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 14 Attorneys for the Port of Bellingham

The Honorable James L. Robart

11 **UNITED STATES DISTRICT COURT**
 12 **WESTERN DISTRICT OF WASHINGTON**

13 BORNSTEIN SEAFOODS, INC., a
 14 Washington Corporation,
 15
 16 Plaintiff,
 17
 18 vs.
 19 CITY OF BELLINGHAM, a
 20 Washington Municipal Corporation; and
 21 PORT OF BELLINGHAM, a Washington
 22 Municipal Corporation.
 23
 24 Defendants.

No. 2:21-cv-00022-JLR

**STIPULATION FOR DEFENDANT
 PORT OF BELLINGHAM TO FILE
 AMENDED ANSWER,
 AFFIRMATIVE DEFENSES, AND
 COUNTERCLAIMS**


**NOTE ON MOTION CALENDAR:
 08/05/2022**

23 IT IS HEREBY STIPULATED by and between the parties to the First Amended Complaint,
 24 Docket Number Seven (7), through their respective undersigned attorneys of record, that pursuant
 25 to Rule 15(a) of the Federal Rules of Civil Procedure, Defendant Port of Bellingham (the "Port"), in
 26 the above-entitled action may file an amended answer and counterclaims, a copy of which is
 27 attached hereto as **Exhibit A**.


28 IT IS FURTHER STIPULATED that Plaintiff Bornstein Seafoods waives notice and service

1 of the amended answer and counter claims.

2 DATED this 4 day of August, 2022.

By: 
CHMELIK SITKIN & DAVIS P. S.
Attorneys for Defendant Port of Bellingham
SETH A. WOOLSON, WSBA #37973
HOLLY M. STAFFORD, WSBA #40674
T. TODD EGLAND, WSBA #48788
SARA B. FRASE, WSBA #56922

7 DATED this 3rd day of August, 2022.

By: 
DAVIS LAW OFFICE PLLC
Attorneys for Plaintiff Bornstein
Seafoods Inc.
Mark J. Davis, WSBA #51262
Clark J. Davis, WSBA #11635

11 DATED this 4th day of August, 2022.

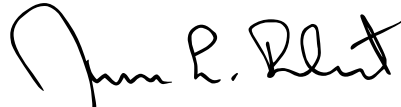
By: /s/ Stephen J. Tan
Stephen J. Tan, WSBA #22756
Tanya Barnet, WSBA #17491
CASCADIA LAW GROUP PLLC
Attorneys for Defendant City of Bellingham

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ORDER

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3 Good Cause appearing therefore, **IT IS HEREBY ORDERED** that Defendant Port of
4 Bellingham is granted leave to file the First Amended Answer, Affirmative Defenses, and
5 Counterclaims, which is attached hereto as **Exhibit A**.

6
7 **DATED:** August 5, 2022

8 

9
10

James L. Robart
United States District Court Judge

CERTIFICATE OF SERVICE

I, Kimiko A. Torres, certify under the laws of the United States of America that on August 5, 2022, I filed a true and correct copy of the foregoing document with the Clerk of the Court and served counsel below by the method indicated:

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CHMELIK SITKIN & DAVIS, P.S.



Kimiko Torres
Legal Assistant to Seth A. Woolson

EXHIBIT A

1 Seth A. Woolson, WSBA #37973
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11 **UNITED STATES DISTRICT COURT**
 12 **WESTERN DISTRICT OF WASHINGTON**

13 BORNSTEIN SEAFOODS, INC., a
 14 Washington Corporation,

15 Plaintiff,

16 vs.

17 CITY OF BELLINGHAM, a
 18 Washington Municipal Corporation; and
 19 PORT OF BELLINGHAM, a Washington
 20 Municipal Corporation.

