(a)(4), 7(a)(2), and 7(c)(1). Moreover, even if the agreement were not immunized by section 7(a)(4), the court held that it would dismiss the antitrust count under the "rule of lenity." The court believed that defendants' through rate agreement was immune under section 7(a)(4) because it was "an agreement or activity concerning the foreign inland segment of through transportation." While the bids submitted to DOD were for through rates, the court reasoned that defendants' agreement "concerned" the "foreign inland segment" because defendants provided some local German agent services as part of through transportation, and these local business activities qualified defendants for immunity for everything they did relating to the shipment of military goods. JA 194-195, 198.

Relying on *United States v. Tucor International, Inc.*, 35 F. Supp. 2d 1172 (N.D. Cal. 1998), *aff'd*, 189 F.3d 834 (9th Cir. 1999),[5] the court rejected the government's contention that the Shipping Act, including its antitrust immunity, applies only to agreements "by or among ocean common carriers" and "marine

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[5] *See also United States v. Tucor International, Inc.*, 238 F.3d 1171 (9th Cir. 2001) (rejecting *Tucor* defendants' Hyde Amendment claims for attorneys fees).

terminal operators" as stated in section 4 of the Act. The court further held that, while it did not believe section 7(a)(4) was ambiguous, if the word "concerning" caused some ambiguity, that ambiguity should be resolved in favor of dismissing the antitrust count under the "rule of lenity."

The court held that the defendants' agreement is also immune under section 7(a)(2) of the Shipping Act, which provides immunity for agreements that are on file with the Federal Maritime Commission ("FMC") or that have been exempted by the FMC from filing. Although defendants' agreement on through rates was never on file with the FMC or exempted from filing, the court believed that because the FMC exempted parties from having to publish their individual tariffs for the movement of military household goods, that exemption from tariff publication extended immunity to a cartel agreement to fix the rates in those tariffs.

Finally, the court held that, although the point was "moot," even if other sections of the Shipping Act in fact provided no antitrust immunity for defendants' agreement, section 7(c)(1) would provide "retroactive immunity" because it provides immunity to agreements whose immunity later is removed or denied by a court or agency.

The court refused to dismiss Count Two of the Information because the

Shipping Act does not provide immunity from prosecution under the federal fraud statute.

SUMMARY OF ARGUMENT

Defendants bilked U.S. taxpayers out of approximately $1 million by rigging bids on through rates to transport the household goods of military and DOD personnel from Germany to points in the United States. The district court concluded that the Shipping Act immunized this bid rigging from section 1 of the Sherman Act. In reaching this conclusion, the court read portions of the Shipping Act out of context, ignored other crucial provisions of the Act, and frustrated the Act's purpose.

The Shipping Act is a clear example of special interest legislation intended to protect and promote a specific industry – United States flag ocean common carriers and marine terminal operators. 46 U.S.C. app. § 1701. Like any other statute, the Shipping Act must be read as a whole and interpreted consistent with Congress's intent. *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359 (2004). And like any statute that creates immunity from the antitrust laws, it must be strictly constructed. *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973). Both the express language and clear purpose of the Shipping Act establish that Congress did not intend to immunize the agreement on through rates at issue in

this case.

First, section 7(a)(4) does not exempt an agreement on through rates from the antitrust laws. Rather, it limits antitrust immunity to "agreement[s] or activit[ies] concerning the foreign inland segment of through transportation" (emphasis added). The bids DOD received in this case – the bids that defendants rigged – were for through rates, which the Shipping Act defines as "the single amount charged by a common carrier in connection with through transportation," 46 U.S.C. app. § 1702(23). The bids were not for the foreign inland segment of a through rate. The fact that Gosselin (but not Pasha) provides some local transportation services within Germany does not change the fact that the defendants agreed with others to fix prices by rigging bids on through rates. It is also irrelevant that the through rates bid to DOD reflect the cost of providing transportation services within Germany. If Congress had wanted to exempt any and all agreements on through rates that included charges for transportation within a foreign country, it would have said so directly.

The district court erred in invoking the rule of lenity to immunize defendants' agreement under section 7(a)(4) because this section is unambiguous in providing immunity only for agreements concerning the foreign inland segment of through transportation. The district court also erred in relying on *Tucor* to

invoke the rule of lenity because there is no evidence that defendants' even knew about, or relied on, the Ninth Circuit's decision in *Tucor.* Such reliance would not be a valid ground for invoking lenity in any event. *Tucor* found immunity for an entirely different agreement that fixed <u>only</u> the rates for inland transportation in the Philippines, and *Tucor* did not suggest that a through rate agreement would enjoy similar immunity. In fact, *Tucor* suggested that such an agreement would not be exempt. *See, e.g., Tucor*, 189 F.3d at 836.

Even if the defendants' bid rigging agreement could be characterized as an agreement concerning a foreign inland segment within the meaning of section 7(a)(4), it is still not exempt from the antitrust laws. The Shipping Act confers antitrust immunity only on agreements by or among ocean common carriers or marine terminal operators that are subject to FMC regulation. The defendants, however, are not ocean common carriers or marine terminal operators, and they have not conspired with such entities to fix through rates. Moreover, defendants' agreement is not one that is regulated by the FMC under the Shipping Act or subject to any of the Shipping Act's requirements or prohibitions. There is no evidence in the text or legislative history of the Shipping Act that Congress intended to immunize anticompetitive conduct that has a direct impact on domestic commerce and that is beyond the scope of FMC regulation.

Nor does section 7(a)(2) exempt the agreement at issue. Defendants' agreement to fix through rates was not on file with the FMC or exempt from filing, as section 7(a)(2) requires. The district court nonetheless held the collusive agreement immune because the FMC had given individuals an exemption from publishing their individual tariffs. But nothing in the Shipping Act or the FMC's regulations provides that non-vessel-operating common carriers (NVOCCs[6]) like defendants and their co-conspirators can file collective tariffs, or agree on their rates.

Finally, section 7(c)(1) does not provide retroactive immunity to the bid rigging agreement because an agreement that never had any immunity to begin with cannot be made immune retroactively by a court order.

ARGUMENT

I. STANDARD OF REVIEW AND PRINCIPLES OF STATUTORY INTERPRETATION

A. STANDARD OF REVIEW

The district court's interpretation of the Shipping Act is reviewed *de novo*. *United States v. Childress*, 104 F.3d 47, 50 (4th Cir. 1996). Where a stipulated statement of facts forms the basis for a plea agreement and motion to dismiss,

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[6] *See* 46 U.S.C. app. § 1702(17)(B) (defining NVOCC).

disputed allegations and assertions outside the stipulated factual record cannot be considered. *United States v. Jensen*, 93 F.3d 667, 669 (9th Cir. 1996); *United States v. Critzer*, 951 F.2d 306, 307 (11th Cir. 1992).[7] Reliance on disputed facts is legal error, also reviewable *de novo*. *United States v. Wardrick*, 350 F.3d 446, 451 (4th Cir. 2003), *cert. denied*, 124 S.Ct. 1730 (2004).

