Nos. 15-35257, 15-35504

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEFF BOARDMAN, et al.,

Plaintiffs-Appellees,

v.

PACIFIC SEAFOOD GROUP, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Oregon
Hon. Michael J. McShane
Case No. 1:15-cv-00108-MC
(Motion to Compel Arbitration and Stay Proceedings)

PLAINTIFFS-APPELLEES' ANSWERING BRIEF

Michael E. Haglund, OSB No. 772030
Michael K. Kelley, OSB No. 853782
Shay S. Scott, OSB No. 934214
Sara Ghafouri, OSB No. 111021
HAGLUND KELLEY LLP
200 SW Market Street, Suite 1777
Portland, OR 97201
(503) 225-0777

Attorneys for Plaintiffs-Appellees

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1(a), Plaintiffs-Appellees inform the Court that all Plaintiffs-Appellees entities are individuals, privately held corporations and limited liability companies and no publicly held corporation owns any of their stock or ownership interests.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

I. INTRODUCTION.

In this consolidated appeal, defendant Frank Dulcich and the more than 50 entities he controls known as Pacific Seafood Group (collectively, "Pacific Seafood Group" or "Pacific Seafood") seek to reverse the district court's denial of defendants' motion to compel arbitration and stay proceedings in order to force plaintiffs' entire lawsuit, which challenges Pacific Seafood Group's proposed acquisition of Ocean Gold Seafoods, Inc. and its affiliated companies (collectively, "Ocean Gold Seafoods" or "Ocean Gold"), into arbitration. Pacific Seafood Group's litigation position, that the legality of acquiring a major competitor must be arbitrated under a prior settlement agreement (the "Resolution Agreement") reached in *Whaley v. Pacific Seafood Group*, No. 1:10-cv-3057~PA (D. Or. June 21, 2010) (Docket Entry #426-1), is seriously flawed for multiple reasons.

When *Whaley* was settled in 2012, the issue of Pacific Seafood Group acquiring Ocean Gold Seafoods and a much smaller group of affiliates and other assets was not litigated. What was litigated and what the parties agreed to under Section 3(a) of the Resolution Agreement was that Pacific Seafood Group and Ocean Gold Seafoods' exclusive marketing agreement would not be renewed in 2016. In *Whaley*, plaintiffs challenged defendants' monopsony power in three *input* markets for onshore whiting, groundfish and pink shrimp; raw fish supplied by fishermen to West Coast processing plants owned by *both* competing defendant

groups. Pacific Seafood Group and Ocean Gold are competitors, but through their exclusive marketing agreement, these defendants agreed to terms under which Ocean Gold would exclusively "process, and sell" its raw material to Pacific Seafood Group according to custom processing formulas and agreed rates.

The exclusive marketing agreement is an outputs contract between competitors. Under Section 3(a) of the Resolution Agreement, if these defendants later negotiated any new agreement that required Pacific Seafood to act as the *exclusive marketer* of seafood produced by Ocean Gold and plaintiffs objected after receiving notice, that issue would be referred to U.S. District Court Judge Hogan or his alternative U.S. Magistrate Judge Jelderks for resolution. ER 428, 432.

The first flaw in defendants' appeal is that Section 3(a) is not an arbitration clause. When a federal judge retains jurisdiction over a settlement agreement, the governing law is the doctrine of ancillary jurisdiction, not the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16. Section 3(a) does not use the word "arbitration," nor does it state that the parties agreed to "arbitrate" post-judgment objections over new marketing agreements, let alone the complete acquisition of one competitor by another. More importantly, the decision maker under Section 3(a) is a federal judge or magistrate judge, not an arbitrator. Federal district court judges and magistrate judges cannot serve as arbitrators as a matter of law.

Second, the proposed acquisition of Ocean Gold's controlling stock involves 11 new parties, 9 of whom were neither signatories nor successors or assigns to the Resolution Agreement, and plaintiffs' lawsuit involves a new claim for unlawful merger under Section 7 of the Clayton Act.[1] The *Whaley* court's ancillary jurisdiction over the Resolution Agreement does not extend to new parties, new theories of liability, and new facts. The district court did not abuse its discretion in refusing to *extend* the *Whaley* court's ancillary jurisdiction in these circumstances.

Finally, defendants' argument that the proposed acquisition is the "functional equivalent" of an exclusive marketing agreement invoking Section 3(a) is an unreasonable interpretation of the Resolution Agreement. Under its plain terms, Section 3(a) is only triggered by a new agreement under which Pacific Seafood is *required* to act as the *exclusive marketer* of Ocean Gold's processed seafood. None of the transactional documents under which Pacific Seafood Group acquires all of the stock or ownership interests in Ocean Gold and six affiliated entities references exclusive marketing for one obvious reason – Ocean Gold and its multiple affiliates are merged into Pacific Seafood Group. There is no need for any marketing relationship. Moreover, Section 16(c) makes clear that nothing in

[1] In Plaintiffs-Appellees' Answering Brief in the Preliminary Injunction Appeal, they referred to proposed acquisition as involving 12 new parties. Pls.' Answering Br. at 4, 35-36 n.6. In this Answering Brief, that number has changed to 11 new parties to reflect that Sherry Vinson is the same person as Sherry Miller.

the Resolution Agreement will impact any "other relationship" between Pacific Seafood and Ocean Gold, for which the proposed merger clearly qualifies.

The proposed transaction to acquire Ocean Gold is simply outside the scope of the Resolution Agreement. The district court's decision denying defendants' motion to compel should be affirmed.

II. STATEMENT OF JURISDICTION.

Plaintiffs agree with defendants' Statement of Jurisdiction.

III. ISSUES PRESENTED FOR REVIEW.

1. Did the district court abuse its discretion in refusing to expand the scope of the *Whaley* court's limited ancillary jurisdiction?

2. Did the district court correctly conclude that the parties did not agree to submit proposed acquisitions for resolution to U.S. District Court Judge Hogan or his replacement U.S. Magistrate Judge Jelderks because they are categorically different than the types of marketing agreements referred to in the Resolution Agreement?

