

MULLINS LAW GROUP PLLC

Transportation Solutions for the 21st Century

2001 L Street NW, Suite 720
Washington, DC 20036

William A. Mullins
wmullins@mullinslawgroup.net
mullinslawgroup.net

Telephone: (202) 663-7850
Direct: (202) 663-7823
Facsimile: (202) 459-2115

August 5, 2025

309886

VIA E-FILING

Chief of Case Administration
Office of Chief Counsel
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

ENTERED
Office of Chief Counsel
August 6, 2025
Part of
Public Record

Re: FD 36836
Norfolk Southern Corporation & Norfolk Southern Railway
Company – Acquisition of Control – Norfolk & Portsmouth Belt
Line Railroad Company

Dear Chief of Case Administration:

In a letter submitted to the Surface Transportation Board filed by CSX Transportation, Inc. (“CSXT”) on August 4, 2025, CSXT filed a public and highly confidential version of Plaintiff CSX Transportation, Inc.’s Consolidated Opposition To Defendants’ Motion For Summary Judgement filed in the United States District Court for the Eastern District of Virginia in Civil Action No. 2:18-cv-530. This procedurally improper and untimely filing was allegedly done at the request of the Office of Proceedings. Norfolk Southern Corporation and Norfolk Southern Railway Company (“NS”) received no similar request nor to NS’s knowledge did Norfolk & Portsmouth Belt Line Railroad (“NPBL”). To ensure a complete and fair record and to ensure due process for both NS and NPBL, NS now submits both a public and highly confidential version of the following documents filed with the United States District Court for the Eastern District of Virginia, Norfolk Division: (1) Norfolk Southern’s Brief in Support of Its Motion for Summary Judgment; (2) Norfolk Southern’s Reply in Support of Its Motion for Summary Judgment; (3) NPBL’s Motion for Summary Judgment; (4) and NPBL’s Reply in Support of Its Motion for Summary Judgment.

Sincerely,

//s// William A. Mullins

William A. Mullins

Enclosure

cc: Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD 36836

**NORFOLK SOUTHERN CORPORATION
NORFOLK SOUTHERN RAILWAY COMPANY
—ACQUISITION OF CONTROL—
NORFOLK & PORTSMOUTH BELT LINE RAILROAD COMPANY**

**NORFOLK SOUTHERN RAILWAY COMPANY’S
BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division**

CSX TRANSPORTATION, INC.,

Plaintiff,

v.

NORFOLK SOUTHERN RAILWAY
COMPANY, *et al.*,

Defendants.

Case No. 2:18-cv-530

**DEFENDANT NORFOLK SOUTHERN RAILWAY COMPANY'S
BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

TABLE OF CONTENTS

	Page
TABLE OF EXHIBITS	iv
GLOSSARY OF WITNESSES	xii
INTRODUCTION	1
STATEMENT OF UNDISPUTED MATERIAL FACTS	3
A. The Parties	3
B. NS and CSX compete for international intermodal container business.....	3
C. The Port of Virginia.....	4
1. The Port of Virginia has operated three terminals	4
2. VIT directs ocean carriers where to dock	6
3. The Port of Virginia competes against other ports	6
4. CSX has a competitive advantage at the Port of New York/New Jersey.....	7
5. NS has a Competitive Advantage at the Port of Virginia	8
6. Trucks compete against railroads for traffic at the POV	9
D. NPBL charges a uniform switch rate per the Operating Agreement	10
1. NPBL set the switch rate at \$210/well to cover its operating expenses	11
2. There was no vote on CSX's 2010 Rate Proposal	11
3. CSX's 2018 Rate and Governance Proposals.....	12
E. CSX was not foreclosed at NIT and used NPBL to move other freight.....	13
F. NS and NPBL are litigating against each other regarding NS's request to have the STB set the trackage fee	15
G. Efforts to sell Pinners Point and decommissioning of Diamond Track.....	16
ARGUMENT	16
I. CSX'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS.....	16

TABLE OF CONTENTS
(continued)

	Page
A. Conduct beyond the limitations period cannot underpin claims or damages	16
B. CSX cannot identify any distinct damages from conduct occurring within the limitations period, so CSX is not entitled to any recovery	18
C. The “continuing violation” doctrine cannot save CSX’s antitrust conspiracy claims.....	19
I. SUMMARY JUDGMENT ON CSX’S ANTITRUST CLAIMS IS WARRANTED	20
A. CSX’s failure to properly define a relevant market compels dismissal of all CSX’s antitrust claims	20
1. CSX cannot proffer evidence to prove that the relevant market pleaded in its Complaint is properly defined	21
2. Regardless of which proposed definition is considered, CSX has improperly gerrymandered the relevant market.....	22
i. Relevant geographic market	24
ii. Relevant service market.....	26
B. CSX cannot establish a genuine issue of material fact on its Section 2 monopolization and attempted monopolization claims	27
1. CSX’s Section 2 monopolization and attempted monopolization claims reach only unilateral conduct by a single firm	28
2. CSX cannot prove exclusionary conduct under an “essential facilities” theory	28
i. CSX was not denied access to NIT.....	31
ii. Antitrust scrutiny is not warranted because the Surface Transportation Board regulates rates	32
3. NS’s conduct did not result in substantial foreclosure.....	32
III. NS IS ENTITLED TO SUMMARY JUDGMENT ON CSX’S FEDERAL AND STATE CONSPIRACY CLAIMS.....	33
A. CSX cannot show evidence of an agreement between NS and NPBL	33
B. CSX cannot prove that trade was restrained unreasonably.....	35

TABLE OF CONTENTS
(continued)

	Page
C. CSX cannot show any overt act in furtherance of the conspiracy	36
IV. NS IS ENTITLED TO SUMMARY JUDGMENT ON CSX’S BREACH OF CONTRACT CLAIM	37
A. NS never blocked CSX’s access to NIT in 2015	38
B. NS did not have a contractual duty to support CSX’s 2018 Rate Proposal.....	38
C. NS had no contractual obligation to change NPBL’s governance.....	40
CONCLUSION.....	40

TABLE OF EXHIBITS

Exhibit	Description	Citation	Confidentiality
1	NPBL Operating Agreement, 1897	NSR_00104139	Confidential
2	<i>Deposition Excerpt</i> - Cannon Moss	30:12-18; 35:2-23; 49:22-50:3; 52:9-25, 58:2-6; 60:4-61:25; 62:1-13; 113:01-113:07; 114:7-16; 193:11-24; 202:14-18; 234:12-20; 242:10-17; 242:21-22; 244:2-15; 244:25-245:1; 250:16-21; 287:25-288:9; 291:21-24; 291:25-292:7	Confidential 52:9-21; 58-2-6; 60:4-61:25; 62:1-13
3	NPBL Supplemental Agreement, March 1, 1989	CSXT0086318	
4	<i>Deposition Excerpt</i> – Ken Joyner (as 30(b)(6) witness)	25:1-3; 19:7-20:9; 128-129:19;	
5	<i>Deposition Excerpt</i> – Rob Girardot (first individual deposition)	41:13-20; 184:12-25; 99:18-99:24; 64:17-20; 64:21-65:10 77:25-78:3; 217:5-12; 60:16-22; 62:7-17; 112:2-113:1	112:7-113:1 (AEO)
6	<i>Deposition Excerpt</i> – Rob Girardot (as 30(b)(6) witness)	34:4-6, 35:19-36:7; 28:13-16; 143:22-144:2; 138:17-19	
7	Prof. Marvel Report	¶¶ 10, 12, 16-17	AEO
8	<i>Deposition Excerpt</i> – Strongosky (first deposition)	45:14-47:1; 62:21-63:23; 64:24-65:5; 69:15-70:1; 72:22-73:3; 83:05-83:13; 89:21-90:4; 104:13-15; 112:8-24; 117:7-13; 120:4-22; 127:3-128:12; 195:2-9; 212:1-6	AEO: 127:3-128:12; 212:1-6; 129:4-22; 104:13-15 Confidential: 89:21-90:4
9	<i>Deposition Excerpt</i> – Jeffery Heller (first deposition)	36:18-21; 257:7-258:8; 248:3-249:9	Confidential
10 (A & B)	Wright Report	¶¶ 21, 37, 59, 61, 66-67, 70, 73, 74, 116, 119, 131, 136, 137, 138; Tbls. 1, 5, 6	AEO

Exhibit	Description	Citation	Confidentiality
11	<i>Deposition Excerpt</i> – Kenney (first deposition)	23:13-23, 28:21-23; 41:20-42:1, 47:12-21; 64:11-65:12; 117:5-15;141:17-20	AEO: 117:5-15; 64:11-65:12; 23:13-23; 141:17-20; 141-142
12	<i>Deposition Excerpt</i> – Piacente	73:24-74:23; 86:7-16; 89:23-90:11	
13	April 21, 2014 National Gateway & Virginia Avenue Tunnel: A Path Forward	CSXT0000897, at Slide 7	AEO
14	10-29-2015 Email re: Intl contracts	CSXT0001792 at -794	AEO
15	Port Strategy Review – Intermodal	CSXT0124777 at -778	AEO
16	<i>Deposition Excerpt</i> – Chris Luebbbers (first deposition)	60:05-60:08	
17	<i>Deposition Excerpt</i> – Capozzi	74:24-75:5; 105:1-6; 100:23-101:13, 193:24-194:6; 116-9-117:8; 172:23-173:9; 186-187:2; 187:15-188:2; 187:20-23; 220:23-221:2;	Confidential (entire transcript)
18	<i>Deposition Excerpt</i> – Dr. Rob Martinez	31:20-21; 31:24-32:4	AEO
19	<i>Deposition Excerpt</i> – Anthony MacDonald	42:3-6, 73:20-25; 91:18-92:5; 92:21-93:1, 97:7-17; 112:6-10; 121:4-9; 131:8-133:3 134:16-135:9; 142:6-19; 144:20-25; 179:15-180:9; 189:17-20;	AEO: 134:16-135:9; 773:20-25; 142:6-8; 131:8-17; 132:2-3; 132:12-16; 132:23:133:3
20	CSX CMA Virginia Options – Mar. 31, 2015	CSXT0037049 at Slide 4	AEO
21	<i>Deposition Excerpt</i> – Hall	33:20-22	Confidential
22	<i>Deposition Excerpt</i> – Eliasson	81:6-9; 49:22-50:2; 130:24-131:14; 87:5-9	
23	Dec. 12, 2016 Email from T. MacDonald to K. Manz re: Port of Virginia operating details	CSXT0050615 at -615	AEO

Exhibit	Description	Citation	Confidentiality
24	<i>Deposition Excerpt</i> – Tony DiDeo	192:22-193:10	Confidential
25	Mar. 1, 2011 Letter from J. Yates to D. Stinson	CSXT0126579 at -579	Confidential
26	Mar. 31, 2015 Email from T. MacDonald to M. Kenney re: NIT Train	CSXT0001301	Confidential
27	<i>Deposition Excerpt</i> – Cary Booth	87:17-88:7	Confidential
28	Mar.20, 2017 Email from R. Girardot to T. Hart re: ZIM-Norfolk NIT Activity	CSXT0117504 at -504	AEO
29	Operation Plan, May 2010	NSR_00306428 at -429	Confidential
30	Mar. 27, 2015 Email from C. Matter to T. MacDonald re: NPBL to NIT	CSXT0001276 at -276	AEO
31	CSX Operation Plan, May 20, 2010	NPBL013648 at -649	
32	<i>Deposition Excerpt</i> – Vick	27:25-28:8; 75:23-76:4; 74:23-76:4; 48:17-49:6	Confidential
33	Apr. 18, 2019 Email from T. Capozzi to J. Strongosky re: MISC and increased volume	CSXT0074449 at -449	AEO
34	May 13, 2019 Email from T. Capozzi to C. Warren re: setting up CSX for growth at POV	CSXT0074914 at -915	AEO
35	<i>Deposition Excerpt</i> – Carl Warren	122:9-17; 72:12-73:5	AEO: 122:9-17
36	Nov. 16, 2016 Email from L. Creech to T. MacDonald re: CSX visit to Norfolk on Nov. 22	CSXT0049507 at -508	Confidential
37	Mar. 1, 2019 Email from A. Beazley to R. Girardot re: Port of VA Questions/Issues UPDATE	CSXT0073025 at -027	AEO
38	Aug. 8, 2018 Email from C. Warren to S. Davis re: VPA Meeting	CSXT0067839 at -840	AEO
39	<i>Deposition Excerpt</i> – Houfek	19:13-20:4; 19:14-20:25; 141:7-16	

Exhibit	Description	Citation	Confidentiality
40	Dec. 15, 2017 Email from R. Girardot to W. Barton re: NY to Pittsburgh	CSXT0063241 at -241	AEO
41	Oct. 10, 2018 Email from J. Strongosky to M. Kenney re: West vs. East Breakdown	CSXT0069501 at -501	AEO
42	Dec. 1, 2014 Email from C. Warren to D. Smith re: Intermodal rates to the Midwest	CSXT0034771 at -771-72	AEO
43	May 26, 2016 Email from R. Girardot to J. Tuttle re: Inland pricing via Baltimore	CSXT0045124 at -124	AEO
44	Jan. 11, 2018 Email from D. Piacente to R. Girardot re: One Pre-call discussion and then call with One to discuss bid status	CSXT0003542	AEO
45	May 27, 2015 Email from B. McGlone to J. Strongosky re: Yang Ming	CSXT0038547 at -747	AEO
46	Jun. 4, 2014 Email from C. Warren to T. Biscan re: VIT	CSXT0032388 at -388	AEO
47	Aug. 1, 2016 to B. Kobza to B. McGlone re: WCSAM service dropping NY and calling Philadelphia	CSXT0046487 at -488	AEO
48	Oct. 23, 2010 Memo from M. McClellan and J. Heller to D. Seale re: International Contract Strategy – 24 months	NSR_00026305 at -305	AEO
49	<i>Deposition Excerpt</i> – Rob Girardot (second individual deposition)	58:7-59:19	AEO
50	Draft Howard Street Tunnel CSX Value Buckets	CSXT0159821 at Slide 4-5	AEO
51	Apr 30, 2015 Email from T. Biscan to J. Strongosky re: CMA CSX	CSXT0038161 at -161	AEO

Exhibit	Description	Citation	Confidentiality
52	Oct. 7, 2015 Email from R. Houfek to G. Van Tassel fwd. Oct. 5, 2015 Email to W. Wilby re: CSX lift agreement	CSXT0040736	Confidential
53	Jan. 19, 2017 Email from B. McGlone to S. McGahey re: “What If” from Maersk	CSXT0052080 at -802-083	AEO
54	Feb. 19, 2019 Email from T. Capozzi to J. Strongosky re: MSC	CSXT0072702 at -702;	AEO
55	Feb. 1, 2018 Email from R. Girardot to S. Baker re: Imports	CSXT0003625 at -625; -627-28	AEO
56	<i>Deposition Excerpt</i> – Kendall	29:16-30:1; 33:14-34:14	
57	Meeting with VPA and CSX, May 19, 2010	VPA000793	
58	Joseph Bonney, “CSX Raises the Roof,” JOC.com, Oct. 18, 2010		
59	CSX NIT Access Discussion	CSXT0003603	AEO
60	CSX Network and Terminal Expansions Support Growth	CSXT0074939 at Slide 3	AEO
61	NS & CSX Schedule	CSXT0165126	Confidential
62	2013 Norfolk Southern East Coast Port Review	NSR_00000912	AEO
63	CSX NIT Discussion	CSXT0003592 at Slide 11	AEO
64	Oct. 12, 2016 Draft Letter to T. Capozzi	CSXT0096239	AEO
65	CSX International Market Share	CSXT0046841 at Slide 8	AEO
66	<i>Deposition Excerpt</i> – Strongosky (second deposition)	70:17-71:3; 18:10-19:16; 32:15-18	
67	Mar. 5, 2018 Letter from D. Piacente to Alexis/Michael	CSXT0159246 at -246-247	AEO
68	CSX ZIM Integrated Shipping Services, Nov. 10, 2016	CSXT0052366 at Slide 9	AEO
69	CSX International Market Share	CSXT0024736 at -736	AEO
70	<i>Deposition Excerpt</i> – Marvel (expert deposition)	33:25-34:3; 33:13-23; 92:4-15; 102:12-24	AEO

Exhibit	Description	Citation	Confidentiality
71	Marvel Reply Report	¶¶ 40; 43, 124, Ex. 1;	AEO
72	May 6, 2014 Email from B. McGlone to T. Biscan re: Crowley Threads Meeting Results 4/30	CSXT0032082	AEO
73	<i>Deposition Excerpt</i> – Michael McClellan (first deposition)	22-23; 119:4-120:18, 151	
74	Port of Baltimore – Port Review, Jan. 24, 2018	CSXT0159556 at -565	AEO
75	Intermodal Activity Report Week Ending 8-4-2017	NSR_00041595 at -597	AEO
76	Heartland Corridor Overview	NS_00001839 at -840	AEO
77	Sept. 7, 2017 Email from J. Strongosky to R. Giardot re: Syracuse inland Port	CSXT0097850 at -850	AEO
78	Mar. 2, 2018 Letter from J. Aihie to M. Martinez	CSXT0159221 at -221	AEO
79	Norfolk and Portsmouth Beltline Railroad Company Tariff NPB 8100-J	NPBL000220	
80	<i>Deposition Excerpt</i> – Michael Wheeler	17:18-18:4; 117:14-118:7	Confidential
81	<i>Deposition Excerpt</i> – James Allan	93:7-94:11, 117:1-7; 75:16-17, 90:4-7; 131:9-12, 15-18, 135:6	Confidential: 131:9-18; 135:6
82	<i>Deposition Excerpt</i> – Stinson	128:8-22; 158	Confidential
83	<i>Deposition Excerpt</i> – Donna Coleman	39:17-40:6; 47:10-15; 87:13-16; 91:11-12; 104:6-8	
84	NPBL Board Minutes, Apr. 9, 2008	NPBL006936 at -957	
85	NPBL Board Minutes, Oct. 5, 2009	NPBL007095	
86	Eliasson E-Mail (Feb. 14, 2011)	CSXT0004190	Confidential
87	NPBL Board Minutes, Dec. 19, 2007	CSXT0000001 at -005	Confidential

Exhibit	Description	Citation	Confidentiality
88	NPBL Board Minutes, Dec. 15, 2009	CSXT0125260	Confidential
89	Crowley Report	5, Tbl. 1, 6 n.11 & Ex. 3 4 n.8; 23	AEO
90	<i>Deposition Excerpt</i> – Tony Ingram	169:2-6	
91	CSX’s 2010 Proposal	NPBL007431	
92	<i>Deposition Excerpt</i> – John Booth	248:10-249:8; 69, 72, 123-24	
93	CSX’s proposed contract	CSXT0109886	Confidential
94	NPBL Board Minutes, Apr. 2011	NPBL017933 at -938	Confidential
95	NPBL Stockholder Minutes, Apr. 2011	CSXT0000262	Confidential
96	Ryan Houfek Email Regarding NPBL Rate Not Being “Too Onerous”	CSXT0082577	AEO
97	June 1, 2015 email exchange between NPBL and VIT	CSXT0001537	Confidential
98	NPBL 2018 Annual Report	NPBL026348	Confidential
99	NPBL 2019 Annual Report	NPBL027926	Confidential
100	Notice of Trackage Cancellation	CSXT0044428	Confidential
101	Moss Email, Aug. 27, 2018	NPBL005850	
102	CSX Resp. NPBL’s Req. Admis. Nos. 5 & 8		Confidential
103	CSX Resp. NPBL’s Req. Admis. No. 3		Confidential
104	Privilege Log Excerpt (filtered Michael Burns)		
105	CSX’s 2018 Rate Proposal	CSXT0100329	Confidential
106	Apr. 2, 2018 Email from J. Swafford to M. Burns re: Rate Proposal for Long Term Intermodal service to NIT	CSXT0119620	AEO

Exhibit	Description	Citation	Confidentiality
107	April 5, 2018 Email from C. Moss to T. DiDeo re: Rate Proposal for Long Term Rail Service to NIT	NPBL006228	
108	NPBL Board Minutes, Apr. 2018	NPBL000745	Confidential
109	<i>Deposition Excerpt</i> – Merilli	55:2-8; 55:13-56:3	Confidential
110	<i>Deposition Excerpt</i> – Armbrust	214:15-21	
111	CSX’s 2018 Governance Proposal	CSXT0100552	Confidential
112	NPBL Shareholder Minutes, Apr. 18, 2018	CSXT0149075	Confidential
113	Moss Ltr. Sept. 11, 2018	NSR_00073843	Confidential
114	Eliasson and Armbrust Memo	CSXT0025521	AEO
115	NPBL Board Minutes, Sept. 4, 2009	NPBL019887	Confidential
116	MacDonald Email Re: NIT Train	CSXT0001301	Confidential
117	Mar. 2, 2011 Letter Re: Operating Window	CSXT0126579	Confidential
118	CSX 2d Supp. Resp. NPBL’s Interrog. No. 4		Confidential
119	CSX’s 2d Suppl. Resp. NS’s 1st Interrog. 3		Confidential
120	CSX’s 4th Suppl. Rule 26(a)(1) Disclosures		
121	Chart of Documents Identified by CSX in its 2d Supp. Resp. NPBL’s Interrog. No. 3		

GLOSSARY OF WITNESSES

NAME	PARTY	POSITION
James Allan	CSX	Former Director of Network, Joint Facilities
Steven Armbrust	CSX	Assistant General Counsel; NPBL Board Member from April 2010 until June 2015
Cary Booth	NS	Former Assistant Vice President of Intermodal and Automotive Operations
John Booth	CSX	Former Director Joint Facilities, Service Design, and Network Planning; member of 2009 NPBL rate committee
Thomas Capozzi	Virginia International Terminals	Chief Sales Officer
Donna Coleman	NPBL	Vice President
Tony DiDeo	CSX	Director, Intercarrier Management
Fredrik Eliasson	CSX	Former Chief Sales and Marketing Officer, NPBL Board Member from April 2010 until the fall of 2011
Robert Girardot	CSX	Director-Strategy & Analytics; CSX Rule 30(b)(6) witness
Jerry Hall	NS	Former Vice President of Transportation; NPBL Board Member from February 2018 until November 2018
Jeffrey Heller	NS	Vice President, Intermodal & Automotive
Ryan Houfek	CSX	Former Assistant Vice President Sales, Assistant Vice President Marketing
Tony Ingram	CSX	Former Chief Operations Officer; NPBL Board Member from 2009 until 2010
Kenneth Joyner	NS	Group Vice President International Intermodal
Quintin Kendall	CSX	Former Vice President, State Government and Community Affairs; NPBL Board Member from April 2012 until January 2018
Maryclare Kenney	CSX	Vice President of Intermodal and Automotive
Chris Luebbers	NS	Director of Intermodal Yield; member of 2009 NPBL rate committee

NAME	PARTY	POSITION
Tony MacDonald	CSX	Former Portsmouth Terminal Manager, CSX Intermodal Terminals, Inc.
Robert Martinez , Ph.D.	NS	Vice President Business Development & Real Estate
Howard P. Marvel , Ph.D.		CSX Expert Witness
Michael McClellan	NS	Vice President of Strategic Planning
Philip Merilli	NS	Former Vice President of Engineering; NPBL Board Member from December 2015 until April 2019
Cannon Moss	NPBL	President and General Manager
Dean Piacente	CSX	Former Vice President of Industrial Products
David Stinson	NS	Division Superintendent; NPBL President and General Manager from 2008 until 2011
Jay Strongosky	CSX	Director, Sales & Marketing, Intermodal
Catherine Vick	Virginia Port Authority	Chief Development and Government Affairs Officer
Michael Wheeler	NS	Former Chief Operating Officer; NPBL Board Member from March 2010 until December 2015
Matthew Wright , Ph.D.		NS Expert Witness

Defendant Norfolk Southern Railway Company (“NS”), by counsel and pursuant to Rule 56 of the Federal Rules of Civil Procedure, submits the following brief in support of its Motion for Summary Judgment on all claims of Plaintiff CSX Transportation, Inc. (“CSX”). For the following reasons,¹ NS’s Motion should be granted.

INTRODUCTION

CSX levels a serious, but false, charge. CSX is a Class 1 railroad serving half of the country, with over \$10 billion in annual revenue. CSX claims that, for more than a decade, Defendants have blocked CSX from having rail access to the docks at a single ocean shipping port terminal in Virginia—Norfolk International Terminal (“NIT”)—and that CSX’s inability to move international intermodal shipping containers directly from that terminal by rail has resulted in harm reverberating through its entire business [REDACTED]

[REDACTED]. But, in reality, CSX *does* have rail access to NIT via the Norfolk and Portsmouth Beltline Railroad Company (“NPBL”), and NPBL has never refused to move CSX’s freight. CSX has *chosen* to move its intermodal containers to and from NIT by truck instead of by rail [REDACTED]

[REDACTED]

[REDACTED]

These undisputed facts lay plain that this case is not about CSX being blocked from NIT. Rather, this case is about CSX’s desire to avoid paying the going rate to access NIT by rail, namely NPBL’s uniform \$210 switch rate for rail traffic—a rate that any user of NPBL must pay; a rate

¹ NS also adopts and incorporates the arguments made in NPBL’s brief that are readily transferable to NS. *U.S. ex rel. LaCorte v. SmithKline Beecham Clinical Lab’ys, Inc.*, 149 F.3d 227, 237–38 (3d Cir. 1998) (recognizing incorporation of “readily transferrable” arguments between parties). This includes all arguments regarding the lack of any conspiracy between NPBL and NS, whether antitrust, business conspiracy, or civil conspiracy. NPBL’s arguments equally apply to NS as the alleged other party to the conspiracy and are, thus, properly subject to adoption and incorporation.

that CSX has in fact paid without complaint on other portions of NPBL not at issue here; and a rate that has since 2010 barely covered NPBL's operating costs. Though the available tariff rate is eminently justified, CSX seeks to use this lawsuit and the threat of treble antitrust damages to extract a special deal from NPBL that is well below the rate that NPBL's Operating Agreement requires it to charge.

In view of the undisputed facts, Defendants are entitled to summary judgment on all of CSX's claims. As a threshold matter, well-established statute of limitations precedent demonstrates that CSX's claims are time-barred, or at minimum must be substantially narrowed on that basis. Additionally, CSX's ill-conceived antitrust claims fail for a number of independent reasons. *First*, CSX has gerrymandered its proposed relevant market—a required element for all of the antitrust claims—around its own circumstances rather than by reference to actual competitive conditions, ignoring that (a) trucking containers from port to destination is an alternative to moving them by rail for ocean carriers; and (b) ocean carriers can move intermodal containers through other terminals and ports to their ultimate destination. *Second*, CSX's monopolization and attempted monopolization claims fail because CSX cannot satisfy the elements of the essential facilities claim it presses here. *Third*, CSX's conspiracy-based antitrust claims fail because there is no conspiratorial agreement, and under the “rule of reason,” CSX cannot prove the requisite substantial anticompetitive effect. CSX's state law claims fare no better, and likewise cannot survive summary judgment for a litany of reasons, including because (1) NS assisted NPBL with moving CSX's intermodal trains to NIT in 2015, and (2) NS had no obligation to accept or consider CSX's 2018 request for a special low switch rate or corporate governance proposal. For these reasons, this Court should grant NS's Motion and dismiss CSX's claims.

STATEMENT OF UNDISPUTED MATERIAL FACTS

A. The Parties

1. NS and CSX are Class 1 railroads that operate in the eastern United States and Canada. (ECF No. 66, at 2.)

2. NPBL is a terminal switching railroad founded in 1896 by eight railroads that operates in the cities of Norfolk, Portsmouth, and Chesapeake, Virginia. (Compl. ¶ 1). NPBL's business and affairs are governed by an Operating Agreement, dated July 7, 1897 (the "Operating Agreement"). (**Ex. 1**, NSR_00104139). NPBL's primary business is to interchange, or switch, freight cars for other railroads, primarily its owners. *Id.* NPBL takes cars tendered by other railroads and delivers them to locations on its rail line, or vice-versa. (**Ex. 2**, Moss Dep. 30:12-18).

3. Following mergers and acquisitions among the original nine railroads, the number of shareholder railroads eventually was reduced to only CSX, Norfolk and Western Railway Company ("NW"), and Southern Railway Company ("SR"). (Compl. ¶ 2). By Supplemental Agreement dated March 1, 1989, CSX, NW, and SR amended the Operating Agreement to allow CSX to appoint two NPBL board members and NW and SR to collectively appoint three board members. (See **Ex. 3**, CSXT0086318²). NW and SR's merger left NS and CSX as the sole shareholders of NPBL, with 57% and 43% respective ownership interests. (Compl. ¶ 23).

B. NS and CSX compete for international intermodal container business.

4. NPBL is not a competitor to either NS or CSX. (**Ex. 4**, Joyner 30(b)(6) Dep. 25:1-3; **Ex. 5**, Girardot (first) Dep. 41:13-20; **Ex. 6**, CSX Corp. Rep. Dep. 34:4-6, 35:19-36:7; **Ex. 7**, Marvel Rep. ¶¶12, 16-17; **Ex. 8**, Strongosky (first) Dep. 72:22-73:3).

² In 1989, NW and SR had legally merged following ICC approval of the Merger in 1982 but were still working through the operational merger. ECF No. 116, at 1.

5. NS and CSX vigorously compete for the transportation of international intermodal containers delivered to or from ports on the East Coast. (Ex. 9, Heller Dep. (first) 36:18-21).

6. “International intermodal traffic” refers to the transportation of cargo containers that are either imported to or exported from the United States and use more than one mode of transportation on a single trip from origin to destination. (Ex. 10, Wright Rep. ¶ 21).

7. Railroads often utilize “double-stacked” trains to move intermodal containers. A double-stacked train can hold up to three containers in a single well, as opposed to a single-stacked train that can hold only one container per well. (Ex. 5, at 184:12-25).

8. CSX executives acknowledge that double-stacked trains double a railroad’s train capacity and create cost and operational efficiencies. (Ex. 11, Kenney (first) Dep. 41:20-42:1, 117:5-15; Ex. 8, at 45:14-47:1, 148:17-149:19; Ex. 12, Piacente Dep. 73:24-74:23; Ex. 13, CSXT0000897 at Slide 6; Ex. 14, CSXT0001792 at -794; Ex. 15, CSXT0124777 at -778).

C. The Port of Virginia

1. The Port of Virginia has operated three terminals.

9. Until May 2020, the Port of Virginia (“POV”) had three terminals supporting international intermodal traffic, Virginia International Gateway (“VIG”), Portsmouth Marine Terminal (“PMT”), and Norfolk International Terminals (“NIT”).³ (Ex. 7, at ¶ 23).

10. At VIG, CSX and NS have on-dock access via the Commonwealth Railway (“CWRV”), a short-line railroad. (Ex. 5, at 99:18-99:24; Ex. 16, Luebbers Dep. (first) 60:05-60:08). In 2019, VIG completed an expansion project and can now offer roughly the same capacity as NIT at 1.2 million containers annually. (Ex. 17, Capozzi Dep. 220:23-221:2; Ex. 10, at ¶ 119).

11. At PMT, NPBL owns the tracks leading to the terminal, which is located next to

³ These three terminals—NIT, VIG, and PMT—are sometimes collectively referred to as the “Hampton Roads ports” or the “Hampton Roads terminals.” *Id.*

CSX's Portsmouth Intermodal Yard. (Ex. 10, at ¶ 37). When operational, PMT could handle approximately 200,000 containers per year. (*Id.* at ¶ 116).

12. CSX had on-dock access to PMT through trackage rights over NPBL's tracks while PMT was operational. (Ex. 17, at 74:24-75:5). NS had on-dock access at PMT by using NPBL and paying NPBL the uniform switch rate. (Ex. 2, at 113:01-113:07).

13. PMT was temporarily shuttered between 2010 and 2014. PMT was shuttered again in 2020 and remains closed today. (Ex. 17, at 172:23-173:19; Ex. 10, Tbls. 5 & 6).

14. At NIT, NS has on-dock access via tracks that it owns. (Ex. 18, Martinez Dep. 31:20-32:04). NPBL has trackage rights over NS's tracks. *Id.*

15. CSX has rail access to the on-dock facilities at NIT via NPBL, provided that CSX pays the NPBL switch rate. (Ex. 19, MacDonald Dep. 42:3-6, 134:16-135:9; Ex. 8, at 195:2-9; Ex. 20, CSXT0037049 at Slide 4; Ex. 21, Hall Dep. 33:20-22, Ex. 22, Eliasson Dep. 81:6-9; Ex. 23, CSXT0050615 at -615).

