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OFFICE OF THE SECRETARY
FEDERAL MARITIME COMMISSION

1 FEDERAL MARITIME COMMISSION

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3 DOCKET NO. 12-03
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5 THE AUCTION BLOCK COMPANY, an ALASKA CORPORATION

6 v.

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

8 _____
9 AMENDED COMPLAINT
10 _____

11 **I. The Complainant** The Auction Block Company is a for-profit corporation in good
12 standing organized under the laws of State of Alaska. The Corporation's principal
13 shareholder is its President Kevin Hogan. The Auction Block Company is a seafood
14 processing and logistics firm engaged in the primary purchase and processing of
15 Alaskan seafood and providing fishing vessel services at the Port of Homer. In addition,
16 The Auction Block Company receives, handles, stores, and delivers property. The
17 principal place of business is 4501 Ice Dock Road, Homer, Alaska 99603. The Auction
18 Block Company is subject to the provisions and protections of the Shipping Act of 1984,
19 as amended, as a "person" as defined in the former 46 U.S.C. § 1702(18) and in 46
20 C.F.R. § 515.2(p) and other authority. Complainant alleges that the matters complained
21 of will continue in the future and will constitute violations of the Shipping Act of 1984, as
22 amended, in the particulars and to the extent indicated and Complainant prays for
23 reparations and damages for injuries which are and will be sustained as a result of
24 these continuing violations. Complainant has done everything necessary to bring and
25 maintain this Complaint before the Commission.

26 **II. The Respondents** The City of Homer is a municipal corporation organized
27 under the laws of the State of Alaska. The City of Homer owns and operates the Port of
28 Homer in Homer, Alaska. The City Manager is Walt Wrede and the Harbormaster is
29 Brian Hawkins. The principal address is 491 East Pioneer Avenue, Homer, Alaska
30 99603. The City and Port are subject to the provisions and protections of the Shipping
31 Act of 1984, as amended, as a "marine terminal operator" as defined in 46 U.S.C. §
32 40102(14) and other authority. The Respondents are at times referred to as the "City"
33 and/or the "Port" and/or the "Respondent."

1 **III. Jurisdiction** The City of Homer operates the Port of Homer and has filed the
2 "Port of Homer Terminal Tariff No. 600 Filed under ATFI Rules" which have been
3 adopted and ratified by the Homer City Council. The City and Port are subject to the
4 provisions of the Shipping Act of 1984, as amended, as a "marine terminal operator" as
5 defined in 46 U.S.C. § 40102(14) and other authority. The Federal Maritime
6 Commission has subject matter jurisdiction of this matter and personal jurisdiction of the
7 Respondents. 46 U.S.C. § 40301 and other authority.

8 **IV. History** The state of Alaska revenue sharing formula in its fish tax law provides
9 an incentive for a city to encourage a person to process fish inside the city limits and
10 thereby create local jobs and generate raw fish tax revenue for the city. The
11 Complainant's competitor, Icicle Seafoods, operated its seafood processing plant inside
12 the boundaries of the City of Homer and created additional jobs and generated tax
13 revenue for the City of Homer. However, in 2001, Icicle Seafoods' processing plant
14 burned down and was not rebuilt. The majority of the fish that Icicle Seafoods unloaded
15 in the City of Homer after 2001 was transported to and processed in the City of Seward
16 which received the job creation and tax benefits. In 2008, Complainant built a
17 processing plant on a parcel of property leased from the City of Homer. Although
18 Complainant was generating all the benefits to and for the City of Homer that were
19 previously generated by competitor Icicle Seafoods, the City of Homer refused and
20 continues to refuse to consider any relief or incentives to Complainant or even to deal or
21 negotiate while continuing to provide relief and incentives to the competitor, Icicle
22 Seafoods, for and with no benefit to Respondents. In addition, Respondents previously
23 entered into exclusive lease and other arrangements with Complainant's competitor,
24 Icicle Seafoods, that are in contravention and violation of the Shipping Act of 1984, as
25 amended, and the published Tariffs discussed below. Respondents' actions and
26 inactions do not serve any valid transportation purpose or advance any genuine public
27 policy concern. Respondents' actions and inactions prejudice Complainant and caused
28 and continue to cause damages to Complainant.