B. PRINCIPLES OF STATUTORY CONSTRUCTION

Exemptions from the antitrust laws must be strictly construed. *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973) (construing the 1916 Shipping Act). Moreover, "[w]hen . . . relationships are governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws." *Id.* at 733; *accord Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 218-19 (1966) (noting need to regulate cartels permitted by the Shipping Act).

In construing a statute, the court must be "guided not by 'a single sentence or member of a sentence, but look[] to the provisions of the whole law, and to its

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[7] Ordinarily, on a motion to dismiss, the sufficiency of the indictment is tested solely by the allegations in the indictment, which are taken be to true. *United States v. Thomas*, 367 F.3d 194, 197 (4th Cir. 2004); *accord Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 343 n.16 (1952).

object and policy.'" *John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank*, 510 U.S. 86, 94 (1993) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45 (1987)); *Beecham v. United States*, 511 U.S. 368, 372 (1994) (courts should seek the "meaning of the whole statute, not of isolated sentences"); *Leocal v. Ashcroft*, No. 03-583, 2004 WL 2514904 at *1 (S.Ct. Nov. 9, 2004) (statutory language must be construed "in its context and in light of the terms surrounding it"). And the "familiar principle of *expressio unius est exclusio alterius*" cautions that, when Congress enacts a provision explicitly defining the reach of a statute, it implies that matters not specifically defined are not within the statute's reach. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992).

II. THE DISTRICT COURT ERRED IN FINDING ANTITRUST IMMUNITY FOR DEFENDANTS' UNREGULATED AGREEMENT TO FIX THROUGH RATES

The district court's holding that the defendants' agreement to fix through rates is immune from prosecution under the Sherman Act is not supported by the plain language of the Shipping Act and its purposes.

A. SECTION 7(a)(4) DOES NOT IMMUNIZE DEFENDANTS' AGREEMENT TO FIX THROUGH RATES

1. <u>An Agreement to Fix Through Rates Is Not An Agreement Concerning The *Foreign Inland Segment*</u>

Section 7(a)(4) provides antitrust immunity for an "agreement or activity concerning the foreign inland segment of through transportation." This case does not involve such an agreement or activity, but instead involves an agreement to fix the through rate. As we have already explained, this through rate included the cost of transportation from a United States port to a final destination within the United States. DOD solicited bids only for through rates, and the bids it received were only for through rates. Defendants agreed with U.S. freight forwarders on the through rates that the U.S. freight forwarders would file with DOD for the overall door-to-door transportation of military household goods from points in Germany, across the ocean, to points in the United States. Defendants simply were not charged with fixing prices for the foreign inland segment of a rate or for any activity involving purely local transportation within Germany.

The district court, nonetheless, extended the limited exemption provided in section 7(a)(4) beyond its plain language and any reasonable reading of the Shipping Act. None of the reasons it gave for its ruling is sound.

First, the court held that section 7(a)(4)'s use of the phrase "concerning the foreign inland segment of through transportation" means that any through rate agreement by parties whose business activities include a local foreign segment are exempt from the antitrust laws. Without examining the charged agreement itself,

the court concluded that defendants' could not be prosecuted because they provided some "local agent services" as part of through transportation. JA 194 ("Defendants' business 'concerns' the foreign inland segment"), JA 198. In fact, only defendant Gosselin provides local German agent services; Pasha does not. From this partially erroneous factual premise, the court jumped to the incorrect conclusion that the charged agreement must be immune; *i.e.*, that the agreement "'concern[ed]' the 'foreign inland segment' of the through transportation" because some of the defendants' business activities were provided locally in Germany. JA 194-95. Given the plain language of section 7(a)(4), the district court's failure to focus on defendants' agreement rather than defendants' irrelevant business activities was clear error. The conduct challenged under the antitrust laws as unlawful in this case is the defendants' agreement to fix through rates, not any of the defendants' other activities in providing local German agent services, and it is this through rate agreement that must be scrutinized to determine whether it can be challenged under section 1 of the Sherman Act and section 7(a)(4) of the Shipping Act. Nothing in the text of the Shipping Act even suggests that defendants' activities in Germany should confer antitrust immunity on an agreement on a through rate that includes transportation from a United States port on U.S. roads or rails to a final destination in the United States.

Second, the district court improperly concluded that defendants' agreement "concerned" the foreign inland segment because a freight forwarder's through rate includes the cost of the foreign inland movement of household goods, along with all the other costs of a door-to-door Germany-U.S. shipment. JA 194 (citing § 1702(24) of Shipping Act (defining through transportation)). But in section 7, Congress immunized agreements only about the foreign inland segment, not agreements on through transportation itself. The ordinary meanings of "concerning" are "in reference to" (THE AMERICAN HERITAGE DICTIONARY 391 (3d ed. 1992)), or, as the district court recognized, JA 194, "to relate to", "to be about" (WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 470 (unabr. 1981)). Words in statutes are generally to be given their ordinary meaning. *Jones v. United States*, 529 U.S. 848, 855 (2000); *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995). These ordinary definitions of "concerning" should have focused the court on what the charged agreement was "about" or "in reference to" – which was plainly through rates. Congress, of course, could have immunized through rate agreements of this sort, but it did not. *United States v. Borden Co.*, 308 U.S. 188, 198-201 (1939).

The district court also believed that, because section 7(a)(4) does not say that an agreement has to "exclusively – or significantly – relat[e] to the foreign

inland segment," the exemption could and should apply to broader conduct concerning more than just the foreign inland segment. JA 199. But Congress did not have to say that section 7(a)(4) concerns "only" or "solely" agreements on foreign inland segments to make its intentions clear. Section 7 states the coverage of the immunities Congress intended to provide. Expanding that coverage, as the district court did, runs afoul of the well-established rules "that exemptions from the antitrust laws are to be narrowly construed," *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979); *FMC v. Seatrain*, 411 U.S. at 733, and that, where Congress specifically lists the agreements and activities that are immune, the court should not infer that activities not so specified are also immune. *See Cipollone*, 505 U.S. at 517; *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) ("Congress implicitly excluded a general discovery rule by explicitly including a more limited one"); *United States v. Brockamp*, 519 U.S. 347, 352 (1997) (explicit listing of exceptions to rule is indicative of congressional intent to preclude courts from reading "other unmentioned, open-ended . . . exceptions into the statute").