16. A railroad seeking access to NIT must coordinate an available operating window with NS. (Ex. 24, DiDeo Dep. 192:22-193:10; Ex. 25, CSXT0126579 at -579; Ex. 26, CSXT0001301; Ex. 9, at 257:7-258:8; Ex. 27, C. Booth Dep. 87:17-88:7).

17. NS and NPBL trains enter and move through NIT in different directions, meaning that two trains cannot be on the tracks at the same time. (Ex. 19, at 92:21-93:1, 121:4-9; Ex. 28, CSXT0117504 at -504). NS enters NIT through the southern main gate and travels in a continuous clockwise fashion as it moves into NIT, loads containers, and then exits NIT's northern back gate. (Ex. 19, at 91:18-92:5). NPBL has trackage rights that allow it to enter and exit NIT through the northern back gate. (Ex. 29, NSR_00306428 at -429; Ex. 30, CSXT0001276 at -276). This requires NPBL to leave NIT through the same gate in which it enters. (Ex. 31, NPBL013648 at -

649; Ex. 19, at 97:7-17).

2. VIT directs ocean carriers where to dock.

18. Virginia International Terminals, Inc. (“VIT”) is the private terminal operating subsidiary of the Virginia Port Authority (“VPA”) that operates the POV. (Ex. 17, at 105:1-6; Ex. 32, Vick Dep. 27:25-28:8).

19. VIT actively manages port operations at the POV [REDACTED]

[REDACTED]

[REDACTED]

20. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

3. The Port of Virginia competes against other ports.

21. Ports compete with one another for international intermodal “discretionary cargo,” which is cargo that can move through more than one port to its ultimate destination. (Ex. 17, at 186:4-187:2; Ex. 15, CSXT0124777 at -777).

22. Ports along the West Coast of the United States compete with ports along the East Coast of the United States for discretionary international intermodal traffic for some origins and destinations, particularly in the Midwest. (Ex. 8, at 62:21-63:23; Ex. 11, at 29:20-30:11; Ex. 12, at 89:23-90:11; Ex. 39, Houfek Dep. 19:13-20:4; Ex. 40, CSXT0063241 at -241; Ex. 41, CSXT0069501 at -501; Ex. 42, CSXT0034771 at -771-72; Ex. 43, CSXT0045124 at -124).

23. The inland locations for which the POV has the greatest natural shipping advantage over other ports tend to be origins and destinations locations close to the port itself. (Ex. 10, at ¶ 70; Ex. 39, at 19:14-20:25).

24. The POV competes with Canadian ports and with the ports of Baltimore, Philadelphia, Savannah, Jacksonville, Charleston, and New York/New Jersey (“Port of NY/NJ”) for discretionary international intermodal traffic. (Ex. 17, at 187:15-188:2; Ex. 19, at 112:6-10; Ex. 20, at Slide 7; Ex. 44, CSXT0003542; Ex. 45, CSXT0038547 at -747; Ex. 15, at -777).

25. CSX and NS consider how pricing affects an ocean carrier’s decision to call at various ports. (Ex. 46, CSXT0032388 at -388; Ex. 8, at 127:3-128:12; Ex. 47, CSXT0046487 at -488; Ex. 48, NSR_00026305 at -305; Ex. 9, at 117:6-13). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

4. CSX has a competitive advantage at the Port of New York/New Jersey.

26. The POV’s main competitor for discretionary international intermodal cargo is the Port of NY/NJ, which is the East Coast port with the largest intermodal container business. (Ex. 10, at ¶ 73; Ex. 17, at 187:20-23; Ex. 5, at 77:25-78:3; Ex. 8, at 212:1-6; Ex. 53, CSXT0052080 at -802-083; Ex. 54, CSXT0072702 at -702; Ex. 46, CSXT0032388 at -388; Ex. 15, CSXT0124777 at -777).

27. The Port of NY/NJ is the first port of call on the East Coast for many ocean carriers, providing it with a speed-to-market advantage over the POV when serving overlapping inland destinations such as the Midwest. (Ex. 10, at ¶ 73; Ex. 32, at 75:23-76:4; Ex. 40, at -241; Ex. 55, CSXT0003625 at -625).

28. CSX has long prioritized the Port of NY/NJ as its main port for international intermodal traffic services. (Ex. 10, at ¶ 74; Ex. 56, Kendall Dep. 29:16-30:1; Ex. 57,

VPA000793; Ex. 58, Joseph Bonney, “CSX Raises the Roof,” JOC.com, Oct. 18, 2010, available at https://www.joc.com/maritime-news/csx-raises-roof_20101018.html (“You hear a lot about the Heartland Corridor. My statement is, ‘Bring them on.’ We can handle them here in New Jersey and beat them head-on, straight up every day.” (quoting Clarence Gooden, CSX’s executive vice president and chief commercial officer)); Ex. 59, CSXT0024736 at -736).

[REDACTED]

[REDACTED]

[REDACTED]

30. CSX reaches the same major Midwest locations through the Port of NY/NJ that NS serves through the POV, including Chicago, Cleveland, Cincinnati, Columbus, Detroit, Louisville, Kansas City, and St. Louis. (Ex. 62, NSR_00000912 at Slide 21; Ex. 63, CSXT0003592 at Slide 11; Ex. 60, at Slides 3-4; Ex. 64, CSXT0096239).

31. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

5. NS has a Competitive Advantage at the Port of Virginia.

33. NS completed its “Heartland Corridor” project in 2010, which gave NS double-stack service through the POV and the fastest and most direct routes to Midwest destinations from the POV. (Ex. 76, NS_00001839 at -840; Ex. 73, McClellan Dep. 22-23, 151). [REDACTED]

[REDACTED]

[REDACTED]

34. CSX did not achieve double-stack capabilities from the POV until December 2016 when the Virginia Avenue Tunnel construction was completed, part of the National Gateway project. (Ex. 5, at 217:5-12; Ex. 12, at 73:24-74:6; Ex. 68, CSXT0052366 at Slide 9; Ex. 69, CSXT0024736 at -736). [REDACTED]

35. [REDACTED]

6. Trucks compete against railroads for traffic at the POV.

36. Between 2012 and 2019, trucks accounted for 60%-65% of all international intermodal traffic through the POV. (Ex. 10, at ¶ 59, Chart 1).

37. CSX and POV officials confirm that trucks and rail compete most closely for international intermodal traffic movements of up to 200 miles. (Ex. 71, Marvel Reply Rep. ¶ 40; Ex. 12, at 86:7-16; Ex. 5, at 60:16-22; Ex. 35, at 72:12-73:5; Ex. 32, at 48:17-49:6; Ex. 72, CSXT0032082 at -082).

38. CSX and NS executives confirm that trucks and rail also compete for international intermodal movements between 200 and 500 miles, and in certain circumstances, for movements longer than 500 miles. (Ex. 8, at 112:8-24; Ex. 73, at 119:4-120:18; Ex. 5, at 62:7-17; Ex. 11, at 47:12-21; Ex. 70, at 33:13-23; Ex. 74, CSXT0159556 at -565; Ex. 4, at 19:7-20:9; Ex. 10, at ¶ 61; Ex. 75, NSR_00041595 at -597; Ex. 40, at -241; Ex. 45, at -747).

39. [REDACTED]

40. Both NS and CSX set at least some of their international intermodal rates in order to remain competitive with trucks. (Ex. 10, at ¶¶ 66-67; Ex. 40, at -241; Ex. 8, 120:4-22; Ex. 9, at 248:3-249:9; Ex. 72, at -082; Ex. 77, CSXT0097850 at -850; Ex. 5, at 112:2-113:1). [REDACTED]

[REDACTED]

[REDACTED]

41. Through CSX's Highway To Rail ("H2R") program, CSX actively seeks to convert trucking of international intermodal traffic to rail movement of those containers by CSX. (Ex. 11, at 64:11-65:12; Ex. 72, at -083; Ex. 8, at 117:7-13).

D. NPBL charges a uniform switch rate per the Operating Agreement.

42. The Operating Agreement requires that NPBL fix a "uniform rate" for the NPBL's "movement of freight cars ... regardless of distance." (Ex. 2, at 114:7-16; Ex. 1, at art. 9; Ex. 6, at 28:13-16; Ex. 22, at 130:24-131:14). The uniform rate is to be "adjusted from time to time" to pay a six percent dividend to shareholders. (Ex. 1, at art. 9). The uniform rate that NPBL charges to switch cars is referred to as its "switch rate."

43. [REDACTED]

[REDACTED]

[REDACTED]

44. NPBL's switch rate is set through a published tariff. (Ex. 82, Stinson Dep. 128:8-22; Ex. 79, NPBL000220). Historically, NPBL has used rate committees to evaluate and propose adjustments to the switch rate to the NPBL Board for a vote. (*Id.* at 158:21-25; Ex. 83, Coleman Dep. 47:10-15).

45. Through its statutory authority, the Surface Transportation Board ("STB") has exclusive jurisdiction over the reasonableness of switch rates and the trackage rights agreement between NS and NPBL. 49 U.S.C. §§ 11102(a), (c)(1).

46. NS provides administrative support to NPBL per contracts with NPBL. (See Ex. 2, at 35:2-23 (leases three locomotives), 52:9-25 (billing and contract services), 58:2-6 (technology services), 60:4-61:25 (car management system), 62:1-13 (email addresses), 193:11-24 (benefits administration), 289:1-290:6 (locomotive maintenance)).

1. NPBL set the switch rate at \$210/well to cover its operating expenses.

47. In 2009, the Board set NPBL's switch rate at \$210 per well, effective January 1, 2010. (Ex. 88, CSXT0125260). The rate has remained the same since 2010. (Ex. 2, at 202:14-18).

48. The NPBL switch rate is based on NPBL's operating costs. (Ex. 89, Crowley Rep. at 5, Tbl. 1; Ex. 2, at 234:12-20; Ex. 83, at 104:6-8).

49. [REDACTED]

[REDACTED]

50. It is "very relevant" to consider NPBL's actual costs in setting the switch rate. (See Ex. 81, at 75:16-17, 90:4-7; Ex. 22, at 87:5-9; Ex. 90, Ingram Dep. 169:2-6).

51. Since 2010, NPBL's Board has approved the annual budget presented by NPBL's officers, which includes NPBL's anticipated expenses for the following year. (Ex. 89, at 4 n.8).

52. CSX's expert testified that he did *not* take into account the NPBL's operating expenses when he analyzed the NPBL switch rate. (Ex. 70, at 92:4-15).

2. There was no vote on CSX's 2010 Rate Proposal.

53. On July 23, 2010, CSX sent a letter to NPBL (the "2010 Proposal") proposing that the parties enter into a contract relating to NPBL's movement of CSX's intermodal freight to and

from NIT. (**Ex. 91**, NPBL007431 at -433). Among other things, CSX proposed that it pay NPBL a switch rate of \$37.50 per container. *Id.* The terms proposed by CSX were subject to negotiation between CSX and NPBL. *Id.* CSX sent NPBL a draft contract as part of the negotiation. (**Ex. 92**, J. Booth Dep. 248:10-249:8; **Ex. 93**, CSXT0109886 at -886-908).

54. The proposed discounted rate did not consider all of NPBL's costs for moving the trains. (See **Ex. 92**, at 69:4-8, 72:7-11, 123:19-124:1; **Ex. 81**, at 131:9-12, 15-18, 135:6 (proposal not based on expenses); **Ex. 80**, at 117:14-118:7 (plan profitability was speculative and unsupported)).

55. NPBL's officers presented their analysis to the NPBL Board. However, no board member ever moved for a vote on whether NPBL should agree to the 2010 Proposal. (See **Ex. 94**, NPBL017933 at -938). Nor did CSX, as a shareholder, make a motion at the April 13, 2011 shareholders meeting to agree to the 2010 Proposal. (**Ex. 95**, CSXT0000262 at -262).

3. CSX's 2018 Rate and Governance Proposals

56. [REDACTED]

[REDACTED]

[REDACTED]

57. On March 23, 2018, CSX sent a letter to NPBL management proposing that the parties enter into a contract relating to NPBL's movement of CSX's intermodal freight to and from NIT. (**Ex. 105**, CSXT0100329; **Ex. 106**, CSXT0119620; **Ex. 6**, at 143:22-144:2). CSX said it was "willing to work through [a rate committee] if necessary." (**Ex. 105**).

58. NPBL pursued the proposal. Moss spoke with CSX about the proposal, met with VIT as to port management, and consulted with NS regarding an operating plan for the movements CSX proposed. (**Ex. 107**, NPBL006228; **Ex. 2**, at 242:10-17). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

59. NPBL management raised CSX's proposal at the April 18, 2018 NPBL Board meeting. (Ex. 108, NPBL000745). Board members raised concerns that giving CSX a special, contract rate would violate the Operating Agreement's uniform rate provision. (Ex. 109, Merilli Dep. 55:2-8). These concerns led NPBL's management to recommend that the Board form a rate committee to fully investigate the proposal. (Ex. 2, at 242:21-22).

60. CSX was not interested in a rate committee. (Ex. 2, at 244:25-245:1). The CSX-appointed directors never moved to form a rate committee and *never* moved for a vote on the 2018 Rate Proposal at the April 18, 2018 Board meeting. (Ex. 6, at 138:17-19; Ex. 110, Armbrust Dep. 214:15-21). NPBL never rejected the rate proposal made by CSX. (Ex. 2, at 287:25-288:9).

61. On April 6, 2018, CSX sent a letter to NS and NPBL demanding that the NPBL Board be restructured to overturn the Supplemental Agreement's 3-2 allocation of board seats between the two parent railroads and for NPBL to adopt an ethics compliance program. (Ex. 111, CSXT0100552). But NPBL already maintained a code of ethics and conflicts of interest standards. (Ex. 2, at 49:22-50:3; Ex. 83, at 39:17-40:6, 214:2-8; Ex. 109, Merilli Dep. 55:13-56:3).

62. CSX asked for a vote to restructure the Board at the shareholder meeting on April 18, 2018. (Ex. 112, CSXT0149075). NS voted its majority shares against the proposal. (*Id.*; Ex. 113, NSR_000738434). Shortly thereafter, CSX commenced this litigation.

E. CSX was not foreclosed at NIT and used NPBL to move other freight.

63. Prior to 2015, NPBL moved only one intermodal train to NIT at CSX's request. (Ex. 19, at 73:20-25). In that instance, CSX recognized that the switch rate was not "too onerous." (Ex. 96, CSXT0082577 at -577). CSX did not ask NPBL to move any other intermodal freight to

or from NIT until March 27, 2015. (Ex. 19, at 131:8-133:3).

64. After receiving CSX's request to move a train of intermodal freight to and from NIT on March 27, 2015, NS worked with NPBL, CSX, and VIT to create an operating window. (Ex. 19, at 142:6-19). An operating window was agreed to on March 31, 2015, and NPBL moved the train on April 1, 2015. (Ex. 19, at 144:20-25; Ex. 116, CSXT0001301). Over the next couple of months, CSX asked NPBL to move eight more trains to and from NIT. (Ex. 2, at 291:21-24; Ex. 19, at 189:17-20). NPBL moved every train that CSX asked it to move. (Ex. 2, at 291:25-292:7).

65. As part of these movements, NS provided an operating window for NPBL to move the trains on NS's track to NIT on Tuesday and Thursday mornings, which was consistent with the operating window that NS provided NPBL on March 1, 2011. (Ex. 97, CSXT0001537; Ex. 117, CSXT0126579; Ex. 19, at 179:15-180:9).

66. CSX has not asked NPBL to move intermodal freight to or from NIT since July 2015. NPBL has never refused to move CSX's intermodal freight to or from NIT. (Ex. 2, at 291:21-292:7; Ex. 19, at 189:17-20; Ex. 11, at 28:21-23).

67. CSX has used NPBL to move other freight. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

68. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

69. [REDACTED]

70. [REDACTED]

[REDACTED] Both (i) the total volume of containers moving by rail in and out of the POV, and (ii) the total number of containers moved by CSX, have increased from 2009 to the present. (Ex. 10, at Tbls. 5, 6).

71. [REDACTED]

F. NS and NPBL are litigating against each other regarding NS's request to have the STB set the trackage fee.

72. [REDACTED]

73. NPBL and NS could not agree on the amount of the trackage fee that NPBL would pay NS for use of NS's tracks. (Ex. 101, NPBL005850; Ex. 102, CSX Resp. NPBL's Req. Admis. Nos. 5 & 8 (AEO) (admitting that NS has not increased the trackage fee and that NPBL opposed NS's request to increase the trackage fee)).

74. As a result, on September 13, 2018, NS petitioned the STB to set the trackage rights compensation, a proceeding where NS and NPBL are adverse parties. (See Ex. 103, CSX Resp. NPBL's Req. Admis. No. 3 (admitting that Defendants did not enter into any trackage fee agreement)).

G. Efforts to sell Pinners Point and decommissioning of Diamond Track.

75. In 2008, NPBL began considering a sale of Port Norfolk Yard (also called Pinner's Point). (See Ex. 84, NPBL006936 at -957). CSX-appointed board members approved selling the property, but ultimately the Board agreed that NPBL should hold off on selling the property. (See Ex. 85, NPBL007095, Ex. 86, Eliasson E-Mail (Feb. 14, 2011); (Ex. 83, at 87:13-16, 91:11-12).

76. NPBL had trackage rights over a short segment of track formerly located between NS Junction and Carolina Junction in the Berkley area of South Norfolk (the "Diamond Track"). (See Ex. 87, Board Min., Dec. 19, 2007, CSXT0000001 at -005). The decommissioning of the Diamond Track was presented to the Board, which approved it without objection. *Id.*

77. NS requested that the STB approve discontinuance of service and trackage rights over the Diamond Track, certifying that no local traffic had moved over the line for at least two years. The STB approved the discontinuance, *without objection from CSX*, effective June 14, 2008. STB Docket No. AB-290 (Sub-No. 299X), *NSR – Discontinuance of Service Exemption & NPBL – Discontinuance of Trackage Rights Exemption*, May 15, 2008.

ARGUMENT

I. CSX'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS.

A. Conduct beyond the limitations period cannot underpin claims or damages.

CSX's claims are based on its contention that NS, together with NPBL, prevented CSX from accessing NIT. CSX relies on the following allegedly wrongful conduct: (1) removal of the Diamond Track in 2008; (2) allegedly blocking CSX's attempt to purchase the Port Norfolk Yard in 2009; (3) setting the NPBL's switch rate at \$210 per car in 2009; (4) purportedly "rejecting" the 2010 Service Proposal; (5) allegedly preventing CSX from using NBPL to move intermodal freight to and from NIT in 2015; and (6) allegedly refusing to adopt CSX's 2018 Service and Governance Proposals. (Compl. ¶ 34; Ex. 118, CSX 2d Supp. Resp. NPBL's Interrog. No. 4).

Section 4B of the Clayton Act provides that any private antitrust cause of action is barred “unless commenced within four years after the cause of action accrued.” 15 U.S.C. § 15b. An antitrust cause of action accrues “when a defendant commits an act that injures a plaintiff’s business.” *Zenith Radio Corp. v. Hazeltine Rsch., Inc.*, 401 U.S. 321, 338 (1971). The “commission of a separate new overt act” in furtherance of an antitrust conspiracy “generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period.” *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997). Thus, an antitrust plaintiff “cannot use an independent, new predicate act as a bootstrap to recover for injuries caused by other earlier predicate acts that took place outside the limitations period.” *Id.* at 190 (even where the plaintiff demonstrates the existence of new overt acts, the plaintiff may recover only for damages *caused by the new acts* that occurred during the limitations period).

CSX’s state law contract and statutory business conspiracy claims against NS are subject to a five-year limitations period. (See ECF No. 66 at 36). See also Va. Code Ann. § 8.01-246; *Detrick v. Panalpina, Inc.*, 108 F.3d 529, 543 (4th Cir. 1997). Its common law conspiracy claim is subject to a two-year limitations period governing breach of fiduciary duty claims.⁴ See *Jones v. Shooshan*, 855 F. Supp. 2d 594, 602 (E.D. Va. 2012). As with its antitrust claims, each of these state law causes of action accrued when CSX first suffered damages, or injury, as a result of the alleged wrongful acts. See *Westminster Investing Corp. v. Lamps Unlimited*, 237 Va. 543, 546 (1989) (breach of contract claim accrues when plaintiff suffers damages, even if slight); *Detrick*, 108 F.3d at 543 (cause of action for either type of conspiracy accrues when the plaintiff suffers an

⁴ CSX’s tortious interference claim was dismissed (ECF No. 66 at 46-48), and its conspiracy claims cannot rest on a breach of the Operating Agreement. See *Station # 2, LLC v. Lynch*, 280 Va. 166, 174 (2010) (mere non-performance of a contract does not, on its own, establish a business conspiracy claim). Nor can CSX rest conspiracy claims on an alleged breach of fiduciary duty by the NPBL directors. See Argument Part III.C *infra*.

injury sufficient to give rise to the underlying tort claim).

As NPBL also explains, under any of these statutory periods, the first four alleged wrongful acts upon which CSX relies—as well as any damages that flow from those acts, whenever they may have been incurred—are time-barred. The Court has already so held in ruling on NS’s Motion to Dismiss. (See ECF No. 66 at 38-40 (finding that CSX alleged “wrongful acts ... *within the five-year statute of limitations*” allegedly produced damages “distinct” from those flowing from the actions NS took *before* 2014 (emphasis added))). Even though the alleged wrongful acts occurring *outside* the statute of limitations may give rise to distinctly separate damages, as the Court recognized, these actions cannot support CSX’s claims. Further, any damages allegedly stemming from time-barred acts are unrecoverable regardless of when the damages accrued.

B. CSX cannot identify any distinct damages from conduct occurring within the limitations period, so CSX is not entitled to any recovery.

CSX relies solely on the testimony of its expert, Professor Howard P. Marvel, for purposes of proving damages for *all* of its claims. (See Ex. 119, CSX’s 2d Suppl. Resp. NS’s 1st Interrog. 3; Ex. 120, CSX’s 4th Suppl. Rule 26(a)(1) Disclosures). Prof. Marvel’s damages model asserts CSX suffered damages from 2009 through 2021, but he does not identify what specific damages were caused by the specific wrongful conduct alleged by CSX. (Ex. 71, at ¶¶ 124-125). For the reasons stated above, CSX cannot recover pre-2015 damages because those damages necessarily are based on allegedly wrongful conduct that took place outside the limitations period.

CSX also is barred from recovering any damages from 2015 forward because CSX cannot identify whether those alleged damages were caused by (a) time-barred conduct, (b) Defendants allegedly preventing CSX from using NPBL to move intermodal freight through NIT in 2015, or (c) Defendants’ alleged refusal to adopt CSX’s 2018 Service and Governance Proposals. CSX may not use a unified damages theory that not only seeks to recover time-barred damages, but also

does not distinguish the alleged damages flowing from time-barred conduct from damages stemming from within-limitations-period conduct. This is the type of bootstrapping that the law does not allow. *See Klehr*, 521 U.S. at 188-90. Thus, CSX's claims must be dismissed.

C. The “continuing violation” doctrine cannot save CSX’s antitrust conspiracy claims.

CSX may claim that its antitrust conspiracy claims are saved by the continuing violation doctrine, which requires proof of an overt act occurring after October 4, 2014 that (1) is a new and independent act that is not merely a reaffirmation of a previous act, and (2) inflicts new injury on the plaintiff. *See Kaw Valley Elec. Coop. Co. v. Kansas Elec. Power Coop., Inc.*, 872 F.2d 931, 933 (10th Cir. 1989) (both elements are necessary for the act to restart the statute of limitations); *accord Lancianese v. Bank of Mt. Hope*, 783 F.2d 467, 470 (4th Cir. 1986); *see also XY, LLC v. Trans Ova Genetics, L.C.*, 890 F.3d 1282, 1292 (Fed. Cir. 2018) (antitrust plaintiff bore burden on summary judgment to present evidence that it had suffered damages as a result of separate antitrust violations occurring within limitations period). In other words, “a newly accruing claim for damages must be based on some injurious act actually occurring during the limitations period, *not merely the abatable but unabated inertial consequences of some pre-limitations action.*” *Al George, Inc. v. Envirotech Corp.*, 939 F.2d 1271, 1274 (5th Cir. 1991) (citation omitted).

Neither NPBL's movement of trains in 2015 nor Defendants' purported failure to consider the 2018 Rate Proposal was a “new and independent act.” CSX undisputedly successfully used NPBL to access NIT in 2015. (SOF ¶¶ 62-65). CSX did not bring the 2018 Rate Proposal to a vote (*id.* ¶ 60), so Defendants took *no overt action* on the 2018 Rate Proposal.⁵ Nor does NS's vote against the Governance Proposal help CSX, as NS had the contractual right to insist that the

⁵ If CSX argues that it did not bring its Rate Proposal for a vote because doing so would have been “futile,” the proposal would alternatively fail to restart the statute of limitations as a futile proposal to deal. *See Kaw Valley*, 872 F.2d at 934.

Supplemental Agreement be followed. (*Id.* ¶ 62). Thus, Defendants did not engage in any new and independent act sufficient to restart the statute of limitations. *See Midwestern Mach. Co. v. Northwest Airlines, Inc.*, 392 F.3d 265, 271 (8th Cir. 2004) (defendant must take new anti-competitive action to restart the statute of limitations).

CSX also cannot show that it suffered new injury or damages as a direct result of any post-2014 action. Instead, CSX merely relies on its expert report to claim damages for each year dating back to 2009. CSX’s failure to provide evidence that NS’s allegedly unlawful 2015 and/or 2018 actions caused injury distinct from the “abatable but unabated inertial consequences” of NPBL’s 2009 decision to set the switch rate at \$210 means that CSX cannot demonstrate any overt act that is sufficient to restart the statute of limitations. *See XY, LLC*, 890 F.3d at 1291 (affirming summary judgment where plaintiff failed to identify any new injury resulting from acts occurring within the limitations period). CSX’s antitrust claims are, thus, barred in their entirety.

II. SUMMARY JUDGMENT ON CSX’S ANTITRUST CLAIMS IS WARRANTED.

A. CSX’s failure to properly define a relevant market compels dismissal of all CSX’s antitrust claims.

All of CSX’s antitrust claims require that it allege and prove the requisite degree of market power in a properly defined relevant antitrust market, that is, the “area of effective competition,” within which “significant substitution in consumption or production occurs.” *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2285 (2018) (hereinafter *AmEx*) (quoting *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965), and Phillip E. Areeda & Herbert Hovenkamp, *Fundamentals of Antitrust Law* § 5.02 (4th ed. 2017)). Without a properly defined market, “there is no way to measure [the defendant’s] ability to lessen or destroy competition.” *Walker Process*, 382 U.S. at 177; *see also AmEx*, 138 S. Ct. at 2283-85 (recognizing that proper application of the rule of reason under Section 1 of the Sherman Act, 15 U.S.C. § 1, usually

requires “an accurate definition of the relevant market”)⁶; *It’s My Party, Inc. v. Live Nation, Inc.*, 811 F.3d 676, 681 (4th Cir. 2016) (plaintiffs alleging monopolization under Section 2 of the Sherman Act, 15 U.S.C. § 2, must “identify[] exactly what market defendant is accused of monopolizing”); *Sun Microsystems, Inc. v. Microsoft Corp.*, 333 F.3d 517, 534 (4th Cir. 2003) (attempted monopolization “requires definition of the relevant market that the defendant is allegedly attempting to monopolize”), *abrogated on other grounds by eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006); *Dickson v. Microsoft Corp.*, 309 F.3d 193, 211 (4th Cir. 2002) (conspiracy to monopolize under Section 2 of the Sherman Act requires allegations as to “market power or share of [the alleged conspirators] in the [relevant] market”).

Here, CSX’s relevant market allegations fail for two separate, independent reasons. *First*, CSX failed to offer evidence to prove that the market alleged in its Complaint is a properly defined relevant market. *Second*, the market proffered by Prof. Marvel, CSX’s expert economist, is impermissibly narrow and does not account for the realities of competition. Courts routinely reject markets that are, as here, gerrymandered around the plaintiff’s preferences, instead of being defined pursuant to accepted market definition principles. *See It’s My Party*, 811 F.3d at 683 (“No party can expect to gerrymander its way to an antitrust victory without due regard for market realities.”); *Consul, Ltd. v. Transco Energy Co.*, 805 F.2d 490, 495 (4th Cir. 1986) (“A market drawn too tightly . . . creates the illusion of market power where none may exist.”).

1. CSX cannot proffer evidence to prove that the relevant market pleaded in its Complaint is properly defined.

CSX’s Complaint alleges a relevant market of “freight transportation by rail in and out of the Hampton Roads’ ports.” (Compl. ¶ 50). CSX made no attempt in discovery to adduce evidence in support of this purported relevant market and, thus, cannot carry its burden on this essential

⁶ See Section III.B., *infra*, explaining that CSX’s Section 1 claim is a “rule of reason” claim.

element. CSX's expert Prof. Marvel defines and analyzes a much narrower market for "on-dock rail access at NIT." (*Compare* Compl. ¶¶ 49-50; with Ex. 7, Marvel Rep. ¶ 12). The two are very different. The market defined in the Complaint contemplates rail service provided to ocean carriers from POV, whereas the market defined by Prof. Marvel contemplates rail access to NIT provided by NPBL. CSX did not seek to amend its Complaint to define a relevant market consistent with Prof. Marvel's definition. CSX may not now proceed on Prof. Marvel's narrower market definition, having failed to amend its complaint to reflect this more limited and very different theory. *Cf. Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (a plaintiff's complaint must give the defendant fair notice of what the . . . claim is and the grounds upon which it rests" (citation omitted)); *accord Monsanto Co. v. Scruggs*, 342 F. Supp. 2d 568, 581-82 (N.D. Miss. 2004) (refusing to permit expert testimony on markets other than alleged in plaintiff's antitrust counterclaim), *aff'd*, 459 F.3d 1328 (Fed. Cir. 2006); *Bepco, Inc. v. Allied-Signal, Inc.*, 106 F. Supp. 2d 814, 824 (M.D.N.C. 2000) (proffer of contradictory expert evidence on relevant market "seriously compromise[d] [plaintiff]'s claim to have defined any relevant markets at all").

Without evidence to support its pleaded relevant market, CSX cannot carry its burden on this essential element. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986) (defendant can meet summary judgment burden by noting the "absence of evidence to support the nonmoving party's case"); *Berlyn Inc. v. Gazette Newspapers, Inc.*, 73 F. App'x 576, 582 (2003) ("The plaintiff in an antitrust case bears the burden of proof on the issue of the relevant . . . market[.]" (quoting *Satellite Television & Assoc. Res., Inc. v. Cont'l Cablevision of Va., Inc.*, 714 F.2d 351, 355 (4th Cir. 1983))).

2. Regardless of which proposed definition is considered, CSX has improperly gerrymandered the relevant market.

Both of CSX's proposed market definitions—the POV rail service market in the Complaint and the on-dock access to NIT market proffered by Prof. Marvel—suffer from a similar flaw. Both

are tightly drawn around CSX's own circumstances, not by reference to traditional market definition principles. Antitrust markets are defined along two dimensions: a relevant product or service market and a relevant geographic market. See e.g., *Berlyn*, 73 F. App'x. at 582; *Am. Online, Inc. v. GreatDeals.Net*, 49 F. Supp. 2d 851, 857-58 (E.D. Va. 1999). Whether a service constitutes a distinct market depends on whether it is "reasonably interchangeable" with other services, or the "extent to which consumers will change their consumption of [that service] in response to a price change in another, i.e., the 'cross-elasticity of demand.'" *It's My Party*, 811 F.3d at 683 (quoting *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 395 (1956), and *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 469 (1992)). A relevant geographic market must be defined by the "area within which the defendant's customers . . . can practicably turn to alternative supplies if the defendant were to raise its prices." *Id.* at 682 (ellipsis in original) (quoting *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 441 (4th Cir. 2011)).

