

**BEFORE THE
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

**BRIEF OF RESPONDENTS CITY OF HOMER
AND ITS PORT OF HOMER**

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES iv

I. INTRODUCTION 1

II. PROCEDURAL BACKGROUND..... 1

III. FACTUAL BACKGROUND..... 4

A. Tariff and Lease Provisions at Issue..... 4

1. Icicle Lease Provisions..... 5

2. Tariff Rates..... 6

B. The City and Port of Homer 7

C. Commercial Fishing Industry in Homer..... 9

D. The Commercial Fishing Industry 12

E. The Operations of the Auction Block Co. and Icicle..... 13

F. The City’s Relationship with Icicle 15

G. The City’s Lease Negotiations with Auction Block..... 19

H. The City’s Current Relationship with Auction Block 25

IV. STANDARD OF REVIEW 26

V. ARGUMENT 26

A. The FMC Does Not Have Jurisdiction Over Auction Block’s Claims 26

**1. The City’s Fish Dock Operations Fall Outside the FMC’s
 Jurisdiction..... 27**

**2. The City of Homer is Not a Terminal Operator for Activity on the
 Fish Dock..... 31**

3. Auction Block is Not a Common Carrier 33

B. Allegations of Procedural Defect Are Unfounded..... 36

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1. The City’s Answer to Complainants’ Fourth Amended Complaint Properly Denies Auction Block’s Allegations 36

2. Homer’s City Manager Never Admitted a Violation of the Act..... 38

3. Alleged Procedural Defects Do Not Excuse Auction Block’s Failure to Present its Case 39

C. The City’s Conduct in No Way Restrains Competition in the Southcentral Alaska Market..... 40

D. The City Did Not Fail to Establish and Enforce Just and Reasonable Regulations and Practices Relating to or Connected with Receiving, Handling, Storing or Delivering Property in Violation of 46 U.S.C. § 41102(c) 41

E. The City Did Not Give any Unreasonable Preference or Advantage or Impose any Undue or Unreasonable Prejudice or Disadvantage in Violation of 46 U.S.C. § 41106(2) 43

1. Auction Block and Icicle Neither Compete Nor are Similarly Situated with One Another 44

2. Any Preference or Advantage Given to Icicle by the City was Reasonable 47

3. The Terms of the Icicle Lease Are Not the Proximate Cause of Alleged Injury by Auction Block 59

F. The City Did Not Unreasonably Refuse to Negotiate in Violation of 46 U.S.C. § 41106(3)..... 64

G. The City Does Not Administer Unfair Leasing Policy/Practices 67

H. Auction Block’s Damages Are Egregiously Overstated..... 69

1. Because the City Charged Auction Block the Rates Published in its Tariff, Reparations are not Available as a Remedy 69

2. The Caselaw Does Not Permit Resellers to Take Advantage of Flat Rate Contracts Intended for One Customer’s Own Use 70

3. The Derivative “Lost Profits” Claim is Duplicative of Pre-Judgment Interest 72

4. Auction Block’s Predictions of Astounding Returns on Reinvested Capital are Factually Unpersuasive 73

I. The Statute of Limitations Bars Reparations 76

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1. The Facts Support Dismissal Due to Statute of Limitations..... 78

2. Auction Block’s “Continuing Violations” Argument is Unavailing 79

3. The Icicle Lease is Valid and In Full Force and Effect 82

4. The Harbor Leasing Lease is Valid and in Full Force and Effect 83

J. Sanctions Against Auction Block Are Appropriate Due to Its Failure to Comply with Discovery 94

VI. CONCLUSION 96

TABLE OF AUTHORITIES

Supreme Court of the United States

City of Milwaukee v. Cement Div., Nat. Gypsum Co.,
515 U.S. 189 (1995)72

Federal Maritime Commission

All Marine,
27 S.R.R. 539 (F.M.C. 1996)40

Bethlehem Steel Corp. v. Indiana Port Commission,
18 S.R.R. 1485 (F.M.C. January 8, 1979)31

Bimsha International v. Chief Cargo Services, Inc. and Kaiser Apparel, Inc.,
F.M.C. No. 10-08, 2011 WL 7144011 (F.M.C. September 14, 2011).....26

*Canaveral Port Authority – Possible Violations of Section 10(b)(10),
Unreasonable Refusal to Deal or Negotiate*,
29 S.R.R. 484 (F.M.C. 2002)64, 66

Ceres Marine Terminals, Inc. v. Maryland Port Admin.,
27 S.R.R. 1251 (F.M.C. 1997)44, 45, 59

Exclusive Tug Arrangements in Port Canaveral, Florida,
F.M.C. No. 02-03 (May 4, 2003)29, 30

International Shipping Agency, Inc. v. The Puerto Rico Ports Authority,
F.M.C. No. 04-01 (A.L.J. September 17, 2004)80

Louis Dreyfus Corp. v. Plaquemines Port, Harbor and Terminal District,
25 F.M.C. 59 (1982).....30

Maher Terminals, LLC v. Port Authority of New York and New Jersey,
F.M.C. No. 08-03 (May 16, 2011) passim

Marine Surveyors Guild, Inc. et al. v. Cooper/T. Smith Corp.,
24 S.R.R. 628 (A.L.J. November 5, 1987)31

*New Orleans Steamship Assoc. v. Bunge Corp. and Southern
Stevedoring Company, Inc.*,
6 S.R.R. 336 (F.M.C. 1965)35

Palmetto Shipping & Stevedoring Company, Inc. v. Georgia Ports Authority,
1987 WL 209056, *53 (F.M.C.)87

Petchem, Inc. v. Canaveral Port Authority,
23 S.R.R. 974 (1986).....29, 48

R.O. White & Co., et al. v. Port of Miami Terminal Operating Co., et al.,
F.M.C. No. 06-11 (July 28, 2009).....26, 40, 48, 49

River Perishes Co.,
28 S.R.R. 751 (1999).....40

Seacon Terminals, Inc. v. Port of Seattle,
26 S.R.R. 886 (F.M.C. 1993)64, 66

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U.S. Court of Appeals

American Association of Cruise Passengers, Inc. v. Carnival Cruise Lines, Inc.,
 911 F.2d 786 (D.C. Cir. 1990)..... 34

Atlantic Track & Turnout Co. v. Perini Corp.,
 989 F.2d 541 (1st Cir. 1993) 71

Brewster of Lynchburg, Inc. v. Dial Corp.,
 33 F.3d 355 (4th Cir. 1994)..... 71

Capital Transportation, Inc. v. Federal Maritime Commission,
 612 F.2d 1312 (1st Cir. 1979) 37

DiRose v. PK Management Corp.,
 691 F.2d 628 (2nd Cir. 1982)..... 88

Empire Gas Corp. v. American Bakeries Co.,
 840 F.2d 1333 (7th Cir. 1988)..... 71

Landstar Exp. Am., Inc. v. Fed. Mar. Comm'n,
 569 F.3d 493 (D.C. Cir. 2009)..... 34

New Orleans S.S. Ass'n v. Plaquemines Port Harbor and Terminal District,
 816 F.2d 1074 (5th Cir. 1987)..... 70

New Orleans Stevedoring Co. v. Federal Maritime Commission,
 80 Fed.App'x 681 (C.A.D.C. 2003) passim

Petchem, Inc. v. FMC et al.,
 853 F.2d 958 (1988) 29

Puerto Rico Ports Authority v. Federal Maritime Commission,
 919 F.2d 799 (C.A. 1st 1990)..... 28

Sutter Home Winery, Inc. v. Vintage Selections, Ltd.,
 971 F.2d 401 (9th Cir. 1992)..... 89

Transpacific Westbound Rate Agreement v. Federal Maritime Commission,
 951 F.2d 950 (9th Cir. 1991)..... 34

Alaska Cases

Acevedo v. City of North Pole,
 675 P.2d 130 (Alaska 1983) 90

Hawken Northwest, Inc. v. State Department of Administration,
 76 P.3d 371 (Alaska 2003) 87, 88

Kaiser v. Umialik Insurance,
 108 P.3d 876 (Alaska 2005) 92

Law Offices of Steven D. Smith, P.C. v. Borg-Warner Security Corp.,
 993 P.2d 436 (Alaska 1999) 92

Mullins v. Oates,
 179 P.3d 930 (Alaska 2008) 87

Northern Fabrication Co., Inc. v. UNOCAL,
 980 P.2d 958 (Alaska 1999) 86

Totem Marine & Tug Barge v. Alyeska Pipeline Serv. Co.,
 584 P.2d 15 (Alaska 1978) 85, 86, 88

Wassink v. Hawkins,
 763 P.2d 971 (Alaska 1988) 86

<i>Zeilinger v. Sohio Alaska Petroleum Company,</i> 823 P.2d 653 (Alaska 1992)	85
---	----

Other Cases

<i>Bridgeport and Port Jefferson Steamboat Co., et al. v. Bridgeport Port Authority,</i> 335 F.Supp.2d 275 (D.Conn. 2004).....	31
<i>City of Lakeland v. Union Oil Co. of Cal.,</i> 352 F.Supp. 758 (M.D. Fla. 1973)	71
<i>Computer Systems Engineering, Inc. v. Qantel Corp.</i> 571 F.Supp. 1379 (D.Mass.1983).....	73
<i>In re Kloster,</i> 127 Ill.App.3d 583 (App.Ct.1984).....	89
<i>Orange & Rockland Utilities, Inc. v. Amerada Hess Corp.,</i> 397 N.Y.S.2d 814, 96 A.L.R.3d 1023 (App.Div. 1977).....	71
<i>Velasco v. Security National Mortgage Company,</i> 823 F.Supp. 2d 1061 (D. Haw. 2011)	83
<i>Western Holding Group, Inc. v. The Mayaguez Port Commission,</i> 611 F.Supp.2d 149 (D.P.R. 2009)	43

U.S. Code

46 U.S.C. § 40101	27, 29
46 U.S.C. § 40102	34
46 U.S.C. § 40102(14)	31
46 U.S.C. § 40102(16)	34
46 U.S.C. § 40102(6)	33, 34
46 U.S.C. § 41102(b)	1
46 U.S.C. § 41102(c).....	2, 41
46 U.S.C. § 41106(1)	2
46 U.S.C. § 41106(2)	2, 43, 44
46 U.S.C. § 41106(3)	2, 64
46 U.S.C. § 41301(a)	76
46 U.S.C. § 41305(a)	73

Code of Federal Regulations

46 C.F.R. § 502.155	26
46 C.F.R. § 502.210(b)(2)	95
46 C.F.R. § 502.253	73
46 C.F.R. § 502.63	83, 90
46 C.F.R. § 502.63(b).....	81
46 C.F.R. § 502.64	37
46 C.F.R. § 502.64(a).....	37

Alaska Statutes

A.S. 43.75.015.....	55
A.S. 45.05.275.....	88

Homer City Code

HCC 1.18.020.....91
 HCC 1.18.020(j)91
 HCC 1.18.030.....90
 HCC 1.18.030(5)(ii)91
 HCC 10.04.055(b)42
 HCC 21.28.....10

Miscellaneous

Cristy Fry, *IPHC Staff Recommends Quota Cuts*,
 HOMER NEWS, December 6, 2012 (Real Estate and Business)13
 Fed. R. Civ. P. 37(a)(5)95
 Joel Gay, *Kevin Hogan: Changing the Halibut Industry*,
 PACIFIC SHIPPING, May 1999..... 10, 41, 57
 Scott C. Matulich and Michael L. Clark, *North Pacific Halibut and
 Sablefish IFQ Policy Design; Quantifying the Impacts on Processors*,
 MARINE RESOURCE ECONOMICS, 18(2):149-166 (2003) 12, 13, 56

I. INTRODUCTION

The Auction Block Co. and Harbor Leasing, LLC (collectively, “Auction Block”) brought an action against the City of Homer, Alaska and the Port of Homer, Alaska (collectively, the “City”) alleging that the City violated the Shipping Act of 1984 (the “Act”) because it refused to give Auction Block, a commercial fish broker hoping to become a fish buyer/processor, a lease of City-owned uplands on the same terms the City provided Icicle Seafoods, Inc. (“Icicle”), a major fish processor/buyer operating in Homer for over 30 years. In its Complaint, Auction Block seeks over \$1 million in damages on the theory that the Act bars the City from negotiating different lease terms with these two significantly different entities. As the City demonstrates throughout this brief, Auction Block does not have a cause of action under the Act for many reasons, including: (1) the Commission does not have jurisdiction; (2) the City did not restrain competition in the relevant market; (3) the respective terms of the Auction Block and Icicle leases are reasonable; (4) the City made every effort to negotiate with Auction Block; (5) even if the City violated the Act, its alleged violation actually benefited rather than injured Auction Block; and (6) any claim for reparations is barred by the statute of limitations.

II. PROCEDURAL BACKGROUND

The instant lawsuit began on April 10, 2012, with the filing of Complainants’ first Complaint before the Federal Maritime Commission (the “FMC”). The Complaint, and three iterations that followed it, claimed five violations of the Act:

- 1) **Violation of 46 U.S.C. § 41102(b):** Complainants alleged that the lease between the City and Icicle was a “Common Carrier Agreement,” as defined by the Shipping Act. All such agreements must be submitted for approval to the FMC under this section of the Act, and the

Icicle Lease was never submitted to the FMC. Complainants thus argued that the City was operating under an “unapproved agreement.”

- 2) **Violation of 46 U.S.C. § 41102(c):** Complainants alleged that the City, as a Marine Terminal Operator (“MTO”), failed to “establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering of property,” as required by the Act.
- 3) **Violation of 46 U.S.C. § 41106(1):** Complainants alleged that the City and another MTO (the City of Seward) agreed to boycott or unreasonably discriminate against Complainants.
- 4) **Violation of 46 U.S.C. § 41106(2):** Complainants alleged that the City, as an MTO, has “given undue or unreasonable preference or advantage or imposed undue or unreasonable prejudice or disadvantage with respect to a person.”
- 5) **Violation of 46 U.S.C. § 41106(3):** Complainants alleged that the City, as an MTO, “unreasonably refused to deal or negotiate” with them.

Over the course of the litigation, Auction Block agreed to drop claims one and three. See Fourth Amended Complaint, CX 0272-280. On June 4, 2012, the parties exchanged initial disclosures. The City provided Auction Block with over 800 pages of documents at the time of the disclosures, including documentation regarding the lease negotiations between the City and Icicle and between the City and Auction Block. See Respondents’ Initial Disclosures, CX 0121-126. In contrast, Auction Block provided absolutely no documentation to the City in support of its claims but instead listed documents allegedly in its possession and stated that the documents were being copied but never provided such documents. See Complainants’ Civil Rule 26(a)(1) Disclosures at 10, CX 0118. Auction Block stated in its disclosures that it intended to rely upon fisheries data but did not provide the City such data until December 23, 2012. *Id.* at 10, CX 0118.

On July 16, 2012, the City and Auction Block both recognized that “a decision of the Commission in *Maher Terminals, LLC v. Port Authority of New York and New Jersey*, F.M.C. No. 08-03 (May 16, 2011) could bar Complainants from recovering reparations in the event that Complainants succeed on their claims.” Joint Motion and Memorandum to Stay Case Pending a Decision on Appeal in the Case in *Maher Terminals, LLC v. Port Authority of New York and New Jersey*. Thus, the parties filed a joint motion to stay the case pending an order in *Maher*. *Id.* The Administrative Law Judge (“ALJ”) responded that the requested stay could not be granted without additional information from the parties. The parties did not submit additional information and thus the case moved forward.

The City initiated discovery on August 21, 2012, and both parties agreed to an expedited discovery process in an effort to complete some discovery prior to mediation scheduled for late September. On September 17, 2012, the City filed a Motion for Partial Summary Judgment alleging that Auction Block was barred from claiming reparations due to the statute of limitations. On October 18, 2012, Auction Block filed its own summary judgment motion requesting judgment entered on each of its remaining three claims.

On October 29, 2012, after repeated requests, the City filed a Motion to Compel seeking a myriad of documents requested during discovery that Auction Block refused to produce. After the ALJ granted the City’s Motion to Compel in part, Auction Block still refused to produce the majority of the documents requested by the City, including fish processor data filed with the Alaska Department of Fish and Game (“ADF&G”). Consequently, on December 19, 2012, the City filed an Expedited

Motion for Sanctions. Later that same day, Auction Block filed an opposition to the City's request for expedited consideration. On December 20, 2012, the City responded to Auction Block's opposition by reiterating the importance of receiving the requested information before the City's brief was due. On December 21, 2012, the ALJ deferred her decision regarding sanctions until the close of the briefing but warned Auction Block to comply with the ALJ's order. On Sunday, December 23, 2012, the City received a signed release permitting it to get fish ticket processor data regarding Auction Block. The City submitted that release to the ADF&G via express mail and email on Wednesday, December 26, 2012. ADF&G has provided the City with fish ticket processing data but Auction Block failed to identify the actual processor/buyer of fish when providing offloading services and thus the data in its current form is not useful. See ADF&G Fish Summary Report for The Auction Block Co., RX 836-1078. Auction Block has never responded to the City's other discovery requests seeking the most basic business data, such as the amount of fish actually processed by Auction Block. See generally Auction Block's responses to the City's Amended First Discovery Requests to Complainants ("Auction Block's Discovery Responses"), Responses to RFP Nos. 1,4,6,7,8,9,11,12, CX 0047-52.

III. FACTUAL BACKGROUND

A. Tariff and Lease Provisions at Issue

The core of this dispute arises from the difference in rates charged Icicle Seafoods, Inc. (formerly Seward Fisheries, Inc. but referred to as Icicle throughout this brief) under a longstanding lease with the City and those charged Harbor Leasing, LLC under the terms of the City's published tariff. The rates under both the lease at issue and the tariff are undisputed by the parties.

1. Icicle Lease Provisions

Icicle is subject to lease terms that differ from the published tariff rates. On September 14, 1979, Icicle and the City entered into a 25-year Lease Agreement, with an additional 25-year option to renew. Complainants' Proposed Findings of Fact ("CFOF"), Stipulated Fact No. 8, CX 0192-207.¹ Under the terms of that lease, Icicle was subject to the published tariff rates. See Icicle Lease, CX 0192-0205. The lease was amended twice, once in 1986 and once in 1988.² The 1986 amendment permitted certain uses by Icicle and established a flat rate of \$33,385 for ice, wharfage, and crane fees for up to 1850 hours of use. See 1986 Amendment to Icicle Lease, CX 0209. The 1988 amendment changed the flat fee to \$30,900 for ice, wharfage, and crane fees up to 1300 hours of use. See 1988 Amendment to Icicle Lease, CX 0214. Specifically, the 1986 amendment provided that:

- Lessee shall have the use of the covered structure at the Fish Dock.
- Lessee may continue to operate its ice dispensing equipment at its present location on the Fish Dock.
- Lessee shall have the use of loading cranes No. 7 and 8 to a maximum of 1,858 [sic] 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.
- Seafood wharfage charges are included within the rental given above.

¹ The lease between Icicle and the City is recorded at Book 111, Pages 884 through 902A in the Homer Recording District. CFOF, Stipulated Fact No. 9, CX 192-207.

² The 1986 amendment is recorded at Book 172, Pages 673 through 678 in the Homer Recording District. CFOF, Stipulated Fact No. 10, CX 208-212. The 1988 amendment is recorded at Book 0181, Pages 383 through 386 in the Homer Recording District. CFOF, Stipulated Fact No. 11, CX 213-216.

- Lessee shall have the use of one fish buying shed. Lessor shall have the right to select the shed for Lessee's use.

CFOF, Stipulated Fact No. 10; First Amendment to the Icicle Lease, CX 0208-212.

The 1988 amendment of the Icicle Lease provides:

- 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.
- 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.
- 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.

CFOF, Stipulated Fact No. 11, CX 0213-216.

The original lease between Seward Fisheries, Inc.(currently Icicle Seafoods, Inc.) and the City and these two amendments are collectively referred to as the Icicle Lease in this brief. The City continues to operate under the 1988 amendment to the Icicle Lease with a charge of \$30,900 for dock use up to a 1300 hour maximum.