Finally, the district court mistakenly relied on the California district court's and Ninth Circuit's decisions in *Tucor* to find immunity on the facts of this case. Op. 23, 25; JA 195, 197 (*Tucor* involved "somewhat similar" facts) (emphasis

added). The only offense charged in *Tucor* was an agreement among local Philippine agents to fix the local inland rate that they charged to U.S. freight forwarders for the Philippine inland segment of through transportation. 35 F. Supp. 2d at 1175. Thus, the district court clearly erred when it stated that the government in *Tucor* "charged the defendant with agreeing to eliminate the low prices bid by freight forwarders to the Government." JA 195 (emphasis added). The conspiracy charged in *Tucor* was, in fact, one among local agents to fix the prices "to be paid by U.S. freight forwarders for moving services" to the local agents. *Tucor* Indictment ¶ 4(a) (emphasis added); JA 83. In this case, by contrast, the conspiracy was not one among local agents to fix the local inland rate that they charged to U.S. freight forwarders; rather, the U.S. freight forwarders were active and willing participants (not victims) in the unlawful scheme.

To be sure, the effect of the local agents' agreement in *Tucor* was that it caused the U.S. freight forwarders to cancel their low rates (JA 195) – because they could no longer honor them when their costs for the foreign inland segment increased – and thus DOD had to pay more. But that was the result of the local agents' agreement, which fixed the price that U. S. freight forwarders would have to pay the Philippine conspirators. The freight forwarders were not parties to the agreement: they, along with DOD, were the victims of it. *Tucor* Indictment ¶¶ 3,

4, JA 82-84. That is why the courts in *Tucor* stressed that the indictment alleged an agreement concerning an activity occurring "exclusively" and "entirely" within the Philippines – foreign inland transportation. 35 F. Supp. 2d at 1183,1185; 189 F.3d at 835-36; 238 F.3d at 1176.[8] And that is why the courts in *Tucor* found the alleged conduct to constitute an "agreement or activity concerning the foreign inland segment of through transportation" under section 7(a)(4).

Moreover, *Tucor* recognized the importance of the distinction between a purely foreign inland agreement and an agreement, like the one in this case, that involves "through transportation" itself:

> "through transportation" . . . includes all of the interrelated segments from the point of origin in the Philippines to the service person's new home in the U.S., though provided by different carriers along the way. The defendants are motor carriers operating entirely within the Philippines. For their part of the "through transportation," they packed, picked up, and trucked household shipments from Subic Naval Base and Clark Air Force Base, both in the Philippines, to a Philippine seaport. That is where the defendants' involvement

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[8] A comparison of the indictment in *Tucor* (JA 81) with the Pasha and Gosselin Information (JA 23) shows that the charged agreements were entirely different. The court's error was in focusing on the effect of the two agreements (*i.e.*, that DOD had to pay higher prices for military transportation in both cases), for, as Gosselin admitted below, "intention and outcome are legally irrelevant." Gosselin Mem. In Support of Motion to Dismiss 12, JA 80. It is neither the "intention" of the parties in entering into the agreement, nor the "effect" of the agreement, that determines Shipping Act immunity, but rather the nature of the agreement itself.

ended.

189 F.3d at 836 (emphasis added). Thus, *Tucor* itself shows that the district court erred in immunizing the through rate agreement in this case.

2. Congress Did Not Intend To Immunize Conduct Like Defendants' That Is Not Subject To FMC Regulation

The district court's interpretation of the Shipping Act also ignores Congress's intent to substitute regulation for antitrust enforcement.

Where a statute confers immunity for certain regulated activities, any activities beyond the scope of the regulated exemption are not immune. IA P. AREEDA & H. HOVENKAMP, ANTITRUST LAW ¶ 244f (2d ed. 2000) (activities beyond scope of explicit antitrust exemptions remain subject to antitrust law enforcement). That is particularly true with respect to the Shipping Act. The 1916 Act was passed only after a lengthy investigation revealed significant abuses under secret carrier agreements, *Carnation*, 383 U.S. at 218-219, so the Act was written to insure that only approved agreements received antitrust immunity. *Id.* at 216-17 (actions taken pursuant to agreement filed with FMC were immune, but activities implementing unfiled conference agreements were not).

That lesson was not lost on the authors of the 1984 Act, which was likewise written so that only those activities that are subject to the regulatory oversight of

the FMC can be exempt. *Puerto Rico Ports Authority v. FMC*, 919 F.2d 799, 806-07 (1st Cir. 1990) (reviewing Shipping Act history and purpose). The primary purpose of the antitrust immunity provisions in the 1984 Act is "to exempt from the antitrust laws those agreements and activities subject to regulation by the Federal Maritime Commission." H.R. Rep. No. 98-53 pt. 1, at 3 (1983), *reprinted in* 1984 U.S.C.C.A.N. 167, 168; H.R. Conf. Rep. 98-600, at 37 (1984), *reprinted in* 1984 U.S.C.C.A.N. 283, 293; *see also* S. Rep. No. 98-3, at 29 (1983) (Act extends immunity "to agreements of ocean common carriers . . . and to other activities regulated under provisions of the bill").[9] *Accord, Ass'n of Cruise Passengers v. Cunard Line*, 31 F.3d 1184, 1185-86 (D.C. Cir. 1994) (only if carrier is "subject to the prohibitions and procedures of the Shipping Act [can it claim immunity from] the Clayton Act"); *A & E Pacific Construction Co. v. Saipan Stevedore Co.*, 888 F.2d 68, 71 (9th Cir. 1989) ("the Act exempts from federal antitrust laws those agreements, and activities which are subject to the

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[9] The Shipping Act of 1984 Act replaced the 1916 Shipping Act, 46 U.S.C. §§ 801 *et seq.*, with respect to the international ocean liner trades. The "heart" of the 1916 Act was section 15, 46 U.S.C. § 814, which granted antitrust immunity to specified kinds of agreements by common carriers and marine terminal operators upon approval by the FMC. *See FMC v. Pacific Maritime Ass'n*, 435 U.S. 40, 54 (1978) (citing H.R. Rep. No. 87-1419, at 2, 15 (1962)). The 1984 Act spread the substance of old section 15 over four separate provisions, sections 4-7, reiterating the subject matter of agreements that could receive immunity.

regulatory oversight of the FMC"); *New York Shipping Ass'n v. FMC*, 854 F.2d 1338, 1357 (D.C. Cir. 1988) ("the shipping laws permit concerted activity among shippers by granting antitrust immunity, but only at the cost of subjecting agreements among carriers to Commission review") (citing *FMC v. Svenska Amerika Linien*, 390 U.S. 238, 243 (1968)).

Congress drafted the 1984 Act to ensure that conduct that would otherwise be subject to the antitrust laws, but immunized from those laws by the new legislation, would be subject to some form of FMC regulation. Specifically, section 4 describes the agreements within the scope of the Act, *i.e.*, agreements of "ocean common carriers" and "marine terminal operators." Section 5 sets forth the filing requirements for such agreements. Section 6 states what action the FMC can take with respect to agreements that are filed. And section 7 specifies which agreements are exempt from the antitrust laws. 46 U.S.C. app. §§ 1703-1706.

