

# RIFKIN, LIVINGSTON, LEVITAN & SILVER, LLC

ATTORNEYS AT LAW

ALAN M RIFKIN  
SCOTT A LIVINGSTON (MD, DC)  
LAURENCE LEVITAN  
EDGAR P SILVER†  
MICHAEL V JOHANSEN  
JOEL D ROZNER (MD, DC)  
MELVIN A STEINBERG†  
RICHARD K REED  
NORMAN D RIVERA  
CHARLES S FAX (MD, DC, NY) ††  
LANCE W BILLINGSLEY†  
PATRICK H RODDY  
M CELESTE BRUCE (MD, DC)  
JAMIE B EISENBERG (MD, DC, NY)  
CAROLYN JACOBS  
ELLEN B FLYNN (MD, DC, CT)  
LYDIA B HOOVER  
GERALDINE VALENTINO†  
LEWIS S GOODMAN†  
TIMOTHY K HOGAN†  
ERIC LEE BRYANT  
KAREN K PASCIUTO  
MICHAEL S NAGY (MD, VA)  
ROTRICA S NEAL  
MEGAN M BRAMBLE  
ELIZABETH K MILLER†

6305 IVY LANE • SUITE 500  
GREENBELT, MARYLAND 20770  
(301) 345-7700 • FAX (301) 345-1294  
E-MAIL CFAX@RLLS.COM

LEGG MASON CENTER • SUITE 305  
600 WASHINGTON AVENUE  
TOWSON, MARYLAND 21204  
(410) 583-9433 • FAX (410) 583-9439

225 DUKE OF GLOUCESTER STREET  
ANNAPOLIS, MARYLAND 21401  
(410) 269-5066 • FAX (410) 269-1235

1133 21<sup>ST</sup> STREET, NW  
WASHINGTON, DC 20007  
(202) 639-0349

April 18, 2006

† OF COUNSEL

†† COUNSEL

## VIA HAND DELIVERY

Secretary  
Federal Maritime Commission  
800 North Capitol Street, N.W.  
Washington, D.C. 20573-0001

Re: *Premier Automotive Services, Inc. v. Robert L. Flanagan and F. Brooks Royster, III*, Docket No. 06-03

Dear Secretary:

Enclosed for filing please find an original and fifteen (15) copies of Appeal of Premier Automotive Services, Inc., From Order dismissing Verified Complaint; Renewed Notice of Information Regarding Possible Violations Of The Shipping Act And Request For Agency Investigation; And Request For Oral Argument.

As indicated by the certificate of service herein, I am serving opposing counsel by mail contemporaneously.

Thank you for your consideration in this matter.

Sincerely,



Charles S. Fax

Enclosure

cc. (w/encl.): Jonathan Blank  
John Longstreth  
M. Catherine Orleman

cc: DG/DC  
**ORIGINAL** Pub  
AG(2)

**BEFORE THE FEDERAL MARITIME COMMISSION**

**PREMIER AUTOMOTIVE SERVICES, INC.,**

Complainant,

v.

**ROBERT L. FLANAGAN and F. BROOKS ROYSTER, III,**

Respondents.

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**Docket No. 06-03**

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**APPEAL OF PREMIER AUTOMOTIVE SERVICES, INC.,  
FROM ORDER DISMISSING VERIFIED COMPLAINT;  
RENEWED NOTICE OF INFORMATION REGARDING  
POSSIBLE VIOLATIONS OF THE SHIPPING ACT AND REQUEST  
FOR AGENCY INVESTIGATION; AND REQUEST FOR ORAL ARGUMENT**

Charles S. Fax  
Rifkin, Livingston, Levitan & Silver  
Suite 500  
6305 Ivy Lane  
Greenbelt, Maryland 20770  
Telephone: (301) 345-7700  
Telecopier: (301) 345-1294  
Cell phone: (410) 274-1453  
Email: [cfax@rlls.com](mailto:cfax@rlls.com)

Attorney for Complainant,  
Premier Automotive Services, Inc.

April 18, 2006

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## I. SUMMARY OF GROUNDS FOR APPEAL

The Ruling on Motion to Dismiss (“Opinion”) turns on a singular question: Following *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002), which held that Eleventh Amendment immunity bars private administrative complaints before the Commission against a state port authority, does the Commission nonetheless have jurisdiction to entertain the Complaint herein under *Ex parte Young*, 209 U.S. 123 (1908), which provides an exception to Eleventh Amendment immunity?

