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

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

Plaintiffs conclude their Answering Brief with the assertion that the parties "cannot fuss about the scope of the contract they negotiated and signed." AB 32-33. Pacific Seafood agrees. A party, "'having made the bargain to arbitrate,'" must be "'held to it.'" *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (citation and brackets omitted). Here, plaintiffs make three arguments to avoid being held to their bargain. None succeeds.

First, Plaintiffs contend that paragraph 3(a) is not an arbitration clause because "[f]ederal district court judges and magistrate judges cannot serve as arbitrators as a matter of law." AB 2. Plaintiffs are wrong. Federal statutes and case law confirm a district court's power to refer disputes to arbitration before a federal judge.

Second, Plaintiffs assume (without explanation) that paragraph 3(a) is an ancillary jurisdiction clause rather than an arbitration agreement. Not so. As Plaintiffs themselves point out, ancillary jurisdiction cannot extend to new facts, new theories, or new types of relief. AB 21-24. Paragraph 3(a) cannot *ever* be an ancillary jurisdiction clause, because it provides for binding determination of new facts (the impact of a future agreement in a future economic landscape), under a new theory (*i.e.*, whether the agreement is "pro-competitive"), with a new type of relief (*i.e.*, approval or denial of the new agreement). The fact that paragraph 3(a)

selects named judges as decision-makers and is not necessary to effectuate the *Whaley* judgment underscores that it is not an ancillary jurisdiction clause.

Third, Plaintiffs argue that the Proposed Transaction is not within the scope of paragraph 3(a) because the only agreements subject to paragraph 3(a) are those that include language expressly requiring Pacific Seafood to sell Ocean Gold-produced seafood. AB 26. Plaintiffs' argument is contradicted by the text and context of paragraph 3(a) and the economic realities of the Proposed Transaction, and it ignores the mandate that arbitration agreements be construed broadly in favor of arbitration.

This Court should enforce paragraph 3(a) and compel arbitration of Plaintiffs' objections to the Proposed Transaction.

II. ARGUMENT

A. Review of the District Court's Order Is De Novo.

This Court reviews de novo both the district court's denial of the motion to compel arbitration and its interpretation of the scope of paragraph 3(a). *Cape Flattery Ltd. v. Titan Mar., LLC*, 647 F.3d 914, 917 (9th Cir. 2011).

Plaintiffs suggest that this Court should review for abuse of discretion whether the district court has ancillary jurisdiction. AB 24 n.13. The *existence* of ancillary jurisdiction, however, is an issue of law reviewed de novo. The authority relied on by Plaintiffs confirms this. *See Ready Transp., Inc. v. AAR Mfg., Inc.*,

627 F.3d 402, 404 (9th Cir. 2010) ("[W]hile a district court's decision to exercise its inherent power is reviewed for an abuse of discretion, whether a district court possessed that power is a question of law reviewed de novo."). Furthermore, the district court did not exercise any discretion, because it never concluded that paragraph 3(a) is an ancillary jurisdiction clause in the first place. The district court properly held that *paragraph 24* is an ancillary jurisdiction clause (AER 2-3 (quoting ¶ 24)), but declined to characterize paragraph 3(a) as another ancillary jurisdiction clause.

B. Paragraph 3(a) Is an Arbitration Agreement.

1. An Agreement to Submit a Dispute for a Decision by a Third Party Is an Arbitration Agreement.

This Court holds that "the most minimal indication of the parties' intent to arbitrate must be given full effect." *Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469, 478 (9th Cir. 1991). "'If the parties have agreed to submit a dispute for a decision by a third party, they have agreed to arbitration.'" *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205, 1208 (9th Cir. 1998) (emphasis and citation omitted). No ifs, ands, or buts. No "'magic words'" necessary. *Id.* (citation omitted). All that is required is an agreement to (1) submit a dispute (2) for a decision (3) by a third party. Plaintiffs do not so much as *acknowledge* this controlling rule from *Wolsey*. Nor do Plaintiffs deny that paragraph 3(a) fulfills all three of the *Wolsey* criteria. OB 23-24. The parties agreed to (1) submit objections

to any new agreement that would require Pacific Seafood to act as the exclusive marketer of any Ocean Gold-produced seafood, (2) for a decision whether it is pro-competitive, (3) to former Judge Hogan or his designated substitute, Magistrate Judge Jelderks. *Wolsey*, 144 F.3d at 1208. That is far more than a "minimal indication" of an intent to arbitrate, and Plaintiffs do not attempt to argue otherwise.

