

Case No. 73014-2-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ARTHUR WEST,

Appellant

vs.

SEATTLE PORT COMMISSION, et al.,

Respondents.

**ANSWERING BRIEF OF DEFENDANTS/RESPONDENTS
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I. INTRODUCTION

Defendants/Respondents Port of Seattle (“POS”) and Port of Tacoma (“POT”) have experienced a decline in international container shipments passing through their seaports over the past several years. Increased competition, from the recently-expanded seaport at Prince Rupert in British Columbia, and from cargo diversions to ports located in California, as well as on the Gulf of Mexico and the east coast through the Panama Canal, accounts for the decline. Searching for a solution, POS and POT, through their elected commissions (collectively, “the Ports”), met 18 times during 2014 to discuss ways in which the Ports could work together to compete for business from international shippers and common carriers. These meetings were held pursuant to specific authorization the Ports had received from the Federal Maritime Commission (“FMC”). The meetings ultimately culminated in the announcement in October 2014 that the Ports intended to form a Seaport Alliance, combining the resources of the two seaports.

These meetings, which were confidential and not open to the public, were held pursuant to the Federal Shipping Act of 1984, 46 U.S.C. § 40101, *et seq.* (the “Shipping Act”), and under the supervision of the FMC. Both the Shipping Act and the FMC’s agency regulations provide

that information the Ports discussed in their meetings is to be maintained as confidential:

Nondisclosure of information. Information and documents (other than an agreement) filed with the [FMC] under [the Shipping Act] are exempt from disclosure under [FOIA] and may not be made public....

46 U.S.C. § 40306 (underlining added); *see also* 46 C.F.R. § 535.701.

This confidentiality requirement applies to the detailed minutes the Ports are required to file with the FMC documenting everything that they discussed at their meetings. 46 C.F.R. §§ 535.701, 535.704(c).

Plaintiff Arthur West (“West”) sued the Ports in September 2014, alleging they violated the Washington Open Public Meetings Act (Ch. 42.30 RCW) (“OPMA”) by holding these non-public meetings. In his First Amended Complaint (“Complaint”), West concedes the Ports’ meetings were conducted pursuant to the Shipping Act, and he does not dispute that the FMC specifically authorized the meetings. West does not allege the Ports violated the FMC’s regulations or that they discussed anything not approved by the FMC. His claim is that the Ports violated the OPMA by not opening these meetings to the public. But the OPMA’s open meeting requirement cannot be harmonized with the Shipping Act’s confidentiality requirements, or its underlying purpose.

Requiring that the Ports' meetings be conducted in public under the OPMA West argues, would undermine the primary purpose of the Act. It would directly conflict with the Act's requirement that information provided to the FMC "may not be made public." 46 U.S.C. § 40306.

Such a requirement also would frustrate the Ports' ability to compete for such business from shippers and common carriers because the Ports' competitors would have access to the Ports' strategic plans. Moreover, many of the Ports' competitors would not be held to this same standard, either because they are not municipal entities subject to the Washington OPMA, because they operate in states without an equivalent statutory requirement, or because they are located outside the United States. Imposing the OPMA on the Ports' ability to meet to discuss sensitive marketplace and competitive issues would place the Ports at a significant competitive disadvantage to the detriment of the public in the Pacific Northwest, something the Shipping Act was specifically intended to prevent.

On December 16, 2014, POS moved to dismiss West's Complaint because the Shipping Act's confidentiality provision preempts his claims under Washington state law. CP 156-68. Simultaneously, POT moved to dismiss his Complaint because he lacks standing to bring his claims. CP 182-240. The trial court granted both motions. CP 273-76. The trial

court ruled that West had not alleged facts sufficient to establish standing under the OPMA and the Washington Uniform Declaratory Judgment Act (Ch. 7.24 RCW), and that the Shipping Act preempts application of the OPMA to the Ports' meetings because the Act requires that the information shared at the meetings be kept confidential. 46 U.S.C. § 40306. The trial court stated:

[I]n terms of violation of the Open Public Meetings Act, ... the Shipping Act preempts the Open Public Meetings Act. And minutes of those meetings are, by description, confidential. Quite simply, the OPMA doesn't apply to the Port's [sic.] meetings.

1/16/15 VRP at 4:9-13.

The trial court also correctly held that West lacked standing to bring his action. His Complaint alleges only that "Plaintiff West is 'any person' as defined in RCW 42.30.130 with standing to seek relief." CP 16. But the law is clear that this type of vague, conclusory allegation does not suffice to confer standing. POS joins POT's brief in seeking affirmance on this ground as well.

West also argues that the trial court abused its discretion in not granting him a continuance under CR 56(f). But CR 56(f) does not apply here. The Ports filed motions to dismiss under CR 12(b)(6). The Court did not convert the Ports' motions to summary judgment motions. Even if the Ports' motions could be viewed as motions for summary judgment

under CR 56, West did not provide an affidavit demonstrating why a continuance was necessary or appropriate. The trial court was well within its discretion in denying West's request.

For all of these reasons, the Ports respectfully request that the Court affirm the trial court's dismissal of West's complaint.

