

1 FEDERAL MARITIME COMMISSION

2 _____
3 DOCKET NO. 12-03
4 _____

5 THE AUCTION BLOCK COMPANY, an ALASKA CORPORATION, and HARBOR
6 LEASING, LLC, an ALASKA LIMITED LIABILITY COMPANY

7 v.

8 THE CITY OF HOMER, a MUNICIPAL CORPORATION, and its PORT OF HOMER

9 _____
10 JOINT MOTION AND MEMORANDUM TO AMEND COMPLAINT AND ALLOW FOR
11 ANSWER
12 _____

13 Come now Complainants The Auction Block Company and Harbor Leasing LLC
14 and move to amend their Complaint. Respondents the City of Homer and the Port of
15 Homer join the motion.

16 Complainants are filing their Fourth Amended Complaint. In response to
17 discovery requests and responses, the Fourth Amended Complaint deletes two
18 statutory violations against Respondents. Respondents join in the amendment of the
19 complaint and the motion to amend. A proposed copy of the Fourth Amended
20 Complaint is attached. Filing this Fourth Amended Complaint will not delay the
21 proceedings.

22 Complainants and Respondents agree that Respondents have the right to file
23 their amended answer addressing the new and/or expanded allegations within 30 days
24 pursuant to Commission Rules 502.64 and 502.70. Respondents are filing their
25 amended answer with this motion and amended complaint.

26 For these reasons, Complainants move to amend their Complaint and seek to file
27 the proposed Fourth Amended Complaint.

28 Dated this 4th day of September, 2012.

29 LAW OFFICE OF STEVEN J. SHAMBUREK
30 Attorney for Complainants

31 By: Steven J. Shamburek
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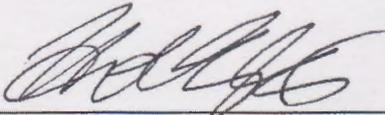
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Respondents the City of Homer and the Port of Homer join the motion to amend.

Dated this 4th day of September, 2012.

BIRCH HORTON BITTNER & CHEROT
Attorneys for Respondents

By:  _____

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1 **FEDERAL MARITIME COMMISSION**

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3 **DOCKET NO. 12-03**
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5 **THE AUCTION BLOCK COMPANY, an ALASKA CORPORATION, and HARBOR**
6 **LEASING, LLC, an ALASKA LIMITED LIABILITY COMPANY**

7 **v.**

8 **THE CITY OF HOMER, a MUNICIPAL CORPORATION, and its PORT OF HOMER**

9 _____
10 **FOURTH AMENDED COMPLAINT**
11 _____

12 **I. The Complainants** The Auction Block Company is a for-profit corporation in
13 good standing organized under the laws of State of Alaska. The Auction Block
14 Company's principal shareholder is its President Kevin Hogan. The Auction Block
15 Company is a seafood processing and logistics firm engaged in the primary purchase
16 and processing of Alaskan seafood, the provision of fishing vessel services and the
17 procurement and use of terminal services at and around the Port of Homer. In addition,
18 The Auction Block Company receives, handles, stores, and delivers property.

19 Harbor Leasing, LLC is a for-profit limited liability company in good standing organized
20 under the laws of State of Alaska. Harbor Leasing, LLC's members are Kevin Hogan
21 and Bronwyn E. Kennedy. Harbor Leasing, LLC is a real estate management company
22 that leases property from the City of Homer and leases property to The Auction Block
23 Company. References to The Auction Block Company relate at times to its status as an
24 approved subtenant of Harbor Leasing, LLC.

25 The principal place of business for both Complainants is 4501 Ice Dock Road, Homer,
26 Alaska 99603. The Auction Block Company and Harbor Leasing, LLC are subject to the
27 provisions and protections of the Shipping Act of 1984, as amended, each as a "person"
28 as defined in the former 46 U.S.C. § 1702(18) and in 46 C.F.R. § 515.2(p) and other
29 authority. Complainants allege that the matters complained of will continue in the future
30 and will constitute violations of the Shipping Act of 1984, as amended, in the particulars
31 and to the extent indicated and Complainants pray for reparations and damages for
32 injuries which are and will be sustained as a result of these continuing violations.

