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U.S. DEPARTMENT OF JUSTICE
FEDERAL MARITIME COMMISSION

FEDERAL MARITIME COMMISSION

DOCKET NO. 12-03

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

v.

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

COMPLAINANTS' MOTION FOR ENTRY OF SUMMARY JUDGMENT

Come now the Complainants The Auction Block Company and Harbor Leasing, LLC ("Complainants") and file this Motion For Entry Of Summary Judgment supported by the Memorandum For Entry Of Summary Judgment and the exhibits, affidavits, documents and evidence noted below.

Complainants move for entry of summary judgment based on the absence of any genuine issues of material fact and Complainants' entitlement to judgment as a matter of law.

Relief is sought based on the factual and legal contentions in Complainants Fourth Amended Complaint¹ at Docket 20; the admissions in Respondents Fourth

¹ At the time of filing this Motion, the Court had not ruled on the Joint Motion And Memorandum To Amend Complaint And Allow For Answer at Docket 20. Thus, the operative complaint is perforce the Third Amended Complaint. In anticipation of the Court granting the Joint Motion, Complainants refer to the contentions in the Fourth Amended Complaint. This Memorandum can be amended to refer to the contentions in the Third Amended Complaint. The factual basis of the five complaints has not changed since April 10 except for 1) the addition of Harbor Leasing, LLC as a party and 2) a historical review of the City's passage of resolutions and ordinances prior to the

1 Amended Answer at Docket 21; Complainants RESPONSE and Exhibits A – I at Docket
2 26; Complainants' Discovery Responses To City Of Homer's Amended First Discovery
3 Requests To Complainants at Exh. B; Complainants' Initial Civil Rule 26(a)(1)
4 Disclosures at Exh. J; Respondents' Initial Civil Rule 26(a)(1) Disclosures at Exh. K; two
5 pages from Respondents' Discovery Responses at Exh. L; the statements and
6 admissions of Respondents' City Manager, Mr. Walt Wrede, at Exh. M; the Affidavit of
7 Ms. Shelly Erickson at Exh. N; the Affidavit of Mr. Don Martin McGee at Exh. O; the
8 Affidavit of Mr. Kevin Hogan at Docket 26 and Exh. P; the Supplemental Affidavit of Mr.
9 Kevin Hogan at Exh. Q; a true and correct copy of the "The Auction Block Company
10 Lost Profit Report April 2009 – August, 2012" at Exh. R; a true and correct copy of the
11 "Pacific Fishing: The Business Magazine For Fishermen" article titled "Kevin Hogan:
12 Changing The Halibut Industry" dated May, 1999 at Exh. S; a true and correct copy of
13 the GRAYSTAR Pacific Seafood, Ltd. information brochure provided by the Company
14 describing the Company's skills and services at Exh. T; the Affidavit of Ms. Jessica
15 Yeoman at Exh. U; the Affidavit of Steven J. Shamburek; and other authority.

16 DATED this 18th day of October, 2012.

17 LAW OFFICE OF STEVEN J. SHAMBUREK
18 Attorney for Complainants

19
20
21 By: 
22 Steven J. Shamburek
23 ABA No. 8606063
24 425 G Street, Suite 610
25 Anchorage, Alaska 99501

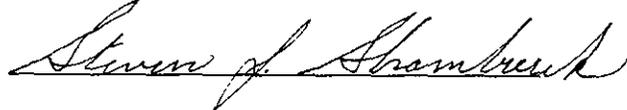
adoption of the Tariffs. Some references to the prior complaints are noted to show that the same basic facts have been advanced from the filing of the initial Complaint on April 10 until today.

1 Telephone: (907) 522-5339
2 shamburek@gci.net
3 shambureklaw@gci.net
4 shamburekbank@gci.net
5

6 **CERTIFICATE OF SERVICE**

7 I hereby certify that I have this day served a copy of the COMPLAINANTS' MOTION
8 FOR ENTRY OF SUMMARY JUDGMENT, COMPLAINANTS' MEMORANDUM FOR
9 ENTRY OF SUMMARY JUDGMENT and Exhibits J – U, and Affidavit of Steven J.
10 Shamburek upon Thomas F. Klinkner, Birch Horton Bittner & Cherot, 1127 West 7th
11 Avenue Anchorage, Alaska 99501 by sending a copy by U.S. Mail and by e-mail
12 attachment to tklinkner@bhb.com and also a copy by e-mail attachment to Holly C.
13 Wells at hwells@bhb.com.

14 Dated this 18th day of October, 2012.

15 

16 Steven J. Shamburek

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FEDERAL MARITIME COMMISSION

DOCKET NO. 12-03

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

v.

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

COMPLAINANTS' MEMORANDUM FOR ENTRY OF SUMMARY JUDGMENT

Introduction

Come now the Complainants *The Auction Block Company and Harbor Leasing, LLC* ("Complainants") and file this Memorandum For Entry Of Summary Judgment. The relief is brought pursuant to the Shipping Act of 1984 as amended by the Ocean Shipping Reform Act of 1998 ("Shipping Act of 1984 as amended").

Discussion

The goal is unquestioned – a shore-based fish processing plant in Homer; the benchmark is uncontested – build and operate a shore-based fish processing plant in Homer; and the incentive and reward are undisputed - relief from crane use and wharfage fees for the owner and operator of the shore-based fish processing plant.

This Memorandum incorporates the discussion of Complainants' business activities set forth in Complainants' RESPONSE TO MOTION FOR PARTIAL

1 SUMMARY JUDGMENT REGARDING STATUTE OF LIMITATIONS ("RESPONSE") at
2 Docket 26.

3 **Respondents Admit That Complainants' Contentions Are True**

4 Subpart E of the Federal Maritime Commission Rules addresses "Proceedings;
5 Pleadings; Motions, Replies" and includes the requirements for complaints, answers
6 and amendments to pleadings. Detailed and verified complaints, answers and
7 amendments to pleadings are at the core of the process.

8 Commission Rule § 502.62(a) "Complaints and fee" states the contents of a
9 complaint and requires verification of the contentions. Complainants conscientiously
10 and diligently detail the factual information and cite the specific statutory violations
11 required by Commission Rules in Complainants' verified complaints.¹ Complainants'
12 five complaints set forth the statutory violations supported by the available disclosures
13 and discovery at the time. Each complaint is properly verified under oath as required by
14 Commission Rule § 502.62(a).²

¹ At the time of filing this Motion, the Court had not ruled on the Joint Motion And Memorandum To Amend Complaint And Allow For Answer at Docket 20. Thus, the operative complaint is perforce the Third Amended Complaint. In anticipation of the Court granting the Joint Motion, Complainants refer to the contentions in the Fourth Amended Complaint. This Memorandum can be amended to refer to the contentions in the Third Amended Complaint. The factual basis of the five complaints has not changed since April 10 except for 1) the addition of Harbor Leasing, LLC as a party and 2) a historical review of the City's passage of resolutions and ordinances prior to the adoption of the Tariffs. Some references to the prior complaints are noted in this discussion to show that the same basic facts have been advanced from the filing of the initial Complaint on April 10 until today.

² Dockets 1, 6, 10, 16 and 26. Each complaint repeated the specific and detailed fundamental facts and damages stated on April 10 with a few amendments and primarily added and then dropped statutory violations. Stated baldly, the initial Complaint brought claims pursuant to 46 U.S.C. §§ 41106(2) and (3); the Amended Complaint added claims pursuant to 46 U.S.C. §§ 41102(b), 41102(b)[(c)] and

1 Commission Rule § 502.64(a) "Answer to complaint; counter-complaint"
2 establishes the requirements for an answer and states in pertinent part:

3 Recitals of material and relevant facts in a complaint, amended complaint,
4 or bill of particulars, unless specifically denied in the answer thereto, shall
5 be deemed admitted as true, but if request is seasonably made, a
6 competent witness shall be made available for cross-examination on such
7 evidence. An answer to the complaint must be verified."

8
9 (Emphasis added). The Rule uses the mandatory verbs "shall" and "must" rather than
10 the discretionary verbs "may" or "could" to note that the requirements are mandatory not
11 discretionary.³

12 "Shall" means shall. In Service Employees Intern. Union v. U.S., 598 F.3d 1110,
13 1113 (9th Cir. 2010), the Ninth Circuit, relying on United States Supreme Court
14 decisions, states: "'There shall be paid \$X' is language commanding a statutorily
15 required amount. This language does not confer on the agency discretion to decide how
16 much ought to be paid. 'The word 'shall' is ordinarily 'The language of command.'"
17 (citing Anderson v. Yungkau, 329 U.S. 482, 485 . . . (1947) (quoting Escoe v. Zerbst,

41106(3); the Second Amended Complaint added claims pursuant to 46 U.S.C. § 41102(c), 41106(1) and 41302(a), added Harbor Leasing, LLC as a Complainant and added some early resolutions and ordinances; the Third Amended Complaint added claims pursuant to 46 U.S.C. § 41305(b) and (c); and the Fourth Amended Complaint dropped three statutory violations, 46 U.S.C. §§ 41102(b), 41106(1) and 41305(c), because they were a challenge to prove and also because the time allowed for discovery was more prudently and efficiently devoted to the development of the other statutory violations. All five complaints were verified as required by Commission Rule § 502.62(a).

³ The interpretation of verbs in federal laws and rules is consistent with the settled interpretation in Alaska. In Fowler v. City of Anchorage, 583 P.2d 817, 820 (Alaska 1978), the Alaska Supreme Court states: "Unless the context otherwise indicates, the use of the word 'shall' denotes a mandatory intent." (Footnote omitted). The interpretation of the word "shall" in the Homer City Code also expresses a mandatory intent.

1 295 U.S. 490, 493 . . . (1935)); see also Lopez v. Davis, 531 U.S. 230, 241 . . . (2001)
2 (“Congress used ‘shall’ to impose discretionless obligations”); Lexecon Inc. v. Milberg
3 Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 . . . (1998) (“[T]he mandatory ‘shall,’ . . .
4 . normally creates an obligation impervious to judicial discretion.”.) Everyone benefits
5 when a rule or statute is clear on its face.

6 Not one of the Respondents’ five Answers⁴ “specifically denie[s]” the “[r]ecitals of
7 material and relevant facts in a complaint [or] amended complaint” in their five Answers
8 as required by Commission Rule § 502.64(a). In addition, not one of the Respondents’
9 five Answers is verified as required by Commission Rule § 502.64(a). The heading of
10 Commission Rule § 502.64(a) is clear.

11 In Capitol Transportation, Inc. v. Federal Maritime Commission, 612 F.2d 1312
12 (1st Cir. 1979), the Circuit Court states: “Capitol never filed an answer denying this
13 status even though under the Commission’s rules material facts not denied are deemed
14 admitted. 46 C.F.R. § 502.54 (1978).” No other case seems to address the Rule that is
15 clear on its face. Both the requirements and the import of failure to meet the
16 requirements are manifest and logical.

17 Commission Rule § 502.70(c) “Amendments or supplements to pleadings”
18 states:

19 Whenever by the rules in the part a pleading is required to be verified, the
20 amendment or supplement **shall also be verified.**

21 (Emphasis added). The Rule uses the mandatory verb “shall” rather than the
22 discretionary verbs “may” or “could” to note that the requirement is mandatory not
23 discretionary. The Rule is clear on its face and consistent with the verification

⁴ Dockets 8, 13, 17, 19 and 21.

1 requirements in Commission Rules §§ 502.62(a) and 502.64(a). The heading of
2 Commission Rule § 502.70(a) is clear.

3 In the UNOPPOSED MOTION AND MEMORANDUM TO AMEND COMPLAINT
4 AND ALLOW FOR ANSWER at Docket 15 at page 1, the Respondents sought to
5 include and the Parties included the following language in the UNOPPOSED MOTION:

6 Complainants and Respondents agree that Respondents have the
7 right to file their amended answer addressing the new and/or expanded
8 allegations within 30 days pursuant to Commission Rules 502.64 and
9 502.70.

10
11 (Emphasis added). The Answer filed by the Respondents did not comply with the very
12 Rules cited by the Respondents.

13 In the JOINT MOTION AND MEMORANDUM TO AMEND COMPLAINT AND
14 ALLOW FOR ANSWER at Docket 20 at page 1, the Respondents sought to include and
15 the Parties included the following language in the JOINT MOTION:

16 Complainants and Respondents agree that Respondents have the
17 right to file their amended answer addressing the new and/or expanded
18 allegations within 30 days pursuant to Commission Rules 502.64 and
19 502.70.

20 (Emphasis added). The Answer filed by the Respondents did not comply with the very
21 Rules cited by the Respondents.

22 Respondents specifically required that this language be included in these two
23 pleadings filed with the Federal Maritime Commission to recognize the Respondents'
24 right to file their answer pursuant to Commission Rule § 502.64 and their amended
25 answers pursuant to Commission Rule § 502.70. However, Respondents did not
26 comply with the very Rules they expressly stated they reserved the right to follow.

1 This Court reminded the Parties to comply with the procedure and deadlines in
2 the Scheduling Order dated May 31, 2012 at Docket 11 at page 2. “The parties are
3 reminded that a ‘scheduling order “is not a frivolous piece of paper, idly entered which
4 can be cavalierly disregarded by counsel without peril.’” (Citations omitted).

5 The Court reminded the Parties to comply with the procedure and deadlines in
6 the Order dated August 9, 2012 at Docket 18. The Court states at page 1 at paragraph
7 3 in pertinent part: “However, the answer to the third amended complaint refers to the
8 second amended complaint. Respondents will be required to file a corrected answer to
9 the third amended complaint.” The Court kindly reminded Respondents of the need to
10 file a conforming answer and afforded the Respondents an opportunity and fourteen
11 days to file a conforming answer. However, Respondents did not comply with the very
12 Rules they expressly stated they reserved the right to follow. In addition, the Court
13 notes at page 2 at paragraph 3 in its concluding paragraph in pertinent part: “The
14 parties were previously advised that ‘[p]arties cannot control an agency’s docket or
15 procedures through agreement among themselves.’” (Citation omitted).

16 Respondents did not specifically deny the specific allegations in Paragraphs I
17 and II and III and IV and V of the Fourth Amended Complaint. Respondents baldly
18 denied the allegations in Paragraphs VI and VII and VIII of the Fourth Amended
19 Complaint but did not make any effort to specifically deny the specific allegations. The
20 specific material allegations of liability and damages in the Fourth Amended Complaint
21 are admitted by Respondents by operation of law.

22 From the filing of the initial Complaint on April 10, 2012 until the close of
23 discovery on October 9, 2012, Respondents have filed answers that do not specifically

1 respond to each carefully crafted contention. In addition, not one of Respondents'
2 Answers is verified. Respondents admit the truth of each of the specific contentions in
3 the Complaints.

4 Even untimely verification is unavailing at this time because the statements in the
5 Fourth Amended Answer cannot be verified without committing and also without
6 suborning perjury. Complainants specifically state the costs billed by the Respondents
7 to the Complainants and paid by the Complainants to the Respondents in their
8 Complaints. The Answers incorrectly state: "Respondents lack knowledge or
9 information from which to form a belief as to the accuracy of the costs incurred by
10 Complainants as alleged in Paragraph V, and therefore deny the same." Respondents
11 do not lack knowledge. Respondents do not lack information. Respondents sent the
12 bills to Complainants. Respondents possess knowledge. Respondents possess
13 information. All of the costs set forth in the Complaints were the costs billed by the
14 Respondents to and paid by the Complainants. Respondents do not lack knowledge or
15 information from which to form a belief as to the accuracy of the costs incurred by
16 Complainants as alleged in Paragraph V.

17 Respondents cannot mitigate by verifying the Answer because the statements in
18 the Answer are neither true nor correct. Respondents were prudent not to verify the
19 Answers because the general sweeping denials are not accurate. The discrete damage
20 claims sought by the Complainants are the amounts actually billed by Respondents and
21 paid by Complainants. Complainants' damages, except for the damages for the year
22 2012 and the precise amount of lost profits, are admitted as true by Respondents. With
23 regard to the specific damages suffered by Complainants for the year 2012,

1 Complainants use the same source of information – the bills sent by Respondents to
2 Complainants – that are admitted by Respondents for the earlier years.

3 **Respondents Admit That Complainants Are Entitled To Reparations**

4 Complainants assert and Respondents admit that the complaint was timely filed
5 and that Complainants are entitled to reparations. Paragraph 10 in COMPLAINANTS'
6 STATEMENT OF UNDISPUTED MATERIAL FACTS states:

7 Complainants allege that the matters complained of will continue in
8 the future and will constitute violations of the Shipping Act of 1984, as
9 amended, in the particulars and to the extent indicated and Complainants
10 pray for reparations and damages for injuries which are and will be
11 sustained as a result of these continuing violations.
12

13 Respondents admit the contentions in paragraphs 11, 29, 35, 47, 63, 74, 83, 88, 93, 98,
14 101, 107 and 117 in COMPLAINANTS' STATEMENT OF UNDISPUTED MATERIAL
15 FACTS that establish Complainants entitlement to reparations. Complainants develop
16 the legal argument in Complainants' RESPONSE at Docket 26.

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

18 Commission Rule § 502.64(a) does not require a finding or even a showing of
19 prejudice. Commission Rule § 502.70(c) does not require a finding or even a showing
20 of prejudice. Complainants rely on the admissions and would be prejudiced if
21 Respondents were allowed to withdraw their admissions after the close of discovery.

22 Complainants relied on Respondents' admission that each of the specific facts is
23 admitted as true by Respondents. Complainants note the names and addresses of two
24 experts – a fisheries industry expert and a certified public accountant – in Complainants'
25 INITIAL CIVIL RULE 26(a)(1) DISCLOSURES at Exh. J at page 2. Complainants list
26 the following two experts:

1 Stephen T. (Steve) Grabacki, FP-C (Privilege asserted)
2 President, and Certified Fisheries Professional
3 GRAYSTAR Pacific Seafood, Ltd.
4 P.O. Box 100506
5 Anchorage, Alaska 99510-0506
6 (907) 272-5600
7 Possible expert witness for Complainants

8
9 Joe Moore CPA (Accountant-client privilege)
10 Altman Rogers & Co.
11 44539 Sterling Hwy
12 Soldotna, AK 99669
13 (907) 262-7478
14 Knowledge of Complainants' financials and industry economics

15
16 Exh. J at page 2; Supplemental Affidavit of Kevin Hogan at Exh. Q at pages 1 – 2 at
17 paragraph 4. Complainants also considered but did not disclosure the following expert
18 when the need for expert testimony was mooted by Respondents' admissions:

19 Barbara Carper, CPA (Accountant-client privilege)
20 Profit Soup
21 356 Upland Drive
22 Tukwila, WA 98188-3801
23 (206) 282-3888
24 She oversaw financial and systems review and business consulting for
25 Complainants.
26 Possible expert witness for Complainants

27
28 Supplemental Affidavit of Kevin Hogan at Exh. Q at page 2 at lines 3 - 5. Complainants
29 did not go forward and engage experts to prepare written opinions on Complainants'
30 and Icicle Seafoods' involvement and participation in the fishing industry; how, why and
31 where they compete for commercially caught seafood; the economics of the commercial

1 fishing industry; the price elasticity of commercial fishers for their product;
2 Complainants' lost profits; and related issues.⁵

3 Respondents did not list any possible experts in their Initial Disclosures marked
4 as Exh. K. Respondents did not subsequently disclose any experts.

5 Although neither of the two Commission Rules requires a finding of prejudice,
6 Complainants have been and are prejudiced by the refusal to answer the Fourth
7 Amended Complaint specifically and to verify the answer under oath. Complainants
8 note that there are over four thousand seven hundred and eighty eight (4788)
9 documents produced by Respondents to review. Reviewing the documents requires a
10 complete commitment of time to the endeavor. Complainants focused on reviewing
11 these documents and preparing their case.

12 Complainants calculated their damages in the Fourth Amended Complaint and
13 earlier complaints using the many bills and invoices sent to them by Respondents.
14 Some of the bills may have been lost or misplaced. If Respondents had any cavil with
15 Complainants' damage figures, Respondents should have raised a concern by
16 challenging the specific averments in the Complaints. Discovery concluded on October
17 9, 2012. No time remains to seek discovery of these amounts and claims admitted as
18 true by Respondents. In addition, Complainants relied on Respondents' admissions
19 that the allegations in the Fourth Amended Complaint are true in preparing "The Auction
20 Block Company Lost Profit Report April 2009 – August, 2012" at Exh. R.

⁵ The overview of GRAYSTAR Pacific Seafood, Ltd.'s professional services is discussed at Exh. T. The website of Altman Rogers & Co. is at <http://www.al:rogco.com/> and for Profit Soup is at <http://www.profitsoup.com/about.php>.

1 In summary, Respondents admit the specific factual and legal contentions in
2 Complainants' Fourth Amended Complaint at Docket 20 at page 1 at line 12 – page 8 at
3 line 9 by operation of law. The Fourth Amended Complaint states the factual basis and
4 legal arguments necessary for this Court to enter summary judgment. Respondents'
5 decision not to contest the averments in the Fourth Amended Complaints and the earlier
6 complaints is grounded in Respondents' recognition and admission that the averments
7 are true.

8 **Respondents Independently Admit And Concede That Complainants'**

9 **Fundamental Contentions Are True**

10 Mr. Walt Wrede is the City Manager for the Respondents. Mr. Wrede is the
11 individual who verified Respondents' discovery responses to Complainants' discovery
12 requests.⁶ Exh. L. Mr. Wrede stated in an interview on April 26, 2012, two weeks and
13 two days after the initial Complaint was filed by Complainants with the Federal Maritime
14 Commission, as follows:

15 AARON SELBIG: When former Homer Council Member Kevin
16 Hogan abruptly resigned his position at the March 12 council meeting, he
17 said he was doing so because he was planning a lawsuit against the City.
18

19 At the time, Hogan was mum on what the nature of that lawsuit
20 might be. But now, thanks to documents filed with the Federal Maritime
21 Commission, now we know. Hogan has filed a complaint with the
22 Commission on behalf of his company, The Auction Block, against the City
23 of Homer alleging unfair business practices at the Homer Harbor.
24

25 According to legal documents filed April 10th, Hogan's basic
26 allegation is that the City gives preferential treatment in the form of, quote,
27 relief and incentives, to Icicle Seafoods, one of The Auction Block's main
28 competitors in the fish buying business.
29

⁶ Respondents' Fourth Amended Answer at Docket 21 at page 2 at line 5 admits
"that the City Manager is Walt Wrede."

1 MR. WREDE: Yeah, the basic facts there are true.

2
3 AARON SELBIG: That's Homer City Manager Walt Wrede, who
4 does not dispute Hogan's basic assertion that Icicle Seafoods has, for
5 years, enjoyed a special deal with the City of Homer. It's a deal that
6 Wrede says began with a long-term contract back in 1976 when Icicle first
7 built its processing plant at the Homer Harbor.

8
9 MR. WREDE: The bottom line is the Council wanted to provide
10 incentives for -- for Icicle to come and build and operate the plant because
11 of the jobs and revenue. That's a typical thing. I mean, even today you
12 hear talk about providing incentives for business to come here. So the
13 Council did that. And they have a break on their crane use and their
14 wharfage, and that was a contractual agreement through the lease.

15
16 AARON SELBIG: Hogan says in his complaint that the breaks
17 given to Icicle Seafoods by the City constitute a, quote, unreasonable or
18 preferential advantage and are a violation of the Federal Shipping Act of
19 1984. He is seeking damages in the amount of \$682,114.

20
21 Reached Tuesday afternoon, Hogan said he could not say much
22 about the case until he had talked further with his attorney. He promised
23 an interview with KBBI News in the coming days saying there is, quote,
24 more to come in the case.

25
26 Wrede says he has heard Hogan talk about this issue before,
27 including once publically during a Homer City Council meeting last fall.

28
29 MR. WREDE: And the city attorney was in the room. And Kevin
30 said is it legal, is it right to have one group of people at the fish dock
31 paying this tariff or being subject to these fees and others not? And the
32 attorney's off-the-cuff response at the time was yes, if you have -- you
33 know, the tariff is like a menu at a restaurant. These are our prices.
34 These are the fees if you want to do business with the Homer Harbor.

35
36 But, basically, if you have a long-term client there, somebody you
37 have a working relationship with and they have a presence, you can have
38 a contractual agreement with them that includes different fees.

39
40 AARON SELBIG: Wrede says Icicle Seafoods still has the same
41 deal, even though its Homer processing plant burnt down in 1988 and was
42 never rebuilt. The long-term contract was reexamined four years ago says
43 Wrede, and the City considered changes to it at that time.

44
45 MR. WREDE: They looked at it, their attorneys looked at it, our
46 attorneys looked at it, and we decided that, you know, those -- that

1 needed to remain in place. That it couldn't be -- couldn't -- or shouldn't be
2 changed.

3
4 AARON SELBIG: The Federal Maritime Commission is a
5 Washington, D.C. based, independent agency that has regulatory power
6 over international shipping, cruise lines, and marine terminals, among
7 other things. According to the agency's website, FMC.gov, the
8 Commission also helps to resolve disputes between parties regarding
9 rates and charges governed under the Shipping Act of 1984.

10
11 Complaints are first received by one of the Commission's
12 Administrative Law Judges, who have wide leeway as to what they may
13 do with any particular case. An Administrative Law Judge could, for
14 instance, request evidence and witness testimony or even subpoena a
15 witness or hold a hearing, much as a court would.

16
17 The judge will ultimately make a ruling in the case, whether that is a
18 settlement of some kind or a ruling in favor of one party or another.
19 Parties involved in the case then have the right to appeal that decision to
20 the five-member Commission itself.

21
22 AARON SELBIG: Walt Wrede says that to his knowledge no other
23 fish buyer operating at the Homer Harbor has complained about the deal
24 Icicle Seafoods enjoys. He says Icicle is still an important economic driver
25 in Homer.

26
27 MR. WREDE: They buy fish here. Sometimes they supply ice and
28 -- and -- and do other things, so . . . Last year they brought a floating
29 processor here that tied up at the deepwater dock for much of the
30 summer, and that generated a lot of revenue for the -- for the -- for the City
31 and for the Enterprise Fund. So it's still -- even though they don't have a
32 shore-based processing plant, they still bring a lot of value to the
33 community.

34
35 AARON SELBIG: The City of Homer has 30 days to reply to
36 Hogan's complaint. Wrede says the city attorney, Thomas Klinkner, is
37 putting that response together now.

38 In Homer, I'm Aaron Selbig.

1 Transcription of April 26, 2012 KBBI Radio News Broadcast at Exh. M (Emphasis
2 added).⁷ This radio broadcast is listed in Complainants' INITIAL CIVIL RULE 26(a)(1)
3 DISCLOSURES at Exh. J at page 6 at line 7. Because Respondents through Mr.
4 Wrede affirm Complainants' fundamental contentions and further agree that the facts
5 ("Yeah, the basic facts there are true.") are admitted, Complainants opted not to depose
6 Mr. Wrede.

7 Mr. Wrede states and admits that the Icicle plant was the reason for the
8 incentives given to Icicle; that the Icicle plant burned down in 1998; that the Icicle plant
9 was never rebuilt; that Icicle still gets a break on their crane use and their wharfage; that
10 Icicle's floating vessel was moored at the City Deep Water Dock (not the Fish Dock);
11 that former City Council Member Mr. Hogan questioned the favorable treatment of Icicle
12 while he was a Council Member on the Homer City Council; that the City does not feel

⁷ The original transcription authenticated by the court reporter is marked at Exh. M. The sealed original document is filed with this pleading with the Court. The "Certificate" states in pertinent part:

I, Patta K. Johnson, Shorthand Reporter for the States of Oregon and Alaska, certify that the foregoing transcript is a true and correct transcription of the April 26, 2012 radio broadcast of Aaron Selbig interviewing Walt Wrede available on the website of radio station KBBI at www.kbbi.org.

I further certify that I am neither attorney or counsel for, nor related to or employed by any of the parties to the action; and furthermore, that I am not a relative or employee or any attorney or counsel employed by the parties hereto or financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal at West Linn, Oregon on this 23th day of September 2012.

Mr. Wrede's statements and admissions are available on the KBBI website and are transcribed by an independent court reporter.

1 bound to honor the rates established in the Tariffs if it opts to offer fees that depart from
2 the Tariffs; that the City's position is supported and advanced by the City Attorney; and
3 that there is a valid lease between Icicle and the City. Mr. Wrede's statement that no
4 other fish buyer operating at the Homer Harbor has complained about the deal enjoyed
5 by Icicle was related by the interviewer in the interview and may not be admissible.