The 1984 Act extended the jurisdiction of the FMC from the 1916 Act to cover intermodal through routes and agreements regarding through rates.[10] 46

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[10] Intermodal transportation was a new development which allowed standardized cargo containers to be loaded and then to move easily from ships, to trains, to trucks. *See generally Norfolk Southern R. Co. v. James N. Kirby*, No. 02-1028, 2004 WL 2514422 at *7-*8 (S.Ct. Nov. 9, 2004). The Department of Justice had challenged the FMC's authority to immunize agreements on intermodal rates under the 1916 Act. *See United States v. FMC*, 694 F.2d 793, 813-14 (D.C. Cir. 1982) (mooted by expiration of intermodal agreement).

U.S.C. app. §§ 1702(6),(23),(24) (extending definitions of "common carrier" and "through transportation" to inland "points"); 46 U.S.C. app. § 1703(a)(1) (covering "through rates"). But there is no evidence that Congress sought with this extended coverage to leave the customers of transportation providers unprotected from conduct that would be both unregulated by the FMC and exempt from antitrust challenge. To the contrary, although Congress extended coverage to intermodal transportation, it reversed the FMC's policy under the 1916 Act of allowing NVOCCs to enter into agreements covered by the Act.[11] While the Act still deems NVOCCs "common carriers" in their relationship with their underlying shippers, it distinguishes between NVOCCs and vessel-operating or "ocean common carriers," 46 U.S.C. app. §§ 1702(16), (17)(B), and section 4 covers *only* agreements of "ocean common carriers." 46 U.S.C. app. § 1703(a).

Moreover, while Congress retained in section 5 the core requirement that ocean common carrier agreements must be filed with the FMC, and thus made known to shippers, it imposed strict limitations on such agreements, including the requirements that ocean common carrier conferences allow free entry and exit and independent action on rates by their members. 46 U.S.C. app. § 1704(b)-(c).

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[11] *See New York Foreign Freight Forwarders & Brokers Ass'n v. ICC,* 589 F.2d 696, 705-06 nn.48-49 (D.C. Cir. 1978) (status of NVOCCs under the 1916 Act).

Congress also gave the FMC a range of remedies to enforce compliance with these rules, including sanctions for failing to file a covered agreement, rejection or cancellation of filed agreements that violate the Act, or a suit to enjoin a "substantially anticompetitive" filed agreement. 46 U.S.C. app. §§ 1705(b),(g),(h), 1710(c). These protections are unavailable if, as in this case, an agreement is not subject to FMC regulation.

Finally, although Congress exempted ocean common carriers from the antitrust laws with respect to agreements on the foreign inland portion of through transportation,[12] the rationale is that, so long as the ocean common carriers' agreement covering their overall rate is filed and subject to regulation, the United States need not be concerned about the ocean common carriers agreeing among themselves on the price they will pay for inland transportation overseas.

The district court here has given defendants a blank check to ignore the antitrust laws, without any oversight by the FMC or any other regulatory or

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[12] Section 7(b)(2) bars ocean common carriers from agreeing among themselves on how much they will pay the railroads and motor carriers to complete the inland segment of through transportation in the United States. But section 7(a)(4), the corresponding provision with respect to the inland segment in foreign countries (inserted at the request of an organization of foreign shipowners, *see* 1981 Shipping Act: Hearings Before Subcommittee on Merchant Marine of the Senate Committee on Commerce, Science and Transportation, 97th Cong. 196-97, 208, 216 (1981)), allows such agreements – again, because the overall rate is filed with the FMC and subject to regulation.

enforcement body. The defendants and freight forwarders whose bids on through rates were rigged are shipping intermediaries and NVOCCs as defined for Shipping Act purposes in section 3 (46 U.S.C. app. §§ 1702(6),1702(17)(B); JA 69-70, 186), and the rates that have been fixed are "through rates" as defined in 46 U.S.C. app. § 1702(23). The district court's holding means that defendants can use section 7 to fix NVOCC rates that Congress pointedly excluded from section 4, § 1703. *See supra*, p. 27. The court also interprets the Shipping Act to mean that Congress immunized an unregulated conspiracy to force freight forwarder NVOCCs to surrender their rate making freedom, in flat contradiction to the fundamental scheme of the Act.

Statutes, however, must be interpreted consistent with their intent. In *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 124 S.Ct. 2359 (2004), the Supreme Court, interpreting another statute, noted that respondents had offered what might be "the more natural reading of the statutory language." *Id.* at 2372. Nevertheless, the Court unanimously rejected that reading because it was inconsistent with the basic intent of the statute: if statutory "language reasonably permits an interpretation consistent with" the statute's intent, the court should adopt it. *Id.* This principle has even more force in this case, where defendants' interpretation is not even "the more natural reading of the statutory language," and

where it is "implausible" that Congress would confer both antitrust immunity, and insulation from FMC regulation. *Transpacific Westbound Rate Agreement v. FMC*, 951 F.2d 950, 957 (9th Cir. 1991).

3. <u>The Rule of Lenity Does Not Provide Grounds For Dismissal of The Antitrust Count</u>

The district court also erred in concluding that, even if defendants' agreement does not "concern" the foreign inland segment, section 7(a)(4) is sufficiently "ambiguous" to invoke the rule of lenity.

"The rule of lenity applies only if, 'after seizing everything from which aid can be derived,' . . . we can make 'no more than a guess as to what Congress intended.'" *Muscarello v. United States*, 524 U.S. 125, 138 (1998) (citations omitted); *accord United States v. Horton*, 321 F.3d 476, 478-480 (4th Cir.), *cert. denied*, 540 U.S. 839 (2003); *United States v. Wilson*, 316 F.3d 506, 514 n.5 (4th Cir.), *cert. denied*, 538 U.S. 1025 (2003). It does not apply simply because a defendant disputes the application of law to its particular circumstances. And, "[t]he simple existence of some statutory ambiguity . . . is not sufficient to warrant application of [the rule of lenity,] for most statutes are ambiguous to some degree." *Muscarello*, 524 U.S. at 138; *accord*, *United States v. Helem*, 186 F.3d 449, 455 (4th Cir. 1999).

In this case, the plain language of section 7(a)(4) clearly establishes that the defendants' through rate agreement does not qualify as an agreement concerning the "foreign inland segment of through transportation." But even if the statute were not clear, the court should have been guided by the well-established rule that exemptions from the antitrust laws are strongly disfavored, and immunity will only be found where the text of the statute and its purpose show that Congress intended to displace the antitrust laws with regulation of the conduct at issue. *FMC v. Seatrain*, 411 U.S. at 733; *see supra,* pp. 16-17. As the United States has already shown, *supra,* pp. 24-29, there is no evidence that Congress intended to exempt the agreement at issue in this case from the antitrust laws.

