

FEDERAL MARITIME COMMISSION

DOCKET NO. 12-03

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

v.

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

COMPLAINANTS' BRIEF

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1 **Background And Introduction**

2 Complainants are two interrelated companies doing business in Homer, Alaska
3 buying and selling commercially caught fish and other seafood in Alaska for processing,
4 freezing, storage, sale and distribution in America and the international market. Mr.
5 Hogan is the President and majority shareholder of The Auction Block Company, an
6 Alaska corporation in good standing, and the manager and one member along with his
7 wife Ms. Bronwyn Kennedy of Harbor Leasing, LLC, an Alaska limited liability company.
8 Harbor Leasing is the lessee of the lease with Respondents and a pass-through entity
9 that leases the property to The Auction Block Company. Ms. Jessica Yeoman is the
10 Vice President and minority owner of The Auction Block Company.

11 Homer is a charming small Alaska town. Homer is also a vexing place for a
12 business person to do business who is not afforded special treatment and favoritism by
13 the City. Leasing activity and access to the Port is controlled and dictated by one
14 person, the Homer City Manager Mr. Walt Wrede.

15 The City exempted an entity, Icicle Seafoods, Inc. ("Icicle"), from paying the rates
16 and fees set forth in the written Tariffs filed with the Federal Maritime Commission even
17 after expiration of the lease that may have provided special exemptions. The prior
18 lease between the City and Icicle expressly required Icicle to maintain a shore-based
19 seafood processing plant. When the Icicle plant burned down, Icicle never rebuilt or
20 even planned to rebuild a processing plant and breached an express written
21 fundamental term of the lease resulting in the expiration of the lease according to its
22 terms on September 14, 2004.

23 Complainants have a long and troubled relationship dealing with Mr. Walt Wrede.

1 Complainants have expanded their processing plant over the years and agreed to build
2 and built a state-of-the-art shore-based seafood processing and freezing plant in
3 Homer. The construction and operation of a shore-based processing plant is the reason
4 stated by Respondents for providing favorable exemptions. Complainants competed
5 with Icicle to build and maintain a shore-based seafood processing plant in Homer.
6 Complainants are not just competing with Icicle, Complainants prevailed in the
7 competition. Respondents not only refuse to provide any incentives for the
8 Complainants, they are committed to destroying Complainants' business while favoring
9 Icicle's business.

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

14 Complainants sought and seek a level playing field and contend that they should
15 receive the exemptions and treatment afforded an entity that builds and maintain a
16 shore-based fish processing plant in Homer. In addition, Complainants seek
17 reparations.

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

19 Detailed and verified complaints, answers and amendments to pleadings are at
20 the core of the Commission process that is fundamentally different than the “notice
21 pleading” system in the federal and other courts. These requirements are clearly
22 substantive not merely procedural. Commission Rule § 502.62(a) “Complaints and fee”

1 states the contents of a complaint and requires verification of the contentions.¹

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

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

9
10 (Emphasis added). The Rule uses the mandatory verbs “shall” and “must” rather than
11 the discretionary verbs “may” or “could” to note that the requirements are mandatory not
12 discretionary.²

13 The verb “shall” in a statute or rule means “shall” and states a mandatory duty
14 and obligation. By contrast, the verbs “may” or “will” are discretionary. In Service
15 Employees Intern. Union v. U.S., 598 F.3d 1110, 1113 (9th Cir. 2010), the Ninth Circuit,
16 relying on United States Supreme Court decisions, states: “‘There shall be paid \$X’ is
17 language commanding a statutorily required amount. This language does not confer on

¹ Subpart E of the Federal Maritime Commission Rules addresses “Proceedings; Pleadings; Motions, Replies” and includes the requirements for complaints, answers and amendments to pleadings. Mr. Hogan with Complainants filed the initial Complainant pro per and conscientiously and diligently followed these provisions and detailed the factual information and cited the specific statutory violations required by Commission Rules. Complainants’ five complaints set forth the statutory violations supported by the available disclosures and discovery at the time. Each complaint is properly verified under oath as required by Commission Rule § 502.62(a).

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

1 the agency discretion to decide how much ought to be paid. “The word ‘shall’ is
2 ordinarily ‘The language of command.’” (citing Anderson v. Yungkau, 329 U.S. 482,
3 485 . . . (1947) (quoting Escoe v. Zerbst, 295 U.S. 490, 493 . . . (1935)); see also Lopez
4 v. Davis, 531 U.S. 230, 241 . . . (2001) (“Congress used ‘shall’ to impose discretionless
5 obligations”); Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 .
6 . . (1998) (“[T]he mandatory ‘shall,’ . . . normally creates an obligation impervious to
7 judicial discretion.”).) Everyone benefits when a rule or statute is clear on its face.

8 Not one of the Respondents’ five Answers “specifically denie[s]” the “[r]ecitals of
9 material and relevant facts in a complaint [or] amended complaint” in their five Answers
10 as required by Commission Rule § 502.64(a). In addition, until November 29, not one of
11 Respondents’ five Answers is verified as required by Commission Rule § 502.64(a).

12 In Capitol Transportation, Inc. v. Federal Maritime Commission, 612 F.2d 1312,
13 1318 (1st Cir. 1979), the Circuit Court states: “Capitol never filed an answer denying this
14 status even though under the Commission’s rules material facts not denied are deemed
15 admitted. 46 C.F.R. § 502.64 (1978).” No other case seems to address the Rule that is
16 clear on its face. Both the requirements and the import of failure to meet the
17 requirements are manifest and logical.³

³ Commission Rule § 502.70(c) “Amendments or supplements to pleadings” states:

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

(Emphasis added). The Rule uses the mandatory verb “shall” rather than the discretionary verbs “may” or “could” to note that the requirement is mandatory not discretionary. The Rule is clear on its face and consistent with the verification requirements in Commission Rules §§ 502.62(a) and 502.64(a). The Court allowed Respondents to verify their Fourth Amended Complaint.

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

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

8
9 (Emphasis added). The Answer filed by the Respondents did not comply with the very
10 Rules cited by the Respondents.

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

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

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

20 Respondents specifically required that this language be included in these two
21 pleadings filed with the Federal Maritime Commission to recognize the Respondents'
22 right to file their answer pursuant to Commission Rule § 502.64 and their amended
23 answers pursuant to Commission Rule § 502.70. However, Respondents did not
24 comply with the very Rules they expressly stated they reserved the right to follow.⁴

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

1 Respondents did not specifically deny the specific allegations in Paragraphs I
2 and II and III and IV and V of the Fourth Amended Complaint. Respondents baldly
3 denied the allegations in Paragraphs VI and VII and VIII of the Fourth Amended
4 Complaint but did not make any effort to specifically deny the specific allegations. The
5 specific material allegations of liability and damages in the Fourth Amended Complaint
6 are admitted by Respondents by operation of law.

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

The Court reminded the Parties to comply with the procedure and deadlines in the Order dated August 9, 2012 at Docket 18. The Court notes at page 2 at paragraph 3 in its concluding paragraph in pertinent part: “The parties were previously advised that “[p]arties cannot control an agency’s docket or procedures through agreement among themselves.” (Citation omitted).

1 Respondents cannot mitigate by verifying the Answer because the statements in
2 the Answer are neither true nor correct nor complete. Respondents were prudent not to
3 verify the Answers previously because the general sweeping denials are not accurate.
4 The discrete damage claims sought by the Complainants are the amounts actually billed
5 by Respondents and paid by Complainants. Complainants' damages, except for the
6 damages for the year 2012 and the precise amount of lost profits, are admitted as true
7 by Respondents. With regard to the specific damages suffered by Complainants for the
8 year 2012, Complainants use the same source of information – the bills sent by
9 Respondents to Complainants – that are admitted by Respondents for the earlier years.

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

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

15 Complainants note the names and addresses of two experts – a fisheries
16 industry expert and a certified public accountant – in Complainants' INITIAL CIVIL
17 RULE 26(a)(1) DISCLOSURES at Exh. J at page 2 / CX 110. Complainants list the
18 following two experts:

- 19 Stephen T. (Steve) Grabacki, FP-C (Privilege asserted)
- 20 President, and Certified Fisheries Professional
- 21 GRAYSTAR Pacific Seafood, Ltd.
- 22 P.O. Box 100506
- 23 Anchorage, Alaska 99510-0506
- 24 (907) 272-5600
- 25 Possible expert witness for Complainants
- 26
- 27 Joe Moore CPA (Accountant-client privilege)

1 Altman Rogers & Co.
2 44539 Sterling Hwy
3 Soldotna, AK 99669
4 (907) 262-7478
5 Knowledge of Complainants' financials and industry economics
6

7 Id.; Supplemental Affidavit of Kevin Hogan at Exh. Q at pages 1 – 2 at paragraph 4 / CX
8 152 - 153. Complainants also considered but did not disclose the following expert
9 when the need for expert testimony was mooted by Respondents' admissions:

10 Barbara Carper, CPA (Accountant-client privilege)
11 Profit Soup
12 356 Upland Drive
13 Tukwila, WA 98188-3801
14 (206) 282-3888
15 She oversaw financial and systems review and business consulting for
16 Complainants.
17 Possible expert witness for Complainants
18

19 Supplemental Affidavit of Kevin Hogan at Exh. Q at page 2 at lines 3 – 5 / CX 152 - 153.
20 Complainants did not go forward and engage experts to prepare written opinions on
21 Complainants' and Iccle Seafoods' involvement and participation in the fishing industry;
22 how, why and where they compete for commercially caught seafood; the economics of
23 the commercial fishing industry; the price elasticity of commercial fishers for their
24 product; Complainants' lost profits; and related issues.⁵

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

⁵ The overview of GRAYSTAR Pacific Seafood, Ltd.'s professional services is discussed at Exh. T / CX 168. The website of Altman Rogers & Co. is at <http://www.altrogco.com/> and for Profit Soup is at <http://www.profitsoup.com/about.php>.

1 Complainants calculated their damages in the Fourth Amended Complaint and
2 earlier complaints using the many bills and invoices sent to them by Respondents.
3 Some of the bills may have been lost or misplaced. If Respondents had any cavil with
4 Complainants' damage figures, Respondents should have raised a concern by
5 challenging the specific averments in the Complaints. Discovery concluded on October
6 9, 2012. No time remains to seek discovery of these amounts and claims admitted as
7 true by Respondents. In addition, Complainants relied on Respondents' admissions
8 that the allegations in the Fourth Amended Complaint are true in preparing "The Auction
9 Block Company Lost Profit Report April 2009 – August, 2012" at Exh. R / CX 158 - 165.

10 In summary, Respondents admit the specific factual and legal contentions in
11 Complainants' Fourth Amended Complaint at Docket 20 at page 1 at line 12 – page 8 at
12 line 9 by operation of law. Respondents' decision not to contest the averments in the
13 Fourth Amended Complaints and the earlier complaints is grounded in Respondents'
14 recognition and admission that the averments are true.

15 **Respondents Independently Admit And Concede That Complainants'**
16 **Fundamental Contentions Are True**

17 Mr. Walt Wrede is the City Manager for the Respondents. Mr. Wrede is the
18 individual who verified Respondents' discovery responses to Complainants' discovery
19 requests.⁶ Exh. L / CX 127 - 128. Mr. Wrede stated in an interview on April 26, 2012,
20 two weeks and two days after the initial Complaint was filed by Complainants with the
21 Federal Maritime Commission, as follows:

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

1 AARON SELBIG: When former Homer Council Member Kevin
2 Hogan abruptly resigned his position at the March 12 council meeting, he
3 said he was doing so because he was planning a lawsuit against the City.
4

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

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

15
16 MR. WREDE: Yeah, the basic facts there are true.

17
18 AARON SELBIG: That's Homer City Manager Walt Wrede, who
19 does not dispute Hogan's basic assertion that Icicle Seafoods has, for
20 years, enjoyed a special deal with the City of Homer. It's a deal that
21 Wrede says began with a long-term contract back in 1976 when Icicle first
22 built its processing plant at the Homer Harbor.

23
24 MR. WREDE: The bottom line is the Council wanted to provide
25 incentives for -- for Icicle to come and build and operate the plant because
26 of the jobs and revenue. That's a typical thing. I mean, even today you
27 hear talk about providing incentives for business to come here. So the
28 Council did that. And they have a break on their crane use and their
29 wharfage, and that was a contractual agreement through the lease.

30
31 AARON SELBIG: Hogan says in his complaint that the breaks
32 given to Icicle Seafoods by the City constitute a, quote, unreasonable or
33 preferential advantage and are a violation of the Federal Shipping Act of
34 1984. He is seeking damages in the amount of \$682,114.

35
36 Reached Tuesday afternoon, Hogan said he could not say much
37 about the case until he had talked further with his attorney. He promised
38 an interview with KBBI News in the coming days saying there is, quote,
39 more to come in the case.

40
41 Wrede says he has heard Hogan talk about this issue before,
42 including once publically during a Homer City Council meeting last fall.

43
44 MR. WREDE: And the city attorney was in the room. And Kevin
45 said is it legal, is it right to have one group of people at the fish dock
46 paying this tariff or being subject to these fees and others not? And the

1 attorney's off-the-cuff response at the time was yes, if you have -- you
2 know, the tariff is like a menu at a restaurant. These are our prices.
3 These are the fees if you want to do business with the Homer Harbor.
4

5 But, basically, if you have a long-term client there, somebody you
6 have a working relationship with and they have a presence, you can have
7 a contractual agreement with them that includes different fees.
8

9 AARON SELBIG: Wrede says Icicle Seafoods still has the same
10 deal, even though its Homer processing plant burnt down in 1988 and was
11 never rebuilt. The long-term contract was reexamined four years ago says
12 Wrede, and the City considered changes to it at that time.
13

14 MR. WREDE: They looked at it, their attorneys looked at it, our
15 attorneys looked at it, and we decided that, you know, those -- that
16 needed to remain in place. That it couldn't be -- couldn't -- or shouldn't be
17 changed.
18

19 AARON SELBIG: The Federal Maritime Commission is a
20 Washington, D.C. based, independent agency that has regulatory power
21 over international shipping, cruise lines, and marine terminals, among
22 other things. According to the agency's website, FMC.gov, the
23 Commission also helps to resolve disputes between parties regarding
24 rates and charges governed under the Shipping Act of 1984.
25

26 Complaints are first received by one of the Commission's
27 Administrative Law Judges, who have wide leeway as to what they may
28 do with any particular case. An Administrative Law Judge could, for
29 instance, request evidence and witness testimony or even subpoena a
30 witness or hold a hearing, much as a court would.
31

32 The judge will ultimately make a ruling in the case, whether that is a
33 settlement of some kind or a ruling in favor of one party or another.
34 Parties involved in the case then have the right to appeal that decision to
35 the five-member Commission itself.
36

37 AARON SELBIG: Walt Wrede says that to his knowledge no other
38 fish buyer operating at the Homer Harbor has complained about the deal
39 Icicle Seafoods enjoys. He says Icicle is still an important economic driver
40 in Homer.
41

42 MR. WREDE: They buy fish here. Sometimes they supply ice and
43 -- and -- and do other things, so . . . Last year they brought a floating
44 processor here that tied up at the deepwater dock for much of the
45 summer, and that generated a lot of revenue for the -- for the -- for the City
46 and for the Enterprise Fund. So it's still -- even though they don't have a

1 shore-based processing plant, they still bring a lot of value to the
2 community.

3
4 AARON SELBIG: The City of Homer has 30 days to reply to
5 Hogan's complaint. Wrede says the city attorney, Thomas Klinkner, is
6 putting that response together now.

7 In Homer, I'm Aaron Selbig.

8 Transcription of April 26, 2012 KBBI Radio News Broadcast at Exh. M / CX 129 – 137

9 (Emphasis added).⁷ Because Respondents through Mr. Wrede affirm Complainants'

10 fundamental contentions and further agree that the facts ("Yeah, the basic facts there

11 are true.") are admitted, Complainants opted not to depose Mr. Wrede or inquire into his

12 admissions and instead focused considerable time, effort and resources on the

⁷ This radio broadcast is listed in Complainants' INITIAL CIVIL RULE 26(a)(1) DISCLOSURES at Exh. J at page 6 at line 7 / CX 114. The original transcription authenticated by the court reporter is marked at Exh. M / CX 129 – 137. The sealed original document is filed with this pleading with the Court. The "Certificate" states in pertinent part:

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

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

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

Mr. Wrede's statements and admissions are available on the KBBI website and are transcribed by an independent court reporter. Respondents recently submitted a recording of the interview.

1 concerns raised by Respondents such as their legal relationship with Icicle and to
2 satisfy Respondents that Complainants are unquestionably a common carrier.⁸

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

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

5 Respondents suggest that Complainants are the only entity to complain about
6 Respondents' lease policies and practices. Ms. Shelly Erickson, a past chair of the
7 Homer Economic Development Commission (EDC) and the Homer Lease Committee
8 from 2008 until 2011, states in her affidavit in her own words:

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

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

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

14 4. Inequity between lease holders.

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

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

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

⁸ Mr. Wrede states that the Icicle plant was the reason for the incentives given to Icicle; that the Icicle plant burned down in 1998; that the Icicle plant was never rebuilt; that Icicle still gets a break on their crane use and their wharfage; that former City Council Member Mr. Hogan questioned the favorable treatment of Icicle while he was a Council Member on the Homer City Council; that the City does not feel bound to honor the rates established in the Tariffs if it opts to offer fees that depart from the Tariffs; that the City's position is supported and advanced by the City Attorney; and that there is a valid lease between Icicle and the City. Mr. Wrede's statement that no other fish buyer operating at the Homer Harbor has complained about the deal enjoyed by Icicle was related by the interviewer in the interview and may not be admissible.

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

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

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

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

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

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

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

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

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

18 Exh. N / CX 138 - 139.⁹ Respondents' mistreatment of and prejudice against
19 Complainants and other lessees and prospective lessees is not an isolated or short-
20 term problem. Ms. Erickson is courageous enough to come forward and share
21 testimony that others are fearful of providing in writing.

22

⁹ Ms. Erickson is listed in Complainants' INITIAL CIVIL RULE 26(a)(1) DISCLOSURES at Exh. J at page 3 at lines 33 – 40 / CX 111. Ms. Erickson is not listed in Respondents' Disclosures at Exh. K / CX 121 – 126 or in any subsequent disclosures. Exhibits J, K and L are authenticated in the Affidavit of Steven J. Shamburek. CX 267 – 268.

1 13. I also worked with tenants to develop a fresh fish market in the Rocky Mountain
2 States.

3 14. I believe that the City of Homer was not fair and equitable in the treatment of all
4 lease holders associated with the fishing industry.

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

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

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

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

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

19 Exh. O / CX 140 – 142 (Emphasis added).¹⁰ Respondents' mistreatment of and
20 prejudice against Complainants and other lessees and prospective lessees is not an
21 isolated or short-term problem. Mr. McGee is courageous enough to come forward and
22 share testimony that others are fearful of providing in writing.¹¹

23
24

¹⁰ Mr. McGee is listed in Complainants' INITIAL CIVIL RULE 26(a)(1) DISCLOSURES at Exh. J at page 4 / CX 112.