6 **Respondents' Former Chair And Committee Member Shelly Erickson Describes**

7 **Respondents' Improper Treatment Of Lease Applicants**

8 Ms. Shelly Erickson, a past chair of the Homer Economic Development
9 Commission (EDC) and the Homer Lease Committee from 2008 until 2011, states in her
10 affidavit:

11 1. I, Shelly Erickson, being duly sworn, hereby depose and state as follows:

12 2. I was the chair of the Homer Economic Development Commission (EDC) and the Homer
13 Lease Committee from 2008 until 2011.

14 3. While on the EDC and the Lease Committee, we tried to revise the Lease Policies
15 because of the following:

16 4. Inequity between lease holders.

17 5. The City Manager negotiates all leases and is accountable to no one.

18 6. There needed to be a mediator between the lessee and the City staff.

19 7. Tried to get industry standards as the measure of requirements for a lessee.

20 8. Tried to make it where the lease would benefit the lessee as much as the lessor which at
21 this point, all of the leases are in favor of the City, with the lessee having no recourse if the City
22 did not like your business practice or personally the leaseholder.

23 9. There are any number of, in my opinion, nonessential ways of doing business that could
24 bump you out of your lease at the whim of the City.

25 10. There is a fear of retaliation from the City with all the lease holders that I have talked to.

1 11. The retaliation they feel would come from the City Staff and the City Manager.

2 12. While this is not all the work we tried to do, it was the focal point in trying to make
3 Homer a fair and equitable place to do business.

4 13. I need to state for the record, this is not the first time the EDC has tried to deal with
5 these issues.

6 14. The EDC fell apart early in 2000ish due to trying to fix the lease issues and the Council
7 rejected their work, just as they did with us after we presented our work and findings to them.

8 15. We on the EDC believed that an impartial attorney should have reviewed our proposed
9 changes to have a fair and balanced opinion on these issues.

10 16. The Council did not do that, but relied on the City Manager and City Attorney's opinion
11 of the issues over the concerns of the EDC.

12

13 Exh. N.⁸ Respondents' mistreatment of and prejudice against Complainants and other
14 lessees and prospective lessees is not an isolated or short-term problem. Ms. Erickson
15 is courageous enough to come forward and share testimony that others are fearful of
16 providing in writing.

17 **A Former Major Tenant Of Respondents Describes Respondents' Improper**

18 **Treatment Of Lessees**

19 Complainants discuss Mr. Don McGee's difficulties as a lessee dealing with the
20 City in their Response to Interrogatory No. 11 discussed above.⁹ In his affidavit, Mr.
21 Don Martin McGee states:

⁸ Ms. Erickson is listed in Complainants' INITIAL CIVIL RULE 26(a)(1) DISCLOSURES at Exh. J at page 3 at lines 33 – 40. Ms. Erickson is not listed in Respondents' Disclosures at Exh. K or in any subsequent disclosures. Exhibits J, K and L are authenticated in the Affidavit of Steven J. Shamburek.

⁹ The discussion above references the discussion in the Claimants' Response at Docket 26 at page 17 at lines 20 – page 18 at line 4.

- 1 1. The terms and conditions of the lease agreement were negotiated by Mr. Manley
2 with the City of Homer.
- 3 2. I was the holder of land leases from the City of Homer located near the fish dock
4 on the Homer Spit. The leases were assigned to me from Jim Manley.
- 5 3. Mr. Manley was a long-time resident and business owner in Homer.
- 6 4. My business and residence is Anchorage Alaska.
- 7 5. Four buildings were located on the property and I purchased those buildings from
8 Mr. Manley at the time the lease was assigned to me.
- 9 6. Consistent with the plans of the City of Homer, the buildings were utilized in
10 support of industrial and commercial business associated with the harbor and in support
11 of the fishing industry.
- 12 7. As the landlord, I worked closely with a series of commercial tenants and
13 maintained and modified the property in support of the fishing industry.
- 14 8. At any given time from five to seven businesses associated with fishing utilized
15 the property I managed at this location.
- 16 9. I was told by my tenants that over 80% of the commercial seafood passing
17 across the dock at Homer was associated with the businesses located on the property I
18 managed and leased from the City of Homer.
- 19 10. The sea food industry went through significant change during my time as a lease
20 holder.
- 21 11. The halibut market moved from a catch limit and derby system to a year round
22 system with individual fish quotas owned by fishermen.
- 23 12. I worked closely with the tenants on my lease to accommodate and develop
24 facilities to support the new system.
- 25 13. I also worked with tenants to develop a fresh fish market in the Rocky Mountain
26 States.
- 27 14. I believe that the City of Homer was not fair and equitable in the treatment of all
28 lease holders associated with the fishing industry.

1 15. Despite my efforts to develop new facilities and markets for fish products, the
2 City refused to extend my lease (as needed to finance new buildings) and refused to
3 assign a portion of my lease to a well-qualified company in the fresh fish business.

4 16. Although my lease was in good standing and was accomplishing all of the
5 targeted goals of the City regarding land use, the City refused to renew, extend or
6 assign leases associated with my property.

7 17. I understand that the City negotiated new land lease agreements with other
8 seafood related businesses and extended or renewed other lease agreements at the
9 same time they had refused to negotiate with me or my tenants.

10 18. I observed that none of these other land leases had facilities constructed on them
11 which were substantially different that the facilities existing or proposed for my lease
12 lots.

13 19. After refusing to renew my lease agreement, the City of Homer demolished all
14 remaining structures on my lease lots and these facilities have not been replaced.

15 Exh. O (Emphasis added).¹⁰ Respondents' mistreatment of and prejudice against
16 Complainants and other lessees and prospective lessees is not an isolated or short-
17 term problem. Mr. McGee is courageous enough to come forward and share testimony
18 that others are fearful of providing in writing.¹¹

19 **Complainants Set Forth The Damages For The Year 2012**

20 **And Fine Tune The Claim For Lost Profits**

21 Complainants' inability to compete on an equal basis with Icicle damages has
22 and is damaging their ability to compete for the purchase of commercially caught fish.
23 The higher rates in the Tariffs charged by Respondents to Complainants and the lower
24 rates in the Expired Icicle Lease charged or waived by Respondents to Icicle directly

¹⁰ Mr. McGee is listed in Complainants' INITIAL CIVIL RULE 26(a)(1) DISCLOSURES at Exh. J at page 4.

¹¹ Others who are not willing to put anything in writing may be willing to speak to the Bureau of Enforcement of the Federal Maritime Commission.

1 and significantly impact the overhead and operating costs of each entity. The disparate
2 treatment directly and significantly impacts the prices that each entity can offer to
3 commercial fishers for their fish. Commercial fishers are extremely sensitive to price.
4 Price is the primary and overriding consideration and paramount concern of fishers.
5 Because The Auction Block cannot offer or at times even come close to meeting Icicle's
6 price, The Auction Block losses sales to Icicle.

7 In their Fourth Amended Complaint at Paragraph VII, Complainants state:

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

17 Docket 20 at page 7 at lines 28 - 34 (Emphasis added). "The Auction Block Company
18 Lost Profit Report April 2009 – August, 2012" discusses the Complainants' financial
19 situation and business prospects and concludes that Complainants lost \$912,766.98 as
20 a result of Respondents' violations of the statutory provisions in the Shipping Act of
21 1984 as amended. Exh. R. In the Prayer for Relief, Complainants state in pertinent
22 part:

23 Wherefore Complainants pray that Respondents be required . . . to pay to
24 said Complainants by way of reparations and damages for the unlawful
25 conduct hereinabove described the sum of at least \$1,232,114.83, with
26 interest and attorney's fees or such other sum as the Commission may
27 determine to be proper as an award of reparations and damages;

28 Docket 20 at page 7 at line 35 – page 8 at line 7 (Emphasis added). This total damage
29 figure includes the undisputed sum of \$332,114.83 for the years 2009 to 2011, the sum

1 of \$48,289.70 for 2012, and the lost profits then calculated "in the sum of at least
2 \$900,000.00" and now calculated more precisely at \$912,766.98. The amounts for
3 2012 are established in the Supplemental Affidavit of Kevin Hogan at Exh Q.

4 In the Supplemental Affidavit of Kevin Hogan at Exh. Q, he states:

5 1. I am the President and majority shareholder of The Auction Block Company, an
6 Alaska corporation in good standing.

7 2. I am also the manager and forty-nine percent (49%) owner member of Harbor
8 Leasing, LLC, an Alaska limited liability company in good standing that is the lessee of
9 the Lease with the Respondents and a pass-through entity. My wife, Ms. Bronwyn
10 Kennedy, is a fifty-one percent (51%) owner member.

11 3. I have personal knowledge of the facts stated herein. I am competent to testify to
12 these facts and do so on the basis of personal knowledge and information.

13 4. I engaged Stephen T. (Steve) Grabacki, FP-C, the President of and Certified
14 Fisheries Professional with GRAYSTAR Pacific Seafood, Ltd., as a possible expert
15 witness for Complainants; I engaged Joe Moore, CPA, with Altman Rogers & Co. who
16 has knowledge of Complainants' financials and industry economics as a possible expert
17 witness for Complainants; and I considered engaging Barbara Carper, CPA with Profit
18 Soup who oversaw financial and systems review and business consulting for
19 Complainants as a possible expert witness for Complainants. Because Respondents
20 admitted the detailed and specific factual and legal contentions in their Answers, expert
21 reports were no longer necessary and therefore I did not seek any expert reports.

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

4 6. Exhibit S is a true and correct copy of the "Pacific Fishing: The Business
5 Magazine For Fishermen" (<http://www.pacificfishing.com/>) article titled "Kevin Hogan:
6 Changing The Halibut Industry" dated May, 1999 that describes the successful efforts
7 by me and The Auction Block to develop and grow the halibut industry in Homer.

8 7. Exhibit T is a true and correct copy of the GRAYSTAR Pacific Seafood, Ltd.
9 information brochure provided to me by Mr. Steve Grabacki describing the Company's
10 skills and services.

11 8. There is one fundamental rule in the economics of the Alaska fisheries: The
12 fishers, as they are known today, are extremely sensitive to the price offered for their
13 fish or seafood product. When selling his or her fish or other seafood product, the fisher
14 looks almost exclusively if not exclusively at price. The only other consideration is
15 whether a buyer is able to pay the price. The Auction Block has always paid the price it
16 bid.

17 9. For years as a private citizen and then as a Council Member of the Homer City
18 Council, City Manager Mr. Wrede and City Attorney Mr. Tom Klinkner assured me,
19 wrongly I recently learned, that there is a valid lease between the City and Icicle. Any
20 references in my past conversations to an "Icicle lease" are based on
21 misrepresentations from both of them to me and also to others on the Homer City
22 Council and to the citizens of the City of Homer.

1 10. As the "Pacific Fishing" article discusses, eleven years after the Icicle plant
2 burned in 1988 and was not rebuilt, The Auction Block by 1999 single-handedly
3 transformed Homer into the number-one halibut port in the North Pacific. The article
4 provides an independent discussion of the halibut industry in Homer by a neutral
5 commentator in 1999.

6 11. The Auction Block has expanded its facilities and capabilities since then. I have
7 been involved from the beginning and at every step of the way in the design,
8 construction, installation, modification, testing and operation of the state-of-the-art
9 shore-based fish processing plant ("Plant") in Homer described in the document I
10 assisted in creating marked as Exhibit A.

11 12. I have reviewed the information in the Affidavit of Jessica Yeoman in careful
12 detail and agree that the figures she compiled showing the Plant's current capacity and
13 ability to process fish and other seafood products are true and accurate and reflect my
14 first-hand experience in the Plant on a daily basis since the Plant came on line.

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

21 14. The owners of The Auction Block Company and the members of Harbor Leasing,
22 LLC discussed this case and the finances of the two companies last week and agreed
23 to continue seeking the incentives promised by Respondents to the entity building and

1 operating a shore-based fish processing plant in Homer. The City offered the incentives
2 to Icicle Seafoods now for over eight (8) years gratuitously without requiring Icicle to
3 rebuild or even agree to rebuild a shore-based fish processing plant. Complainants
4 seek an order requiring Respondents to provide the incentives to Complainants for eight
5 (8) years and at the expiration of that time to impose the rates in the applicable Tariff.
6 Icicle Seafoods has no lease with the City and no shore-based fish processing plant and
7 is and should be obligated to conform to the rates in the applicable Tariffs. This
8 reformation of the Complainants' Lease by adding the standard incentives provided to
9 the operator of a shore-based fish processing plant is the most fair and equitable way to
10 create a level playing field at this time.

11 15. Complainants have been billed by Respondents and Complainants have paid to
12 Respondents \$38,099.13 in crane use expenses in 2012. Respondents have damaged
13 Complainants in the sum of at least \$3,475.00 for the differential provided Icicle
14 Seafoods for property rates. The Auction Block has not calculated the crane
15 overcharges for the year 2012. The Auction Block Company handled 2,821,668 pounds
16 of fish in 2012 which results in a differential and damages to The Auction Block
17 Company of \$6,715.57 (wharfage) in 2012.

18 16. Complainants have lost profits of \$912,766.98 at this time as set forth in the
19 analysis in the "The Auction Block Company Lost Profit Report April 2009 – August,
20 2012" at Exhibit R.

21 17. Complainants' total damages are \$332,114.83 (at least \$257,841.35 [Crane
22 Use], \$10,425.00 [Differential Property Fees], \$16,902.14 [Crane Overcharges] and
23 \$46,946.34 [Wharfage]) for 2009 through 2011 and \$48,289.70 (\$38,099.13 [Crane

1 Use], \$3,475 [Differential Property Fees], [No Crane Overcharges are calculated at this
2 time] and \$6,715.57 [Wharfage]) for 2012 and lost profits of \$912,766.98 from April,
3 2009 through August, 2012 for total damages of \$1,293,171.51.

4 18. The Auction Block has provided the following full-time and part-time employment
5 in Homer: Year: Total:

6 2009 114

7 2010 140

8 2011 136

9 2012 120

10 19. If Respondents succeed in putting The Auction Block out of business, our
11 employees will be put out on the street. Respondents' actions and inactions have very
12 real and devastating consequences for Complainants.

13 In the Affidavit of Jessica Yeoman at Exh. U, she states:

14 1. I Jessica Yeoman, being duly sworn, hereby depose and state as follows:

15 2. I have personal knowledge of the facts stated herein. I am competent to testify to
16 these facts and do so on the basis of personal knowledge and information.

17 3. I am a sixteen percent (16%) owner of The Auction Block Company.

18 4. I first began working with The Auction Block in 1998 and managed dock offloads
19 of fish and developed business relationships with commercial fishermen. I learned
20 quickly that the price offered to a commercial fisherman is the primary if not the
21 exclusive factor in her or his decision to sell commercially caught fish to a buyer.

22 5. My responsibilities grew and expanded over the years including assisting in
23 developing the fleet of vessels that delivered their commercially caught fish and seafood
24 to The Auction Block, maintaining the many regulatory documents and filing the reports

1 that are required by federal and state law, assisting in designing and developing The
2 Auction Block processing facility in Homer, and supervising marketing and advertising
3 for The Auction Block.

4 6. I was directly involved on a day to day basis in buying and selling and
5 transporting commercially caught fish and seafood, supervising the dock foreman who
6 supervised the crew on the dock and working on the dock on a daily basis to oversee all
7 the activities.

8 7. I assisted in inputting financial data and maintained the financial books for The
9 Auction Block for years. I managed the leased property for The Auction Block including
10 the property leased by our related company, Harbor Leasing, LLC, to The Auction Block
11 in a pass through lease.

12 8 The Auction Block offers the full range of services for commercial fishermen
13 including purchasing, selling, brokering, offloading, freezing, processing, transporting
14 and arranging for the transportation of commercially caught fish and seafood in the
15 United States and in the international market.

16 9. The Auction Block offers processing services including bled fish, headed and
17 gutted (H & G) fresh and frozen fillets, "skin on" fresh and frozen fillets, skinless fresh
18 and frozen fillets, portion cuts and vacuum packaged fish, fresh roe, fresh milt, fresh
19 and frozen halibut cheeks, fresh and frozen halibut and salmon steaks, bait products,
20 and fresh round fish packaged for shipping and air freight.

21 10 The Auction Block provides offloading services in Homer for its fishermen and
22 also for other entities including our major competitor, Icicle Seafoods, because Icicle
23 does not have the same presence and access to the Homer labor force.

1 11. The Auction Block provides fishing vessel services such as brokering fish, gear
2 storage, bait sales and storage, mail service, meal sales, settlement and banking
3 responsibilities, travel arrangements, and ice sales.

4 12. The Auction Block provides for the sale and delivery of bait and ice to our
5 fishermen. In the last year, the Auction Block has built and put on line an ice
6 manufacturing facility to meet the ice needs for our fishermen.

7 13. The Auction Block has established business relationships with many ultimate
8 purchasers of the product such as restaurants that inform us of their needs which we
9 then can satisfy in a timely manner by working with our fleet of fishing vessels.

10 14. The total quota of halibut available to catch has been reduced in the last few
11 years because of biological concerns for the resource which has forced everyone
12 involved in the industry to sharpen our pencils and examine costs.

13 15. The season for salmon fishing is set by Mother Nature. When the fish return, the
14 dates and times to fish and the poundage that can be caught are set by the state of
15 Alaska Department of Fish and Game (ADF&G) at times with federal input.

16 16. The season for Pacific cod is set by the state of Alaska and is not constrained by
17 Mother Nature because the fish are off shore in schools.

18 17. The Auction Block's major competitor is Icicle Seafoods. The competitive
19 disadvantage created by the City of Homer with regard to Icicle Seafoods' reduced rates
20 is now more acute and financially devastating to our business.

21 18. About 70 - 80 percent of The Auction Block business in the last four years
22 involves purchasing, selling, brokering, freezing, processing, transporting and arranging
23 for the transportation of commercially caught fish. In recent years, these activities have

1 been conducted on an almost break-even financial basis and thus have not contributed
2 to the profitability of The Auction Block. Because of the increased costs imposed by the
3 City, The Auction Block is not able to compete with a subsidized competitor such as
4 Icicle Seafoods.

5 19. About 20 – 30 percent of The Auction Block business involves offloads of fish for
6 our fishermen and for others such as Icicle Seafoods. These activities account for
7 about 80 to 90 percent of the profits of The Auction Block at this time. These profits are
8 negatively impacted by the higher crane rates that The Auction Block must pay to
9 Respondents.

10 20. Costs for electricity, ice and water have also increased, although these increases
11 impact all competitors in the fishing industry equally and depend on use.

12 21. A positive growth market for The Auction Block is the increasing visitor industry in
13 Homer. The growing influx of tourists is buying and shipping seafood from our fresh
14 and frozen seafood market facilities.

15 22. An increasing number of cruise ships are docking within minutes of our retail fish
16 market at the City Deep Water Dock. In addition to selling to the passengers, we are
17 selling fish and seafood products wholesale to their galleys. This business keeps our
18 crews busy filleting and processing halibut and salmon through the months of June, July
19 and August.

20 23. The Auction Block has been increasing and expanding its fish processing
21 facilities in Homer for years and, since 2009, has been able to handle more fish and
22 seafood product than it is able to afford to purchase.

1 24. I have reviewed the document marked as Exhibit A which is a true and correct
2 copy of the "Solid-Fuel Absorption Refrigeration Emerging Energy Technology Grant"
3 application submitted by The Auction Block Company to the Alaska Energy Authority
4 that describes in accurate detail the recent addition to the fish processing plant ("Plant")
5 designed, developed and operated on the Homer Spit in Homer, Alaska by The Auction
6 Block at this time.

7 25. The Plant is a shore-based state-of-the-art complete fish processing plant that
8 has been "good to go" and has excess operating capacity at this time.

9 26. The Plant processes for the benefit of The Auction Block's own fish and seafood
10 product, for the benefit of other seafood buyers, and for other processing companies
11 when they are at maximum capacity.

12 27. The Plant also processes - guts, fillets, freezes, vacuum packs and ships - for
13 sport fishing customers and local subsistence fishermen.

14 28. The Plant processes, grades, packages and arranges for the shipping of Pacific
15 cod milt to Japan; of salmon roe (eggs) to Japan; and of headed and gutted (H & G)
16 Pacific cod and fresh black cod (sable fish) to the U.S., Canada, Korea and Japan. The
17 Auction Block has worked for over a decade to develop business relationships with
18 customers in the international market.

19 29. The majority of The Auction Block's frozen, headed and gutted (H & G) Pacific
20 cod is loaded into refrigerated containers and shipped on TOTE (Totem Ocean Trailer
21 Express) (<http://www.totemocean.com/>) vessels for shipment to foreign countries.

22 30. About 80 percent of our H & G halibut is delivered to buyers in Canada with most
23 of it delivered to Ladner and Vancouver in British Columbia.

1 31. A shift at the Plant is composed of a defined number of trained individuals using
2 specialized equipment who set up, sanitize and process the product and fill product
3 codes set forth on work orders and then clean up and disinfect the Plant.

4 32. The Plant is able to handle 7000 pounds of finished H & G halibut per
5 hour. Halibut is not as difficult to handle as Pacific cod. A crew of about ten individuals
6 use assorted equipment including an automated heading machine, water-fed scraping
7 tools, scales, knives, roller conveyors, and forklifts to complete the necessary
8 processing activities.

9 33. The Plant is able to handle 5600 pounds of finished H & G salmon per
10 hour. Salmon is not as difficult to handle as Pacific cod. A crew of about fifteen
11 individuals use assorted equipment including an automated heading machine, gutting
12 machine, water-fed scraping tools, scales, knives, wash conveyor, roller conveyors, and
13 forklifts to complete the necessary processing activities. Two other individuals sort,
14 grade and pack the roe (eggs) and then deliver the fish to be finally processed and
15 shipped to the ultimate purchaser.

16 34. The Plant is able to handle 4400 pounds of H & G Pacific cod per hour. Pacific
17 cod is a labor intensive fish to process and requires more clean up time. A crew of
18 about fifteen individuals uses assorted equipment including an automated heading
19 machine, band saw, water-fed scraping tools, scales, knives, wash conveyor, roller
20 conveyors, and forklifts to complete the necessary processing activities. Two other
21 individuals sort, wash, grade and pack the milt for further shipment to Japan.

22 35. The Pacific cod fishery is a very promising fishery for the future of The Auction
23 Block. Mother Nature has provided high yields of this species in our fishing areas and

1 also the government agencies have not significantly restricted the fishery through
2 regulations. Moreover, yet another promising characteristic is the nearly year-long
3 season that allows The Auction Block to supply many different markets and provide
4 steady year-round employment for our employees.

5 36. The Plant is able to process multiple species of fish at the same time by
6 operating multiple shifts. This is particularly critical because the Plant is able to process
7 smaller loads of fish, for example five species of ground fish of only 5000 lbs., more
8 economically than larger processing plants that face much greater start-up costs.
9 Moreover, The Auction Block is then able to ramp up on short notice to handle a
10 substantial volume of fish.

11 37. The Auction Block lost its ability to compete dollar for dollar with Icicle Seafoods
12 in buying halibut and black cod due to the unfair advantage given to Icicle when
13 comparing dock fees (crane use and wharfage) paid by each business.

14 38. Fishermen almost always sell to the highest bidder as long as the fish buyer has
15 a solid reputation for paying in full and on time. Icicle Seafoods and The Auction Block
16 both have good reputations among the fleet for paying in full and on time.

17 39. From my experiences, the Homer City Manager Mr. Walt Wrede is prejudiced
18 against Kevin Hogan and his business pursuits and has been for years. I was involved
19 in several of the negotiating meetings with Mr. Wrede where he acted in a hostile and
20 dismissive manner in his dealings with Mr. Hogan.

21 40. Mr. Wrede, acting on behalf of the City of Homer, seemed upset that The Auction
22 Block won the request for proposal for the property we currently lease from the City of
23 Homer. He seemed to want to preclude The Auction Block in every possible way from

1 being able to meet the financially difficult terms of the lease he forced our companion
2 company, Harbor Leasing, LLC, to sign if we wanted to do business at the Dock. We
3 had no choice except to accept Mr. Wrede's demands because we needed to maintain
4 our shore-based facilities in Homer.

5 41. Mr. Wrede's motive seemed to be to put us out of business by demanding
6 unreasonable, uneconomic and discriminatory terms in the lease.

7 42. Mr. Wrede was callously indifferent when Mr. Hogan asked about the disparity of
8 one company, Icicle Seafoods, with no shore-based fish processing plant, getting the
9 incentives that are reserved for the entity operating a shore-based fish processing plant
10 at a time when The Auction Block was operating a shore-based fish processing plant in
11 Homer.

12 43. Mr. Hogan was present for only about 50 percent of The Auction Block daily
13 business dealings in the almost two years he was "negotiating" the lease with the Mr.
14 Wrede. His absence hindered our ability to operate the business normally and to grow
15 the business profitably.

16 44. Not having Mr. Hogan around during this time was stressful on the business and
17 on me. The Auction Block was forced to pay more money to employees to cover the
18 duties Mr. Hogan normally would have undertaken had he been present.

19 45. I was paid a salary for my position at The Auction Block with an expectation of
20 approximately 50 hours a week but instead worked between 60 - 80 hours per week.
21 This additional work was very stressful and tiring and impacted my home and family life.
22 Mr. Hogan typically would have been able to work more of these hours instead of me.

1 46. Mr. Hogan's commitment of time and effort was a waster because Mr. Wrede did
2 not accept any of our substantive suggestions.

3 47. The City's lease review process is a farce and a charade.

4 48. At the same time that The Auction Block began losing more and more boats to
5 Icicle Seafoods, our customers began to look at other ports to purchase fish. Most of
6 our current customers complain that Homer is the most expensive place for them to buy
7 fish, especially halibut, and are moving their business to Seward and Kodiak.

8 49. The unfair advantage that Icicle Seafoods has over The Auction Block is the
9 single largest reason we have decreasing profits. Our fish buying, processing, selling
10 and transporting business is likely to continue to lose more opportunities to buy fish
11 which will result in The Auction Block be unable to meet the needs of its ultimate
12 customers.

13 50. The Auction Block has lost some customers, both fishermen and ultimate
14 customers, due to Homer's high crane and wharfage charges to The Auction Block.

15 51. After reflecting on this case, the fairest resolution is to provide the incentives to
16 The Auction Block that the City promises to the owner and operator of a shore-based
17 fish processing plant and to require Icicle Seafoods, which has not had a fish
18 processing plant in Homer since 1988, to pay the rates set forth in the Tariffs. Any other
19 entity owning and operating a shore-based fish processing plant in Homer should also
20 receive the incentives

21 A true and correct copy of the "Pacific Fishing: The Business Magazine For
22 Fishermen" (<http://www.pacificfishing.com/>) article titled "Kevin Hogan: Changing The

1 Halibut Industry” dated May, 1999 evinces Mr. Hogan’s efforts to develop and build the
2 market for halibut in Homer is marked as Exh. S. The article states in pertinent part:

3 Yet his two-year-old [in 1999], Internet-based business The Auction Block
4 was almost single-handedly responsible for making Homer the number-
5 one halibut port in the North Pacific, wresting away the title that Kodiak
6 held for years.

7 . . .

8 No matter what Homer offers, however, fishermen will go wherever the
9 price is best, and last year Kevin Hogan found it for them.

10 . . .

11 Fishermen are fickle, he [“fisherman and fisheries consultant Joe
12 Childers”] says. “If someone pays a nickel more a pound, they’ll go there.”

13 . . .

14 He [Hogan] knows how quickly a penny here or a penny there can add up,
15 and he is loath to take any more than necessary from the fisherman, he
16 says. “There’s a limit to what you can pass on.”

17 Exh. S at pages 63 and 65.

18 Respondents’ campaign to put Complainants out of business is taking a
19 devastating financial toll. The “The Auction Block Company Lost Profit Report April
20 2009 – August, 2012” marked as Exh R states and concludes.

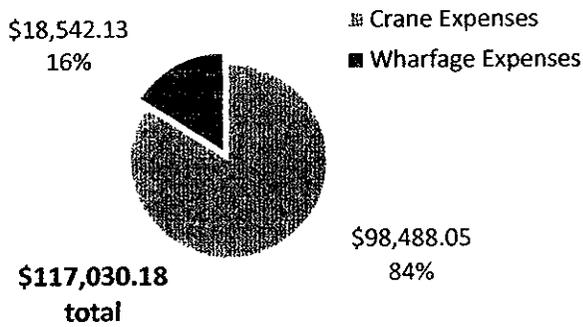
21 **The Auction Block Company**
22 **Lost Profit Report**
23 **April 2009 - August 2012**

24 This Report was prepared by Mr. Kevin Hogan and other employees of The Auction Block
25 Company. This Report details the lost profits of The Auction Block Company from April of 2009
26 until August of 2012 as a direct and proximate result of the City of Homer’s disparate treatment
27 of and prejudice toward the Complainants and other statutory violations by the Respondents of
28 the Shipping Act of 1984 as amended.