Under *Wolsey* and *Republic of Nicaragua*, paragraph 3(a) is an arbitration agreement. As discussed below, Plaintiffs' two arguments to the contrary—the supposed impossibility of a judge serving as arbitrator and ancillary jurisdiction—are unavailing.

2. Plaintiffs' Contention That a Federal Judge Cannot Serve as Arbitrator Is Wrong.

Before the district court, Plaintiffs initially argued against using former Judge Hogan's services, because he is now a *private* alternative dispute resolution professional. AFER[1] 3, 5-6. Pacific Seafood then moved to compel arbitration before Judge Jelderks. ASER 3. On appeal, Plaintiffs now assert for the first time a Catch-22 theory—that Judge Jelderks cannot be an arbitrator either, because he is

[1] Additional Further Excerpts of Record, filed herewith.

not a private individual. Fortunately, this seeming paradox is easily resolved because Plaintiffs are wrong.[2]

Plaintiffs' bold claim that "federal district court judges and magistrate judges *cannot serve as arbitrators*," AB 16, relies solely on cases that have either been abrogated by Congress or do not actually decide the question. In fact, Congress has expressly authorized magistrate judges to perform that role, and the United States Supreme Court, this Court, and other federal courts approve of federal judges serving as arbitrators. A federal court's assignment of a district judge or magistrate judge to serve as an arbitrator does *not* invalidate the arbitration agreement.

a. Congress Has Authorized Magistrate Judges to Act as Arbitrators.

In addition to their other statutorily enumerated powers, magistrate judges "may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. § 636(b)(3). Congress made clear in the Alternative Dispute Resolution Act of 1998 (the "ADR Act of 1998") that one of the "additional duties" referred to in § 636(b) can be serving as an arbitrator. Every district court must "provide litigants in all civil cases with at

[2] However, if this Court were to rule that Judge Jelderks' position as a magistrate judge prevents enforcing the arbitration agreement, Pacific Seafood would move on remand to compel arbitration before retired Judge Hogan.

least one alternative dispute resolution process, including . . . arbitration." *Id.* § 652(a). The District of Oregon offers several alternative dispute resolution processes, including arbitration. D. Or. L.R. 16-4. District courts must "mak[e] neutrals available for use by the parties for each category of process offered," and "the district court may use, among others, *magistrate judges*." *Id.* § 653 (emphasis added). Thus, contrary to Plaintiffs' assertion that magistrate judges "*cannot*" serve as arbitrators (AB 16), Congress has empowered magistrate judges to do so. Indeed, the local rules of some district courts now expressly provide that magistrate judges may conduct arbitrations.[3]

b. Plaintiffs' Authority Cannot Sustain Their Argument.

In light of the ADR Act of 1998, Plaintiffs' assertion that "clear case law" prohibits judges from acting as arbitrators quickly collapses. AB 16. To begin with, Plaintiffs' pre-1998 cases are *no longer good law*. Before 1998, the statute that was the predecessor to the ADR Act of 1998 did not expressly authorize magistrates to act as neutrals in arbitrations. *Compare* Judicial Improvements and

[3] *See* D. Del. L.R. 72.1(a)(1) ("A *Magistrate Judge* is authorized to . . . [c]onduct various alternative dispute resolution processes, including . . . *arbitration* . . . ." (emphases added)); D. Minn. L.R. 16.5 ("*[M]agistrate judges constitute the panel of neutrals* . . . . The court may order the parties . . . to participate in any or all of the following processes *before a judge*: . . . *arbitration*." (emphases added)); *see also* D. Md. L.R. 607 ("The *magistrate judges* of the Court shall constitute the panel of neutrals . . . . *Actions may be referred to arbitration* . . . ." (emphases added)).