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

1 **The Material Facts Are Established**

2 In the Affidavit of Kevin Hogan in support of OPPOSITION TO MOTION at Exh.
3 P / CX 143 - 151, Mr. Hogan avers:¹²

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

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

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

12 4. Exhibit A [CX 1 – 19] is a true and correct copy of the “Solid-Fuel Absorption
13 Refrigeration Emerging Energy Technology Grant” application submitted by The Auction
14 Block Company to the Alaska Energy Authority that describes in accurate detail the fish
15 processing plant designed, developed and operated on the Homer Spit in Homer,
16 Alaska by Complainants at this time. The plant is capable of handling all of the
17 commercially caught fish and seafood currently being delivered to Homer and has
18 enough excess capacity to accommodate other seafood. Complainants are poised to
19 increase the number and amount of fish and seafood product being cleaned, processed,
20 frozen, packaged, and shipped in and from Homer.

¹² Mr. Hogan authenticates the documents at CX 1 – 107 at Exh. P at paragraphs 4 - 18. His Affidavit was filed with Complainants’ RESPONSE TO MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING STATUTE OF LIMITATIONS and then marked as Exh. P / CX 143 - 151.

1 5. Exhibit B [CX 20 – 55] is a true and correct copy of the Complainants’ Discovery
2 Responses To The City Of Homer’s Amended First Discovery Requests To
3 Complainants. I personally assisted in the preparation of all of the responses. My
4 signature verifies the responses. I have reviewed the responses and adopt each of
5 them as my own response on behalf of the Complainants.

6 6. Exhibit C [CX 56 – 63] is a true and correct copy of some documents provided by
7 Respondents. The documents are letters and e-mails between the City of Homer and
8 Icicle Seafoods provided by the Respondents in their Disclosures and marked by
9 Respondents as follows:

10 7. HOMER 530-531 [CX 56 – 57] Letter from Walt Wrede with the City of Homer to
11 Ken “Duff” Hoyt with Icicle Seafoods dated March 25, 2004 (2 pages);

12 8. HOMER 532-533 [CX 58 – 59] Letter from Walt Wrede with the City of Homer to
13 Ken “Duff” Hoyt with Icicle Seafoods dated March 25, 2004 (2 pages);

14 9. HOMER 518 [CX 60] e-mails from Ken “Duff” Hoyt with Icicle Seafoods to Walt
15 Wrede with the City of Homer dated May 19, 2004 and June 2, 2004 and from Walt
16 Wrede with the City of Homer to Ken “Duff” Hoyt with Icicle Seafoods dated June 4,
17 2004 (1 page);

18 10. HOMER 516 [CX 61] Letter from Ken “Duff” Hoyt with Icicle Seafoods to Walt
19 Wrede with the City of Homer dated September 13, 2004 (1 page); and

20 11. HOMER 514-515 [CX 62 – 63] Letter from Walt Wrede with the City of Homer to
21 Ken “Duff” Hoyt with Icicle Seafoods dated September 22, 2004 (2 pages).

22 12. That the following four Tariffs are true and correct copies of the applicable Tariffs:

- 1 13. Exhibit D [CX 64 – 73]: “Terminal Tariff No. 600 Filed under ATFI Rules”
2 effective January 1, 2009 for the years 2009 and 2010.
- 3 14. Exhibit E [CX 74 – 83]: “Terminal Tariff No. 600 Filed under ATFI Rules”
4 effective January 1, 2011.
- 5 15. Exhibit F [CX 84 – 93]: “Terminal Tariff No. 600 Filed under ATFI Rules”
6 effective April 25, 2011.
- 7 16. Exhibit G [CX 94 – 103]: “Terminal Tariff No. 600 Filed under ATFI Rules”
8 effective July 25, 2011.
- 9 17. Exhibit H [CX 104 – 106] is a true and correct copy of two letters I sent on behalf
10 of Complainants to Mr. Wrede with the Respondents dated June 18, 2007 and June 18,
11 2007 that evince the frustration in dealing with the City’s delay and intransigence.
- 12 18. Exhibit I [CX 107 – 108] is a true and correct copy of documents provided by
13 Respondents. The documents are two e-mails between members of the administration
14 of the City of Homer provided by the Respondents in their Disclosures and marked by
15 Respondents as follows: HOMER 3965 – 3966. These documents are further evidence
16 that the City knew that there was no lease with Icicle yet the City continued to represent
17 to the public and to the Homer City Council that there is an “Icicle Lease.”
- 18 19. I served as a Commissioner on the City of Homer Port and Harbor Advisory
19 Commission from April 9, 2007 through October 20, 2009.
- 20 20. I served as a Commissioner on the City of Homer Economic Development
21 Advisory Commission from November 13, 2007 through October 20, 2009.
- 22 21. I served as a Council member on the Homer City Council from October 20, 2009
23 through my resignation on March 12, 2012.

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

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

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

8 25. I resolved the dilemma by resigning from the Homer City Council on March 12,
9 2012 and filing this action with the Federal Maritime Commission on April 10, 2012.

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

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

14 28. I signed the Harbor Leasing/The Auction Block Lease reprinted as Exhibit 10 by
15 the Respondents that was recorded with the state of Alaska on February 19, 2009. I
16 signed the lease under duress and protest. I signed the lease to give the Complainants
17 a location to continue operating their business until I could obtain a long-term lease with
18 the City with workable terms. Without signing a lease for the use of some Harbor
19 property, Complainants' business would have collapsed. There was no other place to
20 go to locate the business.

21 29. At times, the City insisted on a long-term lease and refused to negotiate the
22 terms. At times, the City insisted on a short-term lease and also refused to negotiate

1 the terms. When the City refused to negotiate, I proposed but the City would not
2 consider mediation or arbitration of the matter.

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

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

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

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

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

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

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

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

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

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

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

2
3 41. In her Affidavit, City Clerk Johnson states: "To the best of my recollection after a
4 review of City Council minutes and the minutes of the Economic Development Advisory
5 Commission and the Port and Harbor Commission, I do not recall nor could I find any
6 record of Kevin Hogan challenging either the City's tariffs or City Municipal Code
7 provisions regarding harbor leases as unlawful. Also I do not recall Hogan ever
8 proposing a tariff amendment during his tenure as a City Council member. Hogan
9 voted, however in favor of tariff amendments, most recently in 2011, while he was a City
10 Council member."

11 42. A quick review of City record reveals the following excerpt from the November
12 28, 2011 City Council meeting with Ms. Johnson serving as the Clerk of Record for the
13 City at the meeting.

14 **C. Resolution 11-095.** A Resolution of the City Council of Homer, Alaska,
15 Maintaining the Port of Homer Terminal Tariff No. 600 at the Current Rates. City
16 Clerk. Recommended to follow Budget Ordinance 11-41 schedule.
17

18 Kevin Hogan, city resident, commented on the crane usage and ice rates increase
19 of 300% over the years he has operated a business on the Spit. While he has
20 raised his rates to his customers only 13%, one 6% rate increase resulted in the
21 loss of 50% in business. We are beyond the point of sustaining the level of fees at
22 the port. Tariff rates are published with the Federal Maritime Commission so
23 they are nondiscriminatory. He questioned why he pays \$90 per hour for crane
24 usage when a competitor pays \$24 per hour.
25

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

1 44. Additionally in reviewing the record of documents disclosed by the City as Initial
2 Disclosures in this case, there are numerous examples of testimony by me challenging
3 Harbor Leases and the inconsistent application of policy and the Homer City Code
4 related to the Harbor Leases. Examples include disclosures labeled HOMER 1964-
5 1967, 1986 and 2079.

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

12 C. **Resolution 11-095.** A Resolution of the City Council of Homer, Alaska,
13 Maintaining the Port of Homer Terminal Tariff No. 600 at the Current Rates. City
14 Clerk. Recommended to follow Budget Ordinance 11-41 schedule.
15 Mayor Hornaday opened the public hearing. In the absence of public testimony,
16 Mayor Hornaday closed the public hearing.
17 Motion on the floor from October 10th: MOTION TO ADOPT RESOLUTION 11-
18 095 BY READING OF TITLE ONLY.
19 Councilmember Hogan referenced pg. 168 of the terminal tariff, specifically rule
20 34.2 regarding contract rates. His thought is filing something with the Federal
21 Maritime Commission is to ensure uniformity to the published rates.
22 City Attorney Klinkner advised there is a provision for contract rates to be
23 negotiated outside of the filed tariff.
24 Councilmember Howard supports passing the resolution that shows no change in
25 the tariff. The Port and Harbor Improvement Committee is reviewing all tariffs
26 to determine what rates need to be changed to service the bond. It is expected
27 increases to support the bond will be before Council in March.
28 Councilmember Hogan asked for those amendments to go to the Port and
29 Harbor Advisory Commission first.
30 VOTE: YES. NON OBJECTION. UNANIMOUS CONSENT.

31
32 46. I did cast a vote to uphold the current rates and yet raised questions related to
33 the discrimination practiced by the City. I was barred from introducing an amendment to

1 specifically address the disparity by the City's conflict of interest rules. I was also aware
2 of the dire consequences that befall one who challenges the Administration. I could
3 count that the votes were not there to support an amendment.

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

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

15 49. Icicle had a presence in Homer prior the building of its plant and new base lease
16 in 1979. Icicle assumed a lease that predated the founding of the City from Eugene
17 Browning, d/b/a Alaska Seafoods. The contention that Icicle was entitle to incentives to
18 meet a need for production is a fallacy. The Icicle operation was a profitable facility at
19 the time. Whitney Fidalgo also operated a plant at the harbor until it was bought out by
20 the City for Harbor expansion in the 1980's, a potential windfall for Icicle. Other
21 operators such as C Shop, Barbs Seafoods and Bessie M Seafoods were also in
22 business at the time. The assertion that incentives were necessary to entice Icicle to

1 build a facility is unfounded. Icicle built its facility without incentives which came into
2 place seven years later with the first amendment to the lease.

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

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

8 52. Mr. Wrede has refused to provide any incentives to the Complainants, although
9 the Complainants are the only entity to build a fish processing plant in Homer in
10 decades.

11 Exhibits J, K and L at CX 109 – 128 are authenticated in the Affidavit of Steven J.
12 Shamburek. CX 267 - 268. (CX 120 is inadvertently left blank page.)

13 In the Supplemental Affidavit of Kevin Hogan at Exh. Q / CX 152 - 157, he
14 avers:¹³

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

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

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

¹³ Mr. Hogan authenticates the documents at CX 158 – 168.

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

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

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

17 7. Exhibit T [CX 168] is a true and correct copy of the GRAYSTAR Pacific Seafood,
18 Ltd. information brochure provided to me by Mr. Steve Grabacki describing the
19 Company's skills and services.

20 8. There is one fundamental rule in the economics of the Alaska fisheries: The
21 fishers, as they are known today, are extremely sensitive to the price offered for their
22 fish or seafood product. When selling his or her fish or other seafood product, the fisher
23 looks almost exclusively if not exclusively at price. The only other consideration is

1 whether a buyer is able to pay the price. The Auction Block has always paid the price it
2 bid.

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

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

14 11. The Auction Block has expanded its facilities and capabilities since then. I have
15 been involved from the beginning and at every step of the way in the design,
16 construction, installation, modification, testing and operation of the state-of-the-art
17 shore-based fish processing plant (“Plant”) in Homer described in the document I
18 assisted in creating marked as Exhibit A. [CX 1 – 19].

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

1 13. I assisted in the research and preparation of the “The Auction Block Company
2 Lost Profit Report April 2009 – August, 2012” created to establish the lost profits of the
3 Complainants from April, 2009 until August, 2012 as a result of the disparate treatment
4 of Complainants by Respondents and other statutory violations of the Shipping Act of
5 1984 as amended is marked as Exhibit R. [CX 158 – 165] These calculations of lost
6 profits are a conservative and well-founded calculation of Complainants’ substantial
7 losses.

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

21 15. Complainants have been billed by Respondents and Complainants have paid to
22 Respondents \$38,099.13 in crane use expenses in 2012. Respondents have damaged
23 Complainants in the sum of at least \$3,475.00 for the differential provided Icicle

1 Seafoods for property rates. The Auction Block has not calculated the crane
2 overcharges for the year 2012. The Auction Block Company handled 2,821,668 pounds
3 of fish in 2012 which results in a differential and damages to The Auction Block
4 Company of \$6,715.57 (wharfage) in 2012.

5 16. Complainants have lost profits of \$912,766.98 at this time as set forth in the
6 analysis in the “The Auction Block Company Lost Profit Report April 2009 – August,
7 2012” at Exhibit R. [CX 158 – 165]

8 17. Complainants’ total damages are \$332,114.83 (at least \$257,841.35 [Crane
9 Use], \$10,425.00 [Differential Property Fees], \$16,902.14 [Crane Overcharges] and
10 \$46,946.34 [Wharfage]) for 2009 through 2011 and \$48,289.70 (\$38,099.13 [Crane
11 Use], \$3,475 [Differential Property Fees], [No Crane Overcharges are calculated at this
12 time] and \$6,715.57 [Wharfage]) for 2012 and lost profits of \$912,766.98 from April,
13 2009 through August, 2012 for total damages of \$1,293,171.51.

14 18. The Auction Block has provided the following full-time and part-time employment

15 in Homer: Year: Total:

16	2009	114
17	2010	140
18	2011	136
19	2012	120

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

23 In the Third Supplemental Affidavit of Mr. Kevin Hogan at Exh. Y / CX 185 - 186,
24 he avers:

1 1. I am the President of The Auction Block Company and a member of Harbor
2 Leasing, LLC which are the Complainants in this case.

3 2. I have personal knowledge of the facts stated herein and am competent to testify
4 to these facts.

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

9 4. Exh. AA [CX 188] is a true and correct copy of a Memorandum dated November
10 9, 2012 from the Homer Deputy City Clerk to the Port and Harbor Advisory Commission
11 available on the City of Homer's website.

12 5. Mr. Wrede expresses anxiety that I may leave Homer. If I leave Homer
13 personally, the state-of-the art shoreside fish processing plant described in Exhibit A will
14 be left behind because it is not a portable facility.

15 6. The Federal Maritime Commission is empowered to decide whether the Plant will
16 be a functioning facility providing jobs to the citizens of Homer and tax revenue to the
17 City of Homer or an abandoned monument to the arrogance and influence of Mr.
18 Wrede.

19 In the Fourth Supplemental Affidavit of Mr. Kevin Hogan at CX 269 - 270, he
20 avers:

21 1. I am the President of The Auction Block Company and a member of Harbor
22 Leasing, LLC which are the Complainants in this case.

1 2. I have personal knowledge of the facts stated herein and am competent to testify
2 to these facts.

3 3. Exhibit CX 189 is a true and correct copy of the State of Alaska Department of
4 Revenue Certification For Primary Fish Buyer / Processor for the Auction Block
5 Company for 2012 effective from January 12, 2012.

6 4. Exhibit CX 190 is a true and correct copy of the National Oceanic Atmospheric
7 Administration Fisheries Registered Buyer Permit expires December 31, 2012.

8 5. Exhibit CX 191 is a true and correct copy of the National Oceanic Atmospheric
9 Administration Federal Processor Permit from 1 January, 2012 – 31 December, 2014.

10 6. According to the Homer City Code, Tariff amendments are enacted by the City
11 Council only after conducting a public hearing.

12 7. Prior to assuming a seat on the City Council, I raised the issue with the
13 administration that tariff amendments were being instituted without a public hearing.

14 8. In response, the City began scheduling tariff authorization matters concurrent
15 with the budget and scheduling a public hearing on proposed Tariff amendments.

16 9. In their affidavits, Mr. Wrede and others propose amendments to and
17 interpretations of the Tariffs that must be subject to public hearing and adopted by the
18 City Council in writing to be legally effective.

19 10. If the City Council seeks to amend the Tariffs so that they do not apply to the
20 Fish Dock, there is a legally binding process and procedure to follow before the change
21 is legally effective.

22 11. Complainants have provided discovery responses and testimony showing that
23 we hold our business out to the public to provide transportation of the fish and seafood

1 product by water, by truck or by air depending on the needs of the ultimate consumer
2 who are at times members of the public or commercial consumers of the product.

3 12. Complainants assume legal responsibility for the transportation from the port or
4 point of receipt of the product to the port or point of destination

5 13. Complainants use vessels operating on the high seas including vessels we own,
6 vessels we charter and vessels that fish and operate at our direction.

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

10 15. Mr. Wrede always represented and insisted that the Tariffs applied to the Fish
11 Dock and refused to allow Complainants to receive the incentives bestowed gratuitously
12 on Icicle that also used the Fish Dock. If Mr. Wrede is now saying under oath that the
13 Tariffs do not apply to the Fish Dock, he is admitting that he refused to negotiate or deal
14 in good faith and honestly.

15 In the Affidavit of Jessica Yeoman at Exh. U / CX 169 - 178, she avers:

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

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

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

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

1 5. My responsibilities grew and expanded over the years including assisting in
2 developing the fleet of vessels that delivered their commercially caught fish and seafood
3 to The Auction Block, maintaining the many regulatory documents and filing the reports
4 that are required by federal and state law, assisting in designing and developing The
5 Auction Block processing facility in Homer, and supervising marketing and advertising
6 for The Auction Block.

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

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

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

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

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

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

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

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

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

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

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

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

1 18. About 70 - 80 percent of The Auction Block business in the last four years
2 involves purchasing, selling, brokering, freezing, processing, transporting and arranging
3 for the transportation of commercially caught fish. In recent years, these activities have
4 been conducted on an almost break-even financial basis and thus have not contributed
5 to the profitability of The Auction Block. Because of the increased costs imposed by the
6 City, The Auction Block is not able to compete with a subsidized competitor such as
7 Icicle Seafoods.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 34. The Plant is able to handle 4400 pounds of H & G Pacific cod per hour. Pacific
22 cod is a labor intensive fish to process and requires more clean up time. A crew of
23 about fifteen individuals uses assorted equipment including an automated heading

1 machine, band saw, water-fed scraping tools, scales, knives, wash conveyor, roller
2 conveyors, and forklifts to complete the necessary processing activities. Two other
3 individuals sort, wash, grade and pack the milt for further shipment to Japan.

4 35. The Pacific cod fishery is a very promising fishery for the future of The Auction
5 Block. Mother Nature has provided high yields of this species in our fishing areas and
6 also the government agencies have not significantly restricted the fishery through
7 regulations. Moreover, yet another promising characteristic is the nearly year-long
8 season that allows The Auction Block to supply many different markets and provide
9 steady year-round employment for our employees.

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

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

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

22 39. From my experiences, the Homer City Manager Mr. Walt Wrede is prejudiced
23 against Kevin Hogan and his business pursuits and has been for years. I was involved

1 in several of the negotiating meetings with Mr. Wrede where he acted in a hostile and
2 dismissive manner in his dealings with Mr. Hogan.

3 40. Mr. Wrede, acting on behalf of the City of Homer, seemed upset that The Auction
4 Block won the request for proposal for the property we currently lease from the City of
5 Homer. He seemed to want to preclude The Auction Block in every possible way from
6 being able to meet the financially difficult terms of the lease he forced our companion
7 company, Harbor Leasing, LLC, to sign if we wanted to do business at the Dock. We
8 had no choice except to accept Mr. Wrede's demands because we needed to maintain
9 our shore-based facilities in Homer.