Because CSX has alleged that the harm to competition is the harm to *ocean carriers* as a result of lessened competition between NS and CSX for intermodal contracts, (Ex. 70, at 21:22-22:6), the service and geographic dimensions of the relevant market must include alternative options that *ocean carriers* can substitute to transport their international intermodal containers.⁷ See, e.g., *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 438 (3d Cir. 1997) ("The test for a relevant market is not commodities reasonably interchangeable by a particular plaintiff, but 'commodities reasonably interchangeable by consumers for the same purposes.'" (quoting *E.I. du Pont*, 351 U.S. at 395); *Berlyn*, 73 F. App'x. at 583 (relevant market must identify the

⁷ Despite alleging that ocean carriers were harmed by NS's conduct, CSX has offered no direct evidence from any ocean carrier confirming they were so harmed.

“proper consumer” and the products that those consumers may find reasonably interchangeable). Here, both of CSX’s proposed markets are too narrow in that both (i) improperly omit other modes of transportation that plainly compete with rail transportation for ocean carriers’ business; and (ii) improperly omit from their geographic scope ports beyond the POV that provide alternative options for ocean carriers to move their intermodal containers to their ultimate destination. CSX’s failure to properly define either the service dimension or the geographic dimension is fatal to its claims.

i. Relevant geographic market.

The Complaint alleges a geographic market of “the intermodal port facilities of Hampton Roads, Virginia,” (Compl. ¶ 49), and Prof. Marvel narrows this market further to only NIT. (Ex. Z, at ¶ 40). But here, not only are all *three* intermodal terminals at the POV reasonable alternatives,⁸ so are other ports outside of the POV, most significantly the Port of NY/NJ.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Ocean carriers can, and do, use other POV terminals instead of NIT. (See SOF ¶¶ 10, 12). Indeed, there is no international intermodal traffic or customer that must move through NIT. (SOF ¶ 69).

Moreover, the undisputed evidence demonstrates that ports compete with one another for the movement of international intermodal discretionary cargo—cargo that by definition can be

⁸ CSX significantly increased its international intermodal container movements at both NIT and the POV as a whole during the relevant period. (SOF ¶ 71). PMT closed to international intermodal container traffic in April 2020. (SOF ¶ 13).

moved through more than one port to its final destination.⁹ (SOF ¶¶ 21-22, 24). The primary competitor of the POV is the Port of NY/NJ, (SOF ¶ 26), which benefits from often being the first port of call on the East Coast, providing that port with a speed-to-market advantage over the POV when serving inland destinations such as the Midwest compared to the POV. (SOF ¶ 27). CSX and NS serve the same major Midwest locations through the Port of NY/NJ that they serve through the POV, including Chicago, Cleveland, Cincinnati, Columbus, Detroit, Louisville, Kansas City, and St. Louis. (SOF ¶ 30). Further, CSX has long prioritized the Port of NY/NJ for its own international intermodal service, (SOF ¶ 28), having had double-stack capabilities out of the Port of NY/NJ for at least 10 years, [REDACTED]

[REDACTED] Competition between the POV and the Port of NY/NJ means that ocean carriers can choose to route traffic through either port, as demonstrated [REDACTED]

[REDACTED]

The POV also competes with other East Coast ports—Baltimore, Philadelphia, Savannah, Jacksonville, Charleston, and Canadian ports—for discretionary international intermodal traffic. (SOF ¶ 24). These East Coast ports provide ocean carriers with additional options to reach some of the same origins and destinations served by NS and CSX at the POV. (SOF ¶¶ 21, 24).

⁹ The inland locations for which POV has the greatest natural shipping advantage tend to be close to the port, which in turn tend to be most efficiently served by trucks rather than rail. (SOF ¶ 23).

¹⁰ [REDACTED]

Similarly, West Coast ports compete with East Coast ports (including the POV) for discretionary cargo going to or from markets in the Midwest. (SOF ¶ 22). In fact, CSX evaluates how pricing at different ports affects ocean carriers' decisions about which ports to utilize to move intermodal freight.¹¹ (SOF ¶ 25). [REDACTED]

[REDACTED] Both of CSX's proposed geographic markets are deficient as a matter of law because they fail to include reasonable geographic alternatives available to ocean carriers.

ii. Relevant service market.

Failure to properly define the service dimension of a relevant market is a separate and independent reason CSX's claims must be dismissed. Here, CSX failed to include end-to-end truck transportation as a competitive alternative to rail for ocean carriers. Trucks accounted for more than 60% of the international intermodal traffic at the POV during the 2012-2019 period. (SOF ¶ 36). While trucks dominate movements of cargo containers up to 200 miles, they also compete with rail for a portion of movements of 200 miles or more. (SOF ¶¶ 37-38). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Despite

¹¹ [REDACTED]

this undisputed evidence of competition between trucks and rail, and ocean carriers' ability to switch between them, CSX's market definition entirely fails to account for trucks and is thus inadequate as a matter of law.

B. CSX cannot establish a genuine issue of material fact on its Section 2 monopolization and attempted monopolization claims.

A monopolization or attempted monopolization claim under Section 2 of the Sherman Act requires the plaintiff to prove that the alleged monopolist engaged in conduct not resulting from "growth or development as a consequence of a superior product, business acumen, or historic accident" and that is not explained by legitimate business justifications.¹² *Loren Data Corp. v. GXS Inc.*, 501 F. App'x 275, 282 (4th Cir. 2012); *see also Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 924 F.2d 539, 544 (4th Cir. 1991). Here, the gravamen of CSX's complaint is that NS, through its alleged control over NPBL, foreclosed CSX from on-dock rail access to NIT, which diminished CSX's ability to compete for ocean carriers' business. CSX's claims fail on a number of grounds.¹³

¹² Monopolization requires: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Oksanen v. Page Mem'l Hosp.*, 945 F.2d 696, 710 (4th Cir. 1974) (quoting *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 596 n.19 (1985)). Attempted monopolization requires: (1) "specific intent to monopolize the market, [(2)] the defendant engaged in anti-competitive or predatory conduct designed to further that intent; and [(3)] a dangerous probability of success." *Abcor Corp. v. AM Int'l, Inc.*, 916 F.2d 924, 926 (4th Cir. 1990) (citing *White Bag Co. v. Int'l Paper Co.*, 579 F.2d 1384, 1387 (4th Cir. 1974)). The same definition of exclusionary conduct applies to both claims. *Kolon Indus., Inc. v. E.I. Dupont de Nemours & Co.*, 748 F.3d 160, 178 (4th Cir. 2014) (quoting 3B Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 806a (3d ed. 2008)).

¹³ As to CSX's Section 2 conspiracy-to-monopolize claims, CSX's failure to adequately allege a conspiracy for purposes of Section 1 of the Sherman Act (*see* Section __, *infra*) likewise dooms its Section 2 conspiracy-to-monopolize claims. *See Dickson*, 309 F.3d at 211.

1. CSX’s Section 2 monopolization and attempted monopolization claims reach only unilateral conduct by a single firm.

Section 2’s prohibitions on monopolization and attempted monopolization address *unilateral* conduct by a *single* firm. See *Oksanen v. Page Mem’l Hosp.*, 945 F.2d 696, 710 (4th Cir. 1991) (“[M]onopolization under section two involves the actions of a single firm to control a market.”). Here, however, CSX’s monopolization and attempted monopolization claims depend in large part on conduct that was in fact engaged in by NPBL, supposedly at NS’s direction. Where CSX has argued that NS and NPBL are “separate legal entities, with separate economic interests, separate corporate purposes, and separate management” (Pl.’s Opp’n Def.’s Mot. Dismiss 17, ECF No. 39), CSX cannot simultaneously press single-firm monopolization and attempted monopolization claims premised on both firms’ conduct. See, e.g., *Midwest Gas Servs., Inc. v. Indiana Gas Co.*, 317 F.3d 703, 713 (7th Cir. 2003) (plaintiff’s Section 2 claims alleging co-defendant was “functionally under the control of [defendant]” were not proper where the court found entities to be “separate and distinct”); *Sun Dun, Inc. of Wash. v. Coca-Cola Co.*, 740 F. Supp. 381, 391 (D. Md. 1990) (“The idea that a monopoly is composed of a single economic entity is . . . reflected in the requirement . . . that the requisite market power be held by a single defendant.”). CSX’s Section 2 monopolization and attempt claims fail for this reason alone.

2. CSX cannot prove exclusionary conduct under an “essential facilities” theory.

CSX contends that NS violated Section 2 of the Sherman Act because by denying CSX access to NIT by rail, preventing CSX from competing with NS.¹⁴ But the Supreme Court has

¹⁴ See Compl. ¶ 93(a) (NS caused NPBL to reject CSX’s Service Proposal, thereby denying access to NIT); ¶ 93(b) (failing to allow reasonable/timely movement of CSX rail cars delivered to NIT by NPBL); ¶ 93(c) (refusing to allow NPBL to use CSXT’s locomotives to access NIT); ¶ 93(d) (NS set NPBL’s switch rate at levels designed to exclude competition); ¶ 93(e) (NS caused NPBL to terminate access rights to the “diamond track”).

long reiterated that competitors have no duty to help one another: the Sherman Act “does not restrict the long recognized right of [a] trader . . . engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.” *Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko, LLP (Trinko)*, 540 U.S. 398, 408 (2004) (alteration in original) (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)). While the Supreme Court has recognized certain exceptions to the *Colgate* doctrine, it has been “very cautious,” in part “because of the uncertain virtue of forced sharing.”¹⁵ *Verizon Commc’ns*, 540 U.S. at 408; *see also id.* at 411 (declining to expand the “few existing exceptions from the proposition that there is no duty to aid competitors”); *Loren Data*, 501 F. App’x at 283.

CSX hopes to evade this long-standing rule by attempting to plead an “essential facilities” claim, which “[s]tated most generally” imposes liability “when one firm, which controls an essential facility, denies a second firm reasonable access to a product or service that the second firm must obtain in order to compete with the first.” *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 542 (9th Cir. 1991). Moreover, the “central concern” in an essential facilities claim is whether the control over the facility “is being used to create or further a monopoly in another market.” *Loren Data*, F. App’x at 284 (quoting *Advanced Health-Care Servs., Inc. v. Radford Cmty. Hosp.*, 910 F.2d 139, 150 (4th Cir. 1990)). This matches CSX’s theory of harm to competition here, namely, that NS’s exclusionary conduct has caused downstream harm to ocean

¹⁵ One narrow exception to the *Colgate* rule was established in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), a decision that the Supreme Court subsequently acknowledged to be “at or near the outer boundary of § 2 liability.” *Trinko*, 540 U.S. at 409. Under *Aspen Skiing*, Section 2 liability can attach where (i) the defendant-monopolist has ceased participation in a cooperative venture with a competitor; (ii) the defendant has unilaterally terminated a voluntary course of dealing; and (iii) the defendant is unwilling to provide access to the competitor “even if compensated at retail price.” *Trinko*, 540 U.S. at 409; *see also Loren Data*, 501 F. App’x at 283. As explained in this section, CSX cannot demonstrate it was denied access.

carriers. (**Ex. 70**, at 21:22-22:6).

The Supreme Court has “never recognized [the essential facilities] doctrine.” *Trinko*, 540 U.S. at 411. To the extent it remains viable after *Trinko*, a plaintiff must show: “(1) control by the monopolist of the essential facility; (2) the inability of the competitor seeking access to practically or reasonably duplicate the facility; (3) the denial of the facility to the competitor; and (4) the feasibility of the monopolist to provide the facility.” *Loren Data*, 501 F. App’x at 284 (quoting *Laurel Sand & Gravel*, 924 F.2d at 544).¹⁶

Moreover, the doctrine is cabined by several considerations. First, the facility need not be made available “under whatever terms the competitor wishes.” *Loren Data*, 501 F. App’x at 284. Second, access need only be offered on reasonable terms, evaluated “in the context of competition, rather than from plaintiff’s perspective,” *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 704 F. Supp 1309, 1323 (D. Md. 1989), *aff’d*, 924 F.2d 539 (4th Cir. 1991), and cannot “be read to mean the assurance of a profit” to the competitor seeking access. *Laurel Sand & Gravel*, 924 F.2d at 545. Third, “essential facilities claims should . . . be denied where a state or federal agency has effective power to compel sharing and regulate its scope and terms.” *Trinko*, 540 U.S. at 411 (quoting Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶ 773e (2003 Supp.)). Here, CSX’s monopolization and attempted monopolization claims fail as a matter of law because (i) the undisputed evidence shows that CSX at times *did* access NIT; and (ii) the STB regulates NPBL’s switch rate if challenged as unreasonable.¹⁷

¹⁶ While CSX has not explicitly identified NIT as an essential facility, that is indeed what it is alleging: the theory of harm developed by Prof. Marvel is that CSX’s alleged lack of on-dock access to NIT has caused CSX to lose ocean carrier business across its entire network, not just at NIT or the POV. (**Ex. 71**, at ¶ 124).

¹⁷ While CSX primarily complains about the switch rate and supposed physical denial of access, it also cites a smattering of other acts in connection with its monopolization and attempted monopolization claims—none of which constitutes exclusionary conduct. NS did remove a

i. CSX was not denied access to NIT.

CSX cannot establish that there was either a physical or economic denial of access to NIT. *First*, the undisputed evidence shows that at times CSX *did* access NIT using NS's on-dock rail access via NPBL. (SOF ¶¶ 63-65); *Cf. Trinko*, 540 U.S. at 411 (where access exists, the essential facilities doctrine "serves no purpose"). CSX complains that NS failed to timely move CSX train cars when CSX did pay the switch rate. (Compl. ¶ 93(b)). But the undisputed facts show that (i) with one exception, CSX only tried to move trains via NPBL in 2015, and (ii) in 2015, CSX requested that NPBL move nine trains, NPBL accommodated every request, and CSX moved all its trains successfully.¹⁸ (SOF ¶¶ 63-64). NPBL has never refused to move CSX's freight to or from NIT. (SOF ¶ 66). And CSX has not once sought NPBL service to access NIT since 2015. *Id.*

Second, CSX cannot establish that the switch rate was so unreasonable as to constitute a denial of access. The price charged for the on-dock rail access to NIT is NPBL's switch rate, and the same payment terms apply to any customer seeking to move freight on NPBL—including CSX and NS—as is required by NPBL's Operating Agreement. (SOF ¶ 42). [REDACTED]

[REDACTED]

portion of its own track known as the "diamond track," in 2008; but only after the discontinuation was approved without objection by the NPBL Board. (SOF ¶ 76). CSX also complains that NS refused to allow NPBL to use CSX locomotives, but NPBL already leases three locomotives from NS and receives operations assistance. (SOF ¶ 46). Finally, NPBL's rejection of CSX's rate proposals do not constitute exclusionary conduct because (i) the CSX rate proposal would violate NPBL's Operating Agreement (SOF ¶¶ 42, 59), and (ii) CSX Board members effectively abandoned the 2010 and 2018 proposals by failing to ask for a vote on those proposals. (SOF ¶¶ 55, 60). Indeed, rather than press for a vote, CSX instead opted to file the instant lawsuit. (Compl. ¶ 93(a)).

¹⁸ The 2015 movements show that CSX's use of NPBL to access NIT creates complexity at the terminal. Most terminals operate with trains entering and exiting in one direction, but at NIT CSX trains enter and exit in the opposite direction to NS trains. (SOF ¶ 17). That only one train can run at a time limits on-track capacity and requires schedule coordination with NS. (SOF ¶¶ 17, 65).

[REDACTED]

[REDACTED] The failure to consider the switch rate with respect to NPBL's cost of providing the access is fatal, for the Fourth Circuit has recognized that where the price of access is based on the cost of providing the access, the rate is reasonable as a matter of law. *See Laurel Sand & Gravel*, 924 F.2d at 544-45 (finding rate offer that was a penny over defendant's variable costs to be reasonable). CSX has willingly paid those same switch fees to utilize a different portion of NPBL track that is not at issue in this litigation. (SOF ¶ 67).

In sum, CSX's displeasure with the terms offered does not establish an exception to the rule that there is no duty to aid competitors. *See Loren Data*, 501 F. App'x at 283.

ii. Antitrust scrutiny is not warranted because the Surface Transportation Board regulates rates.

The fact of STB oversight further militates against antitrust intervention here. *See Trinko*, 540 U.S. at 412. The STB provides regulatory oversight of the railroad industry and has exclusive authority to grant terminal access and determine the reasonableness of switch rates, like the one charged by the NPBL. (SOF ¶ 45; Defs.' Mot. Dismiss at 7-9, ECF No. 116.) Because a regulator has the ability to grant the relief CSX seeks, "it [is] less plausible that the antitrust laws contemplate [the] additional scrutiny" that CSX contends is warranted here. *Trinko*, 540 U.S. at 412.

3. NS's conduct did not result in substantial foreclosure.

Separate from CSX's inability to prove it was denied access to an "essential facility," CSX cannot show that it was excluded as a competitor. *See, e.g., Kolon Indus.*, 748 F.3d at 175. As an initial matter, CSX's own business performance repudiates the notion that it was foreclosed from NIT. Since 2009, CSX has significantly increased its volume of international intermodal container movements at NIT, and the POV more broadly. (SOF ¶¶ 70-71). [REDACTED]

[REDACTED]

██████████ *Id.* CSX also complains mightily about the “excessive” rate that it supposedly faced in order to access NIT, ██████████

██

██

██

III. NS IS ENTITLED TO SUMMARY JUDGMENT ON CSX’S FEDERAL AND STATE CONSPIRACY CLAIMS.

To prevail on CSX’s four conspiracy claims (Counts I, II, VIII, and IX), CSX must prove that NS agreed to conspire with another party. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007) (requiring an agreement to show a conspiracy under 15 U.S.C. § 1); *Dickson v. Microsoft Corp.*, 309 F.3d 193, 211 (4th Cir. 2002) (requiring an agreement for conspiracy to monopolize under Section 2); Va. Code § 18.2-499 (prohibiting combination, association, or agreement between two parties to injure another’s reputation, trade, business or profession); Va. Code § 18.2-500 (providing for treble damages for violations of Va. Code § 18.2-499); *Hechler Chevrolet, Inc. v. Gen. Motors Corp.*, 230 Va. 396, 402 (1985) (requiring agreement between two parties for common law conspiracy). Count I additionally requires proof that the agreement restrained trade unreasonably, *Cont’l Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499, 508 (4th Cir. 2002), and Counts II, VIII, and IX also require some action in furtherance of the conspiracy. *Hechler*, 230 Va. at 402; *Masco Contractor Servs. E., Inc. v. Beals*, 279 F. Supp. 2d 699, 708 (E.D. Va. 2003) (citing *Adv. Health-Care Servs., Inc. v. Radford Cmty. Hosp.*, 910 F.2d 139, 150 (4th Cir. 1990)). CSX cannot satisfy these elements for any of its conspiracy claims.

A. CSX cannot show evidence of an agreement between NS and NPBL.

As NPBL also explains, CSX cannot show that NS and NPBL acted in concert with one another. CSX identified 96 communications as evidence of a conspiratorial agreement between

NS and NPBL. (See **Ex. 121** (chart of communications)). Only 15 of the communications are solely between both Defendants, and of those, only eight took place within the limitations period. *Id.* Of these eight, (a) two lack any text due to technical issues; (b) four relate to NPBL's use of NS's tracks to move CSX's intermodal freight to NIT in 2015; and (c) two relate to Defendants' unsuccessful negotiations over a new trackage rights agreement, which resulted in NS initiating an action with the STB to set a new trackage fee.¹⁹ None of these communications show that Defendants entered into a conspiratorial agreement to harm CSX.

The rest of the communications cited by CSX are predominately between NS employees, which cannot support a conspiracy. See *Fox v. Deese*, 234 Va. 412, 428 (1987) (“[A] single entity cannot conspire with itself.”). This is true even for internal communications that include NS employees serving on the NPBL board, as these are not communications with NPBL because the directors are not agents of NPBL unless they are acting collectively as NPBL's board. See *Monacan Hills, Inc. v. Page*, 203 Va. 110, 116 (1961). Even “[a] majority of [directors], in their individual names, cannot act for the board itself and bind the corporation.” *Mosell Realty Corp. v. Schofield*, 183 Va. 782, 793 (1945). Indeed, CSX does not consider its internal communications, which include CSX-appointed NPBL Board members, to be communications with NPBL. It withheld such communications as privileged, which it could not do if the communications included representatives of NPBL. (**Ex. 104**, Privilege Log Excerpt).

Because there is no evidence of an agreement, NS is entitled to summary judgment on CSX's state law conspiracy claims. See *DAG Petroleum Suppliers L.L.C. v. BP P.L.C.*, 452 F.

¹⁹ The Court previously found that CSX's state law conspiracy claims were not time-barred based on CSX's allegation that in 2018, Defendants entered into “a new agreement to increase the amount [NPBL] pays to NS[R] to access NS[R]'s tracks to NIT.” (ECF No. 66, at 39-40). However, there is no agreement between Defendants regarding the trackage fee; NS filed a petition with the STB seeking to set a trackage fee that is higher than NPBL is willing to accept. (SOF ¶¶ 73-74).

Supp. 2d 641, 650 (4th Cir. 2006) (“Where a plaintiff offers no evidence of an agreement or an intent to injure, summary judgment of a business conspiracy claim is proper.”). Similarly, because CSX’s “evidence” of conspiracy is equally consistent with unilateral action, it is deficient as a matter of law for CSX’s federal conspiracy claims. *See Thompson Everett, Inc. v. Nat’l Cable Advert., L.P.*, 57 F.3d 1317, 1325 (4th Cir. 1995) (where claimed injury was caused by “the independent decision” of each defendant not to deal with plaintiff in its preferred manner, failure to prove conspiracy mandated summary judgment in defendants’ favor).

B. CSX cannot prove that trade was restrained unreasonably.

Even if CSX were able to prove the existence of a conspiracy (which it cannot), summary judgment in defendants’ favor on Count I (Section 1 Sherman Act antitrust conspiracy) is independently warranted because CSX cannot prove that any such agreement restrained trade unreasonably. *See Cont’l Airlines*, 277 F.3d at 508 (15 U.S.C. § 1 prohibits only “unreasonable” restraints of trade (citing *Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911))).

CSX contends that defendants’ alleged agreement is a “*per se* [Sherman Act] violation,” (Compl. ¶ 81)—that is, a type of agreement that almost “always or almost always tend to restrict competition and decrease output,” *AmEx*, 138 S. Ct. at 2283 (citation omitted), and does not require further inquiry into the agreement’s competitive effects. But only a “small group of restraints,” primarily agreements on price or output between horizontal (head-to-head) competitors, are classified as *per se* unlawful. *Id.* The “prevailing standard” for analyzing the reasonableness of Section 1 restraints is the so-called “rule of reason,” which requires the court to conduct a fact-specific assessment of market power and market structure to assess the restraint’s actual effect on competition. *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977); *see also Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984).

Here, NS and NPBL are not horizontal, head-to-head competitors. CSX’s own executives

acknowledge that NPBL is not a direct competitor to CSX, and CSX has not bid against NPBL as CSX competes for business. (SOF ¶ 4). Similarly, [REDACTED]

[REDACTED]

[REDACTED]

Instead, NS and NPBL are in a vertical relationship. The legal standard for evaluating the lawfulness of vertical agreements is the “rule of reason” standard. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 907 (2007); *see also Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 735-36 (1988) (“[A] vertical restraint is not illegal *per se* unless it includes some agreement on price or price levels.”); *cf. Dickson*, 309 F.3d at 204-12, 216 (applying rule of reason, rejecting two separate vertical conspiracies and affirming summary judgment in defendants’ favor); *R.J. Reynolds Tobacco Co. v. Philip Morris USA, Inc.*, 67 F. App’x 810, 811-12 (4th Cir. 2003) (per curiam) (affirming that district court’s application of the rule of reason when assessing a non-price vertical restraint).

The rule of reason requires the court to conduct a fact-specific assessment of market power and market structure to assess the restraint’s actual effect on competition in a properly defined relevant market. *Cont’l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 & n.15 (1977); *see also Copperweld Corp. v. Independent Tube Corp.*, 467 U.S. 752, 768 (1984). As explained in Section II.A, *supra*, CSX cannot demonstrate a significant anticompetitive effect because it cannot prove the existence of a properly defined relevant market. And as explained in Sections II.B.3, *supra*, the undisputed evidence shows that there has been no substantial anticompetitive effect flowing from the complained-of restraint.

C. CSX cannot show any overt act in furtherance of the conspiracy.

CSX also cannot show any overt act in furtherance of the purported conspiracy (as required by Counts II, VIII, and IX) for the multiple reasons discussed in Section IV, *infra*: (a) Defendants

did not block CSX's access to NIT in 2015; (b) there was no vote on the 2018 Rate Proposal; and (c) NS was within its rights to vote against the Governance Proposal. *See Hechler Chevrolet*, 230 Va. at 402 ("There can be no conspiracy to do an act which the law allows.").

Further, CSX's state law conspiracy claims fail because they lack the requisite underlying tort. *See Dunlap v. Cottman Transmission Sys., LLC*, 287 Va. 207, 215 (2014) ("[A]ctions for common law civil conspiracy and statutory business conspiracy lie only if a plaintiff sustains damages as a result of an act that is itself wrongful or tortious."). CSX's tortious interference claim was dismissed, (ECF No. 66), and NS's alleged breach of the Operating Agreement is insufficient. *See Station # 2*, 280 Va. at 174 (holding that breach of contract does not "rise to the level of an 'unlawful act' under [Va.] Code [Ann.] § 18.2-500"). That only leaves CSX's breach of fiduciary duty claim against certain directors of NPBL, who have been dismissed as parties (ECF Nos. 143, 159). Further, the NPBL board took *no action* regarding CSX's use of NPBL in 2015 or CSX's 2018 proposals. Hence, even if CSX could still rely on its fiduciary duty claim, it cannot show any breach of the directors' duties.

IV. NS IS ENTITLED TO SUMMARY JUDGMENT ON CSX'S BREACH OF CONTRACT CLAIM.

In Count 5, CSX claims that NS breached its obligations under NPBL's Operating Agreement by (1) "effectively blocking CSXT's access to NS's trackage over which the NPBL has rights," (2) "by refusing to consider proposals that would improve the revenues of the NPBL," (3) "by failing to encourage the business of the NPBL," and (4) "by inducing its employees and/or the Individual Defendants to vote for measures that are harmful to [the] NPBL." (Compl. ¶ 107).

To prevail on a breach of contract claim, CSX must demonstrate that NS had a legally enforceable obligation to CSX, that NS materially breached that obligation, and that NS's breach caused CSX damages. *See Filak v. George*, 267 Va. 612, 619 (2004); *see also Horton v. Horton*,

254 Va. 111, 116 (1997). CSX cannot meet any all of these elements.²⁰

Pre-2014 actions cannot be the basis for CSX's contract claim because they are time-barred. *See* Part A.1. *supra*. That leaves only (1) NPBL's use of NS's tracks in 2015, and (2) the alleged refusal to consider CSX's 2018 demands as possible bases for the claim. NS, however, never blocked CSX's access in 2015. Nor does NS have a contractual obligation to accept, or even consider, CSX's 2018 demands for a special rate or new governance structure.

A. NS never blocked CSX's access to NIT in 2015.

It is undisputed that (a) NPBL moved every intermodal train CSX asked it to move in 2015; (b) NS provided operating windows for NPBL to use NS's track to NIT for each of the movements; and (c) CSX has not asked NPBL to move intermodal freight to or from NIT since 2015. (SOF ¶¶ 63-64, 66). In fact, NPBL, CSX, VIT, *and* NS developed a workable operating plan that provided a twice-a-week operating window for NPBL to use NS's tracks to move CSX's intermodal trains to and from NIT. (SOF ¶ 65). Further, any contractual obligation that NS had regarding NPBL's use of NS's tracks to NIT is governed by the trackage rights agreement between NPBL and NS, *not* the Operating Agreement. Therefore, NPBL's use of NS's tracks in 2015 cannot give rise to a contract claim under the Operating Agreement.

B. NS did not have a contractual duty to support CSX's 2018 Rate Proposal.

CSX cannot claim that NS breached the Operating Agreement by not considering the 2018 Rate Proposal because, per CSX, only NPBL *management*, not the NPBL board or its shareholders, should have acted on its proposal. (SOF ¶ 57). Nor can CSX claim a breach based on NS's

²⁰ CSX cannot show damages resulting from NS's conduct as will be explained in a forthcoming Daubert motion.

purported failure to consider the proposal when CSX never sought a vote on it. (SOF ¶ 60).²¹

Moreover, NS did not have a contractual obligation to accept CSX's 2018 Rate Proposal because it sought a special switch rate, inconsistent with the Operating Agreement's requirement that NPBL charge a "uniform rate for the movement of freight cars." (SOF ¶ 42). NS has the right to require adherence to the Operating Agreement's uniform rate provision. *See id.* Nor does the provision in the Operating Agreement requiring the shareholders to "co-operate cordially in encouraging the business of [NPBL]" save CSX's contract claim. This is an obligation to encourage the business of NPBL, not CSX. Therefore, NPBL, not CSX, would be the proper party to claim damages caused by a breach of the obligation. Because CSX is not seeking to recover damages on behalf of NPBL, it cannot rely on this provision of the Operating Agreement. (Compl. ¶ 108 (alleging harm to CSX (emphasis added))).

Moreover, this provision cannot be read to trump the uniform rate provision because doing so would violate the basic principle that no terms in a contract should be treated as meaningless. *See Ames v. Am. Nat'l Bank of Portsmouth*, 163 Va. 1, 39 (1934) ("No word or clause is to be treated as meaningless if any reasonable meaning consistent with the other parts of the contract can be given to it. . . ."). It is easy to see how these provisions work together. CSX can pay the uniform \$210 switch rate to have NPBL move its intermodal freight, which, contrary to CSX's drayage program, encourages the business of NPBL. If the additional business results in excess profits for NPBL, then, consistent with the Operating Agreement, NPBL can reduce its switch rate.²²

²¹ This is likely because CSX's proposal was merely a pretext to setup litigation. [REDACTED]

²² CSX got the contractual procedure *backwards* for reducing the switch rate. NPBL must set a uniform rate to (1) cover costs and (2) provide a six percent dividend to shareholders. *See*

C. NS had no contractual obligation to change NPBL's governance.

CSX's Governance Proposal demanded that NS agree to (a) equal representation on the NPBL board for CSX and NS; (b) the election of independent directors and officers for NPBL; and (c) adopt an ethics compliance program for NPBL. Under Section 2 of the Supplemental Agreement, however, NS has the right to appoint its three representatives to the NPBL Board. Further, there is no requirement that any of NPBL's directors or its management be independent of its shareholders, and NPBL *already* maintained a code of ethics and conflicts of interest standards. (SOF ¶ 61). Thus, NS properly exercised its shareholder right to vote down CSX's Governance Proposal. CSX cannot use litigation to rewrite NPBL's agreed corporate structure.

In summary, NS is entitled to summary judgment on CSX's breach of contract claim because the record confirms that (1) NS did *not* block CSX's access to NIT, (2) NS did *not* have an obligation to consider the proposals, (3) there was *no* vote on the rate proposal, and thus (4) NS did *not* "fail to encourage" the NPBL's business.

CONCLUSION

For the foregoing reasons, NS respectfully requests that the Court grant NS's Motion for Summary Judgment against CSX and grant any other relief the Court deems appropriate.

Date: April 12, 2021

Respectfully submitted,

NORFOLK SOUTHERN RAILWAY COMPANY

/s/ Michael E. Lacy

Alan D. Wingfield (VSB No. 27489)

Michael E. Lacy (VSB No. 48477)

Massie P. Cooper (VSB No. 82510)

TROUTMAN PEPPER HAMILTON SANDERS LLP

1001 Haxall Point

Richmond, VA 23219

Telephone: (804) 697-1200
Facsimile: (804) 698-6061
Email: alan.wingfield@troutman.com
Email: michael.lacy@troutman.com
Email: massie.cooper@troutman.com

John C. Lynch (VSB No. 39267)
Kathleen M. Knudsen (VSB No. 90845)
TROUTMAN PEPPER HAMILTON SANDERS LLP
222 Central Park Avenue, Suite 2000
Virginia Beach, VA 23462
Telephone: (757) 687-7759
Facsimile: (757) 687-7510
Email: john.lynch@troutman.com
Email: kathleen.knudsen@troutman.com

Tara L. Reinhart
John R. Thornburgh II
Thomas R. Gentry
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, DC 20005
Telephone: (202) 371-7000
tara.reinhart@skadden.com
john.thornburgh@skadden.com
thomas.gentry@skadden.com

*Counsel for Defendant Norfolk Southern Railway
Company*

CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2021, I electronically filed a copy of the foregoing with the Clerk of Court using the CM/ECF system, which sent a notification of such filing (NEF) to the registered participants as identified on the NEF to receive electronic service, including:

Robert W. McFarland, Esq.
Benjamin L. Hatch, Esq.
E. Rebecca Gantt, Esq.
McGuireWoods LLP
World Trade Center
101 West Main Street, Suite 9000
Norfolk, Virginia 23510-1655
Telephone: (757) 640-3716
Facsimile: (757) 640-3930
rmcfarland@mcguirewoods.com
bhatch@mcguirewoods.com
rgantt@mcguirewoods.com

Attorneys for CSX Transportation, Inc.

