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Of Attorneys for Defendants Pacific Seafood Group et al.

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF OREGON
(Medford Division)

JEFF BOARDMAN, DENNIS RANKIN, ROBERT SEITZ, TODD L. WHALEY, LLOYD D. WHALEY, SOUTH BAY WILD, INC., MISS SARAH, LLC, and **MY FISHERIES, INC.,** Plaintiffs, v. **PACIFIC SEAFOOD GROUP, OCEAN GOLD HOLDING CO., INC., DULCICH, INC., FRANK DULCICH, PACIFIC SEAFOOD GROUP ACQUISITION COMPANY, INC., PACIFIC SEAFOOD WASHINGTON ACQUISITION CO., INC., BANDON PACIFIC, INC., BIO-OREGON PROTEIN, INC., PACIFIC CHOICE SEAFOOD COMPANY, PACIFIC COAST SEAFOODS COMPANY, PACIFIC GARIBALDI, INC., PACIFIC GOLD SEAFOOD COMPANY, PACIFIC PRIDE**	Civil No. 1:15-cv-00108-CL **DEFENDANTS' ADDITIONAL MEMORANDUM IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION** **ORAL ARGUMENT REQUESTED** **HEARING: MARCH 5, 2015 10:00 am**

SEAFOOD COMPANY, PACIFIC SEA FOOD CO., PACIFIC SURIMI CO, INC., PACIFIC TUNA COMPANY, LLC, WASHINGTON CRAB PRODUCERS, INC., PACIFIC ALASKA SHELLFISH, INC., SEA LEVEL SEAFOODS, LLC, ISLAND FISH CO., LLC, PACIFIC RESURRECTION BAY, PACIFIC CONQUEST, INC., CALAMARI, LLC, JO MARIE, LLC, LESLIE LEE, LLC, MISS PACIFIC, LLC, PACIFIC FUTURE, LCC, PACIFIC GRUMPY J, LLC, PACIFIC HOOKER, LLC, PACIFIC HORIZON, LLC, PACIFIC KNIGHT, LLC, PRIVATEER, LLC, SEA PRINCESS, LLC, TRIPLE STAR, LLC, PACIFIC FISHING, LLC, PACIFIC SEA FOOD OF ARIZONA, INC., STARFISH INVESTMENTS, INC., DULCICH SURIMI, LLC, BIO-OREGON PROPERTIES, LLC, PACIFIC GROUP TRANSPORT CO., PACIFIC MARKETING GROUP, INC., PACIFIC RUSSIA, INC., PACIFIC RUSSIA VENTURES, LLC, PACIFIC TUNA HOLDING COMPANY, INC., POWELL STREET MARKET, LLC, PACIFIC FRESH SEA FOOD COMPANY, SEACLIFF SEAFOODS, INC., COPPER RIVER RESOURCE HOLDING CO., INC., PACIFIC COPPER RIVER ACQUISITION CO., INC., SEA LEVEL SEAFOODS ACQUISITION, INC., ISLAND COHO, LLC, S & S SEAFOOD CO., INC., PACIFIC SEAFOOD DISC, INC., DULCICH REALTY, LLC, DULCICH REALTY ACQUISITION, LLC, and **DULCICH JET, LLC**,

Defendants.

DEFENDANTS' ADDITIONAL MEMORANDUM IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

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I. THERE IS NO PURCHASE TRANSACTION TO ENJOIN

Any proposed transaction by which Pacific Seafood would purchase Ocean Gold stock or membership interests from an Ocean Gold shareholder terminated by reason of the antitrust objections of the State of Oregon and the Whaley plaintiffs. Declaration of Robert Preston (Doc. 15). The original July 4, 2014 Stock Purchase Agreement expressly stated that one of the conditions to closing was that : "Buyer shall have satisfied itself in its sole and absolute discretion that this Agreement and closing the transactions contemplated herein will not …create the threat or [sic] a violation or assertion of a violation of an antitrust or security law." Supplemental Declaration of Robert Preston (February 13, 2015, ¶ 2 (Stock Purchase Agreement ¶ 6.2(c)). Defendants never had any intention of going forward with the transaction over the objections of plaintiffs' lawyers or the State of Oregon. *Id.* That is why Pacific's lawyers contacted plaintiffs' lawyers and the Oregon Department of Justice in mid- December 2014, and notified them of the proposed transaction in the first place. That is why Pacific waited the next six weeks to hear back and learn whether they objected. Upon learning they did object, Pacific called the deal off. In fact, if plaintiffs' lawyers, instead of spending the six weeks readying their complaint and declarations, had said they objected in mid-December, the deal would have been called off then.

