

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 **COMPLAINANTS' REPLY BRIEF**

11 \_\_\_\_\_

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33

## Table of Contents

Background And Introduction	1
Complainants Are Providing More Of The Jobs To The Citizens Of Homer	3
Complainants Are Paying More Fish Tax	5
Complainants Timely Developed The Facts and Contentions; Respondents Only Recently Presented An Untimely Defense	7
Respondents Fail To Provide A Timely And Admissible Factual Basis To Support Their Contentions	9
Parol Evidence Submitted By Respondents Is Not Probative And Not Admissible	13
The Material Facts Are Established	15
Respondents Continue To Admit And Concede That Complainants' Facts And Contentions Are True In Substantive Admissions	18
Respondents Admit That Complainants' Contentions Are True	22
Complainants Reasonably Rely On Respondents' Admissions Of Truth	22
Respondents Independently Admit And Concede That Complainants' Fundamental Contentions Are True	22
Respondents' Former Chair And Committee Member Shelly Erickson Describes Respondents' Improper Treatment Of Lease Applicants and A Former Major Tenant Of Respondents Describes Respondents' Improper Treatment Of Lessees	23
The Statute Of Limitations Does Not Bar The Claim For Reparations	23
Complainants/Respondents Lease Was Recorded On February 19, 2009 But Did Not Trigger The Running Of The Statute Of Limitations	24
The Statute Of Limitations Is Equitably Tolloed During Mr. Hogan's Service To The Citizens And The City Of Homer	24
The Clear Language In Commission Rule 46 CFR § 502.63(b) Is Controlling	26
Respondents And Icicle Do Not Have A Legally Binding Lease Or Contract	27
Respondents Compelled Complainants To Enter Into A Short-Term Lease Under Duress And Protest That Was Recorded On February 19, 2009	31
The Terms And Conditions In The Tariffs Bind Respondents, Complainants And Icicle Seafoods	31

1	The “General Port and Harbor Provisions” Of The Homer Code Do Not Provide An	
2	Exception For Icicle	32
3	Supporting Legal Discussion	33
4	Complainants Are A "Person" And A Common Law “Common Carrier” ” And Are Able	
5	To Bring And Maintain This Action	33
6		
7	Respondents Are A "Marine Terminal Operator" And A “Person”	39
8	The Commission Has Subject Matter And Personal Jurisdiction	42
9	The Commission Should Not Defer To Respondents	43
10	Complainants Provide Legal And Factual Support For The Statutory Violations	44
11	Respondents Are In Violation Of 46 U.S.C. § 41102(c)	44
12	Respondents Are In Violation Of 46 U.S.C. § 41106(2)	46
13	Respondents Are In Violation Of 46 U.S.C. § 41106(3)	47
14	Complainants Are Entitled To The Reparations In 46 U.S.C. § 41305(b)	49
15	The Request For Sanctions Is Unfounded And Unwarranted	58
16	Conclusion	59
17		
18	Authorities:	
19	Federal Statutes:	
20	46 U.S.C. § 40101(1)(4)	49
21	46 U.S.C. § 41102(c)	44
22	46 U.S.C. § 41106(2)	46
23	46 U.S.C. § 41106(3)	47
24	46 U.S.C. § 41301(a)	26
25	46 U.S.C. § 41305(b)	49, 55
26		
27	Commission Rules:	

1	Commission Rule § 502.62(a)	19
2	Commission Rule § 502.63(b)	26
3	Commission Rule § 502.64	19
4	Commission Rule § 502.64(a)	19
5	Commission Rule § 502.70	19
6	Commission Rule § 502.156	13
7	Commission Rule § 502.207(b)	21
8	Commission Rule § 502.253	58
9		
10	Case Authority:	
11	<u>Capitol Transportation, Inc. v. Federal Maritime Commission</u> , 612 F.2d 1312, 1317 - 18	
12	(1 <sup>st</sup> Cir. 1979)	33
13	<u>Capitol Transportation, Inc. v. Federal Maritime Commission</u> , 612 F.2d 1312, 1318 (1 <sup>st</sup>	
14	Cir. 1979)	20
15	<u>Ceres Marine Terminal v. Maryland Port Admin.</u> , 27 SRR 1251, 1270-71 (FMC 1997)	50
16	<u>Ceres Marine Terminal v. Maryland Port Admin.</u> , 29 SRR 356, 372 (FMC 2001)	50
17	<u>Deaver v. Auction Block Company</u> , 107 P.3d 884 (Alaska 2005)	53
18	<u>In re Estate of Fields</u> , 219 P.3d 995, 1012 at n. 57 (Alaska 2009)	14
19	<u>International Shipping Agency, Inc. v. The Puerto Rico Ports Authority</u> , 30 SRR 407,	
20	425 (2004)	26
21	<u>Maher Terminals, LLC v. Port Authority of New York and New Jersey</u> , FMC No. 08-03	
22	(ALJ May 16, 2011)	26
23	<u>New Orleans S.S. Ass'n v. Plaquemines Port</u> , 816 F.2d 1074, 1077 (5 <sup>th</sup> Cir. 1987)	56
24	<u>Puerto Rico Ports Authority v. Federal Maritime Commission</u> , 919 F.2d 799, 802 (1 <sup>st</sup> Cir.	
25	1990)	42
26	<u>Totem Marine Tug &amp; Barge, Inc. v. Alyeska Pipeline Service Co.</u> , 584 P.2d 15 (Alaska	
27	1978)	24
28	<u>Wassink v. Hawkins</u> , 763 P.2d 971, 975 (Alaska 1988)	25
29	<u>Western Pioneer, Inc. v. Harbor Enterprises, Inc.</u> , 818 P.2d 654 (Alaska 1991)	13
30	<u>Zeilinger v. Sohio Alaska Petroleum Co.</u> , 823 P.2d 653, 675 (Alaska 1992)	24

1

2 Homer City Code 18.08.070.d

27

1 **Background And Introduction**

2 **“Let Complainants Compete”**

3 This simple case involves a classic contest between a principled and tenacious  
4 David on one hand and Goliath (Respondents) and Goliath ([www.icicleseafoods.com](http://www.icicleseafoods.com))  
5 on the other hand. Respondents established the standard, the rationale and the rules.  
6 The goal remains unquestioned – a shore-based fish processing plant in Homer that  
7 provides employment for the citizens of Homer and tax revenue to the City of Homer.  
8 The benchmark is uncontested – build and operate a shore-based fish processing plant  
9 in Homer. The incentive is undisputed – relief from some Tariff crane use fees and  
10 wharfage fees for the owner and operator of the shore-based fish processing plant  
11 based on the actual performance of the plant. The incentives reward the long-term  
12 investment in infrastructure in Homer that promotes nautical commerce, increases  
13 employment in the City and expands the tax base and tax revenue.

14 Complainants and Icicle Seafoods are two similarly situated entities in a  
15 competitive relationship with each other who each seek to build and operate a shore-  
16 based fish processing plant in Homer. From a humble but proud start in a shack and  
17 later a portable trailer, Complainants expanded, developed and operate the benchmark  
18 fish processing plant, yet Respondents refused and refuse to provide the incentives or  
19 even negotiate with Complainants about the incentives. By contrast, Icicle has not  
20 rebuilt their burnt processing plant, yet they are exclusively given incentives that are not  
21 even based on actual performance. Complainants clearly met the challenge and  
22 prevailed in the competition with Icicle. In popular parlance, Complainants “won” the  
23 competition. In this action before the Federal Maritime Commission, Complainants are

1 simply trying to obtain the promised performance-based incentives and some partial  
2 reparations for the debilitating financial damage proximately caused by Respondents.

3           Understanding the “incentives” offered by the City is critical. The “incentives” are  
4 discussed in “1. Icicle Lease Provisions” in Respondents’ Brief at pages 5 and 6 (herein  
5 described as “incentives”) and provide a break on crane fees and wharfage charged by  
6 the City.<sup>1</sup> The incentives offered to Icicle are a gift that directly reduces the operating  
7 costs of the company. However, the same incentives sought by Complainants do not  
8 come out of the City’s pocket. The incentives sought by Complainants are not a grant,  
9 not a credit, not a tax credit, not a loan and not a gift. Complainants seek incentives  
10 that are performance-based and perforce require performance by Complainants.  
11 Nonetheless, Respondents still give the incentives to Icicle gratuitously even though  
12 Icicle is not performing and yet refuse to provide the performance-based incentives to  
13 Complainants even though Complainants are actually performing. Respondents’  
14 speculation that Complainants could overuse the crane fails to acknowledge that the  
15 incentives given to Icicle are a lump sum payment for a defined number of crane use  
16 hours and then establish an hourly rate for crane use beyond that use. Respondents  
17 apparently have not had any problem with Icicle and have offered no sound reason in  
18 the record to suggest that they would have any problem with Complainants.

---

<sup>1</sup> The incentives are also discussed in detail in Complainants’ Fourth Amended Complaint. CX 272 - 280. The Parties agreed that Complainants would mark and file true and correct copies of the Fourth Amended Complaint at CX 272 – 280 and the Fourth Amended Answer at CX 281 – 285 in Complainants’ Supplemental Appendix And Exhibit List. Respondents made references to these pleadings in their Brief. As discussed below, Complainants note that the lease between Respondents and Icicle expired on September 14, 2004.

1 Complainants seek the relief on crane use and wharfage to support the heart and soul  
2 of their business – the state-of-the-art shore-based fish processing Plant in Homer.

3 Mr. Hogan with Complainants spent decades single-handedly developing Homer  
4 into the “halibut capital of Alaska” with great success at the same time that he was and  
5 is constantly “fighting Walt Wrede” (rather than “fighting City Hall”) without success.<sup>2</sup>  
6 Even running as a reform candidate, winning a seat on the Homer City Council and  
7 challenging the game from the inside did not provide him with the platform to challenge  
8 the favoritism and corruption in the City. Mr. Hogan is disgusted by the incompetence  
9 and corruption in Homer. His legacy - the Complainants’ Plant - is affixed to the Homer  
10 Spit and is a fixture in Homer.<sup>3</sup> If the Plant ceases to operate, the incentives cost the  
11 City nothing. However, if the Plant ceases to operate, the citizens lose one of the  
12 largest private-sector employers in the City and the City receives nothing in taxes for all  
13 the fish purchased and processed by Complainants.

14 **Complainants Are Providing More Of The Jobs To The Citizens Of Homer**

15 Complainants’ Plant is located in Homer twenty-four (24) hours a day, seven (7)  
16 days a week and fifty-two (52) weeks a year. In CPFOF 212, Respondents responded  
17 that they are “Unable to admit or deny” the following statement:

---

<sup>2</sup> Compare the article at CX 166 – 167 which discusses the emergence of Homer as the halibut capital of Alaska in 1999 attributed to Mr. Hogan’s efforts with the article last year in “The Anchorage Daily News” noted by Respondents at <http://www.adn.com/2011/08/08/2006273/worlds-halibut-capital-homer.html>.

<sup>3</sup> Respondents note that Complainants have closed their operation in Seward and other cities. Wisely or not, Complaints have now consolidated all of their activities in Homer. In popular parlance, Complainants have put “all of their eggs in one basket” in Homer. In popular parlance, Complainants “doubled down” their entire investment in Homer.

1 The Auction Block has provided the following full-time and part-time  
2 employment in Homer:

3  
4 Year: Total:

5	2009	114
6	2010	140
7	2011	136
8	2012	120

9 CPFOF 202.<sup>4</sup> Respondents do not even know and do not even care to discern the  
10 substantial contribution to employment made by Complainants.

11 Icicle states that it “currently employs nine employees in Homer including three  
12 year-round employees and seven employees who are Homer residents.”<sup>5</sup> RX 1118.  
13 Icicle’s floating processor transports the fish it receives to another city – Seward – by  
14 truck for processing and then leaves Homer after only a fortnight in July.<sup>6</sup> The City’s  
15 records indicate that the Icicle floating processor tied up for six days in 2007 and for no  
16 days in 2008 and for no days in 2009. The City’s records at page 41 (.pdf page 26)  
17 show that the Icicle processor “RM Thorstenson” did not dock at the Deep Water Dock

---

<sup>4</sup> Complainants’ Proposed Findings of Fact are referred to as “CPFOF” and Respondents as “RPFOF”.

<sup>5</sup> Respondents did not provide these figures in their disclosures. Respondents submitted an affidavit on counsel’s pleading paper from an individual who was not disclosed in Respondents’ list of possible witness, CX 121 - 123, almost a month after discovery closed.

<sup>6</sup> Respondents submit Icicle’s fuel purchases as a RPFOF without acknowledging that the fuel is used so that the trucks can transport the fish to Seward for processing which also results in the City of Seward not the City of Homer receiving the fish tax. Other fuel purchases are used to transport the floating processor out of Homer when Icicle departs at the end of the approximately two weeks it spends in Homer. Respondents do not provide Complainants’ fuel purchases for the Commission’s consideration because they do not care what Complainants spend in or contribute to the citizens and the City of Homer.

1 in 2010 ([http://www.cityofhomer-](http://www.cityofhomer-ak.gov/sites/default/files/fileattachments/phpacket.12.15.10.pdf)  
2 [ak.gov/sites/default/files/fileattachments/phpacket.12.15.10.pdf](http://www.cityofhomer-ak.gov/sites/default/files/fileattachments/phpacket.12.15.10.pdf)); at page 46 (.pdf page 50)  
3 that the Icicle processor “RM Thorstenson” docked for a total of 15 days (July 16 – 29  
4 and July 30) in 2011 for a total payment to the City of \$8,961.96 (\$8,321.82 and  
5 \$640.14) ([http://www.cityofhomer-ak.gov/sites/default/files/fileattachments/ph\\_packet\\_12-](http://www.cityofhomer-ak.gov/sites/default/files/fileattachments/ph_packet_12-14-11.pdf)  
6 [14-11.pdf](http://www.cityofhomer-ak.gov/sites/default/files/fileattachments/ph_packet_12-14-11.pdf)); and at page 42 (.pdf page 46) that the Icicle processor docked for a total of  
7 12 days (July 19 – 30) in 2012 for a total payment to the City of \$10,456.56 (\$871.38 x  
8 12 days) ([http://www.cityofhomer-ak.gov/sites/default/files/fileattachments/ph\\_packet\\_10-](http://www.cityofhomer-ak.gov/sites/default/files/fileattachments/ph_packet_10-24-12.pdf)  
9 [24-12.pdf](http://www.cityofhomer-ak.gov/sites/default/files/fileattachments/ph_packet_10-24-12.pdf)).<sup>7</sup>

### 10 **Complainants Are Paying More Fish Tax**

11  
12 In 2009 operating under State of Alaska license number 3785, The Auction Block  
13 Company paid the following sum in fish taxes:

14 2009: \$909,467.88

15 In 2010, 2012 and 2012 operating under State of Alaska license number 8162, The  
16 Auction Block Company paid the following sums that include fisheries business tax,  
17 salmon enhancement tax and Alaska Seafood Marketing Institute (ASMI) marketing  
18 taxes:

19 2010: \$854,959.60

20

21 2011: \$530,265.29

22

23 2012: \$483,334.42

---

<sup>7</sup> Would not the Commission benefit from Respondents candidly and completely stating to the Commission that the Icicle floating processor was in Homer for only 33 days in the years 2007, 2008, 2009, 2010, 2011 and 2012? This is not a game of hide the ball.

