

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 **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

14 By:   
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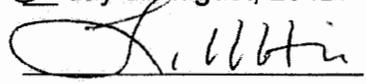
Kevin Hogan

**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 31<sup>st</sup> 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](mailto:tklinkner@bhb.com) and also a copy to Holly C. Wells at [hwells@bhb.com](mailto:hwells@bhb.com).

Dated this <sup>September</sup> 4<sup>th</sup> day of ~~August~~, 2012.

By:   
Steven J. Shamburek