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

RESPONDENTS' RESPONSE TO COMPLAINANTS' PREHEARING BRIEF

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I. INTRODUCTION

On December 18, 2013, the Federal Maritime Commission ("FMC") granted the Motion and Memorandum for Oral Argument filed by Complainants, the Auction Block Company and Harbor Leasing, LLC (collectively, "Auction Block"). The FMC limited oral argument to the following issue:

> Whether the Port of Homer, which provides terminal services to common carriers at two docks within the Port, is a [Marine Terminal Operator] under the Shipping Act of 1984, 46 U.S.C. § 40102(14), with regard to the leasing and tariff practices of the Port and its dockside cargo handling facilities, which do not currently service common carriers.

See Order Granting Request for Oral Argument, 2-3.

Consequently, this brief focuses on whether the City of Homer's status as a Marine Terminal Operator ("MTO") is determined on a facility-by-facility or a municipality-wide basis. Administrative Law Judge Erin Wirth correctly conducted a facility-by-facility analysis and determined that the City of Homer, Alaska and its port (collectively the "City") is not an MTO with regard to leasing and tariff practices of the port and its dockside cargo handling facilities, which do not currently service common carriers, and in particular with regard to the Fish Dock.[1]

Auction Block's Prehearing Brief addresses issues outside the scope of oral argument. While the City does not address those issues here, it has addressed them exhaustively in earlier pleadings in this proceeding, including, but not limited to, the City's Reply to Auction Block's Exceptions.

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[1] The ALJ properly determined that the City does not service common carriers at the Fish Dock. Support for the ALJ's determination can be found in the City's Reply to Complainants' Exceptions and Response to Complainants' Motion and Memorandum for Oral Argument on Complainants' Exceptions ("City's Reply to Auction Block's Exceptions"), 13-18.

II. BACKGROUND

A. The City of Homer and Its Port

Homer, Alaska is a small seaside community of approximately 5,000 people in Southcentral Alaska. The City owns and maintains port and harbor facilities and most of the surrounding uplands adjacent to those facilities located on a 4.5-mile peninsula 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). Mr. Hawkins' affidavit is attached hereto as Exhibit A and may be used at the hearing for illustrative purposes. *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. Two of these facilities, the Deep Water Dock and the Pioneer Dock, lie at the very end of the Spit and outside the City harbor. *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

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Dock is the terminal facility where large vessels such as common carriers, scrap metal barges, the 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 Walt 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 were $855,342 for 2013 and $828,309 for 2012.

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Id. at ¶ 11. 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, resulting in a loss to the City's Port and Harbor Enterprise of $18,688. Hawkins Aff. (January 2, 2013) ¶ 19, RX 1227.

B. 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 fish 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 Seafoods, Inc. ("Icicle"), the other party to the lease challenged by Auction Block. However, even Icicle does not own or have exclusive use of the fish dock or use of the equipment located on that dock. *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

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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.

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. *See* Wrede Aff. (January 2, 2013) *at* ¶ 17, RX 1233. 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,

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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 fishery areas 3A and 3B. *See, i.e.,* Icicle Deposition, 25:23-25, 29:13-18, RX 2, 5. Consequently, Homer is reliant upon its ability to negotiate with fish processors and commercial fishing enterprises to foster the fishing industry and fund the services on the Fish Dock.

III. ARGUMENT

In its Exceptions and its Prehearing Brief, Auction Block presumes that if the City operates as an MTO at any City facility, it is an MTO for all purposes. *See, e.g.,* Exceptions, 9, 13. This broad application of the Act to municipal governments would be a direct violation of the intended scope of the Act and exceeds the jurisdiction Congress granted to the FMC under the Act.

A. A Municipality-Wide Analysis of the City's MTO Status Would Violate the Purpose of the Act

The ALJ astutely recognized that application of the Act to the activities on the Fish Dock would directly contradict the purpose of the Act. *See* Decision, 24. Specifically, ALJ Wirth states:

> [t]he purpose of the Shipping Act is to encourage participation by United States shipping in the international shipping cartels, but prohibit discrimination by terminal facilities serving the commercial maritime trade. The local Alaska fishing industry does not implicate the international commercial maritime trade nor restrict access to international commerce.

Id. (Citations omitted).