29 **V. Violations** Respondents City of Homer and Port of Homer failed and fail to
30 establish a nondiscriminatory regulatory process and failed and fail to prevent the
31 economic discrimination that is at the heart of the regulatory scheme established by
32 Congress in the Shipping Act of 1984, as amended. Respondents are in violation of the
33 Shipping Act of 1984, as amended, specifically 46 U.S.C. § 41102(b) that states in
34 pertinent part: "A person may not operate under an agreement required to be filed
35 under section 40302 or 40305 of this title if (1) the agreement has not become effective
36 under section 40304 of this title or has been rejected, disapproved, or canceled; or (2)
37 the operation is not in accordance with the terms of the agreement or any modifications
38 to the agreement made by the Federal Maritime Commission." Respondents also are in
39 violation of 46 U.S.C. § 41102(b) that states in pertinent part: "A . . . marine terminal

1 operator . . . may not fail to establish, observe, and enforce just and reasonable
2 regulations and practices relating to or connected with receiving, handling, storing, or
3 delivering property.” Respondents also are in violation of 46 U.S.C. § 41106(2) that
4 states in pertinent part: “A marine terminal operator may not . . . (2) give any undue or
5 unreasonable preference or advantage or impose any undue or unreasonable prejudice
6 or disadvantage with respect to any person.” Respondents also are in violation of 46
7 U.S.C. § 41106(3) that states in pertinent part: “A marine terminal operator may not . . .
8 (3) unreasonably refuse to deal or negotiate.” Respondents also may be in violation of
9 other provisions of the Shipping Act of 1984, as amended, that become known through
10 disclosure or discovery. Complainant reserves the right to assert and maintain those
11 causes of action.

12 **A. Respondents’ Treatment of Complainant.** Respondents’ “Terminal Tariff
13 No. 600 Filed under ATFI Rules” effective January 1, 2009, Application Of Rule 34.30
14 regarding “Fish Dock” at Subsection 275 at page 53 sets the published rate for “Fish
15 Dock Crane” use at \$88.00 per hour for the years 2009 and 2010. Respondents’ three
16 (3) “Terminal Tariff No. 600 Filed under ATFI Rules” effective January 1, 2011 and April
17 25, 2011 and July 25, 2011, Application Of Rule 34.30 regarding “Fish Dock” at
18 Subsections 275 at pages 53 set the published rate for “Fish Dock Crane” use at \$90.64
19 per hour for the year 2011 and continuing. Respondents unjustly overcharge
20 Complainant for the services received. Respondents required Complainant to pay and
21 Complainant paid the amount of \$98,488.05 in 2009, \$84,900.65 in 2010, \$74,452.65 in
22 2011 and an undetermined sum in 2012 for total damages of at least \$257,841.35.
23 Damages are continuing into the future.

24 Respondents’ Treatment of Competitor. Respondents required Complainant to
25 pay and complainant paid the rates published in the Tariff and discussed above.
26 However, Respondent does not require Complainant’s major competitor, Icicle
27 Seafoods, Inc. d/b/a Seward Fisheries (“Icicle Seafoods”) to pay and Icicle Seafoods
28 does not pay the rates published in the Tariff. Respondents charge Icicle Seafoods for
29 “Fish Dock Crane” use and also for the use and enjoyment of multiple defined
30 “PREMISES” based on rates in a series of exclusive lease agreements, addenda and
31 amendments executed by Respondents and Icicle Seafoods. The LEASE
32 AGREEMENT dated September 14, 1979 recorded at Book 111, Pages 884 through
33 902A in the Homer Recording District at Paragraph 3 (“USE OF PREMISES”) describes
34 the real property subject to the “Land Lease” at Page 885. The AMENDMENT OF
35 LEASE AGREEMENT dated July 1, 1986 recorded at Book 172, Pages 673 through
36 678 in the Homer Recording District at Paragraph 5 (“USE OF PREMISES”) at Page
37 675 leases the following premises:

38 (a) Lessee shall have the use of the covered structure at the Fish Dock.

- 1 (b) Lessee may continue to operate its ice dispensing equipment at its present
2 location on the Fish Dock.
- 3 (c) Lessee shall have the use of loading cranes No. 7 and 8 to a maximum of
4 1,858 hours per year. Use of the cranes by Lessee in excess of that time
5 shall be at the rate of Fifteen Dollars (\$15.00) per hour.
- 6 (d) Seafood wharfage charges are included within the rental given above.
- 7 (e) Lessee shall have the use of one fish buying shed. Lessor shall have the
8 right to select the shed for Lessee's use.