II. STATEMENT OF THE CASE

Congress enacted the Shipping Act of 1984 as the successor to the Shipping Act of 1916 (which also regulated international shipping). One of the Act's primary purposes is to, "exempt from the antitrust laws those agreements and activities subject to regulation by the Federal Maritime Commission." H.R. Rep. 98-53(I), *3 (1983); 46 U.S.C. § 40307. Under the Shipping Act, marine terminal operators like the Ports¹, as well as other entities engaged in maritime commerce like common carriers and shippers, are permitted to enter into cooperative arrangements and agreements that might otherwise violate federal and state antitrust laws. The Act specifically allows marine terminal operators to:

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

¹ The Act defines marine terminal operator to mean "a person engaged in the United States in the business of providing wharfage, dock, warehouse, or other terminal facilities...." 46 U.S.C. § 40102(14). POS and POT both are marine terminal operators.

46 U.S.C. § 40301(b).

Congress statutorily empowered the FMC with exclusive oversight authority over discussions conducted pursuant to filed discussion agreements. 46 U.S.C. § 40102; H.R. Rep. 98-53(I), *3. Before conducting any such discussions, the Act requires that ports file with the FMC a proposed discussion agreement containing the subject matter of the parties' proposed discussions. Upon review of the discussion agreement, the FMC determines whether to approve or reject the agreement, depending on whether the matters proposed to be discussed are permitted by the Shipping Act. 46 U.S.C. § 40304; 46 C.F.R. § 535.601(b)(1). If approved, the parties' meetings and any actions resulting therefrom are expressly exempt from federal antitrust laws. 46 U.S.C. §§ 40102(2), 40307. Importantly, in order to ensure that the parties to such an agreement do not exceed the scope of their antitrust exemption, participants are required to file detailed minutes of their discussions with the FMC. 46 C.F.R. §§ 535.701(b), 535.704(a). These minutes must describe every substantive component of each meeting, including (1) the date, time and location; (2) the persons in attendance; (3) a description of all discussions that is "detailed enough so that a non-participant reading the minutes could reasonably gain a clear understanding of the nature and extent of the discussions and, where applicable, any decisions reached,"

and (4) any materials circulated at the meetings. 46 C.F.R. § 535.704(c).

Because public disclosure of the information contained in the Ports' meeting minutes would give participants' competitors access to the participants' competitively-sensitive confidential strategies and undermine the Act's purposes, both the Shipping Act and the FMC's implementing regulations make it clear that these minutes are confidential; the public has no right to obtain them.

The Shipping Act provides in relevant part:

Nondisclosure of information. Information and documents (other than an agreement) filed with the [FMC] under [the Shipping Act] are exempt from disclosure under [FOIA] and may not be made public except as may be relevant to an administrative or judicial proceeding....

46 U.S.C. § 40306 (emphasis added). The FMC's regulations likewise provide:

Confidentiality....[M]inutes, and other information submitted by a particular agreement will be exempt from disclosure under [FOIA]....

46 C.F.R. § 535.701(i); *see also* 46 C.F.R. § 535.608.²

West does not dispute that the Ports complied with all of the Act's requirements. They filed their discussion agreement ("Discussion

² The Act's legislative history also confirms that Congress intended for information discussed during these meetings to remain confidential. *See* H.R. Rep. 98-53(II), *31 ("Subsection (I) grants an exemption under the Freedom of Information Act for all information and Documentary materials, other than the agreement itself, that have been submitted to the Commission pursuant to Sections 4 and 5."); H.R. Conf. Rep. 98-600 (1984), *30 ("Subsection (j) provides for confidential treatment of any information submitted under this section.").

Agreement”) with the FMC on January 22, 2014. CP 17; CP 175. The

Discussion Agreement describes their purposes for meeting as follows:

- C. The leaders of both Ports believe that recent developments in the shipping industry threaten the future of the United States (U.S.) Pacific Northwest Trade. These developments include...[i]ncreased competition from expanding ports across North America, which prompts the U.S. Pacific Northwest gateway ports to explore opportunities for a creative collaboration....
- D. It is imperative in this environment that [the Ports] have the ability to discuss how they can both succeed and flourish in the changing environment. The discussion agreement is designed to provide the flexibility they need to explore the options available to maintain a viable competitive position and grow their mutual container market share. The agreement thus allows the parties to meet, discuss, collect and share information on matters concerning the operation of their container terminal facilities. Such discussions can include topics including but not limited to general container related financial information, including planning, development and utilization of facilities, and rates of return (including all terminal rates, charges, and rules and regulations, whether imposed by tariff, marine terminal operator schedule, lease or other contract, or in any other manner).

CP 177-78. The FMC approved the Ports’ Discussion Agreement on March 8, 2014 (CP 175), and the Ports met 18 times in 2014 to discuss matters under their Discussion Agreement, *See* CP 15, ¶1.2. These meetings culminated in the announcement on October 7, 2014 that the Ports would join in a “Seaport Alliance” to strengthen the Puget Sound

gateway and attract more marine cargo to the region.³ As a result of the alliance, the Ports now are the third-largest container gateway for containerized cargo shipping in the United States.

West does not allege that the Ports' discussions exceeded the scope permitted by their Discussion Agreement, or that the Ports have violated the Shipping Act or its implementing regulations. Complaints of either type would have divested this Court of subject matter jurisdiction to hear West's claims in the first instance, since the FMC has exclusive jurisdiction over such disputes. *See* 46 U.S.C. § 41301.

Instead, West's sole contention is that the Ports violated the Washington OPMA by meeting in private as required by the Shipping Act. But as the trial court correctly held, West's Complaint failed to state a claim for relief because he lacked standing and his claims were preempted by the Shipping Act.