The district court invoked the rule of lenity based on its view that the word "concern" could be ambiguous: either "Defendants' conduct . . . needed to be exclusively – or significantly – relating to the foreign inland segment of through transportation," JA 199, or it could simply "relate[] to" or "bear[] on" the foreign inland segment. JA 198. But, although the court purported to rely on the latter definitions (which the government also endorsed), the court never found that the <u>agreement</u> "relate[d] to" or "bear[s] on" the foreign inland segment. Rather, it found that defendants' business activities <u>include</u> foreign inland services such as local German services. Thus, the ambiguity the court found in the statute was

irrelevant. Whether or not the word "concern" has more than one meaning has no bearing on whether defendants' were sufficiently apprised in this case that <u>their agreement to fix through rates</u> was a violation of the Sherman Act, not immunized by section 7(a)(4).[13]

The court also erred when it relied on *Tucor* to invoke the rule of lenity, saying that "[t]here is no doubt that *Tucor* held that any conduct dealing with the foreign inland segment of through transportation is immune under the Shipping Act." JA 199. This is not in fact what *Tucor* held – or even suggested – because *Tucor* involved an agreement very different from the one charged in the

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[13] The use of the phrase "agreement or activity" in section 7(a) does not change the result. The term "activity" derives from earlier versions of the shipping bill, under which then section 3 was captioned "Activities authorized," and section 7(a)(1) would have immunized "any agreement or activity described in section 3." H.R. Rep. 97-611 pt. 1, at 3 (1982). The "authorized activities" were that "[o]cean common carriers may agree to – (1) discuss, fix, and regulate rates [etc.]". *See* 127 Cong. Rec. 19364-65 (1981). The Judiciary Committee simply restyled section 3 of the bill as "Agreements within Scope of the Act," and then substituted "within the scope of the Act" for "described in section 3" in section 7(a)(2). H.R. Rep. No. 97-611 pt. 2, at 3, 6 (1982). The Judiciary Committee's discussion shows no intent to expand the coverage of the meaning of "activity" in section 7. *Id.* at 32-33, and section 5(a) still provides for the filing of any agreement "entered into with respect to an activity described in section [4(a) or (b)]." 46 U.S.C. app. § 1704(a). So the "activities" to which section 7(a) refers are the concerted actions described in section 4, not the defendants' individual businesses.

Information in this case.[14] *See supra*, pp. 21-23. *Tucor* held only that section 7(a)(4) "exempts from criminal prosecution those engaged in trucking household goods to and from points entirely within a foreign country as part of 'through transportation' to the United States," 189 F.3d at 835 (stating court's "hold[ing]"), *i.e.*, "motor carriers operating entirely within the Philippines," 189 F.3d at 836, who "were engaged only in the foreign inland segment of the transportation." *Id.*

Moreover, there is nothing in the Statement of Facts or Information – the factual record in this case (JA 191-92) – to show that the defendants had even heard of let alone relied on *Tucor* in entering into their agreement to fix through rates.[15] The court erred in nonetheless accepting defendants' extra-record allegations that they had relied on *Tucor*.

B. THE EXEMPTIONS IN SECTION 7 APPLY ONLY TO AGREEMENTS BY OR AMONG OCEAN COMMON CARRIERS OR MARINE TERMINAL OPERATORS

If this Court agrees with the government that the agreement at issue in this case does not concern the foreign inland segment of through transportation, then it

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[14] Indeed, although the district court in *Tucor* applied the rule of lenity to an agreement that did not involve the fixing of through rates, the court of appeals in *Tucor* did not affirm on that basis or endorse in any way the district court's application of the rule.

[15] Indeed, invoking *Tucor*, rather than some ambiguity inherent in the statute itself, confuses reliance with lenity.

need not reach the issue decided in *Tucor:* whether an agreement concerning a foreign inland segment that does not include an ocean common carrier or marine terminal operator is exempt from the antitrust laws. Should the Court reach that issue, it should rule that such an agreement is not exempt.

1. The plain language of the Shipping Act and its legislative history show that the antitrust immunities provided in section 7 apply only to agreements "by or among ocean common carriers" and "marine terminal operators," as stated in section 4. No ocean common carrier or marine terminal operator is a party to the agreement in this case.

In construing the immunity provisions of section 7, the Court must take the text of the statute as a whole, with reference to its structure and purpose. *Beecham*, 511 U.S. at 372. Thus, in *FMC v. Seatrain*, 411 U.S. at 733-36, the Supreme Court, in construing the provisions of the Shipping Act of 1916 that gave antitrust immunity to agreements approved by the FMC, concluded that, although the word "agreement" on its face could have been broad enough to encompass agreements to acquire assets, the purpose and the structure of the Act called for a more narrow construction. *See also United States v. Photogrammetric Data Services, Inc.*, 259 F.3d 229, 247 (4th Cir. 2001) ("[t]he plainness or ambiguity of the statutory language is determined by reference to the language itself, <u>the</u>

specific context in which that language is used, and the broader context of the statute as a whole") (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)) (emphasis added).

The "broader context of the statute as a whole" shows that the defendants' agreement is not within the scope of the Act. Section 4 defines "Agreements within scope of [the] chapter" in two categories: (a) agreements by or among "ocean common carriers," and (b) agreements among "marine terminal operators." The term "chapter" means the entire Shipping Act of 1984 (46 U.S.C. app. Chapter 36, §§ 1701-1719). This clear language is reinforced by the remaining provisions of the Act, which provide for FMC oversight of the agreements covered by section 4. Section 5, § 1704, requires that "[a] true copy of every agreement entered into with respect to an activity as defined in §1703 [section 4] shall be filed with the [Federal Maritime] Commission, except agreements related to transportation to be performed within or between foreign countries and agreements among common carriers to establish, operate, or maintain a marine terminal in the United States." § 1704(a) (emphasis added). These provisions inform the meaning of section 7, which addresses filed agreements in 7(a)(1)-(2), agreements relating to transportation in foreign countries in 7(a)(3)-(5), and agreements regarding

terminals in the United States in 7(b)(3).[16] Similarly, as section 5(a) states, the term "activity" in section 7 refers to "an activity as described in section 1703(a) or (b) [section 4]."

It is in this broader context that section 7(a) provides exemptions from the antitrust laws for certain "agreements or activities." It does not cover a broader range of "agreements and activities" than those spelled out in section 4, because section 4 expressly defines the scope of agreements for the entire Shipping Act. The district court's expansive interpretation of "[a]greements within scope of [the] chapter" (section 4) runs afoul of the "familiar principle of *expressio unius est exclusio alterius*." *Cipollone*, 505 U.S. at 517 ("Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted").