21 Defendants.

No. 2:21-cv-00022-JLR

**DEFENDANT PORT OF
 BELLINGHAM'S FIRST AMENDED
 ANSWER, AFFIRMATIVE
 DEFENSES, AND COUNTERCLAIMS**

22 Defendant Port of Bellingham (the "Port"), for its answer to Plaintiff Bornstein Seafoods,
 23 Inc.'s ("Bornstein") Amended Complaint for Damages and Declaratory Relief, admits, denies, and
 24 alleges as follows:

25 **INTRODUCTION**

26 1. This paragraph contains no allegation to which a response is required.
 27

1 28. The allegations in this paragraph are directed at the City and require no response
2 from the Port.

3 29. The Port has insufficient knowledge or information to form a belief as to the truth of
4 the allegations in this paragraph and, on that basis, denies.

5 30. The allegations in this paragraph are directed at the City and require no response
6 from the Port.

7 31. The Port has insufficient knowledge or information to form a belief as to the truth of
8 the allegations in this paragraph and, on that basis, denies.

9 32. The allegations in this paragraph are directed at the City and require no response
10 from the Port.

11 33. The allegations in this paragraph call for a legal conclusion to which no answer is
12 required. To the extent an answer is required, the Port denies.

13 34. The allegations in this paragraph are directed at the City and require no response
14 from the Port.

15 35. The Port denies the allegations in this paragraph.

16 36. The Port admits that the Roeder Landfill sits on land partially owned by the Port.

17 37. The Port has insufficient knowledge or information to form a belief as to the truth of
18 the allegations in this paragraph and, on that basis, denies.

19 38. The Port has insufficient knowledge or information to form a belief as to the truth of
20 the allegations in this paragraph and, on that basis, denies.

21 39. The allegations in this paragraph call for a legal conclusion to which no answer is
22 required. To the extent an answer is required, the Port denies.

23 40. The Port admits the allegations in this paragraph.

24 41. The Port has insufficient knowledge or information to form a belief as to the truth of
25 the allegations in this paragraph and, on that basis, denies.

**CLAIM FOR RELIEF UNDER COMPREHENSIVE
ENVIRONMENTAL RESPONSE COMPENSATION AND LIABILITY ACT
FROM DEFENDANT CITY OF BELLINGHAM**

1
2
3 42. The Port realleges and incorporates by this reference their responses to the preceding
4 Paragraphs of Plaintiff's Amended Complaint.

5 43. The allegations in this paragraph are directed at the City and require no response
6 from the Port.

7 44. The allegations in this paragraph are directed at the City and require no response
8 from the Port.

9 45. The allegations in this paragraph are directed at the City and require no response
10 from the Port.

11 46. The allegations in this paragraph are directed at the City and require no response
12 from the Port.

13 47. The allegations in this paragraph are directed at the City and require no response
14 from the Port.

15 48. The allegations in this paragraph are directed at the City and require no response
16 from the Port.

17 49. The allegations in this paragraph are directed at the City and require no response
18 from the Port.

19 50. The allegations in this paragraph are directed at the City and require no response
20 from the Port.

21 51. The allegations in this paragraph are directed at the City and require no response
22 from the Port.

23 52. The allegations in this paragraph are directed at the City and require no response
24 from the Port.

25 53. The allegations in this paragraph are directed at the City and require no response
26 from the Port.

1 54. The allegations in this paragraph are directed at the City and require no response
2 from the Port.

3 55. The allegations in this paragraph are directed at the City and require no response
4 from the Port.

5 56. The allegations in this paragraph are directed at the City and require no response
6 from the Port.

7 57. The allegations in this paragraph are directed at the City and require no response
8 from the Port.

9 **CLAIM FOR RELIEF UNDER MODEL TOXICS CONTROL ACT**
10 **FROM DEFENDANT CITY OF BELLINGHAM**

11 58. The Port realleges and incorporates by this reference their responses to the preceding
12 Paragraphs of Plaintiff’s Amended Complaint.

13 59. The allegations in this paragraph are directed at the City and require no response
14 from the Port.