West's Complaint alleged standing on the sole basis that, "Plaintiff West is 'any person' as defined in RCW 42.30.130 with standing to seek relief." CP 16, ¶2.1. The trial court properly ruled:

³ <https://www.portseattle.org/Newsroom/News-Releases/Pages/default.aspx?year=2014#469> (last visited November 12, 2015). The Court may take judicial notice of the Ports' formation of the Seaport Alliance under ER 201(b). *See, e.g., Fagg v. Bartells Asbestos Settlement Trust*, 184 Wn. App. 804, 811, 339 P.3d 207 (2014) (taking judicial notice of asbestos contamination and EPA efforts in the Libby area over past several decades, citing EPA release and newspaper article).

Mr. West has not shown he's within a zone of interest to be protected, or has shown injury in fact. Specific facts have to be alleged. And although he describes himself as the quote, "any person", in his pleadings, this does fall short of the requirements under the act. Um, describing himself as having his right status or other legal relations which are affected by the statute is simply not enough.

1/16/15 VRP at 3:24-4:6. As to preemption, the trial court ruled:

in terms of violation of the Open Public Meetings Act, um, the Shipping Act preempts the Open Public Meetings Act. And minutes of those meetings are, by description, confidential. Quite simply, the OPMA doesn't apply to the Port's [sic.] meetings."

Id., at 4:9-13. The trial court's rulings were correct. West lacks standing under settled Washington law, and his claims are preempted by the Shipping Act under both field and conflict preemption. West timely appealed.

III. ARGUMENT

A. Standard of Review.

The Court of Appeals reviews the trial court's decision to dismiss under CR 12(b)(6) de novo. *Gaspar v. Peshastin Hi-Up Growers*, 131 Wn. App. 630, 634, 128 P.3d 627 (2006). The same standard applies when the Court of Appeals is asked to review the trial court's determination that a plaintiff's claim is preempted, *Veit v. Burlington N. Santa Fe Corp.*, 171 Wn.2d 88, 99, 249 P.3d 607 (2011), or that a plaintiff

lacks standing, *Pac. Marine Ins. Co. v. The Dep't of Revenue*, 181 Wn. App. 730, 740, 329 P.3d 101 (2014).

This Court reviews a trial court's decision denying a request for a continuance under CR 56(f) for abuse of discretion. *Turner v. Kohler*, 54 Wn. App. 688, 693, 775 P.2d 474 (1989).

B. The Federal Shipping Act Preempts the OPMA.

The Supremacy Clause, Article VI of the Constitution, provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Art. VI, cl. 2. Under the doctrine known as preemption, “[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law,” for “any state law, however clearly within a State’s acknowledged power, which interferes with or is contrary to federal law, must yield.” *Felder v. Casey*, 487 U.S. 131, 138 (1988) (alteration in original) (citation omitted); *Brown v. Hotel & Rest. Emp. & Bartenders Int’l Union Local 54*, 468 U.S. 491, 503 (1984) (“Where, as here, the issue is one of an asserted substantive conflict with a federal enactment, then ‘[t]he relative importance to the State of its own law is not material . . . for the Framers of our Constitution provided that the federal

law must prevail.”) (alteration in original) (citation omitted).⁴ Further, when preemption is found, it is irrelevant whether the underlying preempted state law was violated. *See Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 584 (1981) (“A finding that federal law provides a shield for the challenged conduct will almost always leave the state-law violation unredressed.”).

“Pre-emption may be either express or implied, and ‘is compelled whether Congress’ command is explicitly stated in the statute’s language or implicitly contained in its structure and purpose.’” *Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 152-53 (1982)) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)); *see also Mutual Pharm. Co., Inc. v. Bartlett*, 133 S.Ct. 2466, 2473 (2013).

West argues that his claims here are not preempted because the Shipping Act does not include a provision expressly preempting state law. Opening Brief at 20. But this argument entirely ignores implied preemption. Under implied preemption, a state law is preempted either where Congress intended to occupy the field (“field preemption”) or where enforcement of the state law would conflict with the application of the federal law (“conflict preemption”). West’s claims are preempted

⁴ For this reason, West’s argument regarding the importance of the OPMA under Washington law is not relevant.

under both rules.⁵

1. West’s Claims are Preempted Under Field Preemption.

“Field preemption” occurs where the federal government intends to exclusively occupy a given field. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 (2000); *Veit*, 171 Wn.2d at 99. Under field preemption, the Court may find Congressional intent to preempt state law under the following circumstances:

- (1) [where] a scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it,
- (2) if the federal act touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject, or
- (3) if the goals sought to be obtained or the obligations imposed reveal a purpose to preclude state authority.

Inlandboatmen’s Union v. Dep’t of Transp., 119 Wn.2d 697, 701-02, 836 P.2d 823 (1992) (citing *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 605 (1991)); *see also Arizona v. U.S.*, 132 S.Ct. 2492, 2501 (2012).

⁵ The case on which West relies on for his argument, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), actually supports the Ports’ position. In *Rice*, the Supreme Court held that an Illinois statute regulating warehousemen was preempted by the United States Warehouse Act, where Congress had “made the ‘power, jurisdiction, and authority’ of the Secretary of Agriculture conferred by the Act ‘exclusive with respect to all persons securing a license’ under the act.” *Id.*, at 229. Here, similarly, Congress granted “the FMC ...exclusive jurisdiction in administering all of the provisions of the Shipping Act as they relate to international liner shipping regulations.” *Seawinds Ltd. v. Nedlloyd Lines, B.V.*, 80 B.R. 181, 184 (N.D. Cal. 1987); 46 U.S.C. §§ 40103, 41301.