While acknowledging that *Ex parte Young* authorizes affirmative injunctive relief in appropriate circumstances, and declining to rule (as urged by the Respondents) that *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261 (1997) bars the action simply because the case implicates state real property interests, the Opinion nonetheless answers this question in the negative. It does so based on three ostensible factors: The “discretionary” nature of MPA’s leasing decisions (which the Opinion concludes are without the reach of *Ex parte Young*, as distinguished from “ministerial” acts, which are within *Ex parte Young*), the complexity of the negotiation process, and the degree of intervention required by the Commission to police the same.

The distinction drawn in the Opinion between “ministerial” and “discretionary” administrative decisions is misunderstood and misapplied, and the analysis is in error. The Opinion should be reversed and the case remanded for adjudication. While the initial administrative decision whether to lease at all may be discretionary, once a state port authority determines to lease property, it is bound by the strictures of the law. The Shipping Act, 46 U.S.C. App. § 1701 et seq., mandates that MPA promulgate “just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.” 46

U.S.C. App. § 1709(d)(1). There is no administrative discretion to ignore or violate this law. But MPA has no such regulations.

The Shipping Act further mandates that MPA not “unreasonably refuse to deal or negotiate” with Premier or others. 46 U.S.C. App. § 1709(b)(10), incorporated by reference in 46 U.S.C. App. § 1709(d)(3). Again, there is no discretion to ignore or violate this statutory stricture. Premier alleges, and the Administrative Law Judge accepts as true for purposes of his analysis, that MPA has unreasonably refused to deal or negotiate with Premier, by offering a sham contract.

Finally, the Shipping Act mandates that MPA not give “any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to” Premier. 46 U.S.C. App. § 1709(d)(4). As with the prior statutory provisions, MPA has no discretion to ignore or violate this law. Premier alleges, however, and the Administrative Law Judge accepts as true for purposes of his analysis, that MPA has done just that, by offering Premier’s direct competitors terms and conditions not afforded to Premier, thereby forcing Premier into bankruptcy and threatening the existence of the company.

As for the negotiation and Commission oversight process, it is true that a Cease and Desist Order might simply direct MPA to cease violating the statutory provisions stated above, and that the means of doing may vary (at least theoretically – in practice, the passage of appropriate regulations as required by the Act, and the proffer to Premier of terms comparable to those offered its direct competitors, seems straightforward). There are many cases following *Ex parte Young*, however, that reflect comparable facts: Suit (against a non-consenting state) based on an objectionable state regulatory scheme or practice with the appropriate relief consisting of a mandatory injunction mandating further (unspecified) administrative action to remedy the

wrong, a variety of means of accomplishing the objective, and the prospect of further judicial review in the event of a later challenge to the adequacy of the subsequent remedial efforts.

There is nothing exceptionable here that takes this case beyond the constitutional reach and authorization of *Ex parte Young* as explicated in the cases that follow it. *Ex parte Young* authorizes this action, and the Opinion should be reversed and the case remanded.

## II. BACKGROUND

Premier, an import/export vehicle processor, has been a tenant at the Dundalk Marine Terminal in Baltimore, Maryland (“the Terminal”), for over forty-one years. The Terminal is owned and operated by MPA, which is directed by the Respondents. Premier’s most recent long-term lease of Lot 90 at the Terminal ended in 2002, and since then, Premier has been a month-to-month tenant. Premier’s processing facilities on Lot 90 offer vehicle and heavy equipment manufacturers, importers and exporters a full range of services including vehicle and equipment receipt, release and assembly, accessory installation, body, paint and warranty campaign work, storage and other pier-side services. In recent years, Premier has specialized in providing these services to manufacturers and shippers of large agricultural and industrial equipment. Premier has invested heavily in Lot 90, including the construction of a 27,500 square foot specialty building containing a body shop, paint shop, offices and wash line (the “Building”), which it owns (and on which it pays real estate taxes), and which it uses in the provision of its professional services. Premier cannot provide full services to its customers, much less compete for new business, without these facilities. Complaint, ¶¶ 6, 7, 15.

Upon expiration of its long-term lease and thereafter, Premier tried to negotiate with MPA for a new lease. Complaint, ¶¶ 14, 17-20. MPA has no regulations, however, that govern the conduct or course of any lease negotiation or the terms of MPA leases. Complaint, ¶ 25, 35.

Unconstrained by any regulations or policies, MPA repeatedly “offered” Premier a new lease that was commercially irrational and confiscatory in three related, material respects.