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In its Complaint and throughout its briefing, 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 in direct contradiction with the stated purpose of the Act and an unwarranted intrusion into a uniquely local sphere of economic activity.

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 an 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 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

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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. Unlike the docks in other Alaska communities, it does not permit any single fish processor to

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lease or own the dock, ensuring open access to all competitors in the fishing industry. Thus, the City's operations on the Fish Dock are aligned with the Act's underlying purpose. Utilizing the Act to prohibit the City from adopting leasing policies and practices that permit it to preserve open access would turn the Act on its head.

B. MTO Status Is Determined on a Facility-by-Facility Basis as a Matter of Law

In addition to the express purpose of the Act, case precedent also requires a review of City services on a facility-by-facility rather than a municipality-wide basis. The federal courts, clearly aware of the many services provided by local governments within their boundaries, have limited the review of jurisdiction to the activities and services at the facility at issue. In *Puerto Rico Ports Authority*, the United States Court of Appeals (First Circuit) expressly limited its review of the FMC's jurisdiction over a service fee charged by the PRPA at its Ponce facilities to activities at that location rather than terminal services provided at other PRPA locations where common carriers were provided greater services. *Puerto Rico Ports Authority*, 919 F.2d at 803. In that case, the court expressly found that "services provided at other ports were not sufficient to create jurisdiction." *Id.* Similarly, in *Bridgeport and Port Jefferson Steamboat Co. v. Bridgeport Port Authority*, 335 F.Supp.2d 275, 281-283 (D.Conn. 2004), the federal district court found that the FMC lacked jurisdiction over the "Water Street facility," which exclusively serviced non-common carriers.

The facility-by-facility analysis employed by the federal court is especially appropriate in a community like Homer, where the City directly owns and operates several different facilities within the City and there is no port authority that is a separate and distinct entity. *See* HCC 10.04.020; HCC 2.40.010; *compare*

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Bridgeport Port Authority, supra; *Puerto Rico Ports Authority*, *supra*; *Petchem, Inc. v. Canaveral Port Authority*, 23 S.R.R. 974 (FMC 1986), *infra*.

Auction Block argues in its Exceptions and implies in its Prehearing Brief that the FMC has sanctioned Auction Block's "an MTO somewhere equals an MTO everywhere" approach. *See* Exceptions, 9-10; Prehearing Brief, 5. In support of its position, Auction Block cites *R.O. White & Co. et al. v. Port of Miami Terminal Operating Co., et al.*, FMC Dkt. 06-11 (ALJ July 28, 2009), a case in which ALJ Paul Lang found that the FMC had personal jurisdiction over a company comprised of several "former" MTOs. *See Id.* In that case, ALJ Lang extended the personal jurisdiction of the FMC to reach members of an umbrella company that suspiciously engaged in violations of the Act shortly after the company's formation. More particularly, several companies that previously acted and registered as MTOs for business conducted at the Miami facility banded together to form Port of Miami Terminal Operating Co. ("POMTOC") and then engaged in exclusionary tactics at the Miami Terminal against a stevedore that would not agree to become a member of POMTOC.

When challenged before the FMC, the individual member companies conveniently claimed that the FMC did not have personal jurisdiction over the individual companies because they no longer were MTOs at the Miami facility and the FMC could not pierce their corporate veils to reach the individual companies. *R.O. White & Co. et al.* at 32. Prior to the creation of POMTOC, all of its members were registered and admitted MTOs at the Miami facility. However, after creating POMTOC the members suddenly claimed that their previous MTO status had

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ceased. *Id.* Even after creation of POMTOC, the members continued to actively control management of POMTOC facilities. *Id.* at 33. ALJ Lang determined that:

> By consolidating their marine terminal operations the members have surrendered some of the independence that they exercised in running their own terminals, but, in view of the degree of retained control, they have not changed their status as marine terminal operators.

Id. at 34.

The case at hand bears absolutely no resemblance to *R.O. White & Co. et. al.* Most importantly, ALJ Lang's decision involved the scope of *personal* jurisdiction before the FMC and the FMC's ability to pierce the corporate veil. He found personal jurisdiction based upon his determination that the individual member companies remained involved in the management of the Miami terminal even after the formation of POMTOC. *Id.* at 34. While ALJ Lang noted that POMTOC failed to cite any authority in support of the proposition that personal jurisdiction is to be determined separately at each port, he recognized the importance of basing jurisdiction on the nature of an MTO's activities at the premises. *Id.* at 34-35.

