

1735 NEW YORK AVENUE NW, SUITE 500  
WASHINGTON, DC 20006-5209  
TEL: (202) 628-1700 FAX: (202) 331-1024  
WWW.PRESTONGATES.COM

John Longstreth, Esq  
johnl@prestongates.com  
(202) 661-6271

May 10, 2006

**VIA HAND DELIVERY**

Federal Maritime Commission  
Office of the Secretary  
800 North Capitol Street NW  
Washington, DC 20573

Re: *Premier Automotive Services, Inc. v. Flanagan and Royster*  
Docket No. 06-03

To Whom It May Concern:

Enclosed please the original and fifteen copies of Respondents-appellees' Reply to Complainant-Appellant's Appeal of Ruling Dismissing Complaint in the above-referenced docket.

If you have any questions about this matter, please contact me at the above number. Thank you for your time and assistance.

Very truly yours,

PRESTON GATES ELLIS  
& ROUVELAS MEEDS LLP

By



John Longstreth

Enclosure  
JL:cdg

cc: Charles S. Fax, Esq.

ORIGINAL *cc: o.s/bgc*  
*ALJ (4)*  
*Con. (5)*

BEFORE THE FEDERAL MARITIME COMMISSION  
WASHINGTON D.C.

PREMIER AUTOMOTIVE SERVICES, INC., )  
 )  
Complainant-appellant, )  
 )  
v. )  
 )  
ROBERT L. FLANAGAN )  
and F. BROOKS ROYSTER III, )  
 )  
Respondents-appellees. )  
\_\_\_\_\_ )

CE-110-06-03

FEDERAL MARITIME COMMISSION

Docket No. 06-03

**RESPONDENTS-APPELLEES' REPLY TO COMPLAINANT-  
APPELLANT'S APPEAL OF RULING DISMISSING COMPLAINT  
AND ITS RENEWED REQUEST FOR AGENCY INVESTIGATION**

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BEFORE THE FEDERAL MARITIME COMMISSION  
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PREMIER AUTOMOTIVE SERVICES, INC., )  
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ROBERT L. FLANAGAN )  
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**RESPONDENTS-APPELLEES' REPLY TO COMPLAINANT-  
APPELLANT'S APPEAL OF RULING DISMISSING COMPLAINT  
AND ITS RENEWED REQUEST FOR AGENCY INVESTIGATION**

Respondents-appellees Robert L. Flanagan and F. Brooks Royster, III hereby reply pursuant to 46 C.F.R. § 502.227(b)(2) to the appeal of Complainant-appellant Premier Automotive Services, Inc. ("Premier") of the March 31, 2006 Ruling of Acting Chief Administrative Law Judge Kenneth A. Krantz ("Ruling"), which dismissed Premier's Complaint and noted that Judge Krantz lacked the authority to initiate an investigation or an action in federal court. Premier also renews its request that the Commission investigate "possible violations of the Shipping Act" in connection with Premier's lease negotiations with the Maryland Port Authority (hereinafter the "Port").

**I. SUMMARY OF THE RULING APPEALED**

Judge Krantz ruled that the agency's adjudication of Premier's Complaint would be inconsistent with principles of state sovereign immunity as articulated in *Federal*

*Maritime Commission v. South Carolina State Ports Authority* (“*FMC v. SCSPA*”), 535 U.S. 743 (2002), *Idaho v. Coeur d’Alene Tribe* (“*Coeur d’Alene*”), 521 U.S. 261 (1997) and *Ex Parte Young*, 209 U.S. 123 (1908). Judge Krantz noted that the relief sought by Premier would require the Commission to supervise ongoing lease negotiations between Premier and a state-owned port under the “infinitely elastic” standard of “commercial reasonableness,” and would “interfere significantly in the state’s exercise of discretion in managing this valuable asset.” Ruling at 5-6. Judge Krantz thus did not need to reach the several other bases Respondents-appellees advanced for dismissal of the Complaint, including that the Shipping Act itself does not authorize actions for injunctive relief against state officials, and that the Complaint contains no allegations sufficient to establish that the Respondents-appellees are themselves marine terminal operators under the Act.<sup>1</sup>

Premier’s appeal does not take issue with Judge Krantz’ characterization of its claims or the relief it seeks. Instead, Premier argues that its case offers an “exact” analogy to several cited decisions in which “complex, multi-faceted, and broad-ranging remedial measures” were required, and in which the details of the requested relief were not “clearly limned.” Appeal Br. at 14-15. Indeed, Premier cites approvingly to a circumstance in which a state “had already been subject to judicial oversight for twenty years when the cited decision was reported.” *Id.* at 15. Premier also asserts that this case does not involve the kind of significant interference with state property rights necessary to invoke the *Coeur D’Alene* line of cases recognizing immunity, but its appeal also discloses that the true purpose of its Complaint is to try to prevent the State of Maryland

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<sup>1</sup> Premier does not address any of these alternative grounds in its appeal, and thus there is no basis for Premier’s suggestion that the Commission should “remand with instructions that the claims be adjudicated on the merits.” See Appeal Br. at 18.

from recovering possession of its own property.<sup>2</sup> As Judge Krantz recognized, it would be a significant infringement of a state's sovereignty to prevent it from possessing its own property, which it manages in the interests of its citizens.

Judge Krantz concluded that this would be a particularly inappropriate case for the Commission to hold, for the first time, that it can supervise a state sovereign's negotiations for a lease of its own property, and prevent the state from regaining possession of that property, on the basis of a private complainant's dissatisfaction with the state's lease offers. Judge Krantz' ruling is fully consistent with the law and with common sense. Nor does Premier offer any basis on which the Commission should order the Bureau of Enforcement, which is presumably aware of Premier's "information regarding possible violations of the Shipping Act," to undertake an investigation that would assist Premier in its efforts to remain on the Port's property without a lease, rather than awaiting any recommendations from the Bureau under the Commission's regular procedures. Respondents-appellees thus respectfully request that the appeal be denied in its entirety.

## **II. SUMMARY OF ARGUMENT**

Complainant-appellant Premier comes before the Commission having allowed its lease for Lot 90 at the Port's Dundalk Marine Terminal (the "Lease") to expire, meaning that Premier has a "tenancy from month-to-month only."<sup>3</sup> The Lease expressly provides that Premier lost any interest in the buildings or other improvements on the leased premise upon expiration of the lease, including a building that it had constructed in 1964

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<sup>2</sup> Appeal Br. at 6 (noting that once the bankruptcy judge issues his written opinion confirming his rejection of Premier's arguments to that court, the Port will "seek to have Premier evicted from Lot 90.")

<sup>3</sup> Lease, Compl. Ex. 1, ¶ 2.2.

and that it refers to repeatedly in its Complaint without acknowledging the Lease provision that expressly negates the interest Premier asserts in it.<sup>4</sup> As a month-to-month tenant, Premier retains only a bare possessory interest in the terminal, which it has refused to vacate despite the Port's notice that it do so, given only after Premier refused several offers of a new lease for Lot 90. Compl. ¶¶ 14, 16-17, and 26 (noting the Port's notice to vacate no later than May 1, 2005, and describing the Port's three prior lease offers).