Under any of these tests, it is clear that West’s claims are preempted.

a. The Shipping Act’s Comprehensive Regulatory Scheme Demonstrates that Congress did not Intend for Supplementation by the States.

The Shipping Act, “provides for the comprehensive regulation of the shipping industry in the United States.” *Maritrend, Inc. v. Galveston Wharves*, 152 F.R.D. 543 (1993); *Seawinds v. Nedlloyd Lines, B.V.*, 80 B.R. 181 (N.D. Cal. 1987) (recognizing Shipping Act sets forth “a comprehensive regulatory scheme”). The original 1916 Shipping Act permitted, “any person carrying on the business of forwarding or furnishing wharfage, dock or warehouse, or other terminal facilities in connection with a common carrier” to enter into agreements that were exempt from antitrust liability. *Maritrend*, 152 F.R.D. at 549. To counterbalance the risks inherent in permitting these maritime entities from engaging in cooperative dealings, the Shipping Act of 1916 vested the FMC with authority to oversee and enforce the Shipping Act’s provisions. *Id.*

In the years following the enactment of the 1916 Act, judicial interpretations of the Act began to “narrow[] the scope of this antitrust immunity and created parallel jurisdiction between” the FMC and courts of general jurisdiction. *Seawinds*, 80 B.R. at 184. As a result, Congress enacted the 1984 Act, “to clarify and broaden the antitrust immunity

provided by the previous Shipping Act of 1916.” *Id.* Among the key amendments Congress made to the Shipping Act was to remove the private right of action in state or federal court for violations prohibited by the Act. Congress instead intended that the remedies and sanctions provided in the Shipping Act will be the “exclusive remedies and sanctions for violation of the act.” *Id.*

As a counterbalance to this relaxation of federal and state antitrust laws, Congress imposed a number of specific requirements on parties operating under the Act. First, any parties seeking to discuss competitive matters covered by the Shipping Act must first file a discussion agreement with the FMC specifically describing what they plan to discuss. 46 U.S.C. §§ 40302, 40304. Only after the FMC approves the agreement can the parties meet. And while marine terminal operators are permitted to meet under agreements to “discuss, fix, or regulate rates or other conditions of service” or “engage in exclusive, preferential, or cooperative working arrangements,” they also are required to submit detailed minutes from any such meetings to the FMC for its review. 46 U.S.C. § 40301(b); 46 C.F.R. § 535.704.

The FMC is specifically authorized to impose substantial fines and penalties on entities that violate the Act. *See* 46 U.S.C. §§ 41107-09. And both the Shipping Act and the FMC’s regulations set forth a specific,

detailed procedure for filing complaints and adjudicating disputes under the Act, with the FMC having exclusive jurisdiction over any such action. 46 U.S.C. § 41301, *et seq.*

In short, the Shipping Act vests in the FMC complete control over every aspect of conduct regulated under the Act. West provides no support for his contention that Congress intended for states also to have regulatory authority over parties' dealings under the Shipping Act, and there is none. The Shipping Act's comprehensive regulatory structure leaves no room for application of state law regarding the parties' authorized meetings under the Act.

b. The Federal Government has Significant Interest in the Field of International Maritime Commerce, Evidencing Congress' Intent to Preclude Supplemental State Regulation.

The Shipping Act is an example of a federal statute that “touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.” *Rice*, 331 U.S. at 230.⁶ International maritime commerce is a field “where the federal interest has been manifest since the beginning of the Republic[.]” *U.S. v. Locke*, 529 U.S. 89, 99 (2000). When resolving

⁶ This is unlike a situation where the federal statute at issue regulates in an area that states have traditionally occupied, in which case the court starts with a presumption against preemption. *Id.*

matters relating to

international maritime commerce...there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers. Rather, we must ask whether the local laws in question are consistent with the federal statutory structure, which has as one of its objectives a uniformity of regulation for maritime commerce.

Id., at 108-09.⁷ The court must assess “whether the purposes and objectives of the federal statutes, including the intent to establish a workable, uniform system, are consistent with concurrent state regulation.” *Id.*, at 115; *see also Panama R. Co. v. Johnson*, 264 U.S. 375, 387 (1924). Where enforcement of the state statute would disrupt the nationwide uniformity secured by the Shipping Act, the state statute is preempted. *Locke*, 529 U.S. at 114 (“the [federal] statute may not be supplemented by laws enacted by the States without compromising the uniformity the federal rule itself achieves”).⁸

Here, requiring the Ports to comply with Washington’s OPMA

⁷ The Supreme Court also recognized that, “[t]he authority of Congress to regulate interstate navigation, without embarrassment from intervention of the separate States and resulting difficulties with foreign nations, was cited in the Federalist Papers as one of the reasons for adopting the Constitution.” *Id.*, at 99; *See also Pac. Merchant Shipping Ass’n v. Cackette*, No. 06-2791, 2007 WL 2914961, *4 (E.D. Cal. Oct. 5, 2007) (same).

⁸ West relies on *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983) and *Retail Prop. Trust v. United Brotherhood of Carpenters and Joiners of America*, 768 F.3d 938 (9th Cir. 2014). But *Retail Property Trust* involved claims brought by a mall against certain union protesters, and a claim that the mall’s actions were preempted under “the complex doctrine of preemption of state causes of action by federal labor law,” known colloquially as *Garmon* and *Machinists* preemption, which applies to labor disputes. *Id.*, at 949-951. *Belknap* involved these same types of preemption. Neither case is relevant to the issues on appeal here.

would disrupt the uniform, nation-wide application and enforcement of the Shipping Act. Parties meeting under the Act would be subject to patchwork application depending on the specific laws of the states in which the marine terminal operators are located, as well as on whether they are public ports or privately-owned maritime terminal operators.