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

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

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

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

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

5 46. Mr. Hogan's commitment of time and effort was a waste because Mr. Wrede did
6 not accept any of our substantive suggestions.

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

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

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

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

21 A true and correct copy of Complainants' Discovery Responses to Respondents'
22 Discovery Requests is attached as Exh. B / CX 20 – 55 and additionally is verified by
23 Mr. Hogan. The most significant responses are noted below.

1 **REQUEST FOR ADMISSION NO. 1:** Admit that Auction Block is not a
2 “common carrier,” as the term is defined in 46 U.S.C. § 40102(6).
3

4 **RESPONSE:** Deny. This request calls for a legal conclusion. The
5 Auction Block Company is not registered as a “common carrier” with the
6 Federal Maritime Commission.
7

8 According to a Federal Maritime Commission decision, “the term
9 ‘common carrier’ as used in the 1916 Act and as better defined in the
10 1984 Act has been interpreted in many cases to mean the common carrier
11 as that term was understood in the common law.” The Auction Block
12 Company performs many of the activities of a “common carrier” as that
13 term was understood in the common law.
14

15 After The Auction Block registered its business for the ground
16 transportation of cargo with the Federal Motor Carrier Safety
17 Administration, the United States Department of Transportation
18 designated USDOT “common carrier” number 1320081 for The Auction
19 Block. The Auction Block maintains and operates three trucks that are
20 actively engaged in receiving, handling, storing, and delivering property
21 including fish product on a regular basis. Most if not all of the fish product
22 originates or is delivered to The Auction Block using the facilities of the
23 Respondents.
24

25 The Auction Block contracts with independent operators of fishing
26 vessels to purchase their fish. The Auction Block directs how much fish to
27 catch, when to catch the fish and where and how to deliver the fish. In
28 addition, Auction Block is also a marketing agent for fishing vessels.
29

30 The Auction Block pays the tariff rate for the transportation of cargo
31 to engage the services of ships with Tote, Lynden, Maersk, Sealand, CSX
32 and APL to Europe, Japan and Canada.
33

34 The Auction Block has handled or acted as agent or forwarder for
35 deliveries to foreign countries. Auction Block uses water transportation
36 and engages the services of ships with Tote, Lynden, Maersk, Sealand,
37 CSX, APL and Cargo Consultants to Europe, Japan and Canada.
38

39 The Auction Block has provided water transportation for cargo
40 between the United States and foreign countries for compensation. The
41 Auction Block has handled or acted as agent or forwarder for deliveries of
42 cargo to foreign countries for compensation.
43

44 The Auction Block has paid the tariff for the transportation of cargo
45 by water from the United States to the port of a foreign country and
46 engages the services of ships with Tote, Lynden, Maersk, Sealand, CSX

1 and APL to Europe, Japan and Canada. To the best of The Auction
2 Block's knowledge, these entities are registered as "common carriers" with
3 the Federal Maritime Commission.
4

5 The Auction Block does not advertise the transportation of either
6 cargo or passengers by water, but the transportation of cargo is structured
7 into the business operations despite not being separately noted in
8 representations to the public.
9

10 One of the owners of The Auction Block owns and operates a
11 United States Coast Guard documented vessel official number 279036.
12 One of the owners of The Auction Block also owns and operates an
13 Alaska registered vessel number AK 4886AL.
14

15 The Auction Block issues and receives Bills of Lading for shippers
16 and consignees. The Auction Block has prepared and filed National
17 Marine Fisheries Service shipping reports in the past. The Auction Block
18 now prepares and files Product Transfer Reports ("PTRs") with the
19 National Marine Fisheries Service.
20

21 The Auction Block is involved on a daily basis in the business of
22 using and paying for the essential terminal services and facilities of the
23 Respondents.
24

25 The relationship between The Auction Block Company and Harbor Leasing, LLC
26 is developed in the discovery responses.

27 **REQUEST FOR ADMISSION NO. 6:** Admit that Auction Block was not
28 named as a party to the Lease.
29

30 **RESPONSE:** Deny. This request calls for a legal conclusion. Harbor
31 Leasing is a related entity that entered into the Lease with the City with the
32 understanding that Harbor Leasing would lease to the Auction Block. The
33 City was aware of and accepted and ratified this arrangement. Paragraph
34 8.04 of the Lease describes "Additional Rent For Sublease" and states in
35 pertinent part: "Landlord expressly permits the Auction Block Company, a
36 closely held company, to sublease the building and improvements without
37 any additional rent requirement to Tenant." HOMER 777. Exhibit B to the
38 Lease includes "CONFORMED COPY OF RESOLUTION AUTHORIZING
39 LEASE AND AUTHORIZING SIGNERS TO SIGN LEASE AGREEMENT
40 ON BEHALF OF TENANT and includes the Harbor Leasing, LCC
41 Resolution and The Auction Block Company Corporate Resolution.
42 HOMER 797 – 799. Harbor Leasing, LLC is a first-party beneficiary and
43 The Auction Block is an express intended third-party beneficiary of the
44 Lease. Respondents admit that "Complainant leases property from the

1 City in the City Harbor.” See Paragraph IV at line 19 of the Fourth
2 Amended Answer. Harbor Leasing incorporates the Answer to
3 Interrogatory No. 11.

4
5 HOMER 777 and HOMER 797 – 799 noted above are at Exh. 10 at page 15 and pages
6 35 – 37 / CX 231 and 251 - 253.

7 Complainants were and are not aware of the terms of the purported lease
8 between the City and Icicle because the City and Icicle do not have a valid lease.
9 Counsel for the Respondents have always referred to the “Icicle Lease” which is more
10 accurately referred to and is referred herein to as the “Expired Icicle Lease.”

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

13
14 **RESPONSE:** Deny. Neither Auction Block Company nor Harbor Leasing
15 was aware of the terms of the Icicle Lease on March 26, 2008 or at this
16 time. The LEASE AGREEMENT dated September 14, 1979 recorded at
17 Book 111, Pages 884 through 902A in the Homer Recording District states
18 at page 2 that the term is “twenty-five (25) years commencing on the
19 14th day of September, 1979, and ending at 12:00 o’clock midnight
20 on the 14th day of September, 2004.” No written lease is available in
21 the public record to evince an extension of the term of the lease. Neither
22 Auction Block nor Harbor Leasing is fully aware of the legal relationship
23 between the City and Icicle after September 14, 2004 and/or at the
24 present time. However, the City and Icicle seem to be observing some of
25 the other terms and conditions of the LEASE AGREEMENT and
26 amendments in their business dealings with each other despite the City’s
27 stated desire and intent to require Icicle Seafoods to adhere to the terms
28 of the Tariffs. HOMER 514 – 515, 530 – 531 and 532 - 533.
29 Complainants incorporate the Answers to Interrogatory Nos. 4 and 11.

30
31 HOMER 514 – 515, 530 – 531 and 532 – 533 and other related documents evincing the
32 failure to conclude an agreement between Respondents and Icicle are set forth at Exh
33 C / CX 56 - 63. According to the terms of the Expired Icicle lease:

34 Any holding over after the expiration of this lease, or any extension hereof
35 with the consent of the Lessor shall be deemed to be a tenancy from
36 month to month. Termination of this lease during the initial period hereof
37 shall terminate all rights of renewal or extension hereunder.

1
2 Exh. 4 at page 2 (Emphasis added) / CX 193. Icicle had and has no right to renew or
3 extend the lease. The legal import of the verb “shall” in the Expired Icicle Lease is
4 addressed below.

5 Complainants’ business is addressed and discussed in the discovery responses.

6 **REQUEST FOR ADMISSION NO. 7:** Admit that you do not operate a
7 fleet of fishing vessels.

8
9 **RESPONSE:** Deny. Auction Block contracts with independent operators
10 of fishing vessels to purchase their fish. Auction Block dictates how much
11 fish to catch, when to catch the fish and where and how to deliver the fish.
12 In addition, Auction Block is a marketing agent for fishing vessels.

13
14 **REQUEST FOR ADMISSION NO. 8:** Admit that your business operations
15 are not identical to those of Icicle Seafoods.

16
17 **RESPONSE:** Deny. The business activities and operations of The
18 Auction Block are not precisely similar to the business activities and
19 operations of Icicle Seafoods. Both entities are fundamentally primary
20 purchasers of commercially caught seafood purchased ex vessel and
21 compete for the business of commercial fishermen and to sell to the end
22 user of the product.

23
24 **REQUEST FOR ADMISSION NO. 9:** Admit that you sell fish to Icicle
25 Seafoods.

26
27 **RESPONSE:** Admit. The Auction Block and its owner on occasion sell
28 some commercially caught seafood to Icicle Seafoods when it is in the
29 best economic interests of each entity.

30
31 **REQUEST FOR ADMISSION NO. 10:** Admit that you and Icicle Seafoods
32 do not share the same customer base.

33
34 **RESPONSE:** Deny. The Auction Block is not aware of all the customer
35 base of Icicle Seafoods. Both entities share some customers and
36 compete in the same market for fishermen and ultimate consumers.

37
38 **REQUEST FOR ADMISSION NO. 11:** Admit that the presence of Icicle
39 Seafoods’ business operations in the City has not directly impacted the
40 quantity of fish that you have been able to purchase, sell, or process as
41 part of your business operations.

42

1 **RESPONSE:** Deny. The City's favorable treatment of Icicle Seafoods has
2 directly impacted the quantity of fish that The Auction Block has been able
3 to purchase, sell and process as part of its business operations.
4 Complainants incorporate the Responses to the Requests for Production.
5

6 **REQUEST FOR ADMISSION NO. 12:** Admit that your Lease with the City
7 was not an agreement for the receiving, handling, storing, or delivering of
8 property.
9

10 **RESPONSE:** Deny. Paragraph 5.01 addresses the "Use" of property and
11 facilities in the Lease and states in pertinent part:
12

13 FISH BUYING FACILITY AND ASSOCIATED OFFICE, WAREHOUSE,
14 COLD STORAGE, STAGING, AND OPERATIONAL AND LOGISTICAL
15 SUPPORT FOR DOCK OPERATIONS. PRIMARY AND SECONDARY
16 COMMERCIAL AND SPORT SEAFOOD PROCESSING, RETAIL
17 SEAFOOD SALES, MAINTENANCE AND GENERAL FISHERMAN'S
18 SUPPORT FACILITIES.
19

20 This description accurately describes some but not all of the business
21 activities of The Auction Block Company and its related entity Harbor
22 Leasing, LLC.
23

24 The Auction Block Company and its related entity Harbor Leasing,
25 LLC are actively engaged in receiving, handling, storing, and delivering
26 property on a daily basis. Complainants receive, handle, store and deliver
27 commercially caught fish in particular halibut, red (sockeye) salmon, silver
28 (coho) salmon, king (chinook) salmon, chum (dog) salmon, pink (humpy)
29 salmon, sablefish (black cod), Pacific cod, ling cod, scallops, skates,
30 yellow eye rockfish, rough eye rockfish, thorny head rockfish, hooligans
31 and other species of fish. Complainants receive, handle, store and deliver
32 storage boxes, totes, palettes, packaging materials, bait, and other gear
33 and equipment. Complainants receive, handle and store bait and
34 packaging materials in lockers rented from the City for delivery.
35

36 The Auction Block Company is certified by Scientific Certification
37 Systems as an entity that "Brokers, processes and sells MSC [Marine
38 Stewardship Council] Certified Alaska Salmon, US North Pacific Halibut,
39 US North Pacific Sablefish and Alaska Pacific Cod" with Certification Code
40 SCS-MFCP-C-0108 valid from March 25, 2010 to March 24, 2013. The
41 certification determined that the product "has been harvested from
42 fisheries that meet stringent environmental, social and economic
43 standards."
44

45 Respondents have admitted in their Fourth Answer to the Fourth
46 Amended Complaint that the Complainants are engaged in receiving,

1 handling, storing, and delivering property. See Paragraph I at line 6 of the
2 Fourth Amended Answer.

3
4 Paragraph 5.01 noted and discussed above is reprinted at Exh. 10 at pages 8 - 9 / CX
5 224 - 225.

6 Complainants have tried for many years to negotiate an equitable and fair lease
7 with the City.

8 **INTERROGATORY NO. 11:** Please describe in detail any and all
9 instances in which the City refused to negotiate with you regarding the use
10 of City property.

11
12 **ANSWER:** Mr. Hogan first commercially fished in and around the waters
13 of Homer in 1974. The City of Homer owns most of the desirable land in
14 an area known as the "Homer Spit" and other areas in the City. Mr.
15 Hogan sought to lease land from the City of Homer starting in 1994. At
16 the time, Mr. Hogan was operating a business and presented a viable
17 business plan to the City seeking to lease a vacant lot of land owned by
18 the City of Homer and not subject to a lease. The City rejected the
19 request.

20
21 In 1995, Mr. Hogan subleased land from Mr. Marty McGee, an
22 existing leaseholder with the City, on behalf of Mr. Hogan's employer,
23 Sahalee Seafoods. Mr. Hogan operated The Auction Block as a sole
24 proprietorship in 1997 and rented land on behalf of The Auction Block
25 from Mr. McGee until 2002. Mr. Hogan incorporated The Auction Block
26 Company on November 19, 1998.

27
28 The City was not negotiating in good faith with Mr. Hogan. Mr.
29 Hogan was aware of and concerned about the treatment and mistreatment
30 of tenants of the City and applications for leases. Mr. Hogan organized
31 Harbor Leasing, LLC on January 29, 2001 to negotiate a lease with the
32 City on behalf of The Auction Block Company. Because of genuine
33 concerns that the City may bring legal action against The Auction Block,
34 Harbor Leasing, LLC was created to insulate The Auction Block from a
35 direct lawsuit by the City. Mr. Michael M. Disler was also an organizer of
36 Harbor Leasing, LLC. After growing frustration and dissatisfaction with the
37 City's refusal to negotiate, Mr. Disler sold his interest in Harbor Leasing,
38 LLC to Mr. Steven K. Zimmerman. After growing frustration and
39 dissatisfaction with the City's refusal to negotiate, Mr. Zimmerman sold his
40 interest in Harbor Leasing, LLC to Ms. Bronwyn E. Kennedy. The effect of
41 the sale is noted on the Biennial Report filed with the State dated February
42 27, 2007. The contact information for Mr. Steven Zimmerman, Ms.

1 Bronwyn Kennedy and Mr. Marti McGee are noted in Complainants' Initial
2 Civil Rule 26(a)(1) Disclosures. Mr. Disler's contact information is: P.O.
3 Box 2976, Homer, AK 99603 (907) 399-1838.
4

5 In 2002, the City of Homer terminated Mr. McGee's lease. In 2002,
6 The Auction Block Company was leasing a parcel as a short-term month-
7 to-month tenant from the City and continued that uncertain relationship
8 until about 2004. The uncertainty made intermediate-term business
9 planning impossible. From 2005 until 2008, Mr. Hogan sought to
10 negotiate a lease with the City. Harbor Leasing presented a lease
11 application fee of \$300 dated February 10, 2005 to the City of Homer.
12 Harbor Leasing presented another lease fee of \$266.66 dated August 1,
13 2007 to the City of Homer. Neither check was negotiated by the City.
14 Harbor Leasing presented another lease application fee of \$300 to the
15 City of Homer dated March 14, 2007 that was cashed about a year later
16 by the City.
17

18 In a letter from Harbor Leasing, LLC dated June 8, 2007 to the City
19 and its attorney, Mr. Hogan states
20

21 Dear Sirs:

22 In reply to your June 6, 2007 letter to Mr. Shamburek, Harbor Leasing LLC
23 remains available, willing and eager to meet to negotiate a long-term lease for
24 Lot 12-C pursuant to our proposal submitted in response to your Request For
25 Proposal in February, 2007.

26 Harbor Leasing LLC, The Auction Block Co., and related principals deny
27 the City's assertion of trespass. The Auction Block Co. relocated its offices to Lot
28 88-4 pursuant to an arrangement with the leaseholder, on a temporary basis,
29 with the term contingent on negotiations with the City for a long-term lease. In
30 reference to that portion of Lot 12-C which is being utilized for Auction Block
31 staging, the use is with the consent and at the initiative of the City. It is, and
32 was, our understanding that this arrangement would continue until such time as
33 a long-term lease is concluded. We are, and have been, willing to proceed to
34 that goal.

35 Regarding the trailers parked on Lot 9, we asked the trucking company to
36 spot the trailers elsewhere. The driver insisted on spotting the trailers where
37 they are "to show the City that you are serious about building something." If the
38 City would like the trailers moved elsewhere that is a possibility, but the best
39 alternative is that the building that is on the trailers be constructed as per our
40 proposal, provided that the City indicates its support for responsible
41 development and jobs by negotiating in good faith for a reasonable long-term
42 lease.

1 Unilateral demands for interim stopgap measures do little to move the
2 process forward. It makes little sense to go to the considerable expense of
3 relocating, once again, our facilities for 52 days, without some sort of assurance
4 that the City intends to proceed in good faith towards a long-term lease.

5 In sum, the City insists on a long-term lease and refuses to negotiate the
6 terms. The City insists on a short-term lease and also refuses to negotiate the
7 terms. If negotiation is unacceptable, will the City consider mediation or
8 arbitration?

9 Thank you for your attention to these matters.

10 Homer 820 (Emphasis added). In another letter to Mr. Walter Wrede
11 dated June 18, 2007, Mr. Hogan states in pertinent part in the final
12 paragraph:

13 ...
14

15 We again extend the offer to enter into mediation or arbitration.
16 Significant City assets are being underutilized and the City is not realizing any
17 revenues because of unwarranted administrative intransigence on lease terms.
18

19 Thank you for your attention to this matter.
20

21 Homer 823 - 824.
22

23 Harbor Leasing, LLC is a related entity to The Auction Block
24 Company that ultimately entered into a lease with the City. Harbor
25 Leasing, LLC signed the Ground Lease And Security Agreement ("Lease")
26 with the City dated March 28, 2008. Mr. Hogan was not satisfied with the
27 terms and conditions and expressed his dissatisfaction with the terms and
28 conditions in the Lease to the City. Mr. Hogan stated and later wrote that
29 he entered into the Lease under duress. Mr. Hogan sought to continue
30 discussing and negotiating the terms and conditions of the Lease.
31

32 The City understood and acknowledged that Harbor Leasing would
33 sublease to The Auction Block Company. The City was aware of and
34 accepted this arrangement. Paragraph 8.04 of the Lease describes
35 "Additional Rent For Sublease" and states in pertinent part: "Landlord
36 expressly permits the Auction Block Company, a closely held company, to
37 sublease the building and improvements without any additional rent
38 requirement to Tenant." The Auction Block is an express intended third-
39 party beneficiary of the Lease. Respondents admit that "Complainant
40 leases property from the City in the City Harbor." See Paragraph IV at line
41 19 of the Fourth Amended Answer. See the Answer to Interrogatory No.
42 11.
43

1 Mr. Hogan has sought to negotiate with the City for years with no
2 success. Mr. Hogan continued and continues to express his
3 dissatisfaction with the Lease to the City and sought and seeks to
4 negotiate with the City. The City refused and refuses to negotiate.