Here, despite Auction Block's last minute assertions in its Prehearing Brief, subject matter rather than personal jurisdiction is at issue and thus the focus is the nature of the activities at the facility in question rather than the identity of the entity performing those activities.[2]

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[2] In its Prehearing Brief, Auction Block misrepresents the City's position regarding personal jurisdiction. The City has consistently denied that the FMC has subject matter or personal jurisdiction. See Answer at III.

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C. A Municipality-Wide Analysis of MTO Status Exceeds the FMC's Jurisdiction Under the Act

The natural consequence of Auction Block's interpretation would not only include unintended regulation of the local fishing industry, it would illegally expand the FMC's jurisdiction to municipal services that have no connection to marine services, much less international shipping. The United States Supreme Court has repeatedly and unequivocally found that federal agencies and commissions cannot exceed the authority granted to them by Congress. *See Stark v. Wickard*, 321 U.S. 288, 309 (1944)("When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted"); *see also U.S. v. Smith*, 812 F.2d 161, 166 (4th Cir. 1987)("The authority of an administrative agency to promulgate a regulation is limited by the statute authorizing the regulation.") Congress certainly never intended and the language of the Act itself in no way supports permitting the FMC to regulate the City's actions outside the international shipping arena.

Under Auction Block's interpretation, the City could feasibly face a challenge before the FMC regarding an unreasonable preference given in its water and sewer rates or an alleged disadvantage suffered by a lessee on property located miles from the coast. *See* 46 U.S.C. §§ 41106(2)(3). Similarly, a complainant could bring a claim before the FMC challenging the City's zoning provisions regarding junkyards or any other business in which property is handled, stored or delivered. *See* 46 U.S.C. § 41102(c). Analyzing jurisdiction on a facility-by-facility rather than a municipality-wide basis is the only way to avoid such absurd and overreaching application of the Act.

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D. The Fish Dock Constitutes a Separate Facility and Must be Analyzed on an Individual Basis

Once ALJ Wirth determined that a facility-by-facility analysis was appropriate, she properly concluded that the Fish Dock constituted a separate facility within the City based upon a comprehensive presentation of the evidence submitted by both parties. In the Decision, the ALJ concluded that the City's port and harbor are located on a 4.5 mile long promontory into Kachemak Bay called the Homer Spit (the "Spit"). Initial Decision, 6, Finding No. 4. The Spit is home to three separate and distinct terminal facilities. *Id.* at 10, Finding No. 41. 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 10, Finding No. 43. Within the City Harbor, which is created and protected by a jetty, the City operates the Fish Dock and small boat docks. *Id.* at 10, Finding No. 44.

The ALJ expanded upon these findings, recognizing the differences between operations on each of the docks. She noted that unlike the Fish Dock, 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 10, Finding No. 45. She further recognized that the Deep Water Dock is the terminal facility where large vessels such as common carriers, scrap metal barges, Icicle's floating processor, and cruise ships dock. *Id.* at 10, Finding No. 47. Additionally, she found that the Pioneer Dock and Deep Water Dock have designated restricted/non-restricted areas, gated TWIC access, and comply with the United States Coast Guard's requirements for regulated/non-regulated vessels utilizing those facilities. *Id.* at 10, Finding No. 49. The ALJ provided citations to the record for each of her findings.

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Auction Block, on the other hand, does not directly challenge any of these findings in its Exceptions or its Prehearing Brief. In its Response to Respondents' Proposed Findings of Fact, Auction Block does respond to the above assertions by disputing that the City facilities are distinct and separate. It does not, however, deny the proposed findings or provide a single citation to the record supporting its dispute. *See* Complainants' Response to Respondents' Findings of Fact, Nos. 51-59, pp. 18-21.

E. Adopting a Tariff Does Not Automatically Make the City an MTO at the Fish Dock

Auction Block has consistently argued that the City's facilities should be treated as one because the City files a tariff with the FMC. *See* Decision, 23. The ALJ correctly determined that an entity does not automatically subject itself to the FMC's jurisdiction simply by filing a tariff. *Id.* In support for this conclusion, the ALJ cites to *Petchem, Inc.* In *Petchem, Inc.*, the FMC was not even willing to find jurisdiction where a tariff was published *and* solicitations were made for common carriers. The FMC reasoned "[i]f jurisdiction were to be found here over Port Canaveral on the basis of its tariff publication and solicitation of common carriers, an explicit extension of existing precedent would be required." *Petchem, Inc.*, 23 S.R.R. at 983. To date, the FMC has not made that "explicit extension of existing precedent" and thus the ALJ's decision was proper.