Multiple committees of the 98th Congress, which enacted the 1984 Shipping Act, confirmed that the antitrust immunities in section 7 are coextensive with the agreements and activities defined in section 4 and made subject to filing

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[16] Thus, Section 2 of the Act, § 1701, makes clear the Act's purposes to: (l) "establish a . . . regulatory process for the common carriage of goods by water in the foreign commerce of the United States. . . ;" (2) "to provide an efficient and economic transportation system in the ocean commerce of the United States. . .;" (3) "encourage the development of an economically sound and efficient United States-flag liner fleet . . . ;" and (4) "promote . . . [U.S.] exports through competitive and efficient ocean transportation . . . "

in section 5. H.R. Rep. No. 98-53, pt. l, at 29 (1983), *reprinted in* 1984 U.S.C.C.A.N. 167, 194; S. Rep. No. 98-3, at 21 (1983). Indeed, the conference report, which this Circuit views as "the most persuasive evidence of legislative intent, after the statute itself," *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 881 (4th Cir. 1996), clearly states that:

> This section [4] states the coverage of the bill. It lists the types of agreements to which the bill applies. When read in connection with sections 5 and 7, the effect is to remove the listed agreements from the reach of the antitrust laws as defined in the bill.

H. R. Conf. Rep. No. 98-600, at 28 (1984) (emphasis added), *reprinted in* 1984 U.S.C.C.A.N. 283, 284; *see also id.* at p. 37 & 1984 U.S.C.C.A.N. at 293-94 (explaining that the immunity conferred for conduct "pursuant to this Act" means agreements "within the scope of an agreement" on file with the FMC).[17]

In short, section 7 immunizes agreements that are described in section 4: those by or among ocean common carriers or marine terminal operators. The

[17] The Shipping Act was considered by four Congresses, including the 98th Congress, before it was enacted. Prior committee reports on what ultimately became the 1984 Shipping Act are consistent with how the 98th Congress described the scope of the statute. *See* H.R. Rep. No. 97-611 pt. 2, at 31 (1982) (House Judiciary Committee, with whom the relevant language of section 4 originated, explained that the language providing that the Act applies to agreements by or among ocean common carriers was "intended . . . to indicate the scope of the Act for purposes of defining the breadth of the antitrust exemption set forth in section 7 of the bill") (emphasis added).

defendants here are not ocean common carriers or marine terminal operators, nor have they agreed with them to fix the through rates bid to DOD.

2. A closer look at the language of sections 5(a) and 7(a)(3)-(4) confirms the limitation on their coverage. Section 5(a), which applies to agreements subject to section 4, excepts from the Act's filing requirement agreements "related to transportation to be performed within or between foreign countries." Section 7(a)(3), in turn, provides antitrust immunity for "any agreement or activity that relates to transportation services within or between foreign countries." The two provisions obviously apply to the same set of agreements. As the FMC has noted, "Section 7(a)(3) is essentially the companion to Section 5(a)'s filing exception." *Foreign-to-Foreign Agreements*, 25 S.R.R. (P&F) 455, 464 (1989), *aff'd*, *Transpacific Westbound Rate Agreement v. FMC*, 951 F.2d 950 (9th Cir. 1991). Indeed, the House Judiciary Committee excluded from the immunity any "agreement or activity that has a direct, substantial, and reasonably foreseeable effect on the commerce of the United States" precisely for that reason. It did not think that agreements substantially affecting U.S. commerce should be exempt from both regulation and the antitrust laws. H.R. Rep. No. 98-53 pt. 2, at 32-33 (1983), *reprinted in* 1984 U.S.C.C.A.N. 221, 252-53. The phrase in section 7(a)(3), "whether or not via the United States," is likewise intended to protect

ocean common carriers, particularly "U.S.-flag carriers," engaged in "landbridge and all-water services between foreign countries that transit or touch the United States." H.R. Rep. No. 98-53 pt. 1, at 33 (1983), *reprinted in* 1984 U.S.C.C.A.N. 167, 198.

Section 7(a)(4) makes sense only as an exception to section 7(a)(3). The coverage of transportation "in a United States import or export trade" is clearly designed to distinguish traffic that merely passes "via the United States." The limitation to the foreign inland segment of "through transportation" makes sense as applied to ocean common carriers because they care about the terms for the inland segment only when engaged in through transportation. Moreover, although section 7(a)(4), unlike section 7(a)(3), immunizes agreements that have a direct impact on U.S. commerce, there are concomitant safeguards because the FMC can protect the interests of U.S. shippers by regulating the ocean common carriers' overall through rate agreements. *See supra*, p. 28 & n.12. Conversely, even if Congress had any reason to take the implausible step of granting foreign inland carriers a wholly unregulated exemption, there is no reason why it would make the exemption contingent on either the existence of a through route or the destination of the cargo. In sum, the filing exception to section 5(a) and the antitrust exemptions in section 7(a)(3)-(4) form a coherent whole only as applied to ocean

common carriers.

3. The district court reasoned that section 7(a)(4) "on its face" is not limited to ocean common carriers. JA 197, 202, citing *Tucor*. But that interpretation ignores the clear language of section 4 which just as plainly "on its face" defines the agreements and activities that are "within the scope of" the Shipping Act, and thus it violates the settled principle that a statute must be read in its entirety, rather than taking isolated portions out of context. Moreover, the district court mistakenly thought that the government was arguing that section 4 applies to "agreements among *only* ocean common carriers and marine terminal operators." JA 202. But, as the government recognized (JA 92-96), an agreement "by . . . ocean common carriers" can include other parties.[18] *See New York Shipping Ass'n v. FMC*, 495 F.2d 1215, 1220 (2d Cir. 1974) (section 15 of 1916 Act covered agreement by carriers and terminal operators with stevedoring firms). Here, however, no ocean common carriers were parties to the through rate agreement and section 4 does not apply.

The district court then proceeded to the equally erroneous conclusion that "[t]he Shipping Act cannot apply . . . to certain agreements among *only* ocean

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[18] The government argued that, "[b]ecause defendants are not ocean common carriers and have not agreed with ocean common carriers to fix through rates, their claim of immunity under the Act is groundless." JA 96 (emphasis added).

common carriers and marine terminal operators because under such a theory, the statute under 1704(a) would be illogical. Ocean common carriers and marine terminal operators do not operate *within* a foreign country. It is obvious that this language deals with internal transportation, which would preclude ocean common carriers and marine terminal operators." Op. 31; JA 203. But, because ocean common carriers can and do make agreements with non-ocean common carriers for foreign inland segments of through transportation,[19] there is nothing "illogical" about limiting section 7 to agreements "by or among" ocean common carriers.