2. Tariff Rates

The lease between the City and Harbor Leasing, LLC requires Harbor Leasing to pay the fees established in the City's Tariff. The City of Homer Terminal Tariff No. 600 includes the user fees on the City's Fish Dock. The Tariff is amended from time to time to reflect the new rate structure for use of City terminal facilities. The

Tariff effective January 1, 1999 provides for various costs, including an \$88.00 per hour fee for crane use with a minimum charge per hour for crane use of 15 minutes. Terminal Tariff No. 600 Effective January 1, 2009, CX 0073. That Tariff also charged \$4.62 per ton for seafood/fish product going over the docks and \$14.00 per ton for cargo. *Id.*

The Tariff effective January 1, 2011 increased the charge for crane use to \$90.64 per hour. The wharfage was increased to \$4.76 per ton of seafood/fish product and \$14.50 per ton for cargo, excluding fishing gear. Terminal Tariff No. 600 Effective January 1, 2011, CX 0083; CX 0093; CX 0103. Currently, the City's wharfage and crane fees remain at these same rates on the Fish Dock. See City of Homer Port and Harbor Fee Schedule, RX 1211-1212.

B. The City and Port of Homer

Homer, Alaska is a small seaside community of approximately 5,000 people in Southcentral Alaska. The City owns and maintains the port and harbor facilities and most of the surrounding uplands adjacent to those facilities located on a 4.5-mile stretch of land extending into Kachemak Bay called the Homer Spit ("Spit"). January 2, 2013 Affidavit of Bryan Hawkins Regarding Respondents' Brief, at ¶ 4, RX 1224 (showing photos of the Spit); see also November 5, 2012 Affidavit of Walt Wrede Re: Reply in Opposition to Complainants' Motion for Summary Judgment, at ¶¶ 3-4, RX 1086.

The Spit is home to three separate and distinct City terminal facilities. Hawkins Aff. (January 2, 2013) at ¶ 6, RX 1225. At the very end of the Spit and outside the City harbor, the City operates its Deep Water Dock and its Pioneer Dock. *Id.* at ¶ 7. Within the City harbor, which is created and protected by a jetty, the City

operates the Fish Dock and Small Boat Harbor (collectively referred to as the “Harbor”). *Id.* at ¶ 8. Unlike the Harbor, the Deep Water Dock and the Pioneer Dock are able to accommodate large deep draft ocean going vessels due to their open water location on Kachemak Bay and the deeper waters surrounding those docks. *Id.* at ¶ 9; see also November 5, 2012 Affidavit of Bryan Hawkins Regarding Reply in Opposition to Complainants’ Motion for Summary Judgment at ¶¶ 14-15, RX 1102.

The Alaska Marine Highway, a state run ferry system shuttling passengers between Alaska communities, moors at the Pioneer Dock as does an occasional cruise ship. See Hawkins Aff. (November 5, 2012) at ¶ 4, RX 1101. The Deep Water Dock is the terminal facility where large vessels such as common carriers, scrap metal barges, Icicle Seafoods’ floating processor, and cruise ships dock. Hawkins Aff. (January 2, 2013), at ¶ 10, RX 1225. While the City definitely attempts to draw large vessels to its Deep Water Dock, common carriers generally moor in Anchorage, Alaska, which is a major ocean transportation hub located approximately 220 nautical miles from Homer. *Id.* at ¶ 12. The City’s Fish Dock, given its shallow waters and the protection afforded it by a jetty, cannot accommodate large deep draft ocean going vessels and is used strictly by fishing vessels and recreational boaters. *Id.* at ¶ 11; see also Hawkins Aff. (November 5, 2012) at ¶¶ 12-14, RX 1102. The City leases about 24 parcels of City property on the Spit for a variety of different uses ranging from restaurants and theatres to fish buyers like Icicle and offloaders like Auction Block. See January 2, 2013 Affidavit of Wrede Regarding Respondents’ Brief, at ¶ 3, RX 1231. The City does, however, try to reserve leases of property

adjacent to the Fish Dock for uses involving the commercial fishing industry. *Id.* at ¶ 6, RX 1232.

The City maintains a separate enterprise fund known as the Harbor Enterprise Fund (“Fund”). *Id.* at ¶ 7. The City deposits in the Fund all of the City’s receipts from user, moorage, and wharfage fees charged for the use of its port and harbor facilities. *Id.* at ¶ 8. The City uses amounts in the Fund to pay the costs of operating and maintaining its port and harbor facilities, including the Fish Dock. ***Id.* at ¶ 9.** Expenditures from the Fund are authorized in the annual City budget approved by the City Council. *Id.* at ¶ 10. The budgeted expenditures from the Fund for operation and maintenance of the Fish Dock are \$855,342 for 2013 and were \$828,309 for 2012. *Id.* at ¶ 11. Thus, Auction Block’s alleged damages would exceed the cost of operating the Fish Dock for more than a year, a devastating and destructive consequence for the City. *Id.* at ¶ 12. In 2011, the total operating budget for the fish dock, including a \$211,613 contribution to the Port and Harbor Reserves, was \$814,524. The year-end revenues from the Fish Dock for that same period were \$795,836, which actually resulted in a loss to the City’s Port and Harbor Enterprise of \$18,688. Hawkins Aff. (January 2, 2013) ¶ 19, RX 1227.

C. Commercial Fishing Industry in Homer

Commercial and sport fishing for salmon, halibut, and Black cod are mainstays of the Homer economy, providing income for many residents, a substantial tax base for the City, and drawing tourists from around the globe. The Fish Dock has been designed by the City to foster the commercial fishing industry. See Wrede Aff. (January 2, 2013) at ¶ 13, RX 1232.

To make its port and harbor facilities fully available to all participants in the fishing industry, regardless of size, the City has always permitted full public access to those facilities. Most communities in Alaska provide exclusive leases or outright ownership of their docks and uplands to major commercial fishing processors, resulting in a commercial fish market dominated by a few large processors. In contrast, the City refuses to grant exclusive use of any City dock and the only large fish processor is Icicle, which does not actually own the dock or any of its equipment. See *generally* Homer City Code (“HCC”) 21.28, RX 1332-1333; see also Complainants’ Initial Civil Rule 26(a)(1) Disclosures, CX 0109-119; Wrede Aff. (November 5, 2012), at ¶ 13, RX 1088; Icicle Seafoods 30(b)(6) Deposition – Kenneth Hoyt, 29:13-18, RX 5. The result for the City is a bustling port with open competition where a small commercial fisherman has the opportunity to sell his or her catch to the highest bidder. The open market created by the City has historically resulted in some of the highest prices for halibut in Alaska and contributed to Homer’s reign as the number one halibut fishing port in the Pacific Northwest. See Joel Gay, *Kevin Hogan: Changing the Halibut Industry*, PACIFIC SHIPPING, May 1999 at 63, CX 0166.

Ironically, The Auction Block Co. probably has benefited most from the City’s open market. *Id.*, CX 0166. The Auction Block Co. was originally an online auction company. See Kevin Hogan Deposition, 12:8-18, RX 10. In the City’s open market environment, the fishermen and the market itself have far more impact on the market price, making an auction on halibut more viable. Wrede Aff. (January 2, 2013) at ¶ 14, RX 1233.

Although Homer's open market approach ensures that every commercial fisherman and fishing enterprise has an equal opportunity to prosper in the City, the City struggles to entice major seafood processing/buying companies to Homer. *Id. at* ¶ 17. A major processor, such as Icicle, brings with it year-round job opportunities, a consistent buyer for commercial fishermen, and a reliable corporate consumer of goods and services for businesses within the City. *Id. at* ¶ 18, RX 1234. Additionally, major fish processors can also be hefty contributors to the State of Alaska fisheries tax, of which the City receives a portion. *Id. at* ¶ 19. For all of these reasons, the City has an obligation to its residents to try and remain competitive and attractive to major processors despite the more exclusive benefits offered by its neighbor ports. *Id. at* ¶ 20.

For the most part, the major processing companies are established in communities in which they receive exclusive use of a dock and are able to own, operate, and lease out their own cranes and equipment. Consequently, all Alaska coastal communities similarly situated to Homer, including Kodiak, Seward, Cordova, Ketchikan, Valdez, Petersburg, and Dutch Harbor, are home to large processing facilities such as Trident Seafoods, Ocean Beauty, Icicle Seafoods, Peter Pan Seafoods, Inc., and Global Seafoods North America. See *Wrede Aff.* (January 2, 2013) at ¶ 12, RX 1232. Unlike its sister cities, Homer has only been able to attract one major processor and that is Icicle. Homer's open market and the inability for processors to control the waterfront are the most likely reasons major processors have been unwilling to establish a presence in Homer as it is optimally located on the

road system and close to fish areas 3A and 3B. See, *i.e.*, Icicle Deposition, 25:23-25, 29:13-18, RX 2, 5.

D. The Commercial Fishing Industry

The commercial fishing industry is a heavily regulated and ever-changing industry. See Hogan Deposition, 36:16 - 37:25, RX 16. The regulating authorities are constantly adjusting the rules that determine the amount of fish available for harvesting in an effort to protect and sustain the fisheries. See Hogan Deposition, 66-67, RX 25-26; Icicle Deposition, 27-28, RX 3-4. While all of the fisheries undergo major shifts and changes based upon available resources, the halibut market has been drastically affected by regulations over the last decade. See *generally* Scott C. Matulich and Michael L. Clark, *North Pacific Halibut and Sablefish IFQ Policy Design; Quantifying the Impacts on Processors*, MARINE RESOURCE ECONOMICS, 18(2):149-166 (2003), RX 57-74.

Prior to 1995, the halibut industry was a derby style fishing system. Under a derby system, fishermen were able to catch as much fish as they possibly could within short windows of time (normally 24 hours or less) designated by the authorities. The result was a large volume of fish coming into port all at once. This system led to a strong frozen market as so much halibut was landed in such a short period that the fish had to be frozen to be preserved and allow their controlled release into the market by processors such as Icicle. Hawkins Aff. (January 2, 2013), at ¶ 14, RX 1226; see *generally* Hogan Deposition, 66-67, RX 25-26.

In 1995, the Secretary of Commerce enacted the Individual Fisheries Quota (“IFQ”) system for halibut. Under the IFQ system, established by the National Marine Fisheries Service, fishermen are issued quota annually that they may harvest over a

much more extended period of time. Currently the halibut long-line season is nine months long. The result is halibut coming into port in smaller volumes over a longer period of time. Hawkins Aff. (January 2, 2013), at ¶ 15, RX 1226. This system has actually fostered a fresh rather than frozen halibut market as buyers can handle and sell halibut immediately upon receipt and thus the fish do not need to be frozen. *Id.* at ¶ 16; see also Hogan Deposition at 66:22-25 and 67:1-10, RX 24-25. The IFQ system also disfavored large processors primarily focused on handling and freezing large volumes of fish. See Hawkins Aff. (January 2, 2013), at ¶ 16, RX 1226; see generally Matulich and Clark, *supra*, at 149-166, RX 57-74.

In recent years the government has drastically reduced the quotas for halibut under the IFQ system. Last year alone the quota was reduced by approximately 56 percent. See Hogan Deposition, at 88:6-10 and 89:7-13, RX 35-36. Additionally, the International Pacific Halibut Commission recently had its interim meeting and delivered another “mind-numbing blow to the fishery” as the Commission staff recommended an additional quota reduction of 70% over the next two years. See Cristy Fry, *IPHC Staff Recommends Quota Cuts*, HOMER NEWS, December 6, 2012 (Real Estate and Business) at 1, RX 76.

E. The Operations of the Auction Block Co. and Icicle

The Auction Block Co. and Icicle are drastically different companies. The Auction Block Co. is a seafood logistics company, offering offloading and auction/broker services to buyers and fishermen alike. See Hogan Deposition, 12:11-18; 15:19-23, RX 10-11. The Auction Block Co. also started custom processing fish in 2010. See page from Auction Block’s website, RX 619; see State of Alaska Fisheries Tax Contributor List, RX 620-624. Today, Auction Block requires

companies using its brokerage services to also use it for offloading. See Hogan Deposition 41:20-25; 42:1-2, RX 17-18. According to Auction Block, “80 to 90 percent of the profits of the Auction Block” derive from the offloading of fish for Icicle and others. See October 18, 2012 Affidavit of Jessica Yeoman at ¶ 19, CX 0172; see Deposition of Heather Brinster at 50:6-9, RX 681; 55:20-22, RX 683. Thus, the majority of Auction Block’s business derives from unloading and packing fish for a buyer as well as dealing with all the permitting and regulatory requirements associated with the purchased catch. Brinster Deposition at 55:10-12, RX 683; Hogan Deposition, 36:11-19, RX 16. According to an ADF&G representative, Auction Block is the only “processor” in the State of which she is aware that files fish tickets on fish it merely offloads. January 3, 2013 Affidavit of H. Charles Sparks ¶ 9, RX 1266.

Icicle, on the other hand, is a major fish buyer and processor throughout the Pacific Northwest which is not in the business of providing offloading services to other entities at any Homer dock. See Woodruff Aff. (November 2, 2012) at ¶ 9, RX 1117-1122. In fact, Icicle actually relies upon Auction Block to perform its offloading services and even buys fish through Auction Block’s auction services. See Sampling of Offloading Service Agreements and Bid Requests between Icicle and Auction Block, RX 627-653, 677-679. Icicle also operates a floating processing vessel that docks at the City’s Deep Water Dock and pays wharfage and all service fees without any discount. See Wrede Aff. (November 5, 2012) at ¶ 12, RX 1087; see *also* Icicle Deposition, 115:12-14, RX 8.

F. The City's Relationship with Icicle

In the 1960s, the City's port was primarily utilized by local fishermen with no major processing companies or prominent fish buyers utilizing the port and a fairly rudimentary dock for offloading fish. See Exhibit A to September 17, 2012 Affidavit of Bryan Hawkins, RX 1097-1099. In 1978, Icicle expressed its interest in exclusively leasing the City's Fish Dock and its goal of building a new and expanded fish processing plant on the uplands near that dock. See September 27, 1978 letter from Seward Fisheries to Homer City Council, RX 79-80. A greater presence by Icicle in the City at that time would revolutionize the fishing industry in Homer, providing a reliable income for the City from the upland lease, offering a plethora of jobs with competitive salaries and benefits for City residents, and creating and maintaining a returning fleet of fishing vessels and crew members, which would deliver fish to Icicle. Despite the City's eagerness to secure a long-term lease with Icicle, the City was hesitant to grant Icicle exclusive use of the Fish Dock and feared that Icicle would limit public access to the dock. See October 4, 1978 letter from James D. Rolfe, then City Attorney, to Seward Fisheries, RX 81-82. Ultimately, the City did not grant Icicle's request and instead retained its public harbor approach.

Despite the City's refusal to grant Icicle exclusive use of the Fish Dock, Icicle and the City entered into negotiations for a lease that would provide Icicle incentives to buy fish and build its processing plant in Homer while retaining open competition on the Fish Dock. On September 14, 1979, Icicle and the City entered into a 25-year Lease Agreement with an additional 25-year option to renew (the "Icicle Lease"). See the Icicle Lease, CX 0192-207; see also Notes from April 28, 2004 Hearing, RX 83; Wrede Aff. (November 5, 2012), at ¶¶ 21-22, RX 1089.

The Icicle Lease included a provision stating that every four years the parties would re-appraise the value of the leasehold and then apply the new rental rates under the lease. See Icicle Lease at 4, CX 0195. The appraisal expressly takes into account City services. By 1986, Icicle was having difficulty gaining adequate access to port facilities given the public use of these facilities and the large volume of fish Icicle was buying from its fleet. See Wrede Aff. (January 2, 2013) at ¶ 21, RX 1234. Thus, the City agreed to amend the Icicle Lease to include additional uses of the Fish Dock in the annual wharfage fee charged to Icicle. See *supra*, Section III(A). The goal was to provide Icicle with the access it needed to efficiently operate given the massive volume of fish it was handling. See Wrede Aff. (January 2, 2013), at ¶ 22, RX 1234.

The Icicle plant in Homer processed various types of fish caught by its fleet in Western Alaska. But on or about July 1, 1998, the plant burned to the ground following an accident. After the accident, Icicle claimed that it hoped to rebuild the plant but eventually informed the City that rebuilding in the fresh halibut market that had developed under the IFQ system simply did not make economic sense. Icicle continued, however, to purchase large volumes of fish in Homer, support a large fishing fleet in Homer, contribute to the Homer community, and invest in services provided by Homer based companies such as The Auction Block Co. See Second Affidavit of John Woodruff, November 2, 2012, at ¶ 9, RX 1117-1122.

Icicle believed that while the Icicle Lease required it to build a processing plant, the Lease did not anticipate the involuntary loss of that plant decades later and thus Icicle asserted that it had fully performed under the Icicle Lease by in fact

building the plant. Accordingly, Icicle exercised its option to renew its lease with the City on March 5, 2004. See March 5, 2004 Letter from Icicle, RX 84. The City, hoping to encourage Icicle to rebuild a shore side processing plant or, at the very least, increase its payments and investments in the City, sent Icicle a Notice of Default on March 25, 2004. See March 25, 2004 letters to Icicle from the City, CX 0056-59. This letter stated that Icicle's failure to rebuild the processing plant was a breach of the parties' agreement and that the City was declaring the lease in default. *Id.* at CX 0056. In response to this letter, Icicle's local office started negotiating with the City Administration, and the City anticipated amending the Icicle Lease to slowly transition Icicle to the published tariff rates for the Fish Dock.

Despite the willingness of Icicle's local representatives to transition to less favorable lease terms, Icicle made it clear that any changes to the lease were subject to approval by its executive officers based in Seattle. See October 9, 2012 Affidavit of J. Woodruff at ¶ 9, RX 1106; Wrede Aff. (October 10, 2012) at ¶ 11, RX 1083. Unfortunately, Icicle's executive officers, namely Dennis Guhlke, rejected the changes to the Icicle Lease proposed by the City. See Woodruff Aff. (October 9, 2012) at ¶¶ 9-10, RX 1106. In response, the City conducted a hearing during which Icicle presented its position that the Icicle Lease was valid and in effect; Icicle was in full compliance with that lease; the City had issued a notice of default in error; and, even if Icicle had violated the terms of the Icicle Lease, the City had waived any breach by failing to take action sooner. See April 15, 2004 Letter to Icicle, RX 85; April 28, 2004 Hearing Notes, RX 83. The City Manager did not declare Icicle in default at that hearing but instead instructed the Harbormaster to continue to work

with Icicle and to consider options for addressing the City's concerns. See Wrede Aff. (January 2, 2013) at ¶ 26, RX 1235.

It became apparent during the City's negotiations with Icicle that Icicle was unwilling to deviate from the Icicle Lease at that time and that if the City wanted to challenge performance under the Icicle Lease, it would have to take action to terminate the Icicle Lease and take legal action against Icicle. See November 23, 2004 letter from D. Guhlke to W. Wrede, RX 86-89; Wrede Aff. (January 2, 2013) at ¶ 27, RX 1235. The City Manager determined, after consulting with legal counsel and City staff, that it was not in the City's best interest to terminate the Icicle Lease as Icicle was an extremely important contributor to the City economy and the City's position that Icicle breached the Icicle Lease was weak, especially in light of the City's silence regarding Icicle's failure to rebuild a shoreside processing plant for over six years and the massive volume of fish Icicle continued to handle on its leased premises. Wrede Aff. (January 2, 2013), at ¶ 28, RX 1235; see also Wrede Aff. (October 10, 2012) at ¶¶ 13-14, RX 1084.

The City was well aware of Icicle's great efforts to maintain a presence in Homer, despite the changes to the halibut market, and the reliable and formidable contributions Icicle continued to make to the community and the port. Whenever the salmon catch warranted, Icicle operated a floating processor plant in Homer off the Deep Water Dock, paying full tariff rates on the use of the Deep Water Dock and a 5% fisheries tax. Icicle also continued to support a large fleet of commercial fishermen who were able to sell their catch exclusively to Icicle while maintaining their residences in Homer. See Woodruff Aff. (November 2, 2012) at ¶¶ 8-9a,

RX 1116-1117. Additionally, Icicle used services provided by local companies such as The Auction Block Co. and Snug Harbor, and continued to support the Homer community through charitable contributions and services. *Id.* at ¶ 9(g), RX 1119; see *generally infra*, Section V(E) for a more detailed discussion of the benefits derived from Icicle. Consequently, the City honored Icicle's exercised option under the Icicle Lease and took steps to ensure that the services and discounts provided to Icicle were weighed and valued during the appraisal process provided for under the Icicle Lease. See *Wrede Aff.* (January 2, 2013) at ¶ 29, RX 1235.