This case is an example of a party manufacturing a controversy where there is none, and then trying to bootstrap itself into obtaining a preliminary injunction for

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something that is not going to happen.

Since Pacific made its initial filing with the Court, the Oregon Attorney General has indicated it is conducting an investigation in connection with the terminated Ocean Gold transaction. The Attorney General does not want Pacific Seafood to go forward with any purchase transaction with respect to Ocean Gold until the Attorney General has completed its investigation. Pacific agrees with the Attorney General and has no intention of closing a transaction. At a very minimum, the cost of this sort of litigation is prohibitive.

Accordingly, Pacific Seafood has proposed a stipulation with the Attorney General that Pacific Seafood will not close any purchase transaction with respect to Ocean Gold during the time the Attorney General has its investigation open.[1]

As the Supplemental Preston Declaration makes clear, any transaction involving the purchase of Ocean Gold assets or stock and membership interests takes months to put together, among other things, because of the numerous third parties involved—lenders, landlords, regulators, and the like. The deal having been terminated, it cannot be put back together quickly. This is all the more so given the changed circumstances caused by the death of General Manager and shareholder Dennis Rydman.

[1] The stipulation is subject to a provision whereby it can be terminated upon 60-days' notice—more than enough time for the Attorney General to apply to a court for preliminary relief. The termination provision is not intended to foreshorten the investigation. Rather it is only there as protection in the case, for example, the investigation remains open for an extended period, but activity in the investigation has ceased.

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Nothing in plaintiffs' Memorandum in Support of Motion for Preliminary Injunction or their supporting declarations establishes any threatened conduct, any reasonable anticipation of threatened conduct, any significant threat of injury, any impending violation, or any contemporary violation of the antitrust laws likely to continue or recur—requirements for the issuance of a preliminary injunction. *Los Angeles Memorial Coliseum Commission v. National Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980)("The Commission demonstrated no real and concrete injury or even threat thereof when it sought the preliminary injunction.").

Here, it is inappropriate for Pacific to be subjected to an extraordinary and drastic remedy where there is no basis for a finding Pacific is about to do something or will do something unless it is preliminarily enjoined. *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008)("preliminary injunction is an 'extraordinary and drastic remedy.'"). Entry of a preliminary injunction would necessarily be understood to mean the Court was finding that plaintiffs are likely to prevail on the merits and that Pacific was about to do something or would do something unless it was preliminarily enjoined. Pacific would be subjected, unfairly, to adverse media publicity arising out of those understandings.

II. PLAINTIFFS HAVE NOT AND CANNOT SHOW THEY ARE LIKELY TO SUFFER IRREPARABLE HARM IN THE ABSENCE OF AN ORDER PRELIMINARILY ENJOINING A DEAL THAT HAS BEEN TERMINATED

Defendants argued in their Memorandum in Opposition to Motion for Preliminary Injunction (Doc. 28) that plaintiffs had not and could not establish that they

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were likely to suffer irreparable harm in the absence of a preliminary injunction (p. 17) on a deal that has been terminated (p. 1-2, 10-12), and particularly in light of plaintiffs' inability to show any antitrust injury (p. 13-16). Nothing in Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction (Doc. 22), or the supporting declarations solves plaintiffs' problems.

Section 16 of the Clayton Act, 15 U.S.C. § 26, permits preliminary injunctions, but only upon "a showing that the danger of irreparable loss or damage is immediate."

A threat of monetary damages does not establish irreparable harm. In *American Passage Media Corp. v. Cass Communications, Inc.*, 750 F.2d 1470 (9th Cir. 1985), a monopolization case, the district court issued a preliminary injunction enjoining enforcement of exclusive dealing contracts. The Ninth Circuit reversed. The court said: "Monetary damages are not usually sufficient to establish irreparable harm."(citing *Goldie's Bookstore v. Superior Court*, 739 F.2d 466, 471 (9th Cir.1984)). *Id.* at 1473-74. The court said the "threat of being driven out of business" would be "sufficient to establish irreparable harm," (citing *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 634 F.2d 1197, 1200 (9th Cir.1980)), but found that "large losses in 1982-83" and forecasts of "large losses again in 1983-84" were "insufficient evidence that AP is threated with extinction." *Id.* at 1474.