Marine terminal operators include municipal ports, like POS and POT, as well as private marine terminal operators who lease or own terminals and operate them as private businesses. While West seeks that ports in Washington be required to conduct open meetings under the OPMA, none of their non-public marine terminal operator competitors would be. These private operators would be permitted, as contemplated by the Shipping Act, to meet with one another in private to fix or regulate rates or enter into preferential relationships with shippers and carriers. In sharp contrast, Washington ports would be required to conduct their meetings in public, where all of their competitors could listen in on the Ports' strategic discussions and use that information to the disadvantage of the Ports.

Enforcement of state open meetings laws also would result in patchwork application of the Shipping Act across the nation, depending on the differences in state law, contrary to long-standing international maritime commerce principles. *Locke*, 529 U.S. at 108, 115. For

example, unlike Washington, Oregon's open public meetings act contains a specific exemption for meetings, "[t]o consider preliminary negotiations involving matters of trade or commerce in which the governing body is in competition with governing bodies in other states or nations." ORS § 192.660(2)(g); *see also* N.J.S.A. § 10:4-12(b)(1) (expressly incorporating the confidentiality provisions found in federal law such as the Shipping Act into New Jersey's open public meetings act). Under both of these states' acts, their local ports' meetings could be conducted in private, giving them a competitive advantage over Washington ports, with no basis in the Shipping Act for such different results.

West relies on *Pac. Merchant Shipping Ass'n v. Goldstene*, 639 F.3d 1154 (2011), in arguing that the federal government did not intend to occupy the entire field of admiralty law. But *Goldstene* is inapposite. The court addressed preemption of admiralty issues generally, under the Constitutional provision that the judicial power of the United States shall extend "to all Cases of admiralty and maritime Jurisdiction." *Id.*, at 1178 (citing *U.S. Const. Art. III § 2, cl. 1*). The case did not involve a claim of preemption over international maritime commerce under the Shipping Act. Moreover, the court in *Goldstene* recognized that even as to general maritime preemption, state laws are only enforceable to the extent that they do not "interfere with the uniform working of the maritime legal

system.” *Id.* Enforcement of the OPMA would be such an interference.⁹

The Shipping Act regulates an area traditionally reserved to the federal government. Allowing states to regulate the manner in which meetings conducted under the Shipping Act must occur would lead to a patchwork application of the Shipping Act’s protections and requirements, and would undermine the nation’s strong interest in maintaining a uniform approach to international maritime commerce.

c. Congress’ Purposes in Enacting the Shipping Act Demonstrate its Intent to Preclude State Regulation of Matters Covered by the Act.

The Shipping Act’s legislative history shows that Congress sought to achieve several purposes in enacting the Act:

First, the FMC is provided exclusive jurisdiction in administering all of the provisions of the Shipping Act as they relate to international liner shipping regulations.

Third, to the extent their activities involve international ocean common carriage, marine terminal operators (ports) are included among those granted expedited approval for

⁹ In *Goldstene*, the court relied on an earlier Ninth Circuit opinion, *Pac. Merchant Shipping Ass’n v. Aubry*, 918 F.2d 1409 (1990). In *Aubry*, the court held that the “Shipping Act does comprehensively regulate maritime activities,” but that it did not preempt California from enforcing its overtime wage laws, because the acts did not conflict, and because enforcing California’s overtime laws did not affect the uniform application of the statute. Importantly, the “Shipping Act” referred to by the Ninth Circuit in *Aubry* is not the same Shipping Act as is before the court here. In *re Vehicle Carrier Serv.*, 2015 WL 5095134, at *15. In 1990, when *Aubry* was decided, the Shipping Act was codified at 46 U.S.C. §§ 1701, *et seq.* The statute referred to in *Aubry* as the “Shipping Act” was codified at 46 U.S.C. § 1801, *et seq.* It is not the Shipping Act of 1984, and is not administered by the FMC. See *id.* at *15 n.14. *Aubry* is not relevant.

agreements which require antitrust immunization.

Seventh, the entire method of regulation is changed to minimize government involvement in shipping operations.

This bill reflects the committee's resolve to provide certainty and predictability in regulation and to establish a regulatory maritime policy that will endure.

H.R. Rep. 98-53(I), at *3-4 (emphasis added); *see also In re Vehicle Carrier Services Antitrust Litig.*, No. 13-33062015 WL 5095134, *14-15 (D.N.J. Aug. 28, 2015). Congress did not intend for ports engaged in discussions involving international maritime commerce to be subject to additional inconsistent regulation at the state level.

In re Vehicle Carrier Services is instructive. There, the plaintiffs alleged that the defendants, a group of international vehicle shippers, had violated state antitrust and consumer protection acts. Despite the absence of language in the Shipping Act precluding state law causes of action, the district court recognized that, by exempting participants from federal antitrust liability and granting the FMC exclusive jurisdiction over administration of the Act, Congress had intended to divest courts of jurisdiction over suits involving international maritime commerce:

Given the outsized federal role in the area of national and international maritime commerce as compared to the states, *see Locke*, 529 U.S. at 99, 108, it does not follow that

Congress ever envisaged that myriad state laws would be applied to regulate international maritime commerce.