James L. Chapman, IV, Esq.
W. Ryan Snow, Esq.
Darius K. Davenport, Esq.
David C. Hartnett, Esq.
CRENSHAW, WARE & MARTIN, P.L.C.
150 W. Main Street, Suite 1500
Norfolk, Virginia 23510
Telephone: (757) 623-3000
Facsimile: (757) 623-5735
jchapman@cwm-law.com
wrsnow@cwm-law.com

*Attorneys for Norfolk and Portsmouth NPBL
Railroad Company*

/s/ Michael E. Lacy

Alan D. Wingfield (VSB No. 27489)
Michael E. Lacy (VSB No. 48477)
Massie P. Cooper (VSB No. 82510)
TROUTMAN PEPPER HAMILTON SANDERS LLP
1001 Haxall Point
Richmond, Virginia 23219
Telephone: (804) 697-1200
Facsimile: (804) 698-6061
Email: alan.wingfield@troutman.com
Email: michael.lacy@troutman.com
Email: massie.cooper@troutman.com

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD 36836

**NORFOLK SOUTHERN CORPORATION
NORFOLK SOUTHERN RAILWAY COMPANY
—ACQUISITION OF CONTROL—
NORFOLK & PORTSMOUTH BELT LINE RAILROAD COMPANY**

**NORFOLK AND PORTSMOUTH BELT LINE RAILROAD COMPANY'S
MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division**

CSX TRANSPORTATION, INC.,

Plaintiff,

v.

Civil Action No. 2:18-cv-530-MSD-RJK

**NORFOLK SOUTHERN RAILWAY
COMPANY, *et al.*,**

Defendants.

**NORFOLK AND PORTSMOUTH BELT LINE RAILROAD COMPANY'S
MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

Defendant Norfolk and Portsmouth Belt Line Railroad Company (the “Belt Line”), by counsel, for its memorandum in support of its Motion for Summary Judgment against CSX Transportation, Inc. (“CSXT”), states as follows:

Introduction

This is a case about intermodal container traffic. CSXT claims that the Belt Line and Norfolk Southern Railway Company (“NS”), since at least 2007, have conspired to block CSXT from intermodal rail access at Norfolk International Terminal (“NIT”). CSXT asserts four counts against the Belt Line: two antitrust conspiracy claims and two state law conspiracy claims. All fail as a matter of law.

The Belt Line has not conspired with NS or harmed CSXT. CSXT’s claims are all time-barred, and its current demand for a special rate for NIT traffic is no different from the demand it made, but did not pursue, in 2010. Its legal theory to establish a conspiracy contradicts settled law, its state law claims are missing the essential element of an unlawful act, and its antitrust claims ignore the Belt Line’s undisputed costs, depending instead on invalid price comparisons.

To reach NIT, the Belt Line must travel over NS-owned tracks. For that route, the Belt Line must coordinate with NS and pay NS a trackage rights fee. It has paid such a fee since 1917. The Belt Line and NS are currently parties to a proceeding before the Surface Transportation Board (“STB”) over the amount of the fee.²

CSXT and NS are the successors of the railroads that formed the Belt Line. NS owns 57% of the Belt Line and CSXT owns 43%. The Belt Line’s current \$210 switching rate is aligned with its operating costs. [REDACTED]

[REDACTED]³ [REDACTED]

CSXT and NS use the Belt Line to move non-intermodal railcars at the \$210 rate all year. [REDACTED]

[REDACTED]⁴ The reason for this litigation is not the rate. It is that CSXT does not want to pay the rate for a particular kind of traffic over a particular route: specifically, intermodal traffic between CSXT’s Portsmouth railyard and NIT.⁵ For that traffic over that route, CSXT complains the rate is too high, [REDACTED]

In 1989, CSXT and NS’s two predecessors, as all the Belt Line shareholders at the time, entered a Supplemental Agreement amending the Operating Agreement. They did not change the

² See D.E. 28-2, Norfolk Southern Railway Company Petition to Set Trackage Rights Compensation dated September 13, 2018, STB Docket No. FD 36223. CSXT intervened in the proceeding after it was filed. The STB then stayed the proceeding at CSXT’s request.

³ See Expert Report of Thomas Crowley (“Crowley Report”), p. 5, Table, 1 (Ex. 3), compiling data from Belt Line’s Annual Reports to Shareholders; *see also* Annual Reports from 2010-2020 (Ex. 4).

⁴ See Crowley Report, p. 23 (Ex. 3); *see also* Annual Reports for 2018 and 2019 (Ex. 4).

⁵ See March 23, 2018 CSXT rate proposal, p. 1 (Ex. 5) (“By this letter, [CSXT] requests that NPBL management adopt the following proposal *for long term rail intermodal service to Norfolk International Terminals* (NIT), as described in detail below...” (emphasis added)).

uniform rate requirement. [REDACTED]

[REDACTED]

[REDACTED]

Since 2010, despite two Board meetings and one shareholder meeting every year, and despite CSXT sending the Belt Line proposals in 2010 and 2018, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] As a result, the uniform rate requirement in the 1897 Operating Agreement remains operative, with the rate set at \$210 per loaded railcar well, as does the Board structure that the parties agreed to in the 1989 Supplemental Agreement.

This case is CSXT's effort to change those agreements – not through Board or shareholder action, but by judicial mandate. Yet there is no antitrust violation here. There is no conspiracy. As set forth below, the Belt Line's rate is lower on a per mile basis than every comparable switching tariff rate on the East Coast or Gulf Coast. [REDACTED]

[REDACTED]

[REDACTED]

6

[REDACTED] The reason CSXT moves tens of thousands of containers every year by truck instead of rail at NIT ([REDACTED]) is not a conspiracy between NS and NPBL; [REDACTED]

[REDACTED]

6

. See D.E. 79.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The Belt Line has done nothing wrong here. It remains willing and able to move CSXT traffic to and from NIT at its tariff switching rate. Under settled law, it cannot be forced to operate below cost, [REDACTED]

[REDACTED]

Summary of the Argument

Four counts remain against the Belt Line. Counts I and II assert federal antitrust conspiracy claims; Counts VIII and IX assert state law conspiracy claims. Based on the undisputed facts, judgment should be entered for the Belt Line on all of them for the following reasons.

All Claims

1. All of CSXT's claims are time-barred. CSXT identified as early as 2009 the same so-called conspiracy for which it seeks relief now. CSXT's expert also traces all of CSXT's damages to 2009. CSXT ascribes no separate damages to any other acts, and has admitted that the only other possibility to save its claims – a “new agreement [in 2018] to increase the amount the Belt Line pays to NS” – was never made.

2. All of CSXT's claims also fail because CSXT has no evidence of a conspiracy, and its legal theory to end-run that flaw contradicts settled law. CSXT bases its conspiracy claims on communications between the Belt Line's NS-appointed Board members and their NS colleagues. Yet courts have uniformly rejected that approach, since individual Board members are not agents

of a company and cannot conspire on its behalf. Put simply, NS employees talking to NS employees does not make the Belt Line a conspirator.

State Law Claims

3. CSXT's state law claims against the Belt Line fail because CSXT no longer asserts an unlawful act. Under Virginia law, a conspiracy without an unlawful act is not actionable. CSXT originally asserted tortious interference, but this Court dismissed that count and CSXT did not amend. No other unlawful act supports CSXT's claims.

Federal Law Claims

4. All of CSXT's antitrust claims fail because, even if CSXT could show an agreement (it cannot), and even if CSXT could then prove a substantial anticompetitive effect in a properly-defined market (it cannot), CSXT still cannot overcome the Belt Line's procompetitive justification for its rate. The Belt Line's rate is justified by its undisputed operating costs, and a price set at cost is by definition procompetitive. CSXT cannot avoid this reality by relying on invalid price comparisons.

Statement of Undisputed Facts

The Belt Line

1. The Belt Line is a short line railroad. It operates approximately 30 miles of track in Norfolk, Portsmouth, and Chesapeake, Virginia.

2. The Belt Line was formed in 1897 by eight railroads. *See* D.E. 1-1. The Operating Agreement that its owners signed in 1897 remains effective today. *Id.*

3. The Belt Line's primary business is to interchange freight cars, sometimes referred to as "switching." It receives cars tendered by CSXT and NS and delivers them to locations on its tracks, or vice versa. *See* Moss Dep. 30:12-18 (**Ex. 6**).

4. Following mergers and consolidations, CSXT and NS are the Belt Line's only two owners now. CSXT owns 43% of the Belt Line and NS owns 57%. See D.E. 1, ¶ 23.

5. In 1989, the Belt Line's owners entered into a Supplemental Agreement amending the Operating Agreement. See D.E. 1-3 (Ex. 7). They agreed that "[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

6. The Belt Line is not a competitor of either NS or CSXT.

The Belt Line's Uniform Rate and Profit Restrictions

7. The Belt Line was set up to operate at cost. See D.E. 1-1, p. 4, Article Ninth (Ex. 1). Its Operating Agreement provides that, "[A] uniform rate shall be fixed for the movement of freight cars over the said [company's] railroad, regardless of distance ..." *Id.* The rate may be adjusted from time to time so "as to yield a net revenue sufficient to pay the interest upon the bonds outstanding and a dividend of six per cent on the stock." *Id.*

8. The switching rate in the Belt Line's published tariff today is \$210 per loaded freight car. See Belt Line Tariff, p. 4, Item 70 (Ex. 2); D.E. 1, ¶ 34. It has been the same since the Belt Line's Board set it at the December 2009 Board meeting. See D.E. 1, ¶ 34.

Intermodal Traffic at the Port of Virginia

9. The Port of Virginia is the third largest international intermodal container port on the East Coast. Until May 2020, it had three primary terminals at which ocean carriers could load or unload container cargo: Portsmouth Marine Terminal, Virginia International Gateway ("VIG"), and Norfolk International Terminals ("NIT"). All are operated by VIT, the operating arm of the Port of Virginia.

10. CSXT and NS are able to access all three terminals, although only VIG and NIT are currently used for international intermodal container traffic.

VIG

11. A third-party short line railroad, Commonwealth Railway (“CWRV”), owns the only track leading into VIG. NS and CSXT pay CWRV a switching fee for rail access at VIG. *See* Girardot Dep. (first) 99:18-99:24 (**Ex. 8**); Luebbers Dep. (first) 60:05-60:08 (**Ex. 9**).

12. CWRV’s public tariff switching rate for intermodal traffic is \$210 per well, loaded or empty. *See* CWRV Tariff, p. 2 (**Ex. 10**).

13. [REDACTED]

[REDACTED] *See* Crowley Report, Table 2, n.1 (**Ex. 3**).

NIT

14. NS has rail access at NIT over its own track leading into the terminal. *See* Martinez Dep. 31:16-32:4 (**Ex. 11**)

15. CSXT can access NIT two ways: by rail via the Belt Line or by truck in the form of drayage, subsidized by VIT. *See* MacDonald Dep. 42:3-6; 54:11-17 (**Ex. 12**).

16. CSXT must pay the Belt Line’s \$210 switching rate to access NIT by rail.

17. CSXT must pay VIT a drayage fee to dray containers between its rail yard and NIT.

[REDACTED] *See* Capozzi Dep. 79:16-80:10, 122:6-23 (**Ex. 13**).

18. [REDACTED]

See Capozzi

Dep. 83:9-13. [REDACTED]

[REDACTED] *See* Capozzi Dep. 248:4-24. [REDACTED]

[REDACTED] *See* Expert Report of Howard Marvel ¶ 49 (**Ex. 14**).

Discontinuance of the “Diamond” in 2007

19. In 2007, the Belt Line Board discontinued service over a portion of NS-owned track that CSXT calls the “diamond.” While CSXT now argues that the purpose was to make NIT access more difficult, CSXT was not using the Belt Line to access NIT at the time. See Girardot Dep. 217:15-23 (Ex.15). The December 2007 Board meeting minutes reflect that the reason was cost: “After discussion and consideration of an alternate route and associated costs of trackage rights the following resolution was, on motion duly made and seconded, adopted...” Dec. 2009 Board Meeting Minutes, p. 5 (Ex. 16).

20. The discontinuance was filed with the STB, with no objection by CSXT. See STB Docket No. AB-290 (Sub-No. 299X), *NSR – Discontinuance of Service Exemption & NPBL – Discontinuation of Trackage Rights Exemption*, May 15, 2008 (Ex. 17).

Establishment of the \$210 Switching Rate in 2009

21. In 2009, the Belt Line’s Board formed a rate committee to review its tariff. The rate committee included representatives from the Belt Line’s management and each of its owners. See Coleman Dep. 109:1-110:25 (Ex. 18).

22. At the Belt Line’s December 2009 Board meeting, following evaluation by the rate committee, the Belt Line’s Board adopted a uniform \$210 line haul switching rate, to take effect January 1, 2010. See Dec. 2009 Board Meeting Minutes (Ex. 19).

23. In sworn deposition testimony, John Booth, CSXT’s Director of Joint Facilities who spent 28 years working with switching railroads throughout the CSXT system, including the Belt Line, described the \$210 rate as “in the neighborhood of what we had been expecting” in 2009, “kind of in the middle of the road,” and “not an unusual number for a terminal switch carrier or an intermediate switch carrier. . .” Booth Dep. 20-22; 141-42 (Ex. 20).

24. [REDACTED]

[REDACTED] See Crowley Report, p. 23 (Ex. 3). [REDACTED]

[REDACTED] *Id.*

CSXT's Rate Proposal in 2010

25. On July 23, 2010, CSXT sent a letter to the Belt Line proposing that the parties enter into a contract relating to the Belt Line's movement of CSXT's intermodal traffic to and from NIT. See 2010 Rate Proposal (Ex. 21). [REDACTED]

[REDACTED] *Id.*

26. In proposing the discounted rate, CSXT did not consider the Belt Line's costs for moving the trains. See Booth Dep. 69:4-8, 123:4-24:17 (Ex. 20).

27. [REDACTED]

[REDACTED] See April 2011 Board Meeting Minutes (Ex. 22).

Nine NIT Trains in 2015

28. With the exception of a single move in 2010, the first time CSXT asked the Belt Line to move intermodal traffic to or from NIT was March 27, 2015. See MacDonald Dep. 142:6-19 (Ex. 12). The Belt Line worked diligently with CSXT, NS, and VIT to create an operating window for the move, which they established on March 31, 2015. *Id.* at 144:20-25.

29. The Belt Line successfully moved that first train on April 1, 2015. *Id.* 144:20-25.

30. [REDACTED]

[REDACTED] See Moss Dep. 291:21-292:7 (Ex. 6); MacDonald Dep. 189:17-20 (Ex. 12); NPBL 028166 (Ex. 23).

31. Tony MacDonald, the head of CSXT's Portsmouth operations in 2015, testified that the plan developed to move CSXT's NIT traffic in 2015 was a workable one. *See* MacDonald Dep. 216:9-13 ("Q. Did you think the operating plan, as it was developed in 2015, was a workable plan in terms of moving intermodal freight to and from NIT using the NPBL? A. I did.").

32. CSXT did not consult Mr. MacDonald about the 2015 rail moves before filing this lawsuit. *See id.* at 220:13-16.

33. [REDACTED]

[REDACTED] *See* MacDonald Dep. 140:14-141:8 (Ex. 12).

34. CSXT has not asked the Belt Line to take any intermodal trains to or from NIT since 2015. *See* Moss Dep. 291:21-292:7; MacDonald Dep. 189:17-20.

35. The Belt Line has never refused to transport CSXT intermodal trains to or from NIT at its tariff rate.

CSXT's Rate Proposal in 2018

36. On March 23, 2018, CSXT sent a letter to the Belt Line asking that the Belt Line adopt a special switching rate for CSXT intermodal traffic to and from NIT. *See* 2018 Rate Proposal, D.E. 1-5 (Ex. 5); Armbrust Dep. 244:22-246:2 (Ex. 24). [REDACTED]

[REDACTED] *Id.* [REDACTED]

[REDACTED] *See* DiDeo Dep. 132:14-22 (Ex. 25).

37. After receiving the 2018 rate proposal, the Belt Line's President, Cannon Moss, consulted with the Belt Line's Vice President, Donna Coleman, and recommended that a rate committee evaluate the proposal. *See* Moss Dep. 242:3-243:7 (Ex. 6).

38. Mr. Moss also met with VIT and NS to develop an operating plan to deliver CSXT trains to and from NIT. *See* NPBL 006228 (Ex. 26); Moss Dep. 242:10-17 (Ex. 6).

39. Mr. Moss also responded in writing to CSXT regarding concerns about the 2018 rate proposal, but no one at CSXT replied. *See* Coleman Dep. Ex. 38 (Ex. 27).

40. [REDACTED]

[REDACTED] *See* CSXT's Resp. to NPBL RFAs 10, 13, 15, 16 (Ex. 28); April 2018 Board Meeting Minutes (Ex. 29); CSXT 30(B)(6) Dep. 138:17-19 (Ex. 15).

CSXT's Governance Proposal in 2018

41. In a letter dated April 6, 2018, CSXT demanded that the Belt Line take certain actions regarding its governance. *See* 2018 Governance Proposal, D.E. 1-6 (Ex. 30). [REDACTED]

[REDACTED] *Id.*

42. [REDACTED]

[REDACTED] *See* April 2018 Shareholder Meeting Minutes (Ex. 31). [REDACTED]

[REDACTED] *Id.*

The Belt Line's Operating Costs

43. The Belt Line's operating costs are reviewed and approved by its Board each year as part of the Belt Line's Annual Report, then adopted as part of the Annual Report by the shareholders. *See* Annual Reports, 2010-2020 (Ex. 4).

44. The Belt Line's \$210 switching rate is at or below the Belt Line's average operating cost per car from 2010 to 2020. *See* Crowley Report, pp. 5-6 (Ex.3).

45. [REDACTED]

[REDACTED] *See* Crowley Report, p. 5, Table, 1 (Ex. 3), compiling data from Annual

Reports; *see also* Annual Reports 2010-2020 (Ex. 4). [REDACTED]

[REDACTED] *Id.*

Other East Coast and Gulf Coast Intermodal Switching Rates

46. The industry standard for comparing railroad rates on a common basis is to compare them “based on the length of haul between the interchange point and the marine terminal the switch carrier serves,” also known as a “per mile” basis. *See* Crowley Report, p. 12 (Ex. 3); Crowley Dep. 235:2-15 (Ex. 32).

47. CSXT does not have a railroad rate expert in this case. *See* Marvel Dep. 165:2-166:20 (Ex. 33). CSXT’s expert witness did not compare any rates on a per mile basis.

48. When compared on a per mile basis, the Belt Line’s switching rate per container is lower than the intermodal tariff rates offered by [REDACTED]

[REDACTED] *See* Crowley Report, pp. 13-15, Tables 2 and 3 (Ex. 3).

49. When compared on a per mile basis, the Belt Line’s switching rate is also lower than the CWRV intermodal tariff rate because the CWRV rate of \$210 per well applies to loaded and empty wells, whereas the Belt Line rate applies only to loaded wells. *See* Belt Line Tariff, p. 4, Item 70 (Ex. 2); Coleman Dep. 155:25-157:1 (Ex. 18); CWRV Tariff, p. 3 (Ex. 10).

Drayage

50. Intermodal container traffic can be transported multiple ways, including by rail or truck. For rail, two to three containers are commonly loaded on a single railcar well. *See* Crowley Report, p. 10 (Ex. 3). This improves operating efficiency, as the more containers in a well, the

lower the cost per container. See Kenney Dep. 41:20-42:1 (**Ex. 34**); Strongosky Dep. (first) 45:14-46:3 (**Ex. 35**); Picante Dep. 74:13-23 (**Ex. 36**).

51. [REDACTED]

[REDACTED] See Girardot Dep. (second) 103:7-107:7 (**Ex. 37**). Since that time, CSXT's efficiency has improved. *Id.*

52. [REDACTED]

[REDACTED] See Marvel Dep. 187:17-188:20 (**Ex. 33**).

Trackage Rights Proceeding at the STB

53. In 1917, NS and the Belt Line entered a Trackage Rights Agreement to allow the Belt Line to access NIT over NS's tracks. [REDACTED] See CSXT 0044428 (**Ex. 38**).

54. [REDACTED]

[REDACTED] See CSXT's Resp. to NPBL RFAs 5, 8 (**Ex. 28**). The dispute is currently before the STB, which stayed the proceeding pending the outcome of this case.

Standard of Review

Summary judgment is appropriate when there is no genuine issue as to any material fact and it appears from the pleadings and supporting affidavits or depositions that the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The Court has an "affirmative obligation" to prevent "factually unsupported claims and defenses" from proceeding to trial. *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1997).

To defeat a motion for summary judgment, the nonmoving party must show the existence of genuine factual disputes that are material to the issues to be decided. See *Anderson v. Liberty*

Lobby, Inc., 477 U.S. 242, 247-48 (1986). When the nonmoving party has the burden of proof and fails to provide sufficient evidence on an issue, then there is no genuine issue of material fact, as “a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” *Celotex*, 477 U.S. at 323. Furthermore, “on summary judgment motions in antitrust cases, the Supreme Court has instructed that when there is evidence of conduct that is consistent with both legitimate competition and an illegal conspiracy, courts may not infer that an illegal conspiracy has occurred without other evidence.” *Thompson Everett, Inc. v. Nat’l Cable Advertising, L.P.*, 57 F.3d 1317, 1323 (4th Cir. 1995) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

Argument

I. All of CSXT’s claims against the Belt Line are either time-barred or not actionable.

CSXT identifies six acts to support its claims, described below. All but two are time-barred outright. The remaining two are not actionable because CSXT identifies no damages that flow from them. The only other possibility, a “new agreement” in 2018, which saved CSXT’s claims on the Motions to Dismiss, never happened.

A. Four of the acts on which CSXT relies are time-barred.

CSXT bases its claims on six alleged acts by the Belt Line and NS: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] See D.E. 1, ¶ 34; CSXT’s 2nd Supp. Resp. to NPBL Interrog. 4. As set forth below, the statute of limitations bars recovery of damages caused by the first four outright.

1. Federal law claims for acts before October 4, 2014 are time-barred.

Counts I and II assert violations of Sections 1 and 2 of the Sherman Act. Under that Act, damages are recoverable only if a plaintiff files suit within “four years after the cause of action accrued.” 15 U.S.C. § 15b. An antitrust cause of action “accrues and the statute begins to run whenever a defendant commits an act that injures a plaintiff’s business.” *Zenith Radio Corp. v. Hazeltine Research*, 401 U.S. 321, 338 (1971). Consequently, CSXT’s antitrust claims must be based on acts that occurred on or after October 4, 2014. See D.E. 1 (filed October 4, 2018).

The first four acts alleged by CSXT occurred in 2007, 2009, and 2010. Contemporaneous correspondence from CSXT to the Belt Line undisputedly reflects that CSXT was aware of its alleged injuries and prepared to bring suit over them at least as early as that time [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Ingram Dep., Ex. 7, p. 2 (**Ex. 39**) (emphasis added).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.*, Ex. 8, p. 1 (**Ex. 40**) (emphasis added). He goes on: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.*, p. 2 (emphasis added). [REDACTED]

[REDACTED]

[REDACTED] *Id.*, Ex. 18, p. 1 (**Ex. 41**).

Others at CSXT were addressing the same issues in the same time period, including CSXT's Vice President of State Government and Community Affairs for Virginia, Quentin Kendall, and its head of Law and Public Affairs, Ellen Fitzsimmons. See Kendall Dep. 170:5-174:7 (Ex. 42). [REDACTED]

[REDACTED]

[REDACTED] Eliasson Dep., Ex. 10, p. 2 and 105:11-113:5 (Ex. 43, 44).

Yet CSXT did not file suit until October 4, 2018. Based on that filing date, as a matter of law, CSXT cannot recover damages for any of the first four acts. See 15 U.S.C. § 15b.

2. State law claims for acts before October 4, 2013 are time-barred.

In Virginia, the limitations period for civil conspiracy is based on the limitations period for the underlying wrongful act. See D.E. 66, p. 36 (citing *Hurst v. State Farm Mut. Auto. Ins.*, 2007 U.S. Dist. LEXIS 21172, at *17 (W.D. Va. 2007)). For statutory business conspiracy, at least where the claim is based on tortious interference, the Virginia Supreme Court has applied a 5-year limitations period for property damage under Va. Code § 8.01-243(B). See *Dunlap v. Cottman Transm. Sys.*, 287 Va. 207, 220-22 (2014).⁷ Consequently, at the earliest, CSXT's antitrust claims must be based on acts that occurred on or after October 4, 2013.

This Court previously held that CSXT does not assert a "single and continuous wrongful act." D.E. 66, p. 37 (citing *Hampton Roads San. Dist. v. McDonnell*, 234 Va. 235, 239 (1987)). Therefore, "Under Virginia law, the applicable statute of limitations accrues separately for each wrongful act." D.E. 66, p. 37 (citing *L-3 Commc'ns Corp. v. Serco, Inc.*, 2018 WL 1352093 at *5

⁷ As explained below, CSXT no longer asserts an underlying act to support its state law claims. Nevertheless, its first four acts fail even under the 5-year period applied in *Dunlap*.

(E.D. Va. 2018)). The Fourth Circuit has held that “only the slightest injury is required to start the running of the limitations period.” *Int’l Surplus Lines Ins. Co. v. Marsh & McLennan, Inc.*, 838 F.2d 124, 129 (4th Cir. 1988). A conspiracy claim in Virginia accrues “at the time the [plaintiff] first suffered any damages resulting from the acts committed in furtherance of the conspiracy.” *Detrick v. Panalpina, Inc.*, 108 F.3d 529, 543 (4th Cir. 1997) (emphasis added).

For the same reasons that CSXT’s antitrust claims based on the four acts from 2007 to 2010 are time-barred, so too are its state law claims.

B. CSXT fails to identify separate damages that flow from any other acts.

That the first four acts are time-barred has crucial implications for the remaining two. CSXT relies exclusively on the Reply Report of its expert witness, Howard Marvel, to prove all of its damages. See CSXT’s 4th Supp. Fed. R. 26(a)(1) Disc. (“CSXT refers to the computation of damages included in the reply expert report of Dr. Howard P. Marvel, Ph.D.”).⁸ Yet Dr. Marvel’s damages model undisputedly fails to apportion damages between any separate unlawful acts. See Marvel Reply Report, pp. 58-63 (**Ex. 45**).

Instead, Dr. Marvel calculates CSXT’s damages based on the combined injurious effect of the time-barred claims and the remaining two claims, making no distinction between them. As he states in his Reply Report: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.*,

p. 60. He emphasizes the point in response to a critique by NS’s expert witness: [REDACTED]

⁸ The Belt Line previously moved to strike all of CSXT’s damages for failure to timely identify any in its initial disclosures. See D.E. 87. That motion remains pending.

unlawful means.” *Gallop v. Sharp*, 179 Va. 335, 338 (1942). Once a cause of action is complete and the statute of limitations begins to run, it runs against all damages resulting from the wrongful act, even damages which may not arise until a future date. *See Street v. Consumers Mining Corp.*, 185 Va. 561 (1946); *Louisville & N.R. Co. v. Saltzer*, 151 Va. 165 (1928).

Indeed, this Court already found that CSXT’s damages attributable to acts outside the limitations period are “distinct” from CSXT’s damages arising from acts inside that period. *See* D.E. 66, pp. 38-9. In comparing the setting of the \$210 rate in 2009 to the alleged failure to adopt CSXT’s proposal in 2018, this Court determined that, “New damages flow from this wrongful act [in 2018] – the Plaintiff’s expectation damages, which is what Plaintiff’s profits would have been if Defendants had accepted the proposal minus what Plaintiff’s profits actually were.” D.E. 66, p. 38. This Court continued: “These damages are distinct from the Defendants’ alleged 2008 [*sic*, 2009] wrongful act.” *Id.* “The damages for the 2008 wrongful act of setting the Uniform Rate would be the difference in CSX’s profit if the parties had set the Uniform Rate at a fair market rate in 2008 minus CSX’s actual profit.” *Id.* Crucially, this Court concluded that, “The damages from establishing the 2008 Uniform Rate *do not encompass the damages sought for other alleged wrongful acts in this action.*” *Id.* at 38-39 (emphasis added).

Despite this roadmap for how to apportion damages, Dr. Marvel does not even attempt to do so. Under his model, damages from setting the uniform rate in 2009 *do* encompass damages sought for other alleged wrongful acts. Nowhere in either of his reports does Dr. Marvel calculate CSXT’s alleged damages for either act that allegedly occurred within the limitations period. At no point does he address, for example, how many trains were actually “impeded” in 2015, for how long, at what cost, and whether CSXT was able to cover elsewhere at some other cost. Nor does he calculate the expectation damages this Court identified for the alleged failure to adopt the 2018

proposal, much less what rate he might have used as a basis for comparison with the tariff rate in making such a calculation.

These flaws are incurable. Under the precedent above, CSXT cannot use the last two acts as a bootstrap to recover damages attributable to the first four, which are all time-barred. And it has no proof of separate damages flowing from the last two, an essential element of its claims. *See* 15 U.S.C. § 15(a); Va. Code § 18.2-500. As a result, all of its claims fail as a matter of law.

C. The only possibility to salvage CSXT’s claims never happened.

Based on its reading of the Complaint on the Motions to Dismiss, this Court determined that CSXT alleged a new act in 2018, which saved its state law conspiracy claims: “While it is easy to see how these new actions constitute a new act of breaching the contract or tortiously interfering, it may be more difficult to see how it is a new act of conspiring because the alleged conspirators are the same and the alleged motivations are the same.” D.E. 66, p. 39. The Court continued, “However, the Complaint alleges that in 2018, Defendants entered into a new agreement to increase the amount Belt Line pays to NS to access NS’s tracks to NIT.” *Id.* The Court concluded that, “[CSXT] has alleged a new conspiracy within the statute of limitations period; this second attempt to raise the Uniform Rate is not a continuation of the same conspiracy to set the Uniform Rate at the 2008 level because the price is again increased.” *Id.*, pp. 39-40.

CSXT subsequently admitted that no such agreement ever occurred. In response to the Belt Line’s Request for Admission No. 3, CSXT admitted:

3. [REDACTED]

[REDACTED]

CSXT's Resp. to NPBL RFA 3 (Ex. 28).

Because there was no new agreement to increase the trackage rights fee the Belt Line pays to NS, the alleged 2018 agreement that saved CSXT's claims previously cannot save them now.⁹ Accordingly, judgment should be entered for the Belt Line on all claims.

II. All of CSXT's claims against the Belt Line require a conspiracy and CSXT cannot show one as a matter of law.

A. All counts against the Belt Line require proof of concerted action.

Concerted action is an essential element of all four conspiracy counts; *i.e.*, that the Belt Line entered into an unlawful contract, combination, or conspiracy with NS. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007) (stating standard as to Count I under 15 U.S.C. § 1); *Advanced Health-Care Servs., Inc. v. Radford Cmty. Hosp.*, 910 F.2d 139, 150 (4th Cir. 1990) (standard as to Count II under 15 U.S.C. § 2); Va. Code § 18.2-500 (standard as to Count VIII under Va. Code § 18.2-499); *Hechler Chevrolet, Inc. v. Gen. Motors Corp.*, 230 Va. 396, 402 (1985) (standard as to Count IX under Virginia common law).

Under Virginia law, proof of a civil conspiracy requires "clear and convincing evidence" of concerted action for an unlawful purpose. *See Dunlap v. Cottman Transm. Sys.*, 287 Va. 207, 215 (2014) (statutory business conspiracy); *Pierce Oil Corp. v. Voran*, 136 Va. 416, 430 (1923) (common law civil conspiracy).