1 Complainants have done everything necessary to bring and maintain this Complaint
2 before the Commission.

3 **II. The Respondents** The City of Homer is a municipal corporation organized
4 under the laws of the State of Alaska. The City of Homer owns and operates the Port of
5 Homer in Homer, Alaska. The City Manager is Walt Wrede and the Harbormaster is
6 Bryan Hawkins. The principal address is 491 East Pioneer Avenue, Homer, Alaska
7 99603. The City and Port are subject to the provisions and protections of the Shipping
8 Act of 1984, as amended, as a "marine terminal operator" as defined in 46 U.S.C. §
9 40102(14) and other authority and as a "person" as defined in the former 46 U.S.C. §
10 1702(18) and in 46 C.F.R. § 515.2(p) and other authority. The Respondents are at
11 times referred to as the "City" and/or the "Port" and/or the "Respondent."

12 **III. Jurisdiction** The City of Homer operates the Port of Homer and has filed the
13 "Port of Homer Terminal Tariff No. 600 Filed under ATFI Rules" which have been
14 adopted and ratified by the Homer City Council. The City and Port are subject to the
15 provisions of the Shipping Act of 1984, as amended, as a "marine terminal operator" as
16 defined in 46 U.S.C. § 40102(14) and other authority and as a "person" as defined in
17 the former 46 U.S.C. § 1702(18) and in 46 C.F.R. § 515.2(p) and other authority. The
18 Federal Maritime Commission has subject matter jurisdiction of this matter and personal
19 jurisdiction of the Respondents. 46 U.S.C. § 40301 and other authority.

20 **IV. History** The state of Alaska revenue sharing formula in its fish tax law provides
21 an incentive for a city to encourage a person to process fish inside the city limits and
22 thereby create local jobs and generate raw fish tax revenue for the city. The
23 Complainants' competitor, Icicle Seafoods, operated its seafood processing plant inside
24 the boundaries of the City of Homer and created additional jobs and generated tax
25 revenue for the City of Homer. However, in 1998, Icicle Seafoods' processing plant
26 burned down and was not rebuilt. The majority of the fish that Icicle Seafoods unloaded
27 in the City of Homer after 1998 was transported to and processed in the City of Seward
28 which received the job creation and tax benefits. In 2008, The Auction Block Company
29 built a processing plant on a parcel of property leased from the City of Homer by Harbor
30 Leasing, LLC. Although the Complainants were generating all the benefits to and for
31 the City of Homer that were previously generated by competitor Icicle Seafoods, the
32 City of Homer refused and continues to refuse to consider any relief or incentives to
33 Complainants or even to deal or negotiate while continuing to provide relief and
34 incentives to the competitor, Icicle Seafoods, for and with no benefit to Respondents. In
35 addition, Respondents previously entered into exclusive lease and other arrangements
36 with Complainants' competitor, Icicle Seafoods, that are in contravention and violation of
37 the Shipping Act of 1984, as amended, and the published Tariffs discussed below.
38 Respondents' actions and inactions do not serve any valid transportation purpose or

1 advance any genuine public policy concern. Respondents' actions and inactions
2 prejudice Complainants and caused and continue to cause damages to Complainants.