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

14 The Complainants' competitor, Icicle Seafoods, operated its
15 seafood processing plant inside the boundaries of the City of Homer and
16 created additional jobs and generated tax revenue for the City of Homer.
17 However, in 1998, Icicle Seafoods' processing plant burned down and was
18 not rebuilt. The majority of the fish that Icicle Seafoods unloaded in the
19 City of Homer after 1998 was transported to and processed in the City of
20 Seward which received the job creation and tax benefits.

21 In 2008, The Auction Block Company built a processing plant on a
22 parcel of property leased from the City of Homer by Harbor Leasing, LLC
23 and subleased to The Auction Block. Although the Complainants were
24 generating all the benefits to and for the City of Homer that were
25 previously generated by competitor Icicle Seafoods, the City of Homer
26 refused and continues to refuse to consider any relief or incentives to
27 Complainants or even to deal or negotiate while continuing to provide
28 relief and incentives to the competitor, Icicle Seafoods, for and with no
29 benefit to Respondents.

30 Respondents previously entered into exclusive lease and other
31 arrangements with Complainants' competitor, Icicle Seafoods, that are in
32 contravention and violation of the Shipping Act of 1984, as amended, and
33 the published Tariffs. Respondents' actions and inactions do not serve
34 any valid transportation purpose or advance any genuine public policy
35 concern. Respondents' actions and inactions prejudice Complainants and
36 caused and continue to cause damages to Complainants.

37 The Complainants were aware of the disparity involving crane use
38 fees in 2008. The Complainants are still not aware of all of the terms and
39 conditions that govern the legal relationship between Icicle Seafoods and
40 the City. The City responds that it is bound to the terms and conditions of
41 its lease and/or arrangement with Icicle Seafoods even if they are in
42 violation of the Shipping Act of 1984, as amended, and the Ocean
43 Shipping Reform Act of 1998, as amended. The City is registered as a

1 “marine terminal operator” with the Federal Maritime Commission. The
2 City filed a Schedule with the Federal Maritime Commission. The City
3 filed multiple Tariffs described in detail in the verified Complaints filed with
4 the Federal Maritime Commission.

5
6 “Terminal Tariff No. 600 Filed under ATFI Rules” effective January
7 1, 2009 addressing “General Application Of Tariff” at Subsection 105(a) at
8 page 11 states:

9
10 Rates, charges, rules and regulations provided in this Tariff
11 will apply to persons and vessels using certain terminal
12 facilities under jurisdictional control of the City of Homer and
13 located within the harbor bounded by the City of Homer with
14 the Small Boat Harbor entrance located at latitude 59 36’ 15”
15 N and longitude 151 24’ 48” W and specifically to docks,
16 appurtenant structures thereto, and waterways under the
17 management of the City of Homer. Special terms and
18 conditions exist for the dock operations by the State of
19 Alaska, Alaska Marine Highway System, for operations of
20 the State Ferry System on the Pioneer Dock and for the
21 dock operations by a contractor engaged in chip storage and
22 loading operations on or in the vicinity of Deep Water Dock.

23
24 (Emphasis added). Respondents’ three (3) “Terminal Tariff No. 600 Filed
25 under ATFI Rules” effective January 1, 2011 and April 25, 2011 and July
26 25, 2011 addressing “General Application Of Tariff” at Subsection 105(a)
27 at page 11 state the same general application of the Tariffs including to
28 the Small Boat Harbor. The Tariffs acknowledge and provide for the
29 special terms and conditions for a specifically named State entity (“State
30 of Alaska, Alaska Marine Highway System”) and for the private sector
31 contractor (“contractor”) engaged in business. The Tariffs do not provide
32 for any special terms and conditions for Icicle Seafoods or even generally
33 refer to an entity such as Icicle Seafoods. When the Tariff was prepared
34 by the City, the City had already declared Icicle Seafoods to be in default
35 of its lease. HOMER 514 – 515, 530 – 531 and 532 – 533.

36
37 Under the circumstances, the City should have crafted the Tariffs to
38 track the treatment afforded Icicle Seafoods. At a minimum, when the
39 inconsistencies, disparities and inequalities were brought to the attention
40 of the City, the City should have negotiated and now should negotiate with
41 Mr. Hogan, Harbor Leasing, LLC and The Auction Block Company.

42
43 A "covenant of good faith and fair dealing" is incorporated into all
44 contracts executed and performed in the State of Alaska. Luedtke v.
45 Nabors AK Drilling, Inc., 834 P.2d 1220 (Alaska 1992). The City did not
46 honor the covenant of good faith and fair dealing in its dealings with Mr.

1 Hogan, Harbor Leasing, LLC and The Auction Block Company. This
2 cause of action under Alaska law is tantamount to the statutory duty set
3 forth in 46 U.S.C. § 41106(3).
4

5 The City continues to enter into leases and other arrangements
6 with other entities that benefit the entities and harm the Complainants and
7 yet will not negotiate with the Complainants.
8

9 Complainants continued to seek to negotiate the terms of the lease
10 in the context of the Federal Maritime Commission's Consumer Affairs &
11 Dispute Resolution Services after the Complaint was filed in April, 2012.
12 The City refused to negotiate. The possible mediation scheduled in
13 September with the assistance of the Federal Maritime Commission is the
14 first time the City has agreed to negotiate with the Complainants.
15

16 HOMER 820 and HOMER 823 – 824 noted above are reprinted at Exh. H / CX 104 -
17 105.

18 A true and correct copy of the “Pacific Fishing: The Business Magazine For
19 Fishermen” (<http://www.pacificfishing.com/>) article titled “Kevin Hogan: Changing The
20 Halibut Industry” dated May, 1999 evinces Mr. Hogan’s efforts to develop and build the
21 market for halibut in Homer is marked as Exh. S / CX 166 - 167. The article states in
22 pertinent part:

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

27 . . .

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

30 . . .

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

33 . . .

1 He [Hogan] knows how quickly a penny here or a penny there can add up,
2 and he is loath to take any more than necessary from the fisherman, he
3 says. "There's a limit to what you can pass on."

4 Exh. S at pages 63 and 65 / CX 166 - 167.

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

6 Title 46 U.S.C. § 41301(a) ("Complaints") states the applicable Commission

7 Rule:

8 In General. — A person may file with the Federal Maritime Commission a
9 sworn complaint alleging a violation of this part, except section
10 41307(b)(1). If the complaint is filed within 3 years after the claim accrues,
11 the complainant may seek reparations for an injury to the complainant
12 caused by the violation.

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

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

21 (Emphasis added). Complainants state and allege in the Fourth Amended Complaint as
22 follows:

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

¹⁴ Respondents did not contend that reparations are barred by the running of the statute of limitations in Respondents' Answer at Docket 8 at page 3. The operative responsive pleading is the Fourth Amended Answer that does assert generally such an affirmative defense.

1 Docket 20, paragraph I, page 1, lines 29 – 32. Complainants contend that this specific
2 contention in the verified Fourth Amended Complaint provides clear specific notice
3 pursuant to the statute and Rule that Complainants seek reparations for continuing
4 damages because damages have continued and are continuing into the future.
5 Respondents did not specifically deny this contention, although they do assert an
6 affirmative defense.¹⁵

¹⁵ At the end of the discussion of the “History” underpinning the case, Complainants state specifically: “Respondents’ actions and inactions prejudice Complainants and caused and continue to cause damages to Complainants.” Id. at page 3, lines 1 - 2. Respondents did not specifically deny this contention.

At the end of the discussion of one violation, Complainants state specifically: “Damages are continuing into the future.” Id. at page 4, line 12. Respondents did not specifically deny this contention.

At the end of the discussion of another violation, Complainants state specifically: “Damages are continuing into the future.” Id. at page 5, line 34. Respondents did not specifically deny this contention.

At the end of the discussion of another violation, Complainants state specifically: “Damages are continuing into the future.” Id. at page 6, line 14. Respondents did not specifically deny this contention.

At the end of the discussion of another violation, Complainants state specifically: “Damages are continuing into the future.” Id. at page 6, line 28. Respondents did not specifically deny this contention.

At the end of the discussion of another violation, Complainants state specifically: “Damages are continuing into the future.” Id. at page 6, line 36. Respondents did not specifically deny this contention.

At the end of the discussion of another violation, Complainants state specifically: “Damages are continuing into the future.” Id. at page 7, line 9. Respondents did not specifically deny this contention.

At the end of the discussion, Complainants state and reaffirm specifically: “Damages are continuing into the future.” Id. at page 7, line 34. Respondents did not specifically deny this contention.

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

3 Homer City Code 18.08.070.d states: “All leases or memorandums of
4 leases shall be recorded.” (Emphasis added). ([http://www.cityofhomer-](http://www.cityofhomer-ak.gov/cityclerk/chapter-1808-city-property-leases)
5 [ak.gov/cityclerk/chapter-1808-city-property-leases](http://www.cityofhomer-ak.gov/cityclerk/chapter-1808-city-property-leases)) The Lease between Harbor
6 Leasing, LLC and the City of Homer was not recorded until February 19, 2009.
7 Respondents’ Exhibit 10 / CX 217 notes that the document was officially recorded on
8 “2/19/2009 at 3:19 PM” in the state of Alaska notation in the upper right hand corner. In
9 addition, the FIRST AMENDMENT TO GROUND LEASE AND SECURITY
10 AGREEMENT dated February 18, 2009 was signed on February 18, 2009 and recorded
11 with the Lease. Exh. 10 at pages 49 – 50 / CX 265 - 266. Mr. Hogan testified that he
12 regarded the Lease as a short-term lease until the Complainants could obtain a long-
13 term lease with the City with workable terms. The signing of this “modus vivendi” did
14 not trigger the statute of limitations at that time.

15 **The Statute Of Limitations Is Equitably Tolled During Mr. Hogan’s Service To The**
16 **Citizens And The City Of Homer**

17 In his affidavit, Mr. Hogan discusses his service to the citizens and City of
18 Homer. Mr. Hogan was elected to the Homer City Council by the citizens of the City of
19 Homer and served from October 20, 2009 through March 12, 2012. Because of conflict

Respondents did not specifically deny the repeated and specific contention that
“Damages are continuing into the future.”

Complainants and Respondents agree that damages are continuing into the
future.

1 of interest concerns, Mr. Hogan was concerned that he could not bring suit against
2 Respondents while he was on the Homer City Council. See generally Homer City Code
3 1.18.030(b) states:

4 1.18.030 Standards and Prohibited Acts.

5 a. City officials, the City Manager, and City hired consultants and contractors, while
6 acting in such capacity, shall not knowingly make false statements to influence official
7 action.

8
9 b. Official Action. No City official or the City Manager shall participate in any official
10 actions in which

11 1. the person is the applicant, a party or has a substantial financial interest in the subject
12 of the official action.

13 2. within a period of one year after the action the person will have a substantial financial
14 interest in the subject of the official action.

15 3. the person resides or owns land within a three-hundred foot periphery of any
16 property that is the subject of any action.

17 4. the person does or will recognize a substantial financial interest as a result of the
18 action.

19 ([http://www.cityofhomer-ak.gov/cityclerk/chapter-118-conflicts-interest-partiality-and-
code-ethics](http://www.cityofhomer-ak.gov/cityclerk/chapter-118-conflicts-interest-partiality-and-
20 code-ethics)). Other legal and ethical standards underlie the dilemma.

21 Mr. Hogan confronted a painful dilemma because he had run for office on a
22 platform to change things from the inside and found that he could not even change
23 things as a member of the Homer City Council. Mr. Hogan also realized that he owes
24 fiduciary duties to the other shareholders of The Auction Block Company and to the
25 other member of Harbor Leasing, LLC. Mr. Hogan resolved the dilemma by resigning
26 from the Homer City Council on March 12, 2012 and filing this action with the Federal
27 Maritime Commission on April 10, 2012. Mr. Hogan is the one person who has the
28 personal knowledge to bring and maintain this action. Mr. Hogan has verified the
29 complaints. Mr. Hogan responded to and verified the discovery requests.

1 In Wassink v. Hawkins, 763 P.2d 971, 975 (Alaska 1988), the Alaska Supreme
2 Court states:

3 Estoppel may be invoked as a defense against the government where four
4 elements are present: (1) the governmental body asserts a position by
5 conduct or words; (2) the person acts in reasonable reliance thereon; (3)
6 the person suffers resulting prejudice; and (4) the estoppel serves the
7 interest of justice so as to limit public injury.

8 (Citation omitted). Mr. Hogan was under the impression created by representations
9 from the legal counsel for the Homer City Council that Icicle in fact had a legal lease.
10 Those representations are a misrepresentation. Mr. Hogan was under the impression
11 that he could not both serve on the Homer City Council and sue the City of Homer. Mr.
12 Hogan reasonably relied on that understanding. Respondents are seeking to impose
13 prejudice on him and Complainants for that moral, legal and ethical dilemma and the
14 resulting reasonable delay. Under these circumstances, estoppel serves the interest of
15 justice so as to limit public injury. The public injuries include the disparity in treatment of
16 Complainants and the economic and social consequences to the public when the
17 economic playing field is neither fair nor level nor competitive.

18 The statute of limitations should be tolled for the period of time that Mr. Hogan
19 could not bring and maintain suit on behalf of the Complainants because he was in the
20 service and employ of the Respondents. The statute of limitations should be tolled from
21 October 20, 2009 through March 12, 2012.

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

23 The discussion and decision in International Shipping Agency, Inc. v. The Puerto
24 Rico Ports Authority, 30 SRR 407, 425 (2004), is compelling and controlling. In a
25 lengthy opinion exhaustively addressing many issues, Administrative Law Judge Miriam

1 A. Trudelle addresses a contention that the claims were barred by the running of the
2 statute of limitations. The Order states in pertinent part:

3 Second, the Commission's own rules provide in 46 CFR [§]
4 502.63(b) that:

5
6 The Commission will consider as in substantial compliance
7 with a statute of limitations a complaint in which complainant
8 alleges that the matters complained of, if continued in the
9 future, will constitute violations of the shipping acts in the
10 particulars and to the extent indicated and in which
11 complainant prays for reparation accordingly for injuries
12 which may be sustained as a result of such violations.

13
14 Although PRPA's unacceptable activities may have begun more than
15 three years ago, Intership alleges that PRPA continues to violate
16 obligations under the Agreement and the Shipping Act. In this case, the
17 complaint clearly includes allegations of continuing offenses and seeks
18 reparations in connection with these violations.

19
20 Complainants clearly and specifically allege continuing violations in their Complaints.

21 Respondents do not specifically deny that the violations are continuing into the future.

22 Complainants also note that the Initial Decision in Maier Terminals, LLC v. Port
23 Authority of New York and New Jersey, FMC No. 08-03 (ALJ May 16, 2011), now on
24 appeal to the Commission does not appear to reference the applicable Rule, namely
25 Commission Rule § 502.63(b), cited by and relied upon by Complainants. The facts
26 and decision are inapposite to the facts of this case.

27 In Petchem, Inc. v. Federal Maritime Commission, 853 F.2d 958, 961 (D.C. Cir.
28 1988), the District of Columbia Circuit states: "Furthermore, in providing its justification,
29 the Port Authority must meet a two-part standard: 'whether [its] decision was
30 reasonable at the time it was made and, even if so, whether it was still reasonable in
31 light of its subsequent effects.'" (Citation omitted). This decision states clearly that
32 subsequent effects and events are reviewed. Complainants allege that the actions and

1 inactions of the Respondents were neither reasonable nor in compliance with the
2 statutory requirements at the time they were taken or not taken. In addition,
3 Complainants allege that the actions and inactions are neither reasonable nor in
4 compliance with the statutory requirements in light of their subsequent effects and
5 events. To this day, the City stands by its decision to treat the Complainants less
6 favorably than Icicle. This Circuit Court decision supports the contention that
7 reparations are available for ongoing violations within the three years allowed by the
8 statute of limitations.

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

10 Despite repeated misrepresentations by Respondents, the lease between
11 Respondents and Icicle Seafoods expired on September 14, 2004. The Homer City
12 Code 18.08.070.d states: “All leases or memorandums of leases shall be recorded.”
13 (Emphasis added). ([http://www.cityofhomer-ak.gov/cityclerk/chapter-1808-city-property-](http://www.cityofhomer-ak.gov/cityclerk/chapter-1808-city-property-leases)
14 [leases](http://www.cityofhomer-ak.gov/cityclerk/chapter-1808-city-property-leases)). The Code uses the mandatory verb “shall” and clearly requires recordation.

15 “Shall” means shall. The public and courts benefit when a rule or statute is clear
16 on its face and the legal import is discussed on pages three to four above.

17 Valid leases that are properly recorded in the state of Alaska are available on the
18 state of Alaska website. (<http://dnr.alaska.gov/ssd/recoff/searchRO.cfm>). No recorded
19 lease exists in the public record between Respondents and Icicle Seafoods.

20 The lease between Respondents and Icicle expired on September 14, 2004
21 (“Expired Icicle Lease”). A copy of the Expired Icicle Lease is at Respondents Exhs. 4
22 and 5 / CX 192 - 216. The lease and amendments with the specific book and pages
23 numbers that reference the recorded documents are noted in the Fourth Amended

1 Complaint and discussed in detail in the subsequent pages therein.¹⁶ The Fourth
2 Amended Complaint states in pertinent part: “The LEASE AGREEMENT dated
3 September 14, 1979 recorded at Book 111, Pages 884 through 902A in the Homer
4 Recording District . . . , AMENDMENT OF LEASE AGREEMENT dated July 1, 1986
5 recorded at Book 172, Pages 673 through 678 in the Homer Recording District . . . and
6 The SECOND AMENDMENT OF LEASE AGREEMENT dated January 25, 1988 with
7 an effective date of September 14, 1987 recorded at Book 0181, Pages 383 through
8 386 in the Homer Recording District.” Docket 20 at page 4 at line 20 – page 5 at line
9 12. These are the only lease documents of record.

10 The LEASE AGREEMENT in paragraph 3 describes “USE OF PREMISES;
11 DEVELOPMENT PLAN” and states in pertinent part: “Use of the above described
12 premises under this lease is for a seafood processing plant, and operations related
13 directly thereto. Any other use is prohibited without the prior written consent of the
14 Lessor.” Exh. 4 at p. 4 / CX 195 (Emphasis added). There is no subsequent recorded
15 lease. Respondents provide one letter dated March 5, 2004 from Icicle to the City that
16 initiated offers and counteroffers but never resulted in a written and recorded extension
17 or lease.

18 Respondents’ internal records clearly show that Icicle does not have a lease with
19 Respondents. In a letter dated March 25, 2004 from Mr. Walt Wrede, the City Manager,
20 to Mr. Ken “Duff” Hoyt, the Homer Buying Station Manager with Icicle Seafoods, Mr.
21 Wrede discusses the “Notice of Default and Intent to Terminate the Lease.”

22 **SUBJECT:** Lot 41 / Port Industrial Subdivision /
23 **Notice of Default and Intent to Terminate Lease**
24

¹⁶ These references appear in all the Complaints.

1 Dear Duff:

2
3 As you know, Icicle Seafoods, (dba Seward Fisheries), has a lease
4 agreement with the City of Homer to conduct business on the parcel
5 referenced above. The initial term of this lease agreement will expire on
6 September 14, 2004. Please consider this letter to be a Notice of Default and
7 Intent to Terminate the Lease. The reasons for this decision are discussed
8 below.