Under federal law, to survive summary judgment, an antitrust plaintiff "must discharge a twofold evidentiary burden." *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 924 F.2d 539, 543

⁹ In fact, the trackage rights fee is the subject of a pending dispute between the Belt Line and NS before the STB, which is currently stayed pending the outcome of this case. *See* STB Docket No. FD 36223.

(4th Cir. 1991). First, the plaintiff “must establish that [the alleged co-conspirators] had a ‘conscious commitment to a common scheme designed to achieve an unlawful objective.’” *Id.* (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984)). Second, the plaintiff “must bring forward evidence that excludes the possibility that the alleged co-conspirators acted independently or based upon a legitimate business purpose.” *Id.* Conduct that is “as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.” *Id.* at 542 (quoting *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986)). CSXT cannot make any such showing here.

B. CSXT fails to establish concerted action.

CSXT’s claims are devoid of concerted action. After this Court ordered CSXT to identify the “specific communication(s)” and “specific overt act(s)” it contends the Belt Line committed, CSXT revealed explicitly that it bases its conspiracy [REDACTED]

[REDACTED] See Second Supp. Ans. to NPBL Interrogs. 3 (communications) and 4 (overt acts) (Ex. 46). None establishes a conspiracy.

[REDACTED] See Ex. 46, p. 9, NSR 00027069 and 00027052. [REDACTED]

[REDACTED] See Ex. 47, p. 9, NSR 00062929. [REDACTED]

[REDACTED] See Allan Dep. 190:6-193:20 [REDACTED]

[REDACTED] See Ex. 48.

CSXT's answer to Interrogatory No. 4 is equally devoid of conspiratorial conduct. [REDACTED]

[REDACTED] See Ex. 46, p. 23 [REDACTED]

[REDACTED]¹⁰ If

anything, it shows prudent business judgment. See *Laurel Sand*, 924 F.2d at 543 (evidence must exclude the possibility of independent action or a legitimate business purpose).

All of this underscores the fundamental problem with CSXT's conspiracy theory. CSXT has not, under any standard, identified actual conspiratorial conduct by the Belt Line. Instead, it relies on conduct by the Belt Line's Board members and rate committee members appointed by NS. For example, in response to Interrogatory No. 3, CSXT identifies:

- "handwritten notes [on a 1999 letter] by Richard S. Johnson, *another NS appointed member of the NPBL Rate Structure Committee*" (p. 8);
- "notes from William J. Romig [in 1999], *an NS-appointed member of the NPBL Board*, ask[ing] NS employee Don Searle to share his view on the proposal" (p. 9);

¹⁰ [REDACTED] See 2017 Annual Report, p. 7 (Ex. 4). [REDACTED] *Id.*, p. 11.

[REDACTED]

[REDACTED]

Ex. 46, pp. 8-9 (emphasis added).

CSXT's answer to Interrogatory No. 4 makes its reliance on [REDACTED]

to support its conspiracy theory even more explicit:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]


Ex. 46, pp. 14-24 (emphasis added).

None of these “acts” is conspiratorial. Under both Virginia and federal law, “there must be two persons to comprise a conspiracy, and a corporation, like an individual, cannot conspire with itself.” *Twombly*, 550 U.S. at 554; *Bowman v. State Bank of Keysville*, 229 Va. 534, 541 (1985) (same). CSXT’s legal theory that the Belt Line somehow acted through NS employees to conspire with other NS employees is totally unsupported. In fact, Virginia courts foreclosed the idea at least 75 years ago. *See Mosell Realty Corp. v. Schofield*, 183 Va. 782, 793 (1945).

Under Virginia law, individual Board members are not agents of a company and therefore cannot conspire on its behalf. *See Mosell Realty*, 183 Va. at 793. As the Virginia Supreme Court explained in reversing a lower court that found such an agency: “[T]he fact that Kaplan and Banks owned a majority of the stock of the corporation, and constituted a majority of its board of directors, gave them no authority to bind the corporation in any such informal manner.” *Id.* “It is elementary that the authority of the directors is conferred upon them as a board, and they can bind the corporation only by acting together as an official body.” *Id.*

The same rule appears in the Restatement (Second) of Agency: “Neither the board of directors nor an individual director of a business is, as such, an agent of the corporation or of its members.” Rest. 2d of Agency 14C. Directors bind the company only as a board. *See Mosell Realty*, 183 Va. at 793; *see also* 18B Am. Jur. 2d Corporations § 1289 (“A corporate board of directors acts as a unit; an individual director may not act alone on behalf of the corporation without authority from the board.”).

The reason for the rule is obvious. A company like the Belt Line has no control over its Board members – appointed by NS or CSXT – any more than they individually have control over

the Belt Line. *See, e.g.*, Restat. 2d of Agency § 14C, cmt b. (“An individual director, as such, has still less resemblance to an agent than has the board as a body. He has no power of his own to act on the corporation’s behalf, but only as one of the body of directors acting as a board.”).

CSXT’s own actions underscore the point. CSXT-appointed Board members regularly communicated with other CSXT employees about the Belt Line the entire time that CSXT claims NS-appointed Board members were conspiring with NS. As just one example, Michael Burns, a CSXT in-house attorney appointed to the Board on April 18, 2018, sent emails to other CSXT employees about the Belt Line on April 19 and 20, which CSXT identifies as prepared in anticipation of litigation. *See* Burns Dep. 60:8-67:9 (**Ex. 52**). In other words, just two days after his first Board meeting, at the same time he owed fiduciary duties to the Belt Line, Mr. Burns was working with his colleagues at CSXT on a lawsuit against the Belt Line. *Id.*

C. Even the two acts within the statute of limitations window cannot establish concerted action.

CSXT’s complaints about impeded train movements in 2015 and “rejection” of its rate proposal in 2018 also do not show concerted action. Stated bluntly, the facts that CSXT alleged in its Complaint have proven untrue in discovery.

2015 Rail Moves. CSXT’s allegations of conspiracy to impede its intermodal trains at NIT in 2015 are demonstrably false. As CSXT’s expert witness confirmed in deposition, [REDACTED] See Marvel Dep. 177:2-178:24 (**Ex. 33**). CSXT does not even identify how it was impeded, how long it was impeded, or how many trains it would have moved (if any) but for any impediments.

The facts are now indisputable that (1) with a single exception in 2010, CSXT never asked the Belt Line to handle intermodal traffic to or from NIT until 2015; (2) [REDACTED]

[REDACTED] (3) after communications between NS and the Belt Line, the Belt Line successfully moved the train; (4) after the first train, the Belt Line set up an operating window with NS for CSXT trains between 2:00am and 4:00am on Tuesdays and Thursdays; and (5) [REDACTED]
[REDACTED]

[REDACTED] See Moss Dep. 126:19-25 (Ex. 6); Moss Dep. Ex. 14 (Ex. 49); MacDonald Dep. 144:14-19, 189:17-20 (Ex. 12); NSR 0001393 (Ex. 50); NPBL 028166 (Ex. 23).

Nothing in 2015 evidences an unlawful conspiracy. Had CSXT consulted its former employee, Tony MacDonald, who was in charge of CSXT's Portsmouth operations in 2015, it would have never made such unsupported claims: [REDACTED]
[REDACTED]

[REDACTED] MacDonald Dep. 216:9-13 (Ex. 12). Yet Mr. MacDonald testified that CSXT never interviewed him before filing suit. *Id.* at 220:13-16.

2018 Rate Proposal. Nor does the handling of CSXT's 2018 rate proposal establish any concerted action. Contrary to the Complaint, the Belt Line never rejected CSXT's proposal. See Moss Dep. 287:25-288:9 ("Q. Did the NPBL ever reject the proposal made for a private contract by CSX? A. No."). [REDACTED]

[REDACTED] See CSXT's Resp. to NPBL RFAs 10, 13, 15-19 (Ex. 28); Armbrust Dep. 214:15-21 (Ex. 24) ([REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] See CSXT's Resp. to NPBL RFAs 17-19 (Ex. 28); *see also* Moss Dep. 287:25-288:6 (Ex. 6) ("Q: And in response to the 2018 proposal from CSX ..., did anybody on the board ever move in response to management's

recommendation that a rate committee be established to evaluate the Belt Line's tariff? A. No."). Simply put, CSXT never pursued its rate proposal, using it instead as an artifice (sent just before filing suit) to avoid the statute of limitations at the pleadings stage.

The Belt Line took CSXT's proposal seriously. Mr. Moss spoke with VIT, NS, and CSXT. See Moss Dep. 242:3-243:7 (Ex. 6). He also determined that the existing \$210 rate was less expensive than drayage for the same route, [REDACTED] *Id.* 246:3-4 (Ex. 6) ("So with market conditions, we were cheaper."). And he raised other considerations, including whether the proposal "made any sense" while the Belt Line's trackage rights fee dispute with NS remained unresolved. *Id.* at 246:11-12 [REDACTED]

[REDACTED]

[REDACTED] *Id.* at 244:10-15 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

None of this conduct is conspiratorial. The consideration by Mr. Moss is indicative of prudent business judgment, which cannot be the basis for a conspiracy claim. See *Matsushita*, 475 U.S. at 588; *Laurel Sand*, 924 F.2d at 543. And, of course, CSXT ignores the pending STB dispute wherein the Belt Line and NS are adversaries, with the Belt Line opposing NS's effort to increase the trackage rights fee for the route to NIT. See *supra*.

The only other aspect of CSXT's 2018 proposals was a wholesale change to the Belt Line's governance structure, which can be made only by the shareholders. See, e.g., 1989 Suppl. Agmt.,

D.E. 1-3 (**Ex. 7**). And inaction by the Belt Line on a point where action is impossible cannot, as a matter of law, be evidence of a conspiracy. *See Hechler Chevrolet*, 230 Va. at 402.

As a result, CSXT cannot support its conspiracy claims as a matter of law, whether under the “clear and convincing” standard of Virginia law or the exacting antitrust standard of federal law. Judgment should be entered for the Belt Line on all of them.

III. All of CSXT’s state law claims in Counts VIII and IX fail as a matter of law because CSXT no longer asserts an unlawful act.

A. A conspiracy claim cannot exist without an underlying unlawful act.

A conspiracy claim without an underlying unlawful act is not actionable in Virginia. As the Virginia Supreme Court explained in *Dunlap*, “Because there can be no conspiracy to do an act that the law allows, *Werth*, 160 Va. at 855, we have held that ‘an allegation of conspiracy, whether criminal or civil, must at least allege an unlawful act or an unlawful purpose’ to survive demurrer.” *Dunlap*, 287 Va. at 215 (citing *Hechler Chevrolet, Inc. v. General Motors Corp.*, 230 Va. 396, 402, (1985)). The Court continued: “In other words, actions for common law civil conspiracy and statutory business conspiracy lie *only if a plaintiff sustains damages as a result of an act that is itself wrongful or tortious*.” *Id.* (collecting cases).

B. CSXT no longer asserts any unlawful act to support its claims.

CSXT’s Complaint originally tracked the Virginia Supreme Court’s opinion in *Dunlap*, where the Court recognized tortious interference as the requisite “unlawful act” for a statutory business conspiracy claim. *See Dunlap*, 287 Va. at 218-19. In fact, the entirety of CSXT’s state law conspiracy allegations in the Complaint, both statutory and common law, are as follows:

[PP 119 and 123] ...Defendant NS has conspired, by express agreement and tacit understanding, with Defendant NPBL, and with the Individual Defendants, in their capacity as directors and/or managers of NPBL, to intentionally, purposefully, and without lawful justification willfully and maliciously *interfere with CSXT’s reasonable business expectations, violate the individual Defendants’ fiduciary duties to NPBL, and to breach NS’s contract with CSXT*. Defendants acted without lawful justification.

D.E. 1, pp. 38, 39 (emphasis added).

None of these allegations is actionable now. The first, tortious interference, cannot be the requisite unlawful act because this Court dismissed that count. *See* D.E. 66, p. 2 (dismissing Count VII). The second, breach of fiduciary duty, also cannot be the requisite unlawful act because it is a claim against individuals, not the Belt Line or NS. *See* D.E. 1, p. 36. Those claims also have been dismissed. *See* D.E. 143; 159. The third, breach of contract, cannot be the requisite unlawful act because breach of contract alone cannot form the basis for a conspiracy claim. *See Station # 2, LLC v. Lynch*, 280 Va. 166, 174 (2010) (non-performance of a contract cannot be the requisite unlawful act for a conspiracy claim where the duties of the parties arise under the contract); *see also Dunlap*, 287 Va. at 217 (same).

The question, then, is what remains? Even the most generous reading of CSXT's Complaint and discovery responses allows nothing else. Having failed to amend Count VII, and having failed to identify separate damages for any acts within the statute of limitations window, CSXT's state law claims lack an underlying unlawful act now. Because a conspiracy claim cannot exist without an unlawful act, CSXT's Counts VIII and IX fail as a matter of law.

IV. All of CSXT's antitrust claims fail because CSXT cannot show that the Belt Line unreasonably restrained trade or conspired with NS to monopolize rail traffic.

CSXT's failures on its antitrust claims run deeper than its inability to show concerted action. Even assuming *arguendo* that CSXT could show an agreement, and could then prove a substantial anticompetitive effect in a properly-defined market,¹¹ CSXT still cannot overcome the Belt Line's procompetitive justification for its rate. It also cannot avoid that justification by relying on invalid price comparisons.

¹¹ The Belt Line incorporates the arguments on this point made by NS in its Brief in Support of its Motion for Summary Judgment.

A. The Belt Line's switching rate cannot be anticompetitive because it is justified by the Belt Line's undisputed costs.

Section 1 of the Sherman Act prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or [interstate] commerce ...” 15 U.S.C. § 1. To establish a violation, a plaintiff must show (1) a contract, combination, or conspiracy (2) that unreasonably restrained trade. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984); *Standard Oil Co. v. U.S.*, 221 U.S. 1, 58-64 (1911); *N.C. State Bd. of Dental Exam’rs v. FTC*, 717 F.3d 359, 371 (4th Cir. 2013). Section 2 prohibits a conspiracy to monopolize any part of trade or commerce. 15 U.S.C. § 2. The elements are: (1) concerted action; (2) a specific intent to achieve an unlawful monopoly; and (3) commission of an overt act in furtherance of the conspiracy. See *Dickson v. Microsoft Corp.*, 309 F.3d 193, 211 (4th Cir. 2002). As shown above, both of CSXT’s counts fail on the first element. Even so, CSXT cannot establish the others either.

CSXT’s case hinges on its claim that the Belt Line’s \$210 switching rate is “exorbitant” and “prohibitive,” preventing CSXT from accessing NIT. CSXT relies on the rate to prove both an unreasonable restraint of trade in support of its Section 1 claim and an overt act in support of its Section 2 claim. Because the Belt Line is not a direct competitor with either NS or CSXT, the Court must apply a “rule of reason” analysis. See *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 907 (2007).

In a rule of reason analysis, “the reasonableness of a restraint is evaluated based on its impact on competition as a whole within the relevant market.” *Oksanen*, 945 F.2d at 708. CSXT bears the initial burden of showing that the defendants’ conduct has had a substantially harmful effect on competition. See *Virginia Vermiculite, Ltd. v. W.R. Grace & Co.*, 108 F. Supp. 2d 549, 575 (W.D. Va. 2000). If CSXT meets its burden, the burden shifts to the Belt Line to “provide evidence that the restraints are justified by procompetitive virtues.” *Id.*

Even ignoring CSXT’s initial burden, CSXT cannot overcome the Belt Line’s procompetitive justification – that the Belt Line’s rate is set to cover its costs, just as its Operating Agreement requires. *See* D.E. 1-1, p. 4, Art. Ninth (**Ex. 1**). And critically, CSXT *does not dispute* the Belt Line’s costs. As CSXT’s expert, Dr. Marvel, conceded in his deposition, he took the Belt Line’s costs “as a given.” Marvel Dep. 91:17-24 (**Ex. 33**). He did no independent analysis of them whatsoever:

Q. There were some questions about operational costs. You did not do any analysis of the Belt Line's operational cost, correct?

A. That is correct.

* * *

Q. Did you do any analysis of the incremental costs of a move to NIT on the Belt Line?

A. Incremental cost to the Belt Line of a move to NIT? That would be difficult because I don't think they have done much movement to NIT.

Q. So you have not done that analysis?

A. I have not done that.

Id. at 168: 9-25 (**Ex. 33**).

CSXT's failure to contest the Belt Line's costs is dispositive of its antitrust claims.

See D.E. 1-1, p. 4, Art. Ninth (**Ex. 1**); Wheeler Dep. 17:18-18:4 (**Ex. 51**); Allan Dep. 93:7-8-94; 117:1-7 (**Ex. 48**). That is exactly what has occurred over the last decade, as evidenced by the Belt Line's operational expenses for every year since 2010:

Table 1 <u>NPBL Operating Expense per Car – 2010 through 2020</u>			
<u>Year</u> (1)	<u>NPBL Op Ex</u> (2)	<u>Cars</u> (3)	<u>Op Ex Per Car</u> (4)
1. 2010			
2. 2011			
3. 2012			
4. 2013			
5. 2014			
6. 2015			
7. 2016			
8. 2017			
9. 2018			
10. 2019			
11. 2020			
12. Average			
a. Weighted	xxx	xxx	
b. Simple	xxx	xxx	

Source: Exhibit No. 3.

See Crowley Report, p. 5, Table, 1 (Ex. 3), compiling data from the Belt Line's Annual Reports; see also Annual Reports from 2010-2020 (Ex. 4).

From 2010 to 2020, the Belt Line's average operating expense per car was [REDACTED] and the weighted average was [REDACTED]. In other words, the Belt Line's \$210 rate is not exorbitant at all, but actually *below cost*. Even excluding 2015, which involved a personal injury accrual, the simple average is [REDACTED] and the weighted average is [REDACTED]. *Id.*, p. 6, n.11.

A price set at or below cost is by definition procompetitive. CSXT knows this firsthand. In *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 704 F. Supp. 1309 (D. Md. 1989), *aff'd*, 924 F.2d 539 (4th Cir. 1991), an aggregates supplier and a short line railroad sued CSXT, accusing it of conspiring with a competitor supplier to keep the plaintiff out of the regional aggregates market. Whereas the competitor was located on CSXT's lines, and could directly access the market that way, the plaintiff supplier needed to travel along both the short line's tracks and CSXT's tracks,

and pay a fee to both railroads, to reach the market. CSXT offered to reduce its rate to just \$.01 over cost, which the plaintiff claimed was still too high.

The supplier sued CSXT under Section 1 of the Sherman Act for conspiring with its competitor and the short line sued CSXT under Section 2 for failing to offer trackage rights as an alternative. *See Laurel Sand*, 704 F. Supp. at 1311. The district court granted summary judgment in favor of CSXT and dismissed both counts, and the Fourth Circuit affirmed.

Pertinent here, the district court explained that, although the rate offered by CSXT “may not be workable in plaintiffs’ plans, the service offered is an alternative to trackage rights so long as it is offered on a reasonable basis.” 704 F. Supp. at 1323. The court held that CSXT “*need not offer plaintiffs a rate below its cost* in order to provide plaintiffs competitive transportation costs....” *Id.* (emphasis added). The court further concluded that offering a rate of \$.01 above cost was “reasonable under the circumstances,” and thus could not amount to a denial of access. *Id.* at 1324. The Fourth Circuit affirmed, holding that offering “a penny over the variable costs, was reasonable,” and that “although trackage rights were preferable, that, alone, did not make the rate offer unreasonable.” 924 F.2d at 544-45.

Here, the Belt Line’s rate is undisputedly at or below its average operating cost, making it by definition procompetitive (especially considering the Belt Line’s breakeven purpose). An alternative holding would impose liability on the Belt Line for failing to price its services below cost, something the antitrust statutes do not support. *See, e.g., Laurel Sand*, 704 F. Supp. at 1323-24. As the district court explained in *Laurel Sand*, “CSX is not responsible for the location of Laurel Sand & Gravel’s quarry; *it need not offer plaintiffs a rate below its costs in order to provide plaintiffs competitive transportation costs* to Annapolis Junction.” *Id.* (emphasis added).

Nor can CSXT avoid this problem by manipulating the cost analysis. CSXT's corporate witness testified in deposition that the Belt Line should treat CSXT's intermodal NIT traffic as merely "incremental" – that is, to consider only the costs directly associated with a move to NIT, ignoring all overhead and other fixed costs. See CSXT 30(b)(6) Dep. 103:9-104:24 (**Ex. 15**). In other words, CSXT would have the Belt Line cover its overhead and other fixed costs through other customers, or other business, so that CSXT can get a lower price to NIT.

Yet forcing the Belt Line's other customers to effectively subsidize CSXT's traffic at NIT presents the same problem in different clothes. In CSXT's proposed scenario, the Belt Line would still offer CSXT a rate below cost, except the Belt Line would have to make up for the discount through other business. Presumably, its next customer would want the same "incremental-only" rate, and the next, and the next, until only a core group of original customers cover all of the Belt Line's overhead, track maintenance, capital improvements, and the like. The Belt Line's shareholders foreclosed this possibility more than a century ago in the Operating Agreement. See D.E. 1-1, p. 4, Art. Ninth (**Ex. 1**) (requiring a "uniform rate").

Because CSXT does not challenge the Belt Line's costs, and because it cannot show that the Belt Line has harmed CSXT any other way, the only permissible finding is that the Belt Line's rate is procompetitive, meaning CSXT's antitrust claims fail as a matter of law.

B. CSXT's allegations rely on improper rate comparisons and ignore the only direct alternative access to NIT.

CSXT cannot avoid the Belt Line's costs by relying on invalid rate comparisons, ignoring the only actual alternative for intermodal traffic at NIT, drayage by truck. Under antitrust law, "Any inquiry into the reasonableness of the rate ... must focus on the rate's reasonableness in the context of competition, *rather than from plaintiffs' perspective.*" *Laurel Sand*, 704 F. Supp. at 1323 (emphasis added); see also *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944) (a

“reasonable” rate is one that permits the business to recover its costs and earn a reasonable profit). It makes no difference that the Belt Line’s rate “may not be workable in [CSXT’s] plans.” *Laurel Sand*, 704 F. Supp. at 1323.

Presumably recognizing the correlation between the Belt Line’s rate and its costs, CSXT attempts to nonetheless manufacture a Sherman Act violation by comparing the Belt Line’s rate to [REDACTED]. See Crowley Report, pp. 13-14 ([REDACTED]).

[REDACTED]¹² [REDACTED]
[REDACTED]
[REDACTED] See D.E. 79. [REDACTED]
[REDACTED]
[REDACTED] and
as a consequence it is not a valid price comparison. See *Laurel Sand*, 704 F. Supp. at 1323.

[REDACTED]
[REDACTED] which is the industry standard for comparing railroad rates. See Crowley Report, pp. 12-15, Tables 2 and 3; Crowley Dep. 235:2-15 (**Ex. 32**). CSXT’s expert witness admitted in deposition that he is not a railroad rate expert himself, or a railroad expert of any kind, nor does he know of any authority for challenging a “per mile” metric as a basis for comparison. See Marvel Dep. 165:2-166:20, 181:16-183:21 (**Ex. 33**).

The Belt Line’s rate is also lower than the actual competitive alternative to NIT, drayage by truck, [REDACTED]. See Crowley Report pp. 18-24 (**Ex.**

¹² CWRV’s rate as published in its tariff is \$210 per well, loaded or empty. See **Ex. 10**.

3). And intermodal traffic, by definition, can move by both means of transport. *Id.* [REDACTED] even using CSXT's assumptions. See Crowley Dep. 227:3-229:18 (**Ex. 32**); see also Marvel Dep. 185:23-189:11 (**Ex. 33**) (conceding that Belt Line rate is lower per container than drayage [REDACTED]).

In sum, CSXT cannot establish an antitrust violation as a matter of law.

Conclusion

For the foregoing reasons, based on the undisputed facts, all of CSXT's claims against the Belt Line fail as a matter of law. The Belt Line respectfully prays that the Court enter judgment for the Belt Line on all of them.

Dated: April 12, 2021

NORFOLK AND PORTSMOUTH
BELT LINE RAILROAD COMPANY

By: /s/ W. Ryan Snow
James L. Chapman, IV, VSB No. 21983
W. Ryan Snow, VSB No. 47423
David C. Hartnett, VSB No. 80452
Alex R. McDaniel, VSB No. 92398
CRENSHAW, WARE & MARTIN, P.L.C.
150 W. Main Street, Suite 1500
Norfolk, Virginia 23510
Telephone: (757) 623-3000
Facsimile: (757) 623-5735
jchapman@cwm-law.com
wrsnow@cwm-law.com
dhartnett@cwm-law.com
amcdaniel@cwm-law.com
*Attorneys for Norfolk and Portsmouth Belt
Line Railroad Company*

CERTIFICATE OF SERVICE

I certify that on this 12th day of April 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a “Notice of Electronic Filing” to all counsel of record who have consented to electronic service.

/s/ W. Ryan Snow

W. Ryan Snow, VSB No. 47423
CRENSHAW, WARE & MARTIN, P.L.C.
150 W. Main Street, Suite 1500
Norfolk, Virginia 23510
Telephone: (757) 623-3000
Facsimile: (757) 623-5735
wrsnow@cwm-law.com

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD 36836

**NORFOLK SOUTHERN CORPORATION
NORFOLK SOUTHERN RAILWAY COMPANY
—ACQUISITION OF CONTROL—
NORFOLK & PORTSMOUTH BELT LINE RAILROAD COMPANY**

**NORFOLK SOUTHERN RAILWAY COMPANY’S
REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division**

CSX TRANSPORTATION, INC.,	)	
	)	
<i>Plaintiff,</i>	)	
	)	
v.	)	Case No. 2:18-cv-530
	)	
NORFOLK SOUTHERN RAILWAY	)	
COMPANY, <i>et al.</i> ,	)	
	)	
<i>Defendants.</i>	)	

**DEFENDANT NORFOLK SOUTHERN RAILWAY COMPANY'S
REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

TABLE OF CONTENTS

	Page
INTRODUCTION	1
ARGUMENT	3
I. CSX’S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS	3
A. CSX’s conspiracy claims accrued more than five years ago.	3
B. CSX does not identify any new injury caused by post-2013 conduct.	4
C. The continuing violation doctrine cannot save CSX’s claims.	5
1. CSX cannot recover damages caused by conduct outside the limitations period.	6
2. The continuing violation doctrine can only be triggered by overt acts.	6
3. CSX has no evidence of any wrongful overt act occurring within the limitations period.	7
II. CSX FAILS TO IDENTIFY ANY EVIDENCE OF AN ACTIONABLE CONSPIRACY BETWEEN DEFENDANTS	8
A. The time-barred conduct does not demonstrate a conspiracy.	9
B. No conspiracy can be inferred from the 2015 train movements or handling of the 2018 Rate Proposal.	11
1. Successful 2015 train movements are not evidence of conspiracy.	11
2. A failure to vote for the 2018 Rate Proposal when CSX did not ask for a vote is not evidence of conspiracy.	12
III. NS IS ENTITLED TO SUMMARY JUDGMENT ON CSX’S ANTITRUST CLAIMS.	13
A. CSX cannot prove a properly defined relevant market or the requisite degree of market power, which is fatal to all of its antitrust claims.	14
1. CSX Incorrectly Contends it Need Not Define a Relevant Market.	14
2. CSX Cannot Support the Relevant Market it Pled Because CSX Has No Expert Evidence to Support its Relevant Market.	15
3. The undisputed facts establish that either market is too narrow.	18

TABLE OF CONTENTS
(continued)

	Page
B. CSX cannot save its Section 2 attempted and actual monopolization claims.	19
1. CSX cannot demonstrate that NS engaged in exclusionary conduct.....	19
2. CSX’s inability to show foreclosure dooms its Section 2 claims.	22
C. CSX cannot demonstrate harm to competition under the Rule of Reason.	22
IV. NS IS ENTITLED TO SUMMARY JUDGMENT ON CSX’S BREACH OF CONTRACT CLAIM.	24
CONCLUSION.....	25

TABLE OF EXHIBITS

Exhibit	Description	Citation	Confidentiality
122	CSX Corp. Dep.	31:10-12	
123	Mar. 28, 2018 CSX Email	CSXT0140145	AEO
124	MacDonald Dep.	216:9-13	Confidential
125	J. Booth Dep.	118:10-20	Confidential

Defendant Norfolk Southern Railway Company (“NS”) submits this reply in support of its Motion for Summary Judgment (the “Motion” or “Mot.”) (ECF No. 307) on all claims of Plaintiff CSX Transportation, Inc. (“CSX”). For the following reasons,¹ NS’s Motion should be granted.

INTRODUCTION

CSX’s claims now hinge on not getting a special, lower rate for intermodal traffic, which NPBL never rejected and is precluded by the Operating Agreement. Since its inception, CSX had based its case on the “unreasonableness” of the Switch Rate, which allegedly blocked CSX from accessing NIT. CSX, however, concedes that it “***supported the consolidated \$210 [switch] rate***” when it was set in 2009. (CSX Opp. Br. Statement of Facts (“CSX SOF”) ¶ 25, ECF No. 324.) CSX now denies that its claims “‘hinge’ on NPBL’s switch rate” (CSX Opp. Br. 68, ECF No. 324), as it must, because the rate is indisputably justified by NPBL’s operating expenses, and CSX’s assertion that the Switch Rate is unreasonable must be resolved by the Surface Transportation Board (“STB”). (See ECF Nos. 115, 329.) Instead, CSX now focuses on NPBL’s alleged failure to provide a special, lower rate for intermodal traffic. (CSX Opp. Br. 68.) But CSX never asked NPBL’s Board to vote on its proposals for this special intermodal rate, and the special rate conflicts with the Operating Agreement’s uniform rate provision, which NS has the right to rely on. (CSX SOF ¶ 14.)

CSX has failed to provide evidence of overt acts causing damage in the statute of limitations period, which renders its claims time barred. CSX relies heavily on pre-2013 conduct and communications between NS employees only, which unsurprisingly reflect NS’s desire to maintain its competitive advantages based its ownership of the track to NIT. CSX’s reliance on

¹ NS also adopts and incorporates the arguments made in NPBL’s reply brief that are readily transferable to NS. *U.S. ex rel. LaCorte v. SmithKline Beecham Clinical Lab’s, Inc.*, 149 F.3d 227, 237–38 (3d Cir. 1998). NS also adopts the same abbreviations used in its Motion.

this old evidence only reinforces that the statute of limitations presumptively bars its claims and alleged damages. These pre-2013 communications neither show any overt acts within the limitations period, nor change that fact that, in 2015, CSX paid the Switch Rate and accessed NIT using NPBL and track owned by NS. And CSX accedes to the fact that CSX did not call for a vote by the NPBL Board on the 2018 Rate Proposal, and thus the proposal was never rejected. What is more, CSX admits that its damages expert does not identify any new damages flowing from alleged overt acts within the limitations period, which renders CSX's claims time barred.

CSX's arguments against dismissal of its antitrust claims are fleeting and meritless.

CSX's Opposition laid bare the weakness of its antitrust claims by giving only cursory treatment to Defendants' arguments. CSX cannot rely on the relevant market sponsored by its expert because it is materially different than the relevant market alleged in its Complaint. Even if CSX could rely on these different markets, the record confirms that both are so gerrymandered that they are plainly improper. CSX cannot show exclusionary conduct or a conspiracy, and CSX's inability to show that it has been foreclosed from the alleged relevant market is likewise fatal to its claims. In the end, the law does not impose an affirmative obligation on NS to facilitate CSX's access to NIT – yet that is precisely the thrust of CSX's claims.

CSX does not trouble to defend its breach of contract claim. CSX treats NS's arguments for dismissal of its contract claim as a mere afterthought, not even addressing most of them. CSX's remaining argument that general covenants can trump NS's specific rights should be rejected as a matter of basic contract law. CSX's breach of contract claim should be dismissed.

This case is ripe for summary judgment, as the material facts necessary for NS's Motion are not in dispute. As explained by NPBL, CSX failed to comply with Local Civil Rule 56(B),

and thus all of NS's Undisputed Statement of Facts are admitted. LCR 56(B).² CSX's response to NS's facts is just an alternative view of the undisputed facts supported by self-serving inferences and legal conclusions. Nowhere does CSX offer evidence that disputes the material facts underpinning NS's Motion, including (a) NPBL moved every train tendered by CSX in 2015 (CSX SOF ¶ 53); (b) there was no vote on the 2018 Rate Proposal (CSX SOF ¶ 71); (b) Defendants did not enter into a new agreement in 2018 to increase the trackage fee (CSX SOF ¶¶ 56-61); (c) CSX experienced volume growth at NIT and POV (CSX SOF ¶ 99); (d) ports compete for discretionary cargo, and ocean carriers "move international intermodal containers to and from the same inland destinations through multiple ports." (CSX SOF ¶ 79); and (e) NS and NPBL do not compete for business (CSX SOF ¶ 9).