1 Figures 1, 2, 3, and 4 below show The Auction Block Company's total dock expenses (crane and
2 wharfage) in Homer for 2009 (Apr-Dec), 2010, 2011, and 2012 (Jan-Aug).

3

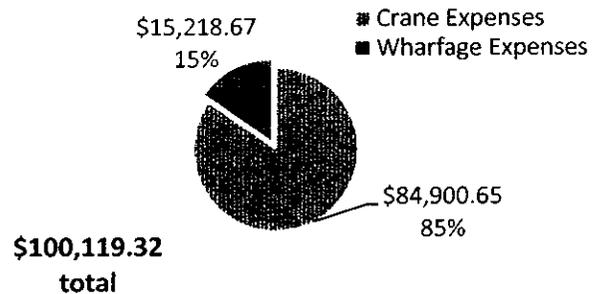
2009 (Apr-Dec)



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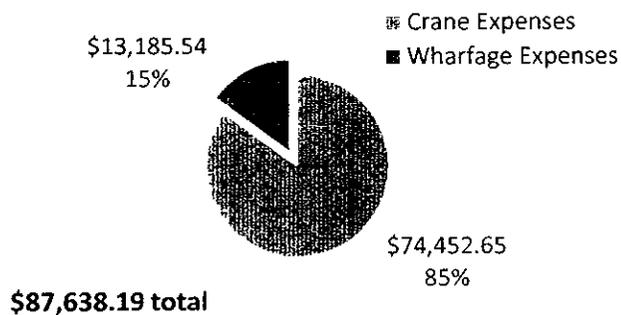
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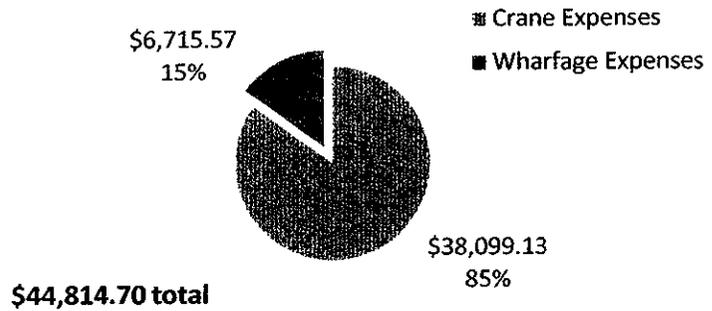
2011



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2012 (Jan-Aug)



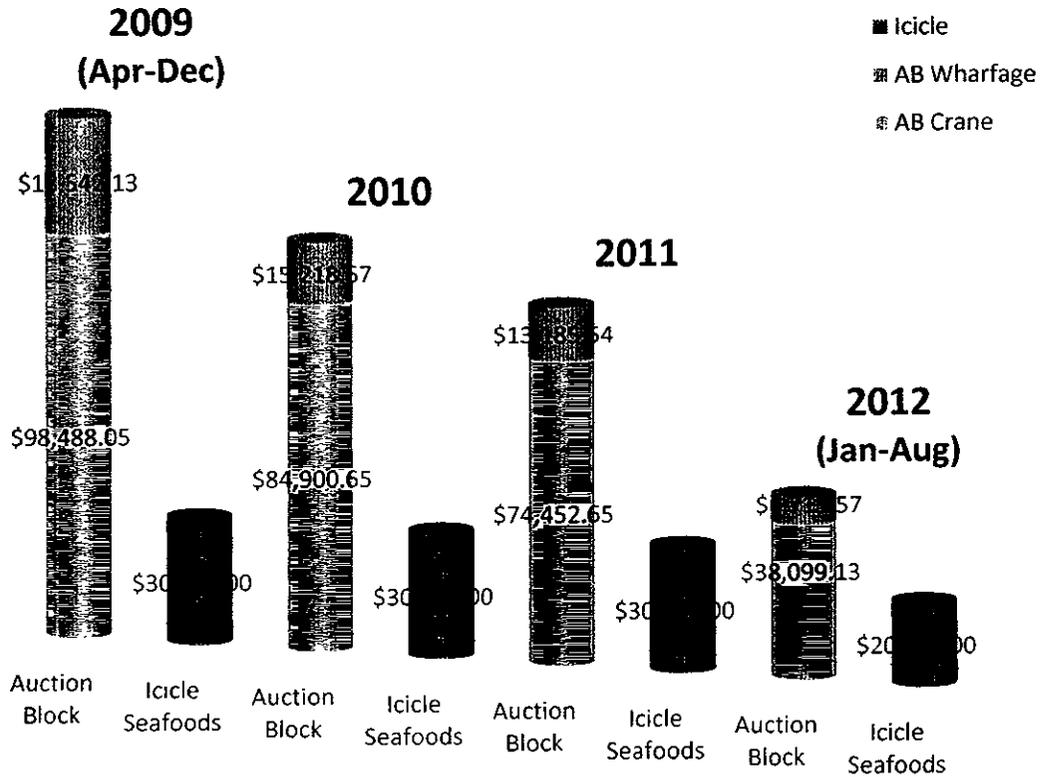
The amounts for crane expenses and wharfage expenses are specifically explained in Complainants' Fourth Amended Complaint at Docket 20 at "Paragraph V. Violations" including Paragraphs A – E at page 3 at line 3 to page 7 at line 9. These amounts are specifically discussed at page 4 at lines 9 – 12 and at page 6 at lines 19 – 28. The amounts billed by Respondents and paid by Complainants for 2012 are discussed and verified in the Supplemental Affidavit of Kevin Hogan.

Over the three-and-a-half-year period, The Auction Block Company paid the City of Homer \$349,601.69 in dock expenditures (crane and wharfage) based on the volume of seafood products and ice that cross the Homer dock. Icicle Seafoods paid the City of Homer a flat rate of \$30,900.00 each year of operation. Over the three-and-a-half-year period, Icicle Seafoods paid a total of \$113,300.00 (\$30,900 x 3 and \$20,600 for 2012) in dock expenditures.

1 Figure 5 below shows the difference in dock operating expenses between The Auction Block
 2 Company and Icicle Seafoods for 2009 (Apr-Dec), 2010, 2011, and 2012 (Jan-Aug).

3

Differential Costs of Dock Operations Total of \$236,301.69



4

5 The Auction Block Company paid the City of Homer \$236,301.69 more than Icicle Seafoods
 6 during this three-and-a-half year period. This amount of \$236,301.69 represents The Auction
 7 Block Company's potential working capital and purchasing power which The Auction Block
 8 Company would have used to purchase, unload, process, and ship additional pounds of fish.

9

Icicle Seafoods' Differential Property Fees

10 Icicle Seafoods also enjoys reduced property fees given by the City of Homer. These amounts
 11 are explained and summarized in Complainants' Fourth Amended Complaint at Docket 20 at
 12 page 5 at lines 13 – 34. The Auction Block Company leases 24,283 square feet from the City of
 13 Homer for an annual fee of \$22,303.68. Icicle Seafoods leases 64,944 square feet from the City
 14 of Homer for an annual fee of \$30,524.00. Table 1 shows the breakdown of The Auction Block
 15 Company and Icicle Seafoods' annual rental expenses.

1

b7 d

PROPERTY LEASE	Square Footage	Annual Fee	Price per ft²
Icicle Seafoods	64,944	\$30,524.00	\$0.47
- additional use of premise	2,754	---	---
Total Icicle property	67,698	\$30,524.00	\$0.45
Total Auction Block property	34,283	\$22,303.68	\$0.65

2

3 The rates clearly show that Icicle Seafoods pays a lower rate per square foot of property. The
 4 Auction Block Company pays the City of Homer \$0.20 more per square foot than Icicle
 5 Seafoods. In addition, Icicle Seafoods benefits from the additional use of 2,750 square feet of
 6 dock space free of charge. The property enjoyed by Icicle free of charge is valued at \$12.50 per
 7 square foot per year, totaling \$34,375.00 per year. This is \$34,375.00 that Icicle Seafoods is not
 8 required to pay to the City of Homer.

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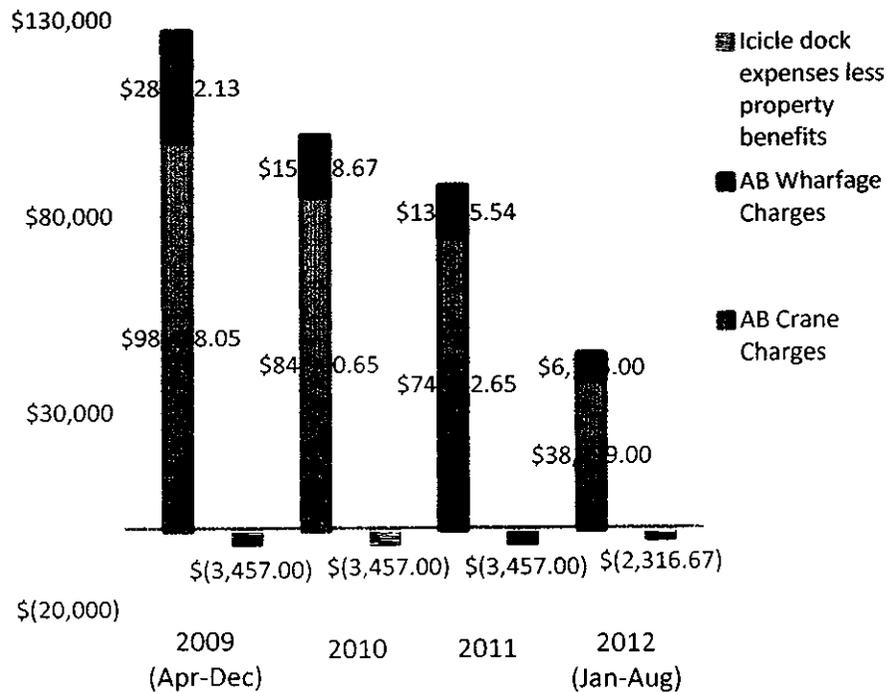
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1 Figure 6 below is the revised differential cost of dock operations between Icycle Seafoods and
 2 The Auction Block Company with consideration given to Icycle Seafoods' property benefits.

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Figure 6

Differential Cost of Dock Operations (Icycle Property Benefits)

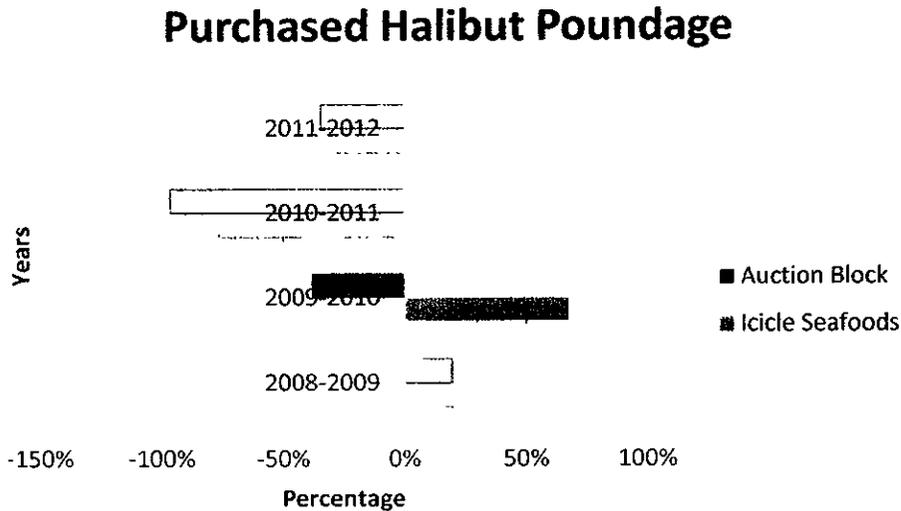


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Icycle Seafoods' annual rate of \$30,900.00 for crane and wharfage charges is further offset by Icycle Seafoods' use of \$34,375.00 worth of property free of charge. Icycle Seafoods enjoys \$3,475 per year in property, crane, and wharfage benefits from the City of Homer. This favorable treatment gives Icycle Seafoods a clear advantage over other businesses that are subject to property value tariffs and dock expenses.

1 Figure 7 below shows the difference between The Auction Block Company and Icicle Seafoods'
2 purchased halibut pounds between consecutive years.

3



4

5 In 2010, the City of Homer increased The Auction Block Company's dock service rates (wharfage
6 and crane) but did not increase Icicle Seafoods' rates. The Auction Block Company's purchased
7 halibut poundage fell by thirty-eight percent (38%) between 2009 to 2010. Icicle Seafoods'
8 purchased halibut poundage increased by sixty-eight percent (68%) during this same time
9 period. The Auction Block Company's higher dock service expenditures decreased the
10 company's purchasing power, resulting in the inability to purchase as many pounds of halibut.
11 During this time, Icicle Seafoods was able to benefit from the consistent lower fixed dock fees
12 given by the City of Homer. With this advantage, Icicle Seafoods was able to purchase eighty-
13 seven percent (87%) more pounds of halibut than The Auction Block Company between 2009
14 and 2010.

15 Halibut fishermen are extremely sensitive to the price offered for their product. The nature of
16 the halibut industry requires fish buyers to bid on a vessel's load and the highest bidder wins
17 the sale. Competitors *lose* or *win* a sale by mere pennies or even by "one cent." A simple
18 increase of \$0.05 per pound is an enormous difference in a fish sale. The funds, if available,
19 would have allowed The Auction Block Company to win far more bids that were otherwise lost
20 due to the Company's limited cash flow.

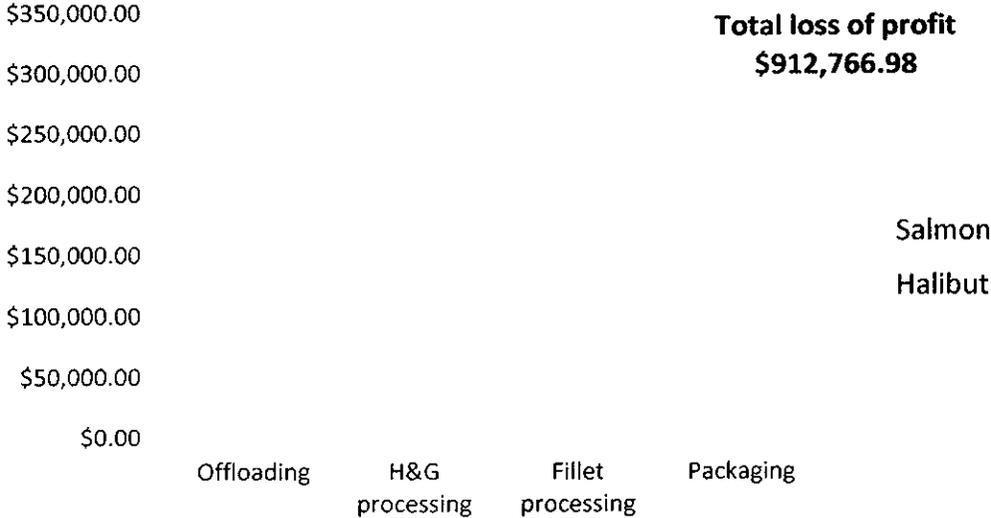
21 The lost purchasing power of \$236,301.69 at the rate of \$0.05 per pound differential paid to
22 vessels would have secured 4,726,034 more pounds that potentially could have been purchased
23 by The Auction Block. Of these total pounds, halibut would account for ninety-one percent
24 (91%) of the pounds, and salmon would account for nine percent (9%) of the pounds, based on

1 accumulated values of pounds purchased and sold by The Auction Block Company. Therefore,
 2 the potential purchase of halibut would have been 4,300,691 pounds, and the potential
 3 purchase of salmon would have been 425,343 pounds.

4 Figure 8 below outlines the potential aggregate profits from April 2009 to August 2012 if dock
 5 rates administered by the City of Homer were equal for both The Auction Block Company and
 6 Icicle Seafoods.

7 **Figure 8**

**The Auction Block Co.'s Potential Profits
 with Additional Working Capital of
 \$236,301.69**



8

9 These values are based on the standard markup for each of the services and/or products. For
 10 the species of halibut, the offloading markup is \$0.05 per pound, H&G (heading and gutting)
 11 processing markup is \$0.10 per pound, fillet processing markup is \$3.15 per pound, and
 12 packaging markup is \$0.05 per pound. For the species of salmon, the offloading markup is
 13 \$0.10 per pound, H&G processing markup is \$0.15 per pound, fillet processing markup is \$2.50
 14 per pound, and packaging markup is \$0.05 per pound.

15 Given these values, the aggregate loss of profits for The Auction Block Company from April
 16 2009 to August 2012 is \$912,766.98.

17 Sources:
 18 Documents reviewed and relied upon to prepare The Auction Block Company's Lost Profit
 19 Report, Fiscal Years April 2009-August 2012:

1
2 2009-2012 QuickBooks company sales
3 2009-2012 Corporate Tax Returns as prepared by The Auction Block Company's
4 accountant
5 2009-2012 The Auction Block Company's records
6

7 **Complainants Further Develop And Affirm The Facts In The Affidavits And**
8 **Discovery Responses To Respondents' Discovery Requests**

9 Complainants discuss their business and financial background and activities in
10 detail in Complainants' RESPONSE at Docket 26 at page 12 at line 1 – page 22 at line
11 16 and incorporate their Discovery Responses to Respondents' Discovery Requests
12 marked at Exh. B. These eleven pages include the Claimants' Responses to
13 Respondents Requests For Admission Numbers 1, 6, 4, 7, 8, 9, 10, 11 and 12 and the
14 Answer to Interrogatory Number 11. Complainants seek to incorporate these factual
15 and legal arguments at these defined pages by specific reference rather than reprinting
16 them in this Memorandum.¹²

17 **Supporting Legal Discussion**

18 With these factual statements and legal contentions advanced by Complainants
19 and admitted by Respondents, the relevant supporting case law is reviewed below.
20 Complainants contend in their Fourth Amended Complaint that the Commission has
21 both personal jurisdiction over the Respondents and subject matter jurisdiction over this
22 matter. Docket 20 at page 2 at lines 17 – 19. Respondents admit these contentions. In
23 California v. United States, 320 U.S. 577 (1943), the United States Supreme Court

¹² If a party is not able to incorporate a prior argument by reference before the Commission, Complainants seek leave to file an amended Memorandum reprinting the argument.

1 found and held that the Federal Maritime Commission has jurisdiction over the vast
2 majority of municipal ports. A court always must ascertain that it has subject matter
3 jurisdiction over the matter. In this case, Complainants contend and Respondents admit
4 the facts that underpin the Court's subject matter jurisdiction over this matter.

5 **Complainants Are A "Person" And A Common Law "Common Carrier"**

6 Complainants The Auction Block Company and Harbor Leasing, LLC are subject
7 to the provisions and protections of the Shipping Act of 1984 as amended by the Ocean
8 Shipping Reform Act of 1998 ("Shipping Act of 1984 as amended") each as a "person"
9 as defined in the former 46 U.S.C. § 1702(18) and in 46 C.F.R. § 515.2(p) and other
10 authority. 46 C.F.R. § 515.2(p) states: "*Person*' includes individuals, corporations,
11 partnerships and associations existing under or authorized by the laws of the United
12 States or of a foreign country." "Any person' means any person." South Carolina Ports
13 Authority v. Georgia Ports Authority, 22 SRR 1111, 1117 (1984).

14 The Auction Block Company and Harbor Leasing, LLC are not registered as
15 "common carriers" with the Federal Maritime Commission. However, as discussed in
16 Complainants' RESPONSE at Docket Number 26 page 12 at line 1 – page 13 at line 23,
17 "[t]he term 'common carrier' as used in the 1916 Act and as better defined in the 1984
18 Act has been interpreted in many cases to mean the common carrier as that term was
19 understood in the common law."

20 In River Parishes Co., Inc. v. Ormet Primary Aluminum Corp., 28 SRR 188, 208 -
21 09 (1998), the Initial Decision discusses the principles of statutory construction of the
22 Shipping Act of 1984 as amended and the common law origins of the definition of a
23 'common carrier.' The Initial Decision states in pertinent part:

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

2 Respondents The City of Homer and Port of Homer are subject to the provisions
3 of the Shipping Act of 1984 as amended as a "marine terminal operator" as defined in
4 46 U.S.C. § 40102(14) and other authority and as a "person" as defined in the former 46
5 U.S.C. § 1702(18) and in 46 C.F.R. § 515.2(p) and other authority. Respondents are
6 registered as a "marine terminal operator." Notice is posted on the Commission's
7 website. (<https://www2.fmc.gov/FMC1Users/scripts/ExtReports.asp?tariffClass=mt0>).
8 Official notice is broader than judicial notice and may be taken, not only of public
9 records and generally accepted facts, but also of matters within an agency's area of
10 special expertise. Union Electric Co. v. F.E.R.C., 890 F.2d 1193, 1202 (D.C. Cir. 1989).
11 The Commission addresses the taking of official notice in Commission Rule 226, 46
12 CFR § 502.226.

13 By operation of law, Respondents admit Complainants' contentions at Docket 20
14 at page 2 at lines 7 – 10 that.

15 The City and Port are subject to the provisions and protections of the
16 Shipping Act of 1984, as amended, as a "marine terminal operator" as
17 defined in 46 U.S.C. § 40102(14) and other authority and as a "person" as
18 defined in the former 46 U.S.C. § 1702(18) and in 46 C.F.R. § 515.2(p)
19 and other authority.

20 Mr. Wrede states and admits that the Icicle floating processor ties up at the Homer City
21 Deep Water Dock. Exh. M at page 5 at lines 1 – 2. Respondents do not dispute that
22 Mr. Hoyt with Icicle Seafoods testified and confirmed that the Icicle floating processor
23 ties up at the Homer City Deep Water Dock. Ms. Yeoman testifies that the cruise ships
24 dock at the Homer City Deep Water Dock and the passengers purchase fish and
25 seafood products from Complainants and the vessels' galleys purchase wholesale

1 product from Complainants.¹³

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

11 In their capacity as a marine terminal operator, Respondents filed Tariffs and
12 filed amended Tariffs with the Federal Maritime Commission. Exhs. D, E, F and G. In
13 their capacity as a marine terminal operator, Respondents impose the rates in the
14 Tariffs on Complainants. In their capacity as a marine terminal operator, Respondents
15 exempt Icicle Seafoods from paying the rates in the Tariffs, albeit without a legal basis.
16 In their capacity as a marine terminal operator, Respondents seek to justify their
17 decision to exempt Icicle Seafoods from the application of the Tariffs by citing, albeit
18 incorrectly, to a provision in the Tariffs. In their capacity as a marine terminal operator,
19 Respondents exclude other persons from the Homer waterfront by precluding access or
20 overcharging for services, albeit illegally. The Shipping Act of 1984 as amended does
21 not allow a marine terminal operator to doff and don the marine terminal operator's hat
22 on a whim. To paraphrase the conclusion in South Carolina Ports Authority v. Georgia

¹³ Affidavit of Jessica Yeoman at Exh. U at page 4 at paragraphs 21 - 22.

1 Ports Authority, 22 SRR 1111, 1117 (1984), “a ‘marine terminal operator’ means a
2 ‘marine terminal operator.’”

3 The Commission Has Subject Matter Jurisdiction

4 Complainants contend and Respondents admit the facts that underpin the
5 Court’s subject matter jurisdiction over this matter. In Petchem, Inc. v. Canaveral Port
6 Authority, 23 SRR 974, 986 - 87 (1986), aff’d sub nom, Petchem, Inc. v. Federal
7 Maritime Commission, 853 F.2d 958, 24 SRR 1156 (D.C. Cir. 1988), the Commission
8 states:

9 Respondents’ analysis is incorrect. The essential facts of
10 Bethlehem Steel should be distinguished from those of St. Philip and this
11 case. The effect of a harbor construction fee on a ship’s access to
12 terminal facilities is far more remote and tangential than that of tug
13 service. Moreover, two decisions more recent than Bethlehem Steel
14 indicate that the theory articulated in St. Philip has continuing vitality. In
15 Louis Dreyfus Corp v. Plaquemines Port, Harbor and Terminal District,
16 ___ FMC ___, 21 SRR 1072 (1982).

17
18 “The statutory scheme contemplates regulation of any entity
19 if it exercises sufficient control over terminal facilities to have
20 a discernible effect on the commercial relationship between
21 shippers and carriers involved in that link.” Id. at 1079.

22
23 The administrative law judge in Plaquemines had characterized St.
24 Philip as establishing a “control theory” of Commission jurisdiction over
25 terminal activities. Id. at 1077, n. 5. The Commission adopted this phrase
26 and stated that “conditioning access to a port’s private facilities upon the
27 payment of a charge for governmental services reflects significant
28 threshold control over terminal facilities.” Id. at 1080. On the basis of this
29 “control theory,” the Commission concluded that it had both personal
30 jurisdiction over the respondent Port District (which was a political
31 subdivision of the State of Louisiana) and subject matter jurisdiction over
32 the Port District’s practice of assessing fees for certain vessel services
33 based on cargo transactions. The Commission specifically held that it had
34 subject matter jurisdiction under Section 17 of the 1916 Act – now Section
35 10(d)(1) of the 1984 Act – because the Port’s practices had an underlying
36 purpose relating to terminal operations and a more than incidental
37 relationship to the handling of cargo. On this point, the Commission
38 distinguished Bethlehem Steel.

1
2 (Citation omitted). Respondents not only condition access they absolutely control
3 access to the Port's facilities and assess charges for those entities provided access.
4 The Port's activities have an underlying purpose related to the terminal operations in
5 Homer and a more than incidental relationship to the handling of cargo – the bounty of
6 the sea. In another footnote in the case, the Commission notes:

7 A necessary implication of Respondents' arguments on this point is
8 that Petchem lacks standing to bring a complaint before the Commission
9 because, as a tug operator, it is not a member of a class protected by the
10 Shipping Acts. In fact, Respondents expressly made such arguments
11 before the Presiding Officer. . . . Respondents' position is contradicted by
12 the broad terms of Section 22 of the 1916 Act, 46 USC §821 (1982 ed.),
13 and Section 11(a) of the 1984 Act, 46 USC app. §1710, which permit any
14 "person" to file a complaint alleging violations of the statute. "Any person"
15 means any person." South Carolina Ports Authority v. Georgia Ports
16 Authority, ___ FMC ___, 22 SRR 1111, 1117 (1984).

17
18 Id. at 987 at n. 39. As noted above, Complainants are a "person" and a common law
19 "common carrier" entitled to relief and protection under the Shipping Act of 1984 as
20 amended. Respondents are a "person" and a "marine terminal operator" subject to
21 regulation and the Commission's subject matter jurisdiction.

22 In Petchem, 853 F.2d at 963, the Circuit Court states:

23 Even though the Shipping Acts disfavor exclusive arrangements,
24 they allow the FMC flexibility in applying the antidiscrimination provisions
25 in light of the particular circumstances existing at a given port. This
26 flexibility is served by a rule that, in the first instance, holds restrictive port
27 service arrangements to be presumptively illegal, but allows the
28 proponents to meet the presumption of illegality through the offer of
29 evidence in support of the restrictive arrangements reasonableness. If,
30 however, such a demonstration is made, the challenging party has, in the
31 Commission's words, the "ultimate burden" of establishing that the
32 justifications fall short of what the law requires.

33
34 (Emphasis added). Respondents are unable to overcome the presumption of illegality.
35 The gravamen of Respondents' position has been and is that the entity providing a

1 shore-based fish processing plant is to be afforded incentives. Respondents have
2 continued to offer incentives and disregard assessing the rates in the Tariff to Icicle
3 even after Icicle failed to rebuild its shore-based fish processing plant, confirmed that it
4 will not rebuild a plant and breached its now expired lease. Respondents have not
5 afforded any incentives to Complainants who fulfilled the requirement that they build
6 and operate a shore-based fish processing plant.