In *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 801 (3rd Cir. 1989), the Third Circuit put the rule more generally:

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> In order to demonstrate irreparable harm the plaintiff must demonstrate potential harm which cannot be redressed by a legal or an equitable remedy following a trial. The preliminary injunction must be the only way of protecting the plaintiff from harm.

As in *American Passage*, the court recognized "'[t]he availability of adequate monetary damages belies a claim of irreparable injury.'" *Id.* As in *American Passage*, the Third Circuit found the district court's determination that "Instant will be forced to shut down" was "not supported by any financial statements or projections in the record indicating that Instant will be forced into bankruptcy." *Id.* at 802. The Third Circuit reversed the district court's granting of a preliminary injunction.

Nothing in Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction (Doc. 22), or the supporting declarations shows that the plaintiffs will be harmed, let alone irreparably harmed, if this Court does not preliminarily enjoin a nonexistent transaction—a transaction that defendants have shown is not going to happen and have promised the Attorney General will not happen while she undertakes her investigation.

In their declarations, plaintiffs have not shown threat of any injury, much less an injury that is irreparable, and is an antitrust injury. All plaintiffs have established is that they fish. They have not offered evidence that any of them sells fish to Pacific or to Ocean Gold. They have not offered evidence that any of them sells fish to a processor that competes with Pacific or Ocean Gold. They have not offered evidence that the number of fish they sell or the price at which they sell would be affected if this Court

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did not preliminarily enjoin a transaction that is not happening. Boardman Declaration (Doc. 23); Todd Whaley Declaration (Doc. 24); Lloyd Whaley Declaration (Doc. 25). Plaintiffs have not shown a threat of monetary harm if the Court does not preliminarily enjoin a transaction that is not happening, much less a "threat of being driven out of business." *American Passage*, 750 F.2d at 1474 (9th Cir. 1985).

Not surprising given their failure on the facts, plaintiffs cite no cases where a court has found a party would be irreparably harmed unless the court preliminarily enjoined a transaction that was not happening and the other party had promised the attorney general would not happen. For example, in plaintiffs' lead case, *Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 545 (1987), what the Court actually said—plaintiffs' chop up their quotation—was: "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." The case before this Court, of course, does not involve environmental injury.

In *State of Cal. v. Am. Stores Co.*, 872 F.2d 837 (9th Cir. 1989), the California Attorney General brought the action in his capacity as *parens patriae* of California consumers. The action was a Clayton Act § 7 action where a "may be substantially to lessen competition" standard applies, as opposed to this action, which is a Sherman Act

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§ 2 action, and where a "maintaining monopoly power accompanied by anticompetitive conduct" standard applies. *Verizon Communications v. Law Offices of Curtis V. Trinko,* LLP, 540 U.S. 398, 405 (2004). In that action, American Stores had already acquired 100% of the stock of Lucky Stores. The preliminary injunction was a Hold Separate order. It was not a case involving a deal that was not happening and where defendant had promised the Attorney General it would not happen.

Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252 (2d Cir. 1989), plaintiffs' other primary case, involved a hostile tender offer by Minorco to buy the stock of Gold Fields, a competitor. The target, Gold Fields, and its partly-owned subsidiary, Newmont, filed an action, among other things, under Clayton Act § 7. The district court entered a preliminary injunction and the Second Circuit affirmed. The Second Circuit did not discuss the issue whether monetary damages would be adequate, but it does seem obvious that in that case, the takeover target was "threatened with extinction." *American Passage* 750 F.2d at 1474 (9th Cir. 1985). *Consolidated* was not a case where a takeover was not going to happen and where a defendant had promised the Attorney General the takeover would not happen.

III. PLAINTIFFS HAVE NOT AND CANNOT SHOW OTHER ELEMENTS REQUIRED FOR THE ISSUANCE OF A PRELIMINARY INJUNTION

With respect to the other elements of a preliminary injunction, there is no likelihood of success on the merits where, as here, the case is moot and the plaintiffs are asking the Court to render an advisory opinion based upon hypothetical facts. There is

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no case or controversy. Where there is no deal, there are no equities that require an unnecessary preliminary injunction. Nothing tips in their favor. The public has no interest in preliminarily enjoining a transaction that is not happening and that defendants have promised the Attorney General will not happen. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008).

The analysis does not change if a court applies the alternative elements found in *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131, 1135 (9th Cir. 2011). Not only have plaintiffs not shown any irreparable harm would occur, plaintiffs have not raised serious questions going to the merits and demonstrated that the balance of hardships tips sharply in their favor. In fact, they have not shown any hardships.