Access to Justice Act, Pub. L. No. 100-702, § 901, 102 Stat. 4642, 4659-63 (1988) (codified at 28 U.S.C. § 651-658), *with* ADR Act of 1998, Pub. L. No. 105-315, § 5, 112 Stat. 2993, 2995 (1998) (codified at 28 U.S.C. § 653). The starting point for the court's analysis in *DDI Seamless Cylinder International Inc. v. General Fire Extinguisher Corp*., 14 F.3d 1163, 1165 (7th Cir. 1994), was the observation that "[f]ederal statutes authorizing arbitration, such as . . . 28 U.S.C. § 651, *et seq.* do not appear to authorize or envisage the appointment of judges or magistrate judges as arbitrators." After 1998, *that is no longer true*. Similarly, two other cases relied on by Plaintiffs, *Hameli v. Nazario*, 930 F. Supp. 171, 180-82 (D. Del. 1996), and *Ovadiah v. New York Ass'n for New Americans*, Nos. 95 Civ. 10523(SS), 96 Civ. 330(SS), 1997 WL 342411, at *9-10 (S.D.N.Y. June 23, 1997), looked to the United States Code as it stood prior to the ADR Act of 1998. None of Plaintiffs' pre-1998 cases establish that, under the current statutory framework and policy choices made by Congress, magistrate judges are precluded from serving as arbitrators.

Plaintiffs' two remaining cases do not establish Plaintiffs' purported rule either. In one unpublished decision, *Small v. Dellis*, 211 F.3d 1265 (table), 2000 WL 472873 (4th Cir. 2000) (unpublished), the court's recitation of procedural history briefly cites *DDI Seamless* as an explanation why, after initially agreeing to arbitration by a magistrate judge, the parties avoided the issue by consenting

instead to simplified judicial procedures. The cursory dictum in an unpublished decision does not bind the Fourth Circuit; nor should it carry any weight with this Court. *See United States v. Shepperson*, 739 F.3d 176, 180 n.2 (4th Cir. 2014).

Delaware Coalition for Open Government v. Strine, 894 F. Supp. 2d 493 (D. Del. 2012), does not hold that judges are *forbidden* to act as arbitrators either. The court specifically noted that the ADR Act "seems to allow" it, but concluded that judges do not as a matter of fact take on the role of arbitrators because "neither the parties nor this Court could find evidence of that practice." *Id.* at 502. As shown below, however, there is ample evidence of federal judges serving as arbitrators.

c. Federal Courts Permit Judges to Serve as Arbitrators.

Cases at all levels of the federal courts show that federal judges do act as arbitrators. In *Besser Manufacturing Co. v. United States*, 343 U.S. 444 (1952), the United States Supreme Court expressly approved a district judge's acting as one of a panel of arbitrators to set royalty rates for a patent licensing remedy. After the parties were unable to agree on a fifth member of an arbitration panel, "the judge stepped in as the fifth arbitrator and voted for the rates proposed by the government-appointed representatives." *Id.* at 448. The Supreme Court noted that "the procedure . . . is an innovation in certain aspects, but novelty is not synonymous with error." *Id.* at 449. "In framing relief in antitrust cases, a range of discretion rests with the trial judge," and "[w]ith respect to the procedure"

chosen, the court was "acting within the discretion vested in it." *Id.* *Besser* flatly contradicts Plaintiffs' view of what federal judges may do, and the Supreme Court's opinion on the matter trumps Plaintiffs'.