15 60. The allegations in this paragraph are directed at the City and require no response
16 from the Port.

17 61. The allegations in this paragraph are directed at the City and require no response
18 from the Port.

19 62. The allegations in this paragraph are directed at the City and require no response
20 from the Port.

21 63. The allegations in this paragraph are directed at the City and require no response
22 from the Port.

23 64. The allegations in this paragraph are directed at the City and require no response
24 from the Port.

25 **CLAIM FOR DECLARATORY JUDGMENT UNDER COMPREHEINSIVE**
26 **ENVIRONMENTAL RESPONSE COMPENSATION AND LIABILITY ACT AGAINST**
27 **DEFENDANT CITY OF BELLINGHAM**

28 65. The Port realleges and incorporates by this reference their responses to the preceding
Paragraphs of Plaintiff’s Amended Complaint.

1 66. The allegations in this paragraph are directed at the City and require no response
2 from the Port.

3 67. The allegations in this paragraph are directed at the City and require no response
4 from the Port.

5 68. The allegations in this paragraph are directed at the City and require no response
6 from the Port.

7 **CLAIM FOR DECLARATORY JUDGMENT UNDER**
8 **MODEL TOXICS CONTROL ACT AGAINST DEFENDANT CITY OF BELLINGHAM**

9 69. The Port realleges and incorporates by this reference their responses to the preceding
10 Paragraphs of Plaintiff’s Amended Complaint.

11 70. The allegations in this paragraph are directed at the City and require no response
12 from the Port.

13 71. The allegations in this paragraph are directed at the City and require no response
14 from the Port.

15 72. The allegations in this paragraph are directed at the City and require no response
16 from the Port.

17 **CLAIM FOR RELIEF UNDER COMPREHENSIVE**
18 **ENVIRONMENTAL RESPONSE COMPENSATION AND LIABILITY ACT**
19 **FROM DEFENDANT PORT OF BELLINGHAM**

20 73. The Port realleges and incorporates by this reference their responses to the preceding
21 Paragraphs of Plaintiff’s Amended Complaint.

22 74. The allegations in this paragraph call for a legal conclusion to which no answer is
23 required. To the extent an answer is required, the Port denies.

24 75. The allegations in this paragraph call for a legal conclusion to which no answer is
25 required. To the extent an answer is required, the Port denies.

26 76. The allegations in this paragraph call for a legal conclusion to which no answer is
27 required. To the extent an answer is required, the Port denies.

1 77. The Port has insufficient knowledge or information to form a belief as to the truth of
2 the allegations in this paragraph and, on that basis, denies.

3 78. The allegations in this paragraph call for a legal conclusion to which no answer is
4 required. To the extent an answer is required, the Port denies.

5 79. The allegations in this paragraph call for a legal conclusion to which no answer is
6 required. To the extent an answer is required, the Port denies.

7 80. The Port denies the allegations in this paragraph.

8 81. The Port admits that it is the “owner” of certain upland real estate. The Port denies
9 the remaining allegations in this paragraph.

10 82. The allegations in this paragraph call for a legal conclusion to which no answer is
11 required. To the extent an answer is required, the Port denies.

12 83. The Port denies the allegations in this paragraph.

13 84. The Port denies the allegations in this paragraph.

14 85. The allegations in this paragraph call for a legal conclusion to which no answer is
15 required. To the extent an answer is required, the Port denies.

16 86. The allegations in this paragraph call for a legal conclusion to which no answer is
17 required. To the extent an answer is required, the Port denies.

18 **CLAIM FOR RELIEF UNDER MODEL TOXICS CONTROL ACT**
19 **FROM DEFENDANT PORT OF BELLINGHAM**

20 87. The Port realleges and incorporates by this reference its responses to the preceding
21 Paragraphs of Plaintiff’s Amended Complaint.

22 88. The Port admits the allegations in this paragraph.