9
10 The initial term for this Lease Agreement expires on September 14, 2004.
11 This lease became effective on September 14, 1979 and was amended on
12 December 10, 1979, July 1, 1986, and September 14, 1987. Lot 41 contains
13 1.371 acres and was the site of Icicle's fish processing plant prior to its
14 destruction in 1998. It is currently the location of your office complex and
15 ice making facility.

16
17 Since the 1998 fire Icicle has not rebuilt its fish processing facility and
18 capacity and has expressed no definitive plans to do so. The fact that the
19 property is not being used for a fish processing plant is a material breach of
20 the intent and conditions of the lease. Section 3 of the lease, entitled, USE
21 OF PREMISES; DEVELOPMENT PLAN, states very clearly that the use
22 of the leased parcel shall be for a seafood processing plant and operations
23 directly related thereto. Our files show that the City has made a number of
24 attempts since 1998 to encourage Icicle to rebuild and/or submit a
25 development plan for a new facility.

26
27 These circumstances show that Icicle is in material and substantial breach
28 of the Lease Agreement. Therefore, the City hereby gives Icicle Seafoods
29 NOTICE OF DEFAULT pursuant to Paragraph 19 of the Lease Agreement
30 for breach of the following provisions:

31
32 1. Paragraph 3 of Lease Agreement: "Use of the premises under this
33 lease is for a seafood processing plant, and operations directly related
34 thereto. Any other use is prohibited without the prior written consent of the
35 lessor. It is specifically understood and agreed that Lessee has not
36 entered into this Lease for the purpose of speculation but in order to fully
37 develop the above described property."

38
39 2. Paragraph 3 of Lease Agreement: "Lessee shall submit a preliminary
40 development plan to the Council, with its application to lease, showing the
41 layout of buildings and other improvements on the said premises, the specific
42 use of said premises, and an estimate of total capital investment therein as well
43 as the completion date for such improvements. The development plan shall by
44 reference become part of this lease as though fully set forth herein, and any

1 failure of the Lessee to fully conform to final "as-built" plans based upon the
2 preliminary development plan or to fully and timely comply with any other
3 requirement set forth in this development plan, shall constitute a material
4 breach of this lease agreement."
5

6 3. Paragraph 4 of Lease Agreement: "It is understood and agreed that Lessor
7 shall retain full control over all land area not occupied by Lessee's buildings;
8 provided however, that Lessee shall have use of any such unoccupied areas as
9 approved in the development plan."
10

11 We recognize that certain other authorized uses were added in the Amendment
12 of Lease Agreement (July 1, 1986) and the Second Amendment of Lease
13 Agreement (September 14, 1987), but none of the amendments removed the
14 basic requirement that the premises be developed and actually used for a
15 seafood processing plant according to the development plans initially approved.
16 For the defaults enumerated above, the City intends to exercise its right under
17 paragraph 19 of the Lease Agreement to terminate the lease for Lot 41 effective
18 at 12:00 o'clock midnight on September 14, 2004, if the defaults are not cured
19 within 30 days of your receipt of this notice.
20

21 If you wish to contest this notice of default and declaration of termination, you
22 must submit a written request for a hearing to me, as City Manager, which must
23 be received in my office before 5:00PM on the date 20 days following the date
24 of this letter. Address your request to me and send it to the address indicated
25 above. Failure to make a timely request will constitute a waiver of all
26 opportunity for hearing.
27

28 If a timely request for hearing is received, an informal hearing before the City
29 Manager will be scheduled. At that hearing Icicle Seafoods will be given an
30 opportunity to present its case as to why the Lease Agreement should not be
31 terminated. The hearing will be held at City Hall in Homer. After such hearing
32 the City Manager will decide whether the Lease Agreement should be
33 terminated on the date indicated in this notice.
34

35 If no hearing is requested, the Lease Agreement will terminate on the date
36 indicated above without further action by the City. The recitation of specific
37 defaults in this notice does not constitute waiver of any other breach or default
38 under the Lease Agreement, including amendments.
39

40 Exh. C, HOMER 530 – 531 / CX 56 – 57 (Emphasis added). In another letter dated
41 March 25, 2004 from Mr. Walt Wrede to Mr. Ken "Duff" Hoyt, Mr. Wrede also discusses
42 the situation in pertinent part as follows:

43 Dear Duff:

1
2 Thanks for your recent letter dated March 5, 2004. I am writing in response to
3 that correspondence and to follow-up on and confirm our phone conversation of
4 the same date regarding the leases referenced above.

5
6 As you know, Icicle Seafoods, (dba Seward Fisheries), has two separate lease
7 agreements with the City of Homer to conduct business on the parcels referenced
8 above. The base term of both lease agreements will expire on September 14, 2004.
9 Your letter of March 5 indicates your desire to renew the lease on Lot 41, but by
10 this letter we advise you that the City of Homer does not consider Icicle Seafoods as
11 eligible to renew, extend, or exercise an option on either of these leases. The
12 reasons for this decision are discussed below.

13
14 Lot 13 B: It is the City's understanding, based upon conversations you have had
15 with City staff, that Icicle does not intend to ask for an option, extension, or renewal
16 of this lease (the former Porpoise Room lot.). If that is incorrect, please inform us
17 at your earliest convenience. The City is presently proceeding as though that lease
18 will expire on September 14, 2004. We anticipate that Icicle will vacate the
19 premises and return the leased parcel to its prior condition pursuant to the terms
20 and conditions of the Lease and Security Agreement.

21
22 The initial term for this Lease Agreement also expires on September 14, 2004.
23 This lease became effective on September 14, 1979 and was amended on
24 December 10, 1979, July 1, 1986, and September 14, 1987. Lot 41 contains
25 1.371 acres and was the site of Icicle's fish processing plant prior to its
26 destruction in 1998. It is currently the location of your office complex and ice
27 making facility.

28
29 As you note in your letter, the base lease (Lease Description and Term) states that
30 "Lessee shall have the option to renew this lease for one (1) successive period of
31 twenty-five (25) years...." The City very much appreciates the fact that Icicle
32 wishes to maintain its presence in Homer. However, as I stated on the phone, it
33 is the City's position at this time that Icicle is not eligible to exercise this option
34 because it has not complied with the General Conditions and Covenants and
35 Special Conditions contained in the Lease Agreement. Therefore, the City
36 maintains that Icicle is in default on the Lease Agreement.

37
38 The City's primary concern is that Icicle has not rebuilt its fish processing
39 facility and capacity and has expressed no plans to do so. The fact that the
40 property is not being used for a fish processing plant is a material breach of the
41 intent and conditions of the lease. Section 3 of the lease, entitled, USE OF
42 PREMISES; DEVELOPMENT PLAN, states very clearly that the use of the
43 leased parcel shall be for a seafood processing plant and operations directly
44 related thereto. A seafood processing plant has not been in operation at that
site for around 6 years. Our files show that the City has made a number of

1 attempts since 1998 to encourage Icicle to rebuild and/or submit a development
2 plan for a new facility.

3 We recognize that certain other authorized uses were added in the Amendment
4 of Lease Agreement (July 1, 1986) and the Second Amendment of Lease
5 Agreement (September 14, 1987), but none of the amendments removed the
6 basic requirement that the premises be developed and actually used for a
7 seafood processing plant according to the development plans initially approved.
8 Furthermore, there are financial and property terms in the Lease Agreement, as
9 amended, that are predicated upon the presence of a fully operating seafood
10 processing plant. Your current activities do not provide the level of
11 commitment in Homer that would justify continuation of those terms.
12 Therefore, we do not see how the option could be exercised under "the same
13 terms and conditions existing under the initial period of this lease."

14 These circumstances show that Icicle is in material and substantial breach of
15 the Lease Agreement. Therefore, by separate letter the City is giving Icicle
16 Seafoods NOTICE OF DEFAULT pursuant to Paragraph 19 of the Lease
17 Agreement.

18 I think it is important to re-emphasize what I stated to you on the phone in early
19 March. The City of Homer sincerely appreciates Icicle Seafoods and is very
20 pleased that the company wishes to maintain a presence here. The City
21 recognizes how much the company contributes to the community in terms of
22 jobs, economic activity, and revenue. The City remains hopeful that economic
23 conditions will improve to the point that construction of a new plant is feasible.
24 We would be happy to discuss how we might work together to make that a
25 reality.

26 The City is very interested in negotiating a new lease with Icicle that is more
27 appropriate for the present situation. We believe it is in the best interests of
28 both parties to do so. We appreciate your expressed willingness to discuss this
29 topic and we hope to get together with you soon. Please do not hesitate to
30 contact us if you have any questions or need additional information.

31 Exh. C, HOMER 532 – 533 / CX 58 – 59 (Emphasis added).

32 In a letter dated September 22, 2004, eight days after the Expired Icicle Lease
33 expired, from Mr. Walt Wrede to Mr. Ken "Duff" Hoyt, Mr. Wrede offers a counter
34 proposal for a new lease.

35 **SUBJECT:** Lot 41 Lease Amendments

36 Dear Duff:

1 Thank you for your recent letter and proposal dated September 13, 2004. The
2 City sincerely appreciates you taking the time to put the proposal together and the
3 spirit in which it was submitted. We have completed our review of the proposal
4 and would like to submit the following counter proposal. We believe that this
5 counter proposal gets us closer to where we need to be. Proposed changes are
6 underlined so that they are easily identified.

7 **LEASE TERM:** A five year lease with one five year renewal option. Also we
8 want to use the City new boilerplate lease format instead of just simply amending
9 the existing lease. The new lease has updated requirements regarding insurance,
10 environmental protection, and other items. I believe you already have a copy.
11 The Lease would have provisions for amendments in the event the Icicle is able to
12 make new investments in Homer.

13 **FISH DOCK:** \$36,000 per year including the following: Crane - 900 hours/year
14 (published tariff rate in effect at the time for hours over 900.) Included crane
15 hours reduced by 100 hrs. annually. At end of 5 year term, the intent is to have
16 crane use at published market rates with no subsidy.

17 The Items Below will be subject to published Tariff rates in effect at the
18 time. They are not included in the \$36,000 figure discussed above.

19 Fish Pump Moorage	\$516.00 per year
20 Dock Shack Lease	\$2,050 / yr.
21 Covered Storage on Dock	\$4,800/yr.
22 Space Lease Pneumatic Ice Delivery	\$2,400/yr.
23 Wharfage - published tariff	

24 Thanks for your time and consideration. Please look this proposal over and get
25 back to us at your earliest convenience. We would suggest a face to face meeting
26 for future discussions.

27 Exh. C, HOMER 514 – 515 / CX 62 – 63 (Emphasis added).

28 In an exchange of e-mails almost eighteen months later on April 28 and 29,
29 2006, the City frankly acknowledges that the Expired Icicle Lease is indeed expired.
30 Ms. Laurie Moore with the City details the letters exchanged by the City and Icicle in
31 2004 including some of the specific letters noted and reprinted above. She states to
32 other members of the City administration:

1 ----Original Message-----

2 From: Laurie Moore

3 Sent: Friday, April 28, 2006 8:59AM

4 To: Walt Wrede; Steve Dean

5 Cc: Regina Harville

6 Subject: Icicle Seafoods

7
8 This is a can of worms. Below is the correspondence in the lease file:

9 An appraisal was due 9/03 and was not done until 3/06. I sent a letter to Duff
10 with the increase of rent from 9/03 – 3/06

11 He called after receiving the letter with the increase that Eileen Bechtol sent him
12 a letter dated January 1999 stating the COH agrees to freezing the lease rate for
13 Lot 41 until September of 2005 or until completion of a new processing facility
14 on this parcel, whichever comes first, therefore, the increase should be retro
15 from September 2005.

16 March 5, 2004 , a letter from Duff to Walt giving notice to exercise their option
17 to renew the lease on Lot 41.

18 March 25, 2004 a letter from Walt the expiration of Lot 13B and Notice of
19 Default Lot 41.

20 March 25, 2004 a letter from Walt giving Lot 41 a Notice of Default and Intent to
21 Terminate Lease.

22 September 3, 2004 a letter from Duff to Walt surrendering lease of Lot 13B.

23 September 13, 2004, there is a letter from Duff to Walt proposing new lease
24 addendums for the lease renewal of Lot 41.

25 September 22, 2004 a letter from Walt to Duff regarding the lease terms for Lot
26 41 however no new lease has been done wit [sic] the new boilerplate lease
27 format.

28 I'm not sure what happened between the Notice of Default and the addendum
29 proposals (3/04-9/04) since I find no correspondence in the lease file.

30 Please let me know ASAP whether the lease increase should go back to 2003 or
31 2005.

32 Thanks,

1 Laurie
2 Laurie Moore, Accounts Receivable Supervisor
3 City of Homer
4 491 E Pioneer Ave
5 Homer Alaska 99603
6 E-mail address: Lmoore@ci.homer.ak.us
7 Phone 1-907-235-8121 ext. 2228
8 Fax : 1-907-235-3140

9 Exh. I at pages 1 – 2 / CX 107 - 108. (Emphasis added). In response, Mr. Wrede
10 acknowledges that Respondents do not have a lease with Icicle. Mr. Wrede states that
11 the City “simply dropped the ball”, “fell into a black hole” and is now operating “in the
12 twilight zone.”

13 From: “Walt Wrede” <wwrede@ci.homer.ak.us>
14 To: “Laurie Moore” <Lmoore@ci.homer.ak.us>; “Steve Dean”
15 <SDean@ci.homer.ak.us>
16 Cc: “Regina Harville” <RHarville@ci.homer.ak.us>
17 Sent Saturday, April 29, 2006 1:48PM
18 Subject: RE: Icicle Seafoods
19 Laurie:
20

21 Wow: Thanks for the trip down memory lane. Painful memories I might add!

22
23 This is another case whether we (the City) simply dropped the ball. After much
24 arguing over whether the lease should be terminated or not, we finally agreed
25 that we would work on an amendment to the existing least [sic] that would
26 address the City’s concerns about the breaks they were receiving even though
27 they no longer had a processing plant here. The idea was that we would
28 gradually bring them up to market rates for things like crane fees, dock use fees
29 etc. We started down that road but it fell into a black hole. We probably missed
30 an opportunity to get something done. They are now taking the position that
31 the old lease is still in effect and they do not want to negotiate any more. I told
32 them that I still want to talk about this. We are in the twilight zone. We do need
33 to follow-up one way or another. I cannot just tell them they are in default on
34 their lease and then not do anything about it.

35
36 As far as the retroactivity issue goes, If it looks like Eileen’s 1999 letter is
37 legitimate and relevant, I would say that we have to abide by it and go retro back
38 to January of 05.
39

1 The new appraisal fair market rent rate should apply (although I think it is
2 rediculously [sic] low). Also, we recently allowed them to move their fence in an
3 effort to help them with a setback problem they had. We lost some square
4 footage in the west side of the old porpoise room lot but gained some square
5 footage on the south side. I think it is basically a wash.

6
7 I would suggest writing them a letter, tell them that we agree to go retroactively
8 to Jan 2005, that that that new appraisal rate applies, and that their actual rent
9 amount may be adjusted later based upon the as-built.

10
11 Walt

12
13 Exh. I at page 1 / CX 107. (Emphasis added). According to the Expired Icicle Lease:

14 Any holding over after the expiration of this lease, or any extension hereof
15 with the consent of the Lessor shall be deemed to be a tenancy from
16 month to month. Termination of this lease during the initial period hereof
17 shall terminate all rights of renewal or extension hereunder.

18
19 Exh. 4 at page 2 / CX 193 (Emphasis added). Icicle had no right to renew or extend the
20 lease. Termination of the lease during the initial period thereof “shall” and did terminate
21 all rights of renewal or extension thereunder. Respondents have been favoring Icicle
22 since September 14, 2004 without any legal basis and contrary to the Tariffs. The
23 Respondents’ favoritism shown to Icicle, one of Complainants’ major competitors, has
24 damaged Complainants’ ability to compete for the purchase and sale of commercially
25 caught fish.

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

28 Mr. Hogan on behalf of the Complainants responded to a request for proposal
29 from the Respondents that expressly did not include the incentives and favoritism
30 shown to and for the benefit of Icicle. On behalf of Complainants, Mr. Hogan attempted
31 to negotiate a lease with the City with the promise of building a seafood processing

1 plant in Homer and sought the same or similar incentives offered to Icicle. Mr. Hogan
2 was compelled to sign what he regarded as a short-term lease under duress and under
3 protest on behalf of the Complainants until he could obtain a long-term lease with the
4 City with workable terms. Without signing a lease for the use of some Harbor property,
5 Complainants' business would have collapsed. There was no other place to go to
6 locate the business.

7 The law in Alaska regarding economic duress is found in Totem Marine Tug &
8 Barge, Inc. v. Alyeska Pipeline Service Co., 584 P.2d 15 (Alaska 1978), and Zeilinger v.
9 Sohio Alaska Petroleum Co., 823 P.2d 653, 675 (Alaska 1992). Duress is said to exist
10 where "(1) one party involuntarily accepted the terms of another, (2) circumstances
11 permitted no other alternative, and (3) such circumstances were the result of coercive
12 acts of the other party." (Citations omitted). In this case, (1) one party – Complainants -
13 involuntarily accepted the terms of another - Respondents - and (2) the circumstances
14 permitted no other alternative, and (3) such circumstances were the result of coercive
15 acts of the other party - Respondents. All three elements are clearly present in this
16 case. This is the type of ongoing unacceptable behavior on the part of the Respondents
17 that violates the statutory provisions set forth in the Shipping act of 1984 as amended.

18 The Lease between Harbor Leasing, LLC and the City of Homer was not
19 recorded until February 19, 2009. Respondents' Exhibit 10 / CX 217 notes that the
20 document was recorded "2/19/2009 at 3:19 PM" in the official state of Alaska notation in
21 the upper right hand corner. The Homer City Code 18.08.070.d states: "All leases or
22 memorandums of leases shall be recorded." (Emphasis added).
23 (<http://www.cityofhomer-ak.gov/cityclerk/chapter-1808-city-property-leases>).

1 Complainants have built and expanded a state-of-the-art “Solid-Fuel Absorption
2 Refrigeration” seafood processing plant described in the “Emerging Energy Technology
3 Grant” application dated June 2012. The description of the fish processing plant is set
4 forth in Exh. A / CX 1 - 19. At the same time, Mr. Hogan sought to obtain a long-term
5 lease for the property from the Respondents on an equal footing with Icicle.

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

7 The Terminal Tariffs govern the business dealings of the Respondents with the
8 Complainants and with Icicle Seafoods and others. Exhibits D / CX 64 - 73, E / CX 74 -
9 83, F / CX 84 – 93 and G / CX 94 - 103.¹⁷ “Terminal Tariff No. 600 Filed under ATFI
10 Rules” effective January 1, 2009 addressing “General Application Of Tariff” at
11 Subsection 105(a) at page 11 / CX 71 states:

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

23
24 Id. (Emphasis added). In addition, Respondents’ three (3) “Terminal Tariff No. 600 Filed
25 under ATFI Rules” effective January 1, 2011 and April 25, 2011 and July 25, 2011
26 addressing “General Application Of Tariff” at Subsection 105(a) at page 11 state the

¹⁷ Complete copies of all four Tariffs were filed as exhibits to Complainants’
RESPONSE TO MOTION FOR PARTIAL SUMMARY JUDGMENT. This BRIEF
includes copies of the relevant pages.