7 In Plaquemines Port v. Federal Maritime Commission, 838 F.2d 536, 542 - 543,
8 24 SRR 813, 818 – 19 (D.C. Cir. 1988), the Circuit Court states:

9 We address the FMC's jurisdiction first. Jurisdiction is governed by
10 the 1984 Act's definition of "marine terminal operator." Section 3(15) of
11 the 1984 Act, 46 U.S.C. § 1702(15) (Supp. III 1985), states that a marine
12 terminal operator is a person engaged "in the business of furnishing
13 wharfage, dock, warehouse, or other terminal facilities in connection with a
14 common carrier." If the Port engages in "furnishing ... other terminal
15 facilities," it is a "marine terminal operator" and falls under the 1984 Act
16 and the FMC's jurisdiction. As noted in the legislative history of the 1984
17 Act, H.R. Rep. No. 53, 98th Cong., 2d Sess., pt. 1, at 29, reprinted in 1984
18 U.S. Code Cong. & Admin. News 167, 194, the relevant language was
19 taken directly from the definition of "other person subject to [the 1916
20 Act]." 46 U.S.C. Sec. 801 (1982). For this reason, the intent behind, and
21 prior interpretations of, the 1916 Act's provisions have continuing
22 precedential force.

23 The 1916 Act was designed to strengthen the U.S. shipping
24 industry. Then, as now, shippers operated in cartels, often called
25 "conferences." Congress believed that U.S. shippers could not opt out of
26 the international cartel system and survive at the level thought required by
27 national needs and security. The 1916 Act, therefore, granted antitrust
28 immunity to shippers' cartels. In exchange, the cartels were subjected to
29 the provisions of the 1916 Act which prohibited discriminatory practices
30 and required the filing and publication of tariffs with the FMC. Essay, *The*
31 *Shipping Act of 1984: A Return to Antitrust Immunity*, 14 Transp. L.J. 153,
32 155-56 (1985).

33 In order to regulate the shippers' cartels effectively, it was
34 necessary to regulate other links in the transportation chain. The sponsor
35 of the 1916 Act, Congressman Alexander, in response to an amendment

1 to strike "other person" subject to the Act, explained that, in order for
2 regulation of the shippers to be effective, the FMC must also "have
3 supervision of all those incidental facilities connected with the main
4 carriers." 53 Cong.Rec. 8276 (1916). Alexander stated that the bill
5 contained no provision regulating shippers that did not also apply to
6 terminal facilities. *Id.* Moreover, he noted, if terminal facilities owned and
7 operated by state political subdivisions discriminated unduly, they, too,
8 would be subject to the 1916 Act. In 1943, the Supreme Court relying on
9 Congressman Alexander's remarks, held that waterfront terminals owned
10 and operated by municipalities were "other person[s] subject to the [1916
11 Act]." California v. United States, 320 U.S. 577, 585-86, 64 S.Ct. 352,
12 356-57, 88 L.Ed. 322 (1944).

13 In its 1982 Dreyfus Order, the FMC relied upon California v. United
14 States's ruling that local government authorities are covered by the
15 statute. The FMC then focused on the Port's degree of involvement in the
16 provision of terminal facilities to determine whether that involvement was
17 sufficient to constitute the "furnishing" of the facilities. Since the Port
18 assessed a fee for its essential services ancillary to the facilities and
19 conditioned access to the private facilities within its jurisdiction upon
20 payment of that fee, the FMC found a "furnishing" of the facilities. As the
21 FMC noted, the Port "has imposed utilization of its services and payment
22 of its fee as an unavoidable appurtenance to all private facilities." 21 SRR
23 (P & F) at 1080.

24 In the order now before us, the FMC applied the same rationale to
25 determine that the Port is a "marine terminal operator" within the meaning
26 of the 1984 Act. NOSA Order, 23 SRR (P & F) at 1372. We agree with
27 the FMC that the Port's combination of offering essential services and
28 controlling access to the private facilities amounts to the furnishing of
29 terminal facilities. Like the FMC, we read the purpose of the relevant
30 portions of the 1916 Act, and its successor, the 1984 Act, to be the
31 prevention of discrimination in the provision of terminal facilities.
32 Ownership or operation of terminal facilities is not a necessary
33 prerequisite to the ability to discriminate. Thus, the critical issue for
34 jurisdiction is that the degree of the Port's involvement enables the Port to
35 discriminate. In this case, the Port has the ability to discriminate in the
36 fees it charges by controlling access to private terminal facilities. This is
37 sufficient to sustain FMC jurisdiction.

38 Our conclusion is buttressed by the fact that in a previous
39 interpretation of the provision at issue here, the Supreme Court focused
40 on the Shipping Act's legislative scheme and required a broad
41 construction to make effective the scheme of regulation the statute
42 established. United States v. American Union Transp., 327 U.S. 437, 447-
43 57, 66 S.Ct. 644, 649-54, 90 L.Ed. 772 (1946). The FMC has twice found

1 that the Port's tariffs, or at least portions of them, violate substantive
2 provisions of the Shipping Acts. It should be clear by now that allowing
3 such discrimination would nullify the Shipping Acts for the first 100 miles of
4 the Mississippi River north of the Gulf.

5 The DOJ argues that upholding FMC jurisdiction over the Port
6 could result in the FMC controlling the fire and emergency services of
7 every waterside city in America. This argument is overstated. Waterside
8 cities will not automatically or accidentally fall into FMC jurisdiction. Only if
9 such ports begin to charge a fee for their services and to control access to
10 private facilities to enforce their charges will today's decision bring them
11 within the jurisdiction of the FMC.

12 (Emphasis added; citations omitted). Footnote six states in pertinent part: "Moreover,
13 the FMC already has jurisdiction over the vast majority of municipal ports. California v.
14 United States, 320 U.S. 577 ... (1994)." Respondents' involvement is complete and
15 enables it to discriminate in favor of Icicle and to the detriment of Complainants by
16 charging different fees for the same services.

17 In Credit Practices Of Sea-Land Service, Inc., 25 SRR 1308, 1313 (1990), states
18 in pertinent part:

19 One of the fundamental purposes of the Shipping Act of 1984 is the
20 establishment of a nondiscriminatory regulatory transportation process for
21 the common carriage of goods in the U.S. foreign commerce. 46 U.S.C. §
22 1701(1). The Commission recognized this policy in stating that "[t]he
23 prevention of economic discrimination is at the heart of the regulatory
24 scheme established by Congress in the 1984 Act." Motor Vehicle
25 Manufacturers Ass'n of the United States, Inc. – Application for Exemption
26 of Vehicle Shipments from Portions of the Shipping Act of 1984, ___ FMC
27 ___, 25 SRR 853 (1990).

28 . . . Thus, the Commission recognizes that there are other
29 instances of undue preference or prejudice where competition is not
30 required.

31 Therefore, contrary to Sea-Land's position it is not essential to
32 demonstrate the existence of a competitive relationship in order to make
33 out a case of unreasonable preference. The Supreme Court so explained

1 in Volkswagenwerk Aktiengesellschaft v. FMC, 390 U.S. 261 [8 SRR 20,
2 109] (1968) (“Volkswagen”).

3 (Emphasis added; footnote omitted). Respondents strain to contend that Complainants
4 and Icicle Seafoods do not compete. Respondents should let them compete.
5 Complainants and Icicle compete, albeit unfairly, for the business of commercial fishers
6 and for ultimate purchasers of commercially caught fish.¹⁴ Respondents and Icicle,
7 seeking to preserve the favorable treatment, are going to absurd and dishonest lengths
8 to suggest that Icicle and Complainants do not compete. A more accurate
9 characterization is that the City is undermining Complainants’ efforts to compete with
10 Icicle while also favoring Icicle.

11 In Ceres Marine Terminal v. Maryland Port Admin., 27 SRR 1251, 1270-71 (FMC
12 1997), the Commission established the elements that must be proven to establish an
13 allegation of an unreasonable preference or prejudice.

14 In order to establish an allegation of an unreasonable preference or
15 prejudice, it must be shown that (1) two parties are similarly situated or in
16 a competitive relationship[46], (2) the parties were accorded different
17 treatment, (3) the unequal treatment is not justified by differences in
18 transportation factors, and (4) the resulting prejudice or disadvantage is
19 the proximate cause of injury. [Citation] The complainant has the burden
20 of proving that it was subjected to different treatment and was injured as a
21 result and the respondent has the burden of justifying the difference in
22 treatment based on legitimate transportation factors.

23 (Citation omitted). Footnote 46 states: “In essence, if the cargo moves in substantially
24 similar transportation circumstances, it is not necessary for the purpose of meeting this
25 criterion that the parties be in direct competition with one another.” All four elements
26 are present in the instant case.

¹⁴ Complainants and Icicle also purchase and sell products and services to each other at times when it is in the economic interests of each entity.

1 In Ceres Marine Terminal v. Maryland Port Admin., 29 SRR 356, 372 (FMC

2 2001), the Commission states:

3 Therefore, we hold that, as a matter of law, the common law
4 doctrines of waiver and estoppel may not be invoked to prohibit a party to
5 an agreement subject to the Commission's jurisdiction from later
6 challenging the agreement in a complaint filed with the Commission
7 alleging that one of the parties to the agreement violated a duty imposed
8 on it by the Shipping Act. We further find that Ceres neither waived its
9 rights under the Shipping Act by entering into an agreement under the
10 Shipping Act, nor is estopped from challenging the terms of its agreement
11 because it waited 18 months before filing its complaint with the
12 Commission. To hold otherwise would abrogate the Commission's
13 statutory duty to promote a transportation and marine terminal system free
14 from undue and unreasonable discrimination.

15
16 (Emphasis added; citation omitted). Damages are easily calculated on this record. The

17 Commission concludes:

18 The Commission finds that the common law doctrines of waiver and
19 estoppel may not be invoked to prohibit a party to an agreement subject to
20 the Commission's jurisdiction from later challenging the agreement in a
21 complaint file with the Commission, alleging that one of the parties to the
22 agreement violated a duty imposed on it by the Shipping Act. We further
23 find it unnecessary to rule on Ceres' alternative grounds for liability.

24
25 We find the appropriate measure of damages for a violation of
26 sections 10(b)(11) and (12), where a party has breached a duty to apply
27 its criteria for granting lower rates in a fair and evenhanded manner, is the
28 difference between the rate that was charged and collected, and the rate
29 that would have been charged but for the undue preference and prejudice.

30
31 We further find that the appropriate measure of damages for a
32 violation of section 10(d)(1) is the degree to which the rates are excessive,
33 which, based on the facts of this case, is the difference between the rates
34 charged Maersk and Ceres.

35
36 Id. at 374 (Emphasis added; citation omitted). In this case, Respondents have

37 "breached a duty to apply its criteria for granting lower rates in a fair and evenhanded

38 manner" and the reparations are "the difference between the rate that was charged and

39 collected, and the rate that would have been charged but for the undue preference and

1 prejudice.” The specific fees charged and collected by Respondents and paid by
2 Complainants are established and admitted. The damages are set forth with specificity
3 in the Fourth Amended Complaint and are not denied with specificity and are admitted
4 in the Fourth Amended Answer.

5 In AHL Shipping Co. v. Kinder Morgan Liquids Terminals, LLC, 30 SRR 520
6 (2004), the Order states in pertinent part:

7 It is not necessary for the Complainant to show that it provides
8 transportation by water of passengers or cargo between the United States
9 and a foreign country; it is only necessary for the Complainant to show for
10 each Respondent that at least one of the Respondent’s customers
11 receiving terminal services is engaged in providing transportation by water
12 of passengers or cargo between the United States and a foreign country.

13
14 Id. at 521. Complainants provide transportation by water of cargo between the United
15 States and a foreign country, namely Canada, Japan, Korea and others.¹⁵ In addition,
16 Respondents’ customers including Icicle receiving terminal services are engaged in
17 providing transportation by water of passengers and cargo between the United States
18 and foreign countries.

19 The reliance on Transpacific v. Federal Maritime Commission is
20 misplaced. The jurisdiction of the Federal Maritime Commission is not
21 based on an agreement between a complaining carrier and the marine
22 terminal operator. The jurisdiction is based on the business practices of a
23 marine terminal operator engaged in service to ocean common carriers.
24 Section 10 of the Shipping Act, 26 (App.) USC 1709(d) prohibits marine
25 terminal operators from engaging in unreasonable practices. Section 11,
26 46 (App.) USC 1710(a), permits “any person” to file a complaint with the
27 Federal Maritime commission alleging a violation of any part of the
28 Shipping Act. The phrase “any person” is not limited to those persons
29 engaged in ocean transportation between the United States and foreign
30 ports.
31

¹⁵ Complainants’ Response to Request for Admission Number 1 at Exh. B at page 7 at line 4 – page 9 at line 9; Affidavit of Ms. Jessica Yeoman at Exh. U at page 5 at paragraphs 28, 29 and 30.

1 Id. at 522. Jurisdiction is based on the business practices of a marine terminal operator
2 engaged in service to “persons” and common law “common carriers” such as the
3 Complainants and others.

4 In Fact Finding Investigation 24 – Exclusive Tug Arrangements In Florida Ports,

5 29 SRR 231 (2001), the Order of Investigation discusses the unreasonable refusal to
6 deal or negotiate and states:

7 Section 10(b)(10) of the 1984 Act, 46 USC App. 1709(b)(10),
8 prohibits an MTO from unreasonably refusing to deal or negotiate.[4] The
9 broad language of this prohibition is new under the Ocean Shipping
10 Reform Act of 1998 (“OSRA”) and, when read in conjunction with the 1984
11 Act’s revised Declaration of Policy, may be applicable to the actions
12 resulting in tug monopolies at Port Canaveral and Port Everglades.[5]

13
14 Footnote four states: “This section is made applicable to MTOs by section 19(d)(3) of
15 the 1984 Act, 46 USC App. 1709(d)(3).” Footnote five states: “OSRA added a new
16 subsection to the 1984 Act’s Declaration of Policy as follows: (4) to promote the growth
17 and developments of United States exports through competitive and efficient ocean
18 transportation and by placing a greater reliance on the marketplace.”

19 Respondents have analogized this situation to a well-established tug business
20 and an upstart enterprise with a few leaky tug boats competing with each other. The
21 analogy is inapposite because the business relationship between Complainants,
22 Respondents and Icicle Seafoods does not involve navigation activities and instead
23 involves the core and fundamental marine terminal activities in Homer. In addition, if
24 the analogy has any application, Icicle Seafoods has zero (0) “tugs” and continues to
25 state that it does not plan to build a tug while The Auction Block has built and operates
26 one hundred percent (100 percent) of the “tugs” in Homer, namely a shore-based state-
27 of-the-art fish processing plant. The gravamen and essence of Complainants’ Fourth

1 Amended Complaint and case is that they seek a level playing field and desire a greater
2 reliance on the marketplace rather than connections and favorable deals that skew and
3 distort the market.¹⁶

4 **The Tariffs Apply To Both Icicle And Complainants**

5 Complainants develop the argument that the Terminal Tariffs apply to
6 Complainants and to Icicle Seafoods in the Complainants' RESPONSE at Docket 26 at
7 page 33 at line 15 – page 37 at line 4. Complainants seek to incorporate this four page
8 factual and legal arguments at these defined pages by specific reference rather than
9 reprinting them in this Memorandum.¹⁷

10 **Respondents and Icicle Do Not Have A Valid Lease Or Contract**

11 Complainants establish that Respondents and Icicle do not have a valid binding
12 lease.¹⁸ The argument is presented and developed in Complainants' RESPONSE at

¹⁶ Complainants discuss their efforts to deal and/or negotiate in the Complainants' RESPONSE at Docket 26 at page 17 at line 5 - page 22 at line 16 and in the Answer to Interrogatory No. 11 at Exh. B at page 19 at line 4 – page 26 at line 20; 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; Affidavit of Jessica Stack at Exh. U at page 7 at paragraph 39 – page 9 at paragraph 47; Respondents' Exh. 9 sets forth just some of futile efforts undertaken by Mr. Hogan to negotiate with Respondents; see also Affidavit of Shelly Erickson at Exh. 0 and Affidavit of Don Martin McGee at Exh. P.

¹⁷ If a party is not able to incorporate a prior argument by reference before the Commission, Complainants seek leave to file an amended Memorandum reprinting the argument.

¹⁸ Despite repeated misrepresentations by Respondents, the lease between Respondents and Icicle Seafoods expired on September 14, 2004. The Homer City Code 18.08.070.d states: "All leases or memorandums of leases **shall** be recorded." (Emphasis added). (<http://www.cityofhomer-ak.gov/cityclerk/chapter-1808-city-property-leases>). The Code uses the mandatory verb "shall" and clearly requires recordation. See the discussion of the legal effect of the verb "shall" at the discussion at page 3 and at footnote 3 above. Valid leases with the City of Homer must be properly recorded in and with the state of Alaska and are available on the state of Alaska website.

1 Docket 26 at page 22 at line 17 – page 32 at line 3. Complainants seek to incorporate
2 this ten page factual and legal arguments at these defined pages by specific reference
3 rather than reprinting them in this Memorandum.¹⁹

4 Conclusion

5 Respondents and Respondents' counsel will never concede that the City and
6 Icicle do not have a valid lease. However, Respondents and Icicle do not have a valid
7 lease. On the advice of Respondents' counsel and at the direction of the City Manager,
8 the City of Homer has exempted Icicle Seafoods from paying the rates set forth in the
9 Tariffs to the City for the last eight years and a month (September 14, 2004 – October
10 15, 2012) with no legal basis. The economic losses to the City are substantial and
11 continue indefinitely. The citizens of the City may not be pleased. Respondents'
12 favorable treatment of Icicle and prejudicial treatment of Complainants have inflicted
13 substantial economic losses and continue to inflict substantial economic losses on

(<http://dnr.alaska.gov/ssd/recoff/searchRO.cfm>). No recorded lease exists in the public record between Respondents and Icicle Seafoods. Respondents and Icicle conflate their illegal conspiracy to favor Icicle into a "lease." Statements in affidavits from Mr. Wrede and Mr. Hoyt with Icicle that they are acting as if there is a lease support Complainants' contention that the City is conspiring with Icicle to favor Icicle and disfavor Complainants without any legal basis. In the Supplemental Affidavit of Kevin Hogan at Exh. Q at page 3 at paragraph 9, he states:

9. For years as a private citizen and then as a Council Member of the Homer City Council, City Manager Mr. Wrede and City Attorney Mr. Tom Klinkner assured me, wrongly I recently learned, that there is a valid lease between the City and Icicle. Any references in my past conversations to an "Icicle lease" are based on misrepresentations from both of them to me and also to others on the Homer City Council and to the citizens of the City of Homer.

¹⁹ If a party is not able to incorporate a prior argument by reference before the Commission, Complainants seek leave to file an amended Memorandum reprinting the argument.

1 Complainants.

2 At the same time, the City relies on the substantial sums paid by Complainants to
3 Respondents to sustain its budget. The City contends that if the same incentives were
4 offered to The Auction Block, there would be devastating economic consequences for
5 the City. This Court should remind Respondents that they cannot have it both ways.
6 The truth is that The Auction Block is keeping the City afloat financially while the City
7 Manager seeks to sink The Auction Block.

8 The City has hobbled The Auction Block's ability to compete for the purchase
9 and sale of commercially caught fish and seafood. The City takes great pleasure in
10 noting the economic and financial devastation resulting from its favoritism of Icicle
11 Seafoods and prejudice toward Complainants. The City keeps contending that its
12 efforts to put The Auction Block out of business have been effective and should be
13 rewarded.

14 The City has at times stated that Complainants can submit an application for a
15 lease. Mr. Hogan testifies that the Homer lease process is "futile," a "sham" and a
16 "fraud."²⁰ Ms. Yeoman testifies that the Homer lease process is a "farce" and a
17 "charade."²¹ Complainants' only realistic recourse is to seek immediate redress before
18 this honorable Commission.²²

²⁰ Affidavit of Kevin Hogan at Exh. P at page 5 at lines 32 - 36 and passim; see also Affidavit of Shelly Erickson at Exh. 0 and Affidavit of Don Martin McGee at Exh. P.

²¹ Affidavit of Jessica Yeoman at Exh. U at page 9 at paragraph 47 and at page 7 at paragraph 39 – page 9 at paragraph 47.

²² Complainants cite Alaska law on duress, estoppel the covenant of good faith and fair dealing and statutory interpretation. However, the Alaska courts do not have the jurisdiction to address the statutory violations in the Shipping Act of 1984 as amended.

1 The Shipping Act of 1984 as amended vests the Federal Maritime Commission
2 with considerable discretion to fashion an appropriate remedy. The Court should note
3 that the City has consistently maintained that the entity providing the shore-based fish
4 processing plant is contributing substantially to the City and is afforded the defined
5 incentives. This Court should accept the Respondents' representations and order the
6 Respondents to offer the incentives currently offered to Icicle to Complainants for eight
7 (8) years to allow Complainants to compete with Icicle and then be subject to the Tariffs.
8 Icicle should be obligated to conform to the rates in the Tariffs.²³ Any other fish
9 processor that builds and operates a shore-based processing plant in Homer should be
10 able to obtain the incentives offered to an entity that builds and operates a shore-based
11 fish processing plant in Homer. Absent favoritism for Icicle, Respondents should have
12 no quarrel with and should support this condign resolution. This remedy is most
13 appropriate and just under the circumstances. Fine-tuning the incentives is justified and
14 required to remedy the past egregious and blatant discrimination. In summary, an
15 award of reparations for past losses and creation of a level playing field are the
16 prescription for a healthy economy in Homer.

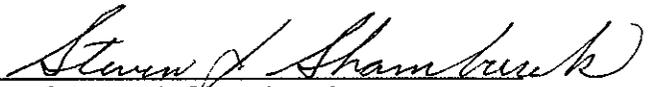
17 For the reasons stated and discussed above, Complainants move for entry of

²³ Rule 34.4 addresses "APPLICATION OF TARIFF." Exhs. D, E, F, and G at page 12. SUBSECTION 105(c) ACCEPTANCE OF TARIFF" at page 12 states "Use of the city docks and terminal facilities of the City shall be deemed acceptance of this Tariff and the terms and conditions named herein." The Tariff uses the mandatory verb "shall" rather than the discretionary verb "may." Icicle used and uses the city docks and terminal facilities and the Deep Water Dock. Icicle's use of the city docks and terminal facilities and the Deep Water Dock of the City is deemed acceptance of the Tariff and the terms and conditions therein.

1 summary judgment.

2 DATED this 18th day of October, 2012.

3 LAW OFFICE OF STEVEN J. SHAMBUREK
4 Attorney for Complainants

5
6
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GENERAL COUNSEL
FEDERAL MARITIME COMMISSION

FEDERAL MARITIME COMMISSION

DOCKET NO. 12-03

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

v.

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

COMPLAINANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS

Come now the Complainants The Auction Block Company and Harbor Leasing, LLC (at times "Complainants") and file **COMPLAINANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS**

Paragraph 18 of the Initial Order at Docket 5 at page 4 requires:

Any party moving for summary judgment must include in a separate document a statement of material facts as to which there is no genuine dispute. This document must set forth in separately numbered paragraphs a concise statement of each material fact as to which the movant contends there is no genuine issue together with a citation to the portion of the motion record establishing the fact or demonstrating that it is uncontroverted. Each paragraph must be limited as nearly as practicable to a single factual proposition. The citation must specify the document and must specify the pages and paragraphs or lines thereof or the specific portions of exhibits establishing the fact.

Complainants include the following facts that are material and as to which there does not exist a genuine issue.

Based on the pleadings in the record, the Commission Rules, Federal Maritime Commission and Circuit Court decisions and other authority and for the reasons

developed and discussed in CLAIMANTS' MOTION FOR SUMMARY JUDGMENT, the following facts are admitted as true by Respondents. Each of these facts is specifically set forth in the Fourth Amended Complaint (and in the earlier initial Complaint and Amended Complaints¹) at Docket 20 and is not specifically denied by Respondents at Docket 21 and is deemed admitted by operation of law.²

1. **The Complainants** The Auction Block Company is a for-profit corporation in good standing organized under the laws of State of Alaska.

2. The Auction Block Company's principal shareholder is its President Kevin Hogan.

3. The Auction Block Company is a seafood processing and logistics firm engaged in the primary purchase and processing of Alaskan seafood, the provision of fishing vessel services and the procurement and use of terminal services at and around the Port of Homer.

4. In addition, The Auction Block Company receives, handles, stores, and delivers property.

5. Harbor Leasing, LLC is a for-profit limited liability company in good standing organized under the laws of State of Alaska.

6. Harbor Leasing, LLC's members are Kevin Hogan and Bronwyn E. Kennedy. Harbor Leasing, LLC is a real estate management company that leases property from the City of Homer and leases property to The Auction Block Company.

¹ Complainants assert the same facts in their Third Amended Complaint at Docket 16 and Respondents admit the contentions in their Answers To Third Amended Complaint at Dockets 17 and 19.

² Complainants are willing to provide this Statement Of Undisputed Material Facts in a .doc format to the Commission and Respondents.

7. References to The Auction Block Company relate at times to its status as an approved subtenant of Harbor Leasing, LLC.

8. The principal place of business for both Complainants is 4501 Ice Dock Road, Homer, Alaska 99603.

9. The Auction Block Company and Harbor Leasing, LLC are subject to the provisions and protections of the Shipping Act of 1984, as amended, each as a "person" as defined in the former 46 U.S.C. § 1702(18) and in 46 C.F.R. § 515.2(p) and other authority.

10. Complainants allege that the matters complained of will continue in the future and will constitute violations of the Shipping Act of 1984, as amended, in the particulars and to the extent indicated and Complainants pray for reparations and damages for injuries which are and will be sustained as a result of these continuing violations.

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

12. **II. The Respondents** The City of Homer is a municipal corporation organized under the laws of the State of Alaska.

13. The City of Homer owns and operates the Port of Homer in Homer, Alaska.

14. The City Manager is Walt Wrede and the Harbormaster is Bryan Hawkins.

15. The principal address is 491 East Pioneer Avenue, Homer, Alaska 99603.

16. The City and Port are subject to the provisions and protections of the Shipping Act of 1984, as amended, as a "marine terminal operator" as defined in 46 U.S.C. § 40102(14) and other authority and as a "person" as defined in the former 46 U.S.C. § 1702(18) and in 46 C.F.R. § 515.2(p) and other authority.

17. The Respondents are at times referred to as the "City" and/or the "Port" and/or the "Respondent."

18. **III. Jurisdiction** The City of Homer operates the Port of Homer and has filed the "Port of Homer Terminal Tariff No. 600 Filed under ATFI Rules" which have been adopted and ratified by the Homer City Council.

19. The City and Port are subject to the provisions of the Shipping Act of 1984, as amended, as a "marine terminal operator" as defined in 46 U.S.C. § 40102(14) and other authority and as a "person" as defined in the former 46 U.S.C. § 1702(18) and in 46 C.F.R. § 515.2(p) and other authority.

20. The Federal Maritime Commission has subject matter jurisdiction of this matter and personal jurisdiction of the Respondents. 46 U.S.C. § 40301 and other authority.

21. **IV. History** The state of Alaska revenue sharing formula in its fish tax law provides an incentive for a city to encourage a person to process fish inside the city limits and thereby create local jobs and generate raw fish tax revenue for the city.

22. The Complainants' competitor, Icicle Seafoods, operated its seafood processing plant inside the boundaries of the City of Homer and created additional jobs and generated tax revenue for the City of Homer.

23. However, in 1998, Icicle Seafoods' processing plant burned down and was not rebuilt.

24. The majority of the fish that Icicle Seafoods unloaded in the City of Homer after 1998 was transported to and processed in the City of Seward which received the job creation and tax benefits.

25. In 2008, The Auction Block Company built a processing plant on a parcel of property leased from the City of Homer by Harbor Leasing, LLC.

26. Although the Complainants were generating all the benefits to and for the City of Homer that were previously generated by competitor Icicle Seafoods, the City of Homer refused and continues to refuse to consider any relief or incentives to Complainants or even to deal or negotiate while continuing to provide relief and incentives to the competitor, Icicle Seafoods, for and with no benefit to Respondents.

27. In addition, Respondents previously entered into exclusive lease and other arrangements with Complainants' competitor, Icicle Seafoods, that are in contravention and violation of the Shipping Act of 1984, as amended, and the published Tariffs discussed below.

28. Respondents' actions and inactions do not serve any valid transportation purpose or advance any genuine public policy concern.

29. Respondents' actions and inactions prejudice Complainants and caused and continue to cause damages to Complainants.

30. **V. Violations** Respondents City of Homer and Port of Homer failed and fail to establish a nondiscriminatory and/or a reasonable regulatory process and failed and fail to prevent the economic discrimination that is at the heart of the regulatory scheme established by Congress in the Shipping Act of 1984, as amended.