1 Fifth Supplemental Affidavit of Kevin Hogan.<sup>8</sup> Complainants are paying fewer taxes in  
2 2012 because they are unable to compete to purchase fish and seafood products  
3 despite the existence of excess capacity in their Plant to process and package the  
4 product.

5 Respondents did not pay any tax for fish processed in a shore-based plant in  
6 Homer and do not dispute that it does not have any state of Alaska permits to operate a  
7 shore-based plant. Icicle states that they paid \$110,000 in fish tax in Homer in 2011.  
8 RX 1117. This is about one fifth what Complainants paid in fish tax in 2011.

9 Complainants bought the amount of fish in the following years:

10 2009: \$22,736,460.47

11 2010: \$24,469,919.48

12 2011: \$14,804,551.71

13 2012: \$13,413,592.00

14 Icicle claims it purchased fish worth more than \$23 million in 2011 and nearly \$12  
15 million in 2012 “from fishermen in and around Homer,” but there is no statement that  
16 these amounts are attributable to Icicle’s purchases “in Homer” or to Icicle’s purchases  
17 “around Homer” which could include Ninilchik, Kasilof, Clam Gulch, Larson Bay,  
18 Seward, St. Paul, Dutch Harbor and other communities. The landings in these other  
19 communities are landings that have nothing to do with the port of Homer.<sup>9</sup> RX 1117.

---

<sup>8</sup> This information was disclosed by Complainants to Respondents as part of Complainants’ financial disclosures including tax returns.

<sup>9</sup> Respondents did not provide these figures in their disclosures. Respondents submitted an affidavit on counsel’s pleading paper almost a month after discovery closed from an individual who was not disclosed in Respondents’ list of possible witness. CX 121 - 123.

1 The competition to purchase is keen, although Complainants are at a substantial  
2 competitive disadvantage vis-a-vis Icicle because of the incentives given to Icicle.

3 **Complainants Timely Developed The Facts and Contentions; Respondents Only**  
4 **Recently Presented An Untimely Defense**  
5

6 Complainants carefully and thoughtfully developed their entire case and  
7 endeavored to anticipate and address all possible reasonable objections in the opening  
8 Brief. Of all the exhibits that Complainants could have been marked as “Exhibit A” / CX  
9 1, they elected and selected the detailed discussion in the “Solid-Fuel Absorption  
10 Refrigeration Emerging Energy Technology Grant” application submitted by The Auction  
11 Block Company to the Alaska Energy Authority that describes in accurate detail the fish  
12 processing plant designed, developed and operated on the Homer Spit in Homer,  
13 Alaska by Complainants at this time (“Plant”). The business and facilities have grown  
14 and expanded over the last fifteen years from a shack to a trailer to a modern Plant.

15 At this stage of the proceeding, however, Complainants could mark as “Exhibit A”  
16 / CX 1 the Respondents’ pleadings and affidavits filed to date, most of them untimely,  
17 because so many of the them, when read in light of the written documents, uncontested  
18 facts and settled law, actually support and prove Complainants’ contentions that  
19 Respondents continue to favor Icicle and prejudice and punish Complainants. The  
20 documents reveal that Mr. Wrede was and is unwilling to deal or negotiate with  
21 Complainants. Throughout this proceeding, the City has acted as a lobbyist for Icicle;  
22 the City attorneys have acted as the legal advocates for Icicle.

23 Contrary to Respondents’ statements, Complainants have provided timely and  
24 complete disclosures and discovery. Complainants set forth their damages in detail in  
25 in their Complaints and in their Initial Disclosures. CX 272 – 280 and CX 114 – 118.

1 Respondents did not specifically challenge the claims for damages in their Initial  
2 Disclosures. CX 125. Respondents did not specifically challenge the claims for  
3 damages in their Fourth Amended Answer. CX 281 – 285. After the Joint Motion to  
4 stay the case was denied on August 9, Respondents served discovery requests on  
5 Complainants with a request for expedited response and then a few days later served  
6 amended discovery requests on Complainants with a request for expedited response  
7 which Complainants accommodated by providing an expedited response on September  
8 11, 2012. CX 20 - 55. Note that Complainants organized the responses by year and  
9 marked them “TABC \_\_\_\_\_.” See for example:

10 **REQUEST FOR PRODUCTION NO. 3:** Please produce all  
11 statements, receipts, invoices, memoranda, or other written record of any  
12 kind recording payment of wharfage fees to the City by Auction Block for  
13 the period January 1, 2008 to the present.  
14

15 **RESPONSE:** Please see the responsive documents. The  
16 documents marked TABC 281 – 307 cover the year 2008, TABC 308 –  
17 417 cover the year 2009, TABC 673 – 707 cover the year 2010, and  
18 TABC 708 – 729 cover the year 2012.  
19

20 The City generates the bills, statements, receipts, invoices,  
21 memoranda, and other written records regarding payments or demands  
22 for payments to the City by Auction Block. Except for one disputed  
23 demand for payment, The Auction Block has paid all invoices, bills and  
24 demands for payment to the City. Responsive documents should also be  
25 in the possession and control of the Respondents.  
26

27 CX 48 – 49. Respondents requested the bills they sent to Complainants which  
28 Complainants timely paid. Complainants provided substantial financial information  
29 including tax returns for the year in question on a thumb drive. Half of the information  
30 sought in Respondents’ discovery requests was information already in the possession  
31 of Respondents because it is provided on a regular basis by Complainants or involved  
32 communications between the Parties; the other half of the information sought in

1 Respondents' discovery requests was information in the possession of third party  
2 government agencies that could be obtained by Respondents via sub poena with  
3 appropriate safeguards for the confidentiality of the information. By contrast,  
4 Respondents turned over volumes of documents that were not organized by year or  
5 topic.

6 Respondents did not provide complete responses in particular copies of the  
7 leases of other lessees sought by Complainants. Because of Respondents'  
8 admissions, however, Complainants opted not to file a motion to compel.

9 **Respondents Fail To Provide A Timely And Admissible Factual Basis To Support**  
10 **Their Contentions**

11  
12 Complainants contend that Mr. Wrede runs the docks. Respondents agree and  
13 respond by providing multiple affidavits from Mr. Wrede that decree how he runs things  
14 on the docks. However, how he runs things on the docks contravenes federal law, state  
15 law, the Homer City Code and the Shipping Act of 1984 as amended. The Commission  
16 should note that Mr. Wrede was not appointed the City Manager until 2003. In the  
17 RPFOF, his affidavits are submitted to make allegations about events that occurred  
18 before he took control or that he cannot testify to because he lacks first-hand  
19 knowledge. Such statements are inadmissible.

20 Mr. Hogan filed the initial Complaint pro per on April 2, 2012. Respondents rely  
21 on affidavits, most from undisclosed witnesses, first provided on the last day set for  
22 discovery on October 9, 2012 and waited until nine months later on January 2 and 3,  
23 2013 to begin making their defense somewhat clearer. Complainants believe that the  
24 affidavits of Mr. Wrede, of Mr. Woodruff and of Mr. Sparks were written by counsel and  
25 are presented on counsel's pleading paper.

1 Icicle Seafoods, represented by two attorneys, produced Mr. Kenneth Hoyt with  
2 Icicle Seafoods as its Federal Rule 30(b)(6) representative for deposition on September  
3 19, 2102.<sup>10</sup> Although he is not noted by either Party in their respective initial  
4 disclosures, he was the designated spokesman for Icicle. Some pages from his  
5 transcribed testimony are in the record. RX 1 – 8. Without notice, however,  
6 Respondents also provide multiple affidavits for a Mr. John Woodruff with Icicle  
7 Seafoods, although Respondents failed to disclose him as a possible witness. CX 121 -  
8 126. In addition, the first affidavit from Mr. Woodruff filed by Respondents is dated  
9 October 9, 2012, the day discovery closed, and another one is subsequent to that date.  
10 His testimony should be precluded. The Commission should disregard the testimony at  
11 RX 1105 – 1124.

12 Respondents also provide two untimely reports from someone, a Mr. H. Charles  
13 Sparks, who was not timely disclosed in their Disclosures. CX 121 - 126.<sup>11</sup> One report  
14 is dated November 16, 2012 and a supplement is dated December 28, 2012. He also  
15 filed an affidavit dated January 3, 2013 on counsels' pleading paper which is long past

---

<sup>10</sup> Complainants withdraw their previous objection to the admission of Mr. Kenneth “Duff” Hoyt’s testimony. Mr. Hoyt was made available for deposition on September 19, 2012 which is before the close of discovery on October 9, 2012. Mr. Hoyt was represented by one of the two attorneys for Icicle who has been involved in this matter since shortly after the initial Complaint was filed by Mr. Hogan.

<sup>11</sup> Complainants note that Respondents’ Response to CPFOF 125 states:

Respondents did not list any possible experts in their Initial Disclosures marked as Exh. K / CX 121 - 126.

Denied. CX 0121 – 0126.

The Parties agree that the Commission can review CX 121 - 126 to determine whether Mr. Sparks was timely disclosed by Respondents as an expert.

1 the close of discovery and a month after Complainants filed their Brief. Respondents  
2 did not file a motion and provide good cause to file late reports. The value and virtue of  
3 the reports are that they show that despite representations to the contrary by counsel  
4 for Respondents, Respondents had access to fishing reports and landing data before  
5 filing the motion for sanctions. RX 1283. These untimely reports should either be  
6 struck by the Commission or simply disregarded. The Commission should disregard the  
7 testimony at RX 1263 – 1309. In addition, Respondents’ motion for sanctions is  
8 undermined by the documents referenced in the very reports filed by Respondents. RX  
9 1283. Complainants had provided the data or Respondents had the data in their  
10 possession. The motion for sanctions is unwarranted and unfounded.

11 As noted above, Respondents rely in part on the affidavits of individuals who  
12 were not listed on Respondents’ disclosures. CX 121 - 126. The Commission should  
13 disregard testimony that would not be admissible at a hearing on this matter. In the  
14 JOINT PREHEARING STATEMENT filed on November 6, 2012, Complainants raise  
15 and preserve this objection to testimony as follows:

16 Complainants contend that Charles Sparks, John Woodruff and Kenneth  
17 “Duff” Hoyt cannot be called as witnesses because they were not  
18 disclosed by Respondents in RESPONDENTS’ INITIAL DISCLOSURES  
19 or before the close of discovery. A true and correct copy of  
20 RESPONDENTS’ INITIAL DISCLOSURES is marked at Exhibit K at  
21 Docket 31.

22 Complainants contend that Walt Wrede, Bryan Hawkins and Charles  
23 Sparks cannot be called as expert witnesses because they were not  
24 disclosed by Respondents in RESPONDENTS’ INITIAL DISCLOSURES  
25 or before the close of discovery. A true and correct copy of  
26 RESPONDENTS’ INITIAL DISCLOSURES is marked at Exhibit K at  
27 Docket 31.  
28

1 JOINT PREHEARING STATEMENT at pages 17 - 18. Exhibit K is at CX 121 - 126.  
2 These affidavits and the testimony presented in them are untimely and inadmissible.  
3 Complainants are not obligated to move to strike the testimony of these individuals in a  
4 separate pleading; Respondents were obligated to move to admit their late-filed  
5 affidavits and reports in a separate pleading and to provide good cause for their  
6 admission by the Commission.

7 All but one short affidavit of Mr. Kevin Hogan were previously attached to  
8 pleadings filed with the Commission. By contrast, the information in the "January 2,  
9 2013 Affidavit of Bryan Hawkins Re: Respondents' Brief" at RX 1224 – 1230 and in the  
10 "January 2, 2013 Affidavit of Walt Wrede Re: Respondents' Brief" at RX 1231 – 1262  
11 and in the "Affidavit of H. Charles Sparks Regarding Respondents' Brief" dated January  
12 3, 2012 at RX 1263 – 1269 was not disclosed previously. Complainants are not  
13 obligated to move to strike the testimony of these individuals in a separate pleading;  
14 Respondents were obligated to move to admit their late-filed affidavits and reports in a  
15 separate pleading and to provide good cause for their admission by the Commission.

16 Complainants' concern with these late-filed allegations is grounded in  
17 fundamental due process considerations and "fundamental fairness" which derive from  
18 the Due Process Clauses of the United States Constitution. Complainants were  
19 obligated to and did make their case on December 4, 2012.

20 By contrast, Complainants' testimony is relevant, material, reliable and  
21 probative. Questions posed by Respondents at the depositions of Mr. Kevin Hogan and  
22 Ms. Jessica Yeoman were scattered and random which is not surprising given the  
23 scope and complexity of the fishing industry and the interplay of state and federal law,

1 regulations and statutes. After the depositions, Mr. Hogan and Ms. Yeoman sat down  
2 and developed organized discussions in their affidavits providing the answers to the  
3 scattered and random questions raised by Respondents at their respective depositions.  
4 Both individuals prepared and filed affidavits that describe and detail the nature and  
5 economics of the fishing industry, the financial picture of Complainants' business, the  
6 operation and capacity of Complainants' Plant, their competitive relationship with Icicle,  
7 and the regulatory environment, among other issues and concerns.<sup>12</sup> Their timely  
8 testimony is based on their first-hand experiences and comports with the written record.  
9 In the CPFOF, Complainants refer to the specific line and/or paragraph in an affidavit to  
10 support a contention. The testimony of Mr. Hogan and Ms. Yeoman is "relevant,  
11 material, reliable and probative" and thus properly received in evidence by the  
12 Commission. Commission Rule § 502.156.