First, the proffered lease required that Premier process 1700 vehicles per acre per year, with penalties assessed for failure to meet that quota. Premier’s direct competitors, however, other vehicle processors of large agricultural and industrial equipment, are held by MPA to a quota of only 1000 vehicles per acre per year. Complaint, ¶ 29. The higher, 1700 vehicle, quota is generally applied by MPA to automobile processors. Automobiles are a fraction of the size of heavy agricultural equipment, their service needs are different, and their typical storage time on the lot is less. Accordingly, many more automobiles than units of heavy agricultural equipment can be processed during the course of a year. Complaint, ¶ 15.

Second, the lease provided that MPA had the absolute power to move Premier from Lot 90, on which sits the Building that is essential to Premier’s business, to any other lot of MPA’s choosing, without a building. Premier’s competitors either are not subject to such a provision, or would suffer no harm by being moved because they do not own buildings on the lots that they lease. Complaint, ¶ 29. Third, in the event of a forced move, Premier could not terminate the lease, and would still be held to a 1700 vehicle per acre per year quota. Complaint, ¶¶ 14, 16, 19. One competitor, though subject to a move by MPA, at least had the right to terminate its lease in the event the move was unacceptable. Complaint, ¶ 29.

In combination, these three provisions rendered MPA’s offer to Premier meaningless if not confiscatory. At the threshold, it was commercially unreasonable for Premier to be held to an unrealistic processing quota that was not applied to any of Premier’s direct competitors in the business of processing large machinery and equipment. The only possible way for Premier to even try to satisfy that quota was to use its Building to capacity at all times. But MPA reserved

the right to move Premier to another lot *without* a building, making it then literally impossible for Premier to fulfill its contractual commitments to its customers. Premier was not given the option to terminate the lease in that event, however. Thus, by accepting the proffered lease, Premier would be allowing itself to be stripped of its business, but obligating itself to pay rent and penalties for five years nonetheless. Premier declined the “offer.” Complaint, ¶ 20.

MPA subsequently told Premier that Lot 90 had been leased to another tenant and that Premier must vacate the property. Complaint, ¶¶ 20, 21. The other tenant was Pasha Automotive Services, Inc., whose parent/affiliate had recently been convicted of two federal felonies, price fixing and conspiracy. Complaint, ¶¶ 22-24.<sup>1</sup> In truth, however, neither the original lease nor the amended lease signed by Pasha and MPA required that MPA lease Lot 90 to Pasha. MPA remains free to lease it to Premier. Complaint, ¶ 22, n.1.

Faced with eviction and the loss of its Building and the surrounding acreage necessary to support its business, and wanting to stay in business, Premier had no commercial recourse but to declare bankruptcy, which it did in April 2005. Complaint, ¶ 28. The United States Bankruptcy Court for the District of Maryland has recently granted MPA’s motion for relief from the automatic stay imposed by virtue of Premier’s bankruptcy filing. Complaint, ¶ 4. Upon the Court’s issuance of an Order and Opinion to that effect, Premier expects that MPA will immediately seek to have Premier evicted from Lot 90.<sup>2</sup>

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<sup>1</sup> When the Complaint was filed, Pasha’s petition for certiorari was pending. Complaint, ¶ 24. It has since been denied. Memorandum of Complainant, Premier Automotive Services, Inc., in Reply to Respondents’ Motion to Dismiss and Response to Request for Commission Investigation, filed on or about March 16, 2006, (“Reply”) at 5.

<sup>2</sup> The Bankruptcy Court likewise has granted summary judgment to MPA on Premier’s adversary proceeding filed in the bankruptcy case, but the Court’s opinion and Order have not yet been issued.

### **III. THE PROCEEDINGS BELOW**

#### **A. The Complaint**

Premier's Complaint before the Commission has four legal components. First, the Complaint recognizes the truncation of the Commission's jurisdiction following *Ceres Marine Terminals Inc. v. Maryland Port Administration*, 2004 W.L. 1855494 (Docket No. 94-01) (F.M.C. 2004) (citing *F.M.C. v. South Carolina State Ports Auth.*, 535 U.S. 743, 747 (2002)). The Complaint observes, however, that the Commission took note of the Supreme Court's comment, in *South Carolina State Ports Auth.*, *supra*, that the Commission "'remains free to investigate alleged violations of the Shipping Act, either upon its own initiative or upon information supplied by a private party . . . and to institute its own administrative proceeding against a state-run port. 122 S. Ct. at 1878-1879 . . .'" *Id.*, at 5. Likewise, the Commission found that it might still have jurisdiction to adjudicate a "privately-initiated complaint proceeding against the directors of a state-run port, rather than against the port." *Id.* Accordingly, the Complaint was being filed as a privately initiated verified complaint against the directors of the state-run port, or in the alternative, as notice of information regarding possible violations of the Shipping Act and a request that the Commission investigate the same. Complaint, ¶ 5.