23 89. The Port has insufficient knowledge or information to form a belief as to the truth of
24 the allegations in this paragraph and, on that basis, denies.

25 90. The Port denies the allegations in this paragraph.

26 91. The allegations in this paragraph call for a legal conclusion to which no answer is
27 required. To the extent an answer is required, the Port denies.

1 92. The Port has insufficient knowledge or information to form a belief as to the truth of
2 the allegations in this paragraph and, on that basis, denies.

3 93. The allegations in this paragraph call for a legal conclusion to which no answer is
4 required. To the extent an answer is required, the Port denies.

5 **CLAIM FOR DECLARATORY JUDGMENT UNDER COMPREHENSIVE**
6 **ENVIRONMENTAL RESPONSE COMPENSATION AND LIABILITY ACT AGAINST**
7 **DEFENDANT PORT OF BELLINGHAM**

8 94. The Port realleges and incorporates by this reference its responses to the preceding
9 Paragraphs of Plaintiff's Amended Complaint.

10 95. The allegations in this paragraph call for a legal conclusion to which no answer is
11 required. To the extent an answer is required, the Port denies.

12 96. The allegations in this paragraph call for a legal conclusion to which no answer is
13 required. To the extent an answer is required, the Port denies.

14 97. The allegations in this paragraph call for a legal conclusion to which no answer is
15 required. To the extent an answer is required, the Port denies.

16 **CLAIM FOR DECLARATORY JUDGMENT UNDER MODEL TOXICS CONTROL**
17 **ACT AGAINST DEFENDANT PORT OF BELLINGHAM**

18 98. The Port realleges and incorporates by this reference its responses to the preceding
19 Paragraphs of Plaintiff's Amended Complaint.

20 99. The Port has insufficient knowledge or information to form a belief as to the truth of
21 the allegations in this paragraph and, on that basis, denies.

22 100. The allegations in this paragraph call for a legal conclusion to which no answer is
23 required. To the extent an answer is required, the Port denies.

24 101. The allegations in this paragraph call for a legal conclusion to which no answer is
25 required. To the extent an answer is required, the Port denies.

26 **AFFIRMATIVE DEFENSES**

27 AND, FOR FURTHER ANSWER AND AFFIRMATIVE DEFENSES, the Port of
28 Bellingham alleges as follows:

1 1. Plaintiff has failed to state a claim upon which relief can be granted.

2 2. Plaintiff's claims are barred, in whole or in part, by the doctrines of waiver, estoppel,
3 and laches.

4 3. Plaintiff is barred from recovering any costs of response under the MTCA that are
5 not the substantial equivalent of a department-conducted or department-supervised remedial action.

6 4. Plaintiff's claims are time-barred, in whole or in part, by applicable statutes of
7 limitation or other applicable law.

8 5. Plaintiff failed to mitigate, minimize, or avoid damages that they allegedly sustained,
9 and recovery against Defendant Port of Bellingham must be reduced accordingly.

10 6. Plaintiff voluntarily and knowingly assumed the risk of any damages they allege that
11 they have sustained.

12 7. Any releases for which the Port would otherwise be responsible were caused solely
13 by an act or omission of Bornstein and a third-party other than an employee of the Port, or one
14 acting in connection with a contractual relationship with the Port. The Port exercised all due care
15 under the circumstances and took precautions against foreseeable acts or omissions of third parties.

16 For these reasons, the Plaintiff is barred from recovery related to such release by RCW
17 70A.305.040(3)(a)(iii).

18 8. Any releases for which the Port would otherwise be responsible were federally
19 permitted releases.

20 9. The claims against the Port in this case are collaterally estopped due to the ongoing
21 litigation in *Port of Bellingham v. Bornstein Seafoods Inc.*, case number 21-2-00095-37 in the
22 Superior Court of Whatcom County.

23 10. The claims in this case are precluded by the doctrine of Res Judicata due to the
24 litigation in *Port of Bellingham v. Bornstein Seafoods Inc.*, case number 21-2-00095-37.