13 **Parol Evidence Submitted By Respondents Is Not Probative And Not Admissible**

14 Respondents' case is built on the statements in the multiple recent affidavits of  
15 Mr. Walt Wrede, the City Manager of Homer; of Mr. Bryan Hawkins, the Homer  
16 Harbormaster; and the tardy and inadmissible statements of Mr. John Woodruff, with  
17 Icicle, that contradict clear written contemporaneous documents, statements and  
18 actions.

19 Alaska state law governs the interpretation of contracts and agreements.  
20 In Western Pioneer, Inc. v. Harbor Enterprises, Inc., 818 P.2d 654 (Alaska 1991), the  
21 Alaska Supreme Court held that the terms of the written contract govern the

---

<sup>12</sup> Complainants note and discuss below that Mr. Sparks does not state in his untimely reports that he even reviewed the affidavits prepared by Mr. Hogan and Ms. Yeoman.

1 interpretation of the contract and are binding on parties to the contract. The Supreme  
2 Court states in pertinent part:

3 The superior court found this evidence to be conflicting and  
4 proceeded to interpret the lease in light of the parol evidence rule as set  
5 forth in Lower Kuskokwim. The court ruled that the testimony of Lindsey  
6 and Woods supported Harbor Enterprises' contention that its obligation  
7 under Section 3.1 for City Dock fuel sales was conditioned on it  
8 constructing the Harbor-City Dock Pipeline, while Jensen's affidavit  
9 indicated that Section 3.1 was intended to include all City Dock fuel sales  
10 regardless of how the fuel reached the dock.

11 In our opinion, Lindsey's testimony reflects only a restatement of  
12 his position in this litigation to which little, if any, weight should be  
13 given. Extrinsic evidence of parties' subjective intent, expressed during  
14 the course of litigation, does not establish an issue of fact regarding the  
15 parties' reasonable expectations.

16 Id. at 657 (Citations omitted; emphasis added). Extrinsic evidence of Respondents' and  
17 Icicle Seafoods' subjective intent, expressed during the course of litigation, does not  
18 create an issue of fact regarding the parties' reasonable expectations. The Court found  
19 that a clear agreement is not and should not be amended, supplemented or repudiated  
20 by parol evidence expressed during the course of litigation. In a recent case, In re  
21 Estate of Fields, 219 P.3d 995, 1012 at n. 57 (Alaska 2009), the Alaska Supreme Court  
22 restates and reaffirms this rule:

23 The evidence they apparently wished to present was live, but  
24 duplicative, testimony about their alleged prior subjective understandings.  
25 We have noted in another context that self-serving litigation-related  
26 expressions of prior subjective intent or understanding are generally not  
27 considered probative of parties' reasonable expectations when they  
28 entered into a contract; the court must look to express manifestations of  
29 each party's understanding.

30 (Citation omitted; emphasis added). Respondents are flooding the record with untimely  
31 affidavits from undisclosed individuals that attempt to amend, supplement or repudiate  
32 prior written statements and agreements or actions.

1 By contrast, Complainants cite from affidavits prepared by the affiants in her or  
2 his words and, as noted by Respondents, Complainants do in fact cut and paste her or  
3 his testimony word for word into the legal briefs. However, Respondents make bald  
4 allegations and cite generally to snippets from depositions which, on closer  
5 examination, often are not the actual testimony of the deponent and are usually taken  
6 out of context. In addition, Respondents seek to introduce parol evidence in affidavits  
7 that contradicts prior statements and actions and contemporaneous and clear written  
8 documents. Respondents are submitting affidavits that appear not even to have been  
9 prepared by the affiant but rather by counsel and are all printed on counsel's pleading  
10 paper. Mr. Wrede in particular attempts to amend, supplement and/or repudiate his  
11 earlier statements and/or actions with ever changing testimony to respond to the most  
12 recent inconsistency raised in a pleading, document or affidavit by offering a new spin.

13 **The Material Facts Are Established**

14 In first reviewing and responding to the RPFOf, Complainants took a red pen  
15 and made an "X" next to each allegation asserted by Mr. Wrede that is not based on  
16 first-hand knowledge because he was not working with the City. Complainants then  
17 made an "X" next to each allegation involving an event or development that he did not  
18 attend or witness. In addition, "self-serving litigation-related expressions of prior  
19 subjective intent or understanding are generally not considered probative of parties'  
20 reasonable expectations when they entered into a contract." Most of Mr. Wrede's  
21 statements contradict his prior statements, contemporaneous written records and  
22 contemporaneous actions. In addition, as discussed above, he was listed as a possible  
23 witness but was never timely disclosed as an expert. CX 121 - 126. Any purported

1 expert testimony should be disregarded. Complainants made a decision not to depose  
2 him because additional testimony was not necessary or relevant.

3 In addition, Complainants took a red pen and made an "X" next to each allegation  
4 asserted by a Mr. John Woodruff who was never listed as a possible witness. CX 121 -  
5 126. His affidavits appear to be prepared by counsel for Respondents for his signature.  
6 Complainant note that much of Mr. Woodruff's testimony is not based on first-hand  
7 knowledge because he was not working with Icicle or in Homer at the time.  
8 Complainants then made an "X" next to each allegation involving an event or  
9 development that he did not attend or witness. In addition, "self-serving litigation-related  
10 expressions of prior subjective intent or understanding are generally not considered  
11 probative of parties' reasonable expectations when they entered into a contract."

12 Complainants took a red pen and made an "X" next to each allegation of Mr.  
13 Howard Sparks who was not timely disclosed as an expert. CX 121 - 126.

14 Complainants reviewed Respondents' Reply to Complainants' Proposed Findings  
15 of Fact and note that Respondents are "Unable to admit or deny" dozens of Complainants'  
16 Proposed Findings of Fact that are supported by Complainants. If the Commission  
17 finds that Complainants supported the proposed findings with admissible evidence, the  
18 findings should be admitted by the Commission.

19 Complainants are responding to each RPFOF and providing those responses  
20 with this Reply Brief. Respondents present dozens of purported facts for the first time  
21 that Complainants are challenged to admit or deny, yet most of the alleged facts are not  
22 relevant. At the end of the careful review, the facts presented by Complainants are  
23 grounded in the record. However, there are few admissible and/or relevant facts to

1 support Respondents' allegations and defenses.

2           The most salient fact is that Respondents and Icicle Seafoods are working  
3 together and going to extraordinary lengths and sparing no expense to protect and  
4 advance their conspiracy. Without any basis in statute or code and contrary to the  
5 Shipping Act of 1984 as amended, Respondents are demanding that this Court  
6 scrutinize Complainants' business and business plan but not scrutinize Icicle.  
7 Respondents discuss what they describe as the contributions of Icicle and disregard  
8 and even fail to mention or acknowledge the many contributions of Complainants.<sup>13</sup>  
9 Respondents do not inquire into the financial viability of Icicle Seafoods but demand that  
10 this Court examine the details of Complainants' financial viability. Respondents impose  
11 a double standard on Complainants which is further probative evidence of the ongoing  
12 unreasonable and unfair preference toward Icicle and unfounded and unjustified  
13 prejudice against Complainants.

14           Respondents and Icicle are conspiring to protect the favoritism shown Icicle.  
15 Respondents attack everything about Complainants' Plant in Homer. Respondents do  
16 not attack anything about Icicle's plant which is explained perforce because Icicle does  
17 not operate a plant in Homer.

18           Respondents and Complainants agree that the City has a hard time attracting  
19 processors to the City. Respondents and Complainants agree that Complainants were

---

<sup>13</sup> Complainants note that Respondents' Response to CPFOF 216 admits:

Exh. Z [CX 187] is a true and correct copy of an award given to The Auction Block Company in 2010 by the Mayor of the Kenai Peninsula Borough "In Recognition of Superior Performance and Dedication as OUTSTANDING COMMERCIAL FISH PROCESSOR." Homer is a city located in the Kenai Peninsula Borough.

1 the only entity even to respond to the City's request for proposal. Without Complainants  
2 Lease and the steady flow of rental payments from Complainants, the land would be  
3 sitting idle and unproductive. Respondents state at times in their argument and in  
4 RPFOF 76 that: "Although Homer's open market approach ensures that every  
5 commercial fisherman and fishing enterprise has an equal opportunity to prosper in the  
6 City, the City struggles to entice major seafood processing/buying companies to  
7 Homer." Complaints disagree with the contention that the City maintains an undefined  
8 open market approach. The City has a difficult time enticing any seafood  
9 processing/buying companies to Homer because of the disparity of treatment of any  
10 individual who or entity that seeks to do business on the docks in Homer. Complainants  
11 provide the explanation by noting that the City has systematically hampered any other  
12 possible entrant by protecting and favoring Icicle and creating insurmountable barriers  
13 to entry.

14 **Respondents Continue To Admit And Concede That Complainants' Facts And**  
15 **Contentions Are True In Substantive Admissions**<sup>14</sup>

16 Complaints filed and served five detailed and verified complaints that specified  
17 the factual and legal basis of their claims. The statutory violations in the complaints  
18 expanded and then contracted in response to the disclosures and discovery. The  
19 operative complaint, the verified Fourth Amended Complaint dated September 4, 2012,  
20 was not answered by Respondents until their filing of the Fourth Amended Answer  
21 dated November 29, 2012. See and compare CX 272 – 280 and CX 281 – 285. Even

---

<sup>14</sup> Complainants presented this issue at the outset of their opening Brief at page 2 because it is the threshold lynch pin concern that is fundamental and pivotal to the resolution of this matter. The argument is moved to this later place in the Reply Brief to allow for discussion of arguments advanced in Respondents' Brief.

1 that late Answer does not specifically deny Complainants' specifically detailed facts and  
2 contentions. CX 281 – 285. Respondents' willful refusal to comply with fundamental  
3 Commission Rules is exacerbated by their delay in presenting a defense until after  
4 discovery closed on October 9, 2012.

5 Respondents' absolute refusal to address let alone even acknowledge the  
6 applicable Commission Rules, one controlling case, and canons of construction are an  
7 admission that the law is settled and Complainants' contentions are well-taken.  
8 Respondents have proclaimed that there is nothing in either the rules of the  
9 Commission or the Federal Rules of Civil Procedure requiring that the City review each  
10 contention in Complainants' Complaint and deny the allegations. However, the two  
11 critical and applicable Commission Rules were cited by Respondents in the motions to  
12 amend and then blatantly disregarded by Respondents when they filed their unverified  
13 Answers and even disregarded in the recently-filed Fourth Amended Answer. CX 281 –  
14 285. In response to CPFOF 110 and 111, Respondents admit that they sought to  
15 include language requiring them to file an answer "pursuant to Commission Rules  
16 502.64 and 502.70" yet they do not explain why they did not file a conforming answer.

17 The only authority previously cited by Respondents involves the interpretation of  
18 one Federal Rule of Civil Procedure that is inapposite to the interpretation of the two  
19 specific Commission Rules actually cited by Respondents and determinative of the  
20 issue. Professors Wright and Miller provide some helpful and uncontested insight  
21 regarding Rule 8(b)(6) of the Federal Rules of Civil Procedure, but they do not comment  
22 on the interpretation of the three Commission Rules §§ 502.62(a) and 502.64(a) that are  
23 admitted by the Parties to be controlling. The Commission Rules are premised on a

1 dispute resolution process that requires each party to establish the facts in dispute and  
2 not in dispute at the outset of the matter. By contrast, the Federal Rules of Civil  
3 Procedure are written for a “notice pleading” system and process that only requires a  
4 party to put another party on general notice that there are facts to support some  
5 generally stated causes of action.

6 Complainants undertook to discern all the case law interpreting these  
7 Commission Rules and could only find one case, Capitol Transportation, Inc. v. Federal  
8 Maritime Commission, 612 F.2d 1312, 1318 (1<sup>st</sup> Cir. 1979). Complainants,  
9 Respondents and the Commission benefit because the insight is provided by a Circuit  
10 Court of Appeals. The case is applicable because Respondents did not even  
11 specifically deny in the Fourth Amended Answer the specific allegations in the Fourth  
12 Amended Complaint. Compare the Fourth Amended Complaint dated September 4,  
13 2012 at CX 272 – 280 with the Fourth Amended Answer dated November 29, 2012 at  
14 CX 281 – 285. Complainants noted and Respondents did not challenge the legal  
15 consequences of a clear Rule using the mandatory verb “shall” in the applicable Rule.

16 Respondents state in Response to CPFOF 127 that they are “Unable to admit or  
17 deny” the following proposed finding:

18 In paragraph 46 of the FOURTH AMENDED COMPLAINT, Complainants  
19 provide the following verified facts and contentions:

20 Respondents required The Auction Block Company to pay and The  
21 Auction Block Company paid the amount of \$98,488.05 in 2009,  
22 \$84,900.65 in 2010, \$74,452.65 in 2011 and an undetermined sum in  
23 2012 for total damages of at least \$257,841.35.

24  
25 Docket 20. Respondents state in pertinent part in their RESPONSE TO  
26 COMPLAINANTS’ STATEMENT OF UNDISPUTED MATERIAL FACTS:

1 Complainants' have not sufficiently supported this statement by identifying  
2 a supporting document, as required by the Commission's Initial Order.  
3 The City cannot identify any document proving or disproving this  
4 statement, and believes that none exists.

5 Complainants state and refer to the billings of the Respondents, not to a  
6 third party. Respondents are always identified as the "City of Homer and  
7 the Port of Homer" by Complainants.

8 Thus, this factual statement regarding damages averred by Complainants remains  
9 unchallenged by Respondents. Respondents state in Response to CPFOF 128 that  
10 they admit the following proposed finding: "Respondents' billings can be confirmed or  
11 denied by Respondents" but they did not confirm or deny the billings set forth in the  
12 verified Complaints. At this time, these damage requests are supported by  
13 Complainants and not denied by Respondents, although Respondents admit they have  
14 the information to confirm or deny them.