1 same general application of the Tariffs including to the “Small Boat Harbor.” CX 81, 91,
2 and 101. The Tariffs acknowledge and provide for the special terms and conditions for
3 a specifically named State entity (“State of Alaska, Alaska Marine Highway System” . . .
4 “on the Pioneer Dock”) and for the private sector contractor (“contractor” . . . “on or in
5 the vicinity of Deep Water Dock”) engaged in business. Id. The Tariffs do not provide
6 for any special terms and conditions for Icicle Seafoods or even generally refer to an
7 entity such as Icicle Seafoods. When the Tariff was prepared by the City effective
8 January 1, 2009, the Expired Icicle Lease had expired. Compare Exhs. 4 / CX 192 –
9 207 and 5 / CX 208 – 216 with the exchange of letters at Exh. C / CX 56 – 63 and the e-
10 mails at Exh. I / CX 107 - 108.¹⁸ The City and Icicle never concluded a binding lease
11 with Icicle. Homer City Code 18.08.070.d states: “All leases or memorandums of
12 leases shall be recorded.” (Emphasis added). ([http://www.cityofhomer-
13 ak.gov/cityclerk/chapter-1808-city-property-leases](http://www.cityofhomer-ak.gov/cityclerk/chapter-1808-city-property-leases))

14 The definitions in the Tariffs are controlling. The following references refer to the
15 Tariffs at Exhs. Exhibits D / CX 64 - 73, E / CX 74 - 83, F / CX 84 – 93 and G / CX 94 -

¹⁸ Exh. C / CX 56 – 63. HOMER 530-531 is the letter from Walt Wrede with the City of Homer to Ken “Duff” Hoyt with Icicle Seafoods dated March 25, 2004 (2 pages); HOMER 532-533 is the letter from Walt Wrede with the City of Homer to Ken “Duff” Hoyt with Icicle Seafoods dated March 25, 2004 (2 pages); HOMER 518 are the e-mails from Ken “Duff” Hoyt with Icicle Seafoods to Walt Wrede with the City of Homer dated May 19, 2004 and June 2, 2004 and from Walt Wrede with the City of Homer to Ken “Duff” Hoyt with Icicle Seafoods dated June 4, 2004 (1 page); HOMER 516 is the letter from Ken “Duff” Hoyt with Icicle Seafoods to Walt Wrede with the City of Homer dated September 13, 2004 (1 page); and HOMER 514-515 is the letter from Walt Wrede with the City of Homer to Ken “Duff” Hoyt with Icicle Seafoods dated September 22, 2004 (2 pages). The “Icicle Lease” expired on September 14, 2004. The City and Icicle were still negotiating another lease as of September 22, 2004. The City and Icicle never concluded a binding lease with Icicle. Homer City Code 18.08.070.d states: “All leases or memorandums of leases shall be recorded.” (Emphasis added). (<http://www.cityofhomer-ak.gov/cityclerk/chapter-1808-city-property-leases>)

1 103. Rule 34.2 addresses “ABBREVIATIONS, SYMBOLS, DEFINITIONS.” In the
2 “DEFINITIONS” section at page 8 of the Tariff, the first definition states “(a)
3 DEFINITIONS OF FEDERAL MARITIME COMMISSION MAY CONTROL: Unless
4 provided in this Tariff, applicable definitions set fort[h] in 46 C.F.R. shall control.” “(p)
5 TERMINAL FACILITIES” are defined at page 10 / CX 70, 80, 90 and 100 as:

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

11
12 “(c) CITY DOCKS” are defined at page 8 / CX 68, 78, 88 and 98 as:

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

19
20 “(g) HOMER HARBOR” is defined at page 9 / CX 69, 79, 89 and 99 as:

21 For the purpose of this Tariff, “Homer Harbor” shall mean all salt water or
22 tide water laying within the boundaries of the City, including that area
23 known as the Small Boat Harbor.

24
25 “(o) SMALL BOAT HARBOR” is defined at page 10 / CX 70, 80, 90 and 100 as:

26
27 “Small Boat Harbor” means that area of water protected by breakwaters
28 constructed by the federal government and by the line of the mean higher
29 high water of the shoreline of the area protected by breakwaters, including
30 docks, floats, berths, tidal grids and other mooring facilities as operated by
31 the City.

32
33 (Emphasis added). This definition includes the land and every structure and facility in
34 the Port of Homer.

35 Rule 34.4 addresses “APPLICATION OF TARIFF.” Exhs. D, E, F, and G at page
36 12 / CX 72, 82, 92 and 102. SUBSECTION 105(c) ACCEPTANCE OF TARIFF” at page

1 12 states “Use of the city docks and terminal facilities of the City shall be deemed
2 acceptance of this Tariff and the terms and conditions named herein.” The Tariff uses
3 the mandatory verb “shall” rather than the discretionary verb “may.” Icicle used and
4 uses the city docks and terminal facilities and the Deep Water Dock. Icicle’s use of the
5 city docks and terminal facilities and the Deep Water Dock of the City is deemed
6 acceptance of the Tariff and the terms and conditions named herein.

7 SUBSECTION 105(d) “RESERVATION OF AGREEMENT RIGHTS” at page 12 /
8 CX 72, 82, 92 and 102 states: “Right is reserved by the City of Homer to enter into
9 agreement with carriers, shippers, consignees and/or their agents concerning rates and
10 services, providing, such agreements are consistent with existing local, state and
11 federal law governing the civil and business relations of all parties.” (Emphasis added).
12 Icicle Seafood is not a registered “carrier,” “shipper,” “consignee” and/or their “agent”
13 and thus this section is inapplicable to justify the favorable treatment of Icicle.
14 Respondents have not presented a written and recorded document between the
15 Respondents and Icicle Seafoods that qualifies as an “agreement” filed with the
16 Commission. In addition, this subsection reserved the right for future “agreements” and
17 does not purport to ratify past “agreements.” The two existing agreements that are
18 exempted from the Tariff are stated in Subsection 105(a) of the Tariff at page 11 / CX
19 71, 81, 91, and 101 discussed above.

20 Respondents clearly provide terminal facilities and services to Complainants,
21 Icicle Seafoods, and other users of the marine terminal facilities in Homer including the
22 wharf, docks, warehouse and other property at the Port. Respondents also serve
23 “common carriers” at the Port such as Complainants and others.

1 **The “General Port and Harbor Provisions” Of The Homer Code**

2 **Do Not Provide An Exception For Icicle**

3 The “General Port and Harbor Provisions” of the Homer Code do not provide
4 authority for the Respondents to exempt Icicle from the provisions in the Tariff. Chapter
5 10.04 “General Port and Harbor Provisions” of the Homer Code states at Homer City
6 Code 10.04.035 “Harbor and Port Tariff” states in pertinent part: “The rates, charges,
7 rules and regulations for wharfage, terminal storage, demurrage and other terminal
8 services and privileges are set forth in the Homer Port and Harbor Tariff and as filed
9 with the Federal Maritime Commission.” Exh. 1 at page 2. Homer City Code
10 10.04.055(b) “Fees” states:

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

17 Id. at page 3. There are no written “special, negotiated arrangements” in the record in
18 this case, yet Respondents have provided special favors and exemptions to Icicle. The
19 two existing agreements that are exempted from the Tariff are stated in Subsection
20 105(a) of the Tariff at page 11 / CX 71, 81, 91, and 101 discussed above.

21 **Supporting Legal Discussion**

22 With the factual statements and legal contentions advanced by Complainants
23 and admitted by Respondents, the relevant supporting case law is reviewed below.
24 Complainants contend in their Fourth Amended Complaint that the Commission has
25 both personal jurisdiction over the Respondents and subject matter jurisdiction over this
26 matter. Docket 20 at page 2 at lines 17 – 19. Respondents admit these contentions.

1 In California v. United States, 320 U.S. 577 (1943), the United States Supreme Court
2 found and held that the Federal Maritime Commission has jurisdiction over the vast
3 majority of municipal ports. A court always must ascertain that it has subject matter
4 jurisdiction over the matter. In this case, Complainants contend and Respondents admit
5 the facts that underpin the Court's subject matter jurisdiction over this matter.

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

7 Complainants The Auction Block Company and Harbor Leasing, LLC are subject
8 to the provisions and protections of the Shipping Act of 1984 as amended each as a
9 "person" as defined in the former 46 U.S.C. § 1702(18) and in 46 C.F.R. § 515.2(p) and
10 other authority. 46 C.F.R. § 515.2(p) states: "*Person*" includes individuals,
11 corporations, partnerships and associations existing under or authorized by the laws of
12 the United States or of a foreign country." "Any person" means any person." South
13 Carolina Ports Authority v. Georgia Ports Authority, 22 SRR 1111, 1117 (1984). The
14 Alaska Supreme Court already found and held that The Auction Block Company is a
15 "primary fish buyer" of fish in Alaska. Deaver v. Auction Block Company, 107 P.3d 884
16 (Alaska 2005).

17 Although The Auction Block Company and Harbor Leasing, LLC are not
18 registered as "common carriers" with the Federal Maritime Commission, they are
19 common law common carriers. "The term 'common carrier' as used in the 1916 Act and
20 as better defined in the 1984 Act has been interpreted in many cases to mean the
21 common carrier as that term was understood in the common law." In River Parishes
22 Co., Inc. v. Ormet Primary Aluminum Corp., 28 SRR 188, 208 - 09 (1998), the Initial
23 Decision discusses the principles of statutory construction of the Shipping Act of 1984

1 as amended and the common law origins of the definition of a “common carrier.” The
2 Initial Decision states in pertinent part:

3 Statutory Construction—
4 Interpreting Exemptions from Remedial Statutes Narrowly

5
6 . . .

7
8 In the 1984 Act Congress gave the Commission jurisdiction over a
9 “marine terminal operator” who was defined as a “person engaged in the
10 United States in the business of furnishing wharfage, dock, warehouse, or
11 other terminal facilities in connection with a common carrier.” (Section
12 3(15) of the 1984 Act.) This was essentially the same definition as that
13 contained in section 1 of the 1916 Act. Elsewhere in the 1984 Act
14 Congress defined “common carrier” more in keeping with the common-law
15 definition of such a carrier as one “holding itself out of the general public to
16 provide transportation by water . . . except that the term does not includes
17 a common carrier engaged in ocean transportation by . . . ocean tramp” . .
18 . . .” The term “common carrier” as used in the 1916 Act and as better
19 defined in the 1984 Act has been interpreted in many cases to mean the
20 common carrier as that term was understood in the common law.
21 [Citation.]

22
23 One of the principles of statutory construction is that a remedial
24 statute should be broadly construed in order to enable an agency to give
25 effect to the statute’s salutary purposes.

26
27 . . .

28
29 The principle that when not completely clear, remedial statutes
30 should be broadly construed to effectuate their purposes is well
31 recognized in law and is followed in many cases. [Citations.]

32
33 . . .

34
35 The fact that the Shipping Acts are remedial and are to be broadly
36 construed to effectuate their salutary purposes was recognized by the
37 Supreme Court in connection with the interpretation of the Commission’s
38 jurisdiction under the same statutory provision in the 1916 Act in which the
39 Commission’s jurisdiction over terminal operators was first conferred.
40 [Citation.]

41
42 (Emphasis added; citations omitted). The Shipping Act of 1984 as amended should be
43 given a broad construction and interpretation to serve its remedial ends in this case.

1 In Capitol Transportation, 612 F.2d at 1317 - 18, the Circuit Court states the
2 seminal test:

3 It is not disputed that, in general, a common carrier under the
4 Shipping Act is, as the government maintains, one who expressly or by
5 course of conduct holds itself out to accept goods for transport by water
6 from whomever offered. . . . It is not necessary, moreover, in order to be
7 such a carrier by water, that one either own or control the means of
8 transportation.

9
10 (Emphasis added; citations omitted). The factual record developed above clearly
11 evinces that Complainants are common carriers.

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

13 Respondents The City of Homer and Port of Homer are subject to the provisions
14 of the Shipping Act of 1984 as amended as a "marine terminal operator" as defined in
15 46 U.S.C. § 40102(14) and other authority and as a "person" as defined in the former 46
16 U.S.C. § 1702(18) and in 46 C.F.R. § 515.2(p) and other authority. Respondents are
17 registered as a "marine terminal operator." Notice is posted on the Commission's
18 website. (<https://www2.fmc.gov/FMC1Users/scripts/ExtReports.asp?tariffClass=mt0>).
19 Official notice is broader than judicial notice and may be taken, not only of public
20 records and generally accepted facts, but also of matters within an agency's area of
21 special expertise. Union Electric Co. v. F.E.R.C., 890 F.2d 1193, 1202 (D.C. Cir. 1989).
22 The Commission addresses the taking of official notice in Commission Rule 226, 46
23 CFR § 502.226.

24 By operation of law, Respondents admit Complainants' contentions at Docket 20
25 at page 2 at lines 7 – 10 that:

26 The City and Port are subject to the provisions and protections of the
27 Shipping Act of 1984, as amended, as a "marine terminal operator" as
28 defined in 46 U.S.C. § 40102(14) and other authority and as a "person" as

1 defined in the former 46 U.S.C. § 1702(18) and in 46 C.F.R. § 515.2(p)
2 and other authority.

3 Ms. Yeoman testifies that the cruise ships dock at the Homer City Deep Water Dock
4 and the passengers purchase fish and seafood products from Complainants and the
5 vessels' galleys purchase wholesale product from Complainants.¹⁹

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

15 In their capacity as a marine terminal operator, Respondents filed Tariffs and
16 filed amended Tariffs with the Federal Maritime Commission. Exhs. D, E, F and G / CX
17 64 - 103. In their capacity as a marine terminal operator, Respondents impose the rates
18 in the Tariffs and others using the Fish Dock including Complainants. In their capacity
19 as a marine terminal operator, Respondents exempt Icicle Seafoods from paying the
20 rates in the Tariffs, albeit without a legal basis. In their capacity as a marine terminal
21 operator, Respondents seek to justify their decision to exempt Icicle Seafoods from the
22 application of the Tariffs by citing, albeit incorrectly, to a provision in the Tariffs. In their
23 capacity as a marine terminal operator, Respondents exclude other persons from the

¹⁹ Affidavit of Jessica Yeoman at Exh. U at page 4 at paragraphs 21 – 22 / CX 172.

1 Homer waterfront by precluding access or overcharging for services, albeit illegally.
2 The Shipping Act of 1984 as amended does not allow a marine terminal operator to doff
3 and don the marine terminal operator's hat on a whim. To paraphrase the conclusion
4 in South Carolina Ports Authority v. Georgia Ports Authority, 22 SRR 1111, 1117
5 (1984), "a 'marine terminal operator' means a 'marine terminal operator.'"

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

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

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

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

25
26 The administrative law judge in Plaquemines had characterized St.
27 Philip as establishing a "control theory" of Commission jurisdiction over
28 terminal activities. Id. at 1077, n. 5. The Commission adopted this phrase
29 and stated that "conditioning access to a port's private facilities upon the
30 payment of a charge for governmental services reflects significant
31 threshold control over terminal facilities." Id. at 1080. On the basis of this
32 "control theory," the Commission concluded that it had both personal
33 jurisdiction over the respondent Port District (which was a political
34 subdivision of the State of Louisiana) and subject matter jurisdiction over
35 the Port District's practice of assessing fees for certain vessel services

1 based on cargo transactions. The Commission specifically held that it had
2 subject matter jurisdiction under Section 17 of the 1916 Act – now Section
3 10(d)(1) of the 1984 Act – because the Port’s practices had an underlying
4 purpose relating to terminal operations and a more than incidental
5 relationship to the handling of cargo. On this point, the Commission
6 distinguished Bethlehem Steel.

7
8 (Citation omitted). Respondents not only condition access they absolutely control
9 access to the Port’s facilities and assess charges for those entities provided access.
10 The Port of Homer’s activities have an underlying purpose related to the terminal
11 operations in Homer and a more than incidental relationship to the handling of cargo –
12 the bounty of the sea. In another footnote in the case, the Commission notes:

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

23
24 Id. at 987 at n. 39. As noted above, Complainants are a “person” and a common law
25 “common carrier” entitled to relief and protection under the Shipping Act of 1984 as
26 amended. Respondents are a “person” and a “marine terminal operator” subject to
27 regulation and the Commission’s subject matter jurisdiction.

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

29 Even though the Shipping Acts disfavor exclusive arrangements,
30 they allow the FMC flexibility in applying the antidiscrimination provisions
31 in light of the particular circumstances existing at a given port. This
32 flexibility is served by a rule that, in the first instance, holds restrictive port
33 service arrangements to be presumptively illegal, but allows the
34 proponents to meet the presumption of illegality through the offer of
35 evidence in support of the restrictive arrangements reasonableness. If,
36 however, such a demonstration is made, the challenging party has, in the

1 Commission's words, the "ultimate burden" of establishing that the
2 justifications fall short of what the law requires.

3
4 (Emphasis added). Respondents are unable to overcome the presumption of illegality.
5 The gravamen of Respondents' position has been and is that the entity providing a
6 shore-based fish processing plant is to be afforded incentives. Respondents have
7 continued to offer incentives and disregard assessing the rates in the Tariff to Icicle
8 even after Icicle failed to rebuild its shore-based fish processing plant, confirmed that it
9 will not rebuild a plant and breached its now expired lease. Respondents have not
10 afforded any incentives to Complainants who fulfilled the requirement that they build
11 and operate a shore-based fish processing plant.

12 In Plaquemines Port v. Federal Maritime Commission, 838 F.2d 536, 542 - 543,
13 24 SRR 813, 818 – 19 (D.C. Cir. 1988), the Circuit Court states:

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

28 The 1916 Act was designed to strengthen the U.S. shipping
29 industry. Then, as now, shippers operated in cartels, often called
30 "conferences." Congress believed that U.S. shippers could not opt out of
31 the international cartel system and survive at the level thought required by
32 national needs and security. The 1916 Act, therefore, granted antitrust
33 immunity to shippers' cartels. In exchange, the cartels were subjected to
34 the provisions of the 1916 Act which prohibited discriminatory practices

1 and required the filing and publication of tariffs with the FMC. Essay, *The*
2 *Shipping Act of 1984: A Return to Antitrust Immunity*, 14 *Transp. L.J.* 153,
3 155-56 (1985).

4 In order to regulate the shippers' cartels effectively, it was
5 necessary to regulate other links in the transportation chain. The sponsor
6 of the 1916 Act, Congressman Alexander, in response to an amendment
7 to strike "other person" subject to the Act, explained that, in order for
8 regulation of the shippers to be effective, the FMC must also "have
9 supervision of all those incidental facilities connected with the main
10 carriers." 53 *Cong.Rec.* 8276 (1916). Alexander stated that the bill
11 contained no provision regulating shippers that did not also apply to
12 terminal facilities. *Id.* Moreover, he noted, if terminal facilities owned and
13 operated by state political subdivisions discriminated unduly, they, too,
14 would be subject to the 1916 Act. In 1943, the Supreme Court relying on
15 Congressman Alexander's remarks, held that waterfront terminals owned
16 and operated by municipalities were "other person[s] subject to the [1916
17 Act]." *California v. United States*, 320 U.S. 577, 585-86, 64 S.Ct. 352,
18 356-57, 88 L.Ed. 322 (1944).