IV. STATEMENT OF THE CASE.

A. The Exclusive Marketing Agreement.

Defendants Frank Dulcich and his vertically-integrated entities comprising Pacific Seafood Group operate five seafood processing plants on the West Coast. Going north to south, these facilities are located in Westport, Washington,

Warrenton, Newport and Charleston in Oregon, and Eureka, California. ER 105-106, 20-21. Collectively, Pacific Seafood Group's five plants process whiting, shrimp, groundfish and Dungeness crab. *Id.* Ocean Gold owns and operates a seafood processing plant in Westport, Washington that is the single largest and most modern on the West Coast. ER 101, 17-18.

In 2006, Pacific Seafood Group and Ocean Gold Seafoods entered into a 10-year exclusive marketing agreement entitled the "Procurement, Processing, Sales and Marketing Agreement."[2] ER 361-373. Except for bait and custom processing for certain customers, Ocean Gold is required to "procure, process, manufacture, custom process or produce Product *only* for [Pacific Seafood Group] and for no other person or entity without the prior written consent" of Pacific Seafood Group. *Id.* (emphasis added).

In addition to establishing an exclusive marketing relationship, the 10-year agreement granted Pacific Seafood Group the right to dictate the prices that Ocean Gold offers to fishermen in the ex vessel markets. This is clear language from Section 3(b) and (c) of the Agreement. ER 362 §§ 3(b), (c).

[2] The agreement is "an exclusive agreement" under which Ocean Gold will exclusively "procure, buy, process and sell to [Pacific Seafood Group], according to the custom processing formulas and rates provided in this Agreement, all product procured or processed by Ocean Gold including whiting, sardines, crab, tuna, black cod, groundfish and all other seafood products hereafter designated by the parties." ER 361.

B. The *Whaley* Case.

In *Whaley*, a proposed class of West Coast commercial fishermen sued Pacific Seafood Group and Ocean Gold Seafoods. ER 379-417. The *Whaley* plaintiffs alleged that Pacific Seafood Group had illegally gained monopsony power in violation of Sections 1 and 2 of the Sherman Act based partly on their 2006 exclusive marketing agreement with Ocean Gold – their main competitor. ER 409-419. The *Whaley* plaintiffs contended that Pacific Seafood controlled 53% of the trawl-caught groundfish market, 65% of the whiting market, and 71% of the Pacific coldwater shrimp market. ER 390; SER 29. The *Whaley* plaintiffs did not litigate any proposed merger involving Ocean Gold, and the Fourth Amended Complaint did not allege violations of Section 7 of the Clayton Act. ER 379-418.

After a lengthy mediation overseen by now-retired U.S. District Court Judge Michael R. Hogan, the parties executed the Resolution Agreement in which the *Whaley* class representatives agreed to dismiss their claims for damages "in exchange for defendants' continued support of a comprehensive package of provisions designed to assure the competitiveness and transparency" in the relevant seafood markets. ER 426-427. The *Whaley* defendants promised that they would not renew that 2006 marketing agreement in 2016, ER 428, and the parties agreed to eliminate the price-fixing provisions in sections 3(b) and (c) of that agreement. ER 429-431. Although Pacific Seafood Group and Ocean Gold denied that these

provisions were ever implemented in practice, the Resolution Agreement provided that these obviously illegal provisions (where one competitor tells another what to pay its suppliers) were stricken from the Agreement. As of the 2012 effective date of the *Whaley* settlement, Pacific Seafood Group and Ocean Gold Seafoods were clearly to be competitors in West Coast ex vessel seafood markets, not as joint venture partners as defendants now claim.

Under Section 3(a) of the Resolution Agreement, Pacific Seafood agreed to provide the *Whaley* plaintiffs 60 days' notice and an opportunity to object if Pacific Seafood and Ocean Gold attempted to pursue "any new agreement that requires Pacific Seafood Group to act as the *exclusive marketer* of any seafood product produced by Ocean Gold Seafoods." ER 428. In the event of an objection, U.S. District Court Judge Hogan would determine "whether the proposed agreement is pro-competitive and if so, it may be approved." *Id.* (emphasis added). Consistent with Section 3(a), the parties agreed to allow the court to retain jurisdiction to resolve post-judgment disputes about the Resolution Agreement. ER 432 (Section 10 provides that "U.S. District Judge Michael R. Hogan shall have *continuing jurisdiction* over all aspects of this Agreement" and, in the event that Judge Hogan is not available, "his replacement shall be U.S. Magistrate Judge John Jelderks") (emphasis added); ER 437 (Section 24 states that "[t]he Court shall *retain*

jurisdiction with respect to the interpretation, implementation and enforcement of the terms of this Agreement") (emphasis added).

On May 21, 2012, Judge Panner approved the class action settlement, the terms of the Resolution Agreement, and dismissed the case. ER 444.

C. The Proposed Acquisition.

Just over a year after *Whaley* concluded, Pacific Seafood began negotiating a deal to merge Ocean Gold and its affiliated entities into Pacific Seafood Group. The deal evolved over 15-months behind closed doors and eventually resulted in three separate Purchase and Sale Agreements: (1) a Stock Purchase Agreement with Ocean Gold Seafoods and its shareholders; (2) a Purchase and Sale of Membership Interest with Hoquiam Riverview Properties, LLC and its members; and (3) a Purchase and Sale of Membership Interests with Ocean Protein, LLC and its members. SER 178-271.[3] Defendants drafted final versions of the agreements effective July 4, 2014, with a proposed closing date of "on or before September 8,

[3] Plaintiffs' Volume 2 of the SER identifies the Declaration of Michael E. Haglund in Opposition to Defendants' Motion to Dismiss and in Support of Plaintiffs' Motion for Preliminary Injunction as Docket Entry #45, but the district court entered that document as Docket Entry #106. AER 181.