Id., at *14. Based on this, the court held that the plaintiffs' state law claims were preempted by the Shipping Act. *Id.*

The Supreme Court's opinion in *Ray v. Atlantic Richfield Co.*, is to the same effect. 435 U.S. 151, 177 (1978). In *Ray*, the Court was asked to determine whether certain tanker regulations adopted by the State of Washington were preempted by the federal Ports and Waterways Safety Act of 1972 (33 U.S.C. § 1221, *et seq.*). The Supreme Court found that many of the state laws were preempted, and noted that Congress had appointed the Secretary of Transportation to enact regulations governing limitations on tanker size. As the Court recognized, "it was anticipated that there would be a single decisionmaker, rather than a different one in each State." *Id.*

The Shipping Act's legislative history confirms that Congress sought to entrust administration of the Act exclusively with the FMC. "[B]y limiting jurisdiction and restricting [the FMC's] regulatory scope, Congress implemented the goal of reducing government involvement in shipping operations." *Seawinds*, 80 B.R. at 185 (citing H.R. Conf. 98-53(I), at 3, 169). And, "[b]y removing the courts from this regulatory process, Congress removed the potential for continuing regulatory

uncertainty.” *Id.* Allowing states to impose their own obligations and restrictions on meetings under the Act would undermine this purpose, and lead to uncertainty Congress sought to eliminate by vesting the FMC with exclusive authority under the Act. Congress intended that the FMC be the “sole decisionmaker,” with discretion to regulate meetings conducted under the Shipping Act, and did not intend for participants to be subject to state laws that touched on the same subject. *Ray*, 435 U.S. at 177.

In *Ray*, the Supreme Court also emphasized that Congress, in adopting the Ports and Waterways Safety Act, had sought to establish a uniform system not just nationally, but also internationally, and that this cut against imposition of separate state regulations touching on the same field:

It is therefore clear that [the PWSA] leaves no room for the States to impose different or stricter design requirements than those which Congress has enacted with the hope of having them internationally adopted or has accepted as the result of international accord. A state law in this area...would frustrate the congressional desire of achieving uniform, international standards and is thus at odds with ‘the object sought to be obtained by [the PWSA] and the character of obligations imposed by it...’

Id. at 168.

Here too, Congress sought to establish a regulatory system that other nations would adopt. 46 U.S.C. § 40101 (identifying as one purpose of the act, to “provide an efficient and economic transportation system in

the ocean commerce of the United States that is, insofar as possible, in harmony with, and responsive to, international shipping practices”). But even if other nations were to not adopt this unitary regulatory approach, the Act’s relaxed antitrust rules would allow ports and other maritime businesses to more effectively compete internationally, against nations whose antitrust laws may be different.

There is no room for the Washington OPMA, or any other state’s different open public meetings act, to displace the Shipping Act’s confidentiality protections. West’s claims are preempted.

2. The Shipping Act Preempts the OPMA under Conflict Preemption.

A hallmark of the nation’s federalist system is that “state laws are preempted when they conflict with federal law.” *Arizona v. U.S.*, 132 S. Ct. at 2501. “This includes cases where ‘compliance with both federal and state regulations is a physical impossibility,’ ... and those instances where the challenged state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” *Id.* (internal citations omitted); *de la Cuesta*, 458 U.S. at 153; *Satomi Owners Ass’n v. Satomi, LLC*, 167 Wn.2d 781, 800, 225 P.3d 213 (2009). The Supreme Court has described how courts should assess whether a “state law stands as an obstacle to the accomplishment and execution of the full purposes of

Congress,” as follows:

What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects:

For when the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power.

Crosby, 530 U.S. at 373.

Washington law applying federal preemption is in accord. “The obstruction [*i.e.* obstacle] strand of conflict preemption focuses on both the objective of the federal law and the method chosen by Congress to effectuate that objective, taking into account the law’s text, application, history, and interpretation.” *McKee v. AT&T Corp.*, 164 Wn.2d 372, 388, 191 P.3d 845 (2008) (citing *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 494, (1987)). Where enforcement of the state law would frustrate Congress’ intent and goals, the state law is preempted. *Id.*

Here, West’s complaint is preempted under both strands of the conflict preemption analysis—it is impossible for the Ports to comply with both the Shipping Act and the OPMA, and even if it were not impossible

to do so, opening the Ports' meetings to the public would frustrate the Ports' ability to discuss confidential competitive strategies.

The Ports cannot maintain the confidentiality of the matters they discuss, as contemplated by the Shipping Act, while at the same time conducting their meetings in public. The Shipping Act provides:

Information and documents (other than an agreement) filed with the [FMC] under this chapter... are exempt from disclosure under [FOIA] and may not be made public.

46 U.S.C. § 40306. The OPMA, in contrast, provides that:

All meetings of the governing body of a public agency shall be open and public and all persons shall be permitted to attend any meeting of the governing body of a public agency, except as otherwise provided in this chapter.

RCW 42.30.030.

The Shipping Act makes it clear that the content and substance of the discussions held under a marine terminal operator's agreement (*i.e.*, the "minutes") filed with the FMC "may not be made public." 46 U.S.C. § 40306. The Shipping Act's confidentiality provision exists for the sole purpose of ensuring that parties meeting pursuant to such an agreement do not have their cooperative efforts undermined by their competitors being able to obtain the competitive information that was discussed.¹⁰

¹⁰ Notably, there is no federal equivalent to the OPMA. Given the sensitive nature of matters discussed pursuant to agreements filed with the FMC, and the importance of maintaining their confidentiality to marine terminal operators' ability to compete for business from international shippers, Congress almost certainly would have exempted the

The OPMA, in contrast, would require that the discussions held by the Ports under their Discussion Agreement be held in public, eviscerating the protections provided by the Shipping Act. It is not possible for the Ports to both maintain the confidentiality of their rate and competition discussions, while conducting them in public.