25 11. Plaintiff is precluded from bringing this lawsuit against the Port due to a cost-
26 splitting agreement allocating costs between the parties.

1 2.5 Beginning in 1994, environmental site assessments and investigations have been
2 conducted at the Site. The results of this work indicate that hazardous substances had been released
3 in the waterway and berth area sediments. The Port reported this information to the Washington
4 State Department of Ecology (“Ecology”).

5 2.6 Ecology added the Site to its list of Confirmed and Suspected Contaminated Sites.
6 At the time it was initially listed, it was known as “Olivine Hilton.”
7

8 2.7 In 1996, Ecology issued an Early Notice Letter to the Port for the Olivine Hilton
9 Site.

10 2.8 In July 2002, Ecology issued a “potentially liable person status” letter to the Port. In
11 September 2002, Ecology notified the Port that it was a potentially liable person under MTCA.

12 2.9 In 2002, the Olivine Hilton Site was split into two (2) separate sites: Olivine Hilton
13 Upland and Olivine Hilton Sediment.
14

15 2.10 In March 2004, Ecology renamed the Olivine Hilton Sediment Site the I & J
16 Waterway Site. The Site boundary is defined by Ecology based upon the extent of contamination
17 caused by the release of hazardous substances at the Site.

18 2.11 Also in March 2004, Ecology issued a “potentially liable person status” letter to
19 Bornstein. Later in 2004, Ecology notified Bornstein that it was a potentially liable person under
20 the MTCA.
21

22 2.12 In January 2005, the Port entered into Agreed Order No. DE 1090 (the “2005 Agreed
23 Order”) with Ecology for the purpose of conducting a remedial investigation/feasibility study
24 (“RI/FS”) at the Site.

25 2.13 In November 2005, the Port entered into a First Amendment to the 2005 Agreed
26 Order with Ecology.
27

1 2.14 In April 2012, the Port entered into a Second Amendment to the 2005 Agreed Order
2 with Ecology.

3 2.15 The Port conducted additional investigation pursuant to the 2005 Agreed Order, as
4 amended.

5 2.16 In 2013, surface and subsurface sampling was conducted in the area beneath
6 Bornstein's dock.

7 2.17 In 2015, an RI/FS was prepared. The RI found hazardous substances, as that term is
8 defined in MTCA, in marine sediments at the Site, including in the vicinity of Bornstein's dock.

9 2.18 In 2019, the Port and Bornstein entered into Agreed Order No. DE 16186 (the "2019
10 Agreed Order") with Ecology.

11 2.19 According to the 2019 Cleanup Action Plan ("CAP") attached to the 2019 Agreed
12 Order, Sediment Cleanup Unit 1 ("SCU-1") encompasses the areas of the Site known as the
13 Navigation Channel West Unit, the Berthing Area Unit, the Dock Unit, and the Floating Dock Unit.

14 2.20 The areas known as the Coast Guard Bank Unit, Coast Guard Unit, Navigation
15 Channel East Unit, South Bank Unit, and Head of Waterway Unit comprise Sediment Cleanup Unit
16 2 at the Site.

17 2.21 The 2019 Agreed Order requires the Port and Bornstein to develop the design of the
18 cleanup action for SCU-1 at the Site.

19 2.22 Ecology has indicated that once the work described in the 2019 Agreed Order is
20 complete, it expects that the CAP will be implemented at the Site pursuant to a Consent Decree that
21 has yet to be negotiated.

22 2.23 The Port anticipates conducting cleanup at the Site. When that occurs, the Port will
23 incur significant costs for implementing the remedial action described in the CAP.
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1 **III. FIRST CAUSE OF ACTION – CONTRIBUTION UNDER THE MODEL**
2 **TOXICS CONTROL ACT**

3 3.1 The Port incorporates by reference its responses above.

4 3.2 The Port is a “person” as defined in RCW 70A.305.020(24).