15 Complainants detail the irreversible prejudice resulting from what can reasonably  
16 be described as the blatant and persistent disregard of the Commission Rules by  
17 Respondents. Discovery decisions were and are made based on the status and  
18 posture of a case at the time. The admissions made by Respondents in their Answers  
19 are no different than admissions made in response to requests for admission. Once a  
20 fact is admitted, a party does not need to seek a second and duplicative admission of  
21 the same fact. The obligation rests with the party who has made the admissions to  
22 move in a timely manner for relief from and to provide good cause to be relieved from  
23 the admissions.

24 Commission Rule § 502.207(b) addressing "Requests for admission" is  
25 instructive and states in pertinent part:

1 (b) *Effect of admission.* Any matter admitted under this rule is  
2 conclusively established unless the presiding officer **on motion** permits  
3 withdrawal or amendment when the presentation of the merits of the  
4 action will be subserved thereby and the party who obtained the  
5 admission fails to satisfy the presiding officer that withdrawal or  
6 amendment will be prejudicial in maintaining the party's action or defense  
7 on the merits. . . . .

8 (Emphasis added.) Respondents have done nothing except to proclaim that they are  
9 above the Commission Rules and exempt from the Court's deadlines. The Commission  
10 should note that there is no motion in the record providing good cause and seeking  
11 leave to withdraw these admissions of fact. The Commission should find and hold that  
12 Respondents admitted CPFOF numbered 1 – 109 as a matter of law.

13 **Complainants Reasonably Rely On Respondents' Admissions Of Truth**

14 Complainants reasonably relied on Respondents' admissions. If Complainants  
15 had filed a cursory complaint, there would not be any specific facts and allegations  
16 requiring a response from Respondents. In this case, however, consistent with  
17 Commission Rules, Complainants carefully tailored and detailed the facts and  
18 contentions in their Complaints as required in the Commission Rules. Complainants  
19 relied on Respondents' admissions and used their limited time and resources to focus  
20 on disputed matters.

21 **Respondents Independently Admit And Concede That Complainants'**  
22 **Fundamental Contentions Are True**

23 Complainants reasonably relied on Mr. Wrede's public admissions in the KBBI  
24 radio interview that confirmed the basic facts in the initial Complaint. With no reason to  
25 question his many statements that reaffirmed Respondents' admissions in their five  
26 Answers, Complainants focused on disputed matters.

1 **Respondents' Former Chair And Committee Member Shelly Erickson Describes**  
2 **Respondents' Improper Treatment Of Lease Applicants and A Former Major**  
3 **Tenant Of Respondents Describes Respondents' Improper Treatment Of Lessees**

4 The only independent third-party evidence of the City's treatment of lessees and  
5 possible lessees is the testimony of Ms. Shelly Erickson at CX 138 - 139 and the  
6 testimony of Mr. Don McGee at CX 140 - 142. Complainants timely disclosed the name  
7 of both witnesses. CX 111 and 112. Ms. Erickson's inside and long-term perspective  
8 serving with the City is compelling and convincing. Mr. McGee's testimony from a major  
9 past tenant provides a long-term perspective on the continuing problem. Both  
10 individuals independently explain and confirm why Mr. Wrede's statement that the City  
11 has a hard time attracting processors is attributable to the City's disparate treatment of  
12 lessees and prospective lessees. These statements confirm the experience and  
13 testimony of Mr. Hogan and Ms. Yeoman.

14 **The Statute Of Limitations Does Not Bar The Claim For Reparations**

15 In Complainants' Brief, they develop the contentions that Complainants'  
16 damages arising from each of the three statutory violations are on-going. As noted  
17 above, Respondents admitted that the damages are on-going by operation of law.  
18 Respondents have stated that the damages began when the Complainants' Lease was  
19 signed, yet given the nature of the damages that arise with each billing from  
20 Respondents, Respondents have not offered a scintilla of evidence to suggest that the  
21 damages have ceased with each unfounded billing from Respondents.

22 In CPFOF Number 98, Complainants aver: "46 U.S.C. § 41305(b) that provides  
23 as a basic amount, if the complaint was filed within the period specified in 46 U.S.C.  
24 § [41301\(a\)](#), that the Federal Maritime Commission shall direct the payment of

1 reparations to the complainant for actual injury caused by a violation of this part, plus  
2 reasonable attorney fees.” Respondents reply that they are “Unable to admit or deny”  
3 this verified contention. In the absence of any information to the contrary, the  
4 contention supported by Complainants should be accepted by the Commission.

5 **Complainants/Respondents Lease Was Recorded On February 19, 2009 But Did**  
6 **Not Trigger The Running Of The Statute Of Limitations**

7 Mr. Hogan testified that the Complainants’ Lease was a temporary lease  
8 executed to allow the business to continue. Contrary to Respondents’ unfounded  
9 statements, Complainants had been undertaking business at or near that location in  
10 facilities that were expanding and growing each year. Mr. Hogan could not move the  
11 business off the Homer Spit. Complainants have met the elements of the test for  
12 duress set forth in Totem Marine Tug & Barge, Inc. v. Alyeska Pipeline Service Co., 584  
13 P.2d 15 (Alaska 1978), and Zeilinger v. Sohio Alaska Petroleum Co., 823 P.2d 653, 675  
14 (Alaska 1992). Respondents are not in a position to deny that Complainants were  
15 experiencing duress because Respondents were not and are not concerned about or  
16 even aware of Complainants’ business. Mr. Hogan did not file suit at the time because  
17 he believed, perhaps naively, that the incentives could still be negotiated with  
18 Respondents.

19 **The Statute Of Limitations Is Equitably Tolloed During Mr. Hogan’s Service To The**  
20 **Citizens And The City Of Homer**

21 Mr. Hogan sets forth the mix of ethical, moral and fiduciary duties that burdened  
22 him in 2008 until he resigned from the Homer City Council in March of 2012.  
23 Respondents may disagree with the decisions made by Mr. Hogan, however, his  
24 decisions are reasonable under the circumstances and provide a basis for the equitable

1 tolling of the statute. Respondents should be estopped from raising the statute of  
2 limitations defense. Wassink v. Hawkins, 763 P.2d 971, 975 (Alaska 1988).

3 Counsel for the City and Mr. Wrede made repeated representations to Mr. Hogan  
4 that the favorable treatment of Icicle is set forth in a written “2004 Icicle Lease” and is  
5 warranted by the Shipping Act of 1984 as amended. In Response to CPFOF 161,  
6 Respondents stated that they are “Unable to admit or deny” the statement in Mr.  
7 Hogan’s affidavit as follows:

8 Until I searched the state of Alaska’s records exhaustively, I thought and  
9 was told that the City and Icicle were operating pursuant to a lease.

10  
11 In Response to CPFOF 195, however, Respondents denied the following  
12 statement:

13 For years as a private citizen and then as a Council Member of the Homer  
14 City Council, City Manager Mr. Wrede and City Attorney Mr. Tom Klinkner  
15 assured me, wrongly I recently learned, that there is a valid lease between  
16 the City and Icicle.

17  
18 City’s Reply: Denied. RX 44-45; RX 728; RX 1080.

19 In Response to CPFOF 325, Respondents stated that they are “Unable to admit or  
20 deny” as follows:

21 **REQUEST FOR ADMISSION NO. 4**: Admit that you were aware of the  
22 terms of the Icicle Lease on or before March 26, 2008.

23  
24 **RESPONSE**: Deny. Neither Auction Block Company nor Harbor Leasing  
25 was aware of the terms of the Icicle Lease on March 26, 2008 or at this  
26 time. The LEASE AGREEMENT dated September 14, 1979 recorded at  
27 Book 111, Pages 884 through 902A in the Homer Recording District states  
28 at page 2 that the term is “twenty-five (25) years commencing on the  
29 14th day of September, 1979, and ending at 12:00 o’clock midnight  
30 on the 14th day of September, 2004.” No written lease is available in  
31 the public record to evince an extension of the term of the lease. Neither  
32 Auction Block nor Harbor Leasing is fully aware of the legal relationship

1 between the City and Icicle after September 14, 2004 and/or at the  
2 present time. However, the City and Icicle seem to be observing some of  
3 the other terms and conditions of the LEASE AGREEMENT and  
4 amendments in their business dealings with each other despite the City's  
5 stated desire and intent to require Icicle Seafoods to adhere to the terms  
6 of the Tariffs. HOMER 514 – 515, 530 – 531 and 532 - 533.  
7 Complainants incorporate the Answers to Interrogatory Nos. 4 and 11.  
8

9 Mr. Hogan incorporated this response as his personal response. Mr. Wrede and Mr.  
10 Klinkner made repeated inaccurate and misleading representations that contributed to  
11 Mr. Hogan's reasonable delay in filing the complaint. The statute should be tolled.

12 **The Clear Language In Commission Rule 46 CFR § 502.63(b) Is Controlling**

13 The clear language of Commission Rule § 502.63(b) is controlling. Title 46  
14 U.S.C. § 41301(a) ("Complaints") states the applicable Commission Rule:

15 In General. — A person may file with the Federal Maritime Commission a  
16 sworn complaint alleging a violation of this part, except section  
17 41307(b)(1). If the complaint is filed within 3 years after the claim accrues,  
18 the complainant may seek reparations for an injury to the complainant  
19 caused by the violation.

20 Federal Maritime Commission Rule § 502.63(b) ("Statute of limitations for  
21 reparations") states:

22 (b) The Commission will consider as in substantial compliance with a  
23 statute of limitations a complaint in which complainant alleges that the  
24 matters complained of, if continued in the future, will constitute violations  
25 of the shipping acts in the particulars and to the extent indicated and in  
26 which complainant prays for reparation accordingly for injuries which may  
27 be sustained as a result of such violations.

28 (Emphasis added). The decision in Maher Terminals, LLC v. Port Authority of New York  
29 and New Jersey, FMC No. 08-03 (ALJ May 16, 2011) does not mention the Rule at any  
30 time in the text or in the footnotes of the decision. The decision in International  
31 Shipping Agency, Inc. v. The Puerto Rico Ports Authority, 30 SRR 407, 425 (2004) is

1 cogent, trenchant and on point. Complainants' averments that the damages are on-  
2 going are supported by the disclosures and discovery. Any delay in filing a complaint  
3 serves to insulate a respondent from damages arising more than three years before the  
4 complaint is filed.

5 **Respondents And Icicle Do Not Have A Legally Binding Lease Or Contract**

6 All nine Justices of the Court located eight blocks to the south of the Federal  
7 Maritime Commission at One First Street could find and hold that the lease between  
8 Respondents and Icicle expired according to its terms on September 14, 2004, but  
9 Respondents would continue to insist to the contrary. In response to many of CPFOF,  
10 Respondents merely cite to CX 192 - 216, the original Icicle Lease and two  
11 Amendments. For the first time in response to CPFOF 405, Respondents are "Unable  
12 to admit or deny" that: "These three leases described above are the only lease  
13 documents of record." In response to CPFOF 409, Respondents admit the letter dated  
14 March 25, 2004 that includes the proposal: "The City is very interested in negotiating a  
15 new lease with Icicle that is more appropriate for the present situation."

16 Icicle indicated an interest in exercising the option, but the letter alone does not  
17 effect an exercise of the option unless the conditions and terms necessary to exercise  
18 the option are first satisfied. The conditions and terms necessary to exercise the option  
19 were not satisfied. CX 56 – 63. The letter at CX 61 dated September 13, 2004 from  
20 Icicle to Respondents states "counter-proposal" on it. The letter at CX 62 dated  
21 September 22, 2004 from Respondents to Icicle describes the letter dated September  
22 13, 2004 as a "proposal." There is no signed and recorded lease after this date in the  
23 record. Respondents recognize and acknowledge this truth in an exchange of e-mails

1 between Mr. Wrede and others in the Homer administration in 2006.<sup>15</sup> CX 107 – 108.

2 Respondents' contention that the purported "Expired Icicle Lease" cannot be  
3 challenged by Complainants is baseless. The purported lease is interposed to excuse  
4 the favoritism shown Icicle Seafoods and the prejudice shown Complainants.  
5 Complainants can challenge the lack of a valid lease before the Commission because  
6 the existence of the lease is the rationalization for the favorable treatment of Icicle and  
7 the disparate treatment of Complainants. In addition, the only source of and  
8 rationalization for the incentives is set forth in the provisions of the expired Icicle lease.

9 Despite repeated misrepresentations by Respondents, the lease between  
10 Respondents and Icicle Seafoods expired on September 14, 2004 and no subsequent  
11 lease was executed and, more critically, recorded with the State. The Homer City Code  
12 18.08.070.d states: "All leases or memorandums of leases shall be recorded."  
13 (Emphasis added). ([http://www.cityofhomer-ak.gov/cityclerk/chapter-1808-city-property-](http://www.cityofhomer-ak.gov/cityclerk/chapter-1808-city-property-leases)  
14 [leases](http://www.cityofhomer-ak.gov/cityclerk/chapter-1808-city-property-leases)). The Code uses the mandatory verb "shall" and clearly requires recordation.  
15 Respondents do not dispute that they failed to fulfill this mandatory obligation that is  
16 designed to prevent the type of vague and "self-serving litigation-related expressions"  
17 proposed by Respondents and Icicle.

18 Respondents do not challenge or even mention the discussion of the legal  
19 requirements for the City to enter into a binding lease. Respondents' failure to  
20 challenge the legal discussion is an admission that the legal discussion is well-taken.

21 No recorded lease exists in the public record between Respondents and Icicle  
22 Seafoods. Respondents and Icicle describe their illegal conspiracy to favor Icicle as a

---

<sup>15</sup> Mr. Wrede states that the City "simply dropped the ball", "fell into a black hole" and is now operating "in the twilight zone." CX 107.