Premier first sought to forestall its departure by filing for bankruptcy. *Id.* ¶ 28 (noting Premier's filing on April 29, 2005 to fend off the Port's notice to vacate by May 1, 2005). This had the effect, regardless of the merits of any of Premier's claims, of automatically staying the Port's efforts to recover its property. *See* 11 U.S.C. § 362. However, following discovery and a several hearings, the Bankruptcy Judge announced he was granting the Port's motion for summary judgment on all of Premier's claims and lifting the stay, allowing the Port to move forward once his formal opinion issues. Compl. ¶4.<sup>5</sup> Premier has thus sought to enlist the Commission's aid in a second delaying tactic, a request for injunctive relief to keep it at the Port despite its refusal to agree to a

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<sup>4</sup> *Id.* at 4.2 (noting that Premier must either remove the building at its expense "upon the termination of this LEASE or any renewal thereof," or else be "deemed to have abandoned all of its property in the buildings or other fixtures"). References in the Complaint to this building, which suggest contrary to this language that Premier retains some cognizable interest in it, are contained, *inter alia*, at ¶¶ 1, 7, 14, 16, 19, and 20. The Complaint also states that Premier owns the building "for the duration of its tenancy," see ¶1, but that is not what the Lease says. Premier is required to remove or abandon the building "upon the termination" of the LEASE or its renewal, which occurred on June 30, 2002. By letter of March 29, 2005, attached as Ex. 17 to the Complaint, the Port expressly requested that Premier remove the building. *See* Compl. ¶ 26.

<sup>5</sup> The Bankruptcy Judge stated in the most recent hearing that he will embody his rulings lifting the stay and granting the Port's motion for summary judgment in a written opinion, which is expected to issue soon.

new lease. Premier's position is based on a series of contentions that the Commission has never before accepted.

1. Premier argues that it can bring a private complaint against Port officials notwithstanding that the Port is an arm of the state and therefore entitled to sovereign immunity, and notwithstanding that the relief Premier seeks would interfere in the Port's sovereign control over a particular piece of State property. Judge Krantz properly rejected this contention, making it unnecessary for him to reach the other grounds Respondents-appellees advanced for dismissal of the Complaint.

2. Premier seeks to bring Shipping Act claims alleging violations of the duties of a marine terminal operator against two individual directors who are not marine terminal operators.

3. Premier seeks to bring claims for private injunctive relief against state officials under a provision of the Shipping Act that has never been construed as providing authority to do so, and that in its plain terms authorizes only private actions for reparations.

4. Premier alleges that the Port has engaged in an unreasonable practice and a refusal to deal even though, as its own Complaint discloses, the Port has offered it three separate leases and it is Premier itself that has refused to make any counteroffer. Premier also does not allege, nor could it, the Port's actions have created a monopoly, reduced competition at the Port, or harmed the shipping public in any way.

5. Premier claims illegal discrimination and undue preference as to the lease terms the Port offered because they did not match a mélange of terms Premier has cherry-picked from other leases with tenants who have made commitments to the Port that

Premier has not made. In doing so, Premier flatly mischaracterizes the Port's offers as set out in the exhibits to Premier's own Complaint.

As Judge Krantz ruled, the Commission need not address the many weaknesses in the merits of Premier's Shipping Act claims to affirm their dismissal because Premier cannot maintain such claims in the first place because of the Port's sovereign immunity. The Commission has never held that a privately-initiated complaint proceeding against the directors of a state-run port, rather than against the port itself, would be permissible over a claim of sovereign immunity. Even if the Commission were to consider such an action permissible in some circumstances, Premier's action here would not be proper because it seeks to interfere directly with the State's sovereign right to control its own property by asking the Commission to supervise lease negotiations that Premier has not undertaken itself. Finally, even if sovereign immunity were not a bar to Premier's claims, the Shipping Act itself cannot be construed to provide for the relief Premier seeks as a private complainant here.

### **III. FACTS RELEVANT TO THE APPEAL**

The facts relevant to this appeal are set forth in Premier's Complaint, including its attachments.<sup>6</sup> Although the Respondents-appellees are required in the context of a motion to dismiss to accept the allegations of the Complaint as true, they do so without intending any implication that the facts set forth in the Complaint are in fact either

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<sup>6</sup> The Commission is entitled to rely on matters set forth in the Exhibits to the Complaint, including the terms of Premier's expired lease, even if Premier has chosen to ignore or mischaracterize those terms in the Complaint. *See Cortec Industries, Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991) (under Fed. R. Civ. P. 10(c), "the complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated into it by reference;" court can also rely on documents integral to the complaint even if not attached as exhibits); 46 C.F.R. § 502.12 (following Fed. R. Civ. P. 10(c) and other federal rules in the absence of an express Commission rule to the contrary).

accurate or complete. Moreover, the Commission is not required to accept assertions by Premier that are negated by the plain terms of its expired lease with the Port; for example, its assertion that it has some kind of property interest in the building on Lot 90 even though the lease expressly provides that any such interest terminated upon expiration of the lease in June 2002.<sup>7</sup>

The Complaint and its attachments disclose the following facts for purposes of this appeal.

**A. The Expired Lease**

Premier leased Lot 90 at MPA's Dundalk Marine Terminal under a Lease entered into in 1992 and renewed in 1997. Compl. ¶13.<sup>8</sup> The lease expired on June 30, 2002. *Id.* Premier has erected a building on the leased premises. Compl. ¶7. The Lease expressly provides, however, that

**Any and all buildings, fixtures, machinery, equipment or improvements installed, erected or caused to be erected by PREMIER upon the leased premises at PREMIER's expense shall be owned by PREMIER and must be removed by it at its expense upon the termination of this LEASE or any renewal thereof; or, in the event that PREMIER requests, in writing, MPA's permission to leave any and all buildings, fixtures, machinery, equipment or improvements erected and intact and MPA specifically notifies PREMIER in writing that MPA specifically allows and agrees that the buildings, fixtures, machinery, equipment or improvements, erected by PREMIER may remain in place, PREMIER shall be deemed to have abandoned all of its property in the buildings or other fixtures, machinery, equipment or improvements left behind to MPA.**

Compl. Ex. 1, ¶4.2 (emphasis added).

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<sup>7</sup> Lease, Compl. Ex. 1, ¶¶ 2.2, 4.2.

<sup>8</sup> Premier makes reference to earlier leases, but does not provide or rely on them.

Under the express terms of the Lease, therefore, the building was subject to removal, or if MPA consented, abandonment by Premier as of June 30, 2002. Contrary to the repeated implications of the Complaint, Premier unambiguously has no right to the building on Lot 90 based on the express language of the Lease attached to the Complaint.<sup>9</sup> The Port has, in fact, expressly requested that Premier remove the building. Compl. ¶ 26 & Ex. 17.

### **B. The Port's Offers of A New Lease**

Premier's expired Lease, as amended during its term, contained no cargo throughput guarantee to MPA; nor was such an obligation part of Premier's month-to-month holdover tenancy. Compl. Ex. 1. After Premier and the Port entered into the Lease, however, the Port began requiring its tenants to guarantee a cargo throughput. Numerous examples of leases containing such throughput provisions are attached to the Complaint.<sup>10</sup> The Port also began asking prospective tenants to agree to relocate their premises if requested based on the Port's changing needs, and negotiated varying relocation provisions that are also contained in leases attached to the Complaint.<sup>11</sup>

The Port made written proposals to Premier in July 2002 and April 2004 for a lease of Lot 90 on a long-term basis. Compl. ¶¶14, 18. Both of those proposals included, among other things, a throughput guarantee and a relocation provision. *Id.*; *see also* Compl. Ex. 3 ¶ 2.1(b) & Ex. 6 ¶2.1(c). The Complaint alleges that Premier asked the Port to modify the throughput guarantee, *id.* ¶18, but does not allege that Premier made

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<sup>9</sup> Premier also refers to this building repeatedly throughout the "Background" section that comprises pages 4-6 of its appeal brief. Premier makes no attempt, however, to deal with the Lease provision under which it was required to remove or abandon that building as of June, 2002.

<sup>10</sup> *See, e.g.*, Compl. Exs. 10 and 11, ¶2.1.c; Ex. 20, ¶3.1.b; Ex. 21, ¶3.4.a; Ex. 22, ¶ 2.1.b; Ex. 23, ¶ 2.1.b; Ex. 24, ¶ 2.1.b; & Ex. 32, ¶ 2.1.c.