2014." SER 180, 182, 218, 220, 245, 247. No notice was provided to the *Whaley* plaintiffs of this deal.[4]

Closing did not occur, however. Instead, the agreements were amended on September 8, 2014 ("Amended Stock Purchase Agreement"),[5] and prospective buyer Pacific Seafood Washington Acquisition Co., Inc.'s interests in the Purchase Agreements were expressly assigned to companies that did not even exist yet. SER 272-277, 286-302. The Amended Stock Purchase Agreement also changed the proposed closing date from "on or before September 8, 2014 to on or before January 31, 2015." SER 273. Defendants' provided no notice of those proposed transactions to plaintiffs' counsel or the Oregon Attorney General.[6]

---

[4] As part of the transactional documents, Dennis Rydman, president of Ocean Gold Seafoods and 31.2% interest shareholder of the company, entered into an option with Pacific Seafood Washington Acquisition Co., Inc. SER 168-177. This option assured that Frank Dulcich would obtain Dennis Rydman's majority ownership and control of the entities regardless of whether the proposed transaction ever closed. *Id*.

[5] The three separate Purchase and Sale Agreements, along with the Amended Stock Purchase Agreement, option, and related transactional documents are collectively referred to as the "Purchase Agreements."

[6] Defendants assert that the proposed acquisition does not constitute a merger. Defs.' Opening Br. at 16 n.10. However, the Purchase Agreements apply to all of Ocean Gold Seafoods' stock and membership interests, even if a minority are subject to post-closing obligations. SER 274. Regardless, Section 7 of the Clayton Act applies equally to mergers and acquisitions. 15 U.S.C. § 18.

In November 2014, Dennis Rydman passed away, and his surviving spouse was authorized to close on the agreements. SER 278-285. A month later, Ocean Gold Holding, Co., Inc. and Ocean Companies Holding Co., LLC, the two yet-to-be-formed entities identified in Amended Stock Purchase Agreement, were registered in the State of Washington. SER 287, 291. During the course of negotiations, there were *at least six proposed closing dates*, the last of which was set for January 22, 2015. On December 12, 2014, merely *three days* before the proposed December 15 closing date, defense counsel advised plaintiffs' counsel for the first time about the proposed acquisition. ER 272. And despite defendants' purported intent to submit any objections to former Judge Hogan, defense counsel expressly explained to plaintiffs' counsel that the Resolution Agreement did not apply: "I don't believe the Resolution Agreement addresses this issue or that it should be a matter of concern to your clients, but I wanted to let you know *what was in the works*." ER 273 (emphasis added). What had been in the "works" was a deal to purchase the largest and most modern combination of seafood processor, flash freezing/cold storage and fishmeal plant on the West Coast, a deal that had been negotiated in secret for almost 15 months.

During their investigation in January 2015, plaintiffs discovered that Pacific Seafood Group was pushing forward to acquire Ocean Gold and its related entities. SER 25-26. Defendants claimed that they had postponed closing to accommodate

any objections, ER 225; however, there is overwhelming evidence that defendants were going to close on the acquisition in January 22, 2015, regardless of any potential objections by plaintiffs. SER 303-316; AER 195.

On January 21, 2015, a day before the last proposed closing date, plaintiffs voiced strong objections to any acquisition of Ocean Gold and asked about the status of the deal and if it was scheduled to close. SER 26. Without any assurances that closing was not imminent, plaintiffs filed their complaint and motion for TRO the next day. ER 490-517.

Defendants then attempted to "submit" the dispute to former Judge Hogan for the first time on January 22, 2015. ER 276. In their email to Hogan, defendants stated that "Pacific Seafood contends that Paragraph 16(c) of the Stipulation applies *and that Paragraph 3(a) does not*." *Id.* (emphasis added).[7] This email is consistent with defense counsel's prior December 12, 2015 email stating that the Resolution Agreement did not apply to the proposed acquisition. *See* ER 273. Five days later on January 27, defendants terminated the proposed acquisition in an effort to moot plaintiffs' claims related to the acquisition of Ocean Gold Seafoods from the jurisdiction of the district court. ER 228-229.

[7] Section 16(c) provides that the Resolution Agreement will not have "any impact on any other relationship between Pacific Seafood and Ocean Gold." SER 53.

D. Procedural Background.

Plaintiffs' complaint filed on January 22, 2015 alleged claims for monopolization and attempted monopolization under Section 2 of the Sherman Act. ER 513-514. Plaintiffs asserted a third claim for a declaration that the proposed acquisition violated the Resolution Agreement, ER 514, but plaintiffs dropped that claim, in part, based on defendants' position that Section 16(c) removed the acquisition from the scope of the Resolution Agreement.[8] ER 469-487. Without objection, plaintiffs amended the complaint to add a claim of unlawful merger under Section 7 of the Clayton Act. ER 122.

On January 28, 2015, plaintiffs moved for a preliminary injunction pursuant to Section 16 of the Clayton Act to prevent Frank Dulcich and his Pacific Seafood empire from further consolidating the West Coast fishing industry by acquiring the stock and/or assets of Ocean Gold and its affiliates.[9] ER 189-192. On March 6,

[8] Defendants criticize plaintiffs for taking a "180-degree turn" by dropping their claim that the proposed transaction violated the Resolution Agreement, even though defendants themselves took conflicting positions. Defs.' Opening Br. at 14. Defendants claimed that the proposed acquisition did not trigger the Resolution Agreement based on Section 16(c), and then later argued that Section 3(a) applied and that the dispute must be submitted to Judge Jelderks. *Compare* ER 273, *with* ER 450-52, 184-85.

[9] On three separate occasions, defendants changed their position and argued the district court lacked jurisdiction and that all disputes should be resolved by Judge Hogan or Judge Jelderks. ER 450-452 (noting that "the parties agreed that all disputes would be resolved by Judge Hogan"); ER 186 (stating that plaintiffs'

2015, District Court Judge Owen Panner granted the preliminary injunction. ER 1-8. Thereafter, a new district court judge was assigned to the case, Judge Michael J. McShane. Pacific Seafood then filed a motion to compel arbitration, asking that the entire lawsuit be resolved by U.S. Magistrate Judge John Jelderks. ASER 1-20.