Second, the Complaint sets forth in three counts MPA's substantive violations of the Shipping Act, 46 U.S.C. App. §§ 1701 *et seq.* Count I states a violation of 46 U.S.C. App. § 1709(d)(1), which makes it unlawful for a marine terminal operator to fail to establish, observe and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing or delivering property. MPA has *no* regulations, and thus is unbound in its commercial discrimination against Premier. Complaint, ¶¶ 33-36. Count II states a violation of

46 U.S.C. App. § 1709(d)(3), which makes it unlawful for any marine terminal operator to unreasonably refuse to negotiate with a tenant. MPA's sham offer to Premier of an unconscionable lease was tantamount to an unreasonable refusal to negotiate. Complaint, ¶¶ 37-40. Count III states a violation of 46 U.S.C. App. § 1709(d)(4), which makes it unlawful for any marine terminal operator to give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person. MPA, by offering Premier's direct competitors reasonable terms denied to Premier, gave an undue and unreasonable preference. Complaint, ¶¶ 41-44.

Third, in the alternative, the Complaint is styled as a notice of information regarding possible violations of the Shipping Act and request for Agency investigation, alerting the Commission to MPA's statutory violations, and asking the Commission to investigate them. *See*, Complaint, Caption, ¶ 5, Prayer for relief.

Fourth, the Complaint prays for declaratory and injunctive relief directing MPA to cease its violations of the Shipping Act and engage in reasonable negotiations with Premier for a new lease. The Complaint also asks the Commission to seek interim injunctive relief enjoining MPA's violations pending administrative consideration of Premier's claims. Finally, the Complaint seeks compensatory relief afforded by the Shipping Act. Complaint, prayer for relief.

MPA, in response to the Complaint, moved to dismiss on the grounds of sovereign immunity and lack of authorization under the Shipping Act. MPA also argued that the Complaint set forth no basis for any violation of the Shipping Act or any investigation by the Commission. *See*, Respondents' Motion to Dismiss and Response to Request for Commission Investigation and Supporting Memorandum, filed on or about February 21, 2006. Premier

opposed the motion. *See, Reply.* The Administrative Law Judge, by Ruling on Motion to Dismiss served on March 31, 2006 (“the Opinion”), dismissed the Complaint.

**B. The Administrative Law Judge’s Ruling**

The Opinion began by limiting its scope to that aspect of the Complaint arising under Section 11(a) of the Shipping Act, 46 U.S.C. App. §1710(a), because “[t]he authority to order an investigation or seek injunctive relief in federal court rests with the Commission and not with one of its Administrative Law Judges.” Opinion, at 1. The Opinion then summarized portions of the Complaint, accepting all facts stated therein as true for the purposes of the motion. Opinion, at 2. Elsewhere the Opinion noted, “For purposes of this motion there is no reason to dispute Premier’s assertion of the objectionable nature of the leases [proffered by MPA]. As business decisions the rejection of these leases may well have been entirely sound *for the reasons that Premier gives,*” Opinion, at 4, 5 [emphasis added], *i.e.*, their confiscatory, discriminatory and unreasonable nature in violation of the Shipping Act’s proscriptions.

The Opinion then turned to the first legal issue framed by the Complaint – the Commission’s jurisdiction, *vel non*, to entertain a private complaint against state officials after *F.M.C. v. South Carolina State Ports Auth.*, 535 U.S. 743 (2002). The Opinion noted Premier’s acknowledgement that state sovereign immunity barred adjudication of the Complaint against MPA, and that consequently, Premier had sued the responsible state officials under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). Opinion, at 2. *Ex parte Young* allows suits for declaratory and injunctive relief against state officials notwithstanding Eleventh Amendment sovereign immunity protecting the state as an entity from suit. The Opinion further noted that the Commission, on remand in *South Carolina State Ports Authority*, observed that a future privately-initiated complaint against the directors of a state run port might be permissible under

*Ex parte Young*, notwithstanding the holding in the South Carolina decision, and that this case framed that issue. Opinion, at 3.

The Opinion next discussed what it held to be limitations on the *Ex parte Young* doctrine, notably, the fact that some state property interests could trump the *Ex parte Young* exception to Eleventh Amendment immunity and be non-justiciable on that constitutional ground. The leading case for that proposition is *Idaho v. Coeur D'Alene Tribe*, 521 U.S. 261 (1997), in which the tribe sought to quiet title to lands held by the state. A ruling in favor of the tribe “would have divested the State of Idaho not only of ownership, but of sovereignty over the lands involved. The Court held that the state’s sovereign immunity barred the suit.” Opinion, at 3.