1 “lease” in a futile and unfounded effort to provide a legal patina for their conspiracy.  
2 The Commission should substitute the word “conspiracy” for the word “lease” in  
3 Respondents’ briefs and affidavits which would manifest the favoritism shown by the  
4 City toward Icicle. Statements in affidavits from Mr. Wrede and also from Mr. Woodruff  
5 with Icicle that they are acting as if there is a “lease” support Complainants’ contention  
6 that the City is conspiring with Icicle to favor Icicle and to disfavor Complainants without  
7 any legal basis. Mr. Wrede still refers to the “Expired Icicle Lease” as the “Icicle Lease”  
8 and pretends that it exists all the while precluding access to a document that does not  
9 exist. Complainants previously noted in a prior pleading that the Homer Deputy City  
10 Clerk sent the following Memorandum to the members of the Homer Port and Harbor  
11 Advisory Commission on November 7, 2012 and posted it on the City of Homer’s  
12 website as follows:

## 13 ***MEMORANDUM***

14 TO: Chair Ulmer and the Port and Harbor Advisory Commission  
15  
16 FROM: Melissa Jacobsen, CMC, Deputy City Clerk  
17  
18 DATE: November 9, 2012  
19  
20 SUBJECT: Informational Discussion regarding the Icicle Seafood’s Lease with  
21 the City of Homer  
22

23 Commissioner Carroll requested that the Icicle Seafood’s lease be included on  
24 the Commission meeting agenda for discussion.  
25

26 As the Commission may already know, a complaint was filed with the Federal  
27 Maritime Commission regarding Icicle Seafood’s lease with the City of Homer.  
28 Because of the sensitivity of this matter and the potential of unintentionally  
29 crossing a line of Attorney Client Privilege, City Manager Wrede agreed that a

1 Commission meeting is not an appropriate venue for discussing the lease at this  
2 time.

3  
4 All City of Homer leases are public information and anyone is able to view the  
5 information. Should Commissioner Carroll, or any other Commissioner, want to  
6 view the lease for general information purposes, they may do so by completing  
7 the request for public records form available on line or at the City Clerk's office.  
8 Once the request is completed arrangements can be made with staff to view the  
9 lease and ask questions.

10  
11 Exh. AA / CX 188. The only valid leases in this case are discussed in the JOINT  
12 PREHEARING STATEMENT at page 7 at paragraphs 9, 10, 11 and at page 8 at  
13 paragraphs 25 - 26 and are each recorded in the "Homer Recording District"<sup>16</sup> and  
14 available on line. CX 192 – 207, CX 208 – 212 and CX 213 - 216. There is no legal  
15 basis for the favorable and exclusive treatment of Icicle.

16 In Response to CPFOF 180, Respondents denied the following assertion:

17 Icicle had a presence in Homer prior the building of its plant and new base  
18 lease in 1979. Icicle assumed a lease that predated the founding of the  
19 City from Eugene Browning, d/b/a Alaska Seafoods. The contention that  
20 Icicle was entitle[d] to incentives to meet a need for production is a fallacy.  
21 The Icicle operation was a profitable facility at the time. Whitney Fidalgo  
22 also operated a plant at the harbor until it was bought out by the City for  
23 Harbor expansion in the 1980's, a potential windfall for Icicle. Other  
24 operators such as C Shop, Barbs Seafoods and Bessie M Seafoods were  
25 also in business at the time. The assertion that incentives were necessary  
26 to entice Icicle to build a facility is unfounded. Icicle built its facility without  
27 incentives which came into place seven years later with the first  
28 amendment to the lease.

29 Respondents again cite to the entire affidavits of Mr. Wrede and Mr. Hawkins without  
30 providing any specific reference or response. The incentives were not needed to induce

---

<sup>16</sup> Complainants note that Complainants' Lease is recorded at "2009-000543-0" in the Homer Recording District. Exh. 10 / CX 217. Documents in the State of Alaska are no longer recorded in a book and at a page but rather are recorded by year with a serial number. Respondents and Icicle do not have a valid lease.

1 Icicle to build a plant because an Icicle plant was already built. Gratuitously giving the  
2 incentives at this time provides no incentive for Icicle to rebuild a plant and removes any  
3 incentive to rebuild a plant.

4 **Respondents Compelled Complainants To Enter Into A Short-Term Lease Under**  
5 **Duress And Protest That Was Recorded On February 19, 2009**

6 Mr. Hogan testified that he was compelled to enter into a short-term lease to  
7 maintain his business on the Homer Spit. His concerns are well-founded and  
8 established.

9 **The Terms And Conditions In The Tariffs Bind Respondents, Complainants And**  
10 **Icicle Seafoods**

11 The terms in the Tariffs bind Complainants and Icicle. Respondents admit the  
12 following four CPFOF as follows:

13 365. "Terminal Tariff No. 600 Filed under ATFI Rules" effective January  
14 1, 2009 addressing "General Application Of Tariff" at Subsection 105(a) at  
15 page 11 states:

16  
17 Rates, charges, rules and regulations provided in this Tariff  
18 will apply to persons and vessels using certain terminal  
19 facilities under jurisdictional control of the City of Homer and  
20 located within the harbor bounded by the City of Homer with  
21 the Small Boat Harbor entrance located at latitude 59 36' 15"  
22 N and longitude 151 24' 48" W and specifically to docks,  
23 appurtenant structures thereto, and waterways under the  
24 management of the City of Homer. Special terms and  
25 conditions exist for the dock operations by the State of  
26 Alaska, Alaska Marine Highway System, for operations of  
27 the State Ferry System on the Pioneer Dock and for the  
28 dock operations by a contractor engaged in chip storage and  
29 loading operations on or in the vicinity of Deep Water Dock.

30  
31 [CX 71, 81, 91 and 101] (Emphasis added).

32  
33 366. Respondents' three (3) "Terminal Tariff No. 600 Filed under ATFI  
34 Rules" effective January 1, 2011 and April 25, 2011 and July 25, 2011  
35 addressing "General Application Of Tariff" at Subsection 105(a) at page 11

1 state the same general application of the Tariffs including to the Fish  
2 Dock. [CX 71, 81, 91 and 101]

3  
4 367. The Tariffs acknowledge and provide for the special terms and  
5 conditions for a specifically named State entity (“State of Alaska, Alaska  
6 Marine Highway System”) and for the private sector contractor  
7 (“contractor”) engaged in business. [CX 71, 81, 91 and 101]

8  
9 368. The Tariffs do not provide for any special terms and conditions for  
10 Icicle Seafoods or even generally refer to an entity such as Icicle  
11 Seafoods.

12  
13 Respondents admit that the Tariffs apply to Icicle and that Icicle is not subject to any  
14 special terms and conditions.

15 Complainants seek the incentives offered by the City to the entity that builds and  
16 operates a shore-based fish processing plant in Homer. Mr. Wrede states that he did  
17 not think that the Complainants’ project would succeed. That is the very reason the  
18 incentives were necessary from the outset. Mr. Wrede will not admit that he wanted Mr.  
19 Hogan to fail. Mr. Wrede’s statement that Icicle may build a shore-based fish  
20 processing plant in the future and thus deserves to continue gratuitously receiving the  
21 incentives is groundless. If Icicle is entitled to the incentives because it might build a  
22 plant, then a fortiori Complainants are entitled to the incentives because they have  
23 expanded, built and operate the Plant in Homer and create jobs and provide tax  
24 revenue. At this time, however, Icicle has no incentive to rebuild a shore-based plant  
25 because it is receiving the incentives gratuitously.

26 **The “General Port and Harbor Provisions” Of The Homer Code Do Not Provide An**  
27 **Exception For Icicle**

28 Respondents contend that there is other authority allowing the City to favor Icicle  
29 and disfavor Complainants. Complainants discuss that purported authority in their Brief.  
30 As discussed in the Brief, there is no evidence that the City was properly exercising this

1 general provision that is not included in and is contradicted by specific provisions in the  
2 Tariffs.

3 **Supporting Legal Discussion**

4 Federal Maritime Commission decisions make a fundamental and almost  
5 paradigmatic distinction between matters involving “navigation” which are less central  
6 and matters involving “terminal services” which are central and fundamental and the  
7 core concern of the Commission. The cases involving navigational issues include those  
8 asserted by surveyors and others do not undermine Complainants’ fundamental  
9 argument. In response to CPFOF 323, Respondents admitted the following factual  
10 contention:

11 The Auction Block is involved on a daily basis in the business of using and  
12 paying for the essential terminal services and facilities of the  
13 Respondents.

14 Congress charges the Commission with maintaining a competitive market for essential  
15 terminal services operated by a marine terminal operator. Complainants incorporate the  
16 legal discussion in their Brief.

17 **Complainants Are A "Person" And A Common Law “Common Carrier” And Are  
18 Able To Bring And Maintain This Action**

19  
20  
21 In Capitol Transportation, 612 F.2d at 1317 - 18, the Circuit Court states the  
22 seminal test for a common carrier:

23 It is not disputed that, in general, a common carrier under the  
24 Shipping Act is, as the government maintains, one who expressly or by  
25 course of conduct holds itself out to accept goods for transport by water  
26 from whomever offered. . . . It is not necessary, moreover, in order to be  
27 such a carrier by water, that one either own or control the means of  
28 transportation. . . . As the United States and the Commission state in their  
29 joint brief,  
30

1 “A person or business association may be classified as a  
2 non-vessel operating common carrier by water if he holds  
3 himself out to provide transportation by water, contracts and  
4 arranges that the goods will be carried and delivered,  
5 assumes responsibility or has liability imposed by law for the  
6 safe transportation of the shipments, and arranges in his  
7 own name with underlying water carriers for the performance  
8 of such transportation, whether or not owning and controlling  
9 the means by which such transportation is effected. In other  
10 words, a company’s status as a common carrier depends on  
11 the nature of its undertaking with the public which it serves  
12 rather than on the nature of the arrangements which it may  
13 make for the performance of its undertaken duty.”  
14

15 (Emphasis added; citations omitted). The factual record developed above clearly  
16 evinces that Complainants, like Capitol, are common law common carriers. In response  
17 to CPFOF 312 – 323, Respondents state:<sup>17</sup>

18 Complainants’ Finding: 312

19  
20 **REQUEST FOR ADMISSION NO. 1:** Admit that Auction Block is not a  
21 “common carrier,” as the term is defined in 46 U.S.C. § 40102(6).

22 **RESPONSE:** Deny. This request calls for a legal conclusion. The  
23 Auction Block Company is not registered as a “common carrier” with the  
24 Federal Maritime Commission.  
25

26 City’s Reply: Unable to admit or deny.

27 Complainants’ Finding: 313

28 According to a Federal Maritime Commission decision, “the term ‘common  
29 carrier’ as used in the 1916 Act and as better defined in the 1984 Act has  
30 been interpreted in many cases to mean the common carrier as that term  
31 was understood in the common law.” The Auction Block Company  
32 performs many of the activities of a “common carrier” as that term was  
33 understood in the common law.  
34

35 City’s Reply: Denied. CX 0026; RX 40; RX 611-612; RX 680-1; RX 680-2.

---

<sup>17</sup> These responses were the subject of part of Respondents’ motion for sanctions. Two salient facts are clear: Complainants answered each of Respondents’ requests for admission clearly and completely; Respondents had an opportunity to challenge Complainants’ responses and contentions.



1           City's Reply: Denied. RX 611-612.

2           Complainants' Finding: 319

3           The Auction Block has paid the tariff for the transportation of cargo by  
4           water from the United States to the port of a foreign country and engages  
5           the services of ships with Tote, Lynden, Maersk, Sealand, CSX and APL  
6           to Europe, Japan and Canada. To the best of The Auction Block's  
7           knowledge, these entities are registered as "common carriers" with the  
8           Federal Maritime Commission.

9  
10          City's Reply: Denied. RX 611-612.

11          Complainants' Finding: 320

12          The Auction Block does not advertise the transportation of either cargo or  
13          passengers by water, but the transportation of cargo is structured into the  
14          business operations despite not being separately noted in representations  
15          to the public.

16  
17          City's Reply: Admitted.

18          Complainants' Finding: 321

19          One of the owners of The Auction Block owns and operates a United  
20          States Coast Guard documented vessel official number 279036. One of  
21          the owners of The Auction Block also owns and operates an Alaska  
22          registered vessel number AK 4886AL.

23  
24          City's Reply: Unable to admit or deny.

25          Complainants' Finding: 322

26          The Auction Block issues and receives Bills of Lading for shippers and  
27          consignees. The Auction Block has prepared and filed National Marine  
28          Fisheries Service shipping reports in the past. The Auction Block now  
29          prepares and files Product Transfer Reports ("PTRs") with the National  
30          Marine Fisheries Service.

31  
32          City's Reply: Admitted.

33          Complainants' Finding: 323

34          The Auction Block is involved on a daily basis in the business of using and  
35          paying for the essential terminal services and facilities of the  
36          Respondents.

37

1           City's Reply: Admitted.

2 Respondents' primary support for their denials is a general citation to two pages of the  
3 deposition of Ms. Yeoman at RX 611 – 612 that do not involve the subject matter of the  
4 proposed findings of fact. The testimony regarding the ownership of vessels, if untrue  
5 or exaggerated, could have been challenged by Respondents by further review of Coast  
6 Guard records.

7           In response to CPFOF 230 – 233, Respondents state:

8           Complainants' Finding: 230

9

10           Complainants have provided discovery responses and testimony showing  
11 that we hold our business out to the public to provide transportation of the  
12 fish and seafood product by water, by truck or by air depending on the  
13 needs of the ultimate consumer who are at times members of the public or  
14 commercial consumers of the product.

15           City's Reply: Denied. CX 00127-00128; RX 1079-1104.

16           Complainants' Finding: 231

17           Complainants assume legal responsibility for the transportation from the  
18 port or point of receipt [receipt] of the product to the port or point of  
19 destination.

20           City's Reply: Denied. CX 0026-28; RX 40; RX 611-612.

21           Complainants' Finding: 232

22           Complainants use vessels operating on the high seas including vessels  
23 we own, vessels we charter and vessels that fish and operate at our  
24 direction.

1           City's Reply: Denied. CX 0026-28; RX 40; RX 611-612.

2           Complainants' Finding: 233

3           Complainants can and do purchase or broker any and all legally caught  
4           fish and/or seafood products and deliver it by any means on the water,  
5           over the ground, or in the air depending on the needs of the ultimate  
6           consumer to any country on the planet.

7           City's Reply: Denied. RX 611-612.

8           Respondents' primary support for their denials is a general citation to two pages of the  
9           deposition of Ms. Yeoman at RX 611 – 612 and one page from the deposition of Mr.  
10          Hogan that do not involve the proposed findings of fact. CX 0026-28 is a reference to  
11          the three pages that provide these assertions in Complainants' Initial Disclosures.