<sup>11</sup> *See, e.g.*, Compl. Ex. 10, ¶1.5; Ex. 21, ¶4.2; Ex. 22, ¶1.5; Ex. 23, ¶1.2.1; Ex. 24, ¶1.2.1; and Ex. 32, ¶1.5.

any specific counter proposal or offered to accept a throughput guarantee at any level. Moreover, although the Complaint misleadingly implies that the Port refused to make any concession to Premier on the throughput rate, *id.*, in fact the Port offered in July 2002 to calculate the throughput based on 85% of Premier's leased acreage (11.5 of 13.47 acres), *see* Compl. Ex. 3 ¶ 2.1(b), and later offered in April 2004 to calculate it on the basis of only about 52% of Premier's leased acreage (3.04 of 6.47 acres). Compl. Ex. 6 ¶ 2.1(c).

The Complaint also alleges that the Port acted wrongfully in including a relocation clause in its proposal to Premier. Compl. ¶¶ 14, 19. The Complaint does not allege, however, that Premier ever advised the Port that it objected to this clause or proposed an alternative. Moreover, Premier alleges that the clause would improperly have deprived it of access to its 40-year old building, but fails to acknowledge, as noted above, that it had lost any rights to that building upon expiration of its lease in 2002.

### **C. The Lease with Pasha**

Although Premier was proving unwilling to commit to a long-term lease, other entities were interested both in leasing land from the Port and in making commitments to keep the Port's terminals busy. The Complaint contains, as exhibits, a number of leases that contain throughput guarantees.<sup>12</sup> As to Lot 90, the Port chose to move forward with a lease to Pasha Automotive Services. Compl. Ex. 10. Pasha was willing to commit to a five-year term, and to guarantee a minimum throughput of 1,700 vehicles per acre. *Id.*, ¶¶ 1.1, 2.1.c. Pasha also accepted a relocation provision, which did not include a provision that the Port relocate any buildings or structures for Pasha. *Id.*, ¶1.5.

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<sup>12</sup> *See, e.g.*, Compl. Exs. 10 and 11, ¶2.1.c; Ex. 20, ¶3.1.b; Ex. 21, ¶ 3.4.a; Ex. 22, ¶ 2.1.b; Ex. 23, ¶ 2.1.b; Ex. 24, ¶ 2.1.b; Ex. 32, ¶2.1.c.

Premier refers to certain criminal charges against Pasha, but does not cite any reason why these charges should have prevented the Port from leasing premises to Pasha. Premier alleges that at one time Pasha was suspended from conducting business with the federal government, Compl. ¶23, but does not (and cannot) allege that Pasha is currently barred from dealing with the federal government. Nor does Premier allege that Pasha's legal troubles prevent it in any way from fulfilling its contractual obligations to the Port.<sup>13</sup>

#### **D. Leases with Other MPA Tenants**

Premier's Complaint cites snippets of several leases that the Port has entered into with other tenants. Compl. ¶29. Premier does not allege, however, that it was willing to enter into a lease on terms substantially similar to any lease given another tenant, or that it communicated any such desire to the Port.

As noted above, Premier's citations to several of these leases are, at the very least, misleading. Premier cites throughput requirements per acre, for example, without addressing differences among tenants as to the acreage or percentage of total leased premises to which the requirements apply. A review of the leases proffered by Premier demonstrates that the Port's other tenants were willing to commit to, *inter alia*, the following:

- ATC Logistics, Inc. was willing to lease 50 acres, guarantee a minimum of 2,500 vehicles per acre in lease years four through twenty, the acreage to include buildings and improvements,<sup>14</sup> and to make a shortfall payment if it failed to meet the guarantee. Compl. Ex. 20, ¶¶ 1.2, 1.4, 3.1.b, ¶4.3.

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<sup>13</sup> Premier alleges that the Port has no "written" policies, standards, or guidelines regarding throughput requirements or the types of tenants with whom MPA may deal, *see* Compl. ¶30, but does not cite any legal requirement for such written policies or standards.

<sup>14</sup> The lease states a requirement of 125,000 vehicles for the 50-acre facility.

- Wallenius Wilhelmsen Atlantic LLC was willing to lease 150 acres for 20 years, guarantee a minimum of 2,400,000 tons for each five-year period of the 20-year lease, make a shortfall payment if it failed to meet the guarantee, make a ship call guarantee, and to pay liquidated damages if it failed to meet that guarantee. Compl. Ex. 21, ¶¶1.1, 1.2, 3.4, 3.5.
- CaseNewHolland, Inc. was willing to guarantee 900 (lease year one) or 1,000 (lease years 2 and 3) “farm and industrial vehicles” per acre (i.e., not motor vehicles or automobiles which are smaller),<sup>15</sup> to apply the guarantee to virtually all of its leased land, and to make a shortfall payment if it failed to meet the farm and industrial vehicle guarantee. Compl. Ex. 22, ¶¶ 2.1.a and b, 3.3.
- Mercedes-Benz USA, LLC was willing to guarantee a minimum of 1,700 vehicles per acre for a period of 10 years, and to make a shortfall payment if it failed to meet the guarantee. Compl. Ex. 23, ¶¶ 1.1, 2.1.b, 3.4.
- Bennett Distribution Services was willing to guarantee 1,000 “farm and industrial vehicles” per acre (i.e., not automobiles which are smaller), to apply the guarantee to all of its leased land (excluding the building), and to make a shortfall payment if it failed to meet the guarantee. Compl. Ex. 24, ¶¶ 2.1.a and b, 3.3. Bennett also agreed to a relocation provision that was not as favorable to it as the provision in the lease the Port proposed to Premier. Compare Compl. Ex. 24, ¶1.5 with Compl. Ex. 3, ¶1.5.
- Pasha Automotive Services was willing to lease over 23 acres, to guarantee 1,700 vehicles per acre per year on all of the leased land (a total of approximately 39,100 vehicles in all) and to make a shortfall payment at the end of lease year five if it failed to meet the guarantee. Compl. Ex. 11 ¶¶ 1, 3, 3.3.
- APS North Terminal, Inc.<sup>16</sup> was willing to lease 75.10 acres from MPA over a 10-year period, to guarantee a minimum of 1,700 vehicles per acre, and to make a shortfall payment if it failed to meet the guarantee. Compl. Ex. 32, ¶¶ 1.1, 1.2, 2.1.c, 3.3, 3.5. The APS lease contains a relocation provision that is substantially similar to, but somewhat less favorable to the tenant than, the relocation provision in the lease MPA proffered to Premier. *Compare Id.*, ¶1.5 with Compl. Ex. 3, ¶1.5.

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<sup>15</sup> Premier distinguishes between itself as a “vehicle processor,” Compl. ¶1, and CaseNewHolland and Bennett as “processor[s] of large farm equipment.” *Id.* ¶20. “Large farm equipment” is larger than automobiles, which would be included in the term “vehicles.” An acre of land can hold a larger number of “vehicles” than pieces of “large farm equipment.” Case New Holland’s guarantee also, unlike the lease offered to Premier, applies to virtually all of its leased acreage.

<sup>16</sup> Premier does not include APS in its discussion of selected lease provisions in Paragraph 29, but the lease is included as an exhibit to the Complaint.)