The Opinion then characterized the property interest in this case as one “involv[ing] the decision to lease a parcel of the state’s property,” Opinion, at 4.

That is not as fundamental a real estate issue as that of state versus tribal sovereignty in *Coeur D’Alene Tribe*, but it is a substantial interest of the state. The Port of Baltimore is one of the nation’s major seaports, and is an important resource of the State of Maryland. A decision for the complainant would not cede either sovereignty or title over Lot 90. However, by directing that the state enter into a long-term lease for a particular piece of waterfront property with one tenant rather than another, and on certain terms described by that tenant, it would interfere significantly in the state’s exercise of its discretion in managing this valuable asset.

*Id.* The Opinion then quoted a passage from *Ex parte Young* to the effect that ministerial, but not discretionary, administrative decisions are within its ambit. ““The general discretion regarding the enforcement of the laws when and as he deems appropriate is not interfered with by an injunction which restrains the state officer from taking any steps towards the enforcement of an unconstitutional enactment, to the injury of complainant. In such case no affirmative action of any nature is directed, and the officer is simply prohibited from doing an act which he had no legal right to do.”” *Id.*, quoting *Ex parte Young*, 209 U.S. 123, 158-159.

Juxtaposing the affirmative relief sought by Premier with the negative relief sought in *Ex parte Young*, the Opinion next observed that in *Coeur d'Alene*, which held the *Ex parte Young* exception inapplicable on *Coeur d'Alene's* facts, the relief sought was also affirmative. *Id.* Yet even in *Coeur d'Alene*, the Opinion noted, the relief sought was ministerial, rather than discretionary. *Id.*<sup>3</sup>

To be sure, the Opinion recognized that the distinction between affirmative relief and negative relief would not be legally determinative of the applicability of *Ex parte Young*. “In other *Young* actions it has been clear what *action* or non-action would be required of the defendant state officials if the plaintiffs prevailed . . . non-discretionary *acts* are required.” Opinion, at 5 [Emphasis added]. That is, *Ex parte Young* had been applied in cases seeking affirmative injunctive relief.<sup>4</sup> What concerned the ALJ here was “the complexity of the discretionary state government processes that the Commission is being asked to supervise in this case.”

In this case we have only the almost infinitely elastic term ‘commercially reasonable’ to define what state officials are to be required to do. . . .

A decision for Premier would require the MPA to offer a new lease. If that proposal were unacceptable to Premier the Commission (or the Administrative Law Judge) would presumably need to determine whether that offer was

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<sup>3</sup> Although the Respondents, in their motion to dismiss, argued that *Coeur d'Alene* barred consideration of the Complaint because the tribe’s case implicated property rights, and the ALJ seemed to recognize some vitality to that position, the Opinion, as shown below, did not decide the motion on that specific ground. In fact, the inapplicability of *Coeur d'Alene* is demonstrated *in extenso* in Premier’s Reply, at 14-19. The cases cited therein reflect that *Ex parte Young* has been applied in many cases impinging on state property interests. *See, e.g., Arnett v. Myers*, 281 F.3d 552 (6th Cir. 2002), *reh. denied*, 2002 U.S. App. LEXIS 7114 (April 10, 2002) (riparian rights); *Lipscomb v. Columbus Mun. Separate School Dist.*, 269 F.3d 494 (5th Cir. 2001) (leases for state land); *Branson School District RE-82 v. Romer*, 161 F.3d 619 (10th Cir. 1998), *cert. denied*, 526 U.S. 1069 (1999) (management of school lands); *Elephant Butte Irrigation Dist. of New Mexico v. Dept. of the Interior*, 160 F.3d 602 (10th Cir. 1998) (entitlement to revenue from lease of state-owned property).

<sup>4</sup> Several such cases are discussed in Premier’s Reply below. *See, e.g., Elephant Butte Irrigation Dist. of New Mexico v. Dept. of the Interior*, *supra*, discussed at Reply, 18-19; *Antrican v. Odom*, 290 F.3d 178, 184 (4th Cir. 2002), discussed at Reply, 19 n. 2, and *infra* at 14;); *Joseph A. ex rel. Wolfe v. Ingram*, 275 F.3d 1253, 1261 (10th Cir. 2002), *id.*; *MCI Telecomm. Corp. v. Ill. Bell Tel. Co.*, 222 F.3d 323, 347-48 (7th Cir. 2000), *cert. denied*, 531 U.S. 1132 (2001), *id.*

commercially reasonable and, if it was not, to require the MPA to make a new, more favorable lease offer. The process would need to be repeated as often as necessary until the parties agreed or the Commission decision-maker was satisfied that the most recent rejected lease offer was commercially reasonable.