3 **V. Violations** Respondents City of Homer and Port of Homer failed and fail to
4 establish a nondiscriminatory and/or a reasonable regulatory process and failed and fail
5 to prevent the economic discrimination that is at the heart of the regulatory scheme
6 established by Congress in the Shipping Act of 1984, as amended. Respondents are in
7 violation of the Shipping Act of 1984, as amended, specifically 46 U.S.C. § 41102(c)
8 that states in pertinent part: "A . . . marine terminal operator . . . may not fail to
9 establish, observe, and enforce just and reasonable regulations and practices relating to
10 or connected with receiving, handling, storing, or delivering property." Respondents
11 also are in violation of 46 U.S.C. § 41106(2) that states in pertinent part: "A marine
12 terminal operator may not . . . (2) give any undue or unreasonable preference or
13 advantage or impose any undue or unreasonable prejudice or disadvantage with
14 respect to any person." Respondents also are in violation of 46 U.S.C. § 41106(3) that
15 states in pertinent part: "A marine terminal operator may not . . . (3) unreasonably
16 refuse to deal or negotiate." Respondents also are in violation of 46 U.S.C. § 41302(a)
17 that states in pertinent part: "The Federal Maritime Commission, on complaint or its
18 own motion, may investigate any conduct or agreement that the Commission believes
19 may be in violation of this part. The Commission may by order disapprove, cancel, or
20 modify any agreement that operates in violation of this part." Respondents also are in
21 violation of 46 U.S.C. § 41305(b) and (c) that states in pertinent part: "(b) Basic
22 Amount. — If the complaint was filed within the period specified in section 41301(a) of
23 this title, the Federal Maritime Commission shall direct the payment of reparations to the
24 complainant for actual injury caused by a violation of this part, plus reasonable attorney
25 fees." Respondents also may be in violation of other provisions of the Shipping Act of
26 1984, as amended, that become known through disclosure or discovery. Complainants
27 reserve the right to assert and maintain those causes of action.

28 **A. Respondents' Treatment of Complainants.** Prior to 1995, Respondents did not
29 file Tariffs with the Federal Maritime Commission and instead included the rates and
30 treatment of persons in the City of Homer Code. In the Ordinance in 1995 (95-69), the
31 Tariffs were taken out of the Code and filed with the FMC. After then, Respondents
32 used Resolutions rather than Ordinances to amend the Tariffs. The Ordinance at 95-
33 18(S) repealed and reenacted Title 10 with the majority of Title 10 incorporated into the
34 Homer Port and Harbor Tariff 95-1, adopted by Resolution 95-69. Prior Ordinance
35 History: Ord. 95-9, 1995; Ord. 95-4, 1995; Ord. 95-3, 1995; Ord. 92-46, 1992; Ord. 92-
36 45, 1992; Ord. 92-23(A), 1992; Ord. 92-22, 1992; Ord. 91-25, 1991; Ord. 91-13(S),
37 1991; Ord. 90-17(A), 1990; Ord. 90-16, 1990; Ord. 90-8(A), 1990; Ord. 90-7, 1990; Ord.
38 89-6, 1989; Ord. 89-4, 1989; Ord. 88-11, 1988; and Ord. 88-2, 1988.

1 Respondents' "Terminal Tariff No. 600 Filed under ATFI Rules" effective January 1,
2 2009, Application Of Rule 34.30 regarding "Fish Dock" at Subsection 275 at page 53
3 sets the published rate for "Fish Dock Crane" use at \$88.00 per hour for the years 2009
4 and 2010. Respondents' three (3) "Terminal Tariff No. 600 Filed under ATFI Rules"
5 effective January 1, 2011 and April 25, 2011 and July 25, 2011, Application Of Rule
6 34.30 regarding "Fish Dock" at Subsections 275 at pages 53 set the published rate for
7 "Fish Dock Crane" use at \$90.64 per hour for the year 2011 and continuing.
8 Respondents unjustly overcharge The Auction Block Company for the services
9 received. Respondents required The Auction Block Company to pay and The Auction
10 Block Company paid the amount of \$98,488.05 in 2009, \$84,900.65 in 2010,
11 \$74,452.65 in 2011 and an undetermined sum in 2012 for total damages of at least
12 \$257,841.35. Damages are continuing into the future.

13 Respondents' Treatment of Competitor. Respondents required The Auction
14 Block Company to pay and The Auction Block Company paid the rates published in the
15 Tariff and discussed above. However, Respondents do not require Complainants'
16 major competitor, Icicle Seafoods, Inc. d/b/a Seward Fisheries ("Icicle Seafoods") to pay
17 and Icicle Seafoods does not pay the rates published in the Tariff. Respondents charge
18 Icicle Seafoods for "Fish Dock Crane" use and also for the use and enjoyment of
19 multiple defined "PREMISES" based on rates in a series of exclusive lease agreements,
20 addenda and amendments executed by Respondents and Icicle Seafoods. The LEASE
21 AGREEMENT dated September 14, 1979 recorded at Book 111, Pages 884 through
22 902A in the Homer Recording District at Paragraph 3 ("USE OF PREMISES") describes
23 the real property subject to the "Land Lease" at Page 885. The AMENDMENT OF
24 LEASE AGREEMENT dated July 1, 1986 recorded at Book 172, Pages 673 through
25 678 in the Homer Recording District at Paragraph 5 ("USE OF PREMISES") at Page
26 675 leases the following premises:

- 27 (a) Lessee shall have the use of the covered structure at the Fish Dock.
- 28 (b) Lessee may continue to operate its ice dispensing equipment at its present
29 location on the Fish Dock.
- 30 (c) Lessee shall have the use of loading cranes No. 7 and 8 to a maximum of
31 1,858 hours per year. Use of the cranes by Lessee in excess of that time
32 shall be at the rate of Fifteen Dollars (\$15.00) per hour.
- 33 (d) Seafood wharfage charges are included within the rental given above.
- 34 (e) Lessee shall have the use of one fish buying shed. Lessor shall have the
35 right to select the shed for Lessee's use.

36 The SECOND AMENDMENT OF LEASE AGREEMENT dated January 25, 1988 with
37 an effective date of September 14, 1987 recorded at Book 0181, Pages 383 through

1 386 in the Homer Recording District at Paragraph 4 ("USE OF PREMISES") at Page
2 384 leases the following additional premises:

- 3 (f) The existing camping area shall be relocated to a [sic] area reasonably close
4 to Lessee's processing operations in order to facilitate placement of fill
5 material on the West side of the Homer Spit.
- 6 (g) The existing parking arrangements will be re-evaluated and amended to
7 reflect changes resulting from the Interim Spit Plan at the next scheduled
8 review of the lease.

9 DOCK AND CRANE USE described in (c) above is amended at Page 384 as follows:

10 Dock use includes crane use up to 1300 hour maximum. All hours of use
11 above the 1300 hour maximum shall be charged at the rate of \$15 per
12 hour. Crane use is no longer limited to cranes No. 7 and 8.

13 The Tariff at page 53 describes the "Ice Plant Bin Storage (roofed-over, open-sided
14 Storage bins at west end of ice plant building sixteen feet by twelve feet)." This 192
15 square foot structure is assessed the rental rate of \$2400 per year ("200/month"
16 multiplied by 12 months) which is a rate of \$12.50 per square foot pursuant to the Tariff.
17 Pursuant to the provisions in (a) through (g) in the USE OF PREMISES paragraphs in
18 the last two LEASE AGREEMENTS set forth above, Respondents allow Icycle Seafoods
19 to use and enjoy for commercial purposes an additional approximately 2750 square feet
20 of Respondents' property. At the annual rate of \$12.50 per square foot calculated
21 pursuant to the provisions in the Tariff, Icycle Seafoods is commercially using and
22 enjoying premises valued at \$34,375.00 (2750 square feet x \$12.50 per square foot).
23 The "Dock Use" charge stated in Paragraph 2 "RENTAL" in the SECOND
24 AMENDMENT at page 384 is \$30,900.00. The amount of \$34,375.00 is the total
25 calculated "USE OF PREMISES" benefit to competitor Icycle Seafoods which exceeds
26 the "Dock Use" charge before the calculation of Icycle Seafoods' "Fish Dock Crane" use.
27 Thus, the Respondents provide at least an annual benefit of \$3,475.00 (\$34,375.00 -
28 \$30,900.00) to Icycle Seafoods that is not provided to The Auction Block Company. In
29 addition, Respondents provide Icycle Seafoods the 1300 hours of Crane Use at no cost
30 and only charge the rate of \$15 per hour for use above 1300 hours as stated in
31 Paragraph 3 "DOCK AND CRANE USE" in the SECOND AMENDMENT at Page 384.
32 However, Respondents charge The Auction Block Company for crane use discussed
33 below. Respondents have damaged Complainants in the sum of at least \$10,425.00
34 (\$3,475.00 x 3 years). Damages are continuing into the future.