9 The SECOND AMENDMENT OF LEASE AGREEMENT dated January 25, 1988 with
10 an effective date of September 14, 1987 recorded at Book 0181, Pages 383 through
11 386 in the Homer Recording District at Paragraph 4 ("USE OF PREMISES") at Page
12 384 leases the following additional premises:

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

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

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

23 The Tariff at page 53 describes the "Ice Plant Bin Storage (roofed-over, open-sided
24 Storage bins at west end of ice plant building sixteen feet by twelve feet)." This 192
25 square foot structure is assessed the rental rate of \$2400 per year ("\$200/month"
26 multiplied by 12 months) which is a rate of \$12.50 per square foot pursuant to the Tariff.
27 Pursuant to the provisions in (a) through (g) in the USE OF PREMISES paragraphs in
28 the last two LEASE AGREEMENTS set forth above, Respondents allow Icycle Seafoods
29 to use and enjoy for commercial purposes an additional approximately 2750 square feet
30 of Respondent's property. At the annual rate of \$12.50 per square foot calculated
31 pursuant to the provisions in the Tariff, Icycle Seafoods is commercially using and
32 enjoying premises valued at \$34,375.00 (2750 square feet x \$12.50 per square foot).
33 The "Dock Use" charge stated in Paragraph 2 "RENTAL" in the SECOND
34 AMENDMENT at page 384 is \$30,900.00. The amount of \$34,375.00 is the total
35 calculated "USE OF PREMISES" benefit to competitor Icycle Seafoods which exceeds
36 the "Dock Use" charge before the calculation of Icycle Seafoods' "Fish Dock Crane" use.
37 Thus, the Respondents provide at least an annual benefit of \$3,475.00 (\$34,375.00 -

1 \$30,900.00) to Icicle Seafoods that is not provided to Complainant. In addition,
2 Respondents provide Icicle Seafoods the 1300 hours of Crane Use at no cost and only
3 charge the rate of \$15 per hour for use above 1300 hours as stated in Paragraph 3
4 "DOCK AND CRANE USE" in the SECOND AMENDMENT at Page 384. However,
5 Respondents charge Complainant for crane use discussed below. Respondents have
6 damaged Complainant in the sum of at least \$10,425.00 (\$3,475.00 x 3 years).
7 Damages are continuing into the future.

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

25 **C.** The Tariff at page 53 states a wharfage rate of \$4.62 per ton for the years 2009
26 and 2010 and a rate of \$4.76 per ton for the year 2011 on fish products handled by the
27 Complainant. Respondents exempt Icicle Seafoods from these charges and
28 assessments. Respondents bill at \$.00231 per pound for the years 2009 and 2010 and
29 at \$.00238 for the year 2011. Complainant handled 8,026,896 pounds of fish in 2009
30 which results in a differential and damages to Complainant of \$18,542.13 in 2009.
31 Complainant handled 6,588,169 pounds of fish in 2010 which results in a differential
32 and damages to Complainant of \$15,218.67 in 2010. Complainant handled 5,540,143
33 pounds of fish in 2011 which results in a differential and damages to Complainant of
34 \$13,185.54 in 2011. Complainant handled an as yet undetermined poundage of fish in
35 2012 with a differential and damages to Complainant of an undetermined sum in 2012.
36 The total damages are at least \$46,946.34 for the years from 2009 until 2012.
37 Damages are continuing into the future.

38 **D.** Respondents charge and Complainant pays an additional wharfage fee for ice
39 used on fish offloaded at the fish dock of \$14.00 per ton in the years 2009 and 2010 and

1 \$14.50 per ton in the year 2011 unless the ice is purchased from the City. Respondents
2 do not assess this fee to and do not receive the fee from Icicle Seafoods. The City and
3 Icicle Seafoods executed an exclusive reciprocal rate arrangement for ice that
4 prejudices and disadvantages and thus damages Complainant. Respondents have
5 damaged Complainant in an amount to be determined. Damages are continuing into
6 the future.

7 **E.** Complainant and competitor Icicle Seafoods compete to purchase fish in the City
8 of Homer and at the Port of Homer and in Alaska in these markets. Respondents'
9 failure to establish, observe, and enforce just and reasonable regulations and practices
10 relating to or connected with receiving, handling, storing, or delivering property
11 damaged Complainant's ability to compete with Icicle Seafoods. If Respondents had
12 not unduly and/or unreasonably preferred and/or advantaged Icicle Seafoods and/or
13 unduly and/or unreasonably prejudiced and/or disadvantaged Complainant,
14 Complainant could have purchased more fish and realized net revenues of up to
15 \$350,000.00. Respondents unreasonably refused and refuse to deal and/or negotiate
16 with Complainant and thus damage Complainant. Damages are continuing into the
17 future.