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

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

1 Our conclusion is buttressed by the fact that in a previous
2 interpretation of the provision at issue here, the Supreme Court focused
3 on the Shipping Act's legislative scheme and required a broad
4 construction to make effective the scheme of regulation the statute
5 established. *United States v. American Union Transp.*, 327 U.S. 437, 447-
6 57, 66 S.Ct. 644, 649-54, 90 L.Ed. 772 (1946). The FMC has twice found
7 that the Port's tariffs, or at least portions of them, violate substantive
8 provisions of the Shipping Acts. It should be clear by now that allowing
9 such discrimination would nullify the Shipping Acts for the first 100 miles of
10 the Mississippi River north of the Gulf.

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

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

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

25 One of the fundamental purposes of the Shipping Act of 1984 is the
26 establishment of a nondiscriminatory regulatory transportation process for
27 the common carriage of goods in the U.S. foreign commerce. 46 U.S.C. §
28 1701(1). The Commission recognized this policy in stating that "[t]he
29 prevention of economic discrimination is at the heart of the regulatory
30 scheme established by Congress in the 1984 Act." Motor Vehicle
31 Manufacturers Ass'n of the United States, Inc. – Application for Exemption
32 of Vehicle Shipments from Portions of the Shipping Act of 1984, ___ FMC
33 ___, 25 SRR 853 (1990).

1 . . . Thus, the Commission recognizes that there are other
2 instances of undue preference or prejudice where competition is not
3 required.

4 Therefore, contrary to Sea-Land's position it is not essential to
5 demonstrate the existence of a competitive relationship in order to make
6 out a case of unreasonable preference. The Supreme Court so explained
7 in Volkswagenwerk Aktiengesellschaft v. FMC, 390 U.S. 261 [8 SRR 20,
8 109] (1968) ("Volkswagen").

9 (Emphasis added; footnote omitted). Respondents strain to contend that Complainants
10 and Icicle Seafoods do not compete. Respondents should let them compete.
11 Complainants and Icicle compete, albeit unfairly, for the business of commercial fishers
12 and for ultimate purchasers of commercially caught fish.²⁰ Respondents and Icicle,
13 seeking to preserve the favorable treatment, are going to absurd and dishonest lengths
14 to suggest that Icicle and Complainants do not compete. A more accurate
15 characterization is that the City is undermining Complainants' efforts to compete with
16 Icicle while also favoring Icicle. Complainants competed with Icicle to build and
17 maintain a shore-based fish processing plant and prevailed in the competition.

18 In Ceres Marine Terminal v. Maryland Port Admin., 27 SRR 1251, 1270-71 (FMC
19 1997), the Commission established the elements that must be proven to establish an
20 allegation of an unreasonable preference or prejudice.

21 In order to establish an allegation of an unreasonable preference or
22 prejudice, it must be shown that (1) two parties are similarly situated or in
23 a competitive relationship[46], (2) the parties were accorded different
24 treatment, (3) the unequal treatment is not justified by differences in
25 transportation factors, and (4) the resulting prejudice or disadvantage is
26 the proximate cause of injury. [Citation] The complainant has the burden
27 of proving that it was subjected to different treatment and was injured as a

²⁰ Complainants and Icicle also purchase and sell products and services to each other at times when it is in the economic interests of each entity.

1 result and the respondent has the burden of justifying the difference in
2 treatment based on legitimate transportation factors.

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

7 In Ceres Marine Terminal v. Maryland Port Admin., 29 SRR 356, 372 (FMC
8 2001), the Commission states:

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

21
22 (Emphasis added; citation omitted). Damages are easily calculated on this record. The
23 Commission concludes:

24 The Commission finds that the common law doctrines of waiver and
25 estoppel may not be invoked to prohibit a party to an agreement subject to
26 the Commission’s jurisdiction from later challenging the agreement in a
27 complaint file with the Commission, alleging that one of the parties to the
28 agreement violated a duty imposed on it by the Shipping Act. We further
29 find it unnecessary to rule on Ceres’ alternative grounds for liability.

30
31 We find the appropriate measure of damages for a violation of
32 sections 10(b)(11) and (12), where a party has breached a duty to apply
33 its criteria for granting lower rates in a fair and evenhanded manner, is the
34 difference between the rate that was charged and collected, and the rate
35 that would have been charged but for the undue preference and prejudice.
36

37 We further find that the appropriate measure of damages for a
38 violation of section 10(d)(1) is the degree to which the rates are excessive,

1 which, based on the facts of this case, is the difference between the rates
2 charged Maersk and Ceres.

3
4 Id. at 374 (Emphasis added; citation omitted). In this case, Respondents have
5 “breached a duty to apply its criteria for granting lower rates in a fair and evenhanded
6 manner” and the reparations are “the difference between the rate that was charged and
7 collected, and the rate that would have been charged but for the undue preference and
8 prejudice.” The specific fees charged and collected by Respondents and paid by
9 Complainants are established and admitted. The damages are set forth with specificity
10 in the Fourth Amended Complaint and are not denied with specificity and are admitted
11 in the Fourth Amended Answer.

12 In AHL Shipping Co. v. Kinder Morgan Liquids Terminals, LLC, 30 SRR 520
13 (2004), the Order states in pertinent part:

14 It is not necessary for the Complainant to show that it provides
15 transportation by water of passengers or cargo between the United States
16 and a foreign country; it is only necessary for the Complainant to show for
17 each Respondent that at least one of the Respondent’s customers
18 receiving terminal services is engaged in providing transportation by water
19 of passengers or cargo between the United States and a foreign country.

20
21 Id. at 521. Complainants provide transportation by water of cargo between the United
22 States and a foreign country, namely Canada, Japan, Korea and others.²¹ In addition,
23 Respondents’ customers including Icicle receiving terminal services are engaged in
24 providing transportation by water of cargo between the United States and foreign
25 countries.

26 The reliance on Transpacific v. Federal Maritime Commission is
27 misplaced. The jurisdiction of the Federal Maritime Commission is not

²¹ Complainants’ Response to Request for Admission Number 1 at Exh. B at page 7 at line 4 – page 9 at line 9 / CX 26 - 28; Affidavit of Ms. Jessica Yeoman at Exh. U at page 5 at paragraphs 28, 29 and 30 / CX 173.

1 based on an agreement between a complaining carrier and the marine
2 terminal operator. The jurisdiction is based on the business practices of a
3 marine terminal operator engaged in service to ocean common carriers.
4 Section 10 of the Shipping Act, 26 (App.) USC 1709(d) prohibits marine
5 terminal operators from engaging in unreasonable practices. Section 11,
6 46 (App.) USC 1710(a), permits “any person” to file a complaint with the
7 Federal Maritime commission alleging a violation of any part of the
8 Shipping Act. The phrase “any person” is not limited to those persons
9 engaged in ocean transportation between the United States and foreign
10 ports.

11
12 Id. at 522. Jurisdiction is based on the business practices of a marine terminal operator
13 engaged in service to “persons” and common law “common carriers” such as the
14 Complainants and others.

15 In Fact Finding Investigation 24 – Exclusive Tug Arrangements In Florida Ports,
16 29 SRR 231 (2001), the Order of Investigation discusses the unreasonable refusal to
17 deal or negotiate and states:

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

24
25 Footnote four states: “This section is made applicable to MTOs by section 19(d)(3) of
26 the 1984 Act, 46 USC App. 1709(d)(3).” Footnote five states: “OSRA added a new
27 subsection to the 1984 Act’s Declaration of Policy as follows: (4) to promote the growth
28 and developments of United States exports through competitive and efficient ocean
29 transportation and by placing a greater reliance on the marketplace.”

30 Respondents have analogized this situation to a well-established tug business
31 and an upstart enterprise with a few leaky tug boats competing with each other. The
32 analogy is inapposite because the business relationship between Complainants,

1 Respondents and Icicle Seafoods does not involve navigation activities and instead
2 involves the core and fundamental marine terminal activities in Homer. In addition, if
3 the analogy has any application, Icicle Seafoods has zero (0) “tugs” and continues to
4 state that it does not plan to build a tug while The Auction Block has built and operates
5 one hundred percent (100 percent) of the “tugs” in Homer, namely a shore-based state-
6 of-the-art fish processing plant. The gravamen and essence of Complainants’ Fourth
7 Amended Complaint and case is that they seek a level playing field and desire a greater
8 reliance on the marketplace rather than connections and favorable deals that skew and
9 distort the market.²² Respondents provide and Complainants use terminal services.

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

11 In summary, Respondents are in violation 46 U.S.C. § 41102(c)²³ because
12 Complainants have proved that Respondents “fail to establish, observe, and enforce
13 just and reasonable regulations and practices relating to or connected with receiving,
14 handling, storing, or delivering property.” Complainants clearly offer “a clear and
15 tangible benefit to the City that warrants deviation from such rates” namely the
16 ownership and operation of a shoreside fish processing plant in Homer, yet

²² Complainants discuss their efforts to deal and/or negotiate in the Answer to Interrogatory No. 11 at Exh. B at page 19 at line 4 – page 26 at line 20 / CX 38 - 45; Supplemental Affidavit of Kevin Hogan at Exh. P at page 3 at paragraph 17 and at page 4 at paragraph 28 - page 6 at paragraph 39 / CX 145 and 146 - 148; Affidavit of Jessica Stack at Exh. U at page 7 at paragraph 39 – page 9 at paragraph 47 / CX 175 - 177; Respondents’ Exh. 9 sets forth just some of futile efforts undertaken by Mr. Hogan to negotiate with Respondents; see also Affidavit of Shelly Erickson at Exh. 0 / CX 138 – 139 and Affidavit of Don Martin McGee at Exh. P / CX 140 - 142.

²³ 46 U.S.C. § 41102(c) states in pertinent part: “A . . . marine terminal operator . . . may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.”

1 Respondents offer the incentives to Complainants' competitor, Icicle Seafoods, that has
2 not rebuilt and does not intend to rebuild a shoreside fish processing plant.
3 Complainants' damages are the additional amounts they are compelled to pay and have
4 admittedly paid in wharfage and crane fees, and lost profits. These damages are
5 proximately caused by Respondents' violations of the statute.

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

7 In summary, Respondents also are in violation of 46 U.S.C. § 41106(2)²⁴ that
8 uses the word "any" rather than "some" or "substantial" to state that only a modicum of
9 "preference" or "advantage" or "prejudice" or "disadvantage" is required. This statute
10 also uses the disjunction "or" not the conjunction "and" throughout the statute.
11 Complainants have proved without a doubt that Respondents "give any undue or
12 unreasonable preference or advantage or impose any undue or unreasonable
13 prejudice or disadvantage with respect to any person." Complainants' damages are the
14 additional amounts they are compelled to pay and have admittedly paid in wharfage and
15 crane fees, and lost profits. These damages are proximately caused by Respondents'
16 violations of the statute.

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

18 In summary, Respondents also are in violation of 46 U.S.C. § 41106(3)²⁵
19 because Respondents "unreasonably refuse to deal or negotiate" with Complainants.²⁶

²⁴ 46 U.S.C. § 41106(2) states in pertinent part: "A marine terminal operator may not . . . (2) give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person."

²⁵ 46 U.S.C. § 41106(3) states in pertinent part: "A marine terminal operator may not . . . (3) unreasonably refuse to deal or negotiate."

1 A similar "covenant of good faith and fair dealing" is incorporated into all contracts
2 executed and performed in the State of Alaska. Luedtke v. Nabors AK Drilling, Inc., 834
3 P.2d 1220 (Alaska 1992). In addition to the testimony of Mr. Hogan and Ms. Yeoman,
4 the Affidavit of Shelly Erickson, a past chair of the Homer Economic Development
5 Commission (EDC) and the Homer Lease Committee from 2008 until 2011, at Exhibit N
6 (CX 138 – 139), and the Affidavit of Don Martin McGee at Exhibit O / CX 140 – 141.
7 These affidavits were prepared and submitted by the affiants in her and in his own
8 words and then cut and pasted without any change. Complainants' damages are the
9 additional amounts they are compelled to pay and have admittedly paid in wharfage and
10 crane fees, and lost profits. These damages are proximately caused by Respondents'
11 violations of the statute.

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

13 Complainants' damages, except the specific amounts for 2012 and the fine-tuned
14 amount for lost profits, are stated by Complainants in specific detail and admitted by
15 Respondents in the five verified Complaints including the verified Fourth Amended
16 Complaint.

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

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

²⁶ Complainants discuss their efforts to deal and/or negotiate in the Complainants' RESPONSE at Docket 26 at page 17 at line 5 - page 22 at line 16 and in the Answer to Interrogatory No. 11 at Exh. B at page 19 at line 4 – page 26 at line 20. Complainants also discuss their futile efforts in the Supplemental Affidavit of Kevin Hogan at Exh. P at page 3 at paragraph 17 and at page 4 at paragraph 28 - page 6 at paragraph 39; and the Affidavit of Jessica Stack at Exh. U at page 7 at paragraph 39 – page 9 at paragraph 47.

1 Complainants' inability to compete on an equal basis with Icicle damages has
2 and is damaging their ability to compete for the purchase of commercially caught fish.
3 The higher rates in the Tariffs charged by Respondents to Complainants and the lower
4 rates in the Expired Icicle Lease charged or waived by Respondents to Icicle directly
5 and significantly impact the overhead and operating costs of each entity. The disparate
6 treatment directly and significantly impacts the prices that each entity can offer to
7 commercial fishers for their fish. Commercial fishers are extremely sensitive to price.
8 Price is the primary and overriding consideration and paramount concern of fishers.
9 Because The Auction Block cannot offer or at times even come close to meeting Icicle's
10 price, The Auction Block losses sales to Icicle.

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

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

21 Docket 20 at page 7 at lines 28 - 34 (Emphasis added). "The Auction Block Company
22 Lost Profit Report April 2009 – August, 2012" discusses the Complainants' financial
23 situation and business prospects and concludes that Complainants lost \$912,766.98 as
24 a result of Respondents' violations of the statutory provisions in the Shipping Act of
25 1984 as amended. Exh. R / CX 158 - 165. In the Prayer for Relief, Complainants state
26 in pertinent part:

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

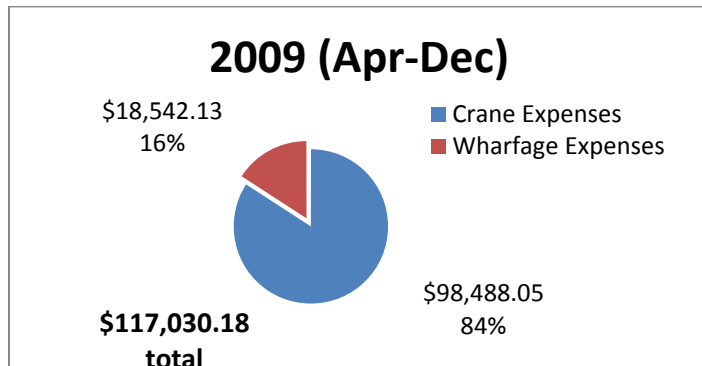
6 Docket 20 at page 7 at line 35 – page 8 at line 7 (Emphasis added). This total damage
7 figure includes the undisputed sum of \$332,114.83 for the years 2009 to 2011, the sum
8 of \$48,289.70 for 2012, and the lost profits then calculated “in the sum of at least
9 \$900,000.00” and now calculated more precisely at \$912,766.98. The amounts for
10 2012 are established in the Supplemental Affidavit of Kevin Hogan at Exh. Q / CX 152 -
11 157.

12 Respondents’ efforts to put Complainants out of business are taking a
13 devastating financial toll. The “The Auction Block Company Lost Profit Report April
14 2009 – August, 2012” marked as Exh. R / CX 158 – 165 states and concludes:

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

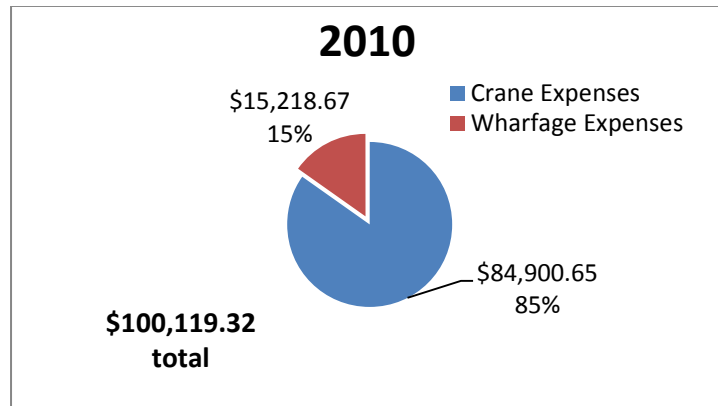
20 Figures 1, 2, 3, and 4 below show The Auction Block Company’s total dock expenses (crane and
21 wharfage) in Homer for 2009 (Apr-Dec), 2010, 2011, and 2012 (Jan-Aug).