The City of Homer is a small town that highly values transparency and public knowledge. The City has repeatedly asserted and the ALJ has rightly found that 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

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itself to the Act for conduct on that dock. Decision, 11, Finding No. 57. Auction Block's suggestion that the City expanded the FMC's jurisdiction not by actually providing services to common carriers on the Fish Dock but simply by publishing rates that apply to current users of that dock is without merit and wholly unsupported by controlling law.

IV. CONCLUSION

For all of the reasons stated above and throughout the City's briefing, motion practice, and record, the Decision is sound and Auction Block's Exceptions are without merit. Auction Block has categorically failed to meet its burden to establish the FMC's jurisdiction over the Fish Dock. The City thus respectfully requests that the Decision be affirmed and Auction Block's Complaint be dismissed with prejudice.

DATED this 10th day of February, 2014.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 10th day of February, 2014, a true and correct copy of the foregoing was served on the following in the manner indicated:

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FEDERAL MARITIME COMMISSION

THE AUCTION BLOCK COMPANY, an Alaska corporation, and HARBOR LEASING, LLC, an Alaska limited liability company, Complainants, vs. THE CITY OF HOMER, a Municipal corporation and its PORT OF HOMER, Respondents.	DOCKET NO. 12-03

AFFIDAVIT OF BRYAN HAWKINS REGARDING RESPONDENTS' BRIEF

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

BRYAN HAWKINS, being first duly sworn, deposes and states as follows:

1. I am Port Director and Harbormaster for the City of Homer ("City") and have been employed in that position continuously since 2008. I have been an employee with the City Port & Harbor since 2000.

2. From 1978 until 2000, I was a commercial fisherman and captain-for-hire primarily working out of the City Harbor.

3. I have knowledge of the facts stated herein and am competent to testify to those facts.

4. 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 (hereinafter referred to as the "Spit" in this Affidavit).

5. The City of Homer Port and Harbor is comprised of two commercial docks (Pioneer and Deep Water Dock) and a harbor basin containing a small boat harbor, a fish dock, and a commercial barge ramp. Photographs of the City of Homer Port and Harbor are attached as Exhibit A to this Affidavit.

6. The Spit is home to three separate and distinct terminal facilities.

7. At the very end of the Spit and outside the City harbor, the City operates its Deep Water Dock and its Pioneer Dock.

8. 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" in this Affidavit.)

9. 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 which affords accessibility and the deeper waters surrounding those docks.

10. The Deep Water Dock is the terminal facility where large vessels such as common carriers, scrap metal barges, Icicle Seafoods, Inc.'s floating processor, and cruise ships, dock.

11. 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.

12. While the City definitely attempts to draw large vessels to its Deep Water Dock, and Pioneer dock, common carriers generally moor in Anchorage,

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Alaska, which is a major ocean transportation hub located approximately 220 nautical miles from Homer.

13. In order for the Port and Harbor to operate as a port we must comply with a long list of federally mandated rules.

14. 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 there was so much halibut coming to port in such a short period that the fish was frozen and steadily released into the market by processors such as Icicle.

15. 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 was halibut coming into port in smaller volumes over a longer period of time.

16. In Homer, the IFQ System actually fostered a fresh rather than frozen halibut market, having extremely negative impacts on processors, which primarily focused on handling and freezing large volumes of fish. Buyers could handle and sell the smaller volumes of halibut immediately upon receipt and thus the fish need not be frozen or processed in Homer.

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17. 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.

18. To this end, Fish Dock fees, such as crane fees and wharfage are set at a low rate, which covers only the cost of providing services and maintaining, repairing or replacing dock facilities as needed.

19. In 2011, the total operating budget for the fish dock including a $ 211,613 dollar 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 Cities Port and harbor Enterprise of $18,688.

FURTHER AFFIANT SAYETH NAUGHT.

BRYAN HAWKINS

SUBSCRIBED AND SWORN to before me this 2 day of January, 2013.