On June 8, 2015, the district court denied defendants' motion to compel arbitration. AER 5. The court acknowledged that "[t]he Resolution Agreement provided ancillary jurisdiction to resolve post-judgment disputes between the parties about the Resolution Agreement." AER 2. At the hearing, the court rejected defendants' contention that former Judge Hogan or Judge Jelderks could act as private arbitrators over Section 3(a) disputes. AER 29, 37. The court also rejected Pacific Seafood's argument that the proposed acquisition invoked Section 3(a), stating: "the phrase 'new contractual agreement' refers to the exclusive marketing agreement described in the prior sentence, not just *any* possible agreement between Pacific Seafood Group and Ocean Gold." AER 4-5 (emphasis added). In so ruling, the court also rejected defendants' claim that an outright acquisition of a competitor was the "functional equivalent" of an exclusive marketing agreement. AER 4 ("But I agree with Plaintiffs that a merger is

---

breached Section 16(c) of the Resolution Agreement and that the dispute "should be resolved by Judge Hogan or Judge Jelderks"); ER 256-267 (claiming that plaintiffs' breached the Section 16(c) of the Resolution Agreement). The district court implicitly rejected defendants' arguments by granting plaintiffs' TRO and preliminary injunction. ER 467-468,1-9.

categorically different from an exclusive marketing agreement.").

V. SUMMARY OF ARGUMENT.

The district court's ruling denying defendant's motion to compel arbitration should be affirmed for key reasons that defendants fail to address. First, Section 3(a) of the Resolution Agreement is not an arbitration clause. It does not mention or require arbitration. Section 3(a) simply refers objections to a limited type of marketing agreement between specific parties to a federal judge or magistrate for resolution. Federal judges and magistrates cannot serve as arbitrators as a matter of law. Second, the district court correctly exercised its discretion by refusing to expand the limited ancillary jurisdiction retained in *Whaley*. That is the governing law that applies, not the law under the FAA. Third, the terms of the Purchase Agreements do not invoke Section 3(a). They do not contain any provision making Pacific Seafood the *exclusive marketer* of Ocean Gold's processed seafood. Instead, the transactional documents proposed to transfer stock and LLC ownership interests. Moreover, in context, Section 16(c) makes clear that a merger of this nature is a type of "other relationship" that falls outside the scope of the Resolution Agreement.

VI. ARGUMENT.

A. Plaintiffs' Claims Are Outside the Scope of the *Whaley* Court's Ancillary Jurisdiction.

1. Section 3(a) is not an "arbitration clause."

The threshold issue on appeal is whether the parties agreed under the Resolution Agreement to arbitrate certain disputes. Defendants assert that Section 3(a) is an "arbitration clause" governed by the FAA, which requires plaintiffs to submit to a "creative arbitration process" in order to challenge the acquisition before U.S. Magistrate Judge John Jelderks.[10] Defs.' Opening Br. at 8, 20-24. According to defendants, this Court must construe Section 3(a) broadly to require arbitration over *any* disputes related to *any new* agreement, even one including nonparties to the Resolution Agreement. *Id.* at 25. Defendants' reliance on the FAA and their characterization of Section 3(a) as an arbitration clause, however, is flawed for the following reasons.

As an initial matter, the FAA provides that contracts evidencing an intent to settle "by arbitration" are valid. 9 U.S.C. § 2. Section 3(a), however, does not use the word "arbitration," nor does it state that the parties agree to "arbitrate" claims

[10] Because Hogan is no longer a sitting federal judge, defendants concede that his alternative U.S. Magistrate Judge Jelderks has jurisdiction over objections submitted pursuant to Section 3(a) or Section 10 of the Resolution Agreement. ASER 15 (requesting that "the Court must compel arbitration before Judge Jelderks and stay this action").

related to any new agreement that "requires Pacific Seafood Group to act as the exclusive marketer" of any Ocean Gold seafood product. ER 428. In defendants' view, "[n]o magic words such as 'arbitrate'" are necessary so long as the parties submit a dispute for a decision by a *third party*. Defs.' Opening Br. at 23. However, the "third party" decision-maker under Section 3(a) is a federal district court *judge* or, in the alternative, a federal magistrate *judge*, not an arbitrator.

Defendants ignore clear case law that that federal district court judges and magistrate judges *cannot serve as arbitrators*. "Federal statutes authorizing arbitration, such as 9 U.S.C. § 1 *et seq.* and 28 U.S.C. §§ 651 *et seq.*, do not appear to authorize or envisage the appointment of judges or magistrate judges as arbitrators, and it is suggestive that when the consent of the parties to proceed before a magistrate judge is required he is authorized to 'order the entry of judgment in the case'—not to make an arbitration award." *DDI Seamless Cylinder Intern., Inc. v. Gen. Fire Extinguisher Corp.*, 14 F.3d 1163, 1165 (7th Cir. 1994). The Seventh Circuit noted that "[e]ven more curious, ingenious, and economical would be a procedure by which a judge or magistrate judge would on day 1, wearing his judge's hat, encourage the parties to submit their dispute to arbitration; would on day 2, wearing his arbitrator's hat, arbitrate the parties' dispute; and on day 3, wearing his judge's hat once more, would confirm the arbitration award." *Id.* at 1165-66.

Multiple courts have followed this reasoning and concluded that judges cannot serve as arbitrators, even if the parties agree to such a process. *See, e.g.*, *Small v. Dellis*, 211 F.3d 1265 (4th Cir. 2000) (unpublished) ("Although the parties initially agreed to arbitrate the dispute before Judge Grimm, magistrate judges may not in their judicial capacity serve as arbitrators."); *Ovadiah v. New York Ass'n for New Americans*, 95 CIV. 10523(SS), 1997 WL 342411 at *10 (S.D.N.Y. June 23, 1997) (then U.S. District Court Judge Sotomayor concluding that "[t]here is inherent difficulty in and serious potential problems with having judicial officers step out of their traditional adjudicatory functions. Arbitrations by magistrate judges should be avoided"); *Delaware Coalition for Open Govt. v. Strine*, 894 F. Supp. 2d 493, 502 (D. Del. 2012), *aff'd sub nom. Delaware Coalition for Open Govt., Inc. v. Strine*, 733 F.3d 510 (3d Cir. 2013) ("Even with the proliferation of alternative dispute resolution in courts, judges in this country do not take on the role of arbitrators."). Even the district court below disagreed with defendants that federal judges could act as arbitrators. *See* AER 29 ("Article I judges, magistrates, are not private arbitrators."); AER 37 ("The idea that a federal judge would bind himself to private arbitration is a conflict.").