**E. The Lot 401 Sublease**

Premier alleges that MPA inappropriately refused to renew a sublease between Premier and another tenant based solely on Premier's seeking of protection from the Bankruptcy Court. Compl. ¶32. The Port's stated reasons are contained in a letter to Premier that notes "MPA's understanding that Premier was not financially in a position to make a long-term commitment to MPA." Compl. Ex. 33 at 2. Premier's contention that the Port's actions violate the bankruptcy code were rejected by the bankruptcy judge, and the Port does not understand Premier to be pursuing that argument here.<sup>17</sup>

**IV. ARGUMENT**

**A. PREMIER'S PRIVATE COMPLAINT IS BARRED BY SOVEREIGN IMMUNITY AND IS NOT COGNIZABLE UNDER THE SHIPPING ACT**

**1. The Commission's Prior Consideration Of The State Sovereign Immunity Doctrine**

In *Ceres Marine Terminals, Inc. v. Maryland Port Administration*, 30 SRR 358 (2004), the Commission found that the Port is an arm of the State of Maryland, and is entitled to sovereign immunity from the regulatory adjudication of privately-filed Shipping Act complaints. Citing *Federal Maritime Comm'n v. South Carolina State Ports Auth.* ("*FMC v. SCSPA*"), 535 U.S. 743 (2002), the Commission noted the U.S. Supreme Court's conclusion that the agency "cannot adjudicate complaints filed against nonconsenting state-run ports, pursuant to the Eleventh Amendment to the Constitution and the doctrine of state sovereign immunity." 30 SRR at 363. The Commission also found that the Port has not waived its immunity from suit. *Id.* at 363-64. Premier does

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<sup>17</sup> In any event, having been belatedly provided documentation by Premier after the filing of the Complaint that it does have a long-term arrangement for this terminal, MPA has offered to consent to a sublease, so this claim would appear to be now moot.

not argue that these rulings are inapplicable to this case, and in fact the Complaint cites the *Ceres* decision in acknowledgement that “the Commission’s jurisdiction has been truncated.” Compl. ¶ 10.

In *South Carolina Maritime Services, Inc. v. South Carolina State Ports Authority* (“*South Carolina Ports*”), 29 SRR 802 (2002), the Commission laid out the principles that, pursuant to the Supreme Court’s ruling, govern sovereign immunity claims before the agency. First, the Commission noted that state sovereign immunity “extends beyond the literal text of the Eleventh Amendment.” 29 SRR at 804, quoting *FMC v. SCSPA*, 122 S.Ct. at 1871. Rather, the inquiry requires consideration of the fundamental role of states as sovereign entities in the federal constitutional framework. *Id.* (“[T]he proper inquiry is not whether Commission adjudications are covered by the Eleventh Amendment, but instead ‘whether the sovereign immunity enjoyed by States *as part of our constitutional framework* applies to adjudications conducted by the FMC.’”) (emphasis supplied by the Commission). The Commission went on to note that the Supreme Court has “‘applied a presumption’ in past cases that the Constitution would not be construed to allow proceedings against States if such proceedings were ‘anomalous and unheard of when the Constitution was adopted.’ *Id.* (citing *Hans v. Louisiana*, 134 U.S. 1, 18 (1890))”. 29 SRR at 804, quoting *FMC v. SCSPA*, 122 S.Ct. at 1872.

Again quoting the Supreme Court, the Commission noted that the “[t]he preeminent purpose of state sovereign immunity is to accord States the *dignity* that is consistent with their status as sovereign entities.” 29 SRR at 804, quoting *FMC v. SCSPA*, 122 S.Ct. at 1874 (emphasis added by the Commission). Finally, the Commission noted that even proceedings seeking prospective relief, such as a cease-and-

desist order, were barred “because any proceeding naming the port, no matter what relief was sought, would transgress the State's dignity interest in not being subjected to an adjudication against its will.” 29 SRR at 805, quoting *FMC v. SCSPA*, 122 S.Ct. at 1879. See *Idaho v. Coeur d' Alene Tribe of Idaho*, 521 U.S. 261, 270 (1997) (“The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleadings.”)

The Commission noted that the *South Carolina Ports* case “did not address whether the doctrine established by the Supreme Court in *Ex parte Young*, 209 U.S. 123 (1908), which permits lawsuits to be filed against state officers (rather than against the State itself) to seek prospective relief, should apply in Shipping Act adjudications.” 29 SRR at 805-06. “Therefore, it may be that a future privately-initiated complaint proceeding against the directors of a state-run port, rather than against the port, would be permissible. Such a determination as to whether the Shipping Act allows such a proceeding, however, will have to wait for a case in which the issue is raised.” *Id.* at 806.

## **2. Judge Krantz Properly Held That The *Ex Parte Young* Fiction Does Not Authorize Premier's Private Complaint.**

Premier's appeal suggests that its Complaint offers the Commission an appropriate vehicle to hold, for the first time, that a private complaint that could not be maintained against a state-run port itself can instead be brought through the expedient of naming the port's directors in their official capacities as respondents. Premier's Complaint cites to the Commission's discussion, set forth above, in which it made reference to the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908). Compl. ¶ 10. That doctrine is not applicable here, however, and sovereign immunity bars Premier's claim.

As the Commission noted in *South Carolina Ports*, state sovereign immunity is fundamental to the constitutional framework, a principle the Supreme Court reiterated again last month:

The immunity of States from suit “is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments.” *Alden v. Maine*, 527 U. S. 706, 713 (1999); see *Seminole Tribe of Fla. v. Florida*, 517 U. S. 44, 55–56 (1996); *Principality of Monaco v. Mississippi*, 292 U. S. 313, 322–323 (1934). . . . The phrase “‘Eleventh Amendment immunity’ . . . is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment.” *Alden*, supra, at 713.

*Northern Ins. Co. of New York v. Chatham County, Georgia*, No. 04-1618, slip op. at 3 (U.S. April 25, 2006).

Because of the importance of state sovereign immunity, the Supreme Court recognized in *Coeur d'Alene* that the *Ex Parte Young* doctrine, on which Premier relies, cannot simply be applied mechanically, but requires a thorough analysis of the nature of the suit, the effect of the relief sought, and the state interests involved. As one federal court of appeals has stated:

Even if Plaintiffs meet all the traditional requirements for the application of the *Ex parte Young* doctrine . . . that does not *automatically* allow the suit to proceed in federal court. The rule from *Coeur d'Alene Tribe* requires a more thorough investigation into the nature of the claim, the state's interest and the potential effect of the requested relief in order to determine what sovereign interests the court's decision might affect and whether federal jurisdiction is appropriate.<sup>18</sup>

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<sup>18</sup> *Elephant Butte Irrigation Dist. of New Mexico v. Dep't of the Interior*, 160 F.3d 602, 611 (10th Cir. 1998) (emphasis in original).

*Coeur d' Alene* held, for example, that where a complaint seeks injunctive relief that would divest the state of ownership and regulatory authority over specific property, sovereign immunity bars the suit notwithstanding *Ex Parte Young*. A state's interests in land to which it claims title are "special sovereignty interests" as to which a state is entitled to sovereign immunity from claims in a federal forum. *Idaho v. Coeur d' Alene Tribe*, 521 U.S. at 270, 289. The Supreme Court ruled that Idaho was entitled to immunity from an action against state officials challenging the state's ownership of certain submerged lands because of the special nature of the State's interest in these lands, and thus declined to apply the fiction of *Young* that the suit was against state officials rather than against the state itself.

As noted in Justice O'Connor's concurring opinion in *Coeur d' Alene*,<sup>19</sup> where a private party's action seeks control of sovereign state land ". . . it simply cannot be said that the suit is not against the state." 521 U.S. at 296. "A federal court cannot summon a state before it in a private action seeking to divest the state of a property interest." *Id.* at 289, citing *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 699-700 (plurality opinion); *Ford Motor Company v. Dep't of the Treasury of Ind.*, 323 U.S. 459, 464 (1946).<sup>20</sup>

The gravamen of Premier's claims here is not the actions of Respondents-appellees Secretary Flanagan or Executive Director Royster, but rather an attempt to gain

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<sup>19</sup> Justice O'Connor wrote separately to emphasize her reliance on the special nature of the real property interests involved, but there is no question that the lead opinion, which together with Justice O'Connor's made up the majority, also relied heavily on this factor. *See. e.g.*, 521 U.S. at 270 ("this case is the functional equivalent of a quiet title action which implicates special sovereignty interests.")