ARGUMENT

I. CSX'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS

A. CSX's conspiracy claims accrued more than five years ago.

CSX's Opposition confirms that all its claims are based on acts that NS, individually or in concert with NPBL, allegedly took to block CSX from accessing NIT. (CSX Opp. Br. 1.) Through its expert, Prof. Marvel, CSX seeks to recover profits purportedly lost as a result of the alleged blockage on an annual basis from 2009 to the present. (NS Ex. 71, at ¶¶ 124-125.)

As NS explained in its opening brief, all of CSX's claims accrued in 2009, when CSX says it first suffered damages caused by Defendants' allegedly wrongful conduct. See NS Opening Br. 17. All of CSX's claims are thus time barred because CSX did not file its Complaint until 2018, well after the applicable limitations periods had expired.

² CSX specifically concedes that the facts in 12 paragraphs of NS's Undisputed Statement of Facts ("SOF") are undisputed. See CSX Opp. Br. 7 (identifying NS SOF ¶¶ 1-3, 5-7, 13-14, 18, 46-47, 51, 53, and 57 as undisputed).

B. CSX does not identify any new injury caused by post-2013 conduct.

Seeking to avoid that outcome, CSX argues that the statute “begins to run from the most recent injury caused by the defendants’ activities” (CSX Opp. Br. 42) and points to allegedly unlawful conduct occurring within the limitations period that allegedly caused new injury. (*Id.* at 45.) CSX’s argument is belied by its own expert, who provides only a single calculation of profits that CSX has purportedly “lost due to ‘the *totality* of NS’s and NPBL’s efforts to foreclose CSX’ from on-dock rail at NIT.” (CSX Opp. Br. 49) (emphasis added).

Prof. Marvel does not calculate any new injury caused by alleged overt acts within the limitations period. Rather, the lost profits CSX claims to have suffered since 2013 are more of the same lost profits that, according to Prof. Marvel, have been accruing since 2009. They are the result of the “unabated and inertial consequences of previous acts” that Defendants allegedly took outside of the limitations period. *Midwestern Mach. Co. v. Northwest Airlines, Inc.*, 392 F.3d 265, 271 (8th Cir. 2004). Therefore, CSX’s claims are barred by the statute of limitations.

CSX cites *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144 (3d Cir. 1992), for the proposition that, although it must prove overt acts occurring within the limitations period, it need not tie its damages to those acts “because ‘overt acts aren’t what cause damage.’” (CSX Opp. Br. 49) (quoting *Lower Lake Erie*, 998 F.2d at 1172).³ This position contravenes Supreme Court precedent relied on by CSX. *See Zenith Radio Corp. v. Hazeltine Rsch., Inc.*, 401 U.S. 321, 338 (1971) (each time plaintiff is injured by an act of the defendant, a cause of action accrues “to

³ The remaining cases cited by CSX do not aid its argument. They address proof of antitrust damages generally, not the recoverability of damages caused by pre-limitations acts. Neither case even discusses the statute of limitations. *See LePage’s, Inc. v. 3M*, 324 F.3d 141, 166 (3d Cir. 2003) (once the jury has found that *the unlawful activity caused the antitrust injury*, damages may be determined without strict proof of what act caused the injury); *Anaheim v. Southern Calif. Edison Co.*, 955 F.2d 1373, 1376 (9th Cir. 1991) (addressing the combined effect of conduct in assessing whether there was a violation of Section 2).

recover the damages caused by *that act*”) (emphasis added); *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 190 (1997) (even if there is a continuing violation, the plaintiff cannot “recover for the injury caused by old overt acts outside the limitations period.”).⁴ Just as in *Gumwood HP Shopping Partners L.P. v. Simon Prop. Grp., Inc.*, 221 F. Supp. 3d 1033 (N.D. Ind. 2016), no award of damages can be sustained where the jury “would be left entirely to speculation to determine [what damages were] triggered by acts that accrued before or after the limitations period began, or to assess what portion of [damages are] attributable to acts that caused harm within the limitations period.” *Id.* at 1045. Indeed, given how CSX has “structured its damage claim, there [is] no basis in the record for the jury to determine what the effect on damages would be if it found one or more of the challenged acts lawful. Thus, if one of [Defendants’] acts [is] not a violation of the antitrust laws, much of the damage claim would become invalid.” *ILC Peripherals Leasing Corp. v. International Business Machines Corp.*, 458 F. Supp. 423, 434 (N.D. Cal. 1978).

CSX argues that its “payment of [the Switch Rate] in 2015 would suffice to restart the statute of limitations on its claims.” (CSX Opp. Br. 45.) Not so. CSX is seeking to recover only “the profits lost as a result of ocean carriers choosing not to contract with CSX” due to Defendants’ alleged conduct, *not* “the marginal difference between the switch rate proposed by CSX and the rate charged by NPBL.” (CSX Opp. Br. 51.) Therefore, CSX cannot now claim its payment of the Switch Rate in 2015 is a new injury that saves its claims from dismissal.

C. The continuing violation doctrine cannot save CSX’s claims.

CSX invokes the continuing violation doctrine to try to save its antitrust claims (CSX Opp. Br. 42, 45), but it has not met its “burden of proof to establish it.” *XY, LLC v. Trans Ova Genetics*,

⁴ Notably, *Lower Lake Erie* was decided before the Supreme Court’s decision in *Klehr*, which made it clear that *only* damages flowing from acts taken within the limitations period are recoverable. *Klehr*, 521 U.S. at 189-90.

890 F.3d 1282, 1292 (Fed. Cir. 2018) (citation omitted).

1. CSX cannot recover damages caused by conduct outside the limitations period.

The continuing violation doctrine allows a plaintiff to assert an antitrust claim that otherwise would be time-barred if the plaintiff proves that the defendant took new actions within the limitations period that inflicted new injury. *Zenith*, 401 U.S. at 338 (in the context of a continuing conspiracy, each time a plaintiff is injured by an act of the defendants, a cause of action accrues). The doctrine does not permit CSX to recover antitrust damages flowing from any alleged pre-2013 conduct, as it attempts to do here. *See Gumwood*, 221 F. Supp. 3d at 1043 (damages flowing from acts occurring more than four years before antitrust suit was filed are not recoverable, even if damages continue to flow into the limitations period); *N.C. Elec. Membership Corp. v. Carolina Power & Light Co.*, 780 F. Supp. 322, 334 (M.D.N.C. 1991) (antitrust claims, and resulting damages, related to overt acts outside the limitations period were barred).

2. The continuing violation doctrine can only be triggered by overt acts.

CSX erroneously claims—based on *Lower Lake Erie*—that it can invoke the continuing violation doctrine to save its antitrust claims when there is “concerted inaction” continuing into the limitations period. (CSX Opp. Br. 43) (arguing that no affirmative act is required). But *Lower Lake Erie* is an outlier; as recently as last month, the Fourth Circuit held that for continuing violations to trigger new limitations periods, there must be (1) a *new and independent overt act* that (2) inflicts new and accumulating injury on the plaintiff. *See Mayor of Baltimore v. Actelion Pharms. Ltd.*, 995 F.3d 123, 131 (4th Cir. 2021) (continuing violation doctrine applies when overt acts injure the plaintiff); *Charlotte Telecasters v. Jefferson Pilot Corp.*, 546 F.2d 570, 572-73 (4th Cir. 1976) (there must be an overt act causing injury to plaintiff’s business; silence does not constitute an overt act); *SD3, LLC v. Black & Decker (U.S., Inc.)*, 215 F. Supp. 3d 486, 499 (E.D.

Va. 2016) (without evidence of new refusals to deal, there can be no continuing violation). CSX cannot rely on purported “concerted inaction” here.

3. CSX has no evidence of any wrongful overt act occurring within the limitations period.

The only alleged concerted action on which CSX relies that occurred within the limitations period is Defendants’ purported obstruction of CSX’s efforts to access NIT via NPBL in 2015, NS’s attempts to negotiate a new trackage rate with NPBL, and Defendants’ purported rejection of CSX’s 2018 Service and Governance Proposals.⁵ (CSX Opp. Br. 45.)

The record firmly establishes that neither Defendant engaged in any overt act to block CSX from accessing NIT in 2015. (NS Opening Br. 36-37; *see also* Part II.B *infra*.) It is undisputed that CSX used NPBL to access NIT in 2015, and that ***NPBL moved every train tendered by CSX.*** (NS SOF ¶¶ 64-66; CSX SOF ¶ 53.) Moreover, neither party committed an overt act with respect to the 2018 proposals. (NS Opening Br. 36-37; *see also* Part II.B.2 *infra*.)⁶ Even if NS and NPBL had “refused to take action” on its 2018 proposals, such so-called “purposeful inaction” cannot restart the statute of limitations.

⁵ CSX asserts that NS takes too narrow a view of the “wrongful conduct” underpinning its claims. (CSX Opp. Br. 43 n.22 (claiming that CSX’s response to NPBL’s interrogatories is “not a catalogue of all evidence supporting its claims”).) But CSX is not permitted, on summary judgment, to refer vaguely to some other evidence of wrongful conduct that might exist. Instead, “a party opposing a properly supported motion for summary judgment ... must ‘set forth *specific facts* showing that there is a genuine issue for trial.’” *Bouchat v. Balt. Ravens Football Club, Inc.*, 346 F.3d 514, 522 (4th Cir. 2003) (quoting Fed. R. Civ. P. 56(e)) (emphasis added).

⁶ CSX does not try to refute NS’s legal argument that, as a shareholder, it had a contractual right to vote down CSX’s Governance Proposal. Instead CSX makes conclusory statements and attempts to cast this as a dispute of fact, not law. *See* CSX Opp. Br. 46 (claiming a factual dispute between NS’s argument that it “had the contractual right” to reject CSX’s Governance Proposal and CSX’s “disput[e with] NS’s interpretation of the relevant agreements”). There is no *factual* dispute as to the vote on the proposal, and as NS explained in its opening brief, it had the contractual right to vote against it. NS Opening Br. 40. CSX offers no rejoinder on this point, and accordingly the Court should consider this legal issue conceded.

Finally, CSX's state law conspiracy claims evaded dismissal at the pleadings stage only because of the allegation that "in **2018**, Defendants entered into a **new agreement** to increase the amount the Belt Line pays to access NS's tracks to NIT." (ECF No. 66, at 39) (emphasis added). This alleged new agreement "is **not a continuation of the same conspiracy** to set the Uniform Rate at the [2009] level because the price is again increased." (*Id.* at 40) (emphasis added).

CSX now relies on these allegations to save its antitrust conspiracy claims too. However, it is undisputed that neither the trackage fee, nor the Switch Rate, has increased since 2009. The alleged price increase that saved CSX's conspiracy claims from dismissal, therefore, never happened. Moreover, CSX admits that Defendants did not enter into any such agreement in 2018 (ECF No. 300-8, RFA No. 3), and that "NPBL has opposed NS's request to increase the amount it charges to NPBL for use of NS's tracks to NIT." (NS SOF ¶¶ 72-74.) CSX is, therefore, unable to demonstrate any new conspiracy causing new injury relating to the trackage fee.

Faced with this admission, CSX now claims that "[i]t was not necessary for Defendants to actually *agree* on a higher rate for their scheme to work as they were able to delay and deny CSX's [2018] proposal based on the uncertainty surrounding this issue alone." (CSX Opp. Br. 48) (emphasis in original). But this theory ignores the Court's ruling and CSX's admissions, which conclusively show that there was no new agreement or resulting injury.⁷ For all these reasons, CSX has no actual evidence of a new conspiracy or any overt act relating to the trackage fee, which requires dismissal of its claims.

II. CSX FAILS TO IDENTIFY ANY EVIDENCE OF AN ACTIONABLE CONSPIRACY BETWEEN DEFENDANTS

As NS predicted, CSX relies primarily on internal NS communications occurring outside

⁷ Moreover, NS informed NPBL on July 31, 2015 that NS was cancelling the Trackage Rights Agreement as of its expiration date, July 31, 2016 – *almost two years before* CSX submitted its 2018 Proposal.

the limitations period as evidence of a conspiratorial agreement between Defendants. (CSX Opp. Br. 52-57.) Even assuming these NS communications show that NS wanted to block CSX from accessing NIT, CSX's state and federal conspiracy claims still should be dismissed. These internal communications are between NS employees only and therefore are not evidence of concerted action or agreement between NS and NPBL. CSX also fails to identify evidence of any overt act by Defendants *within* the limitations period on which to base its claims.

A. The time-barred conduct does not demonstrate a conspiracy.

The internal NS communications on which CSX relies relate to conduct outside of the limitations period, namely, the setting of the Switch Rate at \$210 and the handling of the 2010 Rate Proposal. But, CSX admits that its "[rate] committee members *supported* the consolidated \$210 rate" as long as CSX got a separate, lower switch rate from NPBL to move intermodal freight to and from NIT. (CSX Opp Br. ¶ 25) (emphasis added). CSX's support of the \$210 Switch Rate means it cannot now claim that the setting of that rate, and maintaining it at \$210 per car, is evidence of a conspiracy to block CSX's access to NIT. It also is undisputed that CSX, either as a shareholder of NPBL or through its appointed directors, never sought a vote on its 2010 Rate Proposal. Hence, NPBL did not reject CSX's proposal; the alleged overt act never happened.

Further, the 2010 Rate Proposal proposed terms, including a private switching rate for intermodal traffic, that would "be memorialized in a formal agreement" between CSX and NPBL, *i.e.*, a private contract. Similarly, the 2018 Rate Proposal sought a "definitive rail transportation agreement" between CSX and NPBL that included a private switching rate for intermodal traffic. These private contracts conflict with the Operating Agreement's requirement that "a uniform rate shall be fixed for the movement of freight cars over [NPBL's] railroad," which prevents NPBL from entering into "a special deal that wasn't available to all of the other owners." CSX Corp. Dep. 31:10-12, Ex. 122.

CSX tries to avoid the effect of the uniform rate provision by claiming that “nothing in the [2010] proposal was inconsistent with the **rate** being applied to other NPBL customers.” CSX Opp. Br. ¶ 30 (emphasis added). Even accepting that proposition,⁸ CSX never sought a Board vote on the special intermodal rate either. Rather, CSX demanded that NPBL agree to a private contract with CSX. (CSX Ex. 43) (demanding that [REDACTED] [REDACTED]); CSXT0140145, Ex. 123 (demanding that [REDACTED] [REDACTED] [REDACTED]). While CSX contends that the uniform rate provision can be overridden (CSX SOF ¶ 14), it makes no case that NS, as a shareholder, was required waive enforcement of the uniform rate provision with respect to the rate proposals.

Turning to the internal communications, CSX points to communications and activities—occurring outside of an NPBL Board meeting—of NS employees who also served on the NPBL Board. (CSX Opp. Br. 52-57.) This is not evidence of concerted action or agreement between NS and NPBL because, as a matter of law, the communications involve only one party: NS. As NS explained in its Motion, “directors of a corporation have authority to bind [the corporation] *only when they act collectively as a board.*” (See NS Opening Br. 33-35 (*quoting Monacan Hills, Inc. v. Page*, 203 Va. 110, 116 (1961) (emphasis added))). CSX cites *Starring v. Kemp*, 167 Va. 429 (1936), which adheres to the same core principle of Virginia law: “The directors of a corporation

⁸ In ruling on the motions to dismiss, the Court stated that the 2018 Rate Proposal “does not state that the rate would be lowered for only CSX” because it applied to any traffic by any company on Belt Line’s tracks between “Berkley Yard and NIT.” ECF No. 66, at 27. Practically, this special intermodal rate would only apply to CSX because NS does not need to use NPBL to move intermodal freight to or from NIT. To the extent the Court understood the proposal to mean that the rate would apply to all freight moved by NPBL, reducing the Switch Rate from \$210 to \$80 would reduce the revenues NPBL receives for non-intermodal freight by over 60%.

must act in their corporate capacity, as a board in orderly procedure, *and not as individuals*; plainly one director cannot on his own” bind the corporation. *Id.* at 435 (emphasis added).

The only exception to this rule is if NS-appointed board members were communicating (1) while they were acting as NPBL’s authorized agents with the consent of the NPBL Board, and (2) within the scope of their appointed authority. *Monacan*, 203 Va. at 116. CSX has not identified a *single* piece of evidence showing that any NS employee was conducting NPBL business when engaged in these internal communications, much less that NS employees were acting under authority granted to them by the NPBL Board. Hence, it was a legal impossibility for an individual NPBL Board member, cloaked only with the limited authority to participate in collective board actions, to engage in a conspiracy on NPBL’s behalf.⁹

The same legal principles dictate that the activities of rate committee members also are not evidence of a conspiracy. The rate committee members had no power to bind NPBL; all they could do was make recommendations. In essence, the rate committee provided a forum for representatives of NPBL’s shareholders to debate and try to reach consensus on rate issues.¹⁰ But the rate committee as a group, much less its individual members, had no power to act for NPBL.

B. No conspiracy can be inferred from the 2015 train movements or handling of the 2018 Rate Proposal.

1. Successful 2015 train movements are not evidence of conspiracy.

The overarching theme of CSX’s conspiracy claims is its assertion that it is a “victim of a decades long effort by NS, on its own and in combination with NPBL, to exclude CSX from on-

⁹ As a result, *Am. Soc’y of Mech. Eng’rs v. Hydrolevel Corp.*, 456 U.S. 556 (1982), is inapplicable, as explained by NPBL and in NS’s Motion in Limine, ECF No. 338.

¹⁰ When asked if he was acting in NPBL’s best interests on the 2009 rate committee, CSX committee member John Booth admitted that he was [REDACTED] (J. Booth Dep. 118:10-20, **Ex. 125**) (emphasis added).

dock rail access at” NIT. (CSX Opp. Br. 1.) CSX somewhat contradictorily cites its use of NPBL to access NIT in 2015 in support of the alleged conspiracy, but in any event, CSX does not claim that there were trains that it wanted to move to or from NIT in 2015 that in fact were not moved. As NPBL also explains, it is undisputed that NPBL moved every train tendered by CSX (see CSX SOF ¶ 53), which dooms CSX’s reliance on the 2015 train moves as evidence of a conspiracy.

Instead, CSX self-servingly asserts that its “efforts to use NPBL to move international intermodal traffic to and from NIT during 2015 proved unworkable.” (CSX Opp. Br. ¶ 51.) This is argument, not evidence, and the argument is meritless based on the undisputed fact that NPBL moved every train tendered by CSX. Further, CSX employee Anthony MacDonald (in charge of moving the intermodal trains), agreed that the operating plan developed in 2015 by CSX, NPBL, NS, and VIT [REDACTED]

[REDACTED] (MacDonald Dep. 216:9-13, Ex. 124.)

In sum, the record shows that NPBL moved every train that CSX tendered in accordance with an NS-provided operating window, and that there was no conspiracy to block CSX at NIT.

2. A failure to vote for the 2018 Rate Proposal when CSX did not ask for a vote is not evidence of conspiracy.

NPBL’s handling of the 2018 Rate Proposal also is not evidence of a conspiracy. Like the 2010 Rate Proposal, the NPBL Board never rejected the 2018 Proposal because, as the record confirms, CSX never put it to the NPBL Board for a vote, even though (like the 2010 Proposal), CSX and its appointed board members could have made NPBL’s Board do so. (CSX SOF ¶ 71.) But unlike the 2010 Proposal, which CSX essentially dropped, CSX never intended to legitimately pursue its 2018 Proposal. Instead, the proposal was an obvious set up for this litigation, which CSX began planning several weeks *before* sending the proposal to NPBL. (NS SOF ¶ 56.)

It is undisputed that NPBL management engaged CSX on the proposal, including

suggesting that a rate committee be formed to analyze the 2018 Proposal, as the proposal itself contemplated. (CSX SOF ¶ 66; NS SOF ¶¶ 58-59.) But CSX did not pursue that either. (CSX SOF ¶ 71.) Instead, CSX demanded that NPBL change its governance structure. As was its right, NS, as a shareholder, voted this proposal down. (CSX SOF ¶¶ 67, 69.)

CSX also claims that it demanded that NPBL create an “independent” committee to evaluate its 2018 Proposal, which the NS-appointed Board members purportedly rejected (though the evidence CSX cited does not support this¹¹). (CSX SOF ¶ 71.) Even assuming that happened, an “independent” committee would only make a recommendation to the NPBL Board, which would have the final authority to act (or not) on any such recommendation. Because the NPBL Board never voted on the 2018 Proposal, and thus never rejected it, there was no overt act to which CSX can hitch its conspiracy claims. Accordingly, NS is entitled to summary judgment.

III. NS IS ENTITLED TO SUMMARY JUDGMENT ON CSX’S ANTITRUST CLAIMS.

CSX argues that summary judgment should be used sparingly in antitrust cases, (CSX Opp. Br. 62-63), but ignores the Fourth Circuit’s recognition that sorting out the “unusual entanglement” of legal and factual issues frequently seen in antitrust cases may be “particularly well suited for Rule 56 utilization.” *Thompson Everett, Inc. v. National Cable Advertising*, 57 F.3d 1317, 1324-26 (4th Cir. 1995). Indeed, as shown in NS’s Motion, the Fourth Circuit routinely affirms summary judgment for defendants in antitrust cases where the plaintiff cannot prove its case.¹²

¹¹ CSX appears to be inadvertently mixing its rate proposal with its governance proposal.

¹² See, e.g., *It’s My Party, Inc. v. Live Nation, Inc.*, 811 F.3d 676, 683 (4th Cir. 2016); *Kolon Indus., Inc. v. E.I. DuPont de Nemours & Co.*, 748 F.3d 160, 162 (4th Cir. 2014); *Berlyn, Inc. v. The Gazette Newspapers, Inc.*, 73 F. App’x 576, 578 (4th Cir. 2003); *Thompson Everett*, 57 F.3d at 1324-26; *Oksanen v. Page Memorial Hosp.*, 945 F.2d 696, 708 (4th Cir. 1991) (en banc); *Laurel Sand & Gravel, Inc. v. CSX Transportation, Inc.*, 924 F.2d 539, 540 (4th Cir. 1991); *Abcor Corp. v. AM Int’l, Inc.*, 916 F.2d 924, 925 (4th Cir. 1990).

A. CSX cannot prove a properly defined relevant market or the requisite degree of market power, which is fatal to all of its antitrust claims.

As NS explained, the undisputed facts demonstrate that CSX cannot prove the requisite market power in a properly defined relevant antitrust market—an element essential for all of its antitrust claims. (NS Opening Br. 20-27.) CSX’s response only highlights the flaws in CSX’s arguments.

1. CSX Incorrectly Contends it Need Not Define a Relevant Market.

Perhaps aware of the weakness of its proposed relevant market, CSX claims in opposition that it “need not specifically define the relevant market in this case” because it can “demonstrat[e] monopoly power directly.” (CSX Opp. Br. 64.) CSX is wrong on both the law and the facts.

First, contrary to CSX’s contention, the Supreme Court recently confirmed that a relevant market is required even where a plaintiff proceeds exclusively by direct evidence of market power. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284-85 & n.7 (2018) (hereinafter *AmEx*) (even where plaintiffs were relying exclusively on direct evidence, “defining the relevant market” was a first step and “disagree[ing]” with plaintiffs’ contention that it was not necessary to define the relevant market); (see also NS Opening Br. 20). CSX’s reliance on *Law v. NCAA* is entirely misplaced, as that decision involved a horizontal price restraint under a “quick look” rule of reason analysis. *Law v. Nat’l Collegiate Athletic Ass’n*, 134 F.3d 1010, 1020-21 (10th Cir. 1998) (characterizing the NCAA’s rule “to reduce the high cost of part-time coaches’ salaries” a “naked restriction on price”). That type of naked horizontal agreement is not present here; we explain elsewhere in this brief why CSX’s claim is vertical and subject to rule-of-reason review. (See Part III.C, *infra*.) CSX is thus not excused from defining a relevant market to move forward with its antitrust claims.

Second, even if it CSX could proceed without a relevant market, the undisputed evidence of increasing output both at NIT and POV undermines CSX’s ability to prove market power by

direct evidence.¹³ See *Intellectual Ventures I LLC v. Capital One Financial Corp.*, No. 1:13-cv-00740, 2013 WL 6682981, at *4 (E.D. Va. Dec. 18, 2013) (direct evidence of monopoly power requires proof of supracompetitive prices and restricted output); *Bepco, Inc. v. Allied Signal, Inc.*, 106 F. Supp. 2d 814, 830 (M.D.N.C. 2000) (defining monopoly power as “the ability to restrict output and thereby raise prices to supracompetitive levels”). Here, it is undisputed that CSX’s output *increased* at both NIT and the POV as a whole during the relevant period. (NS Opening Br. 23 n.7, 24 n.8.) At NIT, CSX’s volumes grew from [REDACTED] movements in 2009 to [REDACTED] movements in 2019, and at the POV as a whole, CSX’s volumes grew from [REDACTED] in 2009 to [REDACTED] in 2019. (NS SOF ¶¶ 70-71 (*citing* Wright Rep. Tbls. 5, 6).) Critically, CSX *does not deny* that it has experienced growth at NIT, contending only that the majority of its growth at the POV has been concentrated at VIG. (CSX SOF ¶ 99.) CSX’s undisputed volume expansion *both* at NIT and POV “suggest[s] that [NS] during that expansion lacked the market power to control marketwide output in the first place,” and leaves CSX unable to prove market power through direct evidence.¹⁴ *Rebel Oil Co., Inc. v. Atl. Richfield Co.*, 51 F.3d 1421, 1441 (9th Cir. 1995).

2. CSX Cannot Support the Relevant Market it Pled Because CSX Has No Expert Evidence to Support its Relevant Market.

Turning to the relevant market, CSX’s Opposition only amplifies the lack of evidence to support the impermissibly narrow and gerrymandered relevant market alleged in the Complaint. NS pointed out that CSX lacks expert evidence to support its as-pled relevant market, because its expert opined that the relevant market is much narrower. (NS Opening Br. 21-22.) CSX first

¹³ Direct evidence of monopoly power is only rarely available and even more rarely, if ever, demonstrated. *Mylan Pharms., Inc. v. Warner Chilcott Pub. Ltd. Co.*, 838 F.3d 421, 434 (3d Cir. 2016); *Bepco*, 106 F. Supp. 2d at 830 (“[I]t is often quite difficult to determine through direct evidence whether monopoly power . . . exists.”).

¹⁴ The undisputed evidence demonstrates that NS’s output at NIT and the POV as whole increased during this period as well. (NS SOF ¶ 70 (*citing* Wright Rep. Tbls. 5, 6).)

contends that the two market definitions match, then argues that any differences between the two do not matter because there is no prejudice. (CSX Opp. Br. 65-67.) CSX is wrong on both counts.

The Markets Do Not Match. The Court can quickly reject CSX's argument that the relevant market pled in its Complaint is the same market that Prof. Marvel identified. CSX alleged that the relevant geographic market is "the intermodal port facilities of Hampton Roads," and identifies the three POV terminals used to move intermodal traffic during the relevant period: PMT, VIG, and NIT.¹⁵ (Compl. ¶ 49). The Complaint defined the relevant service market as "[f]reight transportation by rail in and out of the Hampton Roads' ports," and the customers as "major shippers of freight." (*Id.*) Prof. Marvel defined the relevant geographic market as [REDACTED] (NS Ex. 7, at 21), where CSX is the customer [REDACTED] (NS Ex. 7, at ¶ 12.) Prof. Marvel's proposed relevant market is undeniably *narrower* than what CSX pled,¹⁶ and contrary to CSX's claims, he has not attempted to show that the POV is a properly defined relevant market. (*Cf.* CSX Opp. Br. 67.) Both of his empirical analyses are built on alleged harm to CSX and at a single terminal, NIT. (NS Ex. 71, at 41, 58.) Nowhere does he represent that his damages calculations are "based on an alternative market definition comprising the [POV] as a whole," as CSX now claims. (*Cf.* CSX Opp. Br. 67.) CSX thus has no expert economic support for the relevant market alleged in its Complaint.

CSX Cannot Change Horses Mid-Stream. CSX next contends it can change its market definition because Defendants cannot show prejudice. (CSX Opp. Br. 66-67.) But CSX derives no support from the cases it cites. In *City of New York*, the Second Circuit affirmed the conclusion

¹⁵ Although CSX's Complaint refers to these three facilities as *ports*, the parties in this case have commonly referred to the same facilities as *terminals*. (See NS SOF ¶ 9.)

¹⁶ The differences are: the geographic scope (a single terminal vs. three); the service (rail freight transport vs. on-dock rail access); and the customer(s) at issue (ocean carrier shippers vs. CSX).

that the plaintiff's alleged market was legally insufficient and found prejudice from the proposed amendment where, *inter alia*, the plaintiff had waited three years to seek an amendment, and did so only after confronted with a motion for summary judgment challenging its market definition. *See City of New York v. Group Health, Inc.*, 649 F.3d 151, 156, 158 (2d Cir. 2011). In *Ad-Vantage*, the district court had allowed the plaintiff to amend its market definition to drop one of the two submarkets pled in the complaint, and to proceed solely on the other one—clearly, the defendant had been put on notice by the complaint's allegations. *See Ad-Vantage Tel. Directory Consultants, Inc. v. GTE Directories Corp.*, 849 F.2d 1336, 1342-43 (11th Cir. 1987). In *Four Corners*, CSX omits to mention that while the plaintiffs were allowed to rely on the narrower market definition put forward by their expert at summary judgment, there was no prejudice since the court granted summary judgment for defendants. *See Four Corners Nephrology Assoc., P.C. v. Mercy Med. Ctr. Of Durango*, No. 05-2084, 2008 WL 235533, *5 (D. Colo. May 22, 2008). In *Precision Seed*—an unpublished decision not cited by any other court—the court accepted a market that was differently-worded than in the complaint, but apparently not substantively different in scope. *See Precision Seed Co. v. Consol. Grain & Barge Co.*, No. 3:03-cv-079, 2006 WL 840377, *11 (S.D. Ohio Mar. 30, 2006).

Regardless, for two-and-a-half years, Defendants have litigated this case premised on Plaintiff's Complaint, and it was only after NS pointed out the lack of expert evidence to support the as-pled relevant market that CSX pivoted to arguing (implausibly) that the two relevant markets match, and thus, either would do.¹⁷ (CSX Opp. Br. 66.) CSX should be "saddled with [its] Complaint as filed in this Court." *Cont'l Trend Res., Inc. v. OXY USA Inc.*, 44 F.3d 1465,

¹⁷ Even accepting the argument that Defendants were on notice of CSX's revised market definition when its expert proffered his report, Defendants had no way of knowing which of CSX's two market definitions it planned to advance at trial until CSX filed its Opposition on May 3, 2021.

1482 n.19 (10th Cir. 1995), *judgment vacated on other grounds*, 517 U.S. 1216 (1996).

3. The undisputed facts establish that either market is too narrow.

CSX's Opposition confirmed that any properly defined geographic market in this matter is clearly broader than just NIT or the POV, and that truck competition has inappropriately been excluded from the relevant service market.