Although magistrate judges cannot act as arbitrators, they may assume a variety of other roles in assisting the district court, "including those of mediator and adjudicator and . . . these latter roles at least are consistent with [28 U.S.C.] §

636."[11] *Hameli v. Nazario*, 930 F. Supp. 171, 182 (D. Del. 1996). As Judge Posner aptly noted in *DDI Seamless Cylinder Intern.*,

> Parties are free within broad limits to agree on *simplified procedures* for the decision of their case. They can agree for example to waive the right to present oral testimony and instead to treat the summary judgment proceeding as the trial on the merits. They can agree that the hearing on a preliminary injunction shall be deemed the trial on the merits as well. They can agree to a trial on stipulated facts. They can, of course, agree to binding arbitration, *albeit before an arbitrator rather than a judge*.

14 F.3d at 1166 (citations omitted; emphases added).

Contrary to defendants' position, Section 3(a) is clearly not an arbitration clause. Instead, Section 3(a) simply refers disputes of a narrow category of exclusive marketing agreements for decision by Judge Jelderks under the "rule of reason" analysis by asking, on the whole, if the agreement is pro-competitive.[12]

---

[11] The jurisdiction and powers of a magistrate judge are set out in 28 U.S.C. § 636(b)(3). Parties may also consent to a magistrate judge conducting certain proceedings in a civil case. 28 U.S.C. § 636(c).

[12] Defendants argue that under Section 3(a), any decision as to whether a new exclusive marketing agreement would be "pro-competitive" is not the same law as would be made by a federal court adjudicating an antitrust claim. Defs.' Opening Br. at 24 n.12. While plaintiffs agree that the burden shifted to defendants to prove any new agreement must be pro-competitive (and here there is no such agreement invoking Section 3(a)), plaintiffs disagree that the substantive antitrust law would be any different. If the hypothetical new marketing agreement contained terms that per se violated the antitrust laws, they would be subject to that analysis. Otherwise, horizontal competitor collaborations are presumptively analyzed under rule of reason analysis. *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (citing *State Oil Co. v. Khan*, 522 U.S. 3, 10-19 (1997)). "[T]he inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or

2. A dispute under Section 3(a) is part of the *Whaley* court's ancillary jurisdiction.

To resolve disputes under a dismissal-producing settlement agreement, federal courts must have an independent basis of jurisdiction, because normally the enforcement of a settlement agreement is a matter for state courts. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 378, 381 (1994). Federal courts have the discretion to retain ancillary jurisdiction "for two separate, though sometimes related, purposes: (1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent; and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." *K.C. ex rel. Erica C. v. Torlakson*, 762 F.3d 963, 966 (9th Cir. 2014) (internal quotation marks omitted).

The Supreme Court's decision in *Kokkonen* is the seminal case addressing the requirements for a federal district court to retain jurisdiction over a settlement agreement. The Supreme Court first explained that enforcement of the settlement

---

one that suppresses competition. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Nat'l Soc. of Prof'l Engineers v. United States*, 435 U.S. 679, 691 (1978). In contrast, Section 7 of the Clayton Act, at issue in this case, prohibits any merger which may substantially lessen competition in any line of commerce. *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).

agreement is more than just a continuation of the dismissed suit and, therefore, requires its own basis for jurisdiction. *Id.* at 378. The Supreme Court then concluded that the federal courts have *discretion* to retain jurisdiction to enforce a settlement agreement under limited circumstances: "if the parties' obligation to comply with the terms of the settlement agreement ha[s] been made part of the order of dismissal – either by separate provision (such as a provision 'retaining jurisdiction' over the settlement agreement) or by incorporating the terms of the settlement agreement in the order." *Id.* Notwithstanding the federal courts' power to retain ancillary jurisdiction, a federal court may decide to terminate or divest itself of jurisdiction over the settlement agreement. *Arata v. Nu Skin Intern., Inc.*, 96 F.3d 1265, 1269 (9th Cir. 1996).

Here, the Resolution Agreement's terms were made part of Judge Panner's Judgment of Dismissal in *Whaley*. ER 444. Both Sections 10 and 24 refer to the *Whaley* court's continuing jurisdiction over that agreement. ER 432, 437. However, Section 3(a), read in context with those other sections, does not authorize arbitration. The parties simply consented to allow Judge Jelderks to resolve certain post-judgment disputes because they agreed that the court would retain ancillary jurisdiction over those matters. *See, e.g.*, *Brandt v. MIT Dev. Corp.*, 552 F. Supp. 2d 304, 317 (D. Conn. 2008), *order clarified on reconsideration*, CIV.A. 301CV1889SRU, 2008 WL 2230152 at *317 (D. Conn.

May 29, 2008) (rejecting the argument that the district court acted as an *arbitrator* and concluding that the court retained jurisdiction to resolve the disputed settlement details).

3. Ancillary jurisdiction does not extend to new claims and new parties.

A federal court can exercise ancillary jurisdiction over a range of supplementary proceedings, but that jurisdiction only extends so far. "Ancillary enforcement jurisdiction is, at its core, a creature of necessity." *Peacock v. Thomas*, 516 U.S. 349, 359 (1996). In *Peacock*, the Supreme Court cautioned that ancillary jurisdiction does not extend to "proceedings that are entirely new and original or where the relief [sought is] of a different kind or on a different principle than that of the prior decree." *Id.* at 358 (internal quotation marks and citations omitted; brackets in original). Ancillary jurisdiction is for the purpose of enabling a court "to manage its proceedings, vindicate its authority, and effectuate its decrees." *Id.* at 354.