Currently, Icicle continues to maintain an important presence in Homer, employing both seasonal and year-round employees, serving and attracting a sizeable fleet of fishing vessels, and operating a floating processing plant. It also provides substantial business for Auction Block and other companies like it and remains the biggest fish buyer in Homer. See *Hawkins Aff.* (September 17, 2012) at ¶ 4-5, RX 1095; see also *Woodruff Aff.* (November 2, 2012) at ¶ 9b-g, RX 1117-1120.

G. The City's Lease Negotiations with Auction Block

The Auction Block Co. started operating as a seafood auction and logistics company in the 1990s. While Icicle is a wholesale seafood distributor, Auction Block acts as a middle man between fishermen/wholesalers and customers such as restaurants and grocers. In early 2007, the City issued a Request for Proposal advertising for sealed proposals and statements of qualifications to lease several lots on the Spit, including three lots adjacent to the Fish Dock, one lot near the Fish Dock and Harbor entrance, and one lot near the Deep Water Dock. See City of Homer Request for Proposals ("City's RFP"), RX 91-227. The City's RFP included the City's standard Lease and Security Agreement, the City's Property Management Policy and

Procedures and an agreement that requires tenants who are processing fish to pay for the use of and connection to the City's Outfall Line (a line where the fish by-products are ground up and disposed of). See generally City's RFP, RX 91-227. The City's RFP expressly required that the lease of Lot 12C be for use related to the commercial fishing industry. *Id.* at RX 93.

Harbor Leasing responded to the City's RFP with a proposal to lease Lot 12C. See Harbor Leasing, LLC Proposal for Lot 12C, ("Harbor Leasing's Proposal"), RX 228-255. In Harbor Leasing's Proposal, it identified The Auction Block Co. as its "primary occupant" and use of the lot as a "primary and secondary seafood processing facility." *Id.* at RX 236. Harbor Leasing proposed a rental rate of "fair market rent" pursuant to the City Property Management Policy and Procedures Manual and stated that future rental rate adjustments would be governed by terms of the lease document negotiated with the City. *Id.* Harbor Leasing proposed the execution of the lease by April of 2007 and the initiation of "processing activities resulting in fish tax revenue sharing" by January 2008. *Id.* at RX 237.

At the time Harbor Leasing submitted its proposal, neither Harbor Leasing nor The Auction Block Co. had constructed a shoreside processing facility, nor had either entity ever operated a fish processing facility. See generally, Hogan Deposition at 44:20-24, RX 19. Further, the halibut market remained a fresh one and the City was unconvinced that given the existing fishery regulations, a shoreside processing facility newly constructed by an inexperienced processing company could succeed. See Wrede Aff. (January 2, 2013) at ¶ 34, RX 1236. Additionally, the construction plans proposed by Auction Block seemed ambitious and risky, making the City

Manager question Auction Block's reliability and stability. *Id.* at ¶ 35; see also Hogan Deposition, 61:7-12, RX 22.

Nonetheless, the City awarded the lease of Lot 12C to Harbor Leasing, LLC based upon its proposal and the entities began negotiating the terms of the lease at issue in this case. See Harbor Leasing Lease Negotiations Timeline ("Timeline") and Underlying Documents, RX 256-371³; see also City's Responses to Complainants' First Discovery Requests Dated September 13, 2012, Answer to Interrogatory No. 18 ("City's Discovery Responses"), RX 383-387.

Almost immediately after Harbor Leasing's Proposal was chosen, Auction Block began to demand substantial deviations from the terms in its proposal. See November 19, 2007 email between W. Wrede and K. Hogan, RX 332-333, undated K. Hogan letter to W. Wrede, RX 324-329; February 15, 2008 W. Wrede letter to K. Hogan, RX 343-344; W. Wrede February 15, 2008 Lease Negotiation Report, RX 340-342; and March 6, 2008 email between K. Hogan and W. Wrede, RX 350. The City Administration worked diligently with Kevin Hogan, the President of Harbor Leasing and owner of The Auction Block Co., to create a lease acceptable to both parties. *Id.* at RX 343-344. Between March 20, 2007 and March 26, 2008, which was the date the Harbor Leasing Lease was signed, the City participated in exhaustive negotiation efforts. The City administration and/or City attorney sent Harbor Leasing at least 25 emails and nine letters trying to finalize the terms of the

³ This collection is by no means exhaustive and is intended only as a sample of the intensive negotiations between the parties. It also does not include numerous lease drafts that were produced which include the parties' redline changes. See, *i.e.*, Harbor Leasing lease drafts and changes, RX 398-603.

Harbor Leasing Lease. See Timeline at RX 256-261. During these negotiations, Harbor Leasing continuously accused the City of delay despite the City's constant efforts to proceed with the negotiations. See May 30, 2007 letter from K. Hogan to W. Wrede, RX 290; June 18, 2007 letter from K. Hogan to W. Wrede, RX 300-301; June 29, 2007 letter from K. Hogan to W. Wrede, RX 304; July 19, 2007 letter from K. Hogan to W. Wrede, RX 305-307. Harbor Leasing even threatened to demand more concessions the longer the City delayed in accepting the terms proposed by Auction Block. November 19, 2007 email from K. Hogan to W. Wrede at RX 332-333. These complaints were unfounded. Not only did the City negotiate with Auction Block, it actually agreed to numerous concessions during such negotiations, including, but not limited to:

- permitting Mr. Hogan to drill, install and operate a saltwater well;
- granting Mr. Hogan retention of ownership of buildings and improvements on the property subject to certain conditions; and
- extending the time period (from 18 months to 24 months) for Mr. Hogan to restore any damaged buildings.

See Harbor Leasing Drafts and Changes, ¶¶ 1.04, 2.03 and 5.03, CX 0225, RX 441-522.

Although the City had given Mr. Hogan permission to store equipment on Lot 12C, in June 2007, before the parties had entered into a long-term lease, Auction Block had equipment scattered across Lot 12C, Lot 9, and a City right of way and was not paying any rent to the City for the use of the City's property. See Timeline, June 13, 2007 Letter from Walt Wrede to Kevin Hogan, RX 298-299; see *also* June 6,

2007 Letter from Gordon Tans, City Attorney, to Steven Shamburek, Counsel for Harbor Leasing, RX 292-293; May 23, 2007 letter from W. Wrede to K. Hogan, RX 282-283; and May 12, 2007 letter from W. Wrede to K. Hogan, RX 273-274. The City's warnings that Auction Block needed to at least consolidate all of its equipment on Lot 12C were met with accusations by Mr. Hogan and his attorney that the City was unfairly trying to "evict" Auction Block from the lot. See Wrede Aff. (January 2, 2013) at ¶ 42, RX 1238. After repeated warnings by the City administration, Auction Block continued to refuse to move that equipment and it became clear that a long-term lease for Lot 12C would not be negotiated in the immediate future. Additionally, Auction Block complained that the lengthy negotiations surrounding its lease for Lot 12C were having a detrimental effect on Auction Block's business operations. See Timeline, May 30, 2007 letter from Hogan to Wrede, RX 290; June 29, 2007 letter from Hogan to Wrede, RX 304. Consequently, the City presented a short-term lease to Harbor Leasing for Lot 12C that would ensure the City was receiving payment for the use of City property, insurance provisions were in place for the use of that property, and Auction Block could conduct its business on Lot 12C while negotiations continued between the parties on the long-term lease. See Timeline, June 6, 2007 letter from G. Tans to S. Shamburek, RX 292-293; June 13, 2007 letter from W. Wrede to K. Hogan, RX 298-299; September 17, 2012 Affidavit of Walt Wrede at ¶ 4, RX 1080.

Throughout negotiations with Auction Block for both a short- and long-term lease, Mr. Hogan made it clear that he had reviewed the Icicle Lease and was considering its terms while negotiating Auction Block's lease with the City. See

discussion and record citations below. In a 2007 letter, Mr. Hogan requested that the lease include terms identical to the Fish Dock Crane provision in the Icicle Lease. See Timeline, K. Hogan's new proposal to the City, RX 326.

The City Administration and City attorney repeatedly reminded Harbor Leasing that the City Manager could not simply unilaterally agree to substantial revisions to the standard lease terms when such revisions were not included in Harbor Leasing's Proposal. See Timeline, May 12, 2007 letter to K. Hogan from W. Wrede, RX 273-274; May 15, 2007 letter to K. Hogan from W. Wrede, RX 277; June 6, 2007 letter to S. Shamburek from City attorney G. Tans, RX 292-293; and June 13, 2007 letter to K. Hogan from W. Wrede, RX 298-299. While the City Manager expressed his refusal to support the more substantial of the revisions sought by Harbor Leasing, he did present these revisions, including a discounted rate for crane use, to the City Council for its consideration. Ultimately, the City Council chose not to consider Auction Block's proposed crane usage rate discount and instead approved the Harbor Leasing Lease as presented to the City Council on March 10, 2008. See Timeline at RX 364, March 11, 2008 email from W. Wrede to K. Hogan; *see also* Wrede Aff. (January 2, 2013) at ¶ 40, RX 1237.

City Manager Wrede noted before the City Council, and to Mr. Hogan directly, that while he did not support providing incentives or discounts to Harbor Leasing at this time, he did encourage Harbor Leasing to request an amendment to the Lease once Auction Block completed construction of its warehouse/processing plant and could demonstrate that Auction Block was processing fish and justify the requested

incentives. See Timeline, November 5, 2007 email to K. Hogan from W. Wrede, RX 331 and March 10, 2008 memo from W. Wrede to Council, RX 361-362.

Harbor Leasing and the City entered into a long-term lease of Lot 12C on March 26, 2008 (hereafter referred to as the “Harbor Leasing Lease”).⁴ See Harbor Leasing Lease, CX 0217-266. Harbor Leasing agreed to “pay for wharfage, crane use, ice, and other Port and Harbor services at the rates published in the Port and Harbor Tariff.” *Id.* at CX 0223. Harbor Leasing also agreed to construct a “fish buying facility and associated office, warehouse, cold storage, staging, and operational and logistical support for dock operations.” See Harbor Leasing Lease, CX 0225.

H. The City’s Current Relationship with Auction Block⁵

The City has had an increasingly difficult relationship with Auction Block throughout its tenancy. Auction Block has repeatedly failed to comply with the terms of the Harbor Leasing Lease. Auction Block continues to trespass on City property by randomly storing its equipment on various lots on the Spit. See Wrede Aff. (January 2, 2013) at ¶ 42, RX 1238. Auction Block also refuses to comply with the terms of the Harbor Leasing Lease itself. Currently, Harbor Leasing owes the City more than \$15,000 as of September 2012, due to Auction Block’s refusal to comply with an Outfall Line Agreement required under the terms of the Harbor Leasing

⁴ The Harbor Leasing Lease was amended on February 18, 2009, to clarify the application of the liens and encumbrances provisions in the lease. See First Amendment to Ground Lease and Security Agreement, CX 0265-266.

⁵ See *infra* Section V(F) for further discussion regarding negotiations between Auction Block and the City.

Lease.⁶ See Section 5.11 of the Harbor Leasing Lease, CX 0226; see also Wrede Aff. (January 2, 2013) at ¶ 43, RX 1238.

IV. STANDARD OF REVIEW

A complainant alleging that a respondent has violated the Act bears the burden of showing that relief is warranted. 46 C.F.R. § 502.155. The Complainant must prove entitlement to relief by a preponderance of the evidence or, stated another way, “that the existence of a fact is more probable than not.” *R.O. White & Co., et al. v. Port of Miami Terminal Operating Co., et al.*, F.M.C. No. 06-11 (July 28, 2009). The complainant’s burden of proof is also a “burden of persuasion.” See *Bimsha International v. Chief Cargo Services, Inc. and Kaiser Apparel, Inc.*, F.M.C. No. 10-08, 2011 WL 7144011, at 6 (F.M.C. September 14, 2011). “When the evidence is evenly balanced, the party with the burden of persuasion must lose.” *Id.* at 7.

V. ARGUMENT

Auction Block’s Complaint is riddled with misrepresentations and false allegations. In reality, the City is a conscientious local government that has insisted upon uniform application of its Tariff rates since its adoption. While the City does not foreclose its ability to negotiate different rates when warranted, the City rarely deviates from its tariff and never permits exclusive agreements for use of its facilities.

A. The FMC Does Not Have Jurisdiction Over Auction Block’s Claims

Auction Block’s complaint cannot survive as the FMC does not have jurisdiction in this matter. The lease of City property for use by fish

⁶ The outfall line is a disposal system for fish waste.

processors/buyers and seafood retail shops falls outside the general scope of the Act as well as the FMC's jurisdiction.

1. The City's Fish Dock Operations Fall Outside the FMC's Jurisdiction

In its Complaint, Auction Block asks the FMC to assert an unprecedented expansion of the scope of its authority to encompass activities and agreements in the localized commercial fishing industry. While the FMC has of course applied the Act to common carriers who have contracted with fisheries for the shipment of fish, it has never, as far as the City can find, attempted to govern agreements between fisheries and the local government. The decision to expand the FMC's authority beyond the international shipping arena and into the heavily regulated and localized fishing industry would be devastating to communities across the country and would be in direct contradiction with the stated purpose of the Act.

The express purpose of the Act is to:

- (1) establish a nondiscriminatory regulatory process for the common carriage of goods by water in the foreign commerce of the United States with a minimum of government intervention and regulatory costs;
- (2) provide an efficient and economic transportation system in the ocean commerce of the United States that is, insofar as possible, in harmony with, and responsive to, international shipping practices;
- (3) encourage the development of economically sound and efficient liner fleet of vessels of the United States capable of meeting national security needs; and
- (4) promote the growth and development of United States exports through competitive and efficient ocean transportation and by placing a greater reliance on the marketplace.

46 U.S.C. § 40101.

Despite Auction Block's attempt to distort its own activities and those of Icicle to fit within the FMC's purview under the Act, the local side of the fishing industry in no way involves international shipping or the carriage of goods. Instead, the front end of the fishing industry involves the extraction of a natural resource (fish) from the waters surrounding Alaska and the delivery of that natural resource to buyers along the Alaska coast. The terminal services provided by the City on the Fish Dock are designed to assist commercial fishermen in delivering fish directly to the buyer. The cranes fixed to the Fish Dock are large enough to lift the nets of fish coming into port but not capable of lifting the connex containers generally used for cargo shipment. See Hawkins Aff. (November 5, 2012) at ¶¶ 13, 16, RX 1102.

The expansion of the Act to govern local fishing endeavors in the City directly conflicts with the purpose of the Act. The Shipping Acts were drafted to revitalize the United States shipping industry. According to the United States Court of Appeals:

At the outset of World War I, the shipping industry in the United States was lagging far behind its international competitors. In the years immediately preceding the war about ninety percent of all United States' water-carried exports were shipped in foreign vessels. Congress recognized that in order for the United States shipping industry to survive and prosper in an international climate dominated by shipping cartels ("conferences"), it must grant antitrust immunity to the shipping cartels. To ensure that shipping monopolies did not result, however, Congress implemented a scheme of regulation which, among other things, provided for disclosure of all conference agreements, established the United States Shipping Board (predecessor of the Federal Maritime Commission), and prohibited discrimination in shipping. Congress realized that in order to regulate effectively the practices of water carriers, the Shipping Board also must "have supervision of all those incidental facilities connected with the main [water] carriers".

Puerto Rico Ports Authority v. Federal Maritime Commission, 919 F.2d 799, 806-807 (C.A. 1st 1990) (citations omitted).

Accordingly, the Act aims to “place a greater reliance on the marketplace” and minimize “government intervention and regulatory costs.” See 46 U.S.C. § 40101. The City has boldly chosen to operate its Fish Dock as a public dock. See *supra*, Section III(C). Unlike the docks in other Alaska communities, it does not permit any single fish processor to lease or own the dock, ensuring open access to all competitors in the fishing industry. *Id.* That said, the City’s decision to foster competition and maintain an open port makes it difficult to compete with nearby ports, all of which provide major fish buying and processing companies with exclusive access to dock space. See *Wrede Aff.* (November 5, 2012) at ¶ 15, RX 1088.

Auction Block seems to suggest that the line of tug boat cases extending the FMC’s jurisdiction to agreements for exclusive tug services somehow justifies extending the FMC’s jurisdiction to the case at hand. See Complainants’ Brief, 78-79. Complainants fundamentally misinterpret the line of tug boat cases. First and foremost, these cases all involve the award to a single company of exclusive rights to provide tug services at a terminal facility. See *Exclusive Tug Arrangements in Port Canaveral, Florida*, F.M.C. No. 02-03 (May 4, 2003); *Petchem, Inc. v. Canaveral Port Authority*, 23 S.R.R. 974, 987 (1986), *aff’d sub nom., Petchem, Inc. v. FMC et al.*, 853 F.2d 958 (1988) (and other related tug franchise cases). Second, jurisdiction in such cases only exists where an MTO has entered into an *exclusive* arrangement with a tug operations company. See *Exclusive Tug Arrangements* (ALJ recognizes that MTO is “correct in arguing that if the agreement between [the port] and [the tug operator] were non-exclusive, and therefore, tug services were not controlled by [the port] as a condition to docking and undocking at it [sic] terminal facilities, the

Commission would lack jurisdiction” under case precedent but ultimately determined that the arrangement was exclusive and thus fell within FMC’s jurisdiction).

Additionally, the tug boat cases only fall within the jurisdiction of the FMC because creating a monopoly for such operations “ha[s] a discernible effect on the commercial relationship between shippers and carriers involved in that link in transportation.” *Exclusive Tug Arrangements*, F.M.C. No. 02-03 quoting from *Louis Dreyfus Corp. v. Plaquemines Port, Harbor and Terminal District*, 25 F.M.C. 59 (1982).

Unlike the tug cases, the City does not and never has attempted to enter into or award an exclusive lease to any entity. Ironically, the Icicle Lease actually derived from the City’s refusal to grant Icicle exclusive dock space and its goals of operating a public port with open competition. See Notes from April 28, 2004 hearing, RX 83; Wrede Aff. (November 5, 2012) at ¶ 22, RX 1089; see also *supra*, Section III(F). Further, Harbor Leasing actually has a lease with the City and currently provides services in the City.

Also in contrast to the tug cases, fish buyers and processors are not involved in the relevant “link in transportation” governed by the Act. While Auction Block transports fish, such transportation is exclusively undertaken by truck, according to the bills of lading recently produced by Auction Block. See January 3, 2013 Affidavit of Holly C. Wells Regarding Respondents’ Brief, ¶ 6, RX 1311. While being a customer of a common carrier may provide a person certain protection under the Act, Auction Block is no more a common carrier than an individual using a common carrier to ship its household items to a new home.

2. The City of Homer is Not a Terminal Operator for Activity on the Fish Dock

The City is registered as an MTO for purposes of activities on its Deep Water Dock and its Pioneer Dock but not for activities and services on the Fish Dock.

Pursuant to 46 U.S.C. § 40102(14), an MTO for purposes of the Act is a:

person engaged in the United States in the business of providing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier, or in connection with a common carrier and a water carrier subject to subchapter II of chapter 135 of title 49.

In analyzing whether an entity is an MTO under the Act, the United States District Court focuses on the activities of the entity at issue at a given terminal facility and not on a global front. *See Bridgeport and Port Jefferson Steamboat Co., et al. v. Bridgeport Port Authority*, 335 F.Supp.2d 275, 281-282 (D.Conn. 2004) (court finds that FMC lacks jurisdiction over the “Water Street facility,” which exclusively services a non-common carrier).⁷

As discussed in Section III(B), the City provides services to occasional common carriers and cruise ships on its Deep Water Dock and Pioneer Dock but not at the Fish Dock. *See Wrede Aff.* (November 5, 2012) at ¶ 7, RX 1087. However, the City never anticipated that its activities regarding the Fish Dock could fall within the scope of the Act.

⁷ In previous cases, the FMC has held that it does not regulate everything that an MTO does and that such an operator may under some circumstances separate its regulated from its unregulated activities. *Marine Surveyors Guild, Inc. et al. v. Cooper/T. Smith Corp.*, 24 S.R.R. 628, 630 (A.L.J. November 5, 1987); *see also Bethlehem Steel Corp. v. Indiana Port Commission*, 18 S.R.R. 1485, 1490 (F.M.C. January 8, 1979). Further, where the subject matter of the case is novel, extra caution in evaluating jurisdiction over the port is called for. *Marine Surveyors Guild*, 24 S.R.R. at 630.