5 3.3 Bornstein is a “person” within the meaning of RCW 70A.305.020(24).

6 3.4 The Site is a “facility” within the meaning of RCW 70A.305.020(8).

7 3.5 There has been a “release” of hazardous substances to the environment at and from
8 the Site as defined in RCW 70A.305.020(32).

9 3.6 Bornstein is a liable person under RCW 70A.305.040(1)(a) in that it is a current
10 owner and operator of the Site within the meaning of RCW 70A.305.020(22).

11 3.7 Bornstein is also a liable person under RCW 70A.305.040(1)(b) in that it is a former
12 owner and operator of the Site within the meaning of RCW 70A.305.020(22) at the time of disposal
13 or release of hazardous substances.

14 3.8 The release of hazardous substances into the environment at the Site requires
15 “remedial action” and the expenditure of “remedial action costs,” as those terms are defined and
16 described in RCW 70A.305.020(33) and RCW 70A.305.080.

17 3.9 Pursuant to RCW 70A.305.040(2), Bornstein is strictly liable, jointly and severally,
18 for all remedial action costs resulting from the release, or threatened release of, hazardous
19 substances at the Site.

20 3.10 The Port has incurred and will continue to incur remedial action costs related to, and
21 arising out of, the hazardous substances at the Site, including but not limited to attorneys’ fees.
22 Under RCW 70A.305.080, the Port is entitled to recover such fees and costs from Bornstein.

23 3.11 Pursuant to RCW 70A.305.080, the Port has a claim for contribution against
24 Bornstein for remedial action costs incurred at the Site.

25 **IV. SECOND CAUSE OF ACTION – DECLARATORY JUDGMENT UNDER**
26 **THE MODEL TOXICS CONTROL ACT**

27 4.1 The Port incorporates by reference its responses above.

1 4.2 An actual controversy within the jurisdiction of the Court exists between the Port
2 and Bornstein.

3 4.3 Pursuant to RCW 7.24.010, the Port is entitled to Declaratory Judgment that
4 Bornstein, as a liable party under MTCA, is strictly liable, jointly and severally, for all remedial
5 action costs resulting from releases or threatened releases of hazardous substances at the Site, a
6 facility under RCW 70A.305.020(8).

7 4.4 Pursuant to RCW 7.24.010, the Port is entitled to a Declaratory Judgment that
8 Bornstein is liable to the Port in contribution under RCW 70A.305.080 for remedial action costs
9 resulting from the release or threatened release of hazardous substances at the Site, including, but
10 not limited to, attorneys' fees and expenses incurred by the Port at the Site in the future.

11 **V. THIRD CAUSE OF ACTION – CLAIM FOR CONTRIBUTION UNDER**
12 **COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION,**
13 **AND LIABILITY ACT**

14 5.1 The Port incorporates by reference its responses above.

15 5.2 The Port is a “person” as defined in 42 USC § 9601(21).

16 5.3 Bornstein is a “person” within the meaning of 42 USC § 9601(21).

17 5.4 The Site is a “facility” within the meaning of 42 USC § 9601(9).

18 5.5 Bornstein is liable for the Site as an owner and/or operator under 42 USC § 9607(a).

19 5.6 Bornstein has initiated a civil action against the Port under 42 USC § 9607(a).

20 5.7 Pursuant to 42 USC § 9613(f), if the Port is found liable to Bornstein for response
21 costs related to the Site, then the Port is entitled to contribution from Bornstein for all necessary
22 costs of response incurred by the Port consistent with the national contingency plan.

23 **VI. FOURTH CAUSE OF ACTION – DECLARATORY JUDGMENT UNDER**
24 **COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION,**
25 **AND LIABILITY ACT**

26 6.1 The Port incorporates by reference its responses above.

27 6.2 Bornstein has initiated a civil action against the Port under 42 USC § 9607(a) for
28 response costs allegedly incurred to date.