22 **Figure 1**



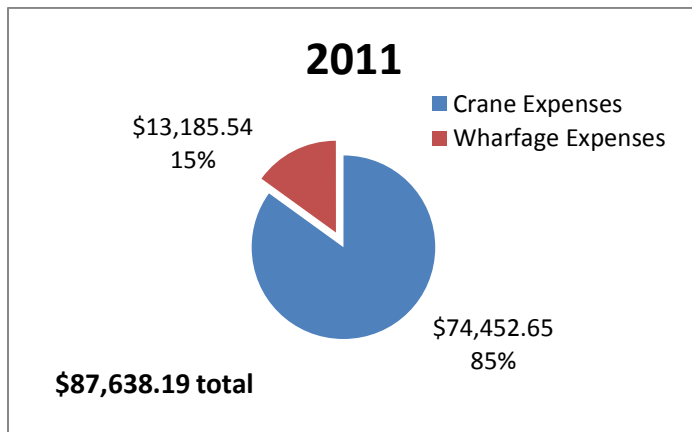
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Figure 2



2

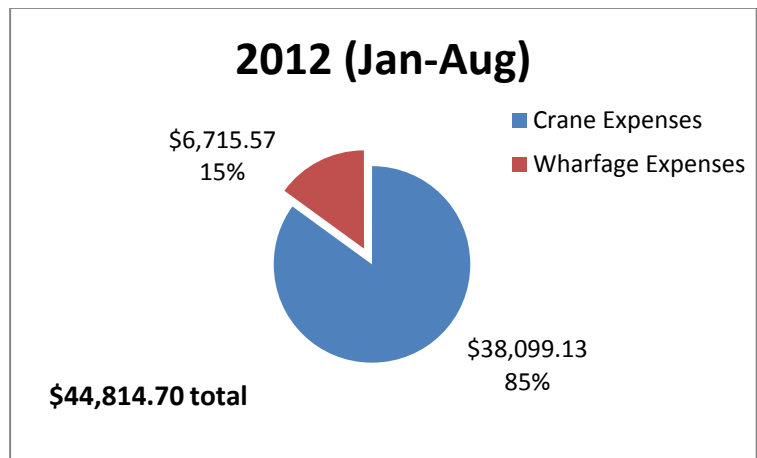
3 Figure 3



4

5

Figure 4



6

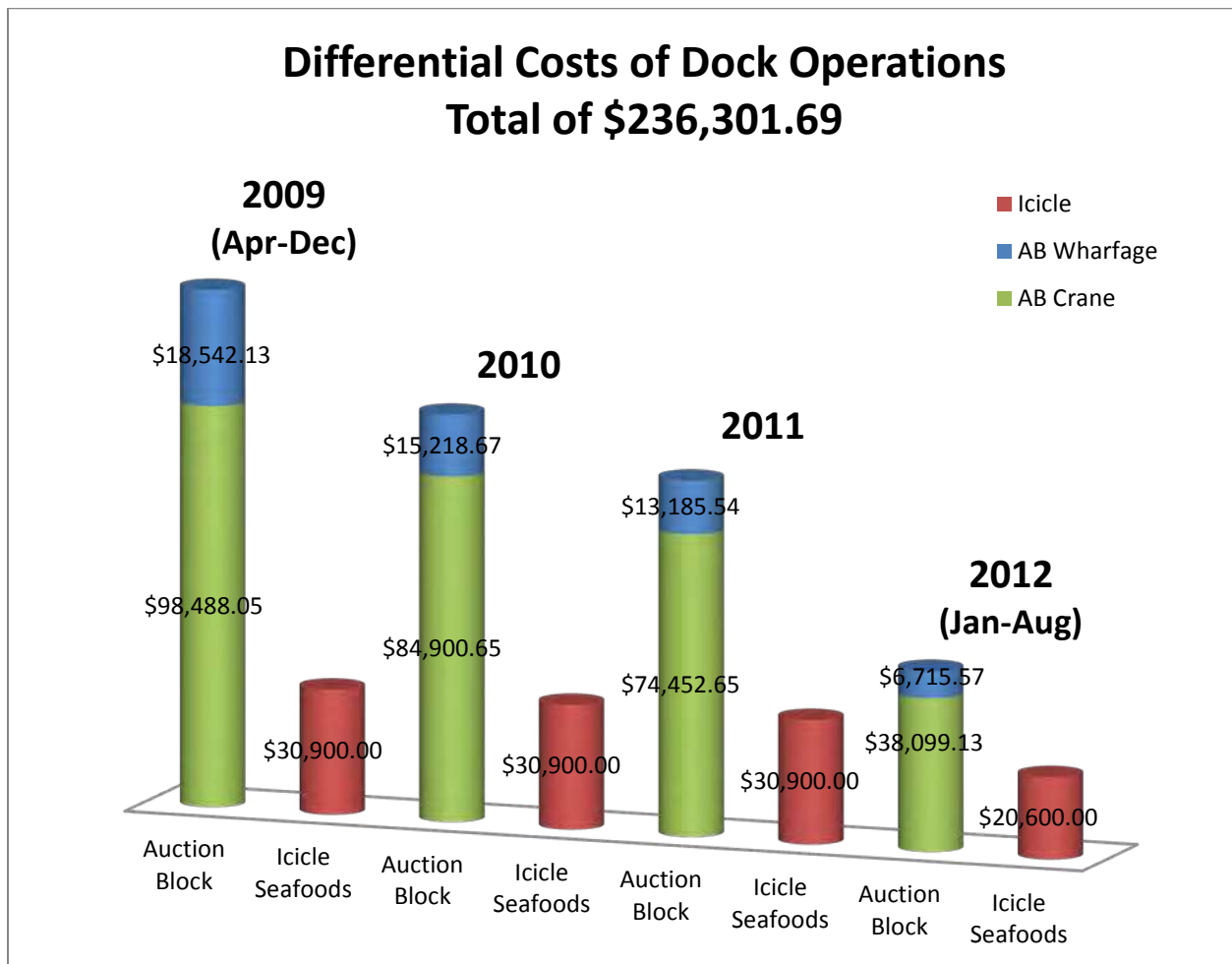
7 The amounts for crane expenses and wharfage expenses are specifically explained in
 8 Complainants’ Fourth Amended Complaint at Docket 20 at “Paragraph V. Violations” including
 9 Paragraphs A – E at page 3 at line 3 to page 7 at line 9. These amounts are specifically discussed
 10 at page 4 at lines 9 – 12 and at page 6 at lines 19 – 28. The amounts billed by Respondents and

1 paid by Complainants for 2012 are discussed and verified in the Supplemental Affidavit of Kevin
2 Hogan.

3 Over the three-and-a-half-year period, The Auction Block Company paid the City of Homer
4 \$349,601.69 in dock expenditures (crane and wharfage) based on the volume of seafood
5 products and ice that cross the Homer dock. Icicle Seafoods paid the City of Homer a flat rate
6 of \$30,900.00 each year of operation. Over the three-and-a-half-year period, Icicle Seafoods
7 paid a total of \$113,300.00 (\$30,900 x 3 and \$20,600 for 2012) in dock expenditures.

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

10 **Figure 5**



11
12 The Auction Block Company paid the City of Homer \$236,301.69 more than Icicle Seafoods
13 during this three-and-a-half year period. This amount of \$236,301.69 represents The Auction
14 Block Company's potential working capital and purchasing power which The Auction Block
15 Company would have used to purchase, unload, process, and ship additional pounds of fish.

Icicle Seafoods' Differential Property Fees

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

Table 1

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

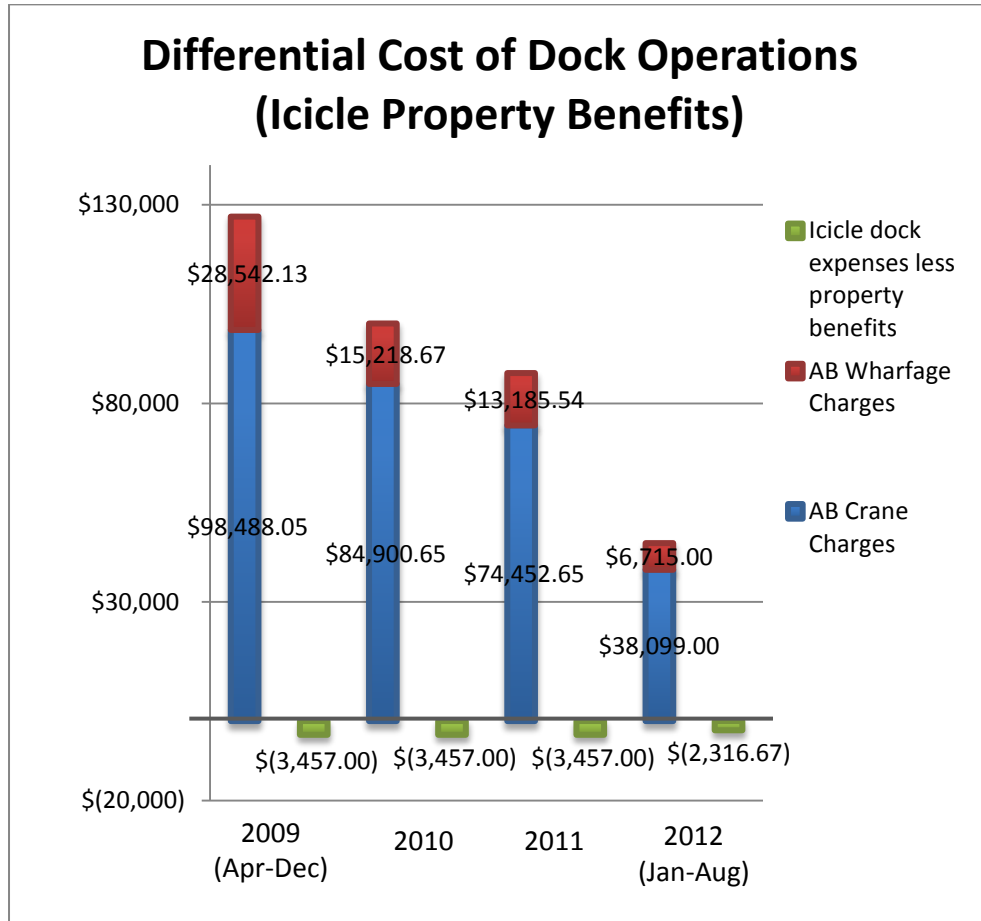
The rates clearly show that Icicle Seafoods pays a lower rate per square foot of property. The Auction Block Company pays the City of Homer \$0.20 more per square foot than Icicle Seafoods. In addition, Icicle Seafoods benefits from the additional use of 2,750 square feet of dock space free of charge.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

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

3

4 Figure 6

5



6

7

8 Icicle Seafoods' annual rate of \$30,900.00 for crane and wharfage charges is further offset by
 9 Icicle Seafoods' use of \$34,375.00 worth of property free of charge. Icicle Seafoods enjoys
 10 \$3,475 per year in property, crane, and wharfage benefits from the City of Homer. This
 11 favorable treatment gives Icicle Seafoods a clear advantage over other businesses that are
 12 subject to property value tariffs and dock expenses.

13

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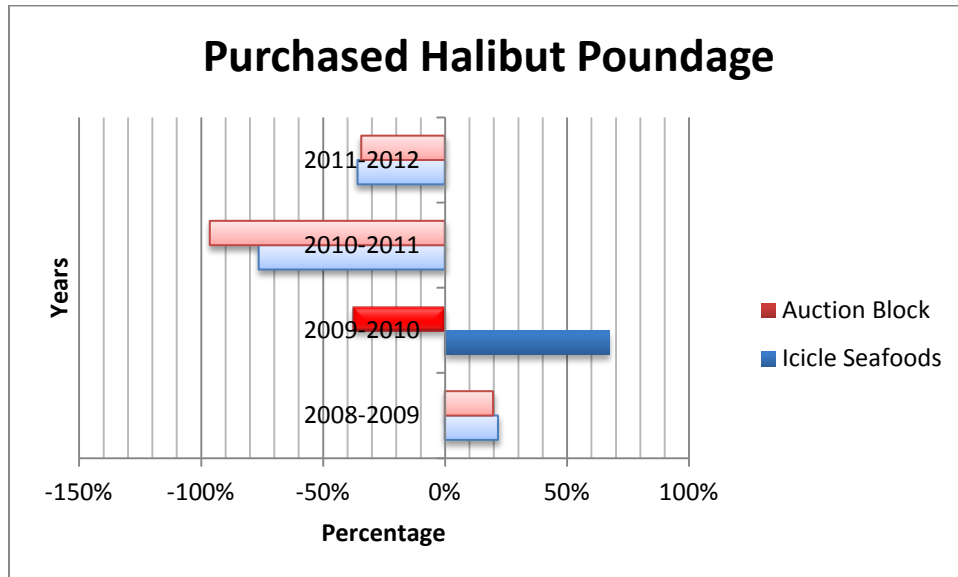
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19

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

3

Figure 7



4

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

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

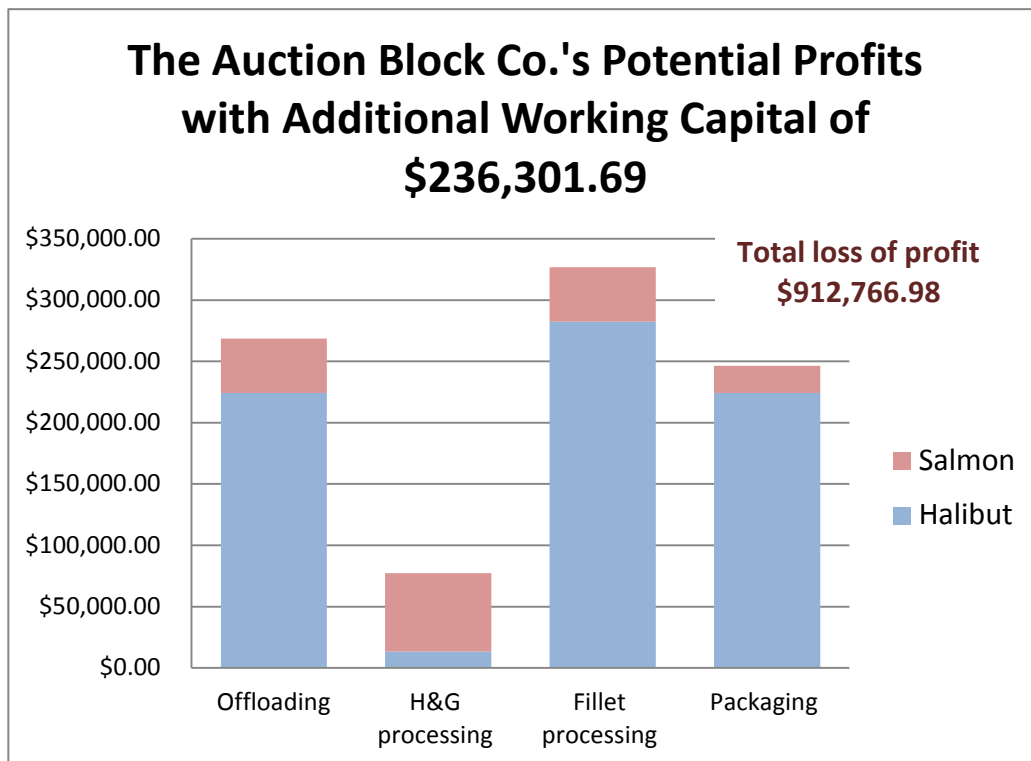
21 The lost purchasing power of \$236,301.69 at the rate of \$0.05 per pound differential paid to
22 vessels would have secured 4,726,034 more pounds that potentially could have been purchased
23 by The Auction Block. Of these total pounds, halibut would account for ninety-one percent
24 (91%) of the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

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

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

7

Figure 8



8

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

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

17 Sources:

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

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

7 **Conclusion**

8 Respondents provided incentives to Icicle based on Icicle's maintenance and
9 operation of a shore-based seafood processing plant in Homer. However, the plant
10 burned down in 1988 and was never rebuilt nor does Icicle ever intend to rebuild the
11 plant. Icicle has not rebuilt a plant and instead tethers a floating processor that receives
12 and trucks the fish to Seward, Alaska for processing and then departs Homer at the end
13 of the season. The Expired Icicle Lease expired on September 14, 2004. Nonetheless,
14 Respondents have not required Icicle to adhere to the rates and provisions in the Tariffs
15 and continue to provide the incentives and relief gratuitously.

16 Complainants sought a long-term lease with Respondents with the same
17 incentives offered to Icicle. Complainants expanded their extant fish processing plant
18 and developed a state-of-the-art shore-based "Solid-Fuel Absorption Refrigeration"
19 seafood processing plant in Homer. The detailed discussion in the application at Exhibit
20 A / CX 1 – 19 submitted to the Alaska Energy Authority describes in accurate detail the
21 fish processing plant designed, developed and operated by Complainants on the Homer
22 Spit in Homer, Alaska. The plant is capable of handling all of the commercially caught
23 fish and seafood currently being delivered to Homer and has enough excess capacity to
24 accommodate other seafood. Complainants are poised to increase the number and
25 amount of fish and seafood product being cleaned, processed, frozen, packaged, and
26 shipped in and from Homer.

1 Despite fulfilling the stated requirement to obtain the incentives, Respondents
2 refused and refuse to provide the incentives to Complainants. Applying to the
3 Respondents is futile. The City has at times stated that Complainants can submit an
4 application for a lease. However, Respondents unreasonably refuse to deal or
5 negotiate with Complainants. Mr. Hogan testifies that the Homer lease process is
6 “futile,” a “sham” and a “fraud.”²⁷ Ms. Yeoman testifies that the Homer lease process is
7 a “farce” and a “charade.”²⁸ Complainants’ only realistic recourse is to seek immediate
8 redress before this honorable Commission.²⁹ Complainants must and have filed this
9 Complaint with the Federal Maritime Commission to seek the relief afforded by the
10 Shipping Act of 1984 as amended.

11 Respondents’ favorable treatment of Icicle and prejudicial treatment of
12 Complainants and refusal to deal or negotiate have inflicted substantial economic
13 losses and continue to inflict substantial economic losses on Complainants. The City
14 has hobbled The Auction Block’s ability to compete for the purchase and sale of
15 commercially caught fish and seafood. The City seems pleased to note the economic
16 and financial devastation resulting from its favoritism of Icicle Seafoods and prejudice
17 toward Complainants.

²⁷ Affidavit of Kevin Hogan at Exh. P at page 5 at lines 32 - 36 and passim; see also
Affidavit of Shelly Erickson at Exh. N / CX 138 – 139 and Affidavit of Don Martin McGee
at Exh. O / CX 140 - 142.

²⁸ Affidavit of Jessica Yeoman at Exh. U at page 9 at paragraph 47 and at page 7 at
paragraph 39 – page 9 at paragraph 47 / CX 177 and 175 - 177.

²⁹ Complainants cite Alaska law on duress, estoppel, the covenant of good faith
and fair dealing and statutory interpretation. However, the Alaska courts do not have
the jurisdiction to address the statutory violations in the Shipping Act of 1984 as
amended.

1 The Shipping Act of 1984 as amended vests the Federal Maritime Commission
2 with considerable discretion to fashion an appropriate remedy. The Court should note
3 that the City has consistently maintained that the entity providing the shore-based fish
4 processing plant is perforce contributing substantially to the City and is provided the
5 defined incentives. This Court should accept the Respondents' representations and
6 order the Respondents to offer the incentives currently offered to Icicle to Complainants
7 for eight (8) years to allow Complainants to compete with Icicle and then be subject to
8 the Tariffs. Icicle should be obligated to conform to the rates in the Tariffs.³⁰ Any other
9 fish processor that builds and operates a shore-based processing plant in Homer should
10 be able to obtain the incentives offered to an entity that builds and operates a shore-
11 based fish processing plant in Homer. Absent favoritism for Icicle, Respondents should
12 have no quarrel with and should support this condign resolution. This remedy is most
13 appropriate and just under the circumstances. Fine-tuning the incentives is justified and
14 required to remedy the past egregious and blatant discrimination. In addition, an award
15 of reparations for past losses is appropriate and justified.

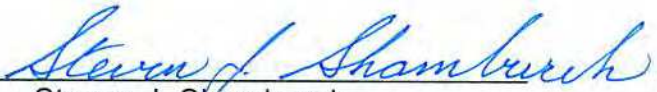
16 For the reasons stated and discussed above, Complainants respectfully move for
17 entry of judgment.

18
19

³⁰ Rule 34.4 addresses "APPLICATION OF TARIFF." Exhs. D, E, F, and G at page 12 / CX 72, 82, 92, 102. SUBSECTION 105(c) ACCEPTANCE OF TARIFF" at page 12 states "Use of the city docks and terminal facilities of the City shall be deemed acceptance of this Tariff and the terms and conditions named herein." The Tariff uses the mandatory verb "shall" rather than the discretionary verb "may." Icicle used and uses the city docks and terminal facilities.

1 DATED this 4th day of December, 2012.

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

5
6 By: 


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18 **CERTIFICATE OF SERVICE**

19
20 I hereby certify that I have this day served a copy of this pleading upon Thomas F.
21 Klinkner, Birch Horton Bittner & Cherot, 1127 West 7th Avenue Anchorage, Alaska
22 99501 by sending a copy by U.S. Mail and by e-mail attachment to tklinkner@bhb.com
23 and also a copy to Holly C. Wells at hwells@bhb.com.

24 Dated this 4th day of December, 2012.

25
26 By: 
27 Steven J. Shamburek
28