When a subsequent claim "is founded not only upon different facts than the underlying suit, but also upon entirely new theories of liability," the court's ancillary enforcement jurisdiction vanishes. *Peacock*, 516 U.S.at 354; *see, e.g.*, *Federal Sav. and Loan Ins. Corp. v. Ferrante*, 364 F.3d 1037, 1041-42 (9th Cir. 2004) (court lacked ancillary jurisdiction to adjudicate amount of fees owing

between attorney and client because the motion was unrelated to the underlying action); *Siding & Insulation Co. v. Acuity Mut. Ins. Co.*, 754 F.3d 367, 374 (6th Cir. 2014) (cautioning against extending ancillary jurisdiction to new theories of liability); *Hudson v. Coleman*, 347 F.3d 138, 143 (6th Cir. 2003) (same). This is consistent with the limited focus of ancillary federal jurisdiction in post-judgment matters. *Gutman v. Klein*, 03 CIV. 1570 BMC, 2015 WL 5022510 at *5 (E.D.N.Y. Aug. 24, 2015) (purpose of ancillary jurisdiction is "simply to see that the judgments of the court are effectuated, not that all related claims between the parties are finally determined in one proceeding").

Thus, the key issue is whether plaintiffs' claims are ancillary to the *Whaley* case. They are not. Section 3(a) provides that the *Whaley* plaintiffs will receive 60-days' notice and an opportunity to object in the event that Pacific Seafood and Ocean Gold negotiate any new agreement that requires Pacific Seafood Group to act as the exclusive marketer of Ocean Gold seafood products. ER 428. After *Whaley* was dismissed, Pacific Seafood Group's 15-month effort to acquire the stock and ownership of Ocean Gold and its multiple affiliates gave rise to a new dispute: whether the proposed acquisition violated Section 7 of the Clayton Act.

While *Whaley* was being litigated, the plaintiffs never pursued a claim for unlawful merger under the Clayton Act. *See* ER 428. Although Pacific Seafood Group attempted to acquire Ocean Gold Seafoods (and some but not all of the

affiliates in the now challenged transaction) during November 2010, that effort was abandoned. AER 80. After dropping their attempted acquisition, the *Whaley* defendants stipulated that the transaction was permanently off and that no further negotiations would occur without 45-days' notice to plaintiffs and the Oregon Department of Justice. *Whaley v. Pacific Seafood Group*, No 1:10-cv-30057~PA (Docket Entry #171-2). As a result, the *Whaley* plaintiffs never amended their complaint to include a Clayton Act anti-merger claim. ER 379-418. Clearly given this procedural history, the parties never intended that the *Whaley* court would retain jurisdiction to resolve disputes regarding an acquisition, and claim preclusion does not apply in light of that stipulation. *Central Delta Water Agency v. United States*, 306 F.3d 938, 952 (9th Cir. 2002) (for *res judicata* to apply, prior suit must involve *same claim* as later suit and be terminated by final judgment on the merits).

Nor did the parties intend that the *Whaley* court would retain jurisdiction over claims imposing *liability* on *new parties*. *See U.S.I. Props. Corp. v. M.D. Const. Co.*, 230 F.3d 489, 496 (1st Cir. 2000) (court lacked jurisdiction over subsequent collection action against new party); *Zweizig v. Rote*, 3:14-CV-00406-ST, 2014 WL 7229202, at *6 (D. Or. Dec. 16, 2014) (same). The Amended Stock Purchase Agreement for the acquisition of Ocean Gold's stock involved 11 new parties that were not signatories to the Resolution Agreement: Ocean Gold

International, Inc,; Ocean Protein, LLC; Hoquiam Riverview Properties, LLC; Ocean Gold Holding Co., Inc.; Ocean Companies Holding Co., LLC; Dennis Rydman (later Jacquelyn A. Rydman, Administrator of the Estate of Dennis Rydman); Francis Miller; Ronald Miller; Richard Miller, Sherry Miller, and Sherry Miller, Trustee of the Spencer G. Miller Trust. SER 276-277. With the exception of Ocean Gold Holding Co., Inc. and Ocean Gold Holding Co., LLC, those new parties are not "successor or assigns" to the Resolution Agreement, and the *Whaley* court lacks ancillary jurisdiction over them.[13]

B. The Proposed Acquisition is Beyond the Scope of the Resolution Agreement.

1. The proposed acquisition is outside the plain language of Section 3(a).

The proposed acquisition is beyond the scope of Section 3(a) of the Resolution Agreement. Any interpretation that the acquisition of Ocean Gold

[13] Defendants assert that the standard of review of a court's denial of a motion to compel arbitration is *de novo*. Defs.' Opening Br. at 20. Despite defendants' label of Section 3(a) as an "arbitration clause," the issue is whether the district court had ancillary jurisdiction to refer a matter outside of its ancillary jurisdiction to Judge Jelderks. As stated above, federal courts have "inherent" power to exercise jurisdiction over settlement agreements so they may manage their proceedings, vindicate their authority, and effectuate decrees. *Kokkonen*, 511 U.S. at 380-81. The courts' exercise of that "inherent" authority is reviewed for abuse of discretion. *Ready Transp., Inc. v. AAR Mfg., Inc.*, 627 F.3d 402, 404 (9th Cir. 2010); *see Arata v. Nu Skin Intern., Inc.*, 96 F.3d 1265, 1268 (9th Cir. 1996).

Seafoods and its affiliates is subject to the *Whaley* court's limited ancillary jurisdiction under Section 3(a) is an untenable interpretation of that section. Section 3(a) only covers disputes concerning future exclusive marketing agreements between Pacific Seafood Group and Ocean Gold Seafoods that requires Pacific Seafood to act as the exclusive marketer of Ocean Gold's processed seafood. Section 3(a) provides:

> **3. <u>Pacific Seafood Group/Ocean Gold Seafoods, Inc. Contract</u>.**
>
> (a) The February 9, 2006 Agreement between Pacific Seafood Group and Ocean Gold Seafoods, will not be renewed in 2016. In the event that the Pacific Seafood and Ocean Gold intend to enter into *any new agreement that requires Pacific Seafood Group to act as the exclusive marketer of any seafood product produced by Ocean Gold Seafoods*, Pacific Seafood and Ocean Gold shall first give 60 days' notice to class counsel and the Oregon Department of Justice and an opportunity to object to the agreement. In the event of an objection to the new contractual arrangement, Judge Hogan shall determine whether the proposed new agreement is pro-competitive and if so, it may be approved.