The oversight by the Commission that this complaint seeks would necessarily be very detailed . . . Such a degree of complexity in fashioning a remedy is incompatible with the application of the *Young* doctrine. More fundamentally, that degree of intervention in the discretionary decisions involved in implementing a state's interest in the management of a seaport is 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*.

*Id.* On the basis of that analysis, the Complaint was dismissed.

#### **IV. THE DECISION BELOW SHOULD BE REVERSED AND REMANDED**

MPA's rank and invidious commercial discrimination against Premier and in favor of its direct competitors – which the ALJ accepts as fact for purposes of his analysis, and which could prove fatal to Premier's business and reduce competition at the Port of Baltimore if not remedied – clearly is the proper subject of Commission jurisdiction under the Shipping Act, 46 U.S.C. App. §§ 1701, *et seq.*

The Act contains at least three specific sections that protect Premier from commercially discriminatory mistreatment by MPA. First, MPA must “. . . establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.” 46 U.S.C. App. § 1709(d)(1). Second, MPA may not “unreasonably refuse to deal or negotiate” with Premier or others. *Id.*, § 1709(b)(10), incorporated by reference in *Id.*, § 1709(d)(3). Third, MPA may not give “any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to” Premier or others. *Id.*, § 1709(d)(4).

Correspondingly, the Act provides several modes of relief for Premier to remedy illegal commercial discrimination by MPA. “Any person may file with the Commission a sworn complaint alleging a violation of this chapter . . . and may seek reparation for any injury caused to the complainant by that violation.” *Id.*, § 1710(a). “The Commission, upon complaint or upon its own motion, may investigate any conduct or agreement that it believes may be in violation of this chapter.” *Id.*, § 1710(c). “In connection with any investigation conducted under this section, the Commission may bring suit in a district court of the United States to enjoin conduct in violation of this chapter.” *Id.*, § 1710(h)(1). “After filing a complaint with the Commission under subsection (a) of this section, the complainant may file suit in a district court of the United States to enjoin conduct in violation of this chapter.” *Id.*, § 1710(h)(2).

MPA’s discriminatory misconduct falls well within these statutory parameters for administrative and adjudicatory relief. *See, e.g., Cargo One, Inc. v. COSCO Container Lines*, F.M.C. Docket No. 99-24 (October 31, 2000) (alleged violations of Shipping Act, involving unfair or unjustly discriminatory practices, undue or unreasonable preferences, undue or unreasonable prejudice or disadvantage are inherently related to Shipping Act, and are properly before F.M.C.); *Tate Stevedore Co. of Mobile v. Alabama State Docks Dept.*, F.M.C. Docket Nos. 87-13, 87-17 (August 18, 1988) (use of marine terminal operator’s superior bargain position to shift cost of liability insurance from itself to stevedores without distinguishing between damages resulting from its own negligence and negligence of others is unfair and prejudicial and violates Shipping Act); “*Fifty Mile Container Rules*” *Implementation by Ocean Common Carriers serving U.S. Atlantic and Gulf Coast Ports*, F.M.C. Docket No. 81-11 (August 3, 1987) (publication and implementation by ocean common carriers of “Fifty Mile Container Rules,”

placing restrictions on their transportation of containerized cargo, unreasonable and violative of Shipping Act). The Opinion does not conclude otherwise.

Rather, the Opinion turns on a singular issue arising post-*South Carolina State Ports Authority*, viz., whether constitutionally, *Ex parte Young*, 209 U.S. 123 (1908) provides a jurisdictional basis for consideration of the Complaint. In concluding that it does not, due to the discretionary nature of MPA's leasing decisions, the complexity of the negotiation process, and the degree of intervention required by the Commission to police the same, the Opinion misconstrues and misapplies *Ex parte Young*, and constitutes reversible error.

In *Ex Parte Young*, the Supreme Court held that the Eleventh Amendment generally does not bar a claimant from bringing a federal court action against a state official, seeking prospective equitable relief for violation of federal law, even when the state has not consented to suit. Following *Young*, numerous courts have authorized claims under federal statutes for injunctive relief against state officials acting under color of state law, notwithstanding the state's non-consent to suit.