12           Complainants before the Commission include both The Auction Block Company  
13          and Harbor Leasing, LLC. In CPFOF 340, Complainants assert:

14           Mr. Hogan organized Harbor Leasing, LLC on January 29, 2001 to  
15           negotiate a lease with the City on behalf of The Auction Block Company.  
16           Because of genuine concerns that the City may bring legal action against  
17           The Auction Block, Harbor Leasing, LLC was created to insulate The  
18           Auction Block from a direct lawsuit by the City.

19  
20           City's Reply: Denied. RX 256-261; RX 1090-1091.

21          Respondents refer to the timeline they created and to statements in an affidavit of Mr.  
22          Wrede. Respondents' Reply that they are "Unable to admit or deny" CPFOF 324 as  
23          follows:

24           **REQUEST FOR ADMISSION NO. 6:** Admit that Auction Block was not  
25           named as a party to the Lease.

26  
27           **RESPONSE:** Deny. This request calls for a legal conclusion. Harbor  
28           Leasing is a related entity that entered into the Lease with the City with the  
29           understanding that Harbor Leasing would lease to the Auction Block. The

1 City was aware of and accepted and ratified this arrangement. Paragraph  
2 8.04 of the Lease describes “Additional Rent For Sublease” and states in  
3 pertinent part: “Landlord expressly permits the Auction Block Company, a  
4 closely held company, to sublease the building and improvements without  
5 any additional rent requirement to Tenant.” HOMER 777. Exhibit B to the  
6 Lease includes “CONFORMED COPY OF RESOLUTION AUTHORIZING  
7 LEASE AND AUTHORIZING SIGNERS TO SIGN LEASE AGREEMENT  
8 ON BEHALF OF TENANT and includes the Harbor Leasing, LCC  
9 Resolution and The Auction Block Company Corporate Resolution.  
10 HOMER 797 – 799. Harbor Leasing, LLC is a first-party beneficiary and  
11 The Auction Block is an express intended third-party beneficiary of the  
12 Lease. Respondents admit that “Complainant leases property from the  
13 City in the City Harbor.” See Paragraph IV at line 19 of the Fourth  
14 Amended Answer. Harbor Leasing incorporates the Answer to  
15 Interrogatory No. 11.  
16

17 HOMER 777 and HOMER 797 – 799 noted above are at Exh. 10 at page  
18 15 and pages 35 – 37 / CX 231 and CX 251 - 253.

19 The Auction Block Company is a party to the Complainants’ Lease. CX 218 refers to  
20 “Exhibit B” at CX 251 - 253. Both entities are able to bring and maintain this action  
21 before the Commission.

22 **Respondents Are A "Marine Terminal Operator" And A "Person"**

23 Respondents state that the City is not registered as a marine terminal operator  
24 for purposes of activities on the Fish Dock. Resort to the record and to Respondents’  
25 specific responses to CPFOF is dispositive. As discussed in exhaustive detail in  
26 Complainants’ Brief, the Tariffs apply to all the docks described and specifically defined  
27 in the Tariffs. No docks are exempt despite the demands in affidavits filed by  
28 Respondents that seek to modify, amend and repudiate the clear written terms and  
29 provisions. Complainants note that the definitions in the Tariffs are controlling.  
30 Respondents admit CPFOF numbers 386, 387, 388 and 389 that state the following  
31 definitions and the scope of the Tariffs. The Tariffs define “(p) TERMINAL FACILITIES”  
32 at Exhs. D, E, F and G at page 10 as:

1 Terminal Facilities include the two (2) City Docks which are the Deep  
2 Water Dock and the Pioneer (Ferry) Dock **the Fish Dock** within the Small  
3 Boat Harbor and associated equipment, offices, warehouses. Storage  
4 space, roads, paved areas, water banks, beaches and shoreline under the  
5 management and control of the City of Homer.  
6

7 (Emphasis added). “(c) CITY DOCKS” are defined at page 8 as:

8  
9 The city docks of the City of Homer include all docks, floats, stalls,  
10 wharves, ramps, piers, bulkheads, and sea walls owned or operated by  
11 the City of Homer including the Deep Water Dock, the Wood and Steel  
12 tidal grids, the Main (Ferry) Dock, **Fish Dock**, and beaches within the  
13 boundaries of the City of Homer.  
14

15 (Emphasis added). The “(g) HOMER HARBOR” and “(o) SMALL BOAT HARBOR” are  
16 also defined.<sup>18</sup>

17 Mr. Hogan avers that at the time of the discussions with Mr. Wrede that Mr.

18 Wrede insisted that the Tariffs applied to the Fish Dock. Mr. Hogan states:

19 Mr. Wrede always represented and insisted that the Tariffs applied to the  
20 Fish Dock and refused to allow Complainants to receive the incentives  
21 bestowed gratuitously on Icicle that also used the Fish Dock. If Mr. Wrede  
22 is now saying under oath that the Tariffs do not apply to the Fish Dock, he  
23 is admitting that he refused to negotiate or deal in good faith and honestly.  
24

25 CX 271 at paragraph 15. Mr. Wrede’s subsequent demands that he would like the  
26 Tariffs not to apply to the Fish Dock are hollow and contradicted by his statements at  
27 the time reflected the terms in the written Complainants’ Lease.

28 Respondents seek to amend the Tariffs via affidavits filed in this proceeding. A  
29 formal amendment process is available and mandatory. If and when Respondents

---

<sup>18</sup> As discussed previously and admitted by Respondents, the Tariffs expressly exclude two entities (“State of Alaska, Alaska Marine Highway System” and a “contractor” no longer working in Homer) but do not reference any specific or general Icicle agreement or even make a specific or general reference to Icicle. These two express written exceptions in the Tariffs further reveal and evince that Respondents could and did exempt a specific entity by specific reference but did not exempt Icicle Seafoods.

1 amend the Tariffs, the amended Tariffs must be filed with the Federal Maritime  
2 Commission. Three amended Tariffs have been filed since 2009. Exhs. E, F and G /  
3 CX 74 – 83, 84 – 93 and 94 - 103. The clear written terms and definitions are binding  
4 until formally amended and adopted by the Homer City Council and filed with the  
5 Commission. Respondents responded to CPFOF numbered below as follows:

6 Complainants' Finding: 225. According to the Homer City Code,  
7 Tariff amendments are enacted by the City Council only after conducting a  
8 public hearing.

9 City's Reply: Admitted.

10 Complainants' Finding: 226. Prior to assuming a seat on the City  
11 Council, I raised the issue with the administration that Tariff amendments  
12 were being instituted without a public hearing.

13 City's Reply: Admitted.

14 Complainants' Finding: 227. In response, the City began scheduling  
15 Tariff authorization matters concurrent with the budget and scheduling a  
16 public hearing on proposed Tariff amendments.

17 City's Reply: Denied. RX 1313-1358.

18 Complainants' Finding: 228. In their affidavits, Mr. Wrede and others  
19 propose amendments to and interpretations of the Tariffs that must be  
20 subject to public hearing and adopted by the City Council in writing to be  
21 legally effective.

22 City's Reply: Denied. RX 1079-1104.

23 Complainants' Finding: 229. If the City Council seeks to amend the  
24 Tariffs so that they do not apply to the Fish Dock, there is a legally binding  
25 process and procedure to follow before the change is legally effective.

26 City's Reply: Admitted.

27 The Tariffs have not been amended to provide an exception for Icicle from the terms  
28 and provisions in the Tariffs.

1 Complainants aver that they provide transportation by water of cargo between  
2 the United States and foreign countries, namely Canada, Japan, Korea and others.<sup>19</sup> In  
3 addition, Respondents' customers including Icycle receiving terminal services are  
4 engaged in providing transportation by water of passengers and cargo between the  
5 United States and foreign countries.<sup>20</sup> Complainants are a common law common  
6 carrier for purposes of the Shipping Act of 1984 as amended.

7 All of Respondents' actions, decisions, exemptions, exceptions and  
8 preferences are undertaken qua a "marine terminal operator" and reference or disregard  
9 applicable provisions in the Tariffs that apply to all the docks and facilities on the Homer  
10 waterfront. Respondents properly admit Complainants' Proposed Finding of Fact 323  
11 that: "The Auction Block is involved on a daily basis in the business of using and paying  
12 for the essential terminal services and facilities of the Respondents."

13 **The Commission Has Subject Matter And Personal Jurisdiction**

---

<sup>19</sup> Complainants' Response to Request for Admission Number 1 at Exh. B / CX 26 - 28 at page 7 at line 4 – page 9 at line 9; Affidavit of Ms. Jessica Yeoman at Exh. U / CX 173 at page 5 at paragraphs 28, 29 and 30.

<sup>20</sup> In Puerto Rico Ports Authority v. Federal Maritime Commission, 919 F.2d 799, 802 (1<sup>st</sup> Cir. 1990), the Circuit Court found that "PRPA's sole function at Ponce is to provide such general harbor services as law enforcement, radio communications, harbor cleaning, and port captain services" and only imposes a "harbor service fee" which does not provide jurisdiction for the Federal Maritime Commission. However, in this matter, Respondents provide, control, regulate and exercise "plenary control" over all of the terminal services on all of the docks and facilities on the Homer waterfront and charge for the services.

1 For the reasons developed in the Brief and in this Reply Brief, the Federal  
2 Maritime Commission has subject matter jurisdiction of this matter and personal  
3 jurisdiction over Respondents.<sup>21</sup>

4 **The Commission Should Not Defer To Respondents**

5 This is not a case that involves any deference to Respondents' sound judgment  
6 because Respondents are not exercising any reasoned judgment. Throughout this

---

<sup>21</sup> Complainants succinctly summarized the factual and legal posture of this matter that supports the subject matter jurisdiction of the Federal Maritime Commission and personal jurisdiction over Respondents in their Brief at pages 77 to 78 as follows:

Almost the entire product that moves from the sea to the processing plant, to the trucks, to the ships and to the planes in Homer is lifted from a vessel (crane use) and transited across the City docks (wharfage) for delivery to the ultimate consumer in American and internationally. The cranes deliver ice and bait to a vessel before it departs and offload the fish and trash after the vessel returns. Respondents have a monopoly on the cranes and the wharfs and all the valuable land. In violation of their long-standing and oft-stated policy to reward the owner and operator of a shore-based fish processing plant in Homer, Respondents favor and prefer Icicle and disfavor and prejudice Complainants.

In their capacity as a marine terminal operator, Respondents filed Tariffs and filed amended Tariffs with the Federal Maritime Commission. Exhs. D, E, F and G / CX 64 - 103. In their capacity as a marine terminal operator, Respondents impose the rates in the Tariffs and others using the Fish Dock including Complainants. In their capacity as a marine terminal operator, Respondents exempt Icicle Seafoods from paying the rates in the Tariffs, albeit without a legal basis. In their capacity as a marine terminal operator, Respondents seek to justify their decision to exempt Icicle Seafoods from the application of the Tariffs by citing, albeit incorrectly, to a provision in the Tariffs. In their capacity as a marine terminal operator, Respondents exclude other persons from the Homer waterfront by precluding access or overcharging for services, albeit illegally. The Shipping Act of 1984 as amended does not allow a marine terminal operator to doff and don the marine terminal operator's hat on a whim. To paraphrase the conclusion in South Carolina Ports Authority v. Georgia Ports Authority, 22 SRR 1111, 1117 (1984), "a 'marine terminal operator' means a 'marine terminal operator.'"

1 proceeding, the City has acted as a lobbyist for Icicle; the City attorneys have acted as  
2 the legal advocates for Icicle.

3 **Complainants Provide Legal And Factual Support For The Statutory Violations**

4 The facts supporting the claims pursuant to the three statutory violations are  
5 developed throughout the Brief and the Reply Brief. The arguments for each of the  
6 three violations are summarized below.

7 **Respondents Are In Violation Of 46 U.S.C. § 41102(c)**

8 Respondents are in violation 46 U.S.C. § 41102(c) states in pertinent part: “A . . .  
9 marine terminal operator . . . may not fail to establish, observe, and enforce just and  
10 reasonable regulations and practices relating to or connected with receiving, handling,  
11 storing, or delivering property.” Respondents expressly admit that Complainants are in  
12 the business of receiving, handling, storing, or delivering property in their Answers and  
13 in discovery responses.

14 Respondents state that they are “Unable to admit or deny” the CPF OF numbers  
15 331 and 332 as follows.

16 331. **REQUEST FOR ADMISSION NO. 10:** Admit that you and Icicle  
17 Seafoods do not share the same customer base.

18  
19 **RESPONSE:** Deny. The Auction Block is not aware of all the customer  
20 base of Icicle Seafoods. Both entities share some customers and  
21 compete in the same market for fishermen and ultimate consumers.  
22

23 332. **REQUEST FOR ADMISSION NO. 11:** Admit that the presence of  
24 Icicle Seafoods’ business operations in the City has not directly impacted  
25 the quantity of fish that you have been able to purchase, sell, or process  
26 as part of your business operations.  
27

28 **RESPONSE:** Deny. The City’s favorable treatment of Icicle Seafoods has  
29 directly impacted the quantity of fish that The Auction Block has been able

1 to purchase, sell and process as part of its business operations.  
2 Complainants incorporate the Responses to the Requests for Production.

3  
4 In reply to CPFOF 353, Respondents replied that they were “Unable to admit or deny”  
5 the following statement:

6 Mr. Hogan reminds the City that it must consider the economic and social  
7 contributions of The Auction Block and Harbor Leasing to the City. The  
8 State of Alaska revenue sharing formula in its fish tax law at Alaska  
9 Statute 43.75.130 (“Refund to Local Governments”) provides an incentive  
10 for a city to encourage a person to process fish inside the city limits and  
11 thereby create local jobs and generate raw fish tax revenue for the city.  
12 Respondents admit: “Respondents admit that the State of Alaska levies a  
13 fish tax and shares revenue from that tax with municipalities.” See  
14 Paragraph IV at line 13 - 14 of the Fourth Amended Answer.

15  
16 City’s Reply: Unable to admit or deny.