IV. WHETHER PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS IS NOT RIPE FOR DETERMINATION GIVEN PLAINTIFFS' FAILURE TO PROVIDE DISCOVERY

Defendants have been producing documents pursuant to the Court's order. As the Court is aware, plaintiffs supported their motion for preliminary injunction with a Declaration of Hans Radtke, a proposed expert. Apparently, Mr. Radtke began work on the case at plaintiffs' request while defendants were waiting to hear back from plaintiffs' lawyer on whether they objected to the proposed transaction between Pacific and the Ocean Gold shareholders. Plaintiff's Memorandum (Doc. 22), p. 5 ("declaration of economist Hans Radtke… assembled in a matter of a few weeks").

In his Declaration (Doc. 27), Mr. Radtke makes a number of assertions: He says

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in ¶ 6 that his opinion is based upon "dozens of interviews with knowledgeable industry sources in the fishing industry, the seafood processing sector, and state and federal regulatory agencies. He claims that at two trade shows Pacific personnel said Pacific "controls" certain markets and that Pacific "makes" certain markets. Radtke Declaration ¶ 12. He makes a number of assertions about the capacity of Ocean Gold and Ocean Protein facilities (¶¶ 19, 20, and 21).

He says he has "learned that there are multiple companies with interest in acquiring the Ocean Gold Seafoods processing plant and cold storage facility," and that "[t]hese include two existing West Coast seafood processors other than Pacific Seafood Group and three to five potential new entrants headquartered either in the United States or abroad." ¶ 19. He says he is "aware of two West Coast seafood processors with an interest in this plant other than Pacific Seafood Group and there are five or more companies involved in the aquaculture feedstuffs business with significant interest in acquiring Ocean Protein." ¶ 20. He says he believes "there are a dozen or more companies other than Pacific Seafood Group with a strong interest in the acquisition of the Ocean Gold Seafoods' quota share, fishing vessels and fishing permit assets." ¶ 21. He claims "there is a high risk" that Pacific's plant at Warrenton will either not be rebuilt at all or will be a much smaller operation." ¶ 28.

Each of these assertions, except the one in ¶ 6, is inadmissible. The Radtke declaration does not contain evidence "sufficient to support a finding that the witness

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has personal knowledge of the matter." Fed. R. Evid. 602. To the extent the matters asserted are in the form of a lay opinion, there is no indication that the opinion is "rationally based on [his] perception." Fed. R. Evid. 701. To the extent, he is giving an expert opinion, to be admissible

> "(b) the testimony is based on sufficient facts or data;
>
> "(c) the testimony is the product of reliable principles and methods; and
>
> "(d) the expert has reliably applied the principles and methods to the facts of the case."

Fed. R. Evid. 702. Because of these insufficiencies, Mr. Radtke may well be doing nothing more than repeating inadmissible hearsay. Fed. R. Evid. 802.

On February 6, defendants sent discovery requests to plaintiffs with respect to Mr. Radtke's declaration and these assertions, in particular. A copy is attached to the Declaration of Michael J. Esler, dated February 13, 2014. In a follow-up phone call February 11, plaintiffs refused to provide the requested information until after the Rule 26 and Rule 16 conferences. *Id.* at ¶ 4. This leaves defendants in the position of having to respond to a declaration that contains statements on matters on which no evidence has been offered sufficient to support a finding that the witness has personal knowledge of the matter (Fed. R. Evid. 602); that contains inadmissible opinions (Fed. R. Evid. 701 and 702), and repeats or is based upon inadmissible hearsay (Fed. R. Evid. 802). In fact, Mr. Radtke admits he has been hampered in reaching an opinion because he has not seen current data on the market. In particular, however, he points to nothing that

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supports a finding of irreparable harm if the Court does not enter a preliminary injunction enjoining a non-existent transaction.

By not providing any discovery, plaintiffs are denying defendants the ability to challenge Mr. Radtke's unfounded assertions and to challenge his credibility. Fed. R. Evid. 607, 611(b). It is, therefore, inappropriate for the Court to go forward and to render what would amount to an advisory opinion with respect to whether plaintiffs are likely to prevail on the merits.

V. PLAINTIFFS' EVIDENCE ON THE MERITS CONSIST OF INADMISSIBLE HEARSAY OR DOES NOT SATISFY THE KNOWLEDGE RULE OR THE OPINION RULE

See Defendants' Motion to Strike, dated February 13, 2015.

VI. CONCLUSION

There being no basis, the motion for preliminary injunction should be denied and the temporary restraining order should be dissolved.

DATED this 13th day of February, 2015.

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