In applying *Young*, courts have recognized not only the propriety of affirmative injunctive relief, but also, in appropriate circumstances, the propriety of an injunctive remedy requiring complex, multi-faceted, and broad-ranging remedial measures by the offending authority. See, e.g., *Antrican v. Odom*, 290 F.3d 178, 184 (4th Cir. 2002) (affirmed right of Medicaid recipients to seek injunction ordering broader access to and insurance coverage for dental screening and treatment); *Joseph A. ex rel. Wolfe v. Ingram*, 275 F.3d 1253, 1261 (10th Cir. 2002) (affirmed right of children in foster care to seek injunction ordering remedial measures to prevent state agency from causing them to spend unreasonable amounts of time in foster care); *MCI Telecomm. Corp. v. Ill. Bell Tel. Co.*, 222 F.3d 323, 347-48 (7th Cir. 2000),

*cert. denied*, 531 U.S. 1132 (2001) (affirmed right of telecommunication companies to challenge the scope of state administrative agency’s determinations regarding the substance of prospective interconnection agreements).

As is apparent from a review of these cases, in each instance the federal court determined that the state agency’s alleged misconduct, if proven, constituted a violation of federal law warranting mandatory injunctive relief in the form of further administrative regulations, oversight, activity, and/or adjudication. In none of these cases were the details of the prospective relief clearly limned – that remained to be determined by the state, and would be subject to further judicial oversight as necessary (indeed, the *Wolfe* case had already been subject to judicial oversight for twenty years when the cited decision was reported).

The analogy to the facts in this case is exact. Here, there is a federal statutory scheme that prohibits the very misconduct alleged in the Complaint – and that the ALJ accepts as true for purposes of his analysis. The claims are amenable to affirmative injunctive relief in the form of an Order to cease and desist from such enumerated violations of the Shipping Act as are proven at a plenary hearing. Assuming that such allegations are proven, and that MPA’s explanations therefor are deemed untrue or insufficient as a matter of law, it would be appropriate for a Cease and Desist Order to issue. Compliance with that Order presumably would entail the establishment and enforcement of “just and reasonable regulations and practices” respecting the leasing of property at the Terminal (responsive to the claim at Count I, that now there are no such regulations); reasonable negotiation with Premier (responsive to the claim at Count II, that the offer made was a sham); and equality of treatment in the offers made to direct competitors (responsive to the claim at Count III, that Premier was unreasonably prejudiced and disadvantaged by MPA’s refusal to offer terms equivalent to those offered to Premier’s

competitors). To be sure, the exact contours of the remedial action might not be spelled out by the Commission, but that would not pose an impediment under *Ex parte Young*, as evidenced by *Antrican, supra, Wolfe, supra, and MCI Telecomm., supra*. Likewise, applying the same cases, the fact that Premier would be entitled to raise a subsequent challenge to the adequacy of the remedial actions taken by MPA would be no bar to jurisdiction under *Young*.

The Opinion observes the distinction drawn in *Ex parte Young* between “ministerial” actions, that are amenable to affirmative injunctive relief notwithstanding a state’s non-consent to suit, and “discretionary” actions, that are not. In finding that the latter is implicated here, and therefore that sovereign immunity holds, the Opinion misapplies the key terms. Just as with the federal constitutional and statutory rights implicated in the cases cited above, there is *no* administrative discretion to violate the federal rights at issue here.<sup>5</sup> The duty to obey the Shipping Act is mandatory and thus ministerial: “No. . . marine terminal operator[] may fail to establish, observe, and enforce just and reasonable regulations and practices,” 46 U.S.C. § 1709(d)(1); “The prohibitions in subsections (b)(10) and (13) of this section apply to marine terminal operators,” 46 U.S.C. § 1709(d)(3); “No common carrier . . . may unreasonably refuse to deal or negotiate;” 46 U.S.C. § 1709(b)(10); “No marine terminal operator may give any undue or unreasonable preference or advantage, or impose any undue or unreasonable prejudice or disadvantage with respect to any person,” 46 U.S.C. § 1709(d)(4). Similarly, the duty to afford constitutional guarantees is absolute, not conditional. *See, Baltimore Import Car Service, supra*. In sum, though the Opinion suggests that the leasing process at a state port authority is wholly