<sup>20</sup> As the lead opinion notes, in *Treasure Salvors* a claim was permitted because the state officials there were acting beyond their state-conferred authority, *see* 458 U.S. at 696-97, an allegation that is not made in Premier's Complaint.

an interest in a particular portion of sovereign state land. Indeed, as noted above, Premier's main concern, expressly stated in its appeal brief at page 6, is that after the bankruptcy judge moves forward to lift the stay in bankruptcy, thus formalizing his decision rejecting Premier's first stratagem for delaying its exit from the Port, the Port will seek to regain possession and control of the state's own land. The injunctive relief Premier seeks in order to interfere with those state efforts thus directly implicates fundamental and special state sovereignty interests.

The doctrine set forth in *Coeur d'Alene* was explained in *MCI Telecom. Corp. v. Bell Atlantic-Pennsylvania*, 271 F.3d 491, 508 (3rd Cir. 2001), as follows:

An action cannot be maintained under *Young* in those unique and special circumstances in which the suit against the state officer affects a unique or essential attribute of state sovereignty, such that the action must be understood as one against the state. One example of such special, essential, or fundamental sovereignty is a state's title, control, possession, and ownership of water and land, which is equivalent to its control over funds of the state treasury. See *Coeur d'Alene*, 521 U.S. at 287; *id.* at 296-97 (O'Connor, J., concurring in part and concurring in the judgment). This exception is best understood as an application of the general rule that *Young* does not permit actions that, although nominally against state officials, in reality are against the state itself.

Premier's action seeks to exploit the Commission's processes to attempt to wrest from the State of Maryland significant control over a particular portion of a state-owned marine terminal from which the State obtains the benefit of its navigable waters for the general public. That directly implicates the state's "title, control, possession, and ownership of water and land," which is a "unique or essential attribute of state sovereignty."

As Judge Krantz recognized, Ruling at 5, the Port's decision to move forward with others after Premier rejected its lease offers was made pursuant to the Port's sovereign right and duty to use its own essential port lands to obtain the benefits of the State's navigable waters. The Port undertakes such duties in order "to increase waterborne commerce of the ports of this State and, by doing so, benefit the people of this State." MD Laws, Transportation Article § 6-102(c)(1). The relief Premier seeks would directly disrupt the Port's plans for a particular parcel of State property that it manages in the public interest. *See also In re Ayres*, 123 U.S. 443, 8 S.Ct. 164 (1887) (equitable action against state officers for specific performance of contract to which the state is a party is barred by the Eleventh Amendment).

A similar circumstance was presented in *Ysleta Del Sur Pueblo v. Raney*, 199 F.3d 281 (5th Cir. 2000), a case that followed *Coeur d'Alene* and held that sovereign immunity barred a putative *Ex Parte Young* claim against state officials. The court described the state's argument in terms that apply well to the present case:

The land at issue here is located in a highly developed area, used for highway construction, maintenance and operation, and has many improvements that help facilitate the purposes which it serves. According to the Appellants, the State will be unable to properly carry out its sovereign responsibilities with regards to state roadways if it loses possession of the property. Appellants note that this case should not be viewed any differently than a case where plaintiffs seek to take possession of land upon which a state highway has been constructed.<sup>21</sup>

Premier seeks to support its appeal of Judge Krantz' ruling by relying on several cases applying *Ex Parte Young* to claims "impinging on state property interests,"<sup>22</sup> and on several other cases applying *Young* in matters involving "complex, multi-faceted and

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<sup>21</sup> *Id.* at 290.

<sup>22</sup> Appeal Br. at 11 n.3.

broad-ranging remedial measures.”<sup>23</sup> Notably, the two sets of cases Premier cites do not intersect. In other words, Premier does not cite a case in which a court or agency was called upon to exercise complex, broad ranging and detailed oversight of a state’s management of its own real property in the public interest, which is the case presented to the Commission. As Judge Krantz found, granting the relief Premier seeks would require the Commission to supervise ongoing lease negotiations with respect to the state’s property under an indeterminate standard of commercial reasonableness, a “degree of intervention . . . incompatible with the sovereign dignity of the states that the Supreme Court identified as fundamental to Eleventh Amendment jurisprudence in *South Carolina State Ports Authority*.” Ruling at 5.

As noted above, Premier does not contest Judge Krantz’ conclusion that it seeks complex and intrusive relief, but instead embraces it and argues that such relief is fully consistent with sovereign immunity principles as applied in several cases construing *Ex Parte Young*. Appeal Br. at 14-16. The cases cited by Premier in support of this contention, however, involved very different situations. *Antrican v. Odom*, 290 F.3d 178 (4th Cir. 2002), concerned a state’s administration of the federal Medicaid program, which the court described as “a federally designed program” in which states are “invited to participate” if they “agree to certain federally established conditions.” *Id.* at 189. The case is not analogous to the present one, which involves no similar election by the state to participate in a federal program, accepting its benefits and burdens, but instead concerns the state’s management of its *own* real property in the public interest. *See Antrican*, 290 F.3d at 190 (noting that the state was free to avoid the burdens sought to be imposed in the lawsuit by declining federal money and not participating in the program). *Joseph A.*

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<sup>23</sup> *Id.* at 11 n.4 & 14.

*ex rel. Wolfe v. Ingram*, 275 F.3d 1253, 1260 (10th Cir. 2002) likewise involved the administration of a program “at least partially funded by the federal government.” And the third case cited by Premier, *MCI Telecomm. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323 (7th Cir. 2000), expressly premised its discussion of the sovereign immunity issue on the fact that the state had voluntarily chosen to participate in a federal regulatory scheme in which Congress had made clear that its participation would waive sovereign immunity. Indeed, the alleged state interest in the *MCI* case was “derived solely from the regulatory role Congress has bestowed on the states.” *Id.* at 347.

Rather than supporting Premier’s argument, these cases it cites are far removed from the situation presented by its Complaint. Not only do none of them involve a state real property interest, but they are all premised on a state’s affirmative decision to enter into a federal program, and thus its decision to accept the benefits of that program and its consequent burdens. In the present case, the state’s interests in controlling its own real property are in no way derived from the Shipping Act or other federal law. They are inherent in the state’s ownership of the property at issue. Nor has the state affirmatively chosen to enter into a grant or benefit program that has the effect of subjecting its terminal leasing activities to the Act. The case law cited by Premier thus does nothing to advance its position.

The separate line of cases that Premier cites as involving some form of state property interest are likewise unavailing. Again, none of these cases involved anything remotely like the present situation, in which a party seeks to invoke a federal forum to interfere with the state’s negotiations to lease its own lands. Nor in any of these cases was a federal tribunal called upon to forestall a state from recovering possession and use

of its *own* real property, or to engage in the kind of ongoing supervision that would be necessary were Premier's claims to be accepted.<sup>24</sup> Indeed, one of the cases Premier cites, *Elephant Butte v. Dept. of the Interior*, expressly noted that "the law will not permit the courts to force [state] officials into negotiating changes in lease agreements." 160 F.3d at 611. See also *MacDonald v. Village of Northport MI*, 164 F.3d 964 (6th Cir. 1999) (state has special sovereignty interest in maintaining public access to Traverse Bay; immunity applies).

In sum, Judge Krantz correctly held that, notwithstanding *Ex Parte Young*, Premier's claims should be dismissed out of respect for the Port's sovereign immunity.