But even if it were technically possible for the Ports to comply with the Shipping Act and the OPMA, doing so would completely undermine Congress' intent in enacting the Shipping Act. The Shipping Act specifically permits ports to enter into agreements to:

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

46 U.S.C. § 40301(b). And it is exactly these matters that the Ports were meeting to discuss. As their Discussion Agreement stated:

[T]he Ports desire to gain mutual understanding of the facts and analysis of what actions and strategies would be beneficial to maintain the U.S. Pacific Northwest as a fully competitive gateway for U.S. trade.

The purpose of this Agreement is to authorize its signatories to meet, discuss, collect and share information on all matters concerning the operation of their container

Shipping Act from its requirements. The fact that Congress chose to exempt documents from disclosure under FOIA demonstrates that Congress was aware of the sensitive nature of the matters discussed by parties to these agreements.

terminal facilities, including but not limited to rates of return; planning, development and utilization of port and port-related facilities; including all terminal rates, charges, and rules and regulations, whether imposed by tariff, marine terminal operator schedule, lease or other contract, or in any other manner, and explore options in the provision of container terminal services.

This Agreement will enable the ports of Seattle and Tacoma to have the discussions necessary to understand how Ports can become more cost effective and operationally efficient without adversely affecting inter port competition, all of which will permit the Ports to continue creating economic growth in and provide other public benefits to their communities.

CP 178-79.

The Ports could not realistically meet and discuss competitively sensitive information like rate setting, or preferential and cooperative working arrangements, if they were required to hold these discussions in public. 46 U.S.C. § 40301(b). It would give the Ports' competitors access to their strategies, and would place the Ports at a competitive disadvantage vis-à-vis marine terminal operators (both here and abroad) who were not subject to similar open public meetings acts.

It also would negatively impact on the public, as one of the primary reasons the Ports were meeting was to "maintain the U.S. Pacific Northwest as a fully competitive gateway for U.S. trade." CP 178. The Ports would not be able to discuss vulnerabilities and strengths, potential rates and contracts, negotiation strategies, and other matters that depend

on confidentiality to be effective. This is why the Shipping Act contains a specific confidentiality provision protecting such information from involuntary disclosure. 46 U.S.C. § 40306; *see also* 46 C.F.R. § 535.701. The OPMA conflicts with the Shipping Act's confidentiality provisions. West's claims are preempted and were properly dismissed.

3. West's Argument that the OPMA is not Preempted Because the Shipping Act Allows the Disclosure of Minutes in Administrative and Judicial Actions is Not Relevant.

West argues that the OPMA is not preempted because the Shipping Act's confidentiality provision does not prevent disclosure, "as may be relevant to an administrative or judicial proceeding." Opening Brief at 15. To the contrary, the language on which West relies is intended to clarify that, in a lawsuit arising out of an alleged violation of the Act or a discussion agreement filed thereunder, minutes reflecting such an agreement may be admissible, if relevant, as part of that action.

West is not seeking to obtain copies of the minutes for use in a relevant legal proceeding. He has not even alleged that the Ports violated the Shipping Act.¹¹ Instead, West is arguing that the OPMA requires that the public, and the Ports' competitors be allowed to participate in the meetings themselves, something that the Shipping Act's confidentiality

¹¹ If he had alleged such a violation, this action would need to be dismissed, as the Court would lack subject matter jurisdiction over the dispute. The FMC has exclusive jurisdiction over actions alleging violations of the Act. *Seawinds*, 80 B.R. at 184-85.

provisions preclude. His argument is without merit.¹²

4. West's Remaining Arguments are Without Merit.

West raises a number of additional arguments in his opening brief that can easily be dispatched. First, West argues that the trial court erred in dismissing his Complaint because the Freedom of Information Act, 5 U.S.C. § 552, does not apply to state agencies like the Port. But this misstates the trial court's ruling and the Ports' argument, and is entirely beside the point. The Port did not argue, and the trial court did not rule, that FOIA applied to the Port and precluded enforcement of the OPMA. The trial court correctly ruled that West's OPMA claims were preempted by the Shipping Act.

Moreover, even if FOIA does not protect from disclosure documents in the possession of state or local municipal entities, the Washington Public Records Act itself contains a section that exempts from disclosure any documents in the Port's possession that would otherwise be protected from disclosure under FOIA. RCW 42.56.070 (specifically exempting from production records falling within the scope of any "other

¹² The FMC's regulations also permit marine terminal operators to voluntarily choose to disclose the contents of their meetings after providing notice to the FMC of their intent to do so. 46 C.F.R. § 535.701. West does not argue that the optional disclosure provision counsels against preemption. Nor could he, as it is settled law that state law cannot "take away the flexibility provided by a federal regulation, and cannot prohibit the exercise of a federally granted option." *Taylor v. General Motors Corp.*, 875 F.2d 816, 827 (11th Cir. Fla. 1989) (citing *de la Cuesta*, 458 U.S. at 155; see also *Irving v. Mazda Motor Corp.*, 136 F.3d 764, 768-69 (11th Cir. 1998)).

statute which exempts or prohibits disclosure of specific information or records”). This argument is without merit.

West also argues that the “signatories” to the Ports’ Discussion Agreement were not POS and POT, but rather the Ports’ Chief Executive Officers, and that the Ports’ CEOs, not the Ports themselves, were directed to act through their respective delegates. But this argument is based on an incorrect reading of the Discussion Agreement.