RACHEL TUSSEY NOTARY PUBLIC STATE OF ALASKA

Notary Public in and for Alaska
My Commission expires:

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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:

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Mr. Steven J. Shamburek 3700 Moss Drive Annandale, Virginia 22003	☑ U.S. Mail ☐ Facsimile ☐ Electronic Delivery ☐ Hand Delivery

BIRCH HORTON BITTNER & CHEROT

By: Katherine L. Heim

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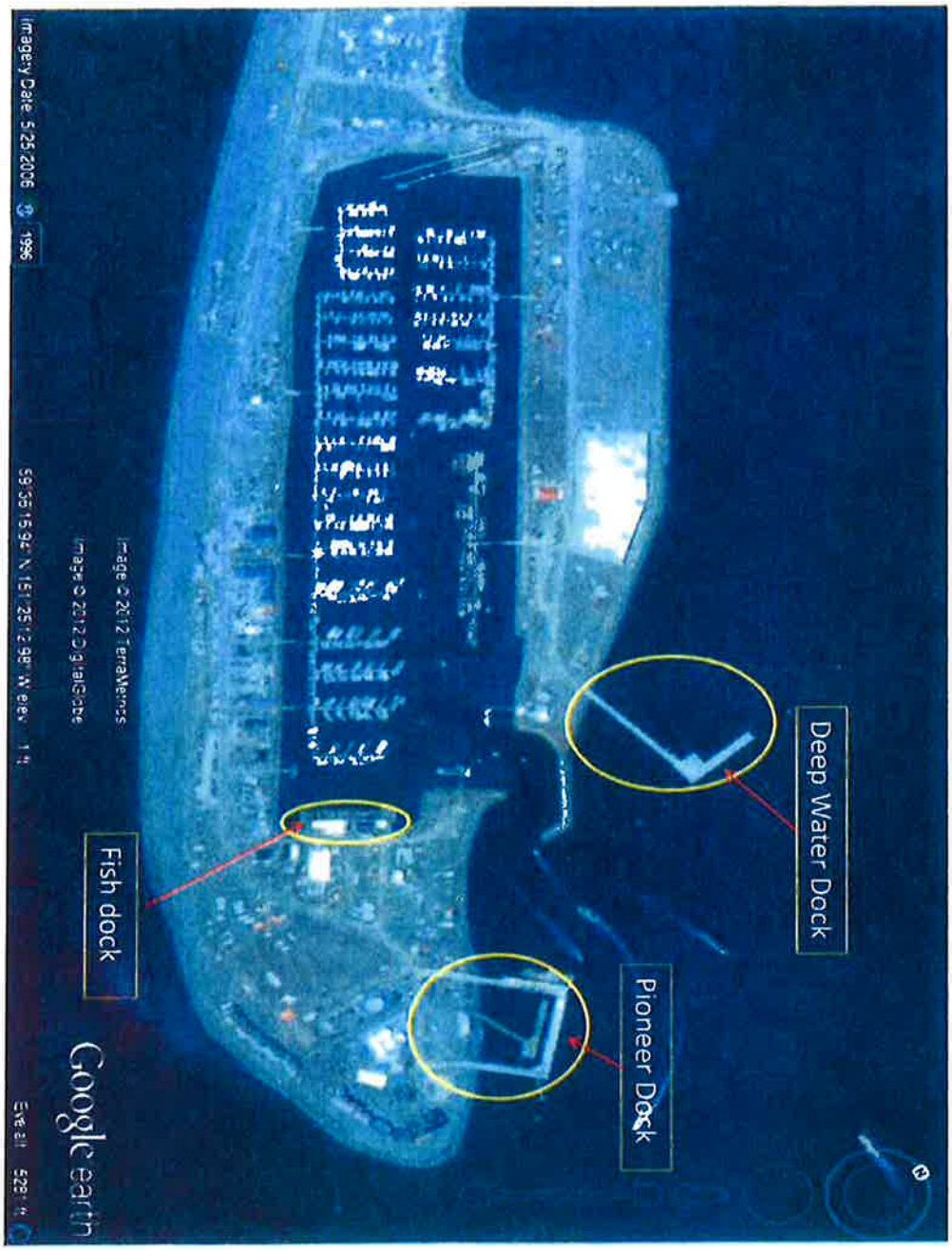

Exhibit A
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Exhibit A
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