Geographic Market. NS explained that the relevant geographic market must be defined by the area within which the defendant's customers (the "proper consumer(s)") can practicably turn to alternative suppliers if the defendant were to raise its prices. (NS Opening Br. 22-23 (*quoting Berlyn*, 73 F. App'x at 583).) As CSX acknowledges, the "proper consumers" here are ocean carriers, (CSX SOF ¶ 101 (contending that "NS's and NPBL's conduct harms ocean carriers")), the relevant inquiry is the options available to ocean carriers to move their freight. *See Rebel Oil*, 51 F.3d at 1435 ("If consumers view the products as substitutes, the products are part of the same market."). While CSX seeks to downplay NS's focus on ocean carriers as a "disagreement on the factual underpinnings of the relevant market definition," contending that port competition has no bearing on the relevant market question (CSX Opp. Br. 63-64), CSX *acknowledges* that ports compete for discretionary cargo, and that ocean carriers "move international intermodal containers to and from the same inland destinations through multiple ports." (CSX SOF ¶ 79.) CSX further protests that it "must take ocean carriers' choices of ports [] as given," (CSX Opp. Br. 63), but CSX's own documents show that pricing affects an ocean carrier's decision to call on a particular port, meaning that railroads can influence an ocean carrier's port choice through their rail pricing.¹⁸ (NS SOF ¶ 25.) The undisputed evidence thus demonstrates that ocean carriers have many options

¹⁸ CSX points out that some of the documents NS relies on address ocean carriers' reactions to port costs, not just rail rates. *See* CSX Opp. Br. n.18. While true, it only supports NS's argument that ocean carriers consider numerous options, including port prices, when deciding through which port to move their discretionary cargo.

through which to move their freight to and from various inland destinations—including through the POV’s closest competitor, the Port of NY/NJ (NS SOF ¶¶ 21, 22, 24, 30)—and the reality is that the impact of CSX’s purported lack of on-dock access at NIT is imperceptible when the true (broader) market dynamics are taken into account.

Service Market. NS explained that the undisputed evidence—including CSX’s own documents and testimony—shows that “end-to-end truck transportation” is a competitive alternative to rail for movements of international intermodal freight of up to 500 miles (NS SOF ¶¶ 37-38), and that CSX’s failure to account for this competition in either of its proposed service markets renders the relevant market deficient as a matter of law. (NS Opening Br. 26-27.) CSX ignores the undisputed evidence demonstrating rail-and-truck competition for destinations of up to 500 miles, suggesting instead that trucks do not compete with rail for movements “beyond local markets.” (CSX Opp. Br. 64.) But the 500-mile service radius in which trucks and rail indisputably compete goes well beyond any definition of “local,”¹⁹ and CSX’s attempt to wave away truck competition thus fails. In light of the undisputed facts demonstrating that there are at least some destinations for which trucks and rail compete for movements of international intermodal freight, CSX’s failure to account for truck transportation in its relevant service market in any way means the market is impermissibly narrow.

In sum, because CSX’s evidence “cannot sustain a jury verdict on the issue of market definition,” “summary judgment is appropriate.” *Rebel Oil*, 51 F.3d at 1435.

B. CSX cannot save its Section 2 attempted and actual monopolization claims.

1. CSX cannot demonstrate that NS engaged in exclusionary conduct.

NS’s opening brief explained that exclusionary conduct is a core element of a Section 2

¹⁹ For example, a 500-mile radius from NIT would include Springfield, MA and Savannah, GA.

Sherman Act monopolization and attempted monopolization claim. (NS Opening Br. 27-28.) CSX completely ignored or failed to squarely address most of NS's arguments.

As NS explained, the gravamen of CSX's complaint is its inability to access its competitor's facilities on its preferred terms. (NS Opening Br. 27-29.) CSX makes no effort to address the decades-old Supreme Court rule limiting the circumstances in which a firm must cooperate with its competitors, instead protesting that it has not pled an essential facilities claim. (CSX Opp. Br. 59.) CSX may not like the label, but its allegations describe just such a scenario.

NS's Motion explained that an essential facilities claim—to the extent such a claim is even still available to a plaintiff in this Circuit—imposes liability when one firm, which controls an essential facility, denies a second firm reasonable access to a product or service that the second firm must obtain in order to compete with the first. (NS Opening Br. 29.) CSX's Opposition confirms that (i) CSX views on-dock access to NIT as essential in order to compete with NS (*see* CSX Opp. Br. 63 (“ocean carriers demand service at the Port of Virginia—including NIT specifically—and CSX *must* have on-dock rail access at NIT to be competitive for their business”) (emphasis added)); and (ii) in order to provide on-dock access at NIT, CSX must utilize tracks that NS owns (and for which NS has provided trackage rights to NPBL).²⁰ (NS SOF ¶¶ 14-15.) The fact that VPA owns NIT (CSX Opp. Br. 60) is irrelevant where it is the NS-owned railroad tracks that CSX must utilize to obtain the allegedly essential on-dock rail access at that terminal. Other than trying to avoid the classification, CSX made no effort to rebut NS's legal analysis or show why summary judgment in defendants' favor is inappropriate on an essential facilities theory.

CSX's next ambit is to argue vaguely that it should survive summary judgment because

²⁰ CSX also cannot dispute that its expert endorses a relevant market consisting of a single means of accessing a single terminal (on-dock rail access at NIT) and a damages theory positing that lack of such access affects CSX's entire network. (NS Ex. 7, at ¶ 40; NS Ex. 71, at ¶ 124).

anticompetitive conduct can come in many forms. (CSX Opp. Br. 59.) But CSX’s own case law recognizes that “courts have been able to adapt the [general Section 2 inquiry] to particular circumstances,” and to develop rules (and exceptions) to implement that inquiry. *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1072, 1073-74 (10th Cir. 2013) (citing the essential facilities doctrine as a “controversial” example of an exception to the rule protecting unilateral conduct). CSX also attempts to avoid summary judgment by arguing that a monopolist’s unilateral conduct can involve third parties (CSX Opp. Br. 60), but here it is clear that if CSX is unable to prove a conspiracy between NS and NPBL (which it cannot, *see* NS Opening Br. 33-36 and Part II, *supra*), the acts of NPBL would be those of a separate and independent firm and do not supply the exclusionary conduct element of a monopolization or attempted monopolization claims.²¹

Finally, CSX argues in passing that STB jurisdiction does not preclude its claims. (CSX Opp. Br. 30 n.16.) However, CSX ignores entirely that where a state or federal agency such as the STB here has the effective power to compel sharing and regulate its scope and terms, it is “less plausible” that the antitrust laws contemplate the additional scrutiny that CSX contended is warranted here. (NS Opening Br. 32 (*citing Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko LLP*, 540 U.S. 398, 407-08 (2004).) Indeed, courts are typically reluctant to step in to regulate “forced sharing” which would require courts to “pick and choose the applicable terms and conditions” of dealing. *Novell*, 731 F.3d at 1073 (citing *Trinko*, 540 U.S. at 407-08).

²¹ CSX’s cited cases are not to the contrary. *Cf. Novell*, 731 F.3d at 1066 (finding lawful a refusal to provide rival with access to intellectual property despite previously agreeing to share); *Conwood Co, LP. v. U.S. Tobacco Co.*, 290 F.3d 768, 778 (6th Cir. 2002) (defendant engaged in conduct in third-party retailers’ stores without retailers’ permission); *United States v. Microsoft*, 253 F.3d 34, 60, 67 (D.C. Cir. 2001) (defendant engaged unaffiliated OEMs and internet access providers in restrictive licensing and exclusive dealing agreements); *Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1087, 1089 (D.C. Cir. 1998) (overturning dismissal of attempted monopolization claims on jurisdictional grounds and affirming dismissal of essential facilities claims).

2. CSX's inability to show foreclosure dooms its Section 2 claims.

NS's opening brief demonstrated CSX's inability to show that it was foreclosed from the alleged relevant market. (NS Opening Br. 32-33.) CSX responds only in passing, contending that this issue presents "disputed issues of fact" (CSX Opp. Br. 60 n.33), but (i) as discussed in Part III.A.1, *supra*, CSX *does not deny* that it has experienced volume growth at NIT and POV (CSX SOF ¶ 99); and (ii) CSX did not dispute that it chose to pay the same \$210 switch rate to move traffic elsewhere (CSX SOF ¶ 75)—or that its own executives *approved* that rate. (CSX SOF ¶ 25.) In addition, CSX's effort to distinguish *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 924 F.2d 539 (4th Cir. 1991), and gin up a factual dispute about the *reasonableness* of the \$210 switch rate is merely a distraction. (CSX Opp. Br. 68-69.) While CSX postulates a distinction between variable costs and fixed costs, here CSX's expert acknowledged that in concluding the rate was unreasonable, he made *no effort at all* to account for *any* of NPBL's costs, regardless of whether they were fixed or variable. (NS SOF ¶ 52.) There can be no foreclosure where, as shown here, the terms of access that are offered are *reasonable*, even if they are not "the terms and conditions [plaintiff] desires." *Loren Data Corp. v. GXS Inc.*, 501 F. App'x 275, 283-284 (4th Cir. 2012).

C. CSX cannot demonstrate harm to competition under the Rule of Reason.

NS's Motion explained that this is a rule of reason case because NS and NPBL are in a vertical relationship, and that CSX's claims would fail that analysis even if CSX were somehow able to demonstrate the existence of an agreement between NS and NPBL.²² (NS Opening Br. 36.)

CSX first argues that *per se* treatment is appropriate here because NS and NPBL are not in a vertical relationship but are rather "*potential* horizontal competitors." (CSX Opp. Br. 61 (*citing Lumber Liquidators, Inc. v. Cabinets To Go, LLC*, 415 F. Supp. 3d 703 (E.D. Va. 2019).) Such a

²² As explained in Part II above, CSX fails to supply any evidence showing a conspiratorial agreement between NS and NPBL. Therefore, CSX's conspiracy claims must be dismissed.

theory is contrary to all of the testimony in this case. No witness has ever suggested NS and NPBL are competitors, potential or otherwise. (NS SOF ¶ 4.) Even under CSX's potential competitor theory (which was not pled in the Complaint), a firm must have "the 'necessary desire, intent, and capability to enter the market'" to qualify as a potential competitor. *Lumber Liquidators*, 415 F. Supp. 3d at 712 (quoting *Engine Specialties, Inc. v. Bombardier, Ltd.*, 605 F.2d 1, 9 (1st Cir. 1979)). NS and NPBL do not compete with one another for on-dock access to NIT because NS is the only company that can offer that access. (NS Opening Br. 35-36; see also NS SOF ¶ 4.) NS provides trackage rights to NPBL, which in turn provides the actual transportation of containers for railroads other than NS who wish to access NIT on-dock, but NPBL itself does not contract with ocean carriers. (NS SOF ¶¶ 14-16; CSX SOF ¶ 9.) The "potential competitor" test is thus inapposite because there is no record evidence suggesting that NPBL ever sought to contract with ocean carriers in competition with NS.²³ Thus, because any NS-NPBL agreement must necessarily be a vertical one, it cannot fall into the "small group of restraints" that are *per se* unlawful. (NS Opening Br. 35); see also *AmEx*, 138 S. Ct. at 2284.

CSX further contends that its Section 1 claims survive summary judgment because the resolution of whether the alleged NS-NPBL agreement unreasonably restrained trade rests on disputed questions of fact as to relevant market, market power, and whether the NPBL rate is justified. (See CSX Opp. Br. 62-65, 67-69.) NS addresses those arguments elsewhere in this brief.²⁴

²³ *Continental* also does not aid CSX here (see CSX Opp. Br. 61), as that case addressed a vertical franchisor-franchisee relationship and narrowed the categories of restraints that could be deemed *per se* unlawful. See *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49-59 (1977).

²⁴ See Part III.A.2, *supra* (market definition); Part III.A.1, *supra* (market power); Part III.B.2 (foreclosure); and Part III.B.2 (reasonableness of the switch rate).

IV. NS IS ENTITLED TO SUMMARY JUDGMENT ON CSX'S BREACH OF CONTRACT CLAIM.

CSX's Opposition provides no answer to NS's Motion seeking summary judgment on the breach of contract claim. First, CSX *cites no admissible evidence* in arguing against dismissal—indeed that section of CSX's Opposition does not contain a single record citation. (CSX Opp. Br. 69-70.) Moreover, CSX does not contest that it cannot base its contract claim on: (1) pre-2014 conduct, as it is barred by the statute of limitations; (2) an alleged lack of *physical* access to NIT, because that is governed by the trackage rights agreement, not the NPBL Operating Agreement; and (3) NS's shareholder vote against CSX's 2018 corporate governance proposals, as that is governed by NS's specific legal rights under 1989 Agreement. (NS Opening Br. 37-40.) CSX's failure to provide any evidence in response to NS's evidence, or argument on these points, merits summary judgment for NS on this claim. *See Variety Stores, Inc. v. Wal-Mart Stores, Inc.*, 888 F.3d 651, 659 (4th Cir. 2018) (“[o]nce the moving party makes a Rule 56 motion, ‘[t]he burden is on the nonmoving party to show that there is a genuine issue of material fact for trial’”).

CSX instead resorts to broad legal conclusions and generic facts about its 2018 Rate Proposal, arguing that various contractual clauses required NS to override the Operating Agreement's uniform rate provision. (CSX Opp. Br. 69-70.) This argument is wholly unsupported. First, NS could not have breached the cordial cooperation clause by “refusing to consider proposals that would improve the revenues of NPBL,” as CSX alleges, (Compl. ¶ 107), **because CSX never put its 2018 Rate Proposal to a vote.** (NS SOF ¶ 60.) As explained in Part II.B.2, *supra*, CSX never asked that NS *do* anything. Further, CSX's attempt to use the general mutual benefit recital, cordial cooperation clause, and implied covenant of good faith to override NS's right to enforce the more specific uniform rate provision is contrary to clearly established Virginia law holding that “that which is specially directed to a particular matter controls in respect thereto over one

which is general in its terms.” *Condo. Servs., Inc. v. First Owners’ Ass’n of Forty Six Hundred Condo., Inc.*, 281 Va. 561, 573 (2011). NS could thus not have violated the Operating Agreement by upholding the uniform rate provision—CSX witnesses *admitted* as much. (NS Ex. 6, at 28:13-16, 23 (Q: “Does CSX agree that NSR would be within its rights to seek to uphold the agreement embodied in . . . the operating agreement?” A: “Yes.”); NS Ex. 22, at 130:24-131:14 (“fully agree[ing]” that amendment or approval of an exception to the Operating Agreement is needed for NPBL to accept a CSX rate proposal for a contract rate).)

Finally, while every contract contains an implied duty to act in good faith, the Supreme Court of Virginia has established that this implied obligation does not – *and cannot* – override the specific terms of the contract. *Condo. Servs.*, 281 Va. at 573. This means that “the duty of good faith does not prevent a party from exercising its explicit contractual rights” *Va. Vermiculite, Ltd. v. W.R. Grace & Co.-Conn.*, 156 F.3d 535, 542 (4th Cir. 1998) (citation omitted). Put another way, a party with valid contractual rights does not breach any obligation of good faith and fair dealing by exercising those contractual rights. *Mahoney v. NationsBank*, 249 Va. 216, 219–21 (1995). As explained above, this is the precise situation here: NS had a right to enforce the uniform rate provision and exercise of that right could not, as a matter of law, violate the duty of good faith.

Accordingly, NS is entitled to summary judgment on CSX’s claim that NS breached the NPBL Operating Agreement by failing to vote for the 2018 Rate Proposal. Because CSX failed to identify admissible evidence supporting its claim for breach of contract on any other ground, NS is entitled to summary judgment on the entirety of CSX’s breach of contract claim.

CONCLUSION

For the foregoing reasons, NS respectfully requests that the Court grant NS’s Motion for Summary Judgment against CSX and grant any other relief the Court deems appropriate.

Date: May 13, 2021

Respectfully submitted,

NORFOLK SOUTHERN RAILWAY COMPANY

/s/ Michael E. Lacy

Alan D. Wingfield (VSB No. 27489)

Michael E. Lacy (VSB No. 48477)

Massie P. Cooper (VSB No. 82510)

TROUTMAN PEPPER HAMILTON SANDERS LLP

1001 Haxall Point

Richmond, VA 23219

Telephone: (804) 697-1200

Facsimile: (804) 698-6061

Email: alan.wingfield@troutman.com

Email: michael.lacy@troutman.com

Email: massie.cooper@troutman.com

John C. Lynch (VSB No. 39267)

Kathleen M. Knudsen (VSB No. 90845)

TROUTMAN PEPPER HAMILTON SANDERS LLP

222 Central Park Avenue, Suite 2000

Virginia Beach, VA 23462

Telephone: (757) 687-7759

Facsimile: (757) 687-7510

Email: john.lynch@troutman.com

Email: kathleen.knudsen@troutman.com

Tara L. Reinhart

John R. Thornburgh II

Thomas R. Gentry

SKADDEN, ARPS, SLATE,

MEAGHER & FLOM LLP

1440 New York Avenue, N.W.

Washington, DC 20005

Telephone: (202) 371-7000

tara.reinhart@skadden.com

john.thornburgh@skadden.com

thomas.gentry@skadden.com

*Counsel for Defendant Norfolk Southern Railway
Company*

115962626

EXHIBIT 122

Page 1

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

No. 2:18cv530

CSX TRANSPORTATION, INC.,
individually and on behalf
of NORFOLK & PORTSMOUTH BELT
LINE RAILROAD COMPANY,

Plaintiff,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
et al.,

Defendants.

Remote Proceedings

January 13, 2021

9:38 a.m. - 6:40 p.m.

VIDEO DEPOSITION OF ROBERT GIRARDOT
(via Teleconference)

Taken before SUZANNE VITALE, R.P.R., F.P.R.
and Notary Public for the State of Florida at Large,
pursuant to Notice of Taking Deposition filed in the
above cause.

Job No. CS4395739

1 everybody has to have the same rate.

2 BY MR. WINGFIELD:

3 Q. And so would CSX agree that the first
4 sentence of paragraph ninth of the operating
5 agreement would prohibit NPBL to giving one of its
6 member railroads a special deal?

7 MR. HATCH: Same objections, calls for a
8 legal conclusion, hypothetical, vague.

9 THE WITNESS: I wouldn't agree with that.
10 They would be prohibited from providing a
11 special deal that wasn't available to all of
12 the other owners.

13 THE COURT REPORTER: I'm sorry. What was
14 the last sentence?

15 THE WITNESS: I'm saying, what this says
16 to me, being someone in the railroad business,
17 that says that the NPBL would be prohibited to
18 offer a special deal to one railroad that was
19 not available to any of the other owning
20 railroads, so ...

21 BY MR. WINGFIELD:

22 Q. Is it your position that -- strike that.

23 Is it CSXT's position that the other
24 railroads could charge themselves one rate and other
25 customers of NPBL could be charged a higher rate?

EXHIBIT 123

Filed Under Seal

EXHIBIT 124

Filed Under Seal

EXHIBIT 125

Filed Under Seal

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD 36836

**NORFOLK SOUTHERN CORPORATION
NORFOLK SOUTHERN RAILWAY COMPANY
—ACQUISITION OF CONTROL—
NORFOLK & PORTSMOUTH BELT LINE RAILROAD COMPANY**

**NORFOLK AND PORTSMOUTH BELT LINE RAILROAD COMPANY'S
REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division**

CSX TRANSPORTATION, INC.,

Plaintiff,

v.

Civil Action No. 2:18-cv-530-MSD-RJK

**NORFOLK SOUTHERN RAILWAY
COMPANY, *et al.*,**

Defendants.

**NORFOLK AND PORTSMOUTH BELT LINE RAILROAD COMPANY'S
REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

Despite 118 exhibits and 102 paragraphs recast as its own statement of fact, CSXT still identifies no conspiratorial conduct whatsoever to establish its case against the Belt Line. CSXT's opposition relies on sweeping statements, not evidence of conspiratorial acts involving the Belt Line. CSXT repeatedly blurs its descriptors, describing concerted action by "Defendants" but identifying only acts by NS.

Perhaps most telling is that CSXT does not dispute the reasonableness of the Belt Line's uniform switching rate. It repeatedly describes the rate as "exorbitant," hoping that repetition will make it so, but offers no evidence to contradict that the rate is equal to the Belt Line's per car operating costs.

Even if there were a glimmer of truth to CSXT's biased complaints—which there is not—its claims against the Belt Line are all time-barred, all fraught with critically missing elements of proof, and all dependent on this Court ignoring [REDACTED], which is the true reason it uses trucks instead of rail to access NIT, not a contrived conspiracy.

Factual disputes require facts, not unsupported arguments. Without concerted action by the Belt Line, and without any evidence contradicting the Belt Line's cost-based switching rate, this case is ripe for summary judgment. The Belt Line cannot be forced to operate below cost, or punished for failing to do so, and its switching rate cannot be artificially judged against either [REDACTED]. Because CSXT cannot support its case, summary judgment should be granted for the Belt Line.

REPLY TO CSXT'S STATEMENT OF DISPUTED MATERIAL FACTS

CSXT's opposition fails to comply with Local Rule 56(B) because it obfuscates what facts CSXT genuinely disputes. While CSXT identifies 18 Belt Line facts that it does not dispute,¹ the presentation of the 36 it contends are disputed masks the fact that it identifies no evidence to contradict them.² "[W]hile a court occasionally may forgive a litigant for failing to strictly comply with mere procedural formalities in the Local Rules, a violation of Local Rule 56(B) lies at the more serious end of the spectrum of non-compliance." *Certusview Techs., LLC v. S&N Locating Servs., LLC*, 2015 U.S. Dist. LEXIS 103982, at *15 (E.D. Va. 2015). When a party fails to produce evidence to dispute a material fact, the court may assume the fact is admitted. E. D. Va. Local Civ. R. 56(B); *see also Integrated Direct Marketing, LLC v. May*, 129 F. Supp. 3d 336, 345 (E.D. Va. 2015) (admitting defendant's statement of facts after plaintiff failed to offer evidence to dispute fact, instead making only argument based on its interpretation of facts).

Here, CSXT fails to produce evidence to support its "disputed" facts. Critically, it fails to come forward with any evidence of (1) the Belt Line's participation in a conspiracy or (2) the Belt Line's \$210 tariff rate exceeding its operating costs, despite claiming to dispute the Belt Line's facts about those issues. Rather than dispute the Belt Line's facts with evidence, CSXT improperly argues its own interpretation of the facts. That is insufficient to avoid summary judgment.

¹ CSXT explicitly does not dispute Belt Line statements of fact 1-5, 11-14, 16-17, 20-22, 34, and 37. *See* CSXT Br. at 7.

² CSXT claims it disputes the Belt Line's remaining statements of fact, but on close reading, it fails to cite evidence to demonstrate any factual dispute of the following 33 Belt Line statements of fact: 6-10, 15, 18-19, 24-29, 31-36, 38-45, 47-54. For three facts it has arguably proffered contradicting evidence, but the disagreements are not material. *Compare* NPBL SOF ¶¶ 23, 30, 46, *with* CSXT SOF ¶¶ 72 n.14, 53 & 53 n.13, 73. Summary judgment does not hinge on whether switch charges can vary, CSXT SOF ¶ 72 n.14; the exact number of trains the Belt Line moved in 2015, CSXT SOF ¶ 53 & 53 n.13; [REDACTED]. CSXT SOF ¶ 73.

A. CSXT offers no evidence to show that the Belt Line conspired with NS.

Concerted action is an essential element of a conspiracy, but CSXT does not identify, in any part of the voluminous record, concerted action by the Belt Line. Beginning with a long litany about what it complains occurred in 2008-2011, CSXT SOF ¶¶ 10-44, CSXT generically refers to actions by “Defendants” yet only identifies actions by NS employees. As but one example, CSXT describes how in 2010 its appointed director made a motion that the Belt Line be allowed to use CSXT locomotives (for free to move CSXT intermodal traffic to NIT, and complains that the three NS-appointed members of the Belt Line Board voted against it. CSXT SOF ¶ 40. CSXT specifically cites this as an example of “concerted action” by the Belt Line. *See* CSXT Br. at 56 (citing CSXT SOF ¶ 40). But CSXT avoids telling the Court that the Belt Line’s then-president sided with the two CSXT-appointed Board members in favor of CSXT’s proposal. *See* CSX Ex. 47. Plainly, there was no “concerted action” by the Belt Line, and CSXT’s recitation of complaints about NS employees cannot make it so.

CSXT’s allegations regarding the Belt Line’s handling of container traffic in 2015, CSXT SOF ¶ 45-55, fare no better. The Belt Line successfully moved every train at NIT that CSXT requested. The Belt Line also coordinated with NS to set up regular twice weekly operating windows for such moves. CSXT offers no evidence to dispute those facts or any evidence to explain how it was harmed by the Belt Line successfully handling its NIT traffic that year.

CSXT similarly claims that another example of concerted action was avoiding a vote on CSXT’s 2018 rate proposal. But the undisputed facts are that the Belt Line’s management (1) analyzed the proposals, (2) provided its analysis to CSXT (to which it never responded), (3) recommended that the Board appoint a rate committee to further analyze the proposals; and (4) that the CSXT-appointed Board members never made a motion to approve the rate proposal or

even appoint a rate committee. CSXT “disputes” these only by arguing that the Board did not vote on the proposal, and that the NS-appointed directors opposed an “independent” rate committee.

Lastly, by CSXT’s own admission, it is undisputed “that NPBL and NS did not enter a new agreement in 2018 to increase the amount NPBL pays NS to access NS’s tracks to NIT.” *See* NPBL Br. at 21-22. Yet CSXT devotes six paragraphs to a new contention that “Defendants” used their purported “dispute” over trackage rights as pretext to justify NPBL’s “artificially high rate” and to reject CSX’s proposal seeking a “commercially reasonable rate.” CSX SOF ¶¶ 56-61. While none of those six paragraphs identify evidence of any involvement by the Belt Line, even if they did, it is nothing but a repackaging of CSXT’s complaint about the \$210 rate set in 2010. CSXT thus is barred from using it to contradict its admission.

B. CSXT offers no evidence to dispute the Belt Line’s operating costs.

CSXT does not dispute that the Belt Line was created in 1897 as a break-even business. It claims to “dispute” that the Belt Line’s switching rate is based on its operating costs, *see* NPBL SOF ¶¶ 43-45, without identifying any evidence to contradict it. In particular, the \$210 rate has consistently been [REDACTED], *see* NPBL SOF ¶ 42, another fact CSXT does not dispute. This is critical because the law does not require [REDACTED]. While CSXT claims to “dispute” this, nowhere does it point to any contrary evidence, only arguing that the Belt Line’s operating costs for traffic at NIT should be treated as incremental costs at the expense of all its other customers who pay the uniform tariff rate of \$210 per car. CSXT SOF ¶ 74.

CSXT thus fails to comply with Local Rule 56(B) for not supporting its claimed “disputed” facts with evidence. As a result, the Court should assume that the facts identified by the Belt Line are admitted, which supports granting it summary judgment.

ARGUMENT³

I. The statute of limitations bars CSXT’s federal antitrust conspiracy claims.

A. When a plaintiff alleges a “decades-long” conspiracy, under federal antitrust law it may only recover damages for acts that occurred within the limitations period.

CSXT suggests that the parties disagree about how the statute of limitations applies with respect to its two federal antitrust counts. CSXT Br. at 42. In fact, there is no disagreement. The cases cited by both sides all hold the same thing: a plaintiff cannot recover damages attributable to acts that occurred more than four years before suit was filed, but can recover those damages attributable to acts occurring within the limitations period. CSXT simply does not realize that this rule is fatal to its damages model, which extends back to nine years before suit was filed and fails to tie its damages to alleged acts within the limitations period.

CSXT only cites half the analysis. For example, in *Zenith Radio Corp. v. Hazeltine Research*, 401 U.S. 321 (1971), the Supreme Court held that:

In the context of a continuing conspiracy to violate the antitrust laws, such as the conspiracy in the instant case, this has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act....

Id. at 338. But CSXT omits the rest: “...and that, *as to those damages*, the statute of limitations runs from the commission of the act.” *Id.* (emphasis added).

Likewise, both parties rely on *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997), but CSXT cites to it only for the proposition that “in the case of a continuing violation ..., each overt act that is part of the violation and that injures the plaintiff ... starts the statutory period running

³ Because CSXT filed a consolidated opposition to the motions for summary judgment filed by the Belt Line and NS, the Belt Line adopts and incorporates the arguments in NS’s reply brief that are readily transferable to the Belt Line. *U.S. ex rel. LaCorte v. SmithKline Beecham Clinical Labs, Inc.*, 149 F.3d 227, 237-38 (3d Cir. 1998).

again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times."

CSXT Br. at 42 (quoting *Klehr*). CSXT again fails to include the most important part:

But the commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period.... *The plaintiff cannot use an independent, new predicate as a bootstrap to recover for injuries caused by other earlier predicate acts that took place outside the limitations period.*

Id. at 189-90 (emphasis added).⁴

B. CSXT's damages model cannot sustain a verdict because it forces the jury to speculate which of CSXT's damages are for acts within the limitations period.

Even if CSXT could show that an overt act in furtherance of a conspiracy was committed within the limitations period, CSXT is barred from recovering damages for earlier acts that occurred outside the limitations period. CSXT filed suit on October 4, 2018, so the 4-year limitations period on its federal antitrust claims extends back to October 2014. Yet CSXT's model only calculates aggregate damages caused by the entirety of the alleged conspiracy, including damages as far back as 2009 for acts allegedly committed in 2008. *See* Marvel Reply Report (ECF No. 301-10) at ¶¶ 124, 126. That leaves the jury to speculate as to CSXT's recoverable losses. Even CSXT agrees a jury verdict awarding damages cannot be "based on speculation or guesswork." CSXT Br. at 49-50 (quoting *LePage's v. 3M*, 324 F.3d 141, 162 (3d Cir. 2003)).

⁴ The other cases CSXT cites affirm this principle. *See Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 502 (1968) (allowing antitrust claim in 1955 for conduct that began in 1912, but only permitting recovery of damages that accrued within limitations period); *Xechem, Inc. v. Bristol-Myers Squibb Co.*, 372 F.3d 899, 902 (7th Cir. 2004) (for suit filed in 2003, plaintiff could recover damages for acts in 2000 and 2002 but not in 1997); *Mayor v. Actelion Pharms. Ltd.*, 2021 U.S. App. LEXIS 10531, at *21 (4th Cir. 2021) ("[E]ach time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act"); *W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 107 (3d Cir. 2010) (plaintiff may only "recover damages for the acts that occurred within the limitations period").

CSXT relies exclusively on its expert to calculate its alleged damages. Its expert states unequivocally that he calculated an aggregate amount of damages that included damages allegedly suffered as far back as October 1, 2009. *See* Marvel Reply Report (ECF No. 301-10) at ¶¶ 124, 126 (stating that “in total” he calculated damage “from October 1, 2009 through December 31, 2020” and that “the source of the damages I estimate is the totality of NS’s and NPBL’s efforts to foreclose CSX, rather than NPBL’s exorbitant switch rate alone”).

CSXT concedes in its opposition that its expert includes damages attributable to acts accruing outside the limitations period, and that he fails to distinguish damages for acts within the limitations period: “To be sure, CSX’s expert, Dr. Howard Marvel, calculated profits CSX lost due to ‘the totality of NS’s and NPBL’s efforts to foreclose CSX’ from on-dock rail at NIT. *Most of these occurred in years* after 2013—within the limitations periods.” CSXT Br. at 49 (internal citations omitted) (emphasis added).

This is fatal to CSXT’s federal antitrust conspiracy claims. When a plaintiff’s evidence gives the jury no basis on which to consider or account for the effect of the statute of limitations on alleged damages, it would be error to submit it to the jury.⁵ “[T]he jury would be left entirely

⁵ Failure to disaggregate damages is routinely fatal to a plaintiff’s antitrust claims. *Cf. Ky v. Marathon Petroleum Co. Lp*, 464 F. Supp. 3d 880, 894-95, 897 (W.D. Ky. 2020) (granting summary judgment when plaintiff’s expert report “did not specify what portion of the calculated damages figure stems from Defendants’ legal conduct and what portion, if any, is caused by any of their allegedly illegal forms of conduct.”); *In re Independent Serv. Orgs. Antitrust Litig.*, 114 F. Supp. 2d 1070, 1090-91 (D. Kan. 2000) (granting summary judgment because plaintiff failed to meet its burden to disaggregate the amount of losses caused by actionable conduct); *Vernon v. So. Cal. Edison Co.*, 955 F.2d 1361, 1372 (9th Cir. 1992) (“serious flaws in the only damage study which could be proffered to the jury placed [plaintiff] in the position of having no proper proof of damages at all”); *United States Football League v. NFL*, 842 F.2d 1335, 1378-79 (2d Cir. 1988); *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 808 (9th Cir. 1988); *Farley Transp. Co. v. Santa Fe Trail Transp. Co.*, 786 F.2d 1342, 1351 (9th Cir. 1985); *ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F. Supp. 423, 434 (N.D. Cal. 1978, *aff’d per curiam sub nom.*, *Memorex Corp. v. IBM Corp.*, 636 F.2d 1188 (9th Cir. 1980), *cert. denied*, 452 U.S. 972 (1981)).

to speculation to determine [what damages were] triggered by acts that accrued before or after the limitations period began, or to assess what portion of [damages are] attributable to acts that caused harm within the limitations period.” *Gumwood HP Shopping Partners L.P. v. Simon Prop. Grp., Inc.*, 221 F. Supp. 3d 1033, 1044-45 (N.D. Ind. Nov. 22, 2016) (excluding plaintiff’s expert because he calculated aggregate damages partly attributable to acts outside the limitations period); *see also Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946) (“Once causation of damages has been established, the amount of damages may be determined by a just and reasonable estimate *as long as the jury verdict is not the product of speculation or guess work*”) (emphasis added).