### **3. The Shipping Act Does Not Permit Premier To Seek Injunctive Relief Against Respondents-Appellees.**

As the Commission recognized on remand in the *South Carolina Ports* case, sovereign immunity is only one hurdle to a party seeking to sue the directors of a state-run port for alleged Shipping Act violations. There is also the issue of "whether the Shipping Act allows such a proceeding," an issue that, like the sovereign immunity issue, the Commission has never before decided. *South Carolina Ports*, 29 SRR at 806. Even if the *Ex Parte Young* doctrine allowed Premier to overcome the sovereign immunity barrier to its private action, which it does not, the Shipping Act itself would not permit the action. Because Judge Krantz's ruling on the sovereign immunity issue was sufficient

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<sup>24</sup> See *Arnett v. Myers*, 281 F.3d 552 (6th Cir. 2002) (rejecting an argument based on *Coeur d'Alene* that had not been raised below; plaintiff's claim required determination of whether plaintiff had an existing property right, and required no ongoing supervision); *Lipscomb v. Columbus Mun. Separate School Dist.*, 269 F.3d 494, 500-02 (5th Cir. 2001) (*Coeur d'Alene* issue also raised for the first time on appeal; lawsuit involved whether voiding the price terms of existing leases violated the Contract Clause; no ongoing supervision requirement); *Branson School Dist. v. Romer*, 161 F.3d 619 (10th Cir. 1998) (same; issue was whether reforming the price terms of existing leases violated Contract Clause); *Elephant Butte*, *supra* (plaintiffs were third party beneficiaries claiming entitlement to a share of profits under existing leases, not seeking possession or control of the property).

to dispose of Premier's Complaint, he did not address these separate grounds for dismissal.<sup>25</sup>

Premier's appeal does not address at all the issue as to whether the Shipping Act itself allows a suit for private injunctive relief against state officials, but merely cites three Commission decisions as to the purported scope of the Shipping Act. Two of the cited decisions did not involve marine terminal operators at all, much less officials of a state authority that is protected by sovereign immunity.<sup>26</sup> The third decision, *Pate Stevedoring Co. of Mobile v. Alabama State Docks Dep't*, 24 S.R.R. 657 (I.D.), adopted, 24 S.R.R. 1221 (1988), held that state sovereign immunity does not apply to private complaints before federal administrative agencies, a holding that was squarely overruled by the U.S. Supreme Court in *FMC v. SCSPA*, *supra*.<sup>27</sup> Premier thus cites absolutely no Commission authority that supports its request for injunctive relief against state officials via a private complaint.

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<sup>25</sup> Premier's appeal brief states that its Complaint falls within the "statutory parameters for administrative and adjudicatory relief," and that Judge Krantz's ruling "does not conclude otherwise." Appeal Br. at 13, 14. To the extent these statements are intended to suggest that Judge Krantz decided the statutory issues in Premier's favor in some way, they are misleading. It is plain from the Judge's Ruling that he did not reach these issues. There is no implication in the Ruling that the Judge considered the Respondents' arguments on these points and declined to accept them.

<sup>26</sup> Appeal Br. at 13, citing *Cargo One, Inc. v. COSCO Container Lines*, 28 S.R.R. 1651 (2000) (alleged violations by an ocean common carrier of vessel space allocation rules; issue before Commission was the scope of Section 8(c) of the Act), and *50 Mule Container Rules*, 24 S.R.R. 411 (1987), *aff'd sub nom. New York Shipping Ass'n v. FMC*, 854 F.2d 1338 (D.C. Cir. 1988) (challenge to rules implemented by ocean common carriers denying containers to a class of persons).

<sup>27</sup> Indeed, even before the Supreme Court's ruling, Judge Kline had found that *Pate v. Alabama State Docks* was not controlling law on the sovereign immunity question in light of *Alden v. Maine*, 527 U.S. at 733, which noted that the logic of the Supreme Court's state sovereign immunity decisions "does not turn on the forum in which the suits were prosecuted." *South Carolina Maritime Services, Inc. v. South Carolina State Ports Authority*, 28 S.R.R. 1307, 1311, 1313-14 (I.D.), *rev'd*, 28 S.R.R. 1489 (FMC 2000), *rev'd*, 243 F.3d 165 (4th Cir. 2001), *aff'd*, 535 U.S. 743 (2002).

Consideration of this issue begins, as always, with the language of the statute. *See Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (“Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.”). Section 11(a) of the Shipping Act provides that a private party “may file with the Commission a sworn complaint alleging a violation of this Act, other than section 6(g), and may seek reparation for any injury caused to the complainant by that violation.” 46 App. U.S.C. 1710(a). The Act thus expressly authorizes private parties to seek reparations (though not from a state or from state officials),<sup>28</sup> that is, the monetary payments for actual injury described in Section 11(g) of the Act. It does not, however, expressly allow parties to seek prospective injunctive relief from the Commission.

While the Commission has, on rare occasions, issued cease and desist orders at the end of proceedings initiated by private parties,<sup>29</sup> it has not to the Port’s knowledge entertained such actions against state officers, and certainly has not done so since the Supreme Court has made clear that agency adjudications of the type Premier seeks to

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<sup>28</sup> Although the Complaint recites that it is seeking reparations, there is no basis for such a claim. Even where *Ex Parte Young* applies and state officers are the defendants, damages or other monetary relief are barred. *Ford Motor Co. v. Dep’t of the Treasury*, 323 U.S. at 464 (“when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to sovereign immunity from suit even though individual officials are the nominal defendants”); see *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (“a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself”). The rule applies even if the claim is couched as one for equitable relief. *Edelman v. Jordan*, 415 U.S. 651 (1974).

<sup>29</sup> It need not be determined, for purposes of the Port’s present argument, whether a private party possesses the power to initiate proceedings seeking injunctive relief against non-state entities or officials; even if that is so, it is a separate issue whether such power would extend to actions against state officials where the state is protected by sovereign immunity.

initiate in its private complaint are fully subject to the sovereign immunity concerns that apply to suits in federal court.

The Port respectfully submits that it would be particularly inappropriate to extend the Shipping Act beyond its express terms to allow a suit for prospective injunctive relief against state officers given the Commission's position that it remains free to "investigate, using its staff, alleged violations of the Shipping Act by state-run ports, rather than relying upon private complainants to file and prosecute complaints against such ports." *South Carolina Ports*, 29 SRR at 805. Should there be a need to assure compliance of state officials with requirements of the Shipping Act, the Commission has recognized its power to investigate, and if necessary bring enforcement actions against, such officials under the Act.

Allowing private parties a similar authority would, however, create the perverse result that state officials could be brought before the agency by private parties even in circumstances where the Commission itself has not determined to open an investigation. As the Supreme Court has recognized, agency enforcement actions are subject to considerations of policy and sound enforcement discretion that do not govern private complainants. *See Alden v. Maine*, 527 U.S. at 756 (noting that an action brought by the federal government "requires the exercise of political responsibility for each suit prosecuted against a state.") Allowing private complainants to initiate complaints for prospective injunctive relief against state officials would eliminate an important check on the ability to bring sovereign states before a tribunal they have not consented to face, and thus eliminate a necessary protection of the dignity interests that the state sovereign immunity doctrine is intended to protect. Those dignity interests are better protected if it

is the Commission, not a private party, that retains the power to bring an unconsenting state before a federal tribunal.

Consistent with the principle that statutes should be construed to avoid constitutional problems wherever possible,<sup>30</sup> the Port thus respectfully submits that the Shipping Act cannot properly be construed in the unprecedented manner that Premier suggests to allow a private complaint for prospective injunctive relief against state officials. In this regard, it is also instructive that Congress has nowhere expressly authorized such relief; to the contrary, as noted above, the statute allowing parties to bring private complaints speaks only of seeking reparations, not injunctive relief.<sup>31</sup>

The Commission would also have to strain the plain language of the Shipping Act in another fashion to allow Premier's action against the Port's officials, rather than the Port itself, as part of an effort to invoke the *Ex Parte Young* fiction. Premier invokes the Commission's jurisdiction on the basis that the Port "is a Marine Terminal Operator as that term is defined in the Shipping Act," Compl. ¶ 8, and each of Premier's three counts alleging Shipping Act violations references alleged violations by a "marine terminal operator." Premier has, not, however, sued the Port; instead it has sued two individuals who are not, and are not alleged to be, marine terminal operators. Premier alleges no basis, and none is apparent, for holding these individuals liable under the Act.