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<sup>5</sup> The statutory rights arise, of course, from the text of the Shipping Act. Federal statutes are a proper basis for assertion of jurisdiction under *Ex parte Young, supra*. *See, Marie O. v. Edgar*, 131 F.3d 610 (7th Cir. 1997). These rights also arise, however, from federal constitutional guarantees. In *Baltimore Import Car Service & Storage, Inc. v. Maryland Port Authority, et al.*, 258 Md. 335 (1970), for example, a case with an all-too-familiar set of facts, the Court of Appeals in Maryland – the state’s highest judicial tribunal – held that MPA’s failure to negotiate with the plaintiff for a lease, while making offers to plaintiff’s competitors, violated the plaintiff’s equal protection rights under the Fourteenth Amendment.

discretionary – and thus potentially, *and legally*, discriminatory as between tenants – the Shipping Act and constitutional law reflect otherwise.<sup>6</sup>

If a Cease and Desist Order were issued by the Commission, the issue before MPA would be compliance. Again, MPA would not have the discretion *not* to comply – at most, and purely as a theoretical proposition, it might be able to elect between two or more lawful options in achieving compliance. As a practical matter, of course, it would not be difficult to determine whether MPA had met its statutory obligation (a good start would be an offer to Premier consistent with the offers made to its direct competitors!). That there might be some discretion at the compliance stage, however, wholly accords with the holdings in *Antrican, supra, Wolfe, supra*, and *MCI Telecomm., supra*, all of which follow *Ex parte Young*. So too is the prospect of further judicial oversight, which the Opinion seems to conclude demonstrates the inapplicability of *Ex parte Young*. In fact, as shown above, *Ex parte Young* authorizes this Complaint.

**V. ALTERNATIVELY, THE COMMISSION SHOULD INVESTIGATE THE POSSIBLE VIOLATIONS OF THE SHIPPING ACT DETAILED IN PREMIER'S COMPLAINT**

The Complaint describes a rogue regime at MPA, where there are no standards for lease terms to be offered to prospective tenants; no policies or directives concerning the types of tenants to which property can be let; no policies, standards or guidelines concerning MPA contracts generally; and no prohibition on leasing property to convicted felons. The Shipping Act proscribes such a regulatory vacuum, and mandates that MPA establish and enforce reasonable regulations regarding shipping activities so as to prevent exactly what happened here – illegal commercial discrimination by MPA that has driven Premier into bankruptcy and will

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<sup>6</sup> What may be discretionary, and therefore not amenable to a federal remedy under *Ex parte Young*, is the decision by a state port authority to lease property in the first instance – but the port authority having made the decision to do so, it defies logic, as well as the law referenced above, to allow commercial discrimination that disenfranchises a responsible competitor. “*Ubi jus, ibi remedium*,” where there is a right, there is a remedy.

drive it out of business unless relief is afforded. If the rules are to have meaning, if fair standards are to be required and enforced, there must be a remedy for the wrongdoing alleged herein.

Doubtless MPA will have a litany of excuses and arguments to the effect that its treatment of Premier was lawful, although how MPA can explain its failure to promulgate regulations, in direct defiance of the law, is unknown. Surely in these circumstances, if there is not to be an adjudicatory hearing in the first instance, the Commission should investigate the charges made herein.

## VI. CONCLUSION

For the reasons stated above and in the Complaint and Reply, Premier submits that the Ruling on Motion to Dismiss should be reversed and remand with instructions that the claims be adjudicated on the merits. Alternatively, the Commission should commence an investigation in accordance with its statutory authority. Oral argument is requested on this appeal.

Respectfully submitted,



Charles S. Fax  
Rifkin, Livingston, Levitan & Silver  
Suite 500  
6305 Ivy Lane  
Greenbelt, Maryland 20770  
Telephone: (301) 345-7700  
Telecopier: (301) 345-1294  
Cell phone: (410) 274-1453  
Email: [cfax@rlls.com](mailto:cfax@rlls.com)

Attorney for Complainant,  
Premier Automotive Services, Inc.

Dated: April 18, 2006

**CERTIFICATE OF SERVICE**

I hereby certify that I have served on Respondents the attached Appeal Of Premier Automotive Services, Inc., From Order Dismissing Verified Complaint; Renewed Notice Of Information Regarding Possible Violations Of The Shipping Act And Request For Agency Investigation; and Request for Oral Argument, by causing a copy thereof to be mailed by first class mail, postage prepaid, on this 18th day of April, 2006, to Respondents' counsel of record:

Jonathan Blank  
John Longstreth  
Preston Gates Ellis & Rouvelas Meeds LLP  
1735 New York Avenue, N.W., Suite 500  
Washington, D.C. 20006

M. Catherine Orleman  
Principal Counsel  
Maryland Port Administration  
The World Trade Center  
Baltimore, Maryland 21202

  
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Charles S. Fax