ER 428 (emphasis added).

The text and context of the Section 3(a) are instructive. "[A] contract will be defined by what the parties said in reaching the agreement and not by what the parties say about it afterwards." *Criterion Interests, Inc. v. The Deschutes Club*, 136 Or. App. 239, 244, 902 P.2d 110 (1995) ("ORS 42.230 provides that the construction of the language of an agreement must begin and end with the words

the parties used."). In construing a contract, the court is to "ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted." ORS 42.230.

Defendants broadly construe the Purchase Agreements for the proposed acquisition as a "new agreement" that is the "functional equivalent" of an exclusive marketing agreement, but the district court correctly rejected that interpretation as beyond the scope of Section 3(a).[14] AER 4-5. Under the proposed merger, Pacific Seafood would acquire its primary competitor and multiple affiliates – folding all into defendants' ongoing monopsony – not contract to serve as its *exclusive marketer*. This is not a situation where increased market power would flow to Pacific Seafood Group from an exclusive contract under which Pacific Seafood Group would obtain exclusive marketing rights and be "*required*" to sell Ocean Gold's seafood production. That is the language required to invoke Section 3(a). Defendants fail to identify *any* language in the transactional documents to acquire Ocean Gold that reference marketing at all.

[14] Defendants claim that the use of the word "any" is dispositive and encompasses both exclusive marketing agreements and exclusive marketing agreements *plus more*. Defs.' Opening Br. at 29. Defendants' argument is fatally flawed because "any new agreement" is later modified by the phrase "*that* requires Pacific Seafood Group to act as the exclusive marketer of any seafood product produced by Ocean Gold Seafoods." ER 428 (emphasis added). Thus, based on this restrictive clause, only exclusive marketing agreements are subject to Section 3(a).

Rather, Pacific Seafood Group seeks to achieve increased market concentration over coldwater shrimp and whiting through an acquisition of Ocean Gold and its affiliates *by permanently eliminating* Ocean Gold as its primary competitor in those markets. Following the acquisition, whether Pacific Seafood would decide to continue Ocean Gold as an independent going concern or completely shutter Ocean Gold and subsume its assets within the Pacific Seafood Group empire is completely speculative. As the owner of these assets and companies, Pacific Seafood would have full authority to make those decisions.

The proposed acquisition simply does not trigger Section 3(a) because the requisite "exclusive marketing" language is absent from those transactional documents. Considering that what defendants propose is actually a merger, which is fundamentally different than a marketing agreement, the absence of such language is no surprise. The transactional agreements at issue do not constitute, under any reasonable interpretation, an "exclusive marketing" contract.

2. <u>In context, Section 16(c) makes clear that the Resolution Agreement has no impact on the proposed acquisition</u>.

Defendants rely solely on the text of Section 3(a) in support of its interpretation, but Section 3(a) must be interpreted in context with other provisions in the Resolution Agreement. *Yogman v. Parrott*, 325 Or. 358, 361, 937 P.2d 1019, 1021 (1997) (The court examines the text of the disputed provision "in the

context of the document as a whole"). The scope of Section 3(a) as limited to marketing agreements or agreements under which Pacific Seafood agreed to *exclusively market* Ocean Gold's processed seafood is further supported by a plain reading of Section 16(c) of the Resolution Agreement. Section 16 provides in relevant part:

> **16. No Admission by Parties.** Whether or not this Agreement is finally approved, *neither this Agreement*, nor any document, statement, proceeding or conduct related to this Agreement, nor any reports or accounts thereof, *shall in any event be*:
>
> * * * * *
>
> (c) *construed to have any impact on any other relationship between Pacific Seafood and Ocean Gold Seafoods and no person bound by this Agreement will contend otherwise.*

ER 435-436 (emphases added).

Notably, defendants previously argued before the district court that the proposed acquisition under Section 16(c) was allowed under the Resolution Agreement because it constituted an "other relationship," which the Resolution Agreement did not impact. SER 20. In a January 23, 2015 email, defense counsel made the following representation to the district court below:

> Pacific Seafood contends that Paragraph 16(c) of the Stipulation applies and that *Paragraph 3(a) does not.*

ER 276 (emphasis added). Defendants later flip-flopped and took a contrary position.[15]

Yet, defendants' initial position concerning the impact of Section 16(c) is consistent with the proper interpretation of the limited scope of Section 3(a). Section 16(c) makes clear that nothing in the Resolution Agreement will have any impact on "any other relationship between Pacific Seafood and Ocean Gold Seafoods." ER 436. In context, it is important to consider that at the time the Resolution Agreement was signed, Pacific Seafood and Ocean Gold were already parties to their 2006 Agreement under which Pacific Seafood served as exclusive marketer. To the extent the parties entered into any *new agreement* requiring Pacific Seafood to act as exclusive marketer of Ocean Gold's processed seafood,

[15] Pacific Seafood's representation that it negotiated the acquisition always intending that it would arbitrate mischaracterizes the record. For support, Pacific Seafood provides three AER cites that reference "Hogan," one of which occurred *after* providing notice to plaintiffs in December 2014. Defs.' Opening Br. at 10. These cherry-picked references ignore defendants' other documents showing multiple prior closing dates that were scheduled without notice to plaintiffs, defendants' other internal communications congratulating themselves on reaching an agreement, evidence indicating that defendants were going to close on the acquisition regardless of any potential objections, and the fact that defendants took the position that they could rightly close outside the terms of the Resolution Agreement under Section 16(c). *See, e.g.*, SER 290-316; AER 195; ER 273, 276. Pacific Seafood Group also states that there were "repeated communications" with plaintiffs' counsel, Defs.' Opening Br. at 12, but those *all* occurred after plaintiffs' counsel was first contacted in December 2014 – a mere three days before the scheduled closing date. ER 269-272, 274.

that agreement *would* invoke Section 3(a). However, the proposed Purchase Agreements under which Pacific Seafood would outright acquire Ocean Gold is a type of "other relationship" squarely within the meaning of Section 16(c).