Premier's Complaint thus piles fiction upon fiction, and inconsistent fictions at that. Respondents-appellees are, in Premier's view, to be considered as the Port for

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<sup>30</sup> See, e.g., *Edward J. DeBartolo Corp. v. NLRB*, 463 U.S. 147, 157 (1983) ("[u]ntil the statutory question is decided, review of the constitutional issue is premature.")

<sup>31</sup> See *Mehrig v. KFC Western, Inc.*, 516 U.S. 479, 487-88 (1996) ("where Congress has provided 'elaborate enforcement provisions' for remedying the violation of a federal statute . . . 'it cannot be assumed that Congress intended to authorize by implication additional judicial remedies . . .'" (quoting *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 14 (1981)).

liability purposes under the Shipping Act, but not for purposes of fundamental sovereign immunity doctrines. This is not only irrational, it is also completely unnecessary, since to the extent the Commission ever finds itself faced with true Shipping Act violations by a state port, as opposed to the illusory allegations in Premier's Complaint, the Commission has recognized its own power to enforce compliance with federal law directly against the port.<sup>32</sup>

Accordingly, the Port respectfully submits that, even if sovereign immunity does not bar this suit, the Shipping Act cannot be construed to allow a private party such as Premier to seek injunctive relief against state officials.

**B. THERE IS NO BASIS FOR ANY COMMISSION INVESTIGATION OF THE PORT BECAUSE PREMIER HAS NOT STATED A VIOLATION OF THE SHIPPING ACT OR ANY IMPACT ON THE SHIPPING PUBLIC.**

Premier's private complaint can be resolved on the basis of the sovereign immunity and Shipping Act arguments outlined above, and thus does not require analysis of the merits of Premier's Shipping Act claims. Premier has, however, also used the Complaint to ask the Commission to investigate the Port, and has even gone as far as to ask the Commission to seek an injunction that would allow it to stay at the Port despite its failure to agree to a lease. There is no basis in law, policy, or good sense for this request.

The Commission recognizes that a public port authority is "familiar with business circumstances at [the port] and entitled to a presumption that it is concerned with public and not private interest." *Petchem, Inc v. Canaveral Port Auth.*, 23 SRR 974, 993 (1986), *aff'd*, 853 F.2d 958 (D.C. Cir. 1988). As the Commission stated in *Agreement No. 2598*,

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<sup>32</sup> As set out in note 28, *supra*, even if *Young* applied, Premier could not obtain reparations or other monetary relief.

17 FMC 286, 297 (1974), its duty is only to protect against violations of the Shipping Act, not to second-guess the business judgments of ports:

the duly authorized Port Authority is the proper body to weigh and evaluate business risks related to that Port's efficiency in the first instance. It is not our function to gainsay the day-to-day economic decisions of the Port, nor would it be appropriate for us to do so. Given our continuing surveillance of the Agreement under which Port Canaveral and its operator must conduct their terminal operations, we see no danger in leaving the fiscal and business determinations in the first instance with the duly authorized Port Authority. Clearly, it is not the function of this agency to substitute its judgment for that of the Port.

“The primary objective of the shipping laws administered by the FMC is to protect the shipping industry's customers, not members of the industry.” *Boston Shipping Ass'n v. FMC*, 706 F.2d 1231 (1st Cir. 1983). Consistent with this principle, the Commission has challenged port leasing activities only where they have created a monopoly or lessening of competition that hurt service at a port,<sup>33</sup> or where there were allegations of systematic discrimination.<sup>34</sup>

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<sup>33</sup> See *Agreement No. 2598, supra*; *Perry's Crane Serv. v. Port of Houston Auth.*, 19 FMC 548 (1977) (requiring use of port-owned crane service); *A.P. St. Philip*, 13 FMC 166 (1969) (exclusive contract with a single operator to provide all tug services at the port); *California Stevedore & Ballast Co. v. Stockton Port Dist.*, 7 FMC 75 (1962) (single operator given the right to perform all stevedoring services at the subject facilities). Moreover, the *Petchem* case upheld the exclusive franchise at issue as a legitimate exercise of the port's broad discretion to manage its own affairs. 23 SRR at 993. See *D.J. Roach, Inc. v. Albany Port Dist.*, 5 FMB 333 (1957) (dismissing complaint alleging monopoly and holding that substituting one stevedore to the exclusion of another did not violate the Shipping Act.); *New Orleans SS Ass'n v. Bunge Corp.*, 8 FMC 687 (1965) (no violation because the Commission did not have jurisdiction); *Agreement Nos. 2108 & 2108-A*, 12 FMC 110 (1968) (struck down a provision requiring carriers to send all of their cargo through one port rather than rival ports.)

<sup>34</sup> See *Ceres, supra*; See also *Petition of the National Customs Brokers and Forwarders Association of America, Inc., and the International Association of NVOCCs for an Investigation of Contracting Practices of the Transpacific Stabilization Agreement*, 30 SRR 24 (order disposing of allegations that carriers discriminated against NVO's as a class).

The Commission has stated it has *jurisdiction* to review port leasing practices even in the absence of a monopoly situation,<sup>35</sup> but the fact remains that the Commission has never purported to do what Premier asks it to do here -- intervene in a port's decision to lease a terminal to one party rather than another. Just as shipping lines may, under the Commission's precedent, choose the ports they will serve as a matter of their business discretion, so too should ports have the authority, in their business discretion, to select the lessees of the terminals they own. *See San Diego Harbor Comm'n v. Matson Navigation Co.*, 7 FMC 394 (1962) ("While we have the authority to regulate established common carrier service, this should not be confused with the power to require that common carrier service be inaugurated, which we do not possess.")

In the present case, Premier makes no allegation of harm to any of the Port's actual or potential customers as a result of the conduct it asserts to be unlawful. In holding port practices to be unlawful or unreasonable in connection with the receiving, storing, handling or delivery of property, the Commission has consistently relied on some showing of such harm. For example, in *Perry's Crane Service v. Port of Houston*, 19 FMC 548, 549 (1977), the Commission held a port's restrictive crane practices unlawful, but only after finding that the testimony "clearly establishes that [the port's] practices result in a disruption to the proper handling of ships and an increase in expenses to stevedores as well as to private crane owners." Similarly, in *American Export-Isbrandtsen Lines, Inc. v. FMC*, 389 F.2d 962, 965, 967 (D.C. Cir. 1968), a Commission order governing truck detention was held to be within its authority under Section 17 of the 1916 Act because it was based on evidence that inefficient use of trucking facilities results in increased operating costs passed on to shippers in the form of higher tariff rates.

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<sup>35</sup> *See Seacon Terminals, Inc. v. Port of Seattle*, 26 SRR 886, 897-98 (1992).

In the present case, the “harm” alleged is purely private to Premier; it would like to stay at the Port without undertaking the obligations of the long-term leases the Port has offered. This is not the kind of case where the Commission has intervened to overturn port decisions.<sup>36</sup>

Premier’s Shipping Act claims are also inconsistent with uncontested facts in its complaint and supporting exhibits. Premier alleges that the Port engaged in an “unreasonable refusal to deal” in violation of Sections 10(d)(3) and 10(b)(10) of the Act, but, as the Complaint sets forth, the Port offered Premier two long-term leases and a written month-to-month lease and allowed Premier to hold over for several years to consider these offers. As set forth above, at pp. 8-9, Premier does not allege that it ever made a counteroffer or that it ever objected to the Port concerning the relocation provision it now claims is oppressive and unreasonable. It asserts that the Port insisted on a throughput requirement without considering Premier’s objections or negotiating on the point, but the exhibits filed with Premier’s own complaint show that the Port made concessions on this very point, yet never received from Premier a commitment as to any given throughput level.