35 **B.** The Tariff dated July 25, 2011 at page 53 states: "Minimum charge per hour for
36 crane" [is] "Fifteen minutes." In application, Respondent City of Homer applies the rates
37 in 15 minute increments, so 16 minutes of use is charged at 30 minutes, 31 minutes is

1 charged at 45 minutes, and 46 minutes is charged at 60 minutes. Respondent City of
2 Homer assesses an automatic overcharge of \$1.51 to \$21.14 on average for each
3 transaction. Respondents City of Homer has represented that this rate structure is set
4 forth in the Tariff, although this rate structure is not set forth in the Tariff. Respondents
5 do not apply these calculations to the Fish Dock Crane charges or use assessed to
6 Icicle Seafoods. Respondents overcharged The Auction Block Company a total of at
7 least \$16,902.14 for the years 2009 to 2011 and an as yet undetermined sum in 2012
8 based on the rate published in the Tariff. In addition, applying the minimum charge
9 outlined in the Tariff results in a crane charge for a 1 minute use of \$24.36. For
10 example, Respondents billed and The Auction Block Company paid \$487.20 for 20
11 crane charges totaling 1 hour. In addition, Respondents billed and The Auction Block
12 Company paid \$419.22 for 17 crane charges that totaled 13 minutes, an effective hourly
13 rate of \$1,934.86 per hour. These charges are not applied to Icicle Seafoods which
14 also is not subject to a per use sales tax. Damages are continuing into the future.

15 **C.** The Tariff at page 53 states a wharfage rate of \$4.62 per ton for the years 2009
16 and 2010 and a rate of \$4.76 per ton for the year 2011 on fish products handled by The
17 Auction Block Company. Respondents exempt Icicle Seafoods from these charges and
18 assessments. Respondents bill at \$.00231 per pound for the years 2009 and 2010 and
19 at \$.00238 for the year 2011. The Auction Block Company handled 8,026,896 pounds
20 of fish in 2009 which results in a differential and damages to The Auction Block
21 Company of \$18,542.13 in 2009. The Auction Block Company handled 6,588,169
22 pounds of fish in 2010 which results in a differential and damages to The Auction Block
23 Company of \$15,218.67 in 2010. The Auction Block Company handled 5,540,143
24 pounds of fish in 2011 which results in a differential and damages to The Auction Block
25 Company of \$13,185.54 in 2011. The Auction Block Company handled an as yet
26 undetermined poundage of fish in 2012 with a differential and damages to The Auction
27 Block Company of an undetermined sum in 2012. The total damages are at least
28 \$46,946.34 for the years from 2009 until 2012. Damages are continuing into the future.

29 **D.** Respondents charge and The Auction Block Company pays an additional
30 wharfage fee for ice used on fish offloaded at the fish dock of \$14.00 per ton in the
31 years 2009 and 2010 and \$14.50 per ton in the year 2011 unless the ice is purchased
32 from the City. Respondents do not assess this fee to and do not receive the fee from
33 Icicle Seafoods. The City and Icicle Seafoods executed an exclusive reciprocal rate
34 arrangement for ice that prejudices and disadvantages and thus damages The Auction
35 Block Company. Respondents have damaged The Auction Block Company in an
36 amount to be determined. Damages are continuing into the future.

37 **E.** The Auction Block Company and competitor Icicle Seafoods compete to
38 purchase fish in the City of Homer and at the Port of Homer and in Alaska in these

1 markets. Respondents' failure to establish, observe, and enforce just and reasonable
2 regulations and practices relating to or connected with receiving, handling, storing, or
3 delivering property damaged Complainants' ability to compete with Icicle Seafoods. If
4 Respondents had not unduly and/or unreasonably preferred and/or advantaged Icicle
5 Seafoods and/or unduly and/or unreasonably prejudiced and/or disadvantaged
6 Complainants, The Auction Block Company could have purchased more fish and
7 realized net revenues of up to \$350,000.00. Respondents unreasonably refused and
8 refuse to deal and/or negotiate with Complainants and thus damaged Complainants.
9 Damages are continuing into the future.