CSXT argues that its expert “calculated CSX’s lost profits by year,” as a potential way to salvage its model. CSXT Br. at 51 (citing Exhibits 15 and 16 of Marvel’s Reply Report). That is meaningless because it is not just a matter of subtracting the damages he calculated for years prior to 2014. Like the excluded expert in *Gumwood*, Marvel improperly opines that the acts outside the limitations period (including the clearly-time barred acts dating back to 2008) caused part of the alleged yearly damages within the limitations period.

The cases on which CSXT relies are inapposite. For example, in *Poster Exchange, Inc. v. National Screen Service Corp.*, 517 F.2d 117 (5th Cir. 1975), where the court approved “day by day calculation of accruing injury,” it was specifically only for injury accruing within the limitations period; the plaintiff expressly disclaimed any recovery of damages for acts outside the limitations period. *See id.* at 124. The court stressed that “a newly accruing claim for damages must be based on some injurious act actually occurring during the limitations period, not merely the abatable but unabated inertial consequences of some pre-limitations action.” *Id.* at 128.

The issue, therefore, is not that CSXT failed to “tie its damages calculation to specific overt acts,” as CSXT frames it, *see* CSXT Br. at 49, but that CSXT failed to tie its damages to acts that occurred within the limitations period. And on this, the failure is indisputable.

The argument advanced by CSXT in its opposition contradicts settled case law and would render the statute of limitations meaningless. CSXT suggests the only thing it must do is pay the Belt Line’s allegedly “exorbitant” rate one time during the limitations period, and then all of its damages for the entirety of the alleged conspiracy are back on the table. CSXT Br. at 45. Under that theory, the *Hanover Shoe* plaintiff could sue in 1955 and recover damages back to 1910 when the first act in furtherance of the conspiracy was committed. The Supreme Court rejected such an absurd result, limiting recovery only of damages within the limitations period. *See* 392 U.S. at 502. CSXT is unable to do that here based on its damages model. *See, e.g., Comcast Corp. v. Behrend*, 569 U.S. 27, 38 (2013) (plaintiffs’ damages model, which calculated total damages from four alleged violations, was impermissibly overinclusive, because it could not establish damages attributable to the one violation that was still actionable after the other three were dismissed).

Because of CSXT’s inability to present any competent evidence of its damages attributable to acts occurring within the limitations period, CSXT is missing an essential element of the federal antitrust claims against the Belt Line, entitling it to summary judgment on Counts I and II.

C. Even if CSXT’s damages model was not overinclusive, there was no continuing violation or new overt act during the limitations period.

For CSXT to reach the jury on damages, it first must show (not just allege) that overt acts in furtherance of a conspiracy were committed within the limitations period. CSXT has no evidence with which to make the requisite showing. Thus, all of CSXT’s claims against the Belt Line are either time-barred or not actionable.

Last year, this Court ordered CSXT to identify all overt acts by the Belt Line it contends were committed in furtherance of the alleged conspiracy. ECF No. 236. In response, CSXT identified six: [REDACTED]

[REDACTED]. *See* Compl. ¶ 34; CSXT’s 2nd Supp. Resp. to NPBL Interrog. 4 (NPBL Ex. 46, ECF No. 302-1).

The Belt Line explained in its motion for summary judgment how the first four alleged acts are time barred, and why the two acts in 2015 and 2018 are not actionable. *See* NPBL Br. at 15-18, 27-30. The Belt Line also pointed out how CSXT admitted that the only other alleged conspiratorial act—the “new agreement in 2018” to increase the trackage fee the Belt Line pays NS—never occurred. *See id.* at 21-22 (citing CSXT’s admission).

In a desperate attempt to avoid summary judgment, CSXT (1) proffers two new overt acts that were never disclosed in discovery, (2) mistakenly applies the continuing-violation doctrine to keep its antitrust claims alive, (3) now pleads an alternative set of facts to keep its state-law conspiracy claims alive, and (4) attempts to manufacture a genuine dispute of material fact about the two acts in 2015 and 2018 by relying on inadmissible hearsay evidence and declarations that are not based on personal knowledge. None are valid; all should be rejected.

1. Only the six overt acts CSXT disclosed in discovery are at issue. At this late date, CSXT cannot introduce new acts to escape summary judgment.

Recognizing that four of the six overt acts it identified are time-barred, and that the other two are not actionable, CSXT contends for the first time in its opposition brief that there were two additional overt acts which are not time-barred: (1) the Belt Line charged CSXT an “exorbitant” rate for moving intermodal containers in 2015, and (2) even though there was no “new agreement in 2018” over trackage fees, Defendants nonetheless used “their purported ‘dispute’ over trackage

rights as a pretext to justify NPBL's artificially high rate and to reject CSX's proposal seeking a commercially reasonable rate." CSXT Br. at 43, 45, 48, 53.

CSXT is not permitted to assert new contentions of overt acts in response to a motion for summary judgment. "It is well settled that a plaintiff may not advance a new argument in response to a summary judgment motion." *Abuelyaman v. Illinois State Univ.*, 667 F.3d 800, 814 (7th Cir. 2011). CSXT failed to disclose either of these alleged acts in discovery, despite a court order requiring it to do so. The Belt Line's interrogatories asked CSXT to identify "the specific overt act(s) by NPBL" and "the specific communication(s) between the Belt Line and NS" that CSXT contends form the basis for the alleged conspiracy. *See* NPBL Ex. 46 (ECF No. 302-1). When CSXT objected to answering, Judge Leonard ordered it "to provide appropriate responses to NPBL's interrogatories 3 and 4..." ECF No. 236. CSXT responded by identifying the six overt acts discussed in the Belt Line's motion. CSXT did not identify the two additional acts now raised in its opposition, nor did it identify communications between the Belt Line and NS about either.

CSXT therefore violated Rule 26(e) and Rule 37(c)(1), and is barred from using either act to oppose the Belt Line's motion. *See* Fed. R. Civ. P. 37(c)(1) ("If a party fails to provide information ... as required by Rule 26(a) or (e), the party is not allowed to use that information ... to supply evidence on a motion ..., unless the failure was substantially justified or is harmless.").⁶

Tacitly acknowledging that its failure is not harmless, CSXT instead argues that it was "substantially justified." It claims that interrogatory 4 "did not ask CSX to identify all wrongful conduct within the limitations period; nor did it ask for examples of action (or purposeful inaction)

⁶ The sanction of exclusion is "automatic." Fed. R. Civ. P. 37 advisory committee notes, 1970 Amend. ("Paragraph (1) prevents a party from using as evidence any ... information that, without substantial justification, has not been disclosed as required by Rules 26(a) and 26(e)(1). This automatic sanction provides a strong inducement for disclosure of material that the disclosing party would expect to use as evidence ... on a motion, such as one under Rule 56.").

by NS. CSX's response is thus not a catalogue of all evidence supporting its claims." CSXT Br. at 43 n.22 (citing its interrogatory answer). The interrogatory asked CSXT to

Identify the specific overt act(s) by NPBL that you contend form the basis for the conspiracy alleged in Counts I, II, VIII, and IX of your Complaint, including the identities of the specific persons who you contend committed such act(s), the dates and circumstances of such act(s), and all documents that support your answer.

NPBL Ex. 46 (ECF No. 302-1). It is impossible to interpret that as only asking about conduct outside the limitations period. And both acts CSXT cites would be "examples of action by" the Belt Line, not NS. The Belt Line charged the \$210 switching rate to CSXT in 2015. It is the Belt Line that CSXT alleges used the trackage rights dispute as pretext.

Because CSXT's failure is neither substantially justified nor harmless, it cannot introduce either of these acts as evidence to oppose summary judgment. It is limited to the six overt acts it disclosed in discovery.

2. The continuing-violation doctrine that CSXT relies on to prevent the first four overt acts from being time-barred does not apply in this case.

To avoid the four-year federal statute of limitations, CSXT invokes the continuing violation doctrine. CSXT Br. at 42-46. There is no continuing violation, though, because there was no overt act committed within the limitations period. CSXT alleges there were two new overt acts after 2014—denial of a scheduling window in 2015 and failure to adopt CSXT's 2018 proposals—but offers no evidence to support them. Accordingly, CSXT's claims are all time-barred.

"In the context of a continuing conspiracy to violate the antitrust laws, ... each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act." *Zenith*, 401 U.S. at 338. Even when a plaintiff alleges a continuing violation, an overt act by the defendant is required to restart the statute of limitations and the statute

runs from the last overt act. *See, e.g., Haier Am. Trading, LLC v. Samsung Elecs., Co.*, 2018 U.S. Dist. LEXIS 152676, at *18 (N.D.N.Y. Sept. 7, 2018). Two elements must exist for an overt act to restart the statute of limitations: “(1) it must be a new and independent act that is not merely a reaffirmation of a previous act; and (2) it must inflict new and accumulating injury on the plaintiff.” *Id.* (citation omitted) (granting motion to dismiss because plaintiff’s allegations of four new overt acts within limitations period were not plausible to keep antitrust claims from being time-barred).

a. There was no new overt act in 2015.

In this case, there was no new overt act to restart the statute of limitations period. CSXT claims that Defendants denied a scheduling window for the Belt Line to move CSXT’s traffic into NIT in 2015. But that allegation is shown to be false by the actual evidence. *See Haier, supra; Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

The undisputed facts are that (1) CSXT requested that the Belt Line move traffic at NIT in 2015, *see* CSXT SOF ¶ 45; (2) the Belt Line requested that NS provide an operating window to complete the move, *see* CSXT SOF ¶ 46; (3) “NS eventually agreed to provide an operating window for this train,” *see* CSXT SOF ¶ 47; (4) the Belt Line successfully completed the move for CSXT, *see* CSXT SOF ¶ 48; (5) CSXT does not dispute that, after the first train, the Belt Line set up a regular operating window with NS for CSXT trains [REDACTED], *see* NPBL SOF ¶ 34; and (6) the Belt Line moved additional trains for CSXT in 2015. *See* CSXT SOF ¶ 53. In other words, it is undisputed that the Belt Line set up an operating window and successfully moved every train at NIT that CSXT requested. None of that “inflict[ed] new and accumulating injury on the plaintiff” to constitute a continuing violation.⁷

⁷ CSXT’s recitation of the facts shows it was not seeking a regular scheduling window into NIT in 2015. CSXT states that the only reason it requested the Belt Line’s help in the first place was because it was “during a period of extreme port congestion across the East Coast,” and CSXT

CSXT's one complaint is that it lost business from one ocean carrier for "several weeks" in 2015. CSXT Ex. 69 31:6-21. But CSXT's testimony was explicit that it temporarily lost this business [REDACTED] *Id.* There is no correlation or causal link between this alleged new injury and any overt act by the Belt Line, because in fact CSXT's evidence is that the Belt Line helped resolve [REDACTED]. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (proof of an antitrust injury requires evidence that the injury "flows from that which makes defendants' acts unlawful").

Additionally, while Rule 37(c)(1) prevents CSXT from pointing to the rate charged by the Belt Line for the train moves at NIT in 2015 to oppose summary judgment, even if CSXT could rely on that evidence, it would not constitute a new overt act inflicting new and accumulating injury. *Haier, supra*. CSXT is seeking only lost profits for allegedly long-term foreclosed access at NIT; it has not requested a refund for an overcharge or identified any damage caused by the handling of its traffic by the Belt Line in 2015. Thus, even if the payment could be considered as evidence, it would not trigger a continuing violation because it did not inflict any new or accumulating injury that CSXT seeks to recover. If anything, it was reaffirmation of the time CSXT paid that same rate in 2010, CSXT SOF ¶ 45, and thus not a new overt act. *Haier, supra*.

b. There was no new overt act in 2018.

The only other potential "new overt act" within the limitations period was the Board's allegedly unlawful failure to adopt CSXT's 2018 proposals. This contention is also unavailing. CSXT ignores the contractual handcuffs of the 1897 Operating Agreement's uniform rate provision that *does not allow the Belt Line to offer the different switch rate* CSXT sought. The

wanted "to move backlogged freight at NIT." Compl. ¶ 4; CSXT SOF ¶ 45. Once that one-time issue was resolved, CSXT never again asked for the Belt Line to move its traffic at NIT.

Belt Line’s shareholders would have to amend the Operating Agreement or waive compliance with that provision, as in the past instances CSXT cites. But that is not the course CSXT took. It admittedly never moved the Belt Line’s Board to adopt either its rate proposal or its governance proposal, and never moved the shareholders to adopt its rate proposal. CSXT cannot manufacture a dispute about this when it admitted these facts in response to requests for admission. *See* CSXT’s Resp. to NPBL RFAs 10, 13, 15-19 (ECF No. 300-8). CSXT does not suggest that the Board members it appointed were somehow prevented from moving for a vote, or that CSXT itself was prohibited from doing so at a shareholders meeting. In fact, one of the CSXT-appointed board members admitted during deposition that “[REDACTED]” Armbrust Dep. (ECF No. 300-4) at 214:15-21. Thus, there was no motion made that Defendants ever rejected, which negates the idea of “purposeful” inaction.

The only case in which CSXT identifies “concerted inaction” as a new overt act is *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144 (3d Cir. 1993). That case involved “inaction” in the form of a boycott and refusal to sell or lease to the plaintiffs; *i.e.*, only acts that the defendants could have performed, regardless of input by the plaintiffs. Here, by contrast, CSXT’s appointed directors at the meeting could have made a motion. CSXT cannot claim injury from inaction on an unmade motion that CSXT could have made but chose not to make.

CSXT cannot satisfy the elements for invoking the continuing-violation doctrine. Because the alleged 2015 and 2018 overt acts are not actionable, and because the first four acts are outside of the statute of limitations, the federal conspiracy claims against the Belt Line must be dismissed.

II. The statute of limitations bars CSXT’s state-law conspiracy claims.

Counts VIII and IX, CSXT’s two state-law conspiracy claims, are also time-barred. Conspiracy causes of action under Virginia law accrue when the plaintiff first suffers any damages

resulting from the acts committed in furtherance of the conspiracy. *See Detrick v. Panalpina, Inc.*, 108 F.3d 529, 543 (4th Cir. 1997). CSXT's causes of action accrued in 2009, outside the limitations period, as that is when its expert claims the conspiracy first damaged CSXT. *See* Marvel Reply Report (ECF No. 301-10) at ¶ 124.

A. There cannot be a continuing conspiracy only for the federal claims, and multiple, separate conspiracies for the state-law claims.

To prevent its state-law claims from being time-barred, CSXT does an about-face from its position with respect to the federal antitrust claims. CSXT argues that events since 2013—within the five-year limitations period under state law—were not part of a continuing conspiracy after all. Instead, they are new conspiracies, disconnected from any earlier agreement to conspire.

CSXT argues that whether there was one continuing conspiracy—as CSXT has consistently averred in all its filings, except for this one section—or whether there were multiple conspiracies, each with its own statute of limitations, “is a factual matter for the jury to find.” CSXT Br. at 47-48. But CSXT does not offer any authority that would allow it to present two sets of facts in order to satisfy conflicting limitations regimes. On the contrary, CSXT is conflating its factual contentions on the applicable statute of limitations with the well-recognized right to plead alternative legal theories. *See, e.g., Witt v. CoreLogic Saferent, LLC*, 2016 U.S. Dist. LEXIS 110662, at *37-38 n.11 (E.D. Va. Aug. 18, 2016) (“The Court recognizes the right to plead alternative legal theories, *but is aware of no authority that allows the pleading of alternative facts where one set of which is entirely the opposite the other.*”) (emphasis added).

Because CSXT is not permitted to temporarily abandon ship solely to prevent some claims from being sunk by the statute of limitations, all of its state-law claims are time-barred.

B. Even if CSXT could rely on alternative sets of facts, that is contrary to its damages model and would force the jury to impermissibly speculate.

In its haste to salvage its state-law claims, CSXT fails to recognize what it would mean for damages if there was a separate conspiracy after 2013. As explained earlier, CSXT's expert ties all of its alleged damages to acts committed both before and after 2013, without distinguishing them. Accepting CSXT's new position means an even more speculative—and unsustainable—damages verdict, because the jury would be left to guess at how much of CSXT's damages are attributable to the supposed new conspiracy(ies). *See* section I.B above.

CSXT cites *Blackwelder v. Millman*, 522 F.2d 766, 776-77 (4th Cir. 1975), for the proposition that, “under Virginia law, damages result from the totality of a conspiracy, not any particular overt act.” CSXT Br. at 50. Reliance on *Blackwelder* is misplaced. There, the court held that damages resulting from a common-law conspiracy to commit fraud were recoverable because, under the facts of the case, the cause of action did not accrue until the defendants completed their conspiracy “by actions occurring well within the limitations period.” 522 F.2d at 777. As the court explained, “the actionable damages as alleged here did not exist” until the last of those actions occurred. *Id.* at 776. Yet CSXT's damages model reaches all the way back to 2009 and is not predicated upon a new conspiracy by the Belt Line within the limitations period.

C. There is no new conspiracy based on Defendants' trackage-rights dispute.

As explained in the Belt Line's opening brief, the only potential state-law claim that was not time-barred was the allegation of a “new agreement in 2018” between Defendants to increase the trackage fee the Belt Line pays NS. NPBL Br. at 20-21. Accepting the Complaint's allegations as true, the Court stated in its order on the motions to dismiss that this could be a new conspiracy, “not a continuation of the same conspiracy to set the Uniform Rate at the 2008 level because the price is again increased.” ECF No. 66 at 39-40. While CSXT's allegation may have led the Court

into believing that Defendants had actually increased the trackage fee in 2018, CSXT admitted in discovery that there was no truth to its allegation. *See* (ECF No. 300-8, Admission No. 3). Consistent with its admission that the alleged “new agreement” never occurred, CSXT did not identify it as a conspiratorial act in response to interrogatory 3 or 4.

CSXT now takes yet another position, contending that the lack of such an agreement was on purpose, that it was “pretext to justify NPBL’s artificially high rate and to reject CSX’s proposal seeking a commercially reasonable rate.” CSXT Br. at 48. This position fails for three reasons.

First, as discussed earlier, CSXT is estopped from relying on such a contention that it failed to identify in response to a court order. Second, CSXT did not allege this conspiracy or unlawful act in its Complaint, *see* Compl. ¶¶ 119 and 123, further demonstrating the unfair prejudice to the Belt Line that would result if CSXT were able to rely on it. *See, e.g., Midco Int’l, Inc. v. Metro. Life Ins. Co.*, 2017 U.S. Dist. LEXIS 103296, at *11 n.3 (N.D. Ill. July 5, 2017) (“a new theory” of liability “raised for the first time in response to the motion for summary judgment” that “was not plaintiff’s theory at the motion-to-dismiss stage” is “waived”). Third, the only “uncertainty surrounding this issue” was caused by CSXT itself. As set forth in Defendants’ motions to dismiss, NS initiated the trackage rights proceeding at the U.S. Surface Transportation Board in September 2018, three weeks before CSXT filed its Complaint. The Belt Line and NS requested the STB give fast track consideration to the trackage rights proceeding, flatly contradicting CSXT’s new claim they intentionally delayed resolving the dispute. *See* ECF No. 51. Further, CSXT was the party that intervened in that proceeding and requested the STB to stay the matter until this case is concluded, thereby prolonging the very uncertainty of which it now complains. *See id.*

D. CSXT never pleaded any other unlawful acts to support its state-law claims.

CSXT did not plead any other unlawful acts that would prevent its state-law claims from being time-barred. The only other unlawful acts that CSXT pleaded in Counts VIII and IX of the Complaint were tortious interference, breach of fiduciary duty, and breach of contract. *See* Compl. ¶¶ 119 and 123. The tortious interference count was dismissed, as was the breach-of-fiduciary-duty count against the individual directors. *See* ECF No. 66 at 2; ECF Nos. 143, 159. And breach of contract, without more, cannot form the basis for a conspiracy claim. *See Dunlap v. Cottman Transm. Sys.*, 287 Va. 207, 217 (2014) (“[T]he non-performance of a contract could not, without more, qualify as an ‘unlawful’ act.”) (citing *Station #2, LLC v. Lynch*, 280 Va. 166, 174 (2010)).

CSXT now argues that “[t]he record contains evidence of many ‘wrongful or tortious acts’ that could constitute the requisite unlawful act for purposes of the state-law conspiracy counts, ‘including NS’s wrongful monopolization under the Sherman Act and the Belt Line’s individual directors’ violations of fiduciary duties.’” CSXT Br. at 58. NS’s alleged monopoly cannot be the requisite unlawful act, though, because CSXT did not plead that in Count VIII or IX. *See* ¶¶ 119 and 123. CSXT’s argument about the individual directors is a red herring, because any conspiracy between NS and them is separate from a conspiracy with the Belt Line. *See id.* (alleging that NS conspired separately with the Belt Line and with the individual directors). Nor could a conspiracy with the individual directors be considered one with the Belt Line. The actions of the individual directors cannot be imputed to the Belt Line, because it never conferred authority on any of them to take the alleged acts on its behalf. *See Monacan Hills, Inc. v. Page*, 203 Va. 110, 116 (1961).

None of CSXT’s attempts to avoid its state-law claims from being time-barred are availing. The Court should therefore grant the Belt Line summary judgment on both state-law claims.

III. CSXT's claims fail because it cannot show a conspiracy involving the Belt Line.

Even if CSXT's claims were not time barred, the four counts against the Belt Line still fail because CSXT cannot show that the Belt Line entered into a conspiratorial agreement with NS.

A. Evidence of unauthorized conduct by individual NS-appointed Board members cannot be imputed to the Belt Line.

"[T]here must be two persons to comprise a conspiracy, and a corporation, like an individual, cannot conspire with itself." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007); *Bowman v. State Bank of Keysville*, 229 Va. 534, 541 (1985). If anything, CSXT's opposition shows only concerted action between NS-appointed directors and other NS employees. As explained above, that conspiracy is not with the Belt Line, because individual Board members are not agents of a company and therefore cannot conspire on its behalf.⁸ The Belt Line has no power over the individual Board members appointed by NS or CSXT. "[D]eclarations and admissions of individual directors when not acting as a board are not binding on the corporation nor admissible as evidence against it, unless they were acting as its authorized agents and within the scope of their authority." *Monacan Hills*, 203 Va. at 116 (citations omitted).

CSXT argues that *Monacan Hills* is distinguishable from the U.S. Supreme Court case it relies on, *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556 (1982). See CSXT Br. at 54. In fact, *Hydrolevel* affirms the holding of *Monacan Hills*. In *Hydrolevel*, the Court found sufficient evidence of a conspiracy between two persons because the subcommittee members at issue were expressly authorized to act as agents of the standards-setting organization, and were found to have acted within the scope of their authority. *Id.* at 572-73.

⁸ See also Belt Line's Motion in *Limine* to Exclude Evidence and Argument Regarding Use of Internal NS Emails (ECF No. 349, 350), incorporated herein by reference.

Here, by contrast, the Belt Line's Board never conferred authority to any individual shareholder-appointed directors to act on the Belt Line's behalf in making any of the communications CSXT cites. *See* CSXT Br. at 52-53. Accepting CSXT's argument would mean the Belt Line could be found to have entered a conspiracy based on conduct that it did not authorize, did not know of, and has no way to prevent, in contravention of both Virginia law and federal law. As a result, CSXT may not rely on the alleged NS-appointed director conduct cited in its opposition to show concerted action by the Belt Line.

B. CSXT's other evidence fails to show that the Belt Line entered into a federal antitrust conspiracy with NS.

The only "evidence" of concerted action by the Belt Line that CSXT cites to other than alleged conduct of the NS-appointed Board members is the following: (1) in 2009, the Board voted to adopt the \$210 tariff switching rate, [REDACTED]; (2) in 2011, the Board did not approve a motion for the Belt Line to use CSXT locomotives in service to NIT; (3) in 2018, the Board did not vote to form a rate committee to analyze CSXT's rate proposal; and (4) in 2015, the Belt Line's president emailed [REDACTED]. *See* CSXT Br. at 56-57 (citing ¶¶ 26, 29, 40, 50, 71). None of it indicates a conspiracy.

First, CSXT concedes it supported the \$210 rate in 2009, CSXT Br. at 14. But CSXT never moved the Board to consider or adopt [REDACTED]. Not acting on a motion that was never made cannot establish an agreement to conspire.

Second, the 2011 locomotive-use motion did not pass because it was a tie vote with the Belt Line's president voting in favor of the motion. CSXT Ex. 47 (NPBL017938). A tie vote cannot constitute concerted action by the Belt Line.

Third, the reason the Board did not form a rate committee in 2018 to analyze CSXT's proposal is because no Board member, not even the CSXT-appointed ones, moved for a vote. This was despite President Moss's recommendation to form a rate committee. When CSXT fails to move for a vote, that is not evidence that the Belt Line agreed to conspire against CSXT.

Fourth, Moss's email [REDACTED]⁹ does not evidence concerted action or conspiratorial intent by the Belt Line. Moss was notifying NS that CSXT was seeking additional operating windows on NS-controlled track. Luebbbers stated that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Because CSXT has no evidence of concerted action by the Belt Line, as a matter of law it cannot satisfy the first element of its federal antitrust conspiracy claims.

C. CSXT fails to show “clear and convincing evidence” that the Belt Line entered into a state-law conspiracy with NS.

CSXT incorrectly argues that it only needs to present evidence reasonably leading to the inference of concerted action in order to defeat summary judgment. CSXT Br. at 52 (citing *Fed. Ins. Co. v. Locash*, 2014 WL 12588635, at *9 (E.D. Va. Feb. 18, 2014)). Virginia law requires “clear and convincing evidence” to satisfy the element of concerted action for an unlawful purpose. *See Dunlap v. Cottman Transm. Sys.*, 287 Va. 207, 215 (2014); *Pierce Oil Corp. v. Voram*, 136 Va. 416, 430 (1923). “When, as here, the non-moving party must produce clear and convincing

⁹ In a footnote, CSXT also cites a 2012 email to suggest [REDACTED] [REDACTED] CSXT Br. at 23 n.11. Because CSXT failed to disclose it in response to the Belt Line's interrogatory asking CSXT to identify conspiratorial communications, it cannot be considered. *See* ECF No. 236; Fed. R. Civ. P. 37(c)(1).

evidence to support its claim, that higher evidentiary burden is considered as part of the summary judgment calculus.” *Wells v. Liddy*, 186 F.3d 505, 520 (4th Cir. 1999).

CSXT concedes its evidence only raises an inference of such an agreement. *See* CSXT Br. at 57. This is far short of the requisite “clear and convincing” evidence.

IV. CSXT cannot overcome the cost justification for the Belt Line’s switching rate.

CSXT argues that its claims do not hinge on the Belt Line’s rate. CSXT Br. at 68. They necessarily do, however, because all of the other alleged anticompetitive conduct has conclusively been shown to be either time-barred or not actionable. Yet, as explained in the Belt Line’s opening brief, this is a Rule of Reason case. CSXT cannot overcome the Belt Line’s procompetitive cost justification—that the Belt Line’s rate is set to cover its costs, just as its Operating Agreement requires. *See* NPBL Br. at 31-36; ECF No. 1-1, p. 4, Art. Ninth. The Belt Line’s rate is therefore procompetitive, which means CSXT’s antitrust claims fail as a matter of law.

To escape that, CSXT first argues that *per se* treatment applies. CSXT Br. at 61. That argument fails because there is no evidence that NS and the Belt Line are “potential horizontal competitors.” *Id.* CSXT concedes that the Belt Line does not compete for ocean carrier business. *See* CSXT SOF ¶ 9. Nor does CSXT offer evidence that the Belt Line has the “necessary desire, intent, and capability to enter the market” as a competitor. *Lumber Liquidators v. Cabinets To Go, LLC*, 415 F. Supp. 3d 703, 712 (E.D. Va. 2019) (citation omitted).

Next, CSXT does not dispute any of the Belt Line’s costs. The Belt Line cited *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 704 F. Supp. 1309 (D. Md. 1989), for the unremarkable proposition that a price set at or below cost is by definition procompetitive. NPBL Br. at 34-35. CSXT argues this only applies in essential facilities cases, even though (1) *Laurel Sand* is not so

limited and (2) CSXT has postured this as an essential facilities case.¹⁰ In any event, CSXT fails to cite any contradictory legal authority suggesting that a rate that is below cost, like the Belt Line's, is anticompetitive. That is because nothing in the law supports such a position.

Instead, CSXT suggests that even though the Belt Line's rate is set at cost, the rate is not needed to cover the specific cost of "service to NIT." CSXT Br. at 68. Its attempt to manipulate the cost analysis is hollow. Its expert, who opines the \$210 rate is "unreasonable," admitted he made no effort to evaluate the Belt Line's costs, fixed or variable. *See* NPBL Ex. 33 at 168:9-25.

CSXT does not respond to the fact that its request for a rate that only covers "incremental" costs for service to NIT would mean forcing the rest of the Belt Line's customers to cover its overhead and fixed costs, all so CSXT could get a lower price for itself to NIT. As the Belt Line's president explained, [REDACTED]

[REDACTED] The Belt Line's shareholders foreclosed this possibility in the 1897 Operating Agreement with the uniform rate requirement. ECF No. 1-1, p. 4, Art. Ninth.

Because the Belt Line's \$210 rate [REDACTED]—which CSXT does not dispute—Counts I and II fail as a matter of law.

V. CSXT has no valid rate comparisons to show the Belt Line's rate is exorbitant.

"Any inquiry into the reasonableness of the rate ... must focus on the rate's reasonableness in the context of competition, rather than from plaintiffs' perspective." *Laurel Sand*, 704 F. Supp. at 1323; *see also FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944). It makes no difference that the Belt Line's rate "may not be workable in [CSXT's] plans." 704 F. Supp. at 1323.

¹⁰ CSXT's expert [REDACTED]. *See* Marvel Report (ECF No. 299-1) at ¶¶ 40, 60.

CSXT has failed to demonstrate that a market for [REDACTED] exists; it has only provided its own. And CSXT's market of "comparable rates" has been cherry-picked from [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED].¹¹

In the absence of these improper comparisons, the Belt Line's switching rate is nearly identical to Commonwealth Railway's published \$210 tariff rate, [REDACTED]. See NPBL Br. at 37-38.

CONCLUSION

Based on the undisputed facts, all four claims against the Belt Line fail as a matter of law. The Belt Line respectfully prays that the Court enter judgment for the Belt Line on all of them.

Dated: May 13, 2021

**NORFOLK AND PORTSMOUTH
BELT LINE RAILROAD COMPANY**

By: /s/ James L. Chapman, IV
James L. Chapman, IV, VSB No. 21983
W. Ryan Snow, VSB No. 47423
David C. Hartnett, VSB No. 80452
Alex R. McDaniel, VSB No. 92398
CRENSHAW, WARE & MARTIN, P.L.C.
150 W. Main Street, Suite 1500
Norfolk, Virginia 23510
Telephone: (757) 623-3000
Facsimile: (757) 623-5735
jchapman@cwm-law.com
wrsnow@cwm-law.com
dhartnett@cwm-law.com
amcdaniel@cwm-law.com
*Attorneys for Norfolk and Portsmouth Belt
Line Railroad Company*

¹¹ See also Belt Line Motion in Limine to Exclude Evidence and Argument About CSXT's Private Switching Rates (ECF No. 353, 354), incorporated herein by reference.

CERTIFICATE OF SERVICE

I certify that on this 13th day of May 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a “Notice of Electronic Filing” to all counsel of record who have consented to electronic service.

/s/ James L. Chapman, IV

James L. Chapman, IV, VSB No. 21983
CRENSHAW, WARE & MARTIN, P.L.C.
150 W. Main Street, Suite 1500
Norfolk, Virginia 23510
Telephone: (757) 623-3000
Facsimile: (757) 623-5735
jchapman@cwm-law.com
*Attorney for Norfolk and Portsmouth Belt
Line Railroad Company*