No common carriers are permitted or able to use the Fish Dock. *Id.* at ¶ 9. The City has adopted policies specifying that the primary purpose of the Fish Dock is for the use of commercial fishing operations. *Id.* The cranes provided for use on the Fish Dock are not large enough to accommodate containers. See *Wrede Aff.* (November 5, 2012) at ¶ 10, RX 1087; see also *Hawkins Aff.* (November 5, 2012) at ¶ 16, RX 1102. Notably, Icicle's salmon floating processor is too large to dock at the City's Fish Dock and thus uses the Deep Water Dock. See *Wrede Aff.* (November 5, 2012) at ¶ 11, RX 1087. Accordingly, Icicle receives no discounts on City rates for services provided to its floating processor. *Id.* at ¶ 12. While the City chooses to apply the tariff to the Fish Dock, it does so to ensure transparent and uniform governance of all City facilities and never intended to subject itself to the Act for conduct on that dock. *Wrede Aff.* (January 2, 2013) ¶ 69, RX 1243. Indeed, the City's tariff even makes a somewhat convoluted attempt to distinguish between the Deep Water Dock/Pioneer Dock and the other facilities, including the Fish Dock, governed by the tariff. See *Complainants' Brief*, 71. The tariff states:

terminal facilities include *the two (2) city docks which are the Deep Water dock and the Pioneer (Ferry) Dock*[,] the fish dock within the small boat harbor and associated equipment, offices, warehouses.[sic] Storage space, roads, paved areas, water banks, beaches and shoreline under the management and control of the City of Homer.

See CX 0070 (emphasis added). Surely Auction Block would not argue that the City is an MTO as to the roads, warehouses, beaches, and water banks on the Spit simply because the City listed all Spit infrastructures in its tariff. The City is simply not acting as an MTO on the Fish Dock since no common carriers receive services at that dock.

3. Auction Block is Not a Common Carrier⁸

Similarly, Auction Block is not a common carrier as that term is defined in the Act. Auction Block, apparently aware of its lack of common carrier status prior to bringing this suit against the City, has never registered as a common carrier with the FMC or in any way conducted itself as a common carrier. See Hogan Deposition at 183:2-10, RX 40 (Hogan admits Auction Block is not a registered common carrier).

46 U.S.C. § 40102(6) defines a “common carrier” for purposes of the Act as a person that:

- (i) holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation;
- (ii) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and
- (iii) uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country

Auction Block has failed to show that (1) it holds itself out to the general public to provide transportation by water, (2) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination, or (3) uses a vessel operating on the high seas.

Courts and the FMC have continuously held that to qualify as a common carrier under the Act, the carrier must transport cargo or people *by water to a port*. Cruise lines are an example of common carriers subject to the Act. The U.S. Court of

⁸ While the City has focused its reply on the common carrier status of Auction Block, it is worth noting that the actual lessee, Harbor Leasing, LLC, is a leasing company and thus definitely not a common carrier. Personal jurisdiction regarding the Harbor Leasing Lease is defeated on that point alone.

Appeals for the District of Columbia Circuit, in *American Association of Cruise Passengers, Inc. v. Carnival Cruise Lines, Inc.*, affirmed that “except to the extent that a cruise calls only at foreign ports, a cruise line is a common carrier under the Shipping Act.” 911 F.2d 786, 788 (D.C. Cir. 1990). Supporting its conclusion, the court noted that “[a] cruise line clearly ‘hold[s] itself out to the general public to provide transportation by water.’ ” *Id.* (Emphasis added).

In *Transpacific Westbound Rate Agreement v. Federal Maritime Commission*, the United States Court of Appeals for the Ninth Circuit cited to legislative history to support its conclusion that the Act “applies *only to the extent* the passengers or cargo transported are loaded or discharged at a U.S. port.” See 951 F.2d 950, 953 (9th Cir. 1991) (emphasis in original).

Non-vessel-operating common carriers (“NVOCC”) are also subject to the Act. See 46 U.S.C. § 40102 (defining NVOCC). Federal statute (46 U.S.C. § 40102(16)) defines a NVOCC as “a common carrier that—(A) does not operate the vessels by which the ocean transportation is provided; and (B) is a shipper in its relationship with an ocean common carrier.” As the statute implies, an entity must qualify under 46 U.S.C. § 40102(6) as a common carrier before it can be considered an NVOCC. See *Landstar Exp. Am., Inc. v. Fed. Mar. Comm’n*, 569 F.3d 493, 497 (D.C. Cir. 2009).

The evidence clearly demonstrates that Auction Block is neither a vessel-operating nor non-vessel-operating common carrier as it does not transport anyone or anything anywhere. Auction Block actually admits that it, “does not advertise the transportation of either cargo or passengers by water” See Complainants’

Brief, 42. Further, Auction Block does not assume responsibility for the transportation from one point of destination to another as required under the Act.

Auction Block manager Jessica Yeoman testified:

Q. And do you ship – or does the company ship some of the product internationally?

A. We hire – usually we'll – yes we do. We ship internationally. I use, you know, I will sell the fish to a buyer, who then – you know, I know that we're packing for international. We have different labels.

See Deposition of Jessica Yeoman, at 51:22 – 52:1, RX 611-612. Marking a package “international” and then giving it to a shipper is not providing transportation or taking “responsibility for the transportation from the port or point of receipt to the port or point of destination.” If such were the case, simply giving a box to Federal Express would make a person a “common carrier.”⁹

Auction Block also failed to submit any credible evidence that it actually operates a vessel or that its goods are even shipped via vessel. Instead, Auction Block disclosed that the *owners* of Auction Block owned a vessel. See Auction Block's Responses to the City of Homer's Amended First Discovery Requests to Complainants, Response to Request for Admission No. 1, CX 0026. Although Auction Block asserts that its USDOT Number demonstrates it is a common carrier

⁹ Arranging shipping in connection with fulfilling a customer's order for fish that Auction Block purchased makes Auction Block a shipper, not a common carrier. See *New Orleans Steamship Assoc. v. Bunge Corp. and Southern Stevedoring Company, Inc.*, S.R.R. 336, 346 (F.M.C. 1965) (“All of Bunge's shipments are in fulfillment of contracts for the sale of grain. Bunge does not undertake to carry for anyone; it does not sell ocean transportation; it merely delivers grain in chartered vessels to its customers.”)

under the Act, its USDOT number simply reaffirms Auction Block's use of truck rather than vessel transportation to send product to its buyers.

B. Allegations of Procedural Defect Are Unfounded

Having failed to meet its burden to establish the FMC's jurisdiction, Auction Block attempts to remedy this deficiency by relying on procedural gimmickry. This consists of allegations that 1) the City admitted all allegations in Auction Block's Fourth Amended Complaint, including those purporting to establish the FMC's jurisdiction, because the City's paragraph-by-paragraph denials in its Answer were not "specific" enough under FMC rules; (2) City Manager Walt Wrede admitted the City violated the Act; and (3) Auction Block relied upon these "admissions" in failing to conduct any depositions, disclose or retain expert witnesses or otherwise present its case in chief. See Complainants' Brief, 2-13. These arguments lack merit to the point of being frivolous.

1. The City's Answer to Complainants' Fourth Amended Complaint Properly Denies Auction Block's Allegations

Contrary to Auction Block's arguments, the City has denied the allegations in Auction Block's Fourth Amended Complaint with sufficient specificity. The City denied separately and specifically each paragraph in which Auction Block asserted any claims. See *generally* City's Answer to Fourth Amended Complaint, CX 0272-280.

There is nothing in either the rules of the FMC or the Federal Rules of Civil Procedure requiring that the City pick apart each sentence of Auction Block's Complaint. Despite Auction Block's attempt to impose a heightened pleading standard in FMC proceedings, the only FMC rule regarding the content of an answer

requires simply that the facts in a complaint be “specifically denied.” See 46 C.F.R. § 502.64(a). The FMC does, however, state in an answer template provided to the public on the FMC website that an answer before the FMC should contain:

...subsequent paragraphs to be numbered II, III, etc., appropriate and responsive admissions, denials, and averments, specifically answering the complaint, *paragraph by paragraph*.

See http://www.fmc.gov/assets/1/Answer_to_Complaint_Format.pdf, RX 613 (emphasis added). At the time the City filed its Answer to the Fourth Amended Complaint, the FMC rules actually included the Answer template. See Exhibit 2 to Subpart E of former 46 C.F.R. § 502.64. The City followed this instruction when preparing its Answer. Accordingly, each numbered paragraph in Auction Block’s complaint is specifically answered by the City. See City’s Answer to Fourth Amended Complaint, CX 0281-285. Auction Block cites no authority that would support declaring insufficient the City’s paragraph by paragraph denial of its allegations.¹⁰

The City not only specifically denied Auction Block’s allegations, it repeatedly and consistently made its denials known throughout discovery and in motion practice. See, e.g., City’s Discovery Responses, RX 372-398; City’s Motion for Partial Summary Judgment dated September 17, 2012.

¹⁰ Auction Block’s reliance on *Capital Transportation, Inc. v. Federal Maritime Commission*, 612 F.2d 1312, 1318 (1st Cir. 1979) is misplaced. In that case Capital Transportation, Inc. never denied or challenged its status as an NVO common carrier until after the FMC had issued its decision and had, instead, tacitly conceded such status throughout the FMC proceedings. *Id.* at 1312. Unlike the defendant in *Capital Transportation, Inc.*, the City expressly and specifically denied Auction Block’s allegations at all stages of this proceeding.

2. Homer's City Manager Never Admitted a Violation of the Act

Auction Block's assertion that City Manager Wrede admitted its allegations in an interview with KBBI News about one week after the City was served with Auction Block's Complaint is a transparent fabrication. Auction Block misrepresents the format of this "interview" as a verbatim report of an exchange between the KBBI reporter and Mr. Wrede. See Transcription of KBBI Radio Interview of Walt Wrede, CX 0129-137. In fact, the KBBI story consists of statements by the reporter alternating with excerpts inserted by the reporter from statements made by Mr. Wrede in an earlier interview. There is no independent foundation for determining whether Mr. Wrede intended that his inserted remarks actually were his responses to the reporter's questions. Thus, when Mr. Wrede says that "those facts are basically true," we have no idea what the "facts" are to which Mr. Wrede is responding. A copy of the audio interview is attached for the ALJ's examination. See CD Recording of April 26, 2012 KBBI Interview, RX 131.

On the contrary, Mr. Wrede recalls that his quoted statement actually responded to the reporter's asking whether Auction Block filed a complaint against the City -- his response merely confirmed the "fact" of the filing of that complaint. See Wrede Aff. (November 5, 2012) at ¶¶ 42-43, RX 1091. He did *not* concede that the allegations themselves were true. *Id.* at ¶ 43. Similarly, the remainder of Mr. Wrede's statements in the interview also lack foundation as expressions of Mr. Wrede's actual views on the matters discussed by the reporter. Without that foundation -- the actual context in which the answers were given or the questions posed -- the interview is wholly unreliable and inadmissible.

Even if, however, the news story is considered admissible evidence, Mr. Wrede does not admit that the Icicle Plant was the sole reason for the incentives given to Icicle. Instead, he states that:

The bottom line is the Council wanted to provide incentives for—for Icicle to come and build and operate the plant because of the jobs and revenue. That's a typical thing. I mean, even today you hear talk about providing incentives for business to come here. So the Council did that.

See Transcription of KBBI Radio Interview of Walt Wrede, p. 2, CX 0131. Mr. Wrede is merely asserting that the Council wanted Icicle, which was one of the largest and most reputable commercial fish buyers and processors in Alaska, to expand its operations in the City and commit to a long-term presence in the City and thus the City Council gave Icicle incentives to do so. See *Wrede Aff.* (November 5, 2012) at ¶ 45, RX 1091. This is not contested information, nor does it constitute an admission.

3. Alleged Procedural Defects Do Not Excuse Auction Block's Failure to Present its Case

Auction Block's argument that it failed to participate in discovery because it believed the City admitted liability ignores the City's clear denials in its Answer and throughout discovery, the parties' motion practice, and even Auction Block's own early participation in discovery. Not deposing anyone was Auction Block's tactical choice. Auction Block, at least initially, participated in discovery. It served the City with its signed Initial Disclosures on June 6, 2012 (although it did not produce any documents at that time), issued discovery requests on or about August 29, 2012, and even notified the City that it would be taking the deposition of City Manager Wrede. In response to Auction Block's request to depose Mr. Wrede, Mr. Wrede prepared to be present in Anchorage, Alaska on the date verbally requested by

Auction Block's counsel. See Wrede Aff. (January 2, 2013) at ¶ 44, RX 1238. A few days before the scheduled deposition, and without explanation, Auction Block's counsel notified the City that it did not intend to depose Mr. Wrede. See September 24, 2012 email correspondence between S. Shamburek and H. Wells, RX 615.

Auction Block chose not to depose any City employees or officers or disclose/retain an expert during discovery. As both a matter of law and equity, Auction Block cannot choose to limit its participation in discovery and then somehow claim that this limited participation provides support for a finding against the City on the merits.

C. The City's Conduct in No Way Restrains Competition in the Southcentral Alaska Market

In order for Auction Block to succeed on any of its claims against the City, it must prove by a preponderance of the evidence that the City's conduct unreasonably restricted competition. See *All Marine*, 27 S.R.R. 539 (F.M.C. 1996); *River Perishes Co.*, 28 S.R.R. 751 (1999); *R.O. White & Co.*, F.M.C. No. 06-11. It is well established under FMC precedent that a complainant must meet its burden to prove the impact on competition in the relevant market area before the FMC will even consider the alleged violations. If the complainant cannot meet this burden and the conduct does not have a significant impact on competition, a respondent is not required to justify its conduct. *Id.*

Auction Block has fundamentally failed to present a *prima facie* case of a lack of sufficient competition among lessees in the Southcentral Alaska market. Auction Block has presented no evidence, disputed or otherwise, that suggests the discounted lease terms provided to Icicle negatively impacted competition. Instead,

Auction Block's own record suggests just the opposite. Auction Block relies upon a news article in which Mr. Hogan is credited with being "the one who finally capitalized on the city's existing infrastructure" by taking advantage of the City's open access to its port. A source in the article "expects Homer to see increasing competition this year, in part because of the increasing demand for halibut." See Gay, *supra*, at 65, CX 0167. Competition in Homer has *flourished* since Icicle received the lease terms now in dispute.

The City has taken great strides to foster competition at its port rather than hinder it. In fact, this case stems from the City's decision to award Icicle incentives rather than provide it ownership or exclusive use of City facilities. As repeatedly discussed throughout this brief, the City's ability to negotiate preferential lease terms with large fish processors/buyers is the only way the City remains competitive with neighboring ports offering exclusive leases or outright dock ownership. Consequently, Auction Block's challenge actually seeks to restrain competition and penalize the City for adopting an open market approach. If Auction Block succeeds, the fundamental tenets of the Act will be undermined.

D. **The City Did Not Fail to Establish and Enforce Just and Reasonable Regulations and Practices Relating to or Connected with Receiving, Handling, Storing or Delivering Property in Violation of 46 U.S.C. § 41102(c)**

Despite Auction Block's claims to the contrary, the City has consistently established and enforced just regulations. True to its culture of open competition, the City has remained transparent regarding its open market approach. Indeed, it has even adopted a tariff provision expressly reserving the right to enter into agreements

with entities for rates and services. See Homer Tariff Rule 34.4(d); HCC 10.04.055(b), RX 616-618. Further, HCC 10.04.055(b) provides that:

[t]he harbormaster may negotiate special fees and charges with a vessel owner or operator where the owner or operator requires an exceptional volume of, or unique or unusual services or facilities, and it is in the best interest of the City to enter into special arrangements. In such event, the harbormaster shall inform the City Manager of such special, negotiated arrangements.¹¹

Icicle is a vessel owner and operator. See Woodruff Aff. (November 2, 2012) at ¶ 9d, RX 1118. Auction Block, on the other hand, does not claim to own any vessels. See Complainants' Responses to Respondents' Amended First Discovery Requests, CX 0026-28. The City has not deviated from its Tariff rates in its dealings with Auction Block and, for all of the reasons stated in this brief and throughout discovery, the discounted rates afforded Icicle are reasonable. Consequently, the City has not failed to enforce reasonable regulations.

Auction Block does not appear to be expressly arguing that the Tariff rates themselves are unreasonable on their own. If, however, Auction Block is contending that those rates are unreasonable, its own subjective opinions are insufficient to

¹¹ While Auction Block has made much of the fact that the Tariff only expressly recognizes the City's ability to enter into agreements with certain identified persons such as shippers, carriers, and their agents, Auction Block fails to acknowledge the Tariff's integration of Homer City Code provisions, which state:

In addition to the Port and Harbor Tariff, the public, shippers, consignees and carriers using City of Homer facilities should consult and be aware that the City of Homer Code of Ordinances, including but not limited to Chapter 5 (Fire Prevention), Chapter 5.14 and 21 (Utilities including Garbage, Refuse, Water and Sewage) and *Chapter 10* (Ports and Harbors), all as amended, *apply and govern where not specifically provided otherwise in this Tariff.*

Section 1 of Tariff Rule 34.2, CX 0101 (emphasis added).

prove a violation of the Act. See *Western Holding Group, Inc. v. The Mayaguez Port Commission*, 611 F.Supp.2d 149, 189 (D.P.R. 2009) (tariff rates that appeared “extortionate” to carrier were not *a fortiori* unreasonable under the Act, particularly in the absence of evidence from carrier that other MTOs set tariff rates differently). Auction Block has not produced expert testimony, or any other evidence, to demonstrate that the City’s tariff rates are unreasonable under the Act.

The language of the Tariff does demonstrate, however, the unnatural efforts that must be made to apply the Tariff to a lessee of City property for purposes that fall outside the shipping industry. A tug boat company, for example, could easily be seen as a “consignee” or “agent” of a carrier as could other entities that have been subject to the Act because of their connection to carrier activities. A fish processor/fish buying company or even a commercial fishing vessel, however, utilizes the docks because the resource they are extracting lives in the sea, the commodity requires a vessel to access it, and vessels are used to deliver the fish to land. This extraction/harvesting process has absolutely no connection with shipping until after the product has been extracted, offloaded, and processed.

E. **The City Did Not Give any Unreasonable Preference or Advantage or Impose any Undue or Unreasonable Prejudice or Disadvantage in Violation of 46 U.S.C. § 41106(2)**

Auction Block also categorically fails to meet its burden to prove that the City gives Icicle undue or unreasonable advantages over Auction Block. The evidence clearly establishes (1) that Icicle and Auction Block are neither in competition nor similarly situated; (2) the sound business judgment exercised by the City in awarding and continuing to honor Icicle’s lease terms; and (3) the terms of the Icicle Lease with the City are in no way the proximate cause of any of Auction Block’s alleged injuries.

In order to prove a violation of 46 U.S.C. § 41106(2), Auction Block must demonstrate that:

- (1) two parties are similarly situated or in a competitive relationship;
- (2) the parties were accorded different treatment; (3) the unequal treatment is not justified by the differences in transportation factors; and
- (4) the resulting prejudice or disadvantage is the proximate cause of injury.

Ceres Marine Terminals, Inc. v. Maryland Port Admin., 27 S.R.R. 1251, 1270-1271 (F.M.C. 1997). The complainant bears the burden of proving that it was treated differently than a competitor and that this treatment injured the complainant. The respondent must show that the difference in treatment, if any, was based upon "legitimate transportation factors." *Id.*¹²

1. Auction Block and Icicle Neither Compete Nor are Similarly Situated with One Another

Auction Block has failed to present evidence proving that Icicle and Auction Block are similarly situated or in competition with one another. Instead, the facts demonstrate that Icicle and Auction Block are not similarly situated and that Auction Block derives a substantial portion of its income directly from Icicle.

The lease that is the subject of Auction Block's Complaint is between the City and Harbor Leasing, LLC. Harbor Leasing, LLC is merely a property management company, which received consent from the City to sublease the property to The Auction Block Co. At the time the lease was negotiated, Harbor Leasing, LLC was a

¹² This standard emphasizes the FMC's lack of jurisdiction in this case as the leases at issue involve pure commercial businesses without a "transportation" component as that term is intended to be used under the Act. All the FMC cases we reviewed involved leases between common carriers, MTOs, or "persons" with, at the very least, incidental impacts upon the shipping industry such as tug boat franchises. Here, neither company provides services to common carriers in any way.

newly formed company, which had never leased City property or any property to the City's knowledge. See *Wrede Aff.* (January 2, 2013) at ¶ 36, RX 1236. Harbor Leasing, LLC's only similarity with Icicle was its lease of a parcel of City property and the requirement that the property be used for commercial fishing activities.