31. Respondents are in violation of the Shipping Act of 1984, as amended, specifically 46 U.S.C. § 41102(c) that states in pertinent part: "A . . . marine terminal operator . . . may not fail to establish, observe, and enforce just and reasonable

regulations and practices relating to or connected with receiving, handling, storing, or delivering property.”

32. Respondents also are in violation of 46 U.S.C. § 41106(2) that states in pertinent part: “A marine terminal operator may not . . . (2) give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person.”

33. Respondents also are in violation of 46 U.S.C. § 41106(3) that states in pertinent part: “A marine terminal operator may not . . . (3) unreasonably refuse to deal or negotiate.”

34. Respondents also are in violation of 46 U.S.C. § 41302(a) that states in pertinent part “The Federal Maritime Commission, on complaint or its own motion, may investigate any conduct or agreement that the Commission believes may be in violation of this part. The Commission may by order disapprove, cancel, or modify any agreement that operates in violation of this part.”

35. Respondents also are in violation of 46 U.S.C. § 41305(b) and (c) that states in pertinent part: “(b) Basic Amount. — If the complaint was filed within the period specified in section 41301(a) of this title, the Federal Maritime Commission shall direct the payment of reparations to the complainant for actual injury caused by a violation of this part, plus reasonable attorney fees.”

36. Respondents also may be in violation of other provisions of the Shipping Act of 1984, as amended, that become known through disclosure or discovery.

37. Complainants reserve the right to assert and maintain those causes of action.

38. **A. Respondents' Treatment of Complainants.** Prior to 1995, Respondents did not file Tariffs with the Federal Maritime Commission and instead included the rates and treatment of persons in the City of Homer Code.

39. In the Ordinance in 1995 (95-69), the Tariffs were taken out of the Code and filed with the FMC.

40. After then, Respondents used Resolutions rather than Ordinances to amend the Tariffs.

41. The Ordinance at 95-18(S) repealed and reenacted Title 10 with the majority of Title 10 incorporated into the Homer Port and Harbor Tariff 95-1, adopted by Resolution 95-69.

42. Prior Ordinance History: Ord. 95-9, 1995; Ord. 95-4, 1995; Ord. 95-3, 1995; Ord. 92-46, 1992; Ord. 92-45, 1992; Ord. 92-23(A), 1992; Ord. 92-22, 1992; Ord. 91-25, 1991; Ord. 91-13(S), 1991; Ord. 90-17(A), 1990; Ord. 90-16, 1990; Ord. 90-8(A), 1990; Ord. 90-7, 1990; Ord. 89-6, 1989; Ord. 89-4, 1989; Ord. 88-11, 1988; and Ord. 88-2, 1988.

43. Respondents' "Terminal Tariff No. 600 Filed under ATFI Rules" effective January 1, 2009, Application Of Rule 34.30 regarding "Fish Dock" at Subsection 275 at page 53 sets the published rate for "Fish Dock Crane" use at \$88.00 per hour for the years 2009 and 2010.

44. Respondents' three (3) "Terminal Tariff No. 600 Filed under ATFI Rules" effective January 1, 2011 and April 25, 2011 and July 25, 2011, Application Of Rule 34.30 regarding "Fish Dock" at Subsections 275 at pages 53 set the published rate for "Fish Dock Crane" use at \$90.64 per hour for the year 2011 and continuing.

45. Respondents unjustly overcharge The Auction Block Company for the services received.

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

47. Damages are continuing into the future.

48. Respondents' Treatment of Competitor. Respondents required The Auction Block Company to pay and The Auction Block Company paid the rates published in the Tariff and discussed above.

49. However, Respondents do not require Complainants' major competitor, Icycle Seafoods, Inc. d/b/a Seward Fisheries ("Icycle Seafoods") to pay and Icycle Seafoods does not pay the rates published in the Tariff.

50. Respondents charge Icycle Seafoods for "Fish Dock Crane" use and also for the use and enjoyment of multiple defined "PREMISES" based on rates in a series of exclusive lease agreements, addenda and amendments executed by Respondents and Icycle Seafoods.

51. The LEASE AGREEMENT dated September 14, 1979 recorded at Book 111, Pages 884 through 902A in the Homer Recording District at Paragraph 3 ("USE OF PREMISES") describes the real property subject to the "Land Lease" at Page 885.

52. The AMENDMENT OF LEASE AGREEMENT dated July 1, 1986 recorded at Book 172, Pages 673 through 678 in the Homer Recording District at Paragraph 5 ("USE OF PREMISES") at Page 675 leases the following premises:³

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

54. DOCK AND CRANE USE described in (c) above is amended at Page 384 as follows:⁵

³ The computer will not allow this information to be printed under Paragraph 52:

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

⁴ The computer will not allow this information to be printed under Paragraph 53:

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

⁵ The computer will not allow this information to be printed under Paragraph 54:

55. The Tariff at page 53 describes the "Ice Plant Bin Storage (roofed-over, open-sided Storage bins at west end of ice plant building sixteen feet by twelve feet)."

56. This 192 square foot structure is assessed the rental rate of \$2400 per year ("200/month" multiplied by 12 months) which is a rate of \$12.50 per square foot pursuant to the Tariff.

57. Pursuant to the provisions in (a) through (g) in the USE OF PREMISES paragraphs in the last two LEASE AGREEMENTS set forth above, Respondents allow Icicle Seafoods to use and enjoy for commercial purposes an additional approximately 2750 square feet of Respondents' property.

58. At the annual rate of \$12.50 per square foot calculated pursuant to the provisions in the Tariff, Icicle Seafoods is commercially using and enjoying premises valued at \$34,375.00 (2750 square feet x \$12.50 per square foot).

59. The "Dock Use" charge stated in Paragraph 2 "RENTAL" in the SECOND AMENDMENT at page 384 is \$30,900.00.

60. The amount of \$34,375.00 is the total calculated "USE OF PREMISES" benefit to competitor Icicle Seafoods which exceeds the "Dock Use" charge before the calculation of Icicle Seafoods' "Fish Dock Crane" use.

61. Thus, the Respondents provide at least an annual benefit of \$3,475.00 (\$34,375.00 - \$30,900.00) to Icicle Seafoods that is not provided to The Auction Block Company.

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

62. In addition, Respondents provide Icicle Seafoods the 1300 hours of Crane Use at no cost and only charge the rate of \$15 per hour for use above 1300 hours as stated in Paragraph 3 "DOCK AND CRANE USE" in the SECOND AMENDMENT at Page 384.

63. However, Respondents charge The Auction Block Company for crane use discussed below. Respondents have damaged Complainants in the sum of at least \$10,425.00 (\$3,475.00 x 3 years). Damages are continuing into the future.

64. **B.** The Tariff dated July 25, 2011 at page 53 states: "Minimum charge per hour for crane" [is] "Fifteen minutes."

65. In application, Respondent City of Homer applies the rates in 15 minute increments, so 16 minutes of use is charged at 30 minutes, 31 minutes is charged at 45 minutes, and 46 minutes is charged at 60 minutes.

66. Respondent City of Homer assesses an automatic overcharge of \$1.51 to \$21.14 on average for each transaction.

67. Respondents City of Homer has represented that this rate structure is set forth in the Tariff, although this rate structure is not set forth in the Tariff.

68. Respondents do not apply these calculations to the Fish Dock Crane charges or use assessed to Icicle Seafoods.

69. Respondents overcharged The Auction Block Company a total of at least \$16,902.14 for the years 2009 to 2011 and an as yet undetermined sum in 2012 based on the rate published in the Tariff.

70. In addition, applying the minimum charge outlined in the Tariff results in a crane charge for a 1 minute use of \$24.36.

71. For example, Respondents billed and The Auction Block Company paid \$487.20 for 20 crane charges totaling 1 hour.

72. In addition, Respondents billed and The Auction Block Company paid \$419.22 for 17 crane charges that totaled 13 minutes, an effective hourly rate of \$1,934.86 per hour.

73. These charges are not applied to Icicle Seafoods which also is not subject to a per use sales tax.

74. Damages are continuing into the future.

75. C. The Tariff at page 53 states a wharfage rate of \$4.62 per ton for the years 2009 and 2010 and a rate of \$4.76 per ton for the year 2011 on fish products handled by The Auction Block Company.

76. Respondents exempt Icicle Seafoods from these charges and assessments.

77. Respondents bill at \$.00231 per pound for the years 2009 and 2010 and at \$.00238 for the year 2011.

78. The Auction Block Company handled 8,026,896 pounds of fish in 2009 which results in a differential and damages to The Auction Block Company of \$18,542.13 in 2009.

79. The Auction Block Company handled 6,588,169 pounds of fish in 2010 which results in a differential and damages to The Auction Block Company of \$15,218.67 in 2010.

80. The Auction Block Company handled 5,540,143 pounds of fish in 2011 which results in a differential and damages to The Auction Block Company of \$13,185.54 in 2011.

81. The Auction Block Company handled an as yet undetermined poundage of fish in 2012 with a differential and damages to The Auction Block Company of an undetermined sum in 2012.

82. The total damages are at least \$46,946.34 for the years from 2009 until 2012.

83. Damages are continuing into the future.

84. **D.** Respondents charge and The Auction Block Company pays an additional wharfage fee for ice used on fish offloaded at the fish dock of \$14.00 per ton in the years 2009 and 2010 and \$14.50 per ton in the year 2011 unless the ice is purchased from the City.

85. Respondents do not assess this fee to and do not receive the fee from Icicle Seafoods.

86. The City and Icicle Seafoods executed an exclusive reciprocal rate arrangement for ice that prejudices and disadvantages and thus damages The Auction Block Company.

87. Respondents have damaged The Auction Block Company in an amount to be determined.

88. Damages are continuing into the future.

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

90. Respondents' failure to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property damaged Complainants' ability to compete with Icicle Seafoods.

91. If Respondents had not unduly and/or unreasonably preferred and/or advantaged Icicle Seafoods and/or unduly and/or unreasonably prejudiced and/or disadvantaged Complainants, The Auction Block Company could have purchased more fish and realized net revenues of up to \$350,000.00.

92. Respondents unreasonably refused and refuse to deal and/or negotiate with Complainants and thus damaged Complainants.

93. Damages are continuing into the future.

94. **VI.** By reason of the facts stated in the foregoing paragraphs and other facts, Complainants have been and are being subject to injury as a direct and proximate result of and caused by the violations by Respondents of the Shipping Act of 1984, as amended, specifically 46 U.S.C. § 41102(c) because Respondents failed to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property;

95. 46 U.S.C. § 41106(2) because Respondents have given undue and/or unreasonable preference and/or advantage and/or imposed undue and/or unreasonable prejudice and/or disadvantage with respect to Complainants;

96. 46 U.S.C. § 41106(3) because Respondents have unreasonably refused and continue to refuse to deal and/or negotiate with Complainants;

97. 46 U.S.C. § 41302(a) that allows the Federal Maritime Commission, on complaint or its own motion, to investigate any conduct or agreement that the Commission believes may be in violation of this part and may by order disapprove, cancel, or modify any agreement that operates in violation of the Shipping Act of 1984;

98. 46 U.S.C. § 41305(b) that provides as a basic amount, if the complaint was filed within the period specified in 46 U.S.C. § 41301(a), that the Federal Maritime Commission shall direct the payment of reparations to the complainant for actual injury caused by a violation of this part, plus reasonable attorney fees.

99. **VII.** Respondents' actions and inactions proximately and legally damaged and continue to damage Complainants in the following manners: Respondents damaged Complainants in the sum of at least \$332,114.83 (at least \$257,841.35, \$10,425.00, \$16,902.14 and \$46,946.34).

100. In addition, Respondents placed the Complainants in a competitive disadvantage in the marketplace and further prejudiced and damaged Complainants in the sum of at least \$900,000.00 or in an amount to be determined after further disclosures and discovery.

101. Damages are continuing into the future.

102. **VIII.** Wherefore Complainants pray that Respondents be required to answer the charges herein;

103. that the Complainants and Respondents have not engaged in informal dispute resolution and should be directed to consider informal resolution of the dispute and claims;⁶

104. that if informal dispute resolution is not possible or is unsuccessful, after due hearing in Washington, D.C, an order be made commanding said Respondents:

105. to cease and desist from the aforesaid violations of said acts;

⁶ Respondents have engaged in some dispute resolution.

106. to establish and put in force such practices as the Commission determines to be lawful and reasonable;

107. to pay to said Complainants by way of reparations and damages for the unlawful conduct hereinabove described the sum of at least \$1,232,114.83, with interest and attorney's fees or such other sum as the Commission may determine to be proper as an award of reparations and damages;

108. to assess a civil penalty or penalties as authorized under 46 U.S.C. § 41107(a) for each violation;

109. to enter such other and further order or orders as the Commission determines to be just and proper in the premises.

The following facts that provide the damage figures for the year 2012 and the lost profits are also undisputed:

110. In the Supplemental Affidavit of Mr. Hogan at Exh. Q, he states: Complainants have been billed by Respondents and Complainants have paid to Respondents \$38,099.13 in crane use expenses in 2012.

111. Respondents have damaged Complainants in the sum of at least \$3,475.00 for the differential provided Icicle Seafoods for property rates.

112. The Auction Block has not calculated the crane overcharges for the year 2012.

113. The Auction Block Company handled 2,821,668 pounds of fish in 2012 which results in a differential and damages to The Auction Block Company of \$6,715.57 (wharfage) in 2012.

114. Complainants have lost profits of \$912,766.98 at this time as set forth in the analysis in the "The Auction Block Company Lost Profit Report April 2009 – August, 2012" at Exhibit R.

115. Complainants' total damages are \$332,114.83 (at least \$257,841.35 [Crane Use], \$10,425.00 [Differential Property Fees], \$16,902.14 [Crane Overcharges] and \$46,946.34 [Wharfage]) for 2009 through 2011 and \$48,289.70 (\$38,099.13 [Crane Use], \$3,475 [Differential Property Fees], [No Crane Overcharges are calculated at this time] and \$6,715.57 [Wharfage]) for 2012 and lost profits of \$912,766.98 from April, 2009 through August, 2012 for total damages of \$1,293,171.51.

116. The Auction Block has provided the following full-time and part-time employment in Homer: Year: Total:

2009	114
2010	140
2011	136
2012	120

117. Damages are continuing into the future.

DATED this 18th day of October, 2012.

LAW OFFICE OF STEVEN J. SHAMBUREK
Attorney for Complainants

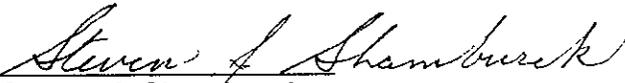
By: 

Steven J. Shamburek
ABA No. 8606063
425 G Street, Suite 610
Anchorage, Alaska 99501
Telephone: (907) 522-5339
shamburek@gci.net
shambureklaw@gci.net
shamburekbank@gci.net

CERTIFICATE OF SERVICE

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

Dated this 18th day of October, 2012.


Steven J. Shamburek

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APR 19 2012
FEDERAL MARITIME COMMISSION

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FEDERAL MARITIME COMMISSION

DOCKET NO. 12-03

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

v.

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

AFFIDAVIT OF STEVEN J. SHAMBUREK

COMMONWEALTH OF VIRGINIA)

) ss.

COUNTY OF FAIRFAX)

1. I am the attorney for the Complainants in this proceeding. I have personal knowledge of the facts stated herein. I am competent to testify to these facts.

2. Exhibit J is a true and correct copy of the Complainants' INITIAL CIVIL RULE 26(a)(1) DISCLOSURES that Mr. Kevin Hogan prepared and that I delivered to counsel for Respondents.

3. Exhibit K is a true and correct copy of RESPONDENTS' INITIAL DISCLOSURES delivered by counsel for Respondents to me.

4. Exhibit L is a true and correct copy of pages 1 and 26 of Respondents' AMENDED RESPONSES TO COMPLAINANTS' FIRST SET OF DISCOVERY REQUESTS TO RESPONDENTS delivered by counsel for Respondents to me.

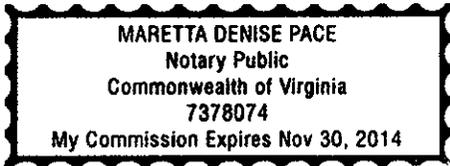
FURTHER YOUR AFFIANT SAYETH NAUGHT.

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Steven J. Shamburek
Steven J. Shamburek

SUBSCRIBED AND SWORN to me this 15 day of October, 2012

Maretta Denise Pace
NOTARY PUBLIC in and for Virginia
My Commission Expires: Nov 30, 2014



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FEDERAL MARITIME COMMISSION

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

v.

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

INITIAL CIVIL RULE 26(a)(1) DISCLOSURES

Complainants serve these INITIAL CIVIL RULE 26(a)(1) DISCLOSURES upon Respondents.

Rule 26(a)(1)(i): the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment.

All of the following witnesses have or may have information that bears on the liability and damages at issue in this case. Complainants will provide a more detailed discussion of the subjects of their information if sought by Respondents. Complainants will seasonably supplement these disclosures.

Kevin Hogan (Attorney-client privilege)
4501 Ice Dock Road
Homer, AK 99603
(907) 399-8090
President of The Auction Block Company and member of Harbor Leasing, LLC. Knowledge of Respondents' policies and treatment of Complainants. Historical background of leases related to operation of Homer terminal. Knowledge of operations of Complainants.

Heather Brinster (Attorney-client privilege)
4610 Thomas Ct

1 Homer, AK 99603
2 (907) 299-3720
3 General Manager of The Auction Block Company, 2011-present.
4 Knowledge of operations of Complainants.
5
6 Jessica Yeoman (Attorney-client privilege)
7 202 W. Michigan Avenue
8 Paw Paw, MI 49079
9 (907) 299-0790
10 General Manager of The Auction Block Company, 1999-2011. Minority owner of The
11 Auction Block Company. Knowledge of operations of Complainants.
12
13 Bronwyn Kennedy (Attorney-client privilege)
14 4735 Tamara St.
15 Homer, AK 99603
16 (907) 235-7267
17 Wife of Kevin Hogan and member of Harbor Leasing, LLC. Limited knowledge of
18 operations of Complainants.
19
20 Stephen T. (Steve) Grabacki, FP-C (Privilege asserted)
21 President, and Certified Fisheries Professional
22 GRAYSTAR Pacific Seafood, Ltd.
23 P.O. Box 100506
24 Anchorage, Alaska 99510-0506
25 (907) 272-5600
26 Possible expert witness for Complainants
27
28 Joe Moore CPA (Accountant-client privilege)
29 Altman Rogers & Co.
30 44539 Sterling Hwy
31 Soldotna, AK 99669
32 (907) 262-7478
33 Knowledge of Complainants' financials and industry economics
34 Possible expert witness for Complainants
35
36 Walt Wrede
37 491 E. Pioneer Avenue
38 Homer, AK 99603
39 (907) 235-8121
40 Homer City Manager
41 Primary contact person for the Respondents

1 Knowledge of Respondents' policies and actions.

2

3 Jo Johnson

4 491 E. Pioneer Avenue

5 Homer, AK 99603

6 (907) 235-8121

7 Homer City Clerk

8 Knowledge of Respondents' policies and actions.

9

10 Mary Calhoun

11 40210 Kaleen St.

12 Homer AK 99603

13 (907) 235-2833

14 Former Homer City Clerk

15 Knowledge of Respondents' policies and actions.

16

17 Regina Maurus

18 491 E. Pioneer Avenue

19 Homer, AK 99603

20 (907) 235-8121

21 Homer City Finance Director

22 Member of Homer Lease Committee

23 Knowledge of Respondents' policies and actions.

24

25 Rick Aboud

26 491 E. Pioneer Avenue

27 Homer, AK 99603

28 (907) 235-8121

29 Homer City Planning Director

30 Member of Homer Lease Committee

31 Knowledge of Respondents' policies and actions.

32

33 Shelly Erickson

34 60998 East End Rd.

35 Homer, AK 99603

36 (907) 399-4700

37 Former Chair of the Economic Development Advisory Commission

38 Former Chair of the Lease Committee

39 Member of the Planning Commission

40 Knowledge of Respondents' policies and actions.

1
2 Steve Zimmerman
3 c/o 2490 Kachemak Drive
4 Homer, AK 99603
5 (907) 399-3003
6 Former member of Harbor Leasing, LLC, 2004-2006
7 Port and Harbor Commission
8 Lease Committee
9 Knowledge of Respondents' policies and actions.
10
11 Rachel Livingston
12 c/o 178 E Bunnell Ave
13 Homer, AK 99603
14 (907) ____-____
15 Former City of Homer Administrative Assistant, 2005-2008 ??
16 Knowledge of Respondents' policies and actions.
17
18 Marty McGee
19 4812 Sundi Drive
20 Anchorage, AK 99502
21 (907) 343-6897
22 Former City of Homer Leaseholder
23 Landlord of The Auction Block Company, 1997-2002
24 Anchorage Municipal Assessor
25 Knowledge of the City of Homer's treatment of tenants
26
27 Marvin Yoder
28 4185 Birch Forest Drive
29 Palmer, AK 99645
30 (907) 746-0068
31 Former City Manager of Seward who had or may have had communications with
32 representatives of Respondents.
33
34 Phil Sheely
35 C/O Box 168
36 Seward, AK 99664
37 (907) ____-____
38 Former City Manager of Seward who had or may have had communications with
39 representatives of Respondents.
40

1 Phil Oates
2 2904 Brittany Drive
3 Anchorage, AK 99504
4 (907) 333-5721
5 Former City Manager of Seward who had or may have had communications with
6 representatives of Respondents.

7
8 Clark Corbridge
9 C/O 3380 C Street
10 Anchorage, AK 99503
11 (907) 274-7580
12 Former City Manager of Seward who had or may have had communications with
13 representatives of Respondents.

14
15 Brad Faulkner
16 P.O. Box 996
17 Homer, AK 99603
18 (907) 299-1871
19 City leaseholder
20 Member of the Economic Development Advisory Commission
21 Knowledge of the City of Homer's treatment of tenants
22 Background in Fisheries Business

23
24 Other members of the Homer City Council, the Port and Harbor Commission, the
25 Economic Development Advisory Commission, the Planning and Zoning Commission
26 and/or the Lease Committee.

27 Rule 26(a)(1)(ii): a copy—or a description by category and location—of all
28 documents, electronically stored information, and tangible things that the disclosing
29 party has in its possession, custody, or control and may use to support its claims or
30 defenses, unless the use would be solely for impeachment.

- 31
- 32 • Respondents' "Terminal Tariff No. 600 Filed under ATFI Rules" effective January
 - 33 1, 2009. 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 • Harbor Leasing, LLC Lease with Respondents.
 - 36 • Icicle Seafoods Leases (and amendments) with Respondents.
 - 37 • Base and Northern Aurora Leases (to be obtained through discovery or
 - 38 subpoena).
 - Other leases with Respondents.

- 1 • Any City of Seward documents referencing The Auction Block Company (to be
- 2 obtained via discovery or subpoena).
- 3 • Homer Land Allocation Plan.
- 4 • e-mail inventory between Complainants and Respondents.
- 5 • Copy of crane charges.
- 6 • Listing of crane overcharges.
- 7 • KBBI broadcast of an interview with Walt Wrede on April 26, 2012.

8

9 Responsive documents are being copied or can be copied.

10 Rule 26(a)(1)(iii): a computation of each category of damages claimed by the
11 disclosing party—who must also make available for inspection and copying as under
12 Rule 34 the documents or other evidentiary material, unless privileged or protected from
13 disclosure, on which each computation is based, including materials bearing on the
14 nature and extent of injuries suffered.

15 Complainants incorporate the damage figures and calculations recited in their
16 Second Amended Complaint as follows:

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

29 Respondents' Treatment of Competitor. Respondents required The Auction
30 Block Company to pay and The Auction Block Company paid the rates published in the
31 Tariff and discussed above. However, Respondents do not require Complainants'
32 major competitor, Icicle Seafoods, Inc. d/b/a Seward Fisheries ("Icicle Seafoods") to pay
33 and Icicle Seafoods does not pay the rates published in the Tariff. Respondents charge
34 Icicle Seafoods for "Fish Dock Crane" use and also for the use and enjoyment of
35 multiple defined "PREMISES" based on rates in a series of exclusive lease agreements,
36 addenda and amendments executed by Respondents and Icicle Seafoods. The LEASE
37 AGREEMENT dated September 14, 1979 recorded at Book 111, Pages 884 through
38 902A in the Homer Recording District at Paragraph 3 ("USE OF PREMISES") describes

1 the real property subject to the "Land Lease" at Page 885. The AMENDMENT OF
2 LEASE AGREEMENT dated July 1, 1986 recorded at Book 172, Pages 673 through
3 678 in the Homer Recording District at Paragraph 5 ("USE OF PREMISES") at Page
4 675 leases the following premises:

- 5 (a) Lessee shall have the use of the covered structure at the Fish Dock.
- 6 (b) Lessee may continue to operate its ice dispensing equipment at its present
7 location on the Fish Dock.
- 8 (c) Lessee shall have the use of loading cranes No. 7 and 8 to a maximum of
9 1,858 hours per year. Use of the cranes by Lessee in excess of that time
10 shall be at the rate of Fifteen Dollars (\$15.00) per hour.
- 11 (d) Seafood wharfage charges are included within the rental given above.
- 12 (e) Lessee shall have the use of one fish buying shed. Lessor shall have the
13 right to select the shed for Lessee's use.

14 The SECOND AMENDMENT OF LEASE AGREEMENT dated January 25, 1988 with
15 an effective date of September 14, 1987 recorded at Book 0181, Pages 383 through
16 386 in the Homer Recording District at Paragraph 4 ("USE OF PREMISES") at Page
17 384 leases the following additional premises:

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

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

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

28 The Tariff at page 53 describes the "Ice Plant Bin Storage (roofed-over, open-sided
29 Storage bins at west end of ice plant building sixteen feet by twelve feet)." This 192
30 square foot structure is assessed the rental rate of \$2400 per year ("200/month"
31 multiplied by 12 months) which is a rate of \$12.50 per square foot pursuant to the Tariff.
32 Pursuant to the provisions in (a) through (g) in the USE OF PREMISES paragraphs in
33 the last two LEASE AGREEMENTS set forth above, Respondents allow Icicle Seafoods
34 to use and enjoy for commercial purposes an additional approximately 2750 square feet
35 of Respondents' property. At the annual rate of \$12.50 per square foot calculated
36 pursuant to the provisions in the Tariff, Icicle Seafoods is commercially using and
37 enjoying premises valued at \$34,375.00 (2750 square feet x \$12.50 per square foot).

1 The actual square footage of the facilities may be larger and must be determined by a
2 professional survey, an appraisal and/or a report by a certified professional. The "Dock
3 Use" charge stated in Paragraph 2 "RENTAL" in the SECOND AMENDMENT at page
4 384 is \$30,900.00. The amount of \$34,375.00 is the total calculated "USE OF
5 PREMISES" benefit to competitor Icicle Seafoods which exceeds the "Dock Use"
6 charge before the calculation of Icicle Seafoods' "Fish Dock Crane" use. Thus, the
7 Respondents provide at least an annual benefit of \$3,475.00 (\$34,375.00 - \$30,900.00)
8 to Icicle Seafoods that is not provided to The Auction Block Company. In addition,
9 Respondents provide Icicle Seafoods the 1300 hours of Crane Use at no cost and only
10 charge the rate of \$15 per hour for use above 1300 hours as stated in Paragraph 3
11 "DOCK AND CRANE USE" in the SECOND AMENDMENT at Page 384. However,
12 Respondents charge The Auction Block Company for crane use discussed below.
13 Respondents have damaged Complainants in the sum of at least \$10,425.00
14 (\$3,475.00 x 3 years). Damages are continuing into the future.

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

32 **C.** The Tariff at page 53 states a wharfage rate of \$4.62 per ton for the years 2009
33 and 2010 and a rate of \$4.76 per ton for the year 2011 on fish products handled by The
34 Auction Block Company. Respondents exempt Icicle Seafoods from these charges and
35 assessments. Respondents bill at \$.00231 per pound for the years 2009 and 2010 and
36 at \$.00238 for the year 2011. The Auction Block Company handled 8,026,896 pounds
37 of fish in 2009 which results in a differential and damages to The Auction Block
38 Company of \$18,542.13 in 2009. The Auction Block Company handled 6,588,169
39 pounds of fish in 2010 which results in a differential and damages to The Auction Block

1 Company of \$15,218.67 in 2010. The Auction Block Company handled 5,540,143
2 pounds of fish in 2011 which results in a differential and damages to The Auction Block
3 Company of \$13,185.54 in 2011. The Auction Block Company handled an as yet
4 undetermined poundage of fish in 2012 with a differential and damages to The Auction
5 Block Company of an undetermined sum in 2012. The total damages are at least
6 \$46,946.34 for the years from 2009 until 2012. Damages are continuing into the future.