The district court also reasoned that, because section 4 does not say that the Act applies "only" to agreements by or among ocean common carriers and marine terminal operators, it must apply to other agreements as well. JA 197, citing *Tucor*, 35 F. Supp. 2d at 1178). This rationale ignores the settled principle that

[19] The government provided the district court with the following example. A group of ocean common carriers agree among themselves on a through rate (as defined in the Shipping Act, § 1702(23)) from the United States to an inland point overseas (*e.g.*, Roanoke to Berlin via the ports of Norfolk and Hamburg). The agreement relating to the overall through rate (Roanoke to Berlin) must be filed, and would be covered by exemption 7(a)(1). To make the overall through rate effective, the ocean carriers must make arrangements for the foreign inland segment (Hamburg to Berlin), and maintaining uniform through rates requires some degree of agreement among the conference members regarding those arrangements. While this foreign inland rate agreement is excepted from the filing requirements of the Shipping Act by section 5(a), it would be covered by exemption 7(a)(4) as an agreement among ocean common carriers concerning the foreign inland segment of through transportation.

exemptions from the antitrust laws must be narrowly construed, and that when Congress explicitly included a limited rule, it "implicitly excluded a general . . . rule." *TRW*, 534 U.S. at 28; *see supra*, pp. 16-17. And it ignores the fact that the district court in *Tucor* conceded that "Section 4 . . . defines the types of agreements for which a filing must be made under Section 5 and for which immunity under Section 7(a)(1) and 7(a)(2) will apply." 35 F. Supp. 2d at 1178.

Because defendants are not marine terminal operators or ocean common carriers and did not agree with such entities, their agreement is not immune.

C. SECTION 7(a)(2) DOES NOT IMMUNIZE THE DEFENDANTS' AGREEMENT

1. Section 7(a)(2), § 1706(a)(2), provides, that "[t]he antitrust laws do not apply to – " :

> any activity or agreement within the scope of this chapter, whether permitted under or prohibited by this chapter, undertaken or entered into with a reasonable basis to conclude that (A) it is pursuant to an agreement on file with the Commission and in effect when the activity took place, or (B) it is exempt under section 1715 of this title from any filing or publication requirement of this chapter.

Section 1715, in turn, permits the FMC to exempt from filing, "any class of agreements between persons subject to this chapter or any specified activity of those persons from any requirement of this chapter if it finds that the exemption will not result in substantial reduction in competition or be detrimental to

commerce."

On their face, these two sections do not immunize the defendants' agreement to fix prices on through rates. That agreement is not "pursuant to an agreement on file with the Commission." It also is not "exempt under section 1715 of this title from any filing or publication requirement." Moreover, because section 1715 provides only for exemptions that "will not result in substantial reduction in competition," the agreement in this case would not qualify for such exemption.

2. The district court did not claim that defendants' "agreement" was either on file with the FMC or exempted from filing by it. Rather, the court broadly held that "[d]efendants' <u>shipping activity</u> involving military households goods is exempt from the Federal Maritime Commission's <u>tariff filing and publication</u> requirements, and thus is immunized from antitrust scrutiny under Section 1706(a)(2) of the Shipping Act." JA 204 (emphasis added), *accord,* JA 201. This reasoning, however, confuses defendants' <u>individual tariff filing</u> requirements under section 8 of the Shipping Act, which the FMC indeed exempted in its tariff filing regulations, with defendants' <u>collusive agreement</u> to fix the rates in those tariffs, which the FMC has never exempted, and which is the subject of these criminal charges.

The filing of agreements and the filing of tariffs are required by different provisions of the Shipping Act, are covered in separate FMC regulations, and serve different purposes. Agreements by or among ocean common carriers and marine terminal operators are required to be filed under section 5 of the Act. Nothing in section 5 or any other provision of the Act requires or provides for the filing of agreements by NVOCCs like defendants. And the district court did not find that NVOCC agreements generally, or defendants' through rate agreement specifically, was either subject to filing or exempted. On the other hand, an NVOCC is required to file its individual tariffs pursuant to section 8 of the Act, 46 U.S.C. app. § 1707. But nothing in section 8 (or any other provision of the Act) suggests that such tariffs can be filed collectively by NVOCCs or that the rates in tariffs filed under section 8 can be established collectively.[20]

Similarly, the FMC regulations exempting agreements and tariffs are codified in separate parts of 46 C.F.R. The regulations exempting "agreements" are contained in part 535 ("Agreements by Ocean Common Carriers and Other Persons Subject to the Shipping Act of 1984"). They define an "agreement" as "an understanding, arrangement or association . . . entered into by or among ocean

[20] Section 8 requires "common carriers" (which include NVOCCs) and "conferences" (which are limited to ocean common carriers) to publish their rates. *See* sections 3(6),(7),(16),(17)(B); 46 U.S.C. app. §§ 1702(6),(7),(16),(17)(B).

common carriers and/or marine terminal operators." 46 C.F.R. § 535.104 (emphasis added). This part of the regulations governing "agreements" also refers to and defines the "antitrust laws" embodied in Title 15 of the United States Code. Neither defendants nor the district court have pointed to anything in part 535, however, that would cover the defendants' collusive agreement on through rates, and no such exemption exists. Indeed, because defendants' agreement is not subject to the filing requirements of section 5 in the first place, the agreement could not qualify for a section 1715 exemption.

The FMC regulations for tariff publication are contained in Part 520. It is on this part alone that the district court and the defendants rely. *See* 46 C.F.R. § 520.13(c)(3). By its express terms, however, Part 520 implements section 8 of the Shipping Act, which similarly is limited to tariff filings, not agreements. 46 C.F.R. § 520.1(b)(2). Part 520 does not refer to "agreements" or to exemptions from the antitrust laws and since, by its express terms, Part 520 grants exemptions from tariff publication, it does not exempt or authorize any collective activity. *See also* 46 Fed. Reg. 35091-92 (July 7, 1981). The regulation makes clear that the purpose of tariff publication is simply "to permit . . . [s]hippers and other members of the public to obtain reliable and useful information concerning the rates and charges that will be assessed by common carriers and conferences for their

transportation services." 46 C.F.R. § 520.1(b)(1).

The district court's reading of the tariff filing exemption for military household goods is especially unpersuasive in light of the fact that the regulation was intended to discourage collusive bidding, not to condone it. The regulation was adopted in response to a petition filed by DOD, which was concerned that freight forwarders were publishing their tariffs prematurely, and thus giving competing freight forwarders an advance "signal" about their upcoming bids. Fearing that this would reduce the competitiveness and independence of freight forwarders' bids, DOD sought to preclude such filings to ensure that freight forwarders derived their rates individually, not collusively. Petition of The Department of Defense for Rulemaking to Amend Parts 531.27 and 536.17 of Title 46 Code of Federal Regulations, pp. 4-7 (attached as Addendum B to this brief).