Auction Block suggests that in *Ceres Marine Terminals, Inc.*, the FMC outright rejected the need for parties to be "similarly situated" or in competition with one another. This presumption misinterprets *Ceres Marine Terminals, Inc.* In *Ceres Marine Terminals, Inc.*, the FMC simply recognized the ability for two users of a service, in that case an MTO and a stevedore, to be similarly situated when their use of the service at issue was the same. See generally *Ceres Marine Terminals, Inc.* The FMC even validated earlier FMC rulings recognizing that the way in which a service is used or funded can impact whether the parties are similarly situated under the Act. *Id.* In one such case, the FMC found that a stevedore and an ocean carrier may not be similarly situated because the principals of the stevedore, which were carriers, paid for the extra benefits received. *Id.* at 1272. In another, the FMC acknowledged that "similarly situated" for purposes of service contracts under Section 8(c) of the 1984 Act was a shipper "willing and able to meet the terms of a specific contract." *Id.* at n.47, 1271.

Auction Block's operations and its resulting use of the crane differs drastically from that of Icicle. See *supra*, Section III(E). Auction Block is, in essence, in the business of operating the crane. It is a key component of Auction Block's offloading services. See generally *Hogan Deposition*, 34-39, RX 1213-1219. Icicle's crane use, on the other hand, is incidental to its operations. *Id.* Auction Block actually provides

crane services directly to *Icicle*, work that constitutes at least 20% of Auction Block's offloading business and emphasizes the lack of competition between the two entities. See Brinster Deposition, at 52:3-8, RX 682; see *generally* Hogan Deposition, 34-39, RX 1213-1219.

Auction Block and *Icicle* also absorb the fees for crane use very differently. *Icicle* operates the City cranes as a means of lifting fish from the vessels and placing them on the dock. It does not use the cranes as a profit center or part of its business. See Woodruff Aff. (November 2, 2012) at ¶ 11, RX 1122. Auction Block, on the other hand, has repeatedly recognized that it operates the crane as a profit center for its business. See Hogan Deposition at 167:1-15, RX 39. Auction Block currently charges over three times what it pays in crane fees and operator costs to those for which it operates the cranes.¹³ Auction Block has unequivocally admitted that if it received *Icicle's* crane rates, it would in turn increase its brokerage of crane services to increase its profits. See Hogan Deposition at 167:1-15, RX 39.

Additionally, Auction Block may actually receive the benefit of *Icicle's* lease rates directly since *Icicle* pays for its crane usage even when Auction Block is

¹³ According to Heather Brinster, Auction Block's General Manager, it costs Auction Block less to operate the crane per hour (\$90) than it does for Auction Block to pay an unloading crew for an hour of labor (\$129.75 minimum). See Brinster Deposition at 39:18 - 40:13, RX 680(B-C). Even when crane use runs slightly over an hour, the cost of the crane (\$112) and crew (\$129.75) are nearly the same. Despite this, Auction Block charges its customers three cents per pound for labor and *nine cents* per pound for the crane. Auction Block's customers are paying *triple* what Auction Block is paying for the crane -- a machine that the customer could have otherwise used itself because it is freely accessible City property. In sum, Auction Block is making a windfall by using the City crane and charging its customers a more than 300% markup.

offloading for it and Auction Block could charge Icicle the same rates as its other customers without having the overhead of crane fees. See *generally* Hogan Deposition, 151-154, RX 1220-1223.

The City provides services on the Fish Dock with the intent to support the effective use of that dock by even the smallest commercial fishing enterprise. See Hawkins Aff. (January 2, 2013) at ¶17, RX 1227. Thus, fees for services provided on the Fish Dock, such as crane fees and wharfage, are set at a low rate, which covers at most the cost of providing services and maintaining, repairing or replacing dock facilities. *Id.* at ¶ 18; see also *supra*, Section III(B). Auction Block's increased use of the cranes solely in response to decreased crane fees and without ties to its processing needs would necessarily increase the maintenance costs of the cranes while decreasing the revenue earned by the City for providing such maintenance. The end result would be an increase in the crane fees to other users and thus a decrease in accessibility to the cranes. In essence, the commercial fishermen choosing to use the cranes directly would be subsidizing Auction Block's increased crane use.

2. Any Preference or Advantage Given to Icicle by the City was Reasonable

Even if one assumes that Auction Block and Icicle are similarly situated, the City has still fully complied with the Act. The City exercised sound business judgment in entering into the Icicle Lease in 1979, amending that lease in the 1980s, and honoring the lease today. Similarly, the City also exercised sound business judgment in applying the tariff rates in the Harbor Leasing Lease. In short, any

preference or advantage given Icicle or disadvantage placed upon Auction Block was reasonable under the Act.

Auction Block ignores the plethora of facts presented by the City justifying the lease terms at issue and instead relies on a series of cases that recognize a “presumption of illegality” where a port awards a contract to one party and excludes all other parties from providing the contracted services. See Complainants’ Brief, 79. Once again, Auction Block misunderstands the case precedent upon which it relies. The cases cited by Auction Block involve *exclusive* agreements in which an MTO completely excludes all but one tug franchise from operating in the port, awarding that franchise a monopoly on tug services. See *generally* the tug boat franchise cases; i.e., *Petchem, Inc. v. Canaveral Port Authority*, 23 S.R.R. at 986-987. Unlike the tug franchises, Auction Block has never been excluded from the marketplace by the City in any way. On the contrary, Auction Block has entered into a 20-year lease with the City with two five-year options to renew. See Harbor Leasing Lease, CX 0219-220. Because Complainants have not been excluded from the marketplace, a presumption of illegality is wholly inappropriate here.

If anything, the FMC has been historically deferential to a port’s business judgment and has repeatedly refused to substitute its own judgment for that of a port. See *New Orleans Stevedoring Co. v. Federal Maritime Commission*, 80 Fed.App’x 681, 683 (C.A.D.C. 2003); *Petchem, Inc. v. Canaveral Port Authority*, 23 S.R.R. at 987; and *R.O. White & Co.*, F.M.C. 06-11 (“[T]he stated rationale for the difference in rental charges, while arguably strained, is not so unreasonable as to outweigh the

long-established reluctance of the FMC to substitute its judgment for that of an entity that is responsible for the day-to-day operation of a port.”)

A preference will be found reasonable if it is related to valid transportation concerns -- with emphasis on commercial, physical, and competitive factors -- follows established policies, and is not based solely on the status of the tenant. See, e.g., *New Orleans Stevedoring Co.*, 80 Fed.App’x 681; *R.O. White & Co.*, F.M.C. 06-11. In *New Orleans Stevedoring Co.*, the port refused to lease a facility to a stevedore during reconstruction of the port and gave preferences to existing lessees. In that case, the port had a general policy against leasing facilities during construction, the port did not seek to remove the stevedore from the market, the port offered a lease to the stevedore at a different facility, and the stevedore had opportunities to commit to a long-term solution but failed to do so. See generally *New Orleans Stevedoring Co.*, 80 Fed.App’x 681. The facts of this case are very similar, and the rationale of *New Orleans Stevedoring Co.*, should be applied here.

The City’s transportation concerns include (a) its interest in complying with its existing, long-term, contractual relationship with Icicle; (b) the City’s interests in economic development; (c) Auction Block’s failure to implement a long-term plan; and (d) the City’s desire to comply with its established policies.

a. *The City’s Interest in Complying with the Icicle Lease Supports the City’s Reasonableness under the Act*

The FMC has recognized the merit of considering the potential ramifications of breaching a preexisting agreement when determining whether lease terms are reasonable under the Act. The Icicle Lease has been in effect for over thirty years, long before the City registered as an MTO or filed a tariff with the FMC. See Wrede

Aff. (November 5, 2012) at ¶ 26, RX 1089-1090. The City's decision to comply with the Icicle Lease instead of facing legal action and the loss of goodwill associated with its breach was reasonable.

The FMC previously concluded that preferential treatment given to an existing long-term leaseholder in order to avoid a breach of contract with the leaseholder is a valid transportation concern. In *New Orleans Stevedoring Co.*, the port stated it wanted to maintain long-term relationships with existing lessees and avoid breach of contract liability. See generally *New Orleans Stevedoring Co.*, 80 Fed.App'x 681. The ALJ concluded, "[i]t cannot seriously be maintained that such a motive is not related to transportation concerns." *Id.*

While Auction Block contends that the Icicle Lease is "expired," this position ignores the intent of the parties and applicable law. As discussed in more detail in Sections III(F) and V(I), both the City and Icicle have consistently and substantially complied with the terms of the Icicle Lease since its execution and neither party in any way disputes the validity of the Icicle Lease. See *Woodruff Aff.* (October 9, 2012) at ¶¶ 12-13, RX 1106; *Wrede Aff.* (October 10, 2012) at ¶ 17, RX 1084. See also November 2004 letter from Icicle to the City, RX 86-90; April 28-29, 2006 email correspondence between City officials regarding Icicle Seafoods, CX 0107-108. The City has admittedly tried to work with Icicle to amend the Icicle Lease to apply the published tariff rates. See *Wrede Aff.* (October 10, 2012) at ¶ 10, RX 1084. While the City Administration believes that the City has an obligation to try and secure the best possible rates from all of its lessees, this obligation does not trump the City's interest in honoring its contracts and any incentives it reasonably awards under such

contracts. Accordingly, the City struck a balance in its negotiations with Icicle, sending Icicle a notice of default and hoping that this notice would incentivize Icicle to forfeit its current rates in exchange for the tariff rates. Unfortunately, Icicle insisted on compliance with the lease terms. The City Manager determined that he had used his best efforts to encourage Icicle to pay more under its lease, but that the City could not afford to lose Icicle's presence in Homer as a result of legal action and the rates afforded Icicle under the Icicle Lease were amply justified by Icicle's contributions to the City and other transportation factors. See *Wrede Aff.* (January 2, 2013) at ¶ 30, RX 1235. The City genuinely believed and believes that even if it succeeded in challenging Icicle's compliance with the Icicle Lease, which was doubtful given the City's failure to challenge Icicle's performance under the Lease for over six years, it would ultimately lose if Icicle left the Homer market. *Id.* See also *Wrede Aff.* (October 10, 2012) at ¶ 14, RX 1084. The City's interest in honoring its long-term lease commitment with Icicle and avoiding litigation regarding the Icicle Lease is a valid transportation concern as recognized by the FMC.

b. The City's Interest in Economic Development

Beyond the City's genuine interest in avoiding a breach of the Icicle Lease, the City's alleged preferential treatment of Icicle is and has been based upon a myriad of other genuine transportation factors including its ultimate goal of fostering economic development at its port. Auction Block undervalues the contributions of Icicle and exaggerates the benefits Auction Block offers to the community. According to Auction Block:

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. The incentive and reward are

undisputed -- relief from crane use and wharfage fees for the owner and operator of the shore-based processing plant.

See Complainants' Brief, 2. While a shorebased processing plant may be Auction Block's ultimate goal, it certainly is not that of the City's. The City's ultimate goals when leasing Spit property adjacent to the Fish Dock are economic development and fostering a profitable and sustainable commercial fishing industry in Homer. See Wrede Aff. (January 2, 2013) at ¶ 5, RX 1231. Of course, the City does encourage the construction of infrastructure on City property, such as a shore side processing facility, but only where that facility will meet the City's ultimate goals. Icicle's operations in the City, both past and present, fully support the City's development and transportation goals and thus the Icicle Lease complies with the Act.

Icicle is and has been a major processor/buyer of fish in the Pacific Northwest for over 45 years. See Woodruff Aff. (November 2, 2012) at ¶ 3, RX 1114. Icicle has been operating in the City for over 35 years. It was the first prominent fish processor in Homer and has led the City in developing the robust fishing industry that exists today. *Id.* at ¶ 5, RX 1115-1116. In its early days in Homer, Icicle was the only significant operator in Homer and brought millions of dollars to the City through fish taxes, wharfage fees, lease agreements, substantial employment opportunities and use of local services. See Homer City Council Resolution 98-102, RX 684. Homer's fishing industry actually grew around Icicle and its operations. See Wrede Aff. (November 5, 2012) at ¶ 24, RX 1089. The steady stream of business and revenue from Icicle provided the City with the resources it needed to build and operate the Fish Dock, and justified the City's efforts to develop and grow its fishing industry. *Id.* Icicle further supported the development project by providing services to the fishing

fleet, including ice production, while the City built the Fish Dock. See Woodruff Aff. (November 2, 2012) ¶ 5, RX 1115-1116.

Icicle's contributions to the City remain unparalleled by others in Homer's commercial fishing industry. Today, Icicle remains the largest fish buyer in Homer. *Id.* at ¶ 9b, RX 1117; Wrede Aff. (November 5, 2012) at ¶ 45, RX 1091-1092. In 2012, Icicle purchased fish worth nearly \$12 million and in 2011 Icicle purchased fish worth more than \$23 million from fishermen in and around Homer.¹⁴ See Woodruff Aff. (November 2, 2012) at ¶ 9b, RX 1117. Icicle set up an ice plant and continues to purchase fish from its fleet of vessels and to operate a floating fish processor off the Deep Water Dock, where it pays published tariff rates for services. See Wrede Aff. (November 5, 2012) at ¶ 29, RX 1090. As a result, Icicle pays a substantial fish tax and ensures supplemental ice production to fishing vessels during the peak season. *Id.* at ¶ 32, RX 1090; see *also* Woodruff Aff. (November 2, 2012) ¶ 9a, RX 1117. This year Icicle paid a fish tax of over \$110,000 for fish processed in Homer on its floating processor. *Id.*

Icicle also heavily utilizes local service providers. In fact, as the City repeatedly stresses in this brief, a substantial portion of Complainants' work comes from Icicle. Auction Block's contracts with Icicle for offloading services in 2012 totaled nearly \$270,000 and over \$300,000 in 2010 and 2011 respectively. *Id.* at ¶ 9g, RX 1119-1120; Collection of Offloading Agreements and Bid Requests between Icicle and Auction Block, RX 625-679. Icicle also utilizes other local services,

¹⁴ The large decrease in fish purchases between 2011 and 2012 demonstrates the impact the reduction in the IFQ quotas had on the industry. See Woodruff Aff. (November 5, 2012) at ¶ 9b, RX 1117.

including marine supply, fuel, propane, marine trade, grocery, boat storage, and trucking services. Icicle purchases nearly \$1 million worth of fuel in Homer annually. See Woodruff Aff. (November 2, 2012) ¶ 9f, RX 1119.

Icicle's contributions are not limited to the Port and Harbor. Icicle provides college scholarships to Southern Kenai Peninsula High School students. See November 3, 1998 Letter from Don Beeson of Icicle to the City, RX 685. It also "sponsors Little League teams, soccer teams, the arts, swim teams, the museum, the Food Pantry, and many other charities and functions in the area." *Id.* See also Wrede Aff. (November 5, 2012) at ¶ 33, RX 1090; Woodruff Aff. (November 2, 2012) at ¶ 9, RX 1117-1122.

The loss of Icicle's presence in the City would have deep seated ramifications on Homer that far exceed the mere loss of a lessee. Since beginning its operations in Homer in 1977, Icicle has supported a large fleet of local fishermen in the salmon, halibut, Black cod, herring and crab fisheries. Many of the commercial fishermen living in Homer are Icicle Fishermen and a part of that fleet. See Woodruff Aff. (November 2, 2012) at ¶ 9c, RX 1118. Indeed, both the Harbormaster and The Auction Block Co.'s chief executive officer were Icicle fishermen. In the event that Icicle left Homer, these fishermen and their crews would face either losing their steady income or relocating and the City would lose the contributions these fishermen and their crews make to the Homer economy and port. Wrede Aff. (January 2, 2013) ¶ 65, RX 1243. In a City with a population of 5,000, this loss would have grave effects on the community. *Id.* Additionally, the floating processor vessel that Icicle docks at the Deep Water Dock is not provided for in the Icicle Lease.

However, that processor processes a massive amount of salmon in the Homer port and pays a substantial tax on those processing activities. Icicle actually pays a 5% tax on fish processed on its floating processor while entities processing fish in a shoreside plant pay only 3%. See A.S. 43.75.015.

The ripple effect from the loss of Icicle would result in the loss of other service providers such as Auction Block. Wrede Aff. (January 2, 2013) ¶ 66, RX 1243. Further, companies that provide equipment and support to the commercial fishing industry would be less likely to consider Homer as an opportune location to offer services as these companies could not count on smaller companies to withstand the constant changes in the fishing industry. *Id.* at ¶ 67. Finally, Icicle's presence ensures the potential for the reconstruction of a processing plant in Homer by Icicle as it has the land and the infrastructure needed to rebuild. While the halibut market is currently a fresh one, the halibut market or another fishery could change direction at any time and Icicle has always maintained that Icicle would resurrect its plant operations if it became economically beneficial for Icicle to do so. See Wrede Aff. (January 2, 2013) at ¶ 31, RX 1236. Consequently, Icicle's benefits to the City run deep and are unparalleled in the community.

Despite Auction Block's belief to the contrary, Auction Block's processing facilities simply did not and do not warrant preferential treatment in these early stages of their operation. To the contrary, when Harbor Leasing, LLC responded to the City's RFP, Auction Block had no experience as a processor and was representing to the City that it would be building a shoreside processing plant at a time when the City was well aware that the IFQ system was having significant negative impacts on that

industry. See *Wrede Aff.* (January 2, 2013) at ¶¶ 34-36, RX 1236; Harbor Leasing Proposal, RX 236. See generally *Matulich and Clark, supra* at 149-166, RX 57-74. The City knew Auction Block had been successful as an auction house and broker but had no reason to believe that it would have the same success as a processing facility. Accordingly, the City entered the Harbor Leasing Lease cautiously and encouraged Auction Block to get its processing operations underway and apply for discounts and incentives after doing so. See *supra*, Section III(G).

The Harbor Leasing Lease was signed in March of 2008 and Auction Block did not start processing until 2010. Even with Auction Block's processing efforts underway, Auction Block still struggles with the processing equipment and does not appear to be able to continually, if ever, operate at full capacity. See *Hogan Deposition* at 59-61, RX 20-22. In addition, Auction Block has continuously failed to comply with the terms of both the Harbor Leasing Lease and the short-term lease that predated it. Currently, Auction Block is in breach of its lease and owes the City over \$15,000 as of September 2012 for its failure to pay for its access to the City's Outfall Line as required under the Harbor Leasing Lease. See *Wrede Aff.* (January 2, 2013) at ¶ 43, RX 1238; *Port of Homer Lease Data*, RX 1197-1210.

In addition to Auction Block's struggles to comply with its lease terms, both presently and prior to execution of the Harbor Leasing Lease, Auction Block has also been struggling to operate a profitable business. See *Complainants' Brief*, 39-40; *Yeoman Aff.* (October 18, 2012) at ¶ 43, CX 0176, and ¶ 48, CX 0177; *Hogan Deposition* at 88:1-3, RX 35 (Hogan testifies that the cut in the quota has made it a tough year for Auction Block but that Auction Block is "meeting our obligations.").

Complainants have already pulled from other markets and had started doing so prior to the execution of the Harbor Leasing Lease. See Hogan Deposition at 28:16-23, 29:1-25 - 30:14, RX 13-15.

It was and remains unclear how long Auction Block will stay in Homer. Auction Block's longevity in Homer is particularly suspect since it has threatened numerous times to leave both recently and during lease negotiations. See Wrede Aff. (November 5, 2012) at ¶ 34, RX 1090. In the newspaper article touted by Auction Block, Kevin Hogan states that "he'll pull out if the city tries to milk more money out of his operation by increasing wharfage fees or adding other taxes." See Gay, *supra*, at 65, CX 0167.

c. *Application of Icicle's Flat Rate to Auction Block Would Restrain Competition*

Allowing Auction Block favored treatment when it is merely offloading fish for others would have profound consequences, including the City's loss of control over the dock and its ability to promote a free market. It also would destroy the City's ability to provide incentives to large fish purchasers in order to encourage the City's economic development effectively restraining competition. Wrede Aff. (January 2, 2013) ¶ 63, RX 1242. If Auction Block when offloading for others could use Icicle's flat yearly rate, than no other fish purchaser, small, medium or large, would have any incentive to purchase crane or wharf service directly from the City. Instead, they would all purchase such service from Auction Block, with Auction Block reselling to anyone crane or wharf time that Auction Block gets from the City at zero marginal cost under a fixed yearly rate. The City's crane and wharf revenues would fall. Worse, the City would lose the ability to provide meaningful incentives to a large fish

purchaser such as Icicle. *Id.* Even the most minor fish purchaser might persuade Auction Block to pass on to it part of the benefit of the fixed yearly crane/wharf rate that the City now offers to Icicle, the largest fish purchaser. Alternatively, instead of passing on the benefit of a fixed yearly rate when reselling the City's crane and wharf, Auction Block might elect to mark up prices and pocket a substantial profit for itself -- an inequitable arbitrage that would take money the City could otherwise earn if the City kept control over use of its own crane and wharf. *Id.* at ¶ 64.

d. Auction Block's Lack of a Long-Term Plan

Auction Block's failure to present or adopt a long-term plan is another valid transportation concern justifying differential treatment by the City. In *New Orleans Stevedoring Co.*, the stevedore was encouraged to develop a long-term solution but failed to adequately respond. 80 Fed.App'x at 683. The record in this case similarly shows the City has regularly invited Auction Block to establish itself and come back again to propose and negotiate a long-term lease. See Timeline, November 19, 2007 email between Auction Block and the City, RX 332-333; March 10, 2008 Memorandum from Walt Wrede to Mayor Hornaday and Council, RX 361-362.