18 **V.** By reason of the facts stated in the foregoing paragraphs, Complainant has been
19 and is being subject to injury as a direct and proximate result of and caused by the
20 violations by Respondents of the Shipping Act of 1984, as amended, specifically 46
21 U.S.C. § 41102(b) because Respondent operated under an agreement required to be
22 filed under section 40302 or 40305 of this title and (1) the agreement has not become
23 effective under section 40304 of this title or has been rejected, disapproved, or
24 canceled, or (2) the operation is not in accordance with the terms of the agreement or
25 any modifications to the agreement made by the Federal Maritime Commission; 46
26 U.S.C. § 41102(c) because Respondents failed to establish, observe, and enforce just
27 and reasonable regulations and practices relating to or connected with receiving,
28 handling, storing, or delivering property; 46 U.S.C. § 41106(2) because Respondents
29 have given undue and/or unreasonable preference and/or advantage and/or imposed
30 undue and/or unreasonable prejudice and/or disadvantage with respect to Complainant;
31 and 46 U.S.C. § 41106(3) because Respondents have unreasonably refused and
32 continue to refuse to deal and/or negotiate with Complainant.

33 **VI.** Respondents' actions and inactions proximately and legally damaged and
34 continue to damage Complainant in the following manners: Respondents damaged
35 Complainant in the sum of at least \$332,114.83 (at least \$257,841.35, \$10,425.00,
36 \$16,902.14 and \$46,946.34). In addition, Respondents placed the Complainant in a
37 competitive disadvantage in the marketplace and further prejudiced and damaged
38 Complainant in the sum of at least \$350,000.00 or in an amount to be determined after
39 further disclosures and discovery. Damages are continuing into the future.

1 VII. Wherefore Complainant prays that Respondents be required to answer the
2 charges herein; that the Complainant and Respondents have not engaged in informal
3 dispute resolution and should be directed to consider informal resolution of the dispute
4 and claims; that if informal dispute resolution is not possible or is unsuccessful, after
5 due hearing in Washington, D.C, an order be made commanding said Respondents: to
6 cease and desist from the aforesaid violations of said acts; to establish and put in force
7 such practices as the Commission determines to be lawful and reasonable; to pay to
8 said Complainant by way of reparations and damages for the unlawful conduct
9 hereinabove described the sum of at least \$682,114.83, with interest and attorney's fees
10 or such other sum as the Commission may determine to be proper as an award of
11 reparations and damages; to assess a civil penalty or penalties as authorized under 46
12 U.S.C. § 41107(a) for each violation, and to enter such other and further order or orders
13 as the Commission determines to be just and proper in the premises.

14 Dated at Homer, Alaska, this 26th day of April, 2012.

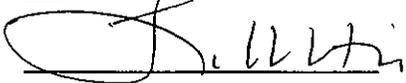
15 
16 Kevin Hogan
17 President
18 The Auction Block Company
19 4501 Ice Dock Road
20 Homer, Alaska 99603
21 _____

22 Verification

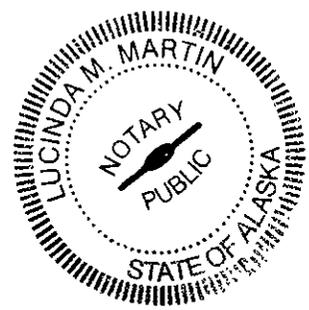
23 State of Alaska)
24 Third Judicial District) ss

25 Kevin Hogan being first duly sworn on oath deposes and says that he is the President of
26 the Complainant, a corporation organized under the laws of the State of Alaska, and is
27 the person who signed the foregoing Complaint on behalf of the Complainant; that he
28 has read the Complaint and that the facts stated therein, upon information received from
29 others, affiant believes to be true.

30 Subscribed and sworn to before me, a notary public in and for the State of Alaska, this
31 26th day of April, 2012.

32 
33 Notary Public in and for the State of Alaska

34 My Commission expires: 3-27-14



1 **FEDERAL MARITIME COMMISSION**

2 _____
3 **DOCKET NO. 12-03**
4 _____

5 **THE AUCTION BLOCK COMPANY, an ALASKA CORPORATION**

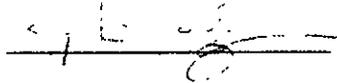
6 v.

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

8 _____
9 **Certificate of Service**
10 _____
11 _____

12
13 I hereby certify that I have this day served a copy of the Amended Complaint and
14 Motion And Memorandum To Amend upon Thomas F. Klinkner Birch Horton Bittner &
15 Cherot 1127 West 7th Avenue Anchorage, Alaska 99501 by sending a copy by e-mail
16 attachment to tklinkner@bhb.com. and a copy to the City Clerk, City of Homer, 491 E
17 Pioneer Ave Homer AK. 99603

18
19
20 Dated at Homer, Alaska, this 1 day of May, 2012.

21 

22 Kevin Hogan

23 For Complainant