The FMC granted DOD's petition, concluding that existing tariff filings no longer served any regulatory purpose because DOD had its own competitive bidding program, which published those rates and thus made them available to the public. 46 Fed. Reg. at 35092; *see also* 45 Fed. Reg. at 41025 (June 17, 1980) (relying on DOD's "competitive rate program"). Far from intending to immunize agreements to fix non-competitive bids, the FMC conferred this exemption from

tariff publication to ensure that through rates were derived competitively.[21]

3. The district court also erred because, as the *Tucor* courts observed, section 7(a)(2) expressly limits itself to activities and agreements covered by section 4, mirroring the language of section 4 by stating that it applies to "any activity or agreement within the scope of this chapter" – *i.e.*, agreements by or among ocean common carriers or marine terminal operators. 35 F. Supp. 2d at 1179; 189 F.3d at 837. While the district court thought that it was relying on *Tucor* (JA 202), both courts in *Tucor* read section 7(a)(2) to confer immunity only on agreements by or among ocean common carriers. The courts in *Tucor* distinguished section 7(a)(2) from section 7(a)(4), believing that although the latter provided immunity to local Philippine shippers, section 7(a)(2) would not. They pointed to the fact that section 7(a)(2) expressly repeats the language of section 4, *i.e.*, providing immunity for "any activity or agreement within the scope of this chapter," and thus section 4 "defines the types of agreements for which a filing must be made under Section 5 and for which immunity under Section . . .

[21] This is also in keeping with the Competition in Contracting Act ("CICA") of 1984, 10 U.S.C. 2304, which requires DOD to procure services through an open process of competitive bidding, *NISH v. Rumsfeld*, 348 F.3d 1263, 1271 (10th Cir. 2003), and with the ITGBL program, which requires U.S. freight forwarders to certify to DOD that their bids are independently determined. *See, e.g.,* International Personal Property Rate Solicitation I-12, at 3-5, Item 307, *available at* http://www.sddc.army.mil/CONTENT/919/i12.pdf.

7(a)(2) will apply," *i.e.*, agreements "by or among ocean common carriers . . . " 35 F. Supp. 2d at 1178 (emphasis added); *accord* 189 F.3d at 837.

D. SECTION 7(c)(1) DOES NOT GRANT THE DEFENDANTS RETROACTIVE IMMUNITY

Section 7(c)(1) provides:

> Any determination by an agency or court that results in the denial or removal of the immunity to the antitrust laws set forth in subsection (a) of this section shall not remove or alter the antitrust immunity for the period before the determination.

The district court reasoned that "the purpose of this section is to not penalize parties who in good faith believe that they have antitrust immunity, if a Court takes that immunity away." JA 205. Thus, even if the Shipping Act did not in fact confer immunity on defendants' agreement under section 7, "[b]ased upon the Ninth Circuit's holding in *Tucor*, the Defendants could have reasonably concluded that they had antitrust immunity in their activities abroad." *Id.* This holding ignores both the stipulated Statement of Facts in this case and the plain language of section 7(c)(1).

First, there is no evidence in this record to support a finding that defendants relied on *Tucor* when they entered into their agreement to fix through rates. *See supra*, p. 33. Indeed, *Tucor* simply held that the specific agreement at issue in that case was immune – it did not specifically immunize any other agreement, and did

not even impliedly create immunity for different defendants entering into entirely different agreements.

No provision of the Shipping Act confers antitrust immunity on the agreement to fix through rates at issue in this case. Indeed, the court's grant of "retroactive immunity" expressly proceeds from the premise that "Defendants did not have immunity under the antitrust laws." JA 204. The faulty logic of the district court's position is that the very act of finding that there was never any immunity creates it.

Section 7(c)(1) bars only the retroactive "remov[al] or alter[ation]" of an existing immunity. That is an important function because the Act provides several mechanisms for terminating agreements that have been filed with the FMC and have been effective under the Act. While the filing confers antitrust immunity automatically pursuant to section 7(a)(l)-(2), that immunity may be removed pursuant to an FMC suit under section 6(g)-(h); by a finding that a carrier's interpretation of an agreement, albeit reasonable, was wrong, under section 7(a)(2); or by an FMC order cancelling an agreement because it was used illegally, under section 11(c). 46 U.S.C. app. §§ 1705(g)-(h), 1706(a)(2), 1710(c). In each of these cases, section 7(c)(1) ensures that removal of immunity for the filed agreement has only prospective effect. *Cf. National Ass'n of Recycling Industries.*

v. American Mail Line, Ltd., 720 F.2d 618, 619 (9th Cir. 1983) (immunity under the 1916 Act extended only to agreements that the FMC had approved; and, until appropriately filed rates are disapproved, they are immune) (citing *FMC v. Seatrain*, 411 U.S. at 728, and *Volkswagenwerk Aktiengesellschaft v. FMC*, 390 U.S. 261, 271 (1968)).

The legislative history also makes this clear: "The provisions of subsection (c) have been included to prevent the removal or alteration of antitrust immunity for periods prior to the time a determination has been made by an agency or a court that subsequently denies or removes antitrust immunity. This is needed to provide a degree of stability and certainty to an agreement filed in good faith and valid on its face." H. R. Rep. 98-53, part 1, at 33 (1983) (emphasis added). Similarly, the House Judiciary Committee Report, H. R. Rep. 98-53 pt. 2, at 32 (1983), *reprinted in* 1984 U.S.C.C.A.N. 221, 252 (emphasis added) explains:

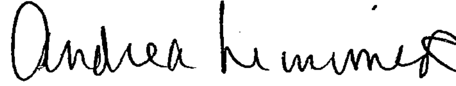
> In subsection (a)(1), the Committee Amendment substitutes the word "is" for "has become" to clarify that antitrust immunity applies only for conduct occurring during the period an agreement is in effect . . . . Of course, the voluntary or compelled termination of an agreement does not void antitrust immunity for any conduct occurring during the period the agreement was in effect (see section (c)(1)).

Section (c)(1), therefore, has no application to agreements that have never been filed with the FMC or been specifically exempted by the FMC from filing.

CONCLUSION

The district court's order dismissing Count One should be reversed.

Respectfully submitted.



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REQUEST FOR ORAL ARGUMENT

Because the legal issues in this case involve the interpretation of a complex statute, appellant requests oral argument in the belief that it will be useful to the court.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 04-4752 **Caption:** US v.Gosselin World Wide Moving N.V. and The Pasha Group

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Dated: December 1, 2004

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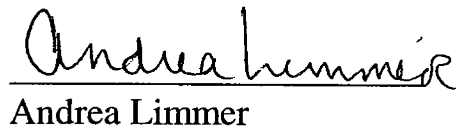

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