It is clear from both the meaning of the term “signatories” and the Discussion Agreement itself that the term refers to the Ports as the parties to the Agreement, not their CEOs as individuals. Black’s Law Dictionary defines “signatory” as, “[a] person or entity that signs a document, personally or through an agent, and thereby becomes a party to an agreement.” *Signatory*, Black’s Law Dictionary (10th ed. 2014). The parties to the Discussion Agreement are POS and POT, not their respective CEOs. CP 179, at Art. IV (“the parties to the Agreement ... are [POS and POT]”).

In fact, the Agreement uses the terms “parties” and “signatories” interchangeably. The Agreement’s signature page states “the signatories have executed this Agreement on the dates below,” and identifies the signing parties as the “Port of Seattle” and “Port of Tacoma,” not their respective CEOs. CP 181. The CEOs signed on behalf of the two entities.

West's argument also ignores that the Discussion Agreement specifically provides that the Ports will "act by and through their respective Commissions," and that while the Ports may "from time to time invite outside parties to attend Agreement meetings to consult with or otherwise provide [input or expertise,] [s]uch parties will not participate in the deliberations or any decision-making processes that may be allowed under this Agreement." CP 179. The decision-making authority is vested in the Ports' Commissions. *Id.* This is consistent with Washington law, which requires that Ports act through their commissions. *See* RCW 53.12.010(1) ("The powers of the port district shall be exercised through a port commission").

Finally, West argues that the Shipping Act cannot preempt the OPMA because the OPMA is a statute of general applicability, whereas the Shipping Act is concerned only with international maritime commerce. To be clear, the Port is not arguing that the Shipping Act preempts the OPMA's enforcement generally, only that the OPMA is preempted with respect to the Ports' meetings under the Shipping Act, which are specifically regulated by the Act. *See In re Vehicle Carrier Services*, 2015 5095134, at *16 (holding that the Shipping Act preempts claims based on state antitrust and consumer protection laws for acts within the purview of the Act). West's argument is without merit.

C. The Trial Court Did Not Abuse its Discretion in Denying West a Continuance under CR 56(f).

West argues that the trial court abused its discretion in not granting him a continuance under CR 56(f). But that rule applies to summary judgment motions under CR 56, not motions to dismiss under CR 12(b)(6). It provides:

When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that for reasons stated, the party cannot present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

CR 56(f).

The Ports did not move for summary judgment. They moved, under CR 12(b)(6), to dismiss West's Complaint for failure to state a claim. The Ports' motions relied on the allegations contained in West's amended complaint, and documents cited therein. The Port did not rely on any materials outside of those specifically permitted by CR 12(b)(6), and the trial court did not convert the Ports' motions into summary judgment motions under CR 56. CR 56(f) does not apply.

Even if CR 56(f) did apply, the trial court did not abuse its discretion in not granting West a continuance. In order to justify a continuance under CR 56(f), the party seeking the continuance must state,

by affidavit, the good reason justifying the delay by the movant in obtaining the desired evidence, what evidence would be established through the additional discovery, and how the desired evidence would raise a genuine issue of material fact. *Turner*, 54 Wn. App. at 693 (citing *Lewis v. Bell*, 45 Wn. App. 192, 196, 724 P.2d 425 (1986)). The movant's failure to meet any of these factors is grounds for denial of the motion. *Gross v. Sunding*, 139 Wn. App. 54, 68, 161 P.3d 380 (2007) (citing *Pelton v. Tri-State Mem'l Hosp.*, 66 Wn. App. 350, 356, 831 P.2d 1147 (1992)).

West did not submit an affidavit with his opposition to the Ports' motions to dismiss articulating the basis for such an extension, nor did he identify the evidence he believed would be uncovered should he be granted an extension. West did not file a separate motion for a continuance. The only support for West's request is a sentence in his opposition stating:

In addition, the refusal of the Ports to disclose records of their meetings requested under the Public Records Act make it impossible to properly respond to the factual claims made in the defendants' motions, and a continuance under CR 56(f) is appropriate.

CP 252.

This single, unsupported statement is not enough to justify a continuance. This is especially true where the trial court accepted as true

all allegations in West's complaint, and dismissed it on the legal grounds that he had failed to state a claim for relief. The trial court did not abuse its discretion by denying him a continuance under CR 56(f).

D. The Trial Court Correctly Ruled that West Lacks Standing to Pursue his Claims.

POS joins the brief of POT in arguing that the trial court correctly dismissed West's claim under CR 12(b)(6) because West failed to allege facts sufficient to establish his standing to pursue a claim for relief under either the Uniform Declaratory Judgment Act or the OPMA.

IV. CONCLUSION

For the reasons set forth herein, POS respectfully requests that the Court affirm the trial court's dismissal of West's first amended complaint and award POS its costs on appeal.

Respectfully submitted this 18th day of November, 2015.

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CERTIFICATE OF SERVICE

I, Florine Fujita, declare that I am employed by the law firm of Calfo Harrigan Leyh & Eakes LLP, a citizen of the United States of America, a resident of the state of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On November 18, 2015, I caused a true and correct copy of the foregoing document to be served on the persons listed below in the manner indicated:

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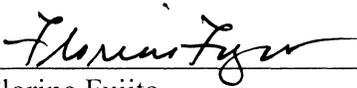
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COUNTY OF THURSTON

DATED this 18th day of November, 2015.



Florine Fujita