Despite the City Manager's recommendation, Auction Block never put forth a proposal for an amendment to the Harbor Leasing Lease. See *Wrede Aff.* (January 2, 2013) at ¶ 45, RX 1238. Auction Block implies that it did not do so because such efforts would have been futile given the City Manager's presumed opposition and control of the lease process in *Homer*. See *Complainants' Brief*, 21; *Hogan Aff.* (October 2, 2012) at ¶ 33-36, CX 0147. However, this suggestion makes little sense as it is the City Council, not the City administration, ultimately tasked with approving or denying a lease amendment. See *Wrede Aff.* (January 2, 2013) at ¶ 47,

RX 1238. Auction Block could have submitted an application to the administration requesting incentives and providing the City the basis for such incentives. The application and its supporting evidence would be considered by the City administration and the Lease Committee and presented to the City Council with a recommendation for approval or denial. *Id.* at ¶ 46.

e. *The City Followed Established Policies in its Treatment of Auction Block*

Any differential treatment of Auction Block by the City is reasonable because the City is following and applying established policies. Before entering into leases, the City issues RFPs so access is available to all interested parties. The applicable rates for use of the Fish Dock are also published in the Tariff. The City also publishes a Property Management Policy and Procedures Manual that applies to all leases in the City, including leases of Spit property. See generally Homer Property Management Policy and Procedures Manual, RX156-176. This lease policy applies to all lessees who entered into a lease with the City after the adoption of these policies. Auction Block cannot claim, as it does here, that the City has failed to observe a reasonable policy. The City's application of its established policies to Auction Block is reasonable and is entitled to the FMC's deference. See *New Orleans Stevedoring Co.*, 80 Fed.App'x at 684.

3. The Terms of the Icicle Lease Are Not the Proximate Cause of Alleged Injury by Auction Block

Auction Block must prove not only that any preference given Icicle was unreasonable, but also that the City's imposition of that preference was the proximate cause of the injuries alleged by Auction Block. See *Ceres Marine Terminals, Inc.*, 27 S.R.R. at 1270-71 (prejudice or disadvantage must be the proximate cause of

injury). A review of Auction Block's actual crane usage reveals that Auction Block suffered absolutely no injury as a result of the Icicle Lease and would have actually owed *more* fees to the City if the Icicle Lease terms were applied to Auction Block's use of the crane for processing/buying its own fish.

a. *The Icicle Preference Did Not Cause Auction Block Injury*

There is no evidence supporting Auction Block's contention that the difference in crane usage rates applied to Icicle and Auction Block is in any way responsible for Auction Block's financial trouble. Kevin Hogan testified during his deposition that Auction Block had a "tough year, *because of*" the cut in the fish quota this year. See Hogan Deposition at 88:1-10, RX 35. Additionally, Auction Block's manager, Jessica Yeoman, testified that Auction Block has been hit with poor salmon runs, universal increases in costs such as fuel, electricity and water, increased cost of staffing, increased cost of maintaining government compliance, and other factors unrelated to the Icicle Lease. See Yeoman Deposition at 29:6 - 30:10, RX 606-607. Mr. Hogan also testified that the expenses facing Auction Block, especially the expense for water, which was "a huge one," had increased over the years. See Hogan Deposition at 82:1-20, RX 32.

Auction Block continuously asserts that if it received the discounts that Icicle received, it could afford to pay more for fish and could thus process more fish, resulting in a higher profit. Auction Block once again ignores its reality. First, the fishermen that sell fish to Icicle are notoriously loyal to Icicle. Mr. Hogan admits that when he was an Icicle fisherman, from 1978 through 2010, he sold exclusively to Icicle and did not even pay attention to price until the season's end. See Hogan Deposition at 73:13-16; 74:1-4, RX 27-28. Harbormaster and former Icicle fisherman

Bryan Hawkins also reports selling exclusively to Icicle, regardless of price. See Hawkins Aff. (November 5, 2012) at ¶ 20, RX 1103. Thus, any argument that the fishermen are actually driven by price per pound without other considerations is false.

Further, Auction Block is not, for the most part, a direct buyer of fish. It is acting as a broker and thus it is the buyer that sets the price, not Auction Block. Thus, the fish price is set by the market as acknowledged by Mr. Hogan. See Hogan Deposition at 12:19-24, RX 10.

Auction Block also fails to establish that it could actually process any more fish than it is currently processing. While it repeatedly references the capacity of its newly built processing plant, it fails to acknowledge that this plant is not actually fully operating. In Mr. Hogan's deposition, he admitted that refrigeration is a key component of the processing facility and that the turbo freezer was currently under modification. See Hogan Deposition at 59:18-20, RX 20; 64:3-5, RX 24. Mr. Hogan also recognized that the plant did not start making ice until early 2012. *Id.* at 63:24-25, RX 23. While Mr. Hogan was eager to inform the City of the processing capacity of Auction Block's facilities, he continually evaded questions regarding the capacity of that facility as it was currently operating. When asked what Auction Block's current capacity was, Mr. Hogan responded, in part:

--we still do a lot of processing. And the primary market is fresh fish, I mean, regardless. And, you know, it's always—it's always better to send a fish to market fresh than it is frozen, I believe.

See Hogan Deposition at 73:14-16, RX 27. When asked how much Auction Block processed in 2007, Mr. Hogan answered, "I have no idea." *Id.* at 77:11, RX 29. When asked the same question for 2008, Mr. Hogan again responded, "I have no idea." *Id.* at 78:4-6, RX 30. Mr. Hogan stated that he really didn't know how much

Auction Block processed in 2009 but that Auction Block had started to do a “fair amount.” *Id.* at 79:6 - 80:3, RX 30(A-B). Auction Block failed to report that it processed at all in 2009 to the State of Alaska Department of Revenue, making Hogan’s claims extremely suspect. See State of Alaska Fisheries Tax Contributor List, RX 620-624. Mr. Hogan also could not tell the City how much Auction Block processed in 2010 or 2011 and could not even definitively testify that the amount of fish processed by Auction Block had actually increased over the years, stating only that it’s “a safe bet.” See Hogan Deposition at 81:1-14, RX 31.

b. Auction Block Charged Less for Crane Fees Attributed to Its Processor/Buyer Activities Under the Tariff Rates Than It Would Have Paid Under the Icicle Flat Rate

Perhaps the starkest evidence that the City did not cause Auction Block injury is that Auction Block would actually have paid *more* for use of the crane and wharf to offload the fish it purchased and processed if it had paid the Icicle flat yearly rate for those transactions. Because the Tariff rates allow Auction Block to pay for crane and wharf use by the unit (hourly or per ton), and Auction Block’s volume of use when purchasing fish for its own account has been small, Auction Block has paid the City at least \$36,987 *less* for its own use of the crane and wharf over the last four years than it would have paid if the City had charged it Icicle’s \$30,900 yearly fixed rate. See Wrede Aff. (January 2, 2013) at ¶ 49, RX 1239.

	Estimated Auction Block Crane Charges (for own use transactions)	Estimated Auction Block Wharf Charges (for own use transactions)	Estimated Auction Block Total Charges (for own use transactions)	Icicle Fixed Rate Charges (all Icicle use is own use)	Difference in Charges
2009	9,680	\$971	\$10,651	\$30,900	-\$20,249
2010	13,794	\$1,508	\$15,302	\$30,900	-\$15,598
2011	19,012	\$1,738	\$20,750	\$30,900	-\$10,150
2012	34,103	\$5,808	\$39,910	\$30,900	\$9,010
Total			\$86,613	\$123,600	-\$36,987

Id. at ¶ 50.¹⁵ As shown in the above table, the only year in which Auction Block would have benefited under the Icicle Lease was 2012; a year in which Auction Block completely stopped reporting any use of the crane for offloading in April and, from that month on, reported every use of the crane as if for its own use. See *Wrede Aff.* (January 2, 2013) at ¶ 56, RX 1241. This shift makes little sense given Auction Block's own deposition testimony that offloading remains the vast majority of Auction Block's business. See *Yeoman Aff.* at ¶ 19, CX 0172. Regardless, on the whole, Auction Block still paid \$36,987 less under the published tariff rates than it would have paid had it been privy to the Icicle Lease terms for 2009 through 2012.

¹⁵ These calculations derived from the only direct evidence Auction Block submitted to the City regarding its processing/purchasing activities, which are Auction Block's crane cards. Auction Block has two separate crane cards that it uses to track its use of City cranes. One of these cards is designated for the use of the crane by Auction Block when providing offloading services for others. The other is used when Auction Block uses the crane to lift fish it is buying for itself. See *Hogan Deposition* at 163:20-164:2, RX 37-38. Auction Block's use of the cards is not monitored by the City and thus the City relies on Auction Block's self-reporting to ensure that the proper card is used. See *Wrede Aff.* (January 2, 2013) at ¶¶ 51-52, 54, RX 1239-1240.

F. **The City Did Not Unreasonably Refuse to Negotiate in Violation of 46 U.S.C. § 41106(3)**

Auction Block's most offensive allegation against the City may be its claim that the City unreasonably refused to negotiate with Auction Block in violation of the Act. See Complainants' Brief, 46-48. In support of this claim, Auction Block accuses the City of everything from fraud and conspiracy to retaliation. *Id.* at 13-14, 21, 46-48. The City engaged in extensive and comprehensive negotiations with Auction Block for over a year, resulting in a negotiated and signed lease between the parties. Auction Block's accusations ignore the City administration's efforts as well as the successful end product, the Harbor Leasing Lease.

"Refusal to negotiate" under the Act means refusal "by a marine terminal operator to give actual consideration to an entity's efforts at negotiation." *Canaveral Port Authority – Possible Violations of Section 10(b)(10), Unreasonable Refusal to Deal or Negotiate*, 29 S.R.R. 484 (F.M.C. 2002) (where MTO refused to conduct mandatory hearing to discuss carrier's franchise application, and instead decided not to even consider the application, MTO unlawfully refused to negotiate). The prohibition is on a refusal to even see what the other party is offering.

In contrast, in *Seacon Terminals, Inc. v. Port of Seattle*, 26 S.R.R. 886, 889 (F.M.C. 1993), an MTO haggled with a carrier for more than a year about the terms of a lease renewal, and when the negotiations failed the MTO leased the lot to someone else. The FMC found no unlawful refusal to negotiate by the MTO. It had merely exercised its business discretion by refusing to extend lease terms that the carrier considered favorable. *Id.* Genuine policy considerations that motivate an MTO to reject a proposal will justify any alleged refusal to negotiate. See *New*

Orleans Stevedoring Co., 80 Fed.App'x at 683 (general policy against leasing lots during reconstruction activity valid reason for refusing to lease facility to common carrier).

The evidence is overwhelming: at all times the City gave good faith consideration to all of Auction Block's requests. After awarding Auction Block the leasehold on Lot 12C, the City made every effort to negotiate with Auction Block even despite its request for drastic deviations from its proposal during those negotiations. See generally Timeline, RX 256-261 and Section III(G) *supra*. See also May 14, 2007 City Council Minutes, City Manager's Report, RX 692-693 (City Manager Wrede reports that Auction Block has requested 29 amendments to the lease and that the City is considering them carefully).

Despite the City's efforts, which included numerous letters, emails, and lengthy in-person meetings, the parties were still at an impasse in November 2007. Nonetheless, the City pressed on with Harbor Leasing and permitted Auction Block to occupy the property in the interim. Mr. Hogan warned in an email to the City: "The code states all lease terms except those required by the code are negotiable. And in case you haven't figured out my position it is simply this: the longer this is delayed, the more I am going to ask for." See November 19, 2007 email from Kevin Hogan to Walt Wrede, RX 332-333. Mr. Hogan acknowledged in his deposition that this statement was part of a back-and-forth negotiation over lease terms:

- Q. But it's safe to say that at the time you sent this e-mail, you were in negotiations, negotiations, talks of some sort—
- A. Right.
- Q. —with the City of Homer regarding the terms of the Auction Block lease, correct?

A. Yes.

See Hogan Deposition at 200:25 – 201:6, RX 42-43. He also acknowledged that these negotiations took an unexpectedly long time. *Id.* at 216:13-17, RX 46-47. Mr. Hogan reluctantly admitted that the parties exchanged more than two draft leases, held at least one in-person meeting, exchanged more than five emails, and exchanged letters by mail. *Id.* at 217:3-24, 218:16-18, RX 47-48; 220:21 – 221:10, 221:17 – 222:9, RX 49-51. In actuality, the record reflects far more numerous correspondence between the City and Auction Block during negotiations. See *generally*, Timeline, RX 256-261. In a report to the Mayor and the City Council on February 15, 2008, the City Manager noted: “The City has worked very hard to accommodate Mr. Hogan. For example, it has patiently attempted to work through negotiations that have lasted more than a year. We have spent ample amounts of time and resources on this.” See February 15, 2008 Memorandum from Walt Wrede to Mayor Hornaday and Council, RX 340-342. This process continued until a final lease draft was submitted to, and approved by, the City Council. See Timeline, RX 368.

Like in *Seacon Terminals, Inc.*, this is a case of hard bargaining that left a party less than satisfied. It is not a case of “refusal to deal or negotiate.” Moreover, this was not a case, like in *Canaveral Port Authority*, of a party’s refusal to give any consideration to a proposal. Far from it. The City gave constant consideration to Auction Block’s proposals. When it declined to provide the benefits Auction Block was demanding, it did so because of the City administration’s belief that it could not make unilateral substantial changes that were not included in Auction Block’s original response to the RFP nor could it provide unwarranted incentives that violated the

public policy of open access to City facilities integral to Homer's port management. As demonstrated in *New Orleans Stevedoring Co.*, a valid policy consideration justifies rejection of a proposal. There was no outright rejection, just a lengthy bargaining process that ended in a lease wherein neither party got everything they wanted. There was no refusal to deal or negotiate by the City.

G. The City Does Not Administer Unfair Leasing Policy/Practices

Auction Block implies throughout its brief that the City unfairly administers its leasing policies and that Auction Block would be able to prove these alleged inequities but for the fear of retaliation prevalent among lessees. See Complainants' Brief, 13-16, 21. While these accusations have no relevance in this proceeding, the City is compelled to dispel them given their gravity.

In an effort to engage the community in local government, the City has established several advisory committees that make recommendations to the City Council on a variety of matters. Among these committees are the Port and Harbor Advisory Commission ("PHAC"), the Economic Development Commission ("EDAC"), and the Homer Lease Committee. *Wrede Aff.* (January 2, 2013) at ¶ 58, RX 1241. Mr. Hogan actually sat as a member of both the EDAC and the PHAC from 2007 through 2009. See Complainants' Brief, 13. The City makes a concerted effort to appoint members of the community to these committees with express interest in Homer's economic development, its port operations, and its lease policies respectively. As a result, these committees often are comprised of business owners in the community with strong opinions as to the City's land management policies. See *Id.* at ¶ 59, RX 1241. While this often results in passionate discourse between the City staff, the Council, and the members of these committees, City Manager

Wrede believes that the ultimate result is greater community involvement in local government and well rounded policies. *Id.* at ¶ 60. Mr. Hogan's dissatisfaction with the Council's decisions to reject some of the committees' recommendations does not support the conclusion that the committees' input into the City's policies and procedures is futile or that its lease negotiations are a sham.

Mr. Hogan has presented absolutely no evidence that any of the City's lease policies/practices are unlawful or discriminatory as applied to Auction Block or any other lessee. Instead, he relies on affidavits from his former landlord, Don McGee, and Shelly Erickson, a former member of the EDAC and the Homer Lease Committee, for the proposition that the City treats lessees inequitably. See Complainants' Brief, 13-14. Mr. McGee asserts that the City failed to renew his lease despite his full compliance with the lease terms. See Complainants' Brief, 16. The City chose not to renew Mr. McGee's lease because Mr. McGee's lease had expired and the City administration determined that it was in the City's best interest to reoffer the property for lease under a competitive bidding procedure. The City manager at the time encouraged Mr. McGee to submit a proposal on the property but Mr. McGee chose not to do so. See October 15, 2001 Letter from D. McGee to R. Drathman; October 16, 2001 Letter from R. Drathman to D. McGee, RX 108-709. Despite Mr. McGee's unhappiness with the City's decision, the City committed no discriminatory act against Mr. McGee.

Similarly, Ms. Erickson accuses the City of inequity between lessees (see Complainants' Brief, 14) but provides no basis for her conclusory assertion. Although the City has fully responded to Auction Block's discovery requests with specific data

regarding each of the City's leases on the Spit, see generally City's Discovery Responses, RX 372-398, Auction Block cites no evidence to support its allegation of discrimination against lessees.

H. Auction Block's Damages Are Egregiously Overstated¹⁶

In addition to Auction Block's failure to prove any violations under the Act, Auction Block's claimed damages are unsupported and, at the very least, egregiously over-stated. Auction Block relies on the "Lost Profits Report" first submitted as Exhibit R to its now-denied motion for summary judgment. It cuts and pastes that document into its merits brief and proposed findings of fact. See Complainants' Brief, 89; CFOF, ¶ 427. The Report has no specific author, is apparently not the work of an expert, cites no sources for its figures, and contains numerous methodology errors. In the report, Auction Block claims it paid \$236,302 more than Icicle paid from April 2009 to August 2012 for use of the crane and wharf. See Complainants' Brief, 93 (reprinting report). Auction Block alleges that, if it had not paid the \$236,302, it would have reinvested that "additional working capital" in its business and converted it into \$912,767 in profits. See Complainants' Brief, 97.

1. Because the City Charged Auction Block the Rates Published in its Tariff, Reparations are not Available as a Remedy

In seeking \$236,302 in alleged rate difference covering the time period April 2009 through the present, Auction Block seeks retrospective relief from the tariff

¹⁶ The City focuses solely on the damages asserted by Auction Block in this brief but requests that a hearing or additional briefing be permitted in the event that the ALJ subjects the City to fines for its conduct. The City would never intentionally or maliciously violate the Act and is a very small community with a small operating budget for its port. The City simply requests the ability to provide the ALJ with documentation as to the detriment fines would have on the City and the FMC precedent weighing against imposing any such fines.

rates charged Auction Block. Auction Block derives its further request for \$912,767 in lost profits from the claim for rate differences. Thus, the lost profit claim also depends on obtaining retrospective relief from the terms of a filed tariff. See Complainants' Brief, 97.

The Fifth Circuit has held that FMC orders declaring rates set forth in tariffs "unduly discriminatory" have a prospective-only effect, and that the discriminatory tariff rates may still be lawfully collected and retained for service provided before the date they are set aside. *New Orleans S.S. Ass'n v. Plaquemines Port Harbor and Terminal District*, 816 F.2d 1074, 1077 (5th Cir. 1987) (where ALJ found that MTO's tariff charges were unreasonably discriminatory, "[t]he tariff at issue was assessable and collectible until September 16, 1986, when nullified by the FMC's adoption of the ALJ's order.") Accordingly, should the FMC find that it has jurisdiction and that the City's tariff is unreasonably discriminatory, it may order prospective tariff changes, but not damages (reparations) for amounts previously collected under the Tariff.