The purchase of Ocean Gold's stock does not implicate Section 3(a) because the transactional documents do not require Pacific Seafood to exclusively market Ocean Gold's production. Instead, the documents for the proposed acquisition address deal points typical to an acquisition: Ocean Gold's valuation report, *see* SER 59, the Stock Purchase Agreement and terms, including the Shares and Purchase Price for the stock, SER 180-181, 218-219, 245-246, the Closing, SER 182, 220, 247, the parties' Representations and Warranties, SER 184-187, 221-224, 249-252, Closing Conditions, SER 191-193, 224-226, 252-254, and miscellaneous other provisions, SER 194-199, 226-236, 255-265. The Purchase Agreements do not require the acquiring firm to subsequently market anything.[16] SER 168-277. Thus, the acquiring firm is free to use its newly acquired assets as it chooses, which fails to invoke the limited scope of Section 3(a).

[16] Defendants' entire 47-page argument, that by acquiring Ocean Gold, Pacific Seafood would have "*acted as the exclusive marketer*" of Ocean Gold's processed seafood, cites to nothing in the record except Section 3(a). Defs.' Opening Br. at 28. This is a circuitous argument. Defendants ignore the terms of the Purchase Agreements, ignore the reality that none of those agreements mandate that Pacific Seafood exclusively market anything, and that the Purchase Agreements fail to contain the language necessary to trigger Section 3(a).

3. The future acquisition of Ocean Gold was not "released or waived" under Section 2 of the Resolution Agreement.

Defendants are also wrong in asserting that Section 2 of the Resolution Agreement released future claims that challenge the acquisition *in favor of resolving such claims under Section 3(a)*. Defs.' Opening Br. at 36. Section 2 defines "Released Claims" as covering only claims that existed on the date the release was signed covering the *delivery time period* at issue in *Whaley*, and not future claims arising from events after that date. Section 2 defines "Released Claims" as:

> Any and all claims for monopolization, attempted monopolization or conspiracy to restrain trade under Sections 1 and 2 of the Sherman Act that relate to the delivery of trawl-caught ground fish, whiting or pink shrimp to West Coast processors from Ft. Bragg, California north to the Canadian border *between June 21, 2006 and December 31, 2011* and specifically including any claims for damages and/or injunctive relief related to those claims.

ER 428 (emphasis added).

Defendants' make a confusing leap that plaintiffs either "released *or waived*" claims for unlawful acquisition (one that would not occur until January 2015) due to the operation of Section 2. Defs.' Opening Br. at 36. That argument makes no sense for multiple reasons.

First, the temporal scope of Released Claims under Section 2 is limited to the delivery time period *between June 21, 2006 and December 31, 2011*.

Defendants ignore the timing of the release as ending on December 31, 2011, and the fact that the proposed acquisition at issue was set to close in January 2015, well beyond the time period in Section 2 – more than two and one-half years after the May 21, 2012 Resolution Agreement entered into in *Whaley*.

Second, defendants' use the word "waiver" interchangeably with "release" in reference to Section 2, but nowhere in Section 2 does the word "waiver" appear. Defendants do this in an effort to inappropriately invoke Section 3(a) by arguing that plaintiffs either "released" *or "waived"* claims under Section 2 in lieu of resolving those claims under Section 3(a). Defendants' introduction of the word "waiver" does not expand the scope of Section 3(a).

Third, defendants ignore that *all* agreements that could potentially invoke Section 3(a) *require* "Pacific Seafood to act as exclusive marketer," ER 428, and that none of the transactional documents contain that language. Defendants complain about the narrow scope of that marketing language in an effort to argue that acquisitions *should* be included, but that is the scope of Section 3(a) that the parties agreed to.[17] Defendants cannot fuss about the scope of the contract they

[17] Defendants' argument on appeal that transactional documents are *within* the scope of Section 2 despite the absence of the requisite marketing language contradicts their counsel's own oral argument before the district court: *Compare* Defs.' Opening Br. at 36, *with* AER 33 (referring to the scope of Section 3(a); "MR. SNIDER: It's any new agreement that *requires* Pacific Seafood to act as the exclusive marketer.") (emphasis added).

negotiated and signed. *Knappenberger v. Cascade Insurance Co*., 259 Or. 392, 397 (1971).

VII. CONCLUSION.

For the reasons set forth above, the district court's order denying Pacific Seafood's motion to compel arbitration should be affirmed.

DATED this 9th day of September, 2015.

Respectfully submitted,

HAGLUND KELLEY LLP

/s/ *Michael E. Haglund*
Michael E. Haglund, OSB No. 772030
Of Attorneys for Plaintiffs-Appellees.

CERTIFICATE OF COMPLIANCE

Form 6. Certificate of Compliance with Rule 32(a).

Certificate of Compliance With Type-Volume Limitations, Typeface Requirements and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

   ☒ this brief contains 7,739 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

   ☐ this brief uses a monospaced typeface and contains _____ lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   ☒ this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman, *or*

   ☐ this brief has been prepared in a monospaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

Dated: September 9, 2015

/s/ *Michael E. Haglund*
Michael E. Haglund, OSB No. 772030
Of Attorneys for Plaintiffs-Appellees

STATEMENT OF RELATED CASES

To the knowledge of Plaintiffs' counsel, there are no related cases pending before this Court at this time.

DATED this 9th day of September, 2015.

/s/ *Michael E. Haglund*
Michael E. Haglund, OSB No. 772030
Of Attorneys for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on September 9th, 2015, I caused the foregoing **PLAINTIFFS-APPELLEES' ANSWERING BRIEF** to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that I have caused the foregoing document to be sent by electronic mail to the following non-CM/ECF participant:

None

/s/ *Michael E. Haglund*
Michael E. Haglund, OSB No. 772030
Of Attorneys for Plaintiffs-Appellees