10 **VI.** By reason of the facts stated in the foregoing paragraphs and other facts,
11 Complainants have been and are being subject to injury as a direct and proximate result
12 of and caused by the violations by Respondents of the Shipping Act of 1984, as
13 amended, specifically 46 U.S.C. § 41102(c) because Respondents failed to establish,
14 observe, and enforce just and reasonable regulations and practices relating to or
15 connected with receiving, handling, storing, or delivering property; 46 U.S.C. § 41106(2)
16 because Respondents have given undue and/or unreasonable preference and/or
17 advantage and/or imposed undue and/or unreasonable prejudice and/or disadvantage
18 with respect to Complainants; 46 U.S.C. § 41106(3) because Respondents have
19 unreasonably refused and continue to refuse to deal and/or negotiate with
20 Complainants; 46 U.S.C. § 41302(a) that allows the Federal Maritime Commission, on
21 complaint or its own motion, to investigate any conduct or agreement that the
22 Commission believes may be in violation of this part and may by order disapprove,
23 cancel, or modify any agreement that operates in violation of the Shipping Act of 1984;
24 and 46 U.S.C. § 41305(b) that provides as a basic amount, if the complaint was filed
25 within the period specified in 46 U.S.C. § 41301(a), that the Federal Maritime
26 Commission shall direct the payment of reparations to the complainant for actual injury
27 caused by a violation of this part, plus reasonable attorney fees.

28 **VII.** Respondents' actions and inactions proximately and legally damaged and
29 continue to damage Complainants in the following manners: Respondents damaged
30 Complainants in the sum of at least \$332,114.83 (at least \$257,841.35, \$10,425.00,
31 \$16,902.14 and \$46,946.34). In addition, Respondents placed the Complainants in a
32 competitive disadvantage in the marketplace and further prejudiced and damaged
33 Complainants in the sum of at least \$900,000.00 or in an amount to be determined after
34 further disclosures and discovery. Damages are continuing into the future.

35 **VIII.** Wherefore Complainants pray that Respondents be required to answer the
36 charges herein; that the Complainants and Respondents have not engaged in informal
37 dispute resolution and should be directed to consider informal resolution of the dispute
38 and claims; that if informal dispute resolution is not possible or is unsuccessful, after

1 due hearing in Washington, D.C, an order be made commanding said Respondents: to
2 cease and desist from the aforesaid violations of said acts; to establish and put in force
3 such practices as the Commission determines to be lawful and reasonable; to pay to
4 said Complainants by way of reparations and damages for the unlawful conduct
5 hereinabove described the sum of at least \$1,232,114.83, with interest and attorney's
6 fees or such other sum as the Commission may determine to be proper as an award of
7 reparations and damages; to assess a civil penalty or penalties as authorized under 46
8 U.S.C. § 41107(a) for each violation; and to enter such other and further order or orders
9 as the Commission determines to be just and proper in the premises.

10 DATED at Anchorage, Alaska, this 4th day of September, 2012.

11 LAW OFFICE OF STEVEN J. SHAMBUREK
12 Attorney for Complainants
13

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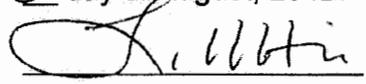
Kevin Hogan

Verification

State of Alaska)
Third Judicial District) ss

I Kevin Hogan being first duly sworn on oath deposes and says that he is the President of The Auction Block Company, a corporation organized under the laws of the State of Alaska, and is also a member of Harbor Leasing, LLC, a limited liability company organized under the laws of the State of Alaska, and is authorized to handle business matters for both entities and is the person who signed the foregoing Fourth Amended Complaint on behalf of the Complainants, that he has read the Fourth Amended Complaint and that the facts stated therein, upon information received from others, affiant believes to be true and correct.

Subscribed and sworn to before me, a notary public in and for the State of Alaska, this 31st day of August, 2012.



Notary Public in and for the State of Alaska

My Commission expires: 3-27-14



CERTIFICATE OF SERVICE

FOURTH

I hereby certify that I have this day served a copy of this ~~THIRD~~ AMENDED COMPLAINT upon Thomas F. Klinkner, Birch Horton Bittner & Cherot, 1127 West 7th Avenue Anchorage, Alaska 99501 by sending a copy by U.S. Mail and e-mail attachment to tklinkner@bhb.com and also a copy to Holly C. Wells at hwells@bhb.com.

Dated this 4th day of ~~August~~ ^{September}, 2012.

By: 
Steven J. Shamburek