2. The Caselaw Does Not Permit Resellers to Take Advantage of Flat Rate Contracts Intended for One Customer's Own Use

Auction Block cites no precedent to support its argument that a port must extend a flat rate contract offered to one party for its use of Fish Dock facilities in its own operations, to a reseller such as The Auction Block Co. The central feature of a flat rate is that there is zero marginal cost for each additional use of the crane and wharf service. Granting a flat rate to a reseller eliminates an essential check against abuse of that flat rate structure, namely that the customer granted that flat rate for its own operations will buy a finite amount of fish and so has finite needs for the crane and wharf. A reseller granted a flat rate can aggregate the individual business needs

for each of its own customers, resulting in multiple users of the crane and wharf effectively sharing a single flat rate. Sparks Aff. (January 3, 2013) ¶¶7, RX 1265. This would expose the City to far greater use of its crane and wharf for no additional compensation, and also deprive the City of the opportunity to directly sell crane and wharf use to others. Wrede Aff. (January 2, 2013) at ¶ 68, RX 1243. Think what would happen to an all-you-can-eat restaurant that allows customers to carry delicacies outside to share with their friends and family waiting nearby.

Applicable precedent would allow the City to refuse to let a customer resell to third parties crane and wharf time it purchased from the City at a fixed yearly rate. The fixed rate arrangement is analogous to a requirements contract, under which the seller (here the City) meets all the buyer's requirements (here Icicle's crane and wharf usage), whatever they might be, for a price set in advance. The precedent confirms the seller's implied right to refuse to supply a buyer who was originally purchasing for its own use when the requirements contract was signed, but later became a reseller. See *Empire Gas Corp. v. American Bakeries Co.*, 840 F.2d 1333, 1336 (7th Cir. 1988); *City of Lakeland v. Union Oil Co. of Cal.*, 352 F.Supp. 758, 768 (M.D. Fla. 1973) (holding that transactions in which utility sold power at wholesale to third parties must be excluded from calculation of damages); accord *Orange & Rockland Utilities, Inc. v. Amerada Hess Corp.*, 397 N.Y.S.2d 814, 820, 96 A.L.R.3d 1023 (App.Div. 1977).¹⁷ Although interpreting Uniform Commercial Code provisions applicable to sales of goods, these cases are based largely on the duty of good faith

¹⁷ The holding in *Empire Gas Co.* was later followed by other circuits. See *Brewster of Lynchburg, Inc. v. Dial Corp.*, 33 F.3d 355, 365 (4th Cir. 1994); *Atlantic Track & Turnout Co. v. Perini Corp.*, 989 F.2d 541, 544 (1st Cir. 1993).

dealings inherent in every contract, rather than on considerations peculiar to the UCC. At the very least, it is not unreasonably discriminatory to decline to grant a reseller a flat yearly rate intended for a customer purchasing for its own use. The devastating effects that would befall the City if Icicle's flat rate were applied to The Auction Block Co. (a reseller) are discussed in detail in Section V(E)(2), above.

3. The Derivative "Lost Profits" Claim is Duplicative of Pre-Judgment Interest

Auction Block's lost profits claim, if considered a rate differential claim, would also be barred by the Act's provision of pre-judgment interest as the statutory remedy for loss of the time value of money. Because the gravamen of the claim is what would have happened had the \$236,301 been available to it earlier, rather than only upon a judgment at the end of this case, Auction Block's lost profits claim seeks to recover the time value of money, albeit at a spectacularly high rate of return. In predicting that \$236,301 of "additional working capital" would have become \$912,767 in extra profits over the 3.5 year period from April 2009 through October 2012 (when the lost profits report was first provided to the City), Auction Block predicts a 286% investment return, which is an 82% annual return.¹⁸

Pre-judgment interest restores to the plaintiff the return-on-principal that the plaintiff would have earned had the amount wrongfully taken from him by the defendant been invested prudently in the interim between the date of the loss and the date of the judgment. See *City of Milwaukee v. Cement Div., Nat. Gypsum Co.*, 515 U.S. 189, 1996 (1995). The Act fully addresses this aspect of a complainant's

¹⁸ \$912,767 less \$236,301 "additional working capital" = \$676,466 investment return. \$676,466 / 3.5 years = \$193,276 return per year. \$193,276 / \$236,301 = 81.8% annual investment return.

loss. It provides for allowance of pre-judgment interest on reparations “from the date of the loss” at “commercial rates” which the FMC sets by rule. 46 U.S.C. § 41305(a); 46 C.F.R. § 502.253. It is this statutorily-mandated rate of return on principal, and not the outlandishly ambitious 82% annual return predicted by Auction Block, that would compensate Auction Block for loss of the time value of money if it prevails. “[I]nterest is, by nature, an allowance for the time value of money, and awarding both interest and any other form of allowance for the time value of money is inherently duplicative” *Computer Systems Engineering, Inc. v. Qantel Corp.*, 571 F.Supp. 1379, 1383 (D.Mass.1983).

4. Auction Block’s Predictions of Astounding Returns on Reinvested Capital are Factually Unpersuasive

Finally, even if the FMC were to entertain Auction Block’s argument that it would have reinvested \$236,301 in rate differentials to generate \$912,767 in additional profits, the argument is unpersuasive factually.¹⁹ Auction Block’s hypothesis is that, if \$236,301 in additional working capital had been available, it could have bid 5¢ per pound higher on a range of fish auctions, and so won more bids and purchased more fish which it would have processed for more profits. See Complainants’ Brief, 97.

The first flaw is causation of damages. If The Auction Block Co.’s business plan for generating 82% annual returns was realistic, it would have been funded regardless of the rates the City charged for crane and wharf use. The Auction Block

¹⁹ Because the statute and rule set the pre-judgment interest rate, there in fact is no need to conduct case-by-case evidentiary evaluations of the investment returns the Complainants might have been able to generate had they had access to money at an earlier point of time.

Co.'s business plan did not require assembling \$236,301 in additional working capital all at once. The fish are purchased on a lot-by-lot basis, so only a minimal incremental investment would be necessary. To use Auction Block's own example, it costs just \$250 to bid 5¢ per pound higher on a 5,000 lb load of fish. See Lost Profit Report, CX 164. Under Auction Block's theory, that nominal additional incremental investment would generate spectacular returns that could be reinvested by bidding 5¢ per pound higher on the next several lots of fish, making the business plan essentially self-funding. Moreover, at least after the first few lots of fish were successfully purchased and processed for a handsome profit, investors would have had ample incentive to supply capital in even larger increments. In short, Auction Block has failed to prove that the City's decision to charge tariff crane and wharf rates caused it to lose the capital needed to earn \$912,767 in additional profits.

The second flaw is the unrealistically high return-on-investment that Auction Block projects. Government regulation sets limits on catch, so bidding 5¢ more per pound will not generate an unlimited additional supply of fish to buy. For example, the government has reduced the maximum halibut catch by 56% in the last two years. See Hogan Deposition, 88:6-10, RX 35. Furthermore, The Auction Block Co.'s refrigeration system came online only very recently, in 2012, so it is doubtful The Auction Block Co. had the capacity to process substantially more fish from 2009 through 2012 than it actually purchased and processed. See Hogan Deposition, 63:8-13 (freezer operational in February 2012), RX 23. Moreover, long-term buyer loyalty is a major factor with respect to some species, including salmon, so offering 5¢ more per pound to fishermen will not necessary result in a vast increase in fish

purchases. See Hogan Deposition, 73:8-18 (salmon market is more dependent on pre-existing relationships than price), RX 27. Charles Sparks reviews these factors. See Sparks Aff. ¶¶ 13-15, RX 1267-1268.

Jessica Yeoman of The Auction Block Co. testified by deposition that purchasing and processing fish soaked up the vast bulk of The Auction Block Co.'s business efforts but generated only a small portion of its revenues, meaning that the line of business was largely unprofitable, while offloading-for-others required far less work and generated far more receipts. See Yeoman Deposition, 45:18 - 47:6, RX 608-610. As purchasing and processing fish was unprofitable even when not paying an extra 5¢ more per pound for the fish, it seems highly unlikely that purchasing and processing would suddenly have become spectacularly profitable if funds were found to bid an extra 5¢ per pound for fish, in order to increase fish purchases.

The Auction Block Co. took a great risk in trying to construct and operate a new processing facility in a fresh fish market governed by a fisheries management system that has drastically reduced fishing quotas over the last four years. The City recognized this risk at the time it accepted Auction Block's response to its RFP and hoped that this risk would prove wise. While it is unfortunate that it did not, the City cannot serve as a scapegoat for Auction Block's business decisions.²⁰

²⁰ In the event that the ALJ determines that damages are due in this case, the City respectfully requests an opportunity to separately address the calculation of these damages as Auction Block has failed to provide adequate data to calculate such damages at this time.

I. The Statute of Limitations Bars Reparations

In addition to the plethora of flaws in Auction Block's damages claims, Auction Block's claims for reparations are barred by the statute of limitations and thus should be dismissed.

The Act specifically sets out a three-year statute of limitations for any claims seeking reparations damages: "If the complaint is filed within three years after the claim accrues, the complainant may seek reparations for an injury to the complainant caused by the violation." See 46 U.S.C. § 41301(a). The FMC has adopted "the 'discovery rule' to determine when a cause of action accrues under the Shipping Act." *Mahe*, F.M.C. No. 08-03 at 12. Under the discovery rule, "a cause of action accrues when a party knew or should have known that it had a claim." *Id.*

Recent developments in the FMC's interpretation of the discovery rule are important to this case. In *Mahe*, *supra*, ALJ Clay G. Guthridge addressed whether the Act's statute of limitations barred a claim based on discrimination in lease negotiations and in the lease itself. *Id.* *Mahe* sought reparations from and a cease and desist order against the Port Authority for purported Act violations. *Id.* at 2. *Mahe* claimed the Port Authority unreasonably prejudiced him, provided preference to others, refused to negotiate with him, failed to enforce reasonable regulations, and continued these discriminatory practices. *Id.* at 3. Applying the discovery rule, ALJ Guthridge found that the statute of limitations barred *Mahe*'s reparations claim. *Id.* at 2. ALJ Guthridge found that *Mahe* entered into a lease with the Port Authority on October 1, 2000, and at that point the statute of limitations for any claim based on lease negotiations or lease terms began to run. *Id.* at 22, 26. *Mahe* filed its claim against the Port Authority on June 3, 2008 -- over 7 years after the claim accrued and

the statute of limitations began to run. *Id.* at 2-3. Thus, the three-year statute of limitations had run, barring Maher’s reparations claim. *Id.*

The ALJ’s decision in *Maher* was rooted in the fact that on October 1, 2000 – when Maher signed the lease – Maher knew the lease terms and “more importantly the differences between [its] Lease and [the other] Lease.” *Id.* at 23. Whether Maher knew the Port Authority’s reasons for including different terms in the two leases did not impact the running of the statutes of limitations. *Id.* at 26. Moreover, Maher failed to establish a “continuing violation” for statute of limitations purposes. *Id.* at 33. Maher alleged that “claims accruing outside of the limitations period do not bar complaints seeking reparations for claims of continuing violations inside the limitations period.” *Id.* at 34. ALJ Guthridge clarified, however, that the continuing violation rule required the party to “commit an overt act of discrimination within the limitations period for a plaintiff/complainant to receive damages.” *Id.* A party must engage in “a new and independent act that is not merely a reaffirmation of a previous act” and the new act must inflict new injury for it to be a continuing violation. *Id.* at 35. In other words “[a]cts that are merely ‘unabated inertial consequences’ of a single act do not restart the statute of limitations.” *Id.* at 37. As for Maher’s situation, ALJ Guthridge asserted that any overt discriminatory act by the Port Authority was committed on or before the parties signed the lease on October 1, 2000. *Id.* at 41. ALJ Guthridge affirmed that the Port Authority did not engage in an overt discriminatory act in the three years before Maher filed its claim. *Id.* As a result, ALJ Guthridge concluded that the statute of limitations barred Maher’s reparations claim.

1. The Facts Support Dismissal Due to Statute of Limitations

The Act's statute of limitations bars any reparation claim Auction Block asserts against the City based on contract negotiations or contract terms. Auction Block filed its claims on April 10, 2012, more than four years after signing its lease with the City on March 26, 2008. Like in *Maher*, Auction Block is alleging that the purported violations of the Act began with the signing of their lease. Also like in *Maher*, Auction Block was fully aware of the allegedly discriminatory terms of the Icicle Lease when it signed its own lease. In June 2007, Auction Block sent the City a proposed lease clause for use of the Fish Dock Crane, stating "the clause is based on the Icicle lease." See Timeline, RX 326. On March 5, 2008, as the parties were finally getting ready to sign, Auction Block president Kevin Hogan wrote to the City Manager: "what we are looking at is the same as the provisions in the fish factory and Icicle leases." *Id.*, RX 350, March 5, 2008 email from K. Hogan to W. Wrede. Auction Block has even admitted knowledge of the allegedly discriminatory terms in its answers to interrogatories. See Complainants' Responses to the City of Homer's Amended First Discovery Request to Complainants, Interrogatory No. 4, CX 0035. Consequently, as in *Maher*, Auction Block's claims are barred by the statute of limitations.

Complainants' delay in filing their complaint is even more egregious upon consideration of the relationship and role that Kevin Hogan has had with the City. Mr. Hogan served on both the PHAC and the EDAC at the time of Harbor Leasing Lease negotiations. See Mayor's Certificates of Resignation and Letter of Resignation, RX 711-713. As a member of those commissions, Mr. Hogan had detailed knowledge of the City's leasing policies and its relationship with Icicle and its other lessees. Mr. Hogan then became an elected member of the City Council on

October 20, 2009, and as such was able to review all the City policies and laws and propose amendments to these laws. Mr. Hogan voted in favor of Tariff amendments as recently as 2011, yet never proposed any Tariff amendments while sitting on the Council. See April 25, 2011 City Council Minutes, RX 714-727; City of Homer Resolutions Regarding Tariff Revisions, RX 1127-1195; September 17, 2012 Affidavit of Johnson at ¶ 3, RX 1126. Mr. Hogan did, however, express his support for the Icicle Lease to the City Administration in informal conversations occurring while he held a position with the City. See Wrede Aff. (September 17, 2012) at ¶ 5, RX 1080.

At the very least, Auction Block *should have* been aware of the allegedly discriminatory terms of the Icicle Lease upon entering into the Harbor Leasing Lease, thereby triggering the limitations period. The Icicle Lease and its amendments were all publically recorded, and Auction Block repeatedly references the recorded location of the Icicle Lease in its Fourth Amended Complaint. Kevin Hogan himself has admitted that terms in the Harbor Leasing Lease were based upon the Icicle Lease. See Hogan Deposition at 233:12-25 and 234:1-4, RX 52-53. Finally, Auction Block's argument that it entered into a lease with the City "under protest" because the City had refused to give it all the beneficial terms of the Icicle Lease is further proof that Auction Block has missed the statute of limitations. The Harbor Leasing Lease was executed on March 26, 2008 and recorded on February 19, 2009. Both of these dates are more than three years before Auction Block filed its complaint against the City on April 10, 2012.

2. Auction Block's "Continuing Violations" Argument is Unavailing

Auction Block argues that because it has alleged that the City's violations of the Act are "continuing into the future," the statute of limitations has not run. See

Complainants' Brief, 57. The legal authorities cited by Auction Block for this argument are inapposite. Auction Block relies almost entirely on *International Shipping Agency, Inc. v. The Puerto Rico Ports Authority*, F.M.C. No. 04-01 (A.L.J. September 17, 2004), calling the case "compelling and controlling." See Complainants' Brief, 56-58. But *International Shipping Agency, Inc.* has no relevance here. *International Shipping Agency, Inc.* ("Intership") accused The Puerto Rico Ports Authority ("PRPA") of failing to comply with the terms and obligations of the agreement between the parties and unreasonably discriminating against Intership in its treatment of other port users. See generally *International Shipping Agency, Inc. at 23-24*. While this is a broad generalization of the multitude of claims brought by Intership, none of Intership's claims challenged the lawfulness of the provisions of the parties' agreement. On the contrary, Intership was seeking redress specifically because PRPA failed to comply with the terms of the parties' agreement. The issue in *International Shipping Agency, Inc.* is the repeated and continuing violation of the agreement terms and not the legality of the agreement terms themselves.

The FMC's decision in *International Shipping Agency, Inc.* is actually in perfect harmony with *Maher*. In *Maher*, the ALJ expressly quoted *Puerto Rico Ports Authority*, stating that in that case:

[a]lthough PRPA's unacceptable activities may have begun more than three years ago, its liability for violations under the Shipping Act does not arise from a single discrete act that occurred in the past and is now complete. Rather, PRPA's liability arises from continued violations of obligations that continue to exist under the Agreement.

F.M.C. No. 08-03 at p. 40.

The ALJ in *Maher* continued, however, stating: “In contrast, Maher’s claim for a reparation award for the negotiations that resulted in Lease EP-249 and Lease EP-249 itself arose from acts ‘that occurred in the past and [are] now complete.’” *Id.*

Auction Block further misconstrues FMC precedent by claiming the *Maher* case failed to address the FMC regulation regarding “continuing violation.” See Complainants’ Brief, 57. Despite Auction Block’s claims, the *Maher* case clearly addressed the regulation cited by Auction Block – 46 C.F.R. § 502.63(b). See *Maher*, F.M.C. No. 08-03 at 33. The cited regulation states: “The Commission will consider as in substantial compliance with a statute of limitations a complaint in which complainant alleges that the matters complained of, *if continued in the future*, will constitute violations of the shipping acts.” 46 C.F.R. § 502.63(b) (emphasis added). In *Maher*, the ALJ refers to these regulations as the “continuing violation rule.” F.M.C. No. 08-03 at 33. In *Maher*, the ALJ noted that Maher alleged that “claims accruing outside of the limitations period do not bar complaints seeking reparations for claims of *continuing violations* inside the limitations period.” *Id.* at 34 (emphasis added). The ALJ continued by focusing its analysis on FMC precedent interpreting the continuing violation rule. *Id.* The ALJ clarified that the continuing violation rule required the party to “commit an overt act of discrimination within the limitations period for a plaintiff/complainant to receive damages.” *Id.* The ALJ ultimately found that the execution of the lease constituted the overt act of discrimination, if one existed, and that imposition of the terms of that lease were simply “unabated inertial consequences” of the original act. See generally *Maher*

at 35, 41. In other words, “[a]cts that are merely ‘unabated inertial consequences’ of a single act do not restart the statute of limitations.” *Id.* The ALJ concluded, stating:

Maher has not cited any contrary controlling authority that would support a holding that current operation under the terms of Lease EP-249 is a continuing violation of the Act. Therefore, the continuing violation rule does not support Maher's claim for a reparation award for alleged discrimination in negotiations leading up to signing Lease EP-249 and the terms of Lease EP-249 itself.

Id.

As in *Maher*, the conduct alleged by Auction Block arose from the single overt act of executing the lease at issue, an act which contained the allegedly discriminatory conduct. Any negotiations occurring before the execution of the lease would also be subject to the statute of limitations since such negotiations would have occurred more than three years ago. Thus under the regulation cited by Auction Block and the related precedent analyzed in *Maher*, Auction Block has failed to assert a continuing violation and its reparation claims are thereby barred by the statute of limitations.

3. The Icicle Lease is Valid and In Full Force and Effect

Auction Block attempts to evade the statute of limitations by arguing that the City's lease with Icicle Seafoods is invalid. See Complainants' Brief, 58-67. Auction Block fails to explain how the invalidity of the Icicle Lease would impact its own failure to file a complaint within the Act's deadline, but appears to contend that the absence of a valid Icicle lease creates a “continuing violation” that tolls the limitations period. Despite Auction Block's claim, the Icicle Lease is valid as a matter of law. Icicle and the City agree that the Icicle Lease is in full force and effect. See Woodruff Aff. (October 9, 2012) at ¶¶ 12-13, RX 1106; Wrede Aff. (October 10, 2012) at ¶ 13,

RX 1084. Both the City and Icicle have consistently and substantially complied with the terms of the Icicle Lease since its execution and neither party in any way refutes the validity of the Icicle Lease. See Woodruff Aff. (October 9, 2012) at ¶¶ 12-13, RX1106; Wrede Aff. (October 10, 2012) at ¶ 17, RX 1084. See November 23, 2004 letter from Icicle to the City, RX 86-90; April 2006 email correspondence between City officials regarding Icicle Seafoods, CX 0107-108. Consequently, it would be nonsensical to permit Complainants, outside entities without standing who are not parties to the Icicle Lease, to ignore the intent and positions of the actual parties to the lease. See *Velasco v. Security National Mortgage Company*, 823 F.Supp. 2d 1061, 1067 (D. Haw. 2011) (absent an enforceable contract right, a party lacks standing to challenge the validity of a contract).