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

15 E. The Auction Block Company and competitor Icicle Seafoods compete to
16 purchase fish in the City of Homer and at the Port of Homer and in Alaska in these
17 markets. Respondents' failure to establish, observe, and enforce just and reasonable
18 regulations and practices relating to or connected with receiving, handling, storing, or
19 delivering property damaged Complainants' ability to compete with Icicle Seafoods. If
20 Respondents had not unduly and/or unreasonably preferred and/or advantaged Icicle
21 Seafoods and/or unduly and/or unreasonably prejudiced and/or disadvantaged
22 Complainants, The Auction Block Company could have purchased more fish and
23 realized net revenues of up to \$350,000.00. Respondents unreasonably refused and
24 refuse to deal and/or negotiate with Complainants and thus damaged Complainants.
25 Damages are continuing into the future.

26 F. On information and belief, Respondents discussed and/or agreed with another
27 marine terminal operator, the City of Seward, or with a common carrier to boycott, or
28 unreasonably discriminate in the provision of terminal services to, Complainants. The
29 City of Seward is subject to the provisions and protections of the Shipping Act of 1984,
30 as amended, as a "marine terminal operator" as defined in 46 U.S.C. § 40102(14) and
31 other authority and as a "person" as defined in the former 46 U.S.C. § 1702(18) and in
32 46 C.F.R. § 515.2(p) and other authority. Respondents' actions, inactions, agreements,
33 boycotts and/or discrimination damaged Complainants. Respondents have damaged
34 Complainants in an amount to be determined. Damages are continuing into the future.

35 Complainants intend to rely on information and data from the Federal
36 Department of Commerce, National Marine Fisheries Service, Alaska Region including:

- 37
- IFQ Harvests by Port of Landing

- 1 • Standard Prices for Halibut
- 2 • Estimated Ex-Vessel Prices for Halibut, Area 3A

3

4 In addition, Complainants intend to rely on information and data from the State of
5 Alaska Department of Fish & Game ("ADFG") and Department of Revenue and the
6 Commercial Fisheries Entry Commission ("CFEC") including:

7

- 8 • ADFG Landing Reports ("fish tickets")
- 9 • CFEC Landings Reports
- 10 • Commercial Operators Annual Reports

11 Complainants intend to rely on two separate datasets, one for Homer and one for
12 Seward, covering a ten-year time-series (2002-2011 or as recent as possible).

13 Complainants intend to obtain a survey of the Icicle facilities to determine the
14 actual square footage of the facilities.

15 In addition, Complainants assert market damages based on the pounds landed in
16 the years 2009-2011 which are a total of 20,155,208 pounds at seven cents a pound
17 (\$.07) per pound for a loss of \$1,410,864.56. Damages for 2012 are continuing.

18 In addition, Complainants intend to supplement these disclosures with additional
19 information and more specific computations of damages.

20 Rule 26(a)(1)(iv): for inspection and copying as under Rule 34, any insurance
21 agreement under which an insurance business may be liable to satisfy all or part of a
22 possible judgment in the action or to indemnify or reimburse for payments made to
23 satisfy the judgment.

24 Not applicable.

25 DATED at Anchorage, Alaska, this 4th day of June, 2012.

26

LAW OFFICE OF STEVEN J. SHAMBUREK
Attorney for Complainants

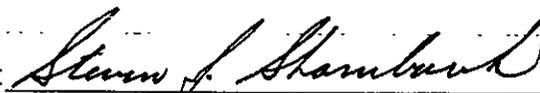
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By: 

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Steven J. Shamburek

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ABA No. 8606063

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425 G Street, Suite 610

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Anchorage, Alaska 99501

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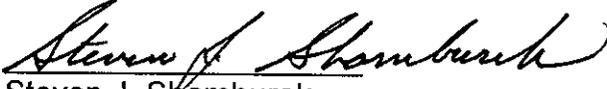
Telephone: (907) 522-5339

shamburek@gci.net
shambureklaw@gci.net
shamburekbank@gci.net

CERTIFICATE OF SERVICE

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6
7 I hereby certify that I have this day served a copy of this INITIAL CIVIL RULE 26(a)(1)
8 DISCLOSURES upon Thomas F. Klinkner, Birch Horton Bittner & Cherot, 1127 West
9 7th Avenue Anchorage, Alaska 99501 by sending a copy by e-mail attachment to
10 tklinkner@bhb.com and also a copy to Holly C. Wells at hwells@bhb.com.

11 Dated this 4th day of June, 2012.

12
13 By: 
14 Steven J. Shamburek

ORIGINAL

FEDERAL MARITIME COMMISSION

RECEIVED

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10:00 AM

THE AUCTION BLOCK COMPANY, an Alaska corporation, and HARBOR LEASING, LLC, an Alaska limited liability company,

Complainants,

vs.

THE CITY OF HOMER, a Municipal corporation and its PORT OF HOMER,

Respondents.

Docket No. 12-03

RESPONDENTS' INITIAL DISCLOSURES

Respondents, City of Homer and its Port of Homer, (collectively referred to as "the City"), by and through counsel, hereby make its preliminary disclosures pursuant to Fed. R. Civ. P. 26(a)(1). Complainants, The Auction Block Company and Harbor Leasing, LLC, will be referred to as "Auction Block" and/or "Harbor Leasing" in these disclosures. The Complainants' claims arise out of the terms, conditions, and negotiations surrounding two separate leases: (1) the lease between Harbor Leasing, LLC and the City ("Harbor Leasing Lease") identifying Auction Block as Tenant, and (2) lease between the City and Icicle Seafoods, Inc. ("Icicle Lease"). These disclosures are based on the information currently known to the City.

I. FRCP 26(a)(1)(A)(i): Individuals Likely to have Discoverable Information That may be Used to Support Claims or Defenses

- 1. Dru Corbin
City of Homer
c/o Birch Horton Bittner & Cherot
1127 W. Seventh Avenue
Anchorage, AK 99501
907-276-1550

Attorney/Client Privilege

BIRCH HORTON BITTNER & CHEROT
ATTORNEYS AT LAW
1127 WEST SEVENTH AVENUE
ANCHORAGE, ALASKA 99501-3301
TELEPHONE (907) 276-1550 • FACSIMILE (907) 276-3680

Dru Corbin was a member of the City's lease committee at all relevant times and may have discoverable knowledge of the terms and negotiations of the Harbor Leasing Lease.

2. Steve Dean **Attorney/Client Privilege**
c/o Birch Horton Bittner & Cherot
1127 W. Seventh Avenue
Anchorage, AK 99501
907-276-1550

Steve Dean was a member of the lease committee at all relevant times and may have discoverable knowledge of the terms and negotiations of the Harbor Leasing Lease.

3. Lisa Ellington **Attorney/Client Privilege**
c/o Birch Horton Bittner & Cherot
1127 W. Seventh Avenue
Anchorage, AK 99501
907-276-1550

Lisa Ellington was a member of the lease committee at all relevant times and may have discoverable knowledge of the terms and negotiations of the Harbor Leasing and Icicle Leases.

4. Bryan Hawkins **Attorney/Client Privilege**
c/o Birch Horton Bittner & Cherot
1127 W. Seventh Avenue
Anchorage, AK 99501
907-276-1550

Bryan Hawkins is the current Harbormaster for the City and was a member of the lease committee at all relevant times. He is expected to have discoverable knowledge of the Harbor Leasing and Icicle Leases.

5. Kevin Hogan **Attorney/Client Privilege**
c/o Law Offices of Steven J. Shamburek
425 G Street, Suite 610
Anchorage, AK 99501
907-522-5339

Kevin Hogan is Manager/Member of Harbor Leasing and Director/President of Auction Block. He may have discoverable knowledge regarding the business and financial affairs of these companies, lease negotiations between the City and Harbor Leasing and communications with the City relating to this action.

6. Bronwyn E. Kennedy **Attorney/Client Privilege**
c/o Law Offices of Steven J. Shamburek
425 G Street, Suite 610
Anchorage, AK 99501
907-522-5339

Bronwyn Kennedy is a Member of Harbor Leasing, and may have discoverable knowledge regarding its business and financial affairs.

7. Walt Wrede **Attorney/Client Privilege**
c/o Birch Horton Bittner & Cherot
1127 W. Seventh Avenue
Anchorage, AK 99501
907-276-1550

Walt Wrede is the current Manager for the City and has knowledge of lease and negotiations between the City and Harbor Leasing and Auction Block and communications with Harbor Leasing and Auction Block relating to this action. He also has knowledge of the Icicle Lease.

8. Representatives of Icicle Seafoods, Inc. with knowledge regarding the Icicle Lease and negotiations surrounding that lease to be identified at a later date.

9. Representatives from the City of Seward knowledgeable about the City of Seward's interactions with the City regarding Harbor Leasing or Icicle Seafoods, Inc.

10. Expert witnesses as they are determined to be necessary and identified during the course of this case and discovery.

11. All witnesses necessary to authenticate documents to whose admissibility other parties are unwilling to stipulate.

12. All witnesses listed by other parties.

13. All witnesses identified in the course of subsequent discovery or investigation.

14. All witnesses whose depositions are taken in this case.

15. All witnesses necessary for rebuttal purposes.

The City reserves the right to name further potential witnesses at a later date as such responsible persons are identified.

II. FRCP 26(a)(1)(A)(ii): Documents Relevant to Claims or Defenses

The City objects to the disclosure of any documents that are privileged and protected under the attorney-client privilege, deliberative process privilege, and/or that are protected under the attorney work product doctrine. Without waiving such objections, the following is a list or description by category of documents located at Birch Horton Bittner & Cherot, 1127 W. Seventh Avenue, Anchorage, Alaska, that may be used to support Respondents' claims and defenses:

1. Non-privileged correspondence and other documents from the City's files relating to the Harbor Leasing Lease, numbered HOMER000001-HOMER000494 and HOMER000813-HOMER000835;

2. Non-privileged correspondence and documents from the City's files pertaining to the Icicle Lease, numbered HOMER000503-HOMER000762; and

3. Harbor Leasing Lease with the City, numbered HOMER000763-HOMER000812. Email and other communications concerning negotiations of the Harbor Leasing Lease. The City is in the process of gathering additional documents relating to this matter, which will be produced at a later date.

III. FRCP 26(a)(1)(iii): Computation of Damages

Damages include but are not limited to reimbursement for all reasonable costs and attorneys' fees incurred in defending this action, as well as any pre-judgment and post-judgment statutory interest on all amounts due.

IV. FRCP 26(a)(1)(iv): Insurance Agreements

No insurance agreements appear to exist that would be available to satisfy a possible judgment, but the City is currently confirming this lack of coverage with its insurance provider, Alaska Municipal League Joint Insurance Association.

VI. FRCP 26(e): Future Supplementation

These disclosures are based on the information currently known to the City, and the City reserves the right to amend and supplement these disclosures throughout the course of discovery in this action.

DATED this 4th day of June, 2012.

BIRCH HORTON BITTNER & CHEROT
Attorneys for Respondents

By: 
Thomas F. Klinkner, ABA #7610112
Holly C. Wells, ABA #0511113
1127 West Seventh Avenue
Anchorage, AK 99501
Telephone: 907.276.1550
Facsimile: 907.276.3680
Email: tklinkner@bhb.com

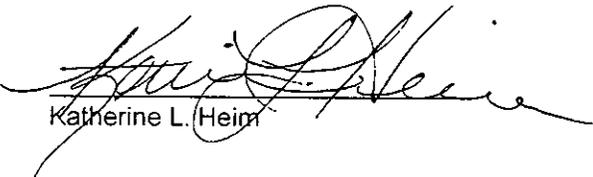
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 4th day of June, 2012, a true and correct copy of the foregoing was served on the following in the manner indicated:

Law Office of Steven J. Shamburek
425 G Street, Suite 610
Anchorage, AK 99501

- U.S. Mail
- Facsimile
- Electronic Delivery
- Hand Delivery

BIRCH HORTON BITTNER & CHEROT

By: 
Katherine L. Heim

BIRCH HORTON BITTNER & CHEROT
ATTORNEYS AT LAW
1127 WEST SEVENTH AVENUE
ANCHORAGE, ALASKA 99501-3301
TELEPHONE (907) 276-1550 • FACSIMILE (907) 276-3680

FEDERAL MARITIME COMMISSION

THE AUCTION BLOCK COMPANY, an)
Alaska corporation, and HARBOR)
LEASING, LLC, an Alaska limited)
liability company,)

Docket No. 12-03

Complainants,)

vs.)

THE CITY OF HOMER, a Municipal)
corporation and its PORT OF HOMER,)

Respondents.)

AMENDED RESPONSES TO COMPLAINANTS'
FIRST SET OF DISCOVERY REQUESTS TO RESPONDENTS

Respondents the City of Homer, Alaska and the Port of Homer, Alaska (collectively referred to hereafter as "the City"), by and through their attorneys of record, hereby amends their Responses to Complainants' First Set of Discovery Requests as follows:

GENERAL OBJECTIONS

1. The City objects to the extent that the discovery requests seek production of documents that are already in Complainants' possession, custody and/or control and/or that can be more or as easily obtained by Complainants.

2. The City objects to the extent that discovery requests seek information that is protected by the attorney-client, work product, and deliberative process privileges.

3. The City objects to the extent that discovery requests impose upon the City greater obligations than required under the applicable rules of civil procedure.

BIRCH HORTON BITTNER & CHEROT
ATTORNEYS AT LAW
1127 WEST SEVENTH AVENUE
ANCHORAGE, ALASKA 99501-3301
TELEPHONE (907) 276-1550 • FACSIMILE (907) 276-3680

VERIFICATION

STATE OF ALASKA)
) ss.
Third Judicial District)

Walt Wrede in his/her capacity as City Manager of

The City of Homer, and being first duly sworn, deposes and states that he/she has read the foregoing Answers to Complainants' Interrogatories, knows the contents thereof, and believes the same to be true and correct.

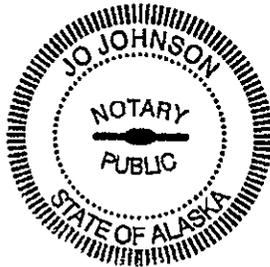
THE CITY OF HOMER

Walt Wrede

SUBSCRIBED AND SWORN to before me, this 4th day of October,

2012.

[Signature]
Notary Public for Alaska
My Commission expires: 12/19/15



BIRCH HORTON BITTNER & CHEROT
ATTORNEYS AT LAW
1127 WEST SEVENTH AVENUE
ANCHORAGE, ALASKA 99501-3301
TELEPHONE (907) 276-1660 • FACSIMILE (907) 276-3680

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KBBI NEWS BROADCAST

APRIL 26, 2012

Transcribed by: Patta K. Johnson

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TRANSCRIPT OF APRIL 26, 2012

KBBI NEWS BROADCAST

AARON SELBIG: When former Homer Council Member Kevin Hogan abruptly resigned his position at the March 12 council meeting, he said he was doing so because he was planning a lawsuit against the City.

At the time, Hogan was mum on what the nature of that lawsuit might be. But now, thanks to documents filed with the Federal Maritime Commission, now we know. Hogan has filed a complaint with the Commission on behalf of his company, The Auction Block, against the City of Homer alleging unfair business practices at the Homer Harbor.

According to legal documents filed April 10th, Hogan's basic allegation is that the City gives preferential treatment in the form of, quote, relief and incentives, to Icicle Seafoods, one of The Auction Block's main competitors in the fish buying business.

MR. WREDE: Yeah, the basic facts there are true.

AARON SELBIG: That's Homer City Manager Walt Wrede, who does not dispute Hogan's basic assertion that Icicle Seafoods has, for years, enjoyed a special deal with the City of Homer. It's a deal that Wrede

1 says began with a long-term contract back in 1976 when
2 Icicle first built its processing plant at the Homer
3 Harbor.

4 MR. WREDE: The bottom line is the Council
5 wanted to provide incentives for -- for Icicle to come
6 and build and operate the plant because of the jobs and
7 revenue. That's a typical thing. I mean, even today
8 you hear talk about providing incentives for business to
9 come here. So the Council did that. And they have a
10 break on their crane use and their wharfage, and that
11 was a contractual agreement through the lease.

12 AARON SELBIG: Hogan says in his complaint
13 that the breaks given to Icicle Seafoods by the City
14 constitute a, quote, unreasonable or preferential
15 advantage and are a violation of the Federal Shipping
16 Act of 1984. He is seeking damages in the amount of
17 \$682,114.

18 Reached Tuesday afternoon, Hogan said he
19 could not say much about the case until he had talked
20 further with his attorney. He promised an interview
21 with KBBI News in the coming days saying there is,
22 quote, more to come in the case.

23 Wrede says he has heard Hogan talk about
24 this issue before, including once publically during a
25 Homer City Council meeting last fall.

1 MR. WREDE: And the city attorney was in the
2 room. And Kevin said is it legal, is it right to have
3 one group of people at the fish dock paying this tariff
4 or being subject to these fees and others not? And the
5 attorney's off-the-cuff response at the time was yes, if
6 you have -- you know, the tariff is like a menu at a
7 restaurant. These are our prices. These are the fees
8 if you want to do business with the Homer Harbor.

9 But, basically, if you have a long-term
10 client there, somebody you have a working relationship
11 with and they have a presence, you can have a
12 contractual agreement with them that includes different
13 fees.

14 AARON SELBIG: Wrede says Icicle Seafoods
15 still has the same deal, even though its Homer
16 processing plant burnt down in 1988 and was never
17 rebuilt. The long-term contract was reexamined four
18 years ago says Wrede, and the City considered changes to
19 it at that time.

20 MR. WREDE: They looked at it, their
21 attorneys looked at it, our attorneys looked at it, and
22 we decided that, you know, those -- that needed to
23 remain in place. That it couldn't be -- couldn't -- or
24 shouldn't be changed.

25 AARON SELBIG: The Federal Maritime

1 Commission is a Washington, D.C. based, independent
2 agency that has regulatory power over international
3 shipping, cruise lines, and marine terminals, among
4 other things. According to the agency's website,
5 FMC.gov, the Commission also helps to resolve disputes
6 between parties regarding rates and charges governed
7 under the Shipping Act of 1984.

8 Complaints are first received by one of the
9 Commission's Administrative Law Judges, who have wide
10 leeway as to what they may do with any particular case.
11 An Administrative Law Judge could, for instance, request
12 evidence and witness testimony or even subpoena a
13 witness or hold a hearing, much as a court would.

14 The judge will ultimately make a ruling in
15 the case, whether that is a settlement of some kind or a
16 ruling in favor of one party or another. Parties
17 involved in the case then have the right to appeal that
18 decision to the five-member Commission itself.

19 AARON SELBIG: Walt Wrede says that to his
20 knowledge no other fish buyer operating at the Homer
21 Harbor has complained about the deal Icycle Seafoods
22 enjoys. He says Icycle is still an important economic
23 driver in Homer.

24 MR. WREDE: They buy fish here. Sometimes
25 they supply ice and -- and -- and do other things, so...

1 Last year they brought a floating processor here that
2 tied up at the deepwater dock for much of the summer,
3 and that generated a lot of revenue for the -- for
4 the -- for the City and for the Enterprise Fund. So
5 it's still -- even though they don't have a shore-based
6 processing plant, they still bring a lot of value to the
7 community.

8 AARON SELBIG: The City of Homer has 30 days
9 to reply to Hogan's complaint. Wrede says the city
10 attorney, Thomas Klinkner, is putting that response
11 together now.

12 In Homer, I'm Aaron Selbig.

13 (Recording concluded.)

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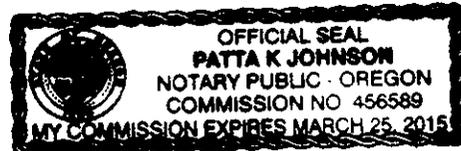
CERTIFICATE

I, Patta K. Johnson, Shorthand Reporter for the States of Oregon and Alaska, certify that the foregoing transcript is a true and correct transcription of the April 26, 2012 radio broadcast of Aaron Selbig interviewing Walt Wrede available on the website site of radio station KBBI at www.kbbi.org.

I further certify that I am neither attorney or counsel for, nor related to or employed by any of the parties to the action; and furthermore, that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal at West Linn, Oregon on this 23th day of September 2012.

Patta K. Johnson
Patta K. Johnson
My Commission Expires
March 25, 2012



NEWS [1] - 1:2	relative [1] - 6:11 relief [1] - 1:17 remain [1] - 3:23 reply [1] - 5:9 Reporter [1] - 6:2 request [1] - 4:11 resigned [1] - 1:5 resolve [1] - 4:5 response [2] - 3:5, 5:10 restaurant [1] - 3:7 revenue [2] - 2:7, 5:3 room [1] - 3:2 ruling [2] - 4:14, 4:16	transcript [1] - 6:4 transcription [1] - 6:4 treatment [1] - 1:17 true [2] - 1:21, 6:4 Tuesday [1] - 2:18 typical [1] - 2:7
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OF [1] - 1:1 off-the-cuff [1] - 3:5 once [1] - 2:24 one [4] - 1:18, 3:3, 4:8, 4:16 operate [1] - 2:6 operating [1] - 4:20 Oregon [2] - 6:3, 6:15		ultimately [1] - 4:14 under [1] - 4:7 unfair [1] - 1:13 unreasonable [1] - 2:14 up [1] - 5:2
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particular [1] - 4:10 parties [4] - 4:6, 4:16, 6:10, 6:12 party [1] - 4:16 Patta [2] - 6:2, 6:23 paying [1] - 3:3 people [1] - 3:3 place [1] - 3:23 planning [1] - 1:7 plant [4] - 2:2, 2:6, 3:16, 5:6 position [1] - 1:5 power [1] - 4:2 practices [1] - 1:14 preferential [2] - 1:17, 2:14 presence [1] - 3:11 prices [1] - 3:7 processor [1] - 5:1 processing [3] - 2:2, 3:16, 5:6 promised [1] - 2:20 provide [1] - 2:5 providing [1] - 2:8 publically [1] - 2:24 putting [1] - 5:10	Seafoods [5] - 1:18, 1:24, 2:13, 3:14, 4:21 seal [1] - 6:15 seeking [1] - 2:16 SELBIG [7] - 1:4, 1:22, 2:12, 3:14, 3:25, 4:19, 5:8 Selbig [2] - 5:12, 6:5 September [1] - 6:16 set [1] - 6:14 settlement [1] - 4:15 Shipping [2] - 2:15, 4:7 shipping [1] - 4:3 shore [1] - 5:5 shore-based [1] - 5:5 Shorthand [1] - 6:2 site [1] - 6:6 so.. [1] - 4:25 sometimes [1] - 4:24 special [1] - 1:24 States [1] - 6:3 station [1] - 6:7 still [4] - 3:15, 4:22, 5:5, 5:6 subject [1] - 3:4 subpoena [1] - 4:12 summer [1] - 5:2 supply [1] - 4:25	value [1] - 5:6 violation [1] - 2:15
Q	T	W
quote [3] - 1:17, 2:14, 2:22	tariff [2] - 3:3, 3:6 term [3] - 2:1, 3:9, 3:17 terminals [1] - 4:3 testimony [1] - 4:12 Thomas [1] - 5:10 tied [1] - 5:2 today [1] - 2:7 together [1] - 5:11 TRANSCRIPT [1] - 1:1	Walt [3] - 1:23, 4:19, 6:6 Washington [1] - 4:1 website [2] - 4:4, 6:6 West [1] - 6:15 wharfage [1] - 2:10 WHEREOF [1] - 6:14 wide [1] - 4:9 WITNESS [1] - 6:14 witness [2] - 4:12, 4:13 wrede [1] - 5:9 WREDE [5] - 1:20, 2:4, 3:1, 3:20, 4:24 Wrede [7] - 1:23, 1:25, 2:23, 3:14, 3:18, 4:19, 6:6 www.kbbi.org [1] - 6:7
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radio [2] - 6:5, 6:7 rates [1] - 4:6 reached [1] - 2:18 rebuilt [1] - 3:17 received [1] - 4:8 Recording [1] - 5:13 reexamined [1] - 3:17 regarding [1] - 4:6 regulatory [1] - 4:2 related [1] - 6:9 relationship [1] - 3:10		year [1] - 5:1 years [2] - 1:24, 3:18

ORIGINAL

AFFIDAVIT OF SHELLY ERICKSON

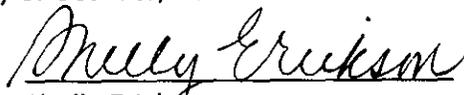
STATE OF ALASKA) ss.

THIRD JUDICIAL DISTRICT)

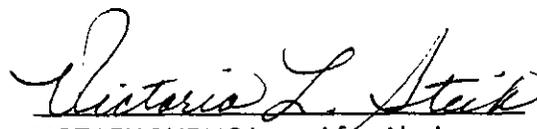
1. I, Shelly Erickson, being duly sworn, hereby depose and state as follows:
2. I was the chair of the Homer Economic Development Commission (EDC) and the Homer Lease Committee from 2008 until 2011.
3. While on the EDC and the Lease Committee, we tried to revise the Lease Policies because of the following:
4. Inequity between lease holders.
5. The City Manager negotiates all leases and is accountable to no one.
6. There needed to be a mediator between the lessee and the City staff.
7. Tried to get industry standards as the measure of requirements for a lessee.
8. Tried to make it where the lease would benefit the lessee as much as the lessor which at this point, all of the leases are in favor of the City, with the lessee having no recourse if the City did not like your business practice or personally the leaseholder.
9. There are any number of, in my opinion, nonessential ways of doing business that could bump you out of your lease at the whim of the City.
10. There is a fear of retaliation from the City with all the lease holders that I have talked to.
11. The retaliation they feel would come from the City Staff and the City Manager.

12. While this is not all the work we tried to do, it was the focal point in trying to make Homer a fair and equitable place to do business.
13. I need to state for the record, this is not the first time the EDC has tried to deal with these issues.
14. The EDC fell apart early in 2000ish due to trying to fix the lease issues and the Council rejected their work, just as they did with us after we presented our work and findings to them.
15. We on the EDC believed that an impartial attorney should have reviewed our proposed changes to have a fair and balanced opinion on these issues.
16. The Council did not do that, but relied on the City Manager and City Attorney's opinion of the issues over the concerns of the EDC.

Dated this 4 day of October, 2012


Shelly Erickson

SUBSCRIBED AND SWORN to me this 4th day of October, 2012


NOTARY PUBLIC in and for Alaska
My Commission Expires: May 8, 2016

FEDERAL MARITIME COMMISSION

DOCKET NO. 12-03

*12-13-12
2-13-12
01-12-12*

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

v.

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

AFFIDAVIT OF DON MARTIN McGEE

STATE OF ALASKA)

) ss.

THIRD JUDICIAL DISTRICT)

1. I Don Martin McGee, being duly sworn, hereby depose and state as follows:

2. I was the holder of land leases from the City of Homer located near the fish dock on the Homer Spit. The leases were assigned to me from Jim Manley.

3. The terms and conditions of the lease agreement were negotiated by Mr. Manley with the City of Homer.

4. Mr. Manley was a long-time resident and business owner in Homer.

5. My business and residence is Anchorage Alaska.

6. Four buildings were located on the property and I purchased those buildings from Mr. Manley at the time the lease was assigned to me.

1 7. Consistent with the plans of the City of Homer, the buildings were utilized in
2 support of industrial and commercial business associated with the harbor and in support
3 of the fishing industry.

4 8. As the landlord, I worked closely with a series of commercial tenants and
5 maintained and modified the property in support of the fishing industry.

6 9. At any given time from five to seven businesses associated with fishing utilized
7 the property I managed at this location.

8 10. I was told by my tenants that over 80% of the commercial seafood passing
9 across the dock at Homer was associated with the businesses located on the property I
10 managed and leased from the City of Homer.

11 11. The sea food industry went through significant change during my time as a lease
12 holder.

13 12. The halibut market moved from a catch limit and derby system to a year round
14 system with individual fish quotas owned by fishermen.

15 13. I worked closely with the tenants on my lease to accommodate and develop
16 facilities to support the new system.

17 14. I also worked with tenants to develop a fresh fish market in the Rocky Mountain
18 States.

19 15. I believe that the City of Homer was not fair and equitable in the treatment of all
20 lease holders associated with the fishing industry.

21 16. Despite my efforts to develop new facilities and markets for fish products, the
22 City refused to extend my lease (as needed to finance new buildings) and refused to
23 assign a portion of my lease to a well-qualified company in the fresh fish business.