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<sup>36</sup> Premier’s allegations also run afoul of Commission precedent holding that the requirement of Section 10(d)(1) of the 1984 Act (and its predecessor Section 17 of the 1916 Act) to “establish, observe and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing or delivering property” does not extend to a single decision. *See J.M. Altieri v. Puerto Rico Ports Authority*, 7 FMC 416 (1962) (“If the action of respondent were one of a series of such occurrences, a practice might be spelled out that would invoke the coverage of section 17. *Hecht, Levis and Kahn, Inc. v. Isbrandtsen Co.*, 3 FMB 798 (1950). However, the action of respondent is an isolated or “one shot” occurrence. Complainant-appellant has alleged and proved only the one instance of such conduct. It can not be found to be a “practice,” within the meaning of section 17.”). *See also D.J. Roach, Inc.*, 5 FMB at 335 (1957) (terminal operator’s decision to substitute one stevedore for another did not constitute an unjust or unreasonable practice in connection with the receiving, handling, or storing of property under Section 17 of the Shipping Act, 1916 (now Section 10(d)(1) of the 1984 Act.) Thus, this case is unlike *Ceres*, where the Complainant alleged, and the Commission found, that the Port granted more favorable terms to a shipping line as part of a policy to prefer such lines as tenants because they controlled cargo.

No Commission precedent supports a claim of refusal to deal under these facts; nor does common sense. The Port's obligations in these circumstances should be fixed by the terms of its leases, not by some broad and vague concept of a "refusal to deal," particularly when the party claiming the so-called refusal has had a chance for nearly four years to deal for the terminal.<sup>37</sup>

Premier has also contended that it was discriminated against by the Port, in violation of the Shipping Act and of its lease, because other operators at the Port received more favorable lease terms than it was offered. These allegations are insufficient to warrant the Commission's action. "The Act clearly contemplates the existence of permissible preferences and prejudices," *Petchem. Inc. v. FMC*, 853 F.2d 958, 963 (D.C. Cir. 1988), and undue preference and prejudice "must be established by clear and convincing proof." *San Diego Harbor Comm'n v. Matson Navigation Co.*, 7 FMC 394, 402 (1962).

Ports routinely vary their lease terms from operator to operator. The Commission ruled almost 30 years ago that Port authorities are permitted to negotiate individual leases with individual carriers with individualized terms. *See Agreement No. 8905*, 7 FMC 792 (1964) (agreement not unlawful merely because it fails to follow the port's tariff

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<sup>37</sup> As noted above, Premier's extensive allegations concerning Pasha are simply a red herring. *See* Compl. ¶¶ 22-25. Premier does not allege, nor could it, that Pasha's convictions have any effect on its ability to fulfill the terms of any lease with the Port. As noted above, at pp. 9-10, there is no allegation that Pasha is not currently good standing as a contractor with the United States government. Premier apparently thinks the Port should punish Pasha in some unspecified way in its lease negotiations, but does not explain why that is either required or appropriate under the circumstances. The Port believes the federal courts are fully able to impose and supervise any appropriate punishment for Pasha's violations. Moreover, the Port was not required to set up some kind of comparative bidding situation between Pasha and Premier. *See Seacon*, 26 SRR at 899 & n.31.

charges). Such varying lease terms will have varying effects on tenants, but this does not constitute discrimination under the Shipping Act.

Premier's discrimination allegations cherry-pick through leases offered other tenants, ignoring the full burdens and benefits of those leases and suggesting that isolated terms can be taken from each and compared to less favorable terms allegedly offered Premier. This is not the way the Commission approaches discrimination claims. For example, in *Seacon*, the Commission recited its case law recognizing that preferences and prejudices can be permissible, and noted that it "is not required to tally exactly what benefits were receive by the relevant parties." 26 SRR at 900. "Indeed, it would be impossible for the port to insure that all its tenants are identically situated, since each parcel and each operator has geographical and commercial idiosyncracies." *Id.*

Premier's allegations suffer the added defect that the terms it challenges are not embodied in any final or executed lease, and that it did not advance to the Port what terms it was prepared to accept. Moreover, as noted above, Premier's allegations of discrimination are negated by uncontradicted facts disclosed by the exhibits to its own Complaint (though ignored in the Complaint itself). For example, Premier alleges that MPA's offer included a throughput rate of 1700 vehicles per acre while Bennett Distribution Services has a rate of 900 to 1000 vehicles per acre, but omits mention of the fact that the guarantee in the Bennett lease is entirely for larger "farm and industrial vehicles" rather than including smaller automobiles and that Bennett's throughput rate is based on all of its leased acreage (excluding the building), *see* Compl. Ex. 24 ¶¶ 1.2, 2.1(b), while the Port offered to calculate Premier's throughput rate at the basis of only about 52% of Premier's leased acreage (3.04 of 6.47 acres). Compl. Ex. 6 ¶ 2.1(c). This

was, as noted above, a concession from the lease the Port first offered, which would have calculated the throughput based on 85% of the leased acreage. Compl. Ex. 3 ¶ 2.1(b).

In sum, Premier's contentions of Shipping Act violations do not even state a claim, much less warrant any investigation. In any event, to the extent Premier seeks the Commission's action, its proper course of action is to submit its information to the Commission's Bureau of Enforcement, which can then make any appropriate recommendations to the Commission in accordance with its usual procedures.<sup>38</sup>

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<sup>38</sup> See *South Carolina Maritime Services*, 28 S.R.R. at 1315 (noting precedent that allows the Commission to "simply refer the allegations in the complaint to the Bureau of Enforcement (BOE) and await BOE's recommendations.").

**V. CONCLUSION**

Premier's private complaint against the Port was properly dismissed on sovereign immunity grounds. Additionally, the Complaint sets forth no basis for any Commission action with respect to Premier's request for an investigation. Respondents-appellees therefore respectfully request that Premier's appeal, including the request for Commission investigation, be denied in its entirety.

Respectfully submitted,



M. Catherine Orleman  
Principal Counsel  
MARYLAND PORT  
ADMINISTRATION  
The World Trade Center  
Baltimore, Maryland 21202  
Phone: (410) 385-4432  
Fax: (410) 333-4533  
Email:  
corleman@mdot.state.md.us

Jonathan Blank  
John Longstreth  
PRESTON GATES ELLIS  
& ROUVELAS MEEDS LLP  
1735 New York Avenue, NW, Suite 500  
Washington, DC 20006  
Phone: (202) 628-1700  
Fax: (202) 331-1024  
Email: jblank@prestongates.com  
johnl@prestongates.com

Attorneys for Respondents-appellees  
Robert L. Flanagan and F. Brooks Royster, III

May 10, 2006

**CERTIFICATE OF SERVICE**

I, John Longstreth, hereby certify that I have this 10th day of May, 2006 served the foregoing Respondents-Appellees' Reply to Complainant-Appellants' Appeal of Ruling Dismissing Complaint via U.S. mail upon the following persons:

Charles S. Fax, Esq.  
Rifkin, Livingston, Levitan, & Silver LLC  
6305 Ivy Lane, Suite 500  
Greenbelt, MD 20770  
(301) 345-7700

*Attorney for Premier Automotive Services, Inc.*



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John Longstreth

Attorney for Respondents  
Robert L. Flanagan and F.  
Brooks Royster III