4. The Harbor Leasing Lease is Valid and in Full Force and Effect

Perhaps more puzzling than Auction Block's attempt to invalidate the Icicle Lease is its attempt to negate the existence of its own lease with the City. March 26, 2008, the date of the Harbor Leasing Lease, is indisputably the date the instant action accrued under 46 C.F.R. § 502.63.²¹ Auction Block does not dispute that it duly executed the Harbor Leasing Lease, recorded that lease, and complied with that lease for more than four years (and continues to do so to this day). Indeed, Mr. Hogan actually admitted that he entered a long-term lease with the City and that

²¹ Complainants assert that the date applicable to the statute is the date the Harbor Leasing Lease was recorded (February 19, 2009) rather than the date it was signed (March 26, 2008). Complainants' Brief, 68. The distinction is irrelevant. February 19, 2009 is still more than three years prior to the date of Complainants' action (April 10, 2012), and the claims therein are still barred.

he has not terminated that lease. See Hogan Deposition, 248:8-12, RX 56; 235:21-23, RX 54.

Instead of a direct challenge, Auction Block attempts to work around the lease date and push its claims within the limitations period by claiming: (1) it was “under duress” when it entered into the Harbor Leasing Lease; (2) damages hadn’t accrued when it entered the Harbor Leasing Lease and so it couldn’t bring its claim at that time; (3) Kevin Hogan was concerned he could not sue the City while sitting on the Council so any claims were tolled until he resigned; and (4) the City Attorney advised the Council that it could enter into agreements such as the Icicle Lease that deviated from the Tariff, so Auction Block relied on that advice and didn’t bring suit. See Complainants’ Brief, 54-73. Despite the novelty of these allegations, none of them are grounded in law or supported by the facts.

a. *There is No Evidence of Duress in the Auction Block Lease*

Auction Block’s duress argument is defeated by the inconsistency in its own logic. Auction Block asserts that “Mr. Hogan was compelled to sign what he regarded as a short-term lease under duress and under protest on behalf of the Complainants until he could obtain a long-term lease with the City with workable terms.” See Complainants’ Brief, 68. This assertion is nonsensical. If the short-term lease was signed under duress then any claim of duress disappeared the last day the lease was in effect, March 26, 2008 (when it was replaced by a long-term lease). Such duress would have no impact on the validity of the long-term Harbor Leasing Lease, a separate agreement under separate terms. The date of that lease is the

date the statute of limitations began to run, making any duress in the signing of a prior short-term agreement completely irrelevant.

Assuming that Auction Block actually intends to argue that duress voids the long-term Harbor Leasing Lease, this argument too must fail. Duress only exists when: (1) one party involuntarily accepted the terms of another, (2) circumstances permitted no other alternative, and (3) such circumstances were the result of coercive acts of the other party. *Totem Marine & Tug Barge v. Alyeska Pipeline Serv. Co.*, 584 P.2d 15, 21 (Alaska 1978). While Auction Block recites these elements, it makes no effort to provide any substantive support for them. See Complainants' Brief, 68.

Passing over the first prong of the test due to its subjective nature, Auction Block fails to show that it had "no reasonable alternative" but to sign the Harbor Leasing Lease on March 26, 2008. In fact, it had a simple alternative available at all times. It was already party to a short-term lease with the City on the property at issue. See Hogan Deposition, 240:11-15, RX 55. Facing no eminent eviction from the property, Auction Block could have simply resumed negotiations or brought this very action against the City for relief.

The third prong of duress – "coercive acts" that are criminal, tortious, or morally reprehensible – is where Auction Block's claim undoubtedly falls apart. A truly coercive act is most typically a threat. See *Zeilinger v. Sohio Alaska Petroleum Company*, 823 P.2d 653, 658 (Alaska 1992) (employee could not invalidate separation agreement with employer where employer undertook no action which could be considered threatening). While "deliberately withholding payment of an acknowledged debt" may constitute a wrongful act, merely driving a hard bargain

because of another party's dire financial straits is not. See *Totem Marine*, 584 P.2d at 24 as compared to *Northern Fabrication Co., Inc. v. UNOCAL*, 980 P.2d 958, 961 (Alaska 1999) (contractor seeking to void a release between it and drilling platform owner could not "use its financial weakness as a sword to negate a properly executed release"). Even if that bargain causes financial troubles there is no duress without "wrongful acts or threats" in the process. *Wassink v. Hawkins*, 763 P.2d 971 (Alaska 1988) (agreement signed by owners of dairy farm in order to avoid foreclosure not made under duress because foreclosure was justified).

Auction Block does not assert any coercive act or conduct by the City. Instead, Auction Block alleges that the City refused to agree to sign a lease until it received at least some of the terms it wanted. See Complainants' Brief, 68. Of course, in the midst of negotiating a contract such demands are both reasonable and expected. The City's willingness to execute a short-term lease to permit Auction Block to operate its business during negotiations for a long-term lease exemplifies the City's efforts to accommodate Auction Block rather than threaten or unduly pressure it. Further, the City's refusal to cede to Auction Block's demands during negotiations stemmed from its unwillingness to deviate from the City Tariff and its efforts to promote uniform application of the rates. The City believed it could not give Auction Block the discounts enjoyed by Icicle because (1) Auction Block had not requested them when it filed its response to the City's request for proposal and (2) the City believed that providing Auction Block such discounts would unreasonably discriminate against the companies which are actually similarly situated to Auction

Block, as those companies all pay the published Tariff rates. Such a position is hardly criminal, tortious, or morally reprehensible.

Presuming that Auction Block's assertions are true and the City categorically refused to grant Auction Block the terms it sought, such a position by the City still would not constitute duress. It is well established in caselaw that a hard negotiating stance cannot be considered "duress." See *Mullins v. Oates*, 179 P.3d 930, 937 (Alaska 2008) (purchaser's settlement with vendor after mediator cast negative assessment of purchaser's case was not formed under duress). A hard bargain is simply not the same thing as a threat. The FMC has made it clear: "one may not void a contract on the grounds of duress merely because he entered into it with reluctance, the contract is disadvantageous to him, the bargaining power of the parties was unequal or there was some unfairness in the negotiations preceding the agreement." *Palmetto Shipping & Stevedoring Company, Inc. v. Georgia Ports Authority*, 1987 WL 209056, *53 (F.M.C.) (tariff provision requiring local agents to be responsible for the port's terminal charges was not unlawful and vessel owner's willing compliance with it was not the product of duress). Like the purchaser in *Mullins*, Auction Block simply didn't get the deal it wanted. The requisite "criminal, tortious, or morally reprehensible conduct" isn't there.

Even if Auction Block could point to a coercive act by the City, it would also have to demonstrate a causal link between that act and the circumstances of economic hardship. Auction Block has submitted no evidence that the City engaged in any coercive act that negatively impacted Auction Block's business. In *Hawken Northwest, Inc. v. State Department of Administration*, 76 P.3d 371 (Alaska 2003),

the Alaska Supreme Court affirmed a finding of no economic duress after a successful bidder on an invitation to bid was required to sign a release before the project owner would agree to a long-term lease. Although the plaintiff repeatedly asserted that it signed the release only because it feared imminent bankruptcy, it provided no proof. While the court did not question the severity of the plaintiff's economic hardship, the lack of a causal link between the claimed wrongdoing and economic harm invalidated the plaintiff's claim. *Id.* at 378-379. Like in *Hawken*, this case presents no causal link. If negotiations with the City really did put Auction Block on the precipice of "financial collapse," then Auction Block has given no proof of it.

Moreover, even if the FMC determined that the City subjected Auction Block to "criminal, tortious, or morally reprehensible conduct that left the plaintiff with no reasonable alternative to accept the terms," the resulting duress would not toll the statute of limitations.²² Duress does not *ipso facto* void a contract. At most, duress would render the Harbor Leasing Lease *voidable* by one of the contracting parties. *See Totem Marine*, 584 P.2d at 24. "A contract or release, the execution of which is induced by duress, is voidable, not void, and the person claiming duress must act promptly to repudiate the contract or release or he will be deemed to have waived his right to do so." *DiRose v. PK Management Corp.*, 691 F.2d 628, 633-634 (2nd Cir. 1982). Auction Block has *never* repudiated its lease, or even informed the City that it was contemplating doing so. Instead, it has enjoyed the benefits of the

²² Even if Complainants assert the Harbor Leasing Lease is void in Alaska (where such an action belongs), the court would bar the claim because of the State's three-year statute of limitations on actions in contract. *See* A.S. 45.05.275. The passage of time since Complainants signed their lease bars their present claims at every turn.

Harbor Leasing Lease for the past four years. See Auction Block application for Emerging Energy Technology Grant, CX 0012. Even presuming Auction Block's claims of duress have merit; the Harbor Leasing Lease would be voidable, but not void.

Proof of duress on the merits will also fail to toll the statute because Auction Block has by its ongoing performance waived the claim. A party cannot enjoy the benefits of a contract and then later claim "duress" because of their dissatisfaction with its terms. See *In re Kloster*, 127 Ill.App.3d 583, 585 (App.Ct.1984) ("An agreement, even if signed under duress alleged by one party, is binding if later conduct affirms it"); see also *Sutter Home Winery, Inc. v. Vintage Selections, Ltd.*, 971 F.2d 401, 408 (9th Cir. 1992) (wine distributor barred from challenging validity of distributor agreement on grounds of duress because distributor accepted benefits of agreement for four years before seeking rescission). Again, even assuming Complainants' baseless accusations of City misconduct are true, Complainants' ensuing compliance – and failure to ever assert its lease was void in *any context* prior to this proceeding – keeps the lease valid. With each unresisting payment to the City, Auction Block has ratified the Lease.

Finally, related to Auction Block's duress argument is its "ripeness" argument for tolling the statute of limitations. Auction Block has argued that all the elements of the causes of action were not present and Auction Block not yet damaged when it signed its lease. Auction Block appears to argue that between the signing of the Lease on March 26, 2008, and the running of the statute of limitations on March 26, 2011, Auction Block accrued no damages. Yet its Complaint specifically cites to four

years of damages. There is no dispute that Auction Block is claiming damages during the limitations period. Auction Block may mean that the March 26, 2008 date is inapplicable because there were no damages on *that specific day*. But the statute runs from the date of injury, not “the date of damages.” See 46 C.F.R. § 502.63

b. Mr. Hogan’s Position on the City Council Has No Impact on the Statute of Limitations

In perhaps its most absurd assertion, Auction Block argues that it cannot be subject to the statute of limitations because Mr. Hogan delayed action due to “concern” that he could not bring an action against the City while sitting on the Homer City Council. See Complainants’ Brief, 55. Despite Mr. Hogan’s concern, there is no local or state law prohibiting Mr. Hogan from suing the City in his individual capacity while serving on the City Council. Indeed, a city council member in the City of North Pole, Alaska actually did just that and while he did not succeed on the merits, his suit was not barred by his position with the city he served. See *Acevedo v. City of North Pole*, 675 P.2d 130 (Alaska 1983).

Complainants’ citation to HCC 1.18.030 is at best a smoke-and-mirrors attempt to hide the lack of support for Complainants’ position and, at worst, an intentional misrepresentation of the law. HCC 1.18.030 prohibits City officials and the City Manager from participating in any “official action” in which, among other things, “the person is an applicant, a party or has a substantial financial interest in the subject of the official action” or “the person does or will recognize a substantial financial interest as a result of the action.” “Official action” is defined as:

A recommendation, decision, approval, disapproval, vote, or other similar action, including inaction, (when it is the equivalent of a decision to take negative action), made while serving in the capacity of city

official or city manager, whether such action or inaction is administrative, legislative, quasi-judicial, advisory, or otherwise.

HCC 1.18.020(j), RX 1313-1322. In other words, the City Code prohibits a City official from voting on or participating in a decision in his or her capacity as a City official in which that official has a substantial financial interest. In essence, this provision prohibits Council members like Mr. Hogan from voting on their own lease applications or requests for variances on their own property. This provision would not, however, have any effect on a City official's right to bring a civil suit against the City or any sort of other complaint before a non-City entity.

Similarly, no provision of the City Code prohibited Mr. Hogan from challenging the Tariff rates and the uniform application of lease terms, even while he was negotiating Auction Block's lease. While HCC 1.18.020 prohibits a City official from participating in an "official action" in which he has a substantial financial interest, HCC 1.18.030(5)(ii) expressly permits City officials to participate in official actions where the official's gain or loss "would generally be in common with all other citizens or a large class of citizens." Amendments to the Tariff or City Code provisions are universally applied and affect all citizens subject to them. See generally HCC 1.18, RX 1313-1322. Thus, under HCC 1.18.030(5)(ii), Mr. Hogan could have proposed an amendment to the Tariff, the City Code or the lease policies and yet chose not to do so.

Mr. Hogan must have had some awareness of this provision since he concedes he did participate in a unanimous vote to approve changes to the Tariff rates. See Complainants' Brief, 23. Further, Mr. Hogan was actively involved in revisions to the City's leasing policies while sitting on PHAC. See Hogan Deposition,

207:19-25; 208:1-8, RX 44-45; Hogan Aff. (October 2, 2012) at ¶¶ 19-20, CX 0146. There were various courses of action Mr. Hogan could have taken despite his status as a Council member, including filing this lawsuit within the limitations period. He took none of them.

c. *The Statute of Limitations Was Not Equitably Tolled*

Finally, Auction Block not only claims an “impression” that Mr. Hogan’s status prevented Auction Block from filing suit, it unfairly proceeds to blame this impression on the City. Auction Block claims “equitable estoppel” tolls the statute of limitations because the City unjustly asserted that Mr. Hogan could not bring suit and Auction Block relied on that assertion. See Complainants’ Brief, 54-56. This argument is called “equitable tolling.” Equitable tolling only occurs when a defendant’s wrongful conduct “lulls a plaintiff into inaction or otherwise induces him to delay filing a claim until the limitation period has run.” *Kaiser v. Umialik Insurance*, 108 P.3d 876, 880 (Alaska 2005). Mr. Hogan must be able to argue that he “relied on the defendant’s fraud by either consciously relying on an affirmative misrepresentation or failing to discover fraudulently concealed evidence.” *Law Offices of Steven D. Smith, P.C. v. Borg-Warner Security Corp.*, 993 P.2d 436, 446 (Alaska 1999).

The equitable tolling argument must fail because Mr. Hogan’s subjective “impressions” were of his own making. Mr. Hogan was not relying on the representations of anyone when he interpreted the City Code to mean that he was barred from bringing suit. Moreover, his conclusion that suit was barred was not reasonable. A cursory reading of the Code would have clarified that a Council member is perfectly free to bring a civil action against whomever they choose, so

long as they abstain from participating in proceedings concerning that action before the Council.

Auction Block attempts to bolster its equitable tolling argument by stating Mr. Hogan opted against a lawsuit because of the representations of the attorney for the City at a December 12, 2011 Council meeting. See Complainants' Brief, 23. At the meeting, the attorney stated that the City Tariff contained a provision permitting the City to negotiate lease provisions with terms outside those of the Tariff. This argument fails for numerous reasons. The first is that the City's counsel was speaking to his client, the City of Homer, and not to Mr. Hogan in his private capacity as a business owner. Tolling the statute of limitations every time a person declines to bring suit because of a statement made in a public forum would have enormous negative policy implications.

What's more, there was no "affirmative misrepresentation" or "concealment" by the attorney because his remark was accurate. The Tariff provides: "Right is reserved by the City of Homer to enter into agreement with carriers, shippers, consignees, and/or their agents concerning rates and services, providing such agreements are consistent with existing local, state and federal law governing civil and business relations of all parties concerned." See Tariff No. 600, RX 728. The City's attorney correctly opined that agreements such as the Icicle Lease were permitted by the Tariff. There was no intentional deception or obfuscation, such as the kind required to toll the statute. As a matter of law, there is no "estoppel" tolling the statute of limitations.

J. Sanctions Against Auction Block Are Appropriate Due to Its Failure to Comply with Discovery

Complainants' conduct during discovery has created an issue which the ALJ in a December 21, 2012 order asked the City to include in its Prehearing Brief. That issue is Complainants' complete recalcitrance over production of timely requested documents, the release of fish ticket processor data from the ADF&G, and the ensuing costs to the City of pursuing the documents and making a successful motion to compel production of same. The City filed a Motion to Compel production of discovery on October 29, 2012. See Motion to Compel Briefing, RX 729-770. The ALJ ordered Auction Block to sign the release, and produce any documents upon which it intended to rely.

Auction Block produced some documents and returned a signed copy of the release but with the "hold harmless" provision crossed-out in blue ink. See Request for Release of Summary Fish Ticket Data to a Third Party, RX 771-772. The documents submitted to the City were substantially bills of lading. Auction Block never produced business records that would show how much processing Auction Block actually had done in the last four years. See Wells Aff. (January 3, 2013) ¶ 7, RX 1311; Auction Block's Discovery Responses, CX 0020-55. Although the City determined any further efforts to seek discovery from Auction Block would be futile at this late hour, the City did choose to at least attempt to secure a properly executed release for fish ticket processor data. See Wells Aff. (January 3, 2013) ¶ 8, RX 1311. Because ADF&G would not release fish ticket information with an altered release form, the City moved to compel production again, and asked for sanctions against Auction Block. See Motion for Sanctions briefing, RX 773-835. Auction Block finally

delivered to counsel for the City a signed, notarized, and unaltered release on December 23, 2012. ADF&G delivered a spreadsheet of fish ticket data to the City on December 28, 2012. See ADF&G Fish Summary Report for the Auction Block Co., 2008-2012, RX 836-1078.

Although Auction Block eventually produced a signed release, the City still seeks a sanction of reimbursement of all reasonable attorney's fees following Auction Block's willful violation of a discovery order, pursuant to 46 C.F.R. § 502.210(b)(2).

The Federal Rules of Civil Procedure state:

if the requested discovery is provided after the motion was filed, the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising the conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees."

See Fed. R. Civ. P. 37(a)(5).

The City has been extremely prejudiced by Auction Block's refusal to fully comply with the discovery rules. Although the City now has received the fish ticket processing data requested from ADF&G, it is apparent from a review of this data that Auction Block unexpectedly failed to differentiate between fish Auction Block processed and fish it offloaded, and instead reported itself as the "processor" on substantially all fish it handled in 2008 through 2012. See Wells Aff. (January 3, 2013) at ¶ 9, RX 1311.; Sparks Aff. (January 3, 2013) at ¶ 8, RX 1265-1266. Auction Block's delay has foreclosed the City from working with the State to obtain more specific reports from other agencies such as the Commercial Fisheries Entry Commission or the Federal Department of Commerce, National Fisheries Service, of Auction Block's activities before the filing date for this brief. See Auction Block's Discovery Responses, RFP Nos. 4, 6, CX 49-50.

In light of the considerable expenses incurred pursuing discovery that Auction Block only produced in part and only after willful violation of a discovery order, the City now seeks a sanction of \$14,739.00, such sum being the amount of attorney's fees incurred pursuing a signed release. See Wells Aff. (January 3, 2013) at ¶ 10, RX 1311

VI. CONCLUSION

The FMC does not have jurisdiction in this matter as the Act was never intended to regulate the local commercial fishing industry. Even if jurisdiction is established, however, the Icicle Lease does not restrain or negatively impact on competition in the Southcentral market and thus the City need not justify the allegedly preferential treatment afforded Icicle. Further, any preferential treatment by the City was reasonable and in full compliance with the Act as were all negotiations between the City and Auction Block. In the event that the ALJ determines that the City's conduct violated the Act in any way, Auction Block still cannot recover damages as it fails to prove an injury suffered as a result of the City's conduct and reparations are barred by the statute of limitations. Finally, Auction Block's direct violation of an order issued by the ALJ and its failure to cooperate during discovery necessitates the award of attorney's fees to the City for its efforts in compelling these documents. For all of these reasons and the reasons stated throughout this brief, the City respectfully requests that Auction Block's Complaint be dismissed.

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DATED this 4th day of January, 2013.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 4th day of January, 2013, a true and correct copy of the foregoing was served on the following in the manner indicated:

Mr. Steven J. Shamburek
3700 Moss Drive
Annandale, Virginia 22003

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

Respondents' Appendix (Volumes 1 and 2) was served on Mr. Shamburek by U.S. mail to the above address.

BIRCH HORTON BITTNER & CHEROT

By: _____
Katherine L. Heim