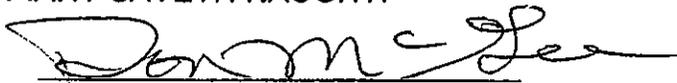
1 17. Although my lease was in good standing and was accomplishing all of the
2 targeted goals of the City regarding land use, the City refused to renew, extend or
3 assign leases associated with my property.

4 18. I understand that the City negotiated new land lease agreements with other
5 seafood related businesses and extended or renewed other lease agreements at the
6 same time they had refused to negotiate with me or my tenants.

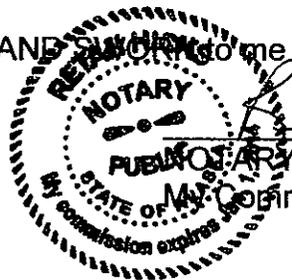
7 19. I observed that none of these other land leases had facilities constructed on them
8 which were substantially different that the facilities existing or proposed for my lease
9 lots.

10 20. After refusing to renew my lease agreement, the City of Homer demolished all
11 remaining structures on my lease lots and these facilities have not been replaced.

12 FURTHER YOUR AFFIANT SAYETH NAUGHT.

13 
14 DON MARTIN MCGEE

15 SUBSCRIBED AND SWORN to me this 11 day of October, 2012

16  Rystal Heels
17 NOTARY PUBLIC in and for Alaska
18 My Commission Expires: 1-1-14

FEDERAL MARITIME COMMISSION

DOCKET NO. 12-03

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

v.

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

AFFIDAVIT OF KEVIN HOGAN in support of

**OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING
STATUTE OF LIMITATIONS**

STATE OF ALASKA)

) ss.

THIRD JUDICIAL DISTRICT)

Kevin Hogan being duly sworn hereby deposes and states as follows:

1. I am the President and majority shareholder of The Auction Block Company, an Alaska corporation in good standing.

2. I am also the manager and forty-nine percent (49%) owner member of Harbor Leasing, LLC, an Alaska limited liability company in good standing that is the lessee of the Lease with the Respondents and a pass-through entity. My wife, Ms. Bronwyn Kennedy, is a fifty-one percent (51%) owner member.

3. I have personal knowledge of the facts stated herein. I am competent to testify to these facts and do so on the basis of personal knowledge.

1 4. Exhibit A is a true and correct copy of the "Solid-Fuel Absorption Refrigeration
2 Emerging Energy Technology Grant" application submitted by The Auction Block
3 Company to the Alaska Energy Authority that describes in accurate detail the fish
4 processing plant designed, developed and operated on the Homer Spit in Homer,
5 Alaska by Complainants at this time. The plant is capable of handling all of the
6 commercially caught fish and seafood currently being delivered to Homer and has
7 enough excess capacity to accommodate other seafood. Complainants are poised to
8 increase the number and amount of fish and seafood product being cleaned, processed,
9 frozen, packaged, and shipped in and from Homer.

10 5. Exhibit B is a true and correct copy of the Complainants' Discovery Responses
11 To The City Of Homer's Amended First Discovery Requests To Complainants. I
12 personally assisted in the preparation of all of the responses. My signature verifies the
13 responses. I have reviewed the responses and adopt each of them as my own
14 response on behalf of the Complainants.

15 6. Exhibit C is a true and correct copy of some documents provided by
16 Respondents. The documents are letters and e-mails between the City of Homer and
17 Icicle Seafoods provided by the Respondents in their Disclosures and marked by
18 Respondents as follows:

19 7. HOMER 530-531 Letter from Walt Wrede with the City of Homer to Ken "Duff"
20 Hoyt with Icicle Seafoods dated March 25, 2004 (2 pages);

21 8. HOMER 532-533 Letter from Walt Wrede with the City of Homer to Ken "Duff"
22 Hoyt with Icicle Seafoods dated March 25, 2004 (2 pages);

1 9. HOMER 518 e-mails from Ken "Duff" Hoyt with Icicle Seafoods to Walt Wrede
2 with the City of Homer dated May 19, 2004 and June 2, 2004 and from Walt Wrede with
3 the City of Homer to Ken "Duff" Hoyt with Icicle Seafoods dated June 4, 2004 (1 page);
4 10. HOMER 516 Letter from Ken "Duff" Hoyt with Icicle Seafoods to Walt Wrede with
5 the City of Homer dated September 13, 2004 (1 page); and
6 11. HOMER 514-515 Letter from Walt Wrede with the City of Homer to Ken "Duff"
7 Hoyt with Icicle Seafoods dated September 22, 2004 (2 pages).
8 12. That the following four Tariffs are true and correct copies of the applicable Tariffs:
9 13. Exhibit D: "Terminal Tariff No. 600 Filed under ATFI Rules" effective January
10 1, 2009 for the years 2009 and 2010.
11 14. Exhibit E: "Terminal Tariff No. 600 Filed under ATFI Rules" effective January
12 1, 2011.
13 15. Exhibit F: "Terminal Tariff No. 600 Filed under ATFI Rules" effective April 25,
14 2011.
15 16. Exhibit G: "Terminal Tariff No. 600 Filed under ATFI Rules" effective July 25,
16 2011.
17 17. Exhibit H is a true and correct copy of two letters I sent on behalf of
18 Complainants to Mr. Wrede with the Respondents dated June 18, 2007 and June 18,
19 2007 that evince the frustration in dealing with the City's delay and intransigence.
20 18. Exhibit I is a true and correct copy of documents provided by Respondents. The
21 documents are two e-mails between members of the administration of the City of Homer
22 provided by the Respondents in their Disclosures and marked by Respondents as
23 follows: HOMER 3965 – 3966. These documents are further evidence that the City

1 knew that there was no lease with Icicle yet the City continued to represent to the public
2 and to the Homer City Council that there is an "Icicle Lease."

3 19. I served as a Commissioner on the City of Homer Port and Harbor Advisory
4 Commission from April 9, 2007 through October 20, 2009.

5 20. I served as a Commissioner on the City of Homer Economic Development
6 Advisory Commission from November 13, 2007 through October 20, 2009.

7 21. I served as a Council member on the Homer City Council from October 20, 2009
8 through my resignation on March 12, 2012.

9 22. Because of conflict of interest concerns, I was concerned that I could not bring
10 suit against Respondents while I was on the Homer City Council.

11 23. I confronted a painful dilemma because I had run for office on a platform to
12 change things from the inside and found that I could not even change things as a
13 member of the Homer City Council.

14 24. I realized that I owe fiduciary duties to the other shareholders of The Auction
15 Block Company and to the other member of Harbor Leasing, LLC.

16 25. I resolved the dilemma by resigning from the Homer City Council on March 12,
17 2012 and filing this action with the Federal Maritime Commission on April 10, 2012.

18 26. I am the one person who has the personal knowledge to bring and maintain this
19 action.

20 27. I have prepare, revised, finalized and verified the complaints and responded to
21 and verified the discovery requests.

22 28. I signed the Harbor Leasing/The Auction Block Lease reprinted as Exhibit 10 by
23 the Respondents that was recorded with the state of Alaska on February 19, 2009. I

1 signed the lease under duress and protest. I signed the lease to give the Complainants
2 a location to continue operating their business until I could obtain a long-term lease with
3 the City with workable terms. Without signing a lease for the use of some Harbor
4 property, Complainants' business would have collapsed. There was no other place to
5 go to locate the business.

6 29. At times, the City insisted on a long-term lease and refused to negotiate the
7 terms. At times, the City insisted on a short-term lease and also refused to negotiate
8 the terms. When the City refused to negotiate, I proposed but the City would not
9 consider mediation or arbitration of the matter.

10 30. Until I searched the state of Alaska's records exhaustively, I thought and was told
11 that the City and Icicle were operating pursuant to a lease.

12 31. Despite representations from counsel for the City that there is an "Icicle Lease"
13 that shaped my behavior and decisions, I discovered that there is no "Icicle Lease."

14 32. From my perspective as a citizen, as a lease applicant, and as a City Council
15 member, I know that the City of Homer's lease review process is futile.

16 33. From my perspective as a citizen, as a lease applicant, and as a City Council
17 member, I know that the City of Homer's lease review process is a sham.

18 34. From my perspective as a citizen, as a lease applicant, and as a City Council
19 member, I know that the City of Homer's lease review process is a fraud.

20 35. In my experience, Mr. Wrede is the one person who approves and disapproves
21 all lease applications for the Respondents.

22 36. Mr. Wrede refuses to negotiate or approve any material lease amendment that I
23 propose.

1 37. Mr. Wrede has created a culture of reward and retribution at the City.

2 38. Mr. Wrede's statement that no others have complained about the process is
3 false. There are many others who have complained to me as a private citizen. When I
4 was a Homer City Council member, many citizens and constituents also complained to
5 me.

6 39. Most of the individuals who complain privately are afraid to complain publicly for
7 fear of retaliation and retribution.

8 40. I have reviewed the affidavits of Jo Johnson, Bryan Hawkins, and Walt Wrede.

9

10 41. In her Affidavit, City Clerk Johnson states: "To the best of my recollection after a
11 review of City Council minutes and the minutes of the Economic Development Advisory
12 Commission and the Port and Harbor Commission, I do not recall nor could I find any
13 record of Kevin Hogan challenging either the City's tariffs or City Municipal Code
14 provisions regarding harbor leases as unlawful. Also I do not recall Hogan ever
15 proposing a tariff amendment during his tenure as a City Council member. Hogan
16 voted, however in favor of tariff amendments, most recently in 2011, while he was a City
17 Council member."

18 42. A quick review of City record reveals the following excerpt from the November
19 28, 2011 City Council meeting with Ms. Johnson serving as the Clerk of Record for the
20 City at the meeting.

21 **C. Resolution 11-095.** A Resolution of the City Council of Homer, Alaska,
22 Maintaining the Port of Homer Terminal Tariff No. 600 at the Current Rates. City
23 Clerk. Recommended to follow Budget Ordinance 11-41 schedule.
24

25 Kevin Hogan, city resident, commented on the crane usage and ice rates increase
26 of 300% over the years he has operated a business on the Spit. While he has
27 raised his rates to his customers only 13%, one 6% rate increase resulted in the

1 loss of 50% in business. We are beyond the point of sustaining the level of fees at
2 the port. Tariff rates are published with the Federal Maritime Commission so
3 they are nondiscriminatory. He questioned why he pays \$90 per hour for crane
4 usage when a competitor pays \$24 per hour.

5
6 43. The record does not indicate that I stepped down from my Council chair as a
7 member of the Council and addressed the Council as a member of the public, which is
8 proper under provisions of City Code and Council procedures. However, my comments
9 were presented during the Public Hearing portion of the meeting. The comments
10 challenge the inconsistent application of City Tariffs.

11 44. Additionally in reviewing the record of documents disclosed by the City as Initial
12 Disclosures in this case, there are numerous examples of testimony by me challenging
13 Harbor Leases and the inconsistent application of policy and the Homer City Code
14 related to the Harbor Leases. Examples include disclosures labeled HOMER 1964-
15 1967, 1986 and 2079.

16 45. At the December 12, 2011 meeting of the Council, I again raised questions
17 related to the application of the Tariff. The Council voted to affirm the proposition before
18 them which was to not increase the Tariff rates. However, the concerns I raised related
19 to the deviation from the Tariff rates. These comments were made because the City
20 attorney failed to inform the Council of the unfounded departures from the Tariffs for
21 Icicle without any basis in law or contract.

22 C. **Resolution 11-095.** A Resolution of the City Council of Homer, Alaska,
23 Maintaining the Port of Homer Terminal Tariff No. 600 at the Current Rates. City
24 Clerk. Recommended to follow Budget Ordinance 11-41 schedule.
25 Mayor Hornaday opened the public hearing. In the absence of public testimony,
26 Mayor Hornaday closed the public hearing.
27 Motion on the floor from October 10th: MOTION TO ADOPT RESOLUTION 11-
28 095 BY READING OF TITLE ONLY.

1 Councilmember Hogan referenced pg. 168 of the terminal tariff, specifically rule
2 34.2 regarding contract rates. His thought is filing something with the Federal
3 Maritime Commission is to ensure uniformity to the published rates.
4 City Attorney Klinkner advised there is a provision for contract rates to be
5 negotiated outside of the filed tariff.
6 Councilmember Howard supports passing the resolution that shows no change in
7 the tariff. The Port and Harbor Improvement Committee is reviewing all tariffs
8 to determine what rates need to be changed to service the bond. It is expected
9 increases to support the bond will be before Council in March.
10 Councilmember Hogan asked for those amendments to go to the Port and
11 Harbor Advisory Commission first.
12 VOTE: YES. NON OBJECTION. UNANIMOUS CONSENT.
13

14 46. I did cast a vote to uphold the current rates and yet raised questions related to
15 the discrimination practiced by the City. I was barred from introducing an amendment to
16 specifically address the disparity by the City's conflict of interest rules. I was also aware
17 of the dire consequences that befall one who challenges the Administration. I could
18 count that the votes were not there to support an amendment.

19 47. In his affidavit, Harbormaster Bryan Hawkins states: "[I]t is clear that throughout
20 the 1960's the City Port was primarily utilized by local fisherman with no large
21 processing companies or prominent fish buyers utilizing the port and a fairly rudimentary
22 dock for offloading fish. In the late 1970s Icicle Seafoods, Inc. ("Icicle) built a
23 processing plant in the City and began operating a processing business within the City.
24 Based on research I conducted, including reviewing pictures and maps, and my own
25 personal knowledge, Icicle's presence in the City was significant and noticeable; Icicle's
26 presence transformed the City, its port, and its fishing industry."

27 48. Mr. Hawkins' account distorts the situation of the industry at the City Harbor.
28 While it is indisputable that Icicle was a significant player, they were not the only
29 operation based in Homer.

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

50. Mr. Wrede states in his affidavit: "[t]he City consistently and strictly applies its tariff rates to all companies using the port, except when a company provides clear and tangible benefits to the city that warrant deviation." That statement is a lie.

51. Mr. Wrede has not required Icicle to abide by the Tariffs even though the Expired Icicle Lease between the City and Icicle expired on September 14, 2004.

52. Mr. Wrede has refused to provide any incentives to the Complainants, although the Complainants are the only entity to build a fish processing plant in Homer in decades. FURTHER YOUR AFFIANT SAYETH NAUGHT.


Kevin Hogan

SUBSCRIBED AND SWORN to me this 2nd day of October, 2012

Notary Public
SHARON STEWART
State of Alaska
My Commission Expires April 14, 2014

NOTARY PUBLIC in and for Alaska
My Commission Expires: 04/14/14

ORIGINAL

FEDERAL MARITIME COMMISSION

DOCKET NO. 12-03

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

v.

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

SUPPLEMENTAL AFFIDAVIT OF KEVIN HOGAN

STATE OF ALASKA)

) ss.

THIRD JUDICIAL DISTRICT)

I Kevin Hogan being duly sworn hereby depose and state as follows:

1. I am the President and majority shareholder of The Auction Block Company, an Alaska corporation in good standing.

2. I am also the manager and forty-nine percent (49%) owner member of Harbor Leasing, LLC, an Alaska limited liability company in good standing that is the lessee of the Lease with the Respondents and a pass-through entity. My wife, Ms. Bronwyn Kennedy, is a fifty-one percent (51%) owner member.

3. I have personal knowledge of the facts stated herein. I am competent to testify to these facts and do so on the basis of personal knowledge and information.

4. I engaged Stephen T. (Steve) Grabacki, FP-C, the President of and Certified Fisheries Professional with GRAYSTAR Pacific Seafood, Ltd., as a possible expert

1 witness for Complainants; I engaged Joe Moore, CPA, with Altman Rogers & Co. who
2 has knowledge of Complainants' financials and industry economics as a possible expert
3 witness for Complainants; and I considered engaging Barbara Carper, CPA with Profit
4 Soup who oversaw financial and systems review and business consulting for
5 Complainants as a possible expert witness for Complainants. Because Respondents
6 admitted the detailed and specific factual and legal contentions in their Answers, expert
7 reports were no longer necessary and therefore I did not seek any expert reports.

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

11 6. Exhibit S is a true and correct copy of the "Pacific Fishing: The Business
12 Magazine For Fishermen" (<http://www.pacificfishing.com/>) article titled "Kevin Hogan:
13 Changing The Halibut Industry" dated May, 1999 that describes the successful efforts
14 by me and The Auction Block to develop and grow the halibut industry in Homer.

15 7. Exhibit T is a true and correct copy of the GRAYSTAR Pacific Seafood, Ltd.
16 information brochure provided to me by Mr. Steve Grabacki describing the Company's
17 skills and services.

18 8. There is one fundamental rule in the economics of the Alaska fisheries: The
19 fishers, as they are known today, are extremely sensitive to the price offered for their
20 fish or seafood product. When selling his or her fish or other seafood product, the fisher
21 looks almost exclusively if not exclusively at price. The only other consideration is
22 whether a buyer is able to pay the price. The Auction Block has always paid the price it
23 bid.

1 9. For years as a private citizen and then as a Council Member of the Homer City
2 Council, City Manager Mr. Wrede and City Attorney Mr. Tom Klinkner assured me,
3 wrongly I recently learned, that there is a valid lease between the City and Icicle. Any
4 references in my past conversations to an "Icicle lease" are based on
5 misrepresentations from both of them to me and also to others on the Homer City
6 Council and to the citizens of the City of Homer.

7 10. As the "Pacific Fishing" article discusses, eleven years after the Icicle plant
8 burned in 1988 and was not rebuilt, The Auction Block by 1999 single-handedly
9 transformed Homer into the number-one halibut port in the North Pacific. The article
10 provides an independent discussion of the halibut industry in Homer by a neutral
11 commentator in 1999.

12 11. The Auction Block has expanded its facilities and capabilities since then. I have
13 been involved from the beginning and at every step of the way in the design,
14 construction, installation, modification, testing and operation of the state-of-the-art
15 shore-based fish processing plant ("Plant") in Homer described in the document I
16 assisted in creating marked as Exhibit A.

17 12. I have reviewed the information in the Affidavit of Jessica Yeoman in careful
18 detail and agree that the figures she compiled showing the Plant's current capacity and
19 ability to process fish and other seafood products are true and accurate and reflect my
20 first-hand experience in the Plant on a daily basis since the Plant came on line.

21 13. I assisted in the research and preparation of the "The Auction Block Company
22 Lost Profit Report April 2009 – August, 2012" created to establish the lost profits of the
23 Complainants from April, 2009 until August, 2012 as a result of the disparate treatment

1 of Complainants by Respondents and other statutory violations of the Shipping Act of
2 1984 as amended is marked as Exhibit R. These calculations of lost profits are a
3 conservative and well-founded calculation of Complainants' substantial losses.

4 14. The owners of The Auction Block Company and the members of Harbor Leasing,
5 LLC discussed this case and the finances of the two companies last week and agreed
6 to continue seeking the incentives promised by Respondents to the entity building and
7 operating a shore-based fish processing plant in Homer. The City offered the incentives
8 to Icicle Seafoods now for over eight (8) years gratuitously without requiring Icicle to
9 rebuild or even agree to rebuild a shore-based fish processing plant. Complainants
10 seek an order requiring Respondents to provide the incentives to Complainants for eight
11 (8) years and at the expiration of that time to impose the rates in the applicable Tariff.
12 Icicle Seafoods has no lease with the City and no shore-based fish processing plant and
13 is and should be obligated to conform to the rates in the applicable Tariffs. This
14 reformation of the Complainants' Lease by adding the standard incentives provided to
15 the operator of a shore-based fish processing plant is the most fair and equitable way to
16 create a level playing field at this time.

17 15. Complainants have been billed by Respondents and Complainants have paid to
18 Respondents \$38,099.13 in crane use expenses in 2012. Respondents have damaged
19 Complainants in the sum of at least \$3,475.00 for the differential provided Icicle
20 Seafoods for property rates. The Auction Block has not calculated the crane
21 overcharges for the year 2012. The Auction Block Company handled 2,821,668 pounds
22 of fish in 2012 which results in a differential and damages to The Auction Block
23 Company of \$6,715.57 (wharfage) in 2012.

1 16. Complainants have lost profits of \$912,766.98 at this time as set forth in the
2 analysis in the "The Auction Block Company Lost Profit Report April 2009 – August,
3 2012" at Exhibit R.

4 17. Complainants' total damages are \$332,114.83 (at least \$257,841.35 [Crane
5 Use], \$10,425.00 [Differential Property Fees], \$16,902.14 [Crane Overcharges] and
6 \$46,946.34 [Wharfage]) for 2009 through 2011 and \$48,289.70 (\$38,099.13 [Crane
7 Use], \$3,475 [Differential Property Fees], [No Crane Overcharges are calculated at this
8 time] and \$6,715.57 [Wharfage]) for 2012 and lost profits of \$912,766.98 from April,
9 2009 through August, 2012 for total damages of \$1,293,171.51.

10 18. The Auction Block has provided the following full-time and part-time employment
11 in Homer: Year: Total:

12	2009	114
13	2010	140
14	2011	136
15	2012	120

16 19. If Respondents succeed in putting The Auction Block Company out of business,
17 our employees will be put out on the street. Respondents' actions and inactions have
18 very real and devastating consequences for Complainants.

19 FURTHER YOUR AFFIANT SAYETH NAUGHT.

20
21
22
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ORIGINAL

10/13/12
10/13/12

The Auction Block Company
Lost Profit Report
April 2009 - August 2012

Exhibit R

The Auction Block Company

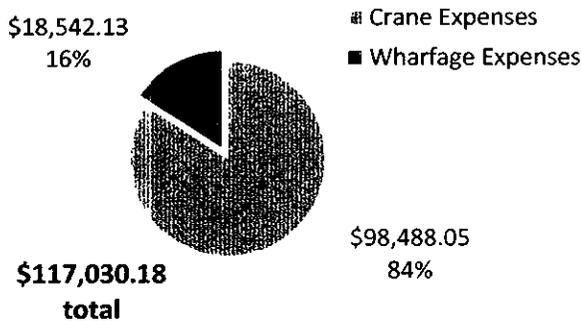
Lost Profit Report

April 2009 - August 2012

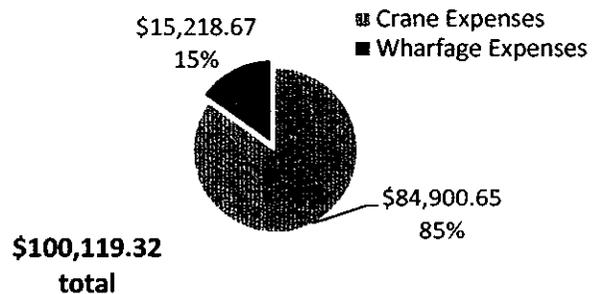
This Report was prepared by Mr. Kevin Hogan and other employees of The Auction Block Company. This Report details the lost profits of The Auction Block Company from April of 2009 until August of 2012 as a direct and proximate result of the City of Homer's disparate treatment of and prejudice toward the Complainants and other statutory violations by the Respondents of the Shipping Act of 1984 as amended.

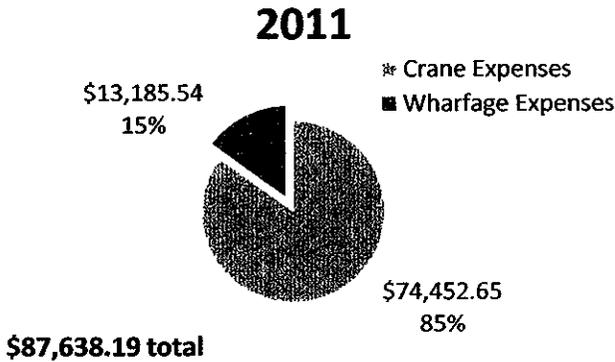
Figures 1, 2, 3, and 4 below show The Auction Block Company's total dock expenses (crane and wharfage) in Homer for 2009 (Apr-Dec), 2010, 2011, and 2012 (Jan-Aug).

2009 (Apr-Dec)

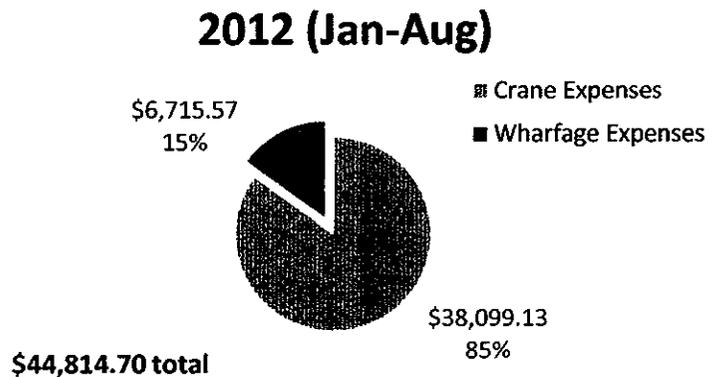


2010





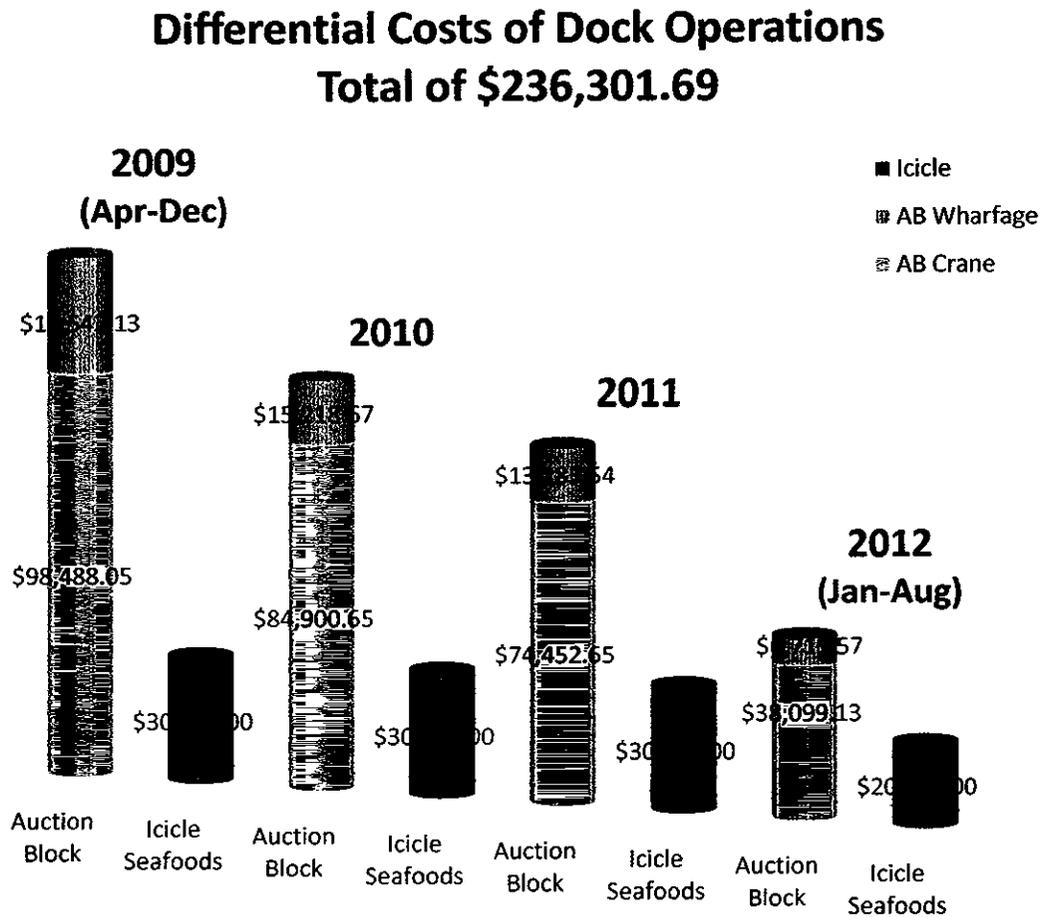
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The amounts for crane expenses and wharfage expenses are specifically explained in Complainants' Fourth Amended Complaint at Docket 20 at "Paragraph V. Violations" including Paragraphs A – E at page 3 at line 3 to page 7 at line 9. These amounts are specifically discussed at page 4 at lines 9 – 12 and at page 6 at lines 19 – 28. The amounts billed by Respondents and paid by Complainants for 2012 are discussed and verified in the Supplemental Affidavit of Kevin Hogan.