17 Despite Mr. Hogan’s repeated efforts to remind the City “that it must consider the  
18 economic and social contributions of The Auction Block and Harbor Leasing to the City,”  
19 the Respondents do not care about Complainants’ business in and contributions to  
20 Homer.

21 Respondents provide some evidence of the current expenditures of Icicle but  
22 never sought to obtain the same information from Complainants. Respondents’ failure  
23 is further evidence of favoritism toward Icicle and prejudice toward Complainants. Icicle  
24 purchases fuel in Homer<sup>22</sup>; Complainants purchase fuel in Homer. Icicle contributes to  
25 charitable and civic activities in Homer; Complainants contribute to charitable and civic  
26 activities in Homer. Icicle has purchased commercially caught fish and seafood;

---

<sup>22</sup> Respondents do not deny that the fuel is purchased to transport fish by truck to another city – Seward - for processing and also to operate the floating processor but not to operate a shore-based fish processing plant. All of Complainants’ fuel purchases are in support of the shore-based fish processing plant, the Plant. None of these factors are even raised let alone considered by the Respondents.

1 Complainants have purchased more commercially caught fish and seafood. Icicle pays  
2 some fish tax; Complainants pay far more fish tax. Icicle provides employment to no  
3 more than ten individuals; Complainants provide far more employment to more than 100  
4 citizens. Respondents do not tie the allegations in the recent and untimely affidavits of  
5 Mr. Wrede, Mr. Hawkins, Mr. Woodruff and/or Mr. Sparks to legitimate transportation  
6 considerations. None of the allegations in these affidavits explain Respondents'  
7 decision made in 2004 to give incentives gratuitously to Icicle and then to deny them to  
8 Complainants.

9 Complainants have proven by a preponderance of the evidence that  
10 Respondents "fail to establish, observe, and enforce just and reasonable regulations  
11 and practices relating to or connected with receiving, handling, storing, or delivering  
12 property." Complainants clearly offer the "clear and tangible benefit to the City that  
13 warrants deviation from such rates" namely the ownership and operation of a shoreside  
14 fish processing plant in Homer that Respondents claim to seek and to reward.  
15 However, Respondents offer the incentives gratuitously to Complainants' competitor,  
16 Icicle Seafoods, that has not rebuilt and does not intend to rebuild a shore-based fish  
17 processing plant. Respondents' actions and inactions are the proximate cause of  
18 Complainants' damages.

19 **Respondents Are In Violation Of 46 U.S.C. § 41106(2)**

20 Respondents also are in violation of 46 U.S.C. § 41106(2) that states in pertinent  
21 part: "A marine terminal operator may not . . . (2) give any undue or unreasonable  
22 preference or advantage or impose any undue or unreasonable prejudice or  
23 disadvantage with respect to any person." 46 U.S.C. § 41106(2) uses the word "any"

1 rather than “some” or “substantial” to state that only a modicum of “preference” or  
2 “advantage” or “prejudice” or “disadvantage” is required. This statute also uses the  
3 disjunction “or” not the conjunction “and” throughout the statute. Complainants have  
4 proved by a preponderance of the evidence that Respondents “give any undue or  
5 unreasonable preference or advantage or impose any undue or unreasonable  
6 prejudice or disadvantage with respect to any person.” Complainants incorporate the  
7 factual and legal discussion above. Respondents’ actions and inactions are the  
8 proximate cause of Complainants’ damages.

9 **Respondents Are In Violation Of 46 U.S.C. § 41106(3)**

10 Respondents also are in violation of 46 U.S.C. § 41106(3) that states in pertinent  
11 part: “A marine terminal operator may not . . . (3) unreasonably refuse to deal or  
12 negotiate.” Respondents “unreasonably refuse[d] to deal or negotiate” with  
13 Complainants.<sup>23</sup> Respondents continue to “unreasonably refuse to deal or negotiate”  
14 with Complainants. Mr. Hogan spent a year trying and trying and trying and trying and  
15 trying and trying and trying to obtain the promised incentives without success. At this  
16 time, Complainants should not even need to deal or negotiate, although Respondents  
17 continue to refuse to deal and negotiate. Respondents should provide the incentives to  
18 Complainants. Mr. Wrede goes so far as to state that he is allowing Icicle to continue to

---

<sup>23</sup> Complainants discuss their efforts to deal and/or negotiate in the Answer to Interrogatory No. 11 at Exh. B / CX 38 at page 19 at line 4 – page 26 at line 20. Complainants also discuss their futile efforts in the Supplemental Affidavit of Kevin Hogan at Exh. P at page 3 at paragraph 17 and at page 4 at paragraph 28 - page 6 at paragraph 39; and the Affidavit of Jessica Stack at Exh. U at page 7 at paragraph 39 – page 9 at paragraph 47. In addition, Respondents’ Exhibit 9 sets forth just some of futile efforts undertaken by Mr. Hogan to negotiate with Respondents.

1 benefit from the incentives because it could build a plant in the future, yet it has no  
2 incentive to rebuild.

3 Respondents cite to the painfully protracted period of time between the  
4 acceptance of Complainants' proposal and the execution of the short-term  
5 Complainants' Lease. Respondents contend that Complainants are merely dissatisfied.  
6 The test is not to count the number of e-mails or the length of the time before an  
7 agreement is reached but whether there was any good faith dealing or negotiating. Mr.  
8 Hogan and Ms. Yeoman detail their futile efforts to reach an accord with the City that is  
9 at least on a par with Icicle. The duty to negotiate usually refers to a process rather  
10 than an outcome. In this matter, the outcome is dispositive. Given a clear benchmark,  
11 Respondents' refusal to provide the incentives is a clear violation of the duty to deal and  
12 negotiate with Complainants. The violation is ongoing.

13 Complainants and Respondents agree that the City refused to depart from the  
14 Tariffs except for a few non-monetary technical provisions in Complainants' Lease.

15 **REQUEST FOR ADMISSION NO. 5:** Admit that at no time during your  
16 negotiations with the City regarding the Lease did the City ever request  
17 that you agree to charges for the use of City equipment which deviated  
18 from the charges described in the City Terminal Tariff.

19 **RESPONSE:** Deny. Some provisions in the Lease are not included in the  
20 Tariff.

21 Mr. Wrede stated that the Tariffs apply to the Fish Dock and demanded that  
22 Complainants were subject to every monetary provision in the Tariffs. Respondents  
23 would not consider even one of the monetary incentives requested by Mr. Hogan.

1 Complainants did provide a few incidental non-monetary terms for matters not covered  
2 by the Tariffs.

3 In addition to other testimony, Respondents completely disregard the compelling  
4 and damaging testimony in the Affidavit of Shelly Erickson, a past chair of the Homer  
5 Economic Development Commission (EDC) and the Homer Lease Committee from  
6 2008 until 2011, at Exhibit N / CX 138 - 139 and in the Affidavit of Don Martin McGee at  
7 Exhibit O / CX 140 - 142. These affidavits were prepared and submitted by the affiants  
8 in her and in his own words and then cut and pasted into the pleading.

9 Complainants incorporate the factual and legal discussion above. Respondents'  
10 actions and inactions are the proximate cause of Complainants' damages.

11 **Complainants Are Entitled To The Reparations In 46 U.S.C. § 41305(b)**

12 All the recipients of the Sveriges Riksbank Prize in Economic Sciences and the  
13 John Cates Clark Medal are in accord that if you impose costs on one competitor and  
14 reduce costs for another competitor operating in the same market, the market will be  
15 distorted. Complainants and Respondents are in accord that the Shipping Act of 1984  
16 as amended aims to "place a greater reliance on the marketplace" and minimize  
17 "government intervention and regulatory costs." 46 U.S.C. § 40101(1)(4).  
18 Complainants move the Commission to preclude Respondents from further distorting  
19 the marketplace that results in an unfair and uneven economic playing field in Homer.

20 Complainants incorporate their careful discussion of damages in their Brief.<sup>24</sup>  
21 Complainants' damages, except the specific amounts for 2012 and the fine-tuned

---

<sup>24</sup> This incorporation by reference should not be necessary. The Commission Rules preclude a party from advancing new arguments in a reply brief which is an

1 amount for lost profits, are stated by Complainants in specific detail and admitted by  
2 Respondents in the five verified Complaints including the verified Fourth Amended  
3 Complaint. Compare CX 272 – 280 with CX 281 - 285. The Complaints were not able  
4 to set forth the damages for crane use for 2012 in the Complaints. Respondents  
5 responded to CPFOF 207 regarding crane use damages in 2012 as follows:

6 207. Complainants have been billed by Respondents and Complainants  
7 have paid to Respondents \$38,099.13 in crane use expenses in 2012.

8 City's Reply: Denied. RX 1263-1268; RX 1272-1300; RX 1301-1309.

9 Respondents' Reply to CPFOF 207 refers generally to the statements of Mr. Sparks but  
10 not to any admissible evidence that contradicts the amounts averred by Complainants.  
11 Respondents effectively admit Complainants' damages for 2012.

12 Respondents appear not to have read the damages discussion carefully.  
13 Complainants discuss the tests for damages in Ceres Marine Terminal v. Maryland Port  
14 Admin., 27 SRR 1251, 1270-71 (FMC 1997) and Ceres Marine Terminal v. Maryland  
15 Port Admin., 29 SRR 356, 372 (FMC 2001), among other cases, in detail. In Ceres  
16 Marine Terminal v. Maryland Port Admin., 29 SRR 356, 372 (FMC 2001), the  
17 Commission states:

18 Therefore, we hold that, as a matter of law, the common law  
19 doctrines of waiver and estoppel may not be invoked to prohibit a party to  
20 an agreement subject to the Commission's jurisdiction from later  
21 challenging the agreement in a complaint filed with the Commission  
22 alleging that one of the parties to the agreement violated a duty imposed  
23 on it by the Shipping Act. We further find that Ceres neither waived its  
24 rights under the Shipping Act by entering into an agreement under the  
25 Shipping Act, nor is estopped from challenging the terms of its agreement  
26 because it waited 18 months before filing its complaint with the

---

acknowledgement that the argument in the opening brief is adequate unless expressly  
dropped in the reply brief.

1 Commission. To hold otherwise would abrogate the Commission's  
2 statutory duty to promote a transportation and marine terminal system free  
3 from undue and unreasonable discrimination.

4  
5 (Emphasis added; citation omitted). Damages are easily calculated on this record. The

6 Commission concludes:

7 The Commission finds that the common law doctrines of waiver and  
8 estoppel may not be invoked to prohibit a party to an agreement subject to  
9 the Commission's jurisdiction from later challenging the agreement in a  
10 complaint filed with the Commission, alleging that one of the parties to the  
11 agreement violated a duty imposed on it by the Shipping Act. We further  
12 find it unnecessary to rule on Ceres' alternative grounds for liability.

13  
14 We find the appropriate measure of damages for a violation of  
15 sections 10(b)(11) and (12), where a party has breached a duty to apply  
16 its criteria for granting lower rates in a fair and evenhanded manner, is the  
17 difference between the rate that was charged and collected, and the rate  
18 that would have been charged but for the undue preference and prejudice.

19  
20 We further find that the appropriate measure of damages for a  
21 violation of section 10(d)(1) is the degree to which the rates are excessive,  
22 which, based on the facts of this case, is the difference between the rates  
23 charged Maersk and Ceres.

24  
25 Id. at 374 (Emphasis added; citation omitted).

26 Complainants set forth their damages in the initial Complaint which was never disputed  
27 with specific responses in any Answer. The amounts billed by Respondents and paid  
28 by Complainants are not disputed, even tardily, by Respondents. The amounts billed by  
29 Respondents and paid by Icicle are undisputed. In summary, Respondents billed and  
30 Complainants paid \$257,841.35 for the years 2009, 2010 and 2011 and \$38,099.13 for  
31 the year 2012 for crane use as discussed. As developed and discussed in  
32 Complainants' Fourth Amended Complaint at CX 272 - 280 and in their Initial  
33 Disclosures at CX 114 - 117, Icicle in effect paid nothing for crane use under the  
34 incentives. The calculations are set forth below:

1 Complainants paid: \$257,841.35 (2009, 2010 and 2011)

2 \$38,099.13 (2012)

3 Icicle paid: \$ 0.00

4 Damages: \$295,940.48

5 The damages for wharfage are set forth and discussed in the Brief.

6 Only Mr. Sparks flatly rejects these figures and reaches unfounded conclusions  
7 based on inaccurate information and incorrect assumptions. Making sense of the  
8 statements in the affidavit of Mr. Sparks dated January 3, 2013 is trying. As a threshold  
9 matter and as noted previously, Mr. Sparks was not timely disclosed as an expert<sup>25</sup> and  
10 is not qualified as an expert. Counsel for Respondents has him asserting that he is an  
11 “economist” although there is nothing in the documents to suggest that he has taken  
12 even one economics course. Mr. Sparks is affiliated with the “Department of  
13 Accounting and Information Systems Program” but not the “Department of Economics”  
14 at the University of Alaska, Fairbanks. He claims to have written one article on  
15 accounting for fish business but no articles on the economics of the fishing industry. He  
16 submits the titles of articles that were published in accounting journals but not any  
17 articles published in economics journals. He does not even appear to be a member of  
18 the American Economic Association. He has not been qualified as an expert to testify

---

<sup>25</sup> Complainants note that Respondents’ Response to CPFOF 125 states:

Respondents did not list any possible experts in their Initial Disclosures marked as Exh. K / CX 121 - 126.

Denied. CX 0121 – 0126.

The Parties agree that the Commission can review CX 121 - 126 to determine whether Mr. Sparks was timely disclosed by Respondents as an expert.

1 regarding the fishing industry in any court proceeding in the past. He is not qualified to  
2 offer expert testimony in this proceeding.

3 On one hand, Mr. Sparks states that he lacks information for one year, 2009, and  
4 yet later he states that he has reviewed the information for 2008 and 2009. RX 1266,  
5 line 5. He states on January 3, 2013 that he disagrees with the way The Auction Block  
6 reports information to the State, yet he does not even acknowledge the discussion in  
7 Complainants' Brief at page 74 that it is reporting the information to the State as a  
8 "processor" because the company is complying with the findings and holdings of the  
9 Alaska Supreme Court in a published 2005 decision Deaver v. Auction Block Company,  
10 107 P.3d 884 (Alaska 2005) requiring The Auction Block Company to report as a  
11 "primary fish buyer." The upshot of the case is that The Auction Block must report all  
12 fish it handles as the "processor" to comport with the law. Mr. Sparks' hearsay reporting  
13 of the statements of others with the state of Alaska in particular paragraphs 9, 10 and  
14 11 at RX 1266 is inadequate to establish the statements as facts.<sup>26</sup> Mr. Sparks does  
15 not state that he reviewed any of the affidavits of Mr. Hogan or of Ms. Yeoman in  
16 preparing his November 16, 2012 report. RX 1283.

17 Mr. Sparks claims: "First, AB paid no processor fish tax for 2009 despite having  
18 crane activity on its "Own" account for 2009." RX 1293. The Auction Block paid  
19 \$909,467.88 in fish tax in 2009. CX 286. Mr. Sparks appears to have relied on  
20 inaccurate and incomplete information. The State of Alaska fish processor number for  
21 Complainants in year 2009 was 3785 and for years 2010, 2010 and 2012 is 8162. The

---

<sup>26</sup> Under some defined circumstances, an expert may be able to rely on hearsay statements in preparing a report, but Respondents have not shown any authority for the proposition that he can testify to alleged facts qua facts based on hearsay statements.

1 raw data for the years 2009 - 2012 is reported at RX 836 - 1035.

2 Mr. Sparks cannot accurately state what Complainants would have paid under  
3 the terms of the Icicle lease because at this time Icicle is billed differently than  
4 Complainants. As Complainants noted in all of their complaints:

5 **B.** The Tariff dated July 25, 2011 at page 53 states: “Minimum charge  
6 per hour for crane” [is] “Fifteen minutes.” In application, Respondent City  
7 of Homer applies the rates in 15 minute increments, so 16 minutes of use  
8 is charged at 30 minutes, 31 minutes is charged at 45 minutes, and 46  
9 minutes is charged at 60 minutes. Respondent City of Homer assesses  
10 an automatic overcharge of \$1.51 to \$21.14 on average for each  
11 transaction. Respondents City of Homer has represented that this rate  
12 structure is set forth in the Tariff, although this rate structure is not set  
13 forth in the Tariff. Respondents do not apply these calculations to the Fish  
14 Dock Crane charges or use assessed to Icicle Seafoods. Respondents  
15 overcharged The Auction Block Company a total of at least \$16,902.14 for  
16 the years 2009 to 2011 and an as yet undetermined sum in 2012 based  
17 on the rate published in the Tariff. In addition, applying the minimum  
18 charge outlined in the Tariff results in a crane charge for a 1 minute use of  
19 \$24.36. For example, Respondents billed and The Auction Block  
20 Company paid \$487.20 for 20 crane charges totaling 1 hour. In addition,  
21 Respondents billed and The Auction Block Company paid \$419.22 for 17  
22 crane charges that totaled 13 minutes, an effective hourly rate of  
23 \$1,934.86 per hour. These charges are not applied to Icicle Seafoods  
24 which also is not subject to a per use sales tax. Damages are continuing  
25 into the future.

26 Fourth Amended Complaint at CX 276 - 277, page 5, line 35 – page 6, line 14  
27 (Emphasis added). In Response to CPFOF Number 64, Respondents admit: “The  
28 Tariff dated July 25, 2011 at page 53 states: “Minimum charge per hour for crane” [is]  
29 “Fifteen minutes.”” In Response to CPFOF Number 65, Respondents admit: “In  
30 application, Respondent City of Homer applies the rates in 15 minute increments, so 16  
31 minutes of use is charged at 30 minutes, 31 minutes is charged at 45 minutes, and 46  
32 minutes is charged at 60 minutes.” In Response to CPFOF Number 68, Respondents

1 admit: "Respondents do not apply these calculations to the Fish Dock Crane charges or  
2 use assessed to Icicle Seafoods." In Response to CPFOF Number 73, Respondents  
3 admit: "These charges are not applied to Icicle Seafoods which also is not subject to a  
4 per use sales tax." Because of the short time to complete discovery, Complainants note  
5 that they were not able fully to establish the additional damages that result from the  
6 disparity in calculations of crane use. Mr. Sparks cannot simply disregard the different  
7 ways of calculating crane use and assume in his calculations that Complainants are  
8 treated the same as Icicle. In popular parlance, he is "comparing apples with oranges."

9 The Auction Block Company held a business license for a shore-based facility in  
10 Homer in 2010, 2011 and 2012. A copy of the business license for 2012 is at CX 189.  
11 Complainants note that Respondents' Response to CPFOF 216 admits:

12 Exh. Z [CX 187] is a true and correct copy of an award given to The  
13 Auction Block Company in 2010 by the Mayor of the Kenai Peninsula  
14 Borough "In Recognition of Superior Performance and Dedication as  
15 OUTSTANDING COMMERCIAL FISH PROCESSOR." Homer is a city  
16 located in the Kenai Peninsula Borough.

17  
18 The fish and seafood processed by Complainants are set forth at RX 836 - 1095.

19 Mr. Sparks' description of Icicle's activities is a rewriting of the terms in the  
20 Expired Icicle Lease. Under the Expired Icicle Lease, Icicle received the incentives  
21 whether it offloaded its own fish or the fish of others. At this time, however, with no  
22 written lease to review, the City is letting Icicle do anything on the Fish Dock it wants to  
23 do without charging the fees set forth in the Tariff.

24 Respondents misconstrue Complainants' damage requests for past reparations  
25 as set forth in 46 U.S.C. § 41305(b). Complainants are not challenging the  
26 reasonableness of the Homer Tariffs, they are challenging the differing treatment of two

1 similarly situated entities by Respondents and the application of exceptions to the  
2 Tariffs. Respondents misconstrue statements in New Orleans S.S. Ass'n v.  
3 Plaquemines Port, 816 F.2d 1074, 1077 (5<sup>th</sup> Cir. 1987), which involved disputed tariffs  
4 that were nullified and later revised. The decision says nothing about reparations for  
5 past damages. Complainants are entitled to reparations for the past damages  
6 proximately caused by Respondents' statutory violations.

7 "The Auction Block Company Lost Profit Report April 2009 – August, 2012" is  
8 marked at Exhibit R / CX 158 – 165 that was disclosed to Respondents. Exhibit X / 183  
9 - 184. Mr. Hogan avers:

10 5. Exhibit R is a true and correct copy of the "The Auction Block  
11 Company Lost Profit Report April 2009 – August, 2012" prepared by me  
12 and others with Complainants and delivered to Respondents.  
13

14 . . .

15  
16 13. I assisted in the research and preparation of the "The Auction Block  
17 Company Lost Profit Report April 2009 – August, 2012" created to  
18 establish the lost profits of the Complainants from April, 2009 until August,  
19 2012 as a result of the disparate treatment of Complainants by  
20 Respondents and other statutory violations of the Shipping Act of 1984 as  
21 amended is marked as Exhibit R. These calculations of lost profits are a  
22 conservative and well-founded calculation of Complainants' substantial  
23 losses.  
24

25 Supplemental Affidavit of Kevin Hogan at Exh. Q / CX 153 at paragraph 5 at page 2 and  
26 paragraph 13 at pages 3 - 4. The sources of information are noted at Exh. R / CX 165  
27 at page 8 and include:

- 28 2009-2012 QuickBooks company sales
- 29 2009-2012 Corporate Tax Returns as prepared by The Auction Block Company's accountant
- 30 2009-2012 The Auction Block Company's records

31

1 Mr. Hogan and Ms. Yeoman have the experience and expertise to provide the analysis  
2 and conclusions. Respondents cite to snippets in the depositions of Mr. Hogan and of  
3 Ms. Yeoman yet fail to provide the careful review of the business plan and activities of  
4 Complainants and the commercial fishing market set forth in the four Affidavits of Kevin  
5 Hogan at Exhs. P / CX 143 - 151, Q / CX 152 - 157, V / CX 179 - 180 and Y / CX 185 –  
6 186 and the Affidavit of Jessica Yeoman at Exh. U / CX 169 - 178 that support and  
7 underpin the Report.

8 Respondents' Responses to CPFOF noted below are revealing and supportive of  
9 Complainants' assumptions:

10 189. Exhibit R [CX 158 – 165] is a true and correct copy of the “The  
11 Auction Block Company Lost Profit Report April 2009 – August, 2012”  
12 prepared by me and others with Complainants and delivered to  
13 Respondents.

14 City's Reply: Admitted.

15 190. Exhibit S [CX 166 – 167] is a true and correct copy of the “Pacific  
16 Fishing: The Business Magazine For Fishermen”  
17 (<http://www.pacificfishing.com/>) article titled “Kevin Hogan: Changing The  
18 Halibut Industry” dated May, 1999 that describes the successful efforts by  
19 me and The Auction Block to develop and grow the halibut industry in  
20 Homer.

21 City's Reply: Denied. RX 1264-1268; RX 1272-1300; RX 1301-1309.

22 . . .

1 192. There is one fundamental rule in the economics of the Alaska  
2 fisheries: The fishers, as they are known today, are extremely sensitive to  
3 the price offered for their fish or seafood product.

4 City's Reply: Unable to admit or deny.

5 193. When selling his or her fish or other seafood product, the fisher  
6 looks almost exclusively if not exclusively at price.

7 City's Reply: Unable to admit or deny.

8 194. The only other consideration is whether a buyer is able to pay the  
9 price. The Auction Block has always paid the price it bid.

10 City's Reply: Unable to admit or deny.

11 Respondents' Reply to CPFOF 190 refers generally to the statements of Mr. Sparks but  
12 not to any admissible evidence that contradicts the statements in the article.  
13 Complainants set forth and Respondents do not deny the factual and financial  
14 assumptions underpinning the Report.

15 Respondents confuse "lost profits" with "prejudgment interest." A party first sets  
16 forth its damages including lost profits. After entry of judgment for damages, the Court  
17 calculates prejudgment interest on the damages. Commission Rule § 502.253  
18 addresses the calculation of interest.

### 19 **The Request For Sanctions Is Unfounded And Unwarranted**

20 The request for sanctions is unfounded and unwarranted. Complainants  
21 provided the information sought by Respondents. Mr. Sparks admits that he had  
22 access to the information. RX 1283.

1 Respondents could have issues a sub poena to the state of Alaska and obtained  
2 the fish tickets. The dispute focused on whether Complainants should hold the State of  
3 Alaska harmless for any breach of confidentiality by the City or if the City should hold  
4 the State of Alaska harmless for any breach of confidentiality by the City. See the letter  
5 dated December 7, 2012 from Mr. Steven Shamburek to Mr. Adam Cook. CX 288 -  
6 289. See the letter dated December 16, 2012 from Mr. Steven Shamburek to Ms. Holly  
7 Wells. CX 290 - 292. The letter dated December 19, 2012 from Mr. Steven Shamburek  
8 to Mr. Lance Nelson, a Senior Assistant Attorney General with the State of Alaska,  
9 reflects an effort to resolve the donnybrook. CX 293 - 294. In the e-mail response  
10 dated December 19, 2012 from Mr. Lance Nelson to Mr. Steven Shamburek, Mr. Nelson  
11 clarifies the law and the options available to Respondents. CX 295 – 296. Mr. Sparks  
12 had the fish ticket information he needed before the motion was filed. RX 1283. The  
13 request for sanctions contained within Respondents' Brief should be denied.

14 At a minimum, counsel must set forth an hourly rate and provide its  
15 reasonableness. Counsel then must set forth the hours worked and the  
16 reasonableness of the efforts. There is nothing whatsoever in the record to provide any  
17 basis for an award.

## 18 **Conclusion**

19 Upon hearing Complainants' painful and protracted saga, most members of the  
20 public look quizzically and ask: "Why all the fuss?" Respondents make the case that  
21 an entity providing a shore-based fish processing plant in Homer that results in  
22 additional employment and more fish tax should receive some specific monetary

1 incentives. Complainants expanded their facilities and built and operate the shore-  
2 based state-of-the-art Plant in Homer.

3 This Commission is not obligated to don a green eye shade and determine  
4 whether Complainants' Plant or Icicle's plant is more profitable or more promising. The  
5 Shipping Act of 1984 as amended is designed to promote competition not to protect one  
6 competitor or another.

7 Complainants have shown that the disparate charges clearly interfere with the  
8 working of a competitive market in Homer. Congress does not direct the Commission to  
9 set rates and dictate the outcome in a market, Congress directs the Commission to  
10 foster and promote competition and allow the market to allocate resources and set  
11 prices.

12 Respondents introduce evidence suggesting that Complainants are having  
13 challenging financial times. Complainants agree and attribute their challenging financial  
14 situation to the disparate treatment of the City. Complainants must compete for a  
15 diminishing quota of halibut. All competitors must pay additional sums for fuel and  
16 water. Complainants continue to contend and have shown by a preponderance of the  
17 evidence that the one variable in their business plan is the disparate rates gratuitously  
18 given to Icicle and denied to Complainants by Respondents.

19 For the reasons stated in the Brief and in this Reply Brief, Complainants  
20 respectively move for entry of judgment.

21 DATED this 25th day of January, 2013.

22

1 LAW OFFICE OF STEVEN J. SHAMBUREK  
2 Attorney for Complainants  
3

4  
5 By: *Steven J. Shamburek*  
6 Steven J. Shamburek  
7 ABA No. 8606063  
8 425 G Street, Suite 610  
9 Anchorage, Alaska 99501  
10 Telephone: (907) 522-5339  
11 shamburek@gci.net  
12 shambureklaw@gci.net  
13 shamburekbank@gci.net  
14

15  
16 **CERTIFICATE OF SERVICE**

17  
18 I hereby certify that I have this day served a copy of this REPLY BRIEF upon Thomas  
19 F. Klinkner, Birch Horton Bittner & Cherot, 1127 West 7th Avenue Anchorage, Alaska  
20 99501 by sending a copy by U.S. Mail and by e-mail attachment to tklinkner@bhb.com  
21 and also a copy to Holly C. Wells at hwells@bhb.com.

22 Dated this 25th day of January, 2013.

23  
24 By: *Steven J. Shamburek*  
25 Steven J. Shamburek  
26  
27  
28