Over the three-and-a-half-year period, The Auction Block Company paid the City of Homer \$349,601.69 in dock expenditures (crane and wharfage) based on the volume of seafood products and ice that cross the Homer dock. Icicle Seafoods paid the City of Homer a flat rate of \$30,900.00 each year of operation. Over the three-and-a-half-year period, Icicle Seafoods paid a total of \$113,300.00 (\$30,900 x 3 and \$20,600 for 2012) in dock expenditures.

Figure 5 below shows the difference in dock operating expenses between The Auction Block Company and Icicle Seafoods for 2009 (Apr-Dec), 2010, 2011, and 2012 (Jan-Aug).



The Auction Block Company paid the City of Homer \$236,301.69 more than Icicle Seafoods during this three-and-a-half year period. This amount of \$236,301.69 represents The Auction Block Company's potential working capital and purchasing power which The Auction Block Company would have used to purchase, unload, process, and ship additional pounds of fish.

Icicle Seafoods' Differential Property Fees

Icicle Seafoods also enjoys reduced property fees given by the City of Homer. These amounts are explained and summarized in Complainants' Fourth Amended Complaint at Docket 20 at page 5 at lines 13 – 34. The Auction Block Company leases 24,283 square feet from the City of Homer for an annual fee of \$22,303.68. Icicle Seafoods leases 64,944 square feet from the City of Homer for an annual fee of \$30,524.00. Table 1 shows the breakdown of The Auction Block Company and Icicle Seafoods' annual rental expenses.

Table 1

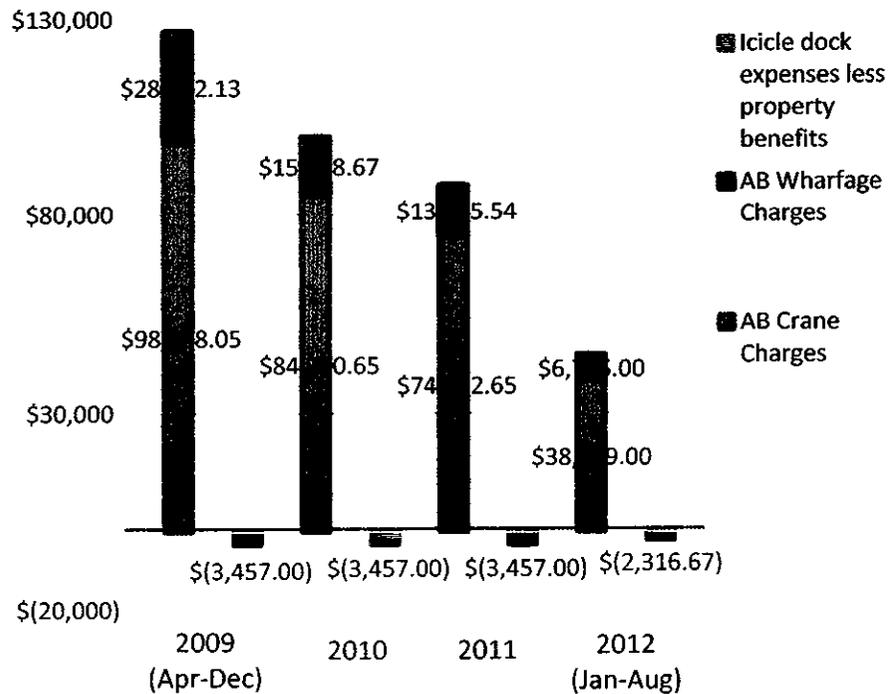
PROPERTY LEASE	Square Footage	Annual Fee	Rate per ft ²
Icicle Seafoods	64,944	\$30,524.00	\$0.47
- additional use of premise	2,754	---	---
Total Icicle property	67,698	\$30,524.00	\$0.45
Total Auction Block property	34,283	\$22,303.68	\$0.65

The rates clearly show that Icicle Seafoods pays a lower rate per square foot of property. The Auction Block Company pays the City of Homer \$0.20 more per square foot than Icicle Seafoods. In addition, Icicle Seafoods benefits from the additional use of 2,750 square feet of dock space free of charge. The property enjoyed by Icicle free of charge is valued at \$12.50 per square foot per year, totaling \$34,375.00 per year. This is \$34,375.00 that Icicle Seafoods is not required to pay to the City of Homer.

Figure 6 below is the revised differential cost of dock operations between Icycle Seafoods and The Auction Block Company with consideration given to Icycle Seafoods' property benefits.

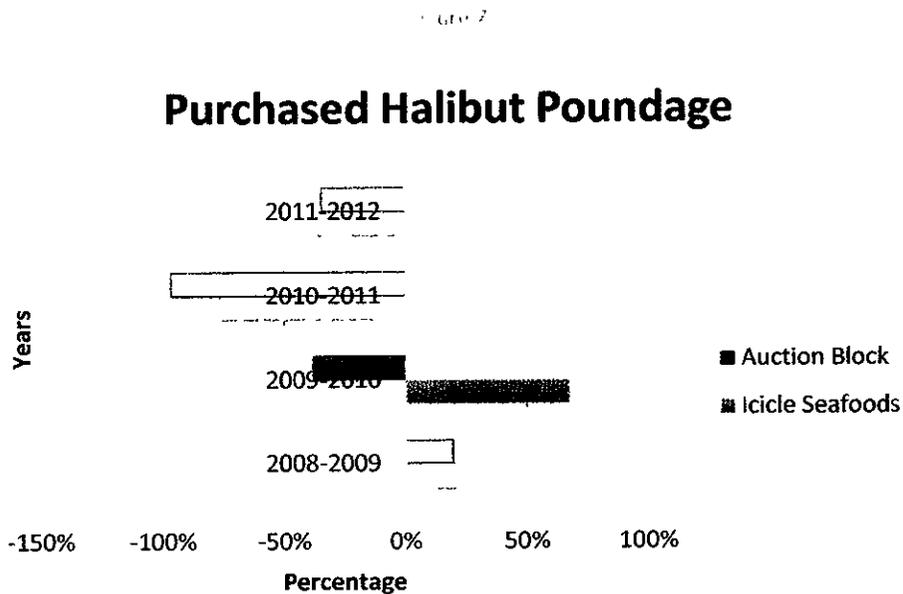
Figure 6

Differential Cost of Dock Operations (Icycle Property Benefits)



Icycle Seafoods' annual rate of \$30,900.00 for crane and wharfage charges is further offset by Icycle Seafoods' use of \$34,375.00 worth of property free of charge. Icycle Seafoods enjoys \$3,475 per year in property, crane, and wharfage benefits from the City of Homer. This favorable treatment gives Icycle Seafoods a clear advantage over other businesses that are subject to property value tariffs and dock expenses.

Figure 7 below shows the difference between The Auction Block Company and Icicle Seafoods' purchased halibut pounds between consecutive years.



In 2010, the City of Homer increased The Auction Block Company's dock service rates (wharfage and crane) but did not increase Icicle Seafoods' rates. The Auction Block Company's purchased halibut poundage fell by thirty-eight percent (38%) between 2009 to 2010. Icicle Seafoods' purchased halibut poundage increased by sixty-eight percent (68%) during this same time period. The Auction Block Company's higher dock service expenditures decreased the company's purchasing power, resulting in the inability to purchase as many pounds of halibut. During this time, Icicle Seafoods was able to benefit from the consistent lower fixed dock fees given by the City of Homer. With this advantage, Icicle Seafoods was able to purchase eighty-seven percent (87%) more pounds of halibut than The Auction Block Company between 2009 and 2010.

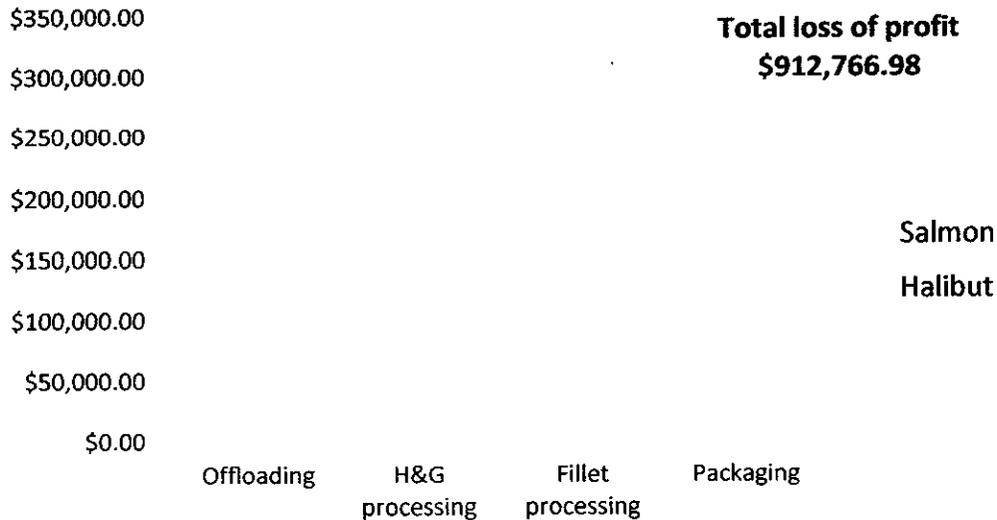
Halibut fishermen are extremely sensitive to the price offered for their product. The nature of the halibut industry requires fish buyers to bid on a vessel's load and the highest bidder wins the sale. Competitors *lose* or *win* a sale by mere pennies or even by "one cent." A simple increase of \$0.05 per pound is an enormous difference in a fish sale. The funds, if available, would have allowed The Auction Block Company to win far more bids that were otherwise lost due to the Company's limited cash flow.

The lost purchasing power of \$236,301.69 at the rate of \$0.05 per pound differential paid to vessels would have secured 4,726,034 more pounds that potentially could have been purchased by The Auction Block. Of these total pounds, halibut would account for ninety-one percent (91%) of the pounds, and salmon would account for nine percent (9%) of the pounds, based on accumulated values of pounds purchased and sold by The Auction Block Company. Therefore, the potential purchase of halibut would have been 4,300,691 pounds, and the potential purchase of salmon would have been 425,343 pounds.

Figure 8 below outlines the potential aggregate profits from April 2009 to August 2012 if dock rates administered by the City of Homer were equal for both The Auction Block Company and Icicle Seafoods.

Figure 8

The Auction Block Co.'s Potential Profits with Additional Working Capital of \$236,301.69



These values are based on the standard markup for each of the services and/or products. For the species of halibut, the offloading markup is \$0.05 per pound, H&G (heading and gutting) processing markup is \$0.10 per pound, fillet processing markup is \$3.15 per pound, and packaging markup is \$0.05 per pound. For the species of salmon, the offloading markup is \$0.10 per pound, H&G processing markup is \$0.15 per pound, fillet processing markup is \$2.50 per pound, and packaging markup is \$0.05 per pound.

Given these values, the aggregate loss of profits for The Auction Block Company from April 2009 to August 2012 is \$912,766.98.

Sources:

Documents reviewed and relied upon to prepare The Auction Block Company's Lost Profit Report, Fiscal Years April 2009-August 2012:

2009-2012 QuickBooks company sales

2009-2012 Corporate Tax Returns as prepared by The Auction Block Company's accountant

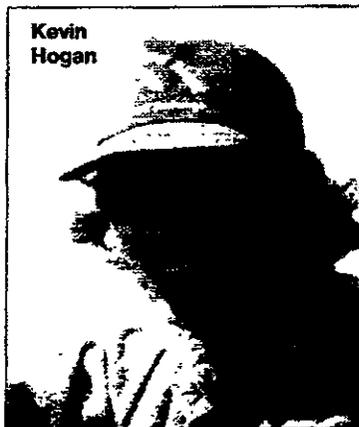
2009-2012 The Auction Block Company's records

Kevin Hogan: Changing The Halibut Industry

AUCTION BLOCK HELPS MAKE HOMER THE TOP HALIBUT PORT, BUT OTHER PORTS ARE IN THE RUNNING.

By Joel Gay

Stepping into Kevin Hogan's former office on the Homer Spit, it was hard to imagine that he was reshaping the century-old halibut business. There was hardly room to remove rain-gear; the decorating scheme was weathered plywood, not walnut. Yet his two-year-old, Internet-based business The Auction Block was almost single-handedly responsible for making Homer the number-one halibut port in the North Pacific, wresting away the title that Kodiak held for years. "Not bad for a hippie in a phone booth with a cell phone," he quipped, lighting another in a long string of Salems.



Homer News

From "Zero Tolerance" to Auctioneering

Hogan came into the business from the inside, having fished salmon and halibut in Cook Inlet since the early 1970s. If his name sounds familiar, it may be from the headlines he inadvertently commanded when his 40-foot boat *Hold Tight* was seized in 1988 by the U.S. Customs Service in Ketchikan. One of his deckhands had brought a small amount of pot on board, and when a federal agent found it, Hogan's name quickly became synonymous with "zero tolerance."

Even as he was being roughed up by the feds, though, Hogan was already thinking about some sort of auction service. It took awhile to gel, but with the arrival of IFQs in 1995, his idea became clearer. In 1997, he opened The Auction Block.

"I think it's a natural outgrowth of the halibut industry," he says. IFQs gave fishermen control over the pace and even the outcome of their seasons, and The Auction Block gives them control over where and to whom they sell their fish.

Others have tried similar operations with no success. "We found the right market niche," Hogan says. "We're between the primary producer and the market wholesaler. Others have focused too far down the revenue stream."

Hogan calls his service a "fisherman's exchange." Typically, a skipper calls ahead with the particulars of his load: total weight, fish sizes, and how long the fish have been out of the water. Once Hogan posts the information, buyers make their offers. Hogan charges the buyer 1.5% and the boat 1%, though the two parties can work out for themselves who pays what. For an additional fee he also will set up processing or shipping.

Buyers must register to participate, and Hogan doesn't take everybody who comes along. "If the buyer doesn't pay, we would," he says. "It's my ass on the line." Only 38 buyers were approved last year,

Not bad indeed. As evidence of his success, look no further than the competition that has popped up. Seward has its own Internet halibut auction this year, and a New Bedford, Massachusetts, auction house wants to lease a lot next door to him in Homer. Hogan himself has expanded, opening a satellite operation in Seward and arranging to take deliveries from Southeast to the Aleutians. He even has a new office.

Hogan can't claim full responsibility for Homer's halibut landings more than doubling in two years; the city itself gets some credit, as do other buyers and packers in Homer. With its public dock, road access, and relative proximity to areas 3A and 3B, Homer is perfectly suited to a fishery that has shifted focus from freezing to serving up fresh fish. Even after the town's only major processing plant, Icicle Seafoods, burned to the ground last summer, landings continued to outpace the major processors in Kodiak.

No matter what Homer offers, however, fishermen will go wherever the price

is best; and last year Kevin Hogan found it for them. When prices plummeted to half their 1997 levels, longliners who sold in Homer earned 10 to 20 cents more per pound than in Kodiak. Word quickly spread. "The Auction Block created a lot of interest," says fisherman and fisheries consultant Joe Childers. He sees Hogan's firm as evidence of the fishery's evolution, in which small buyers will purchase directly from producers, gradually eliminating the traditional middlemen—the canneries. "Kevin's operation is definitely going to be the beginning," he says.

Right now the company is in front of the wave; but as with many fisheries, conditions can change in a year. Prices are higher this season, and if bigger margins enable packers to reduce the price spread between ports like Homer and Kodiak, Childers notes that neither Homer nor Hogan is guaranteed a place at the top of the halibut heap.

Fishermen are fickle, he says. "If somebody pays a nickel more a pound, they'll go there."



FISHERIES SERVICES

Technical Services

- * baseline studies
- * environmental documents
- * impact analyses
- * resource forecasting
- * fishery development
- * seafood quality
- * NEPA support
- * litigation support
- * mitigation strategies
- * supply chain support
- * stakeholder relations
- * fisheries sustainability

Client Industries

- * seafood
- * oil & gas
- * mining
- * commercial fishing
- * infrastructure
- * hydroelectric

Fisheries

- * finfish: freshwater, anadromous, marine
- * marine crustaceans & molluscs

Background

- * founded in 1985
- * 100% owned by Stephen Grabacki, FP-C

Stephen Grabacki's Qualifications

- * Master of Science, Fisheries Biology, University of Alaska Fairbanks
- * Certified Fisheries Professional, American Fisheries Society
- * instructor of Fisheries Management and Seafood Logistics, UA Anchorage
- * over 30 years of experience in Alaskan fisheries

Contact GRAYSTAR

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+907-272-5600 / graystar@alaska.net

FEDERAL MARITIME COMMISSION

DOCKET NO. 12-03

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

v.

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

AFFIDAVIT OF JESSICA YEOMAN

STATE OF HAWAII)
) ss.
COUNTY OF MAUI)

1. I Jessica Yeoman, being duly sworn, hereby depose and state as follows:
2. I have personal knowledge of the facts stated herein. I am competent to testify to these facts and do so on the basis of personal knowledge and information.
3. I am a sixteen percent (16%) owner of The Auction Block Company.
4. I first began working with The Auction Block in 1998 and managed dock offloads of fish and developed business relationships with commercial fishermen. I learned quickly that the price offered to a commercial fisherman is the primary if not the exclusive factor in her or his decision to sell commercially caught fish to a buyer.
5. My responsibilities grew and expanded over the years including assisting in developing the fleet of vessels that delivered their commercially caught fish and seafood to The Auction Block, maintaining the many regulatory documents and filing the reports that are required by federal and state law, assisting in designing and developing The Auction Block processing facility in Homer, and supervising marketing and advertising for The Auction Block.

6. I was directly involved on a day to day basis in buying and selling and transporting commercially caught fish and seafood, supervising the dock foreman who supervised the crew on the dock and working on the dock on a daily basis to oversee all the activities.

7. I assisted in inputting financial data and maintained the financial books for The Auction Block for years. I managed the leased property for The Auction Block including the property leased by our related company, Harbor Leasing, LLC, to The Auction Block in a pass through lease.

8. The Auction Block offers the full range of services for commercial fishermen including purchasing, selling, brokering, offloading, freezing, processing, transporting and arranging for the transportation of commercially caught fish and seafood in the United States and in the international market.

9. The Auction Block offers processing services including bled fish, headed and gutted (H & G) fresh and frozen fillets, "skin on" fresh and frozen fillets, skinless fresh and frozen fillets, portion cuts and vacuum packaged fish, fresh roe, fresh milt, fresh and frozen halibut cheeks, fresh and frozen halibut and salmon steaks, bait products, and fresh round fish packaged for shipping and air freight.

10. The Auction Block provides offloading services in Homer for its fishermen and also for other entities including our major competitor, Icicle Seafoods, because Icicle does not have the same presence and access to the Homer labor force.

11. The Auction Block provides fishing vessel services such as brokering fish, gear storage, bait sales and storage, mail service, meal sales, settlement and banking responsibilities, travel arrangements, and ice sales.

12. The Auction Block provides for the sale and delivery of bait and ice to our fishermen. In the last year, the Auction Block has built and put on line an ice manufacturing facility to meet the ice needs for our fishermen.

13. The Auction Block has established business relationships with many ultimate purchasers of the product such as restaurants that inform us of their needs which we then can satisfy in a timely manner by working with our fleet of fishing vessels.

14. The total quota of halibut available to catch has been reduced in the last few years because of biological concerns for the resource which has forced everyone involved in the industry to sharpen our pencils and examine costs.

15. The season for salmon fishing is set by Mother Nature. When the fish return, the dates and times to fish and the poundage that can be caught are set by the state of Alaska Department of Fish and Game (ADF&G) at times with federal input.

16. The season for Pacific cod is set by the state of Alaska and is not constrained by Mother Nature because the fish are off shore in schools.

17. The Auction Block's major competitor is Icicle Seafoods. The competitive disadvantage created by the City of Homer with regard to Icicle Seafoods' reduced rates is now more acute and financially devastating to our business.

18. About 70 - 80 percent of The Auction Block business in the last four years involves purchasing, selling, brokering, freezing, processing, transporting and arranging for the transportation of commercially caught fish. In recent years, these activities have been conducted on an almost break-even financial basis and thus have not contributed to the profitability of The Auction Block. Because of the increased costs imposed by the

City, The Auction Block is not able to compete with a subsidized competitor such as Icicle Seafoods.

19. About 20 – 30 percent of The Auction Block business involves offloads of fish for our fishermen and for others such as Icicle Seafoods. These activities account for about 80 to 90 percent of the profits of The Auction Block at this time. These profits are negatively impacted by the higher crane rates that The Auction Block must pay to Respondents.

20. Costs for electricity, ice and water have also increased, although these increases impact all competitors in the fishing industry equally and depend on use.

21. A positive growth market for The Auction Block is the increasing visitor industry in Homer. The growing influx of tourists is buying and shipping seafood from our fresh and frozen seafood market facilities.

22. An increasing number of cruise ships are docking within minutes of our retail fish market at the City Deep Water Dock. In addition to selling to the passengers, we are selling fish and seafood products wholesale to their galleys. This business keeps our crews busy filleting and processing halibut and salmon through the months of June, July and August.

23. The Auction Block has been increasing and expanding its fish processing facilities in Homer for years and, since 2009, has been able to handle more fish and seafood product than it is able to afford to purchase.

24. I have reviewed the document marked as Exhibit A which is a true and correct copy of the "Solid-Fuel Absorption Refrigeration Emerging Energy Technology Grant" application submitted by The Auction Block Company to the Alaska Energy Authority

that describes in accurate detail the recent addition to the fish processing plant ("Plant") designed, developed and operated on the Homer Spit in Homer, Alaska by The Auction Block at this time.

25. The Plant is a shore-based state-of-the-art complete fish processing plant that has been "good to go" and has had excess operating capacity for some time.

26. The Plant processes for the benefit of The Auction Block's own fish and seafood product, for the benefit of other seafood buyers, and for other processing companies when they are at maximum capacity.

27. The Plant also processes - guts, fillets, freezes, vacuum packs and ships - for sport fishing customers and local subsistence fishermen.

28. The Plant processes, grades, packages and arranges for the shipping of Pacific cod milt to Japan; of salmon roe (eggs) to Japan; and of headed and gutted (H & G) Pacific cod and fresh black cod (sable fish) to the U.S., Canada, Korea and Japan. The Auction Block has worked for over a decade to develop business relationships with customers in the international market.

29. The majority of The Auction Block's frozen, headed and gutted (H & G) Pacific cod is loaded into refrigerated containers and shipped on TOTE (Totem Ocean Trailer Express) (<http://www.totemocean.com/>) vessels for shipment to foreign countries.

30. About 80 percent of our H & G halibut is delivered to buyers in Canada with most of it delivered to Ladner and Vancouver in British Columbia.

31. A shift at the Plant is composed of a defined number of trained individuals using specialized equipment who set up, sanitize and process the product and fill product codes set forth on work orders and then clean up and disinfect the Plant.

32. The Plant is able to handle 7000 pounds of finished H & G halibut per hour. Halibut is not as difficult to handle as Pacific cod. A crew of about ten individuals use assorted equipment including an automated heading machine, water-fed scraping tools, scales, knives, roller conveyors, and forklifts to complete the necessary processing activities.

33. The Plant is able to handle 5600 pounds of finished H & G salmon per hour. Salmon is not as difficult to handle as Pacific cod. A crew of about fifteen individuals use assorted equipment including an automated heading machine, gutting machine, water-fed scraping tools, scales, knives, wash conveyor, roller conveyors, and forklifts to complete the necessary processing activities. Two other individuals sort, grade and pack the roe (eggs) and then deliver the fish to be finally processed and shipped to the ultimate purchaser.

34. The Plant is able to handle 4400 pounds of H & G Pacific cod per hour. Pacific cod is a labor intensive fish to process and requires more clean up time. A crew of about fifteen individuals uses assorted equipment including an automated heading machine, band saw, water-fed scraping tools, scales, knives, wash conveyor, roller conveyors, and forklifts to complete the necessary processing activities. Two other individuals sort, wash, grade and pack the milt for further shipment to Japan.

35. The Pacific cod fishery is a very promising fishery for the future of The Auction Block. Mother Nature has provided high yields of this species in our fishing areas and also the government agencies have not significantly restricted the fishery through regulations. Moreover, yet another promising characteristic is the nearly year-long

season that allows The Auction Block to supply many different markets and provide steady year-round employment for our employees.

36. The Plant is able to process multiple species of fish at the same time by operating multiple shifts. This is particularly critical because the Plant is able to process smaller loads of fish, for example five species of ground fish of only 5000 lbs, more economically than larger processing plants that face much greater start-up costs. Moreover, The Auction Block is then able to ramp up on short notice to handle a substantial volume of fish.

37. The Auction Block lost its ability to compete dollar for dollar with Icicle Seafoods in buying halibut and black cod due to the unfair advantage given to Icicle when comparing dock fees (crane use and wharfage) paid by each business.

38. Fishermen almost always sell to the highest bidder as long as the fish buyer has a solid reputation for paying in full and on time. Icicle Seafoods and The Auction Block both have good reputations among the fleet for paying in full and on time.

39. From my experiences, the Homer City Manager Mr. Walt Wrede is prejudiced against Kevin Hogan and his business pursuits and has been for years. I was involved in several of the negotiating meetings with Mr. Wrede where he acted in a hostile and dismissive manner in his dealings with Mr. Hogan.

40. Mr. Wrede, acting on behalf of the City of Homer, seemed upset that The Auction Block won the request for proposal for the property we currently lease from the City of Homer. He seemed to want to preclude The Auction Block in every possible way from being able to meet the financially difficult terms of the lease he forced our companion company, Harbor Leasing, LLC, to sign if we wanted to do business at the Dock. We

had no choice except to accept Mr. Wrede's demands because we needed to maintain our shore-based facilities in Homer.

41. Mr. Wrede's motive seemed to be to put us out of business by demanding unreasonable, uneconomic and discriminatory terms in the lease.

42. Mr. Wrede was callously indifferent when Mr. Hogan asked about the disparity of one company, Icicle Seafoods, with no shore-based fish processing plant, getting the incentives that are reserved for the entity operating a shore-based fish processing plant in Homer at a time when The Auction Block was operating a shore-based fish processing plant in Homer.

43. Mr. Hogan was present for only about 50 percent of The Auction Block daily business dealings in the almost two years he was "negotiating" the lease with the Mr. Wrede. His absence hindered our ability to operate the business normally and to grow the business profitably.

44. Not having Mr. Hogan around during this time was stressful on the business and on me. The Auction Block was forced to pay more money to employees to cover the duties Mr. Hogan normally would have undertaken had he been present.

45. I was paid a salary for my position at The Auction Block with an expectation of approximately 50 hours a week but instead worked between 60 - 80 hours per week. This additional work was very stressful and tiring and impacted my home and family life. Mr. Hogan typically would have been able to work more of these hours instead of me.

46. Mr. Hogan's commitment of time and effort was a waste because Mr. Wrede did not accept any of our substantive suggestions.

46. Mr. Hogan's commitment of time and effort was a waste because Mr. Wrede did not accept any of our substantive suggestions.

47. The City's lease review process is a farce and a charade because the entire process is under the control of Mr. Wrede.

48. The unfair advantage that Icicle Seafoods has over The Auction Block is the single largest reason we have decreasing profits. Our fish buying, processing, selling and transporting business is likely to continue to lose more opportunities to buy fish which will result in The Auction Block being unable to meet the needs of its ultimate customers.

49. The Auction Block has lost some customers both fishermen and ultimate customers, due to Homer's high crane and wharfage charges to The Auction Block.

50. After reflecting on this case, the fairest resolution is to provide the incentives to The Auction Block that the City promises to the owner and operator of a shore-based fish processing plant and to require Icicle Seafoods, which has not had a fish processing plant in Homer since 1988, to pay the rates set forth in the Tariffs. Any other entity owning and operating a shore-based fish processing plant in Homer should also receive the incentives.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED this 13th day of October, 2012.


JESSICA YEOMAN

SUBSCRIBED AND SWORN to me this 13 day of October, 2012

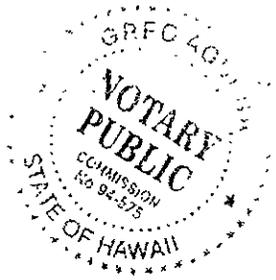
SUBSCRIBED AND SWORN BY JESSICA YEOMAN BEFORE
ME, GREG AGUERA THIS 18TH DAY OF OCTOBER 2012

J. G. T.

NOTARY PUBLIC in and for Hawaii

My Commission Expires: 2/15/14

GREG AGUERA



10/18/12

Doc. Date: *11/18/12* # Pages: *1*

GREG AGUERA, Notary Public, Second Circuit

Doc. Description: *Affidavit of*

Jessica Yeoman

Notary Signature: *[Signature]* Date: *10/18/12*