This Court too holds that a district judge may act as an arbitrator. In *Gockstetter v. Williams*, 9 F.2d 354, 355 (9th Cir. 1925), the district court ordered that, in the event the parties were unable to agree on the value of assets transferred from an insolvent bank to a new bank, the issue would be referred to the district court. On appeal, this Court explained that "in fixing the price of assets in Exhibit D, the Judge of the District Court will act extra-judicially as referee or arbitrator; *it is competent for the parties interested to call upon him in this capacity*." *Id.* at 357 (emphasis added). Plaintiffs ignore this binding precedent.

Other federal courts likewise accept with equanimity federal judges acting as arbitrators. *See, e.g.*, *In re Cont'l Airlines Corp.*, 907 F.2d 1500, 1510 (5th Cir. 1990) (bankruptcy judge served as interest arbitrator for collective bargaining agreement); *Replogle v. Borrego*, No. C 07-04170 CRB, 2008 WL 2338573, at *1 (N.D. Cal. June 4, 2008) (magistrate judge served as arbitrator to determine allocation of attorneys' fees award). Again, these examples contravene Plaintiffs' purported rule.

Because in all of these cases the judge's role as an arbitrator appears to have been ordered by the court,[4] the judges' service was consistent with Canon 4(A)(4) of the Code of Conduct for United States Judges, which prohibits a federal judge from acting as a mediator or arbitrator "apart from the judge's official duties" unless expressly authorized by law. *Cf. Brandt v. MIT Dev. Corp.*, 552 F. Supp. 2d 304, 316 (D. Conn. 2008) ("'Federal judges, . . . may not serve as arbitrators in cases *not on the docket of that judge's court* . . . .'" (first ellipsis and emphasis in original) (quoting *Codes of Conduct for United States Judges, Chapter 5: Compendium of Selected Opinions* § 5.5(1)(a) (2007))). Here, too, because the *Whaley* court approved the Resolution Agreement (ER 444), and because the district court would enter an order compelling arbitration before Judge Jelderks, his service would be fully in keeping with the ethical canons, just as if the district court were to refer a case to him for mediation.

In short, there is no bar to a district judge or magistrate judge serving in the role of arbitrator as directed by a district court. The parties' choice of a federal judge to decide future disputes does not mean paragraph 3(a) is anything other than an arbitration agreement.

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[4] *Gockstetter*, 9 F.2d at 355; *Replogle v. Borrego*, No. 03-cv-04035 (N.D. Cal. order signed Apr. 14, 2008) (Dkt. No. 883). Court records are not available for *Besser* and *In re Continental* through PACER, but in both cases the court clearly cooperated in making the judge available as an arbitrator.

C. Paragraph 3(a) Is Not an Ancillary Jurisdiction Clause.

Plaintiffs next assert that paragraph 3(a) is an ancillary jurisdiction provision rather than an arbitration agreement. Plaintiffs' argument, however, assumes the conclusion. They never establish the proposition. AB 19-24.[5] Instead, Plaintiffs argue at length that the district court could not properly exercise ancillary jurisdiction over their objections because of the particular facts of the current dispute (*i.e.*, the Proposed Transaction, the involvement of new parties,[6] and the specific legal theories being asserted by Plaintiffs). But whether objections to this *particular* new agreement fall within the permissible bounds of ancillary jurisdiction misses the point. Given that Pacific Seafood moved to compel arbitration—not for an exercise of ancillary jurisdiction—the crucial issue for purposes of this appeal is whether paragraph 3(a) is an arbitration agreement or an ancillary jurisdiction clause. As shown below, paragraph 3(a) cannot be an ancillary jurisdiction clause.

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[5] Plaintiffs' citation to *Brandt*, 552 F. Supp. 2d at 317, is inapposite. AB 20. Just because one district court exercised ancillary jurisdiction to resolve certain disputed issues regarding the terms of a settlement agreement, rather than arbitrate them, does not show that the *Whaley* court and the parties here intended paragraph 3(a) as an ancillary jurisdiction clause.

[6] Plaintiffs emphasize the "new parties" in the Proposed Transaction as a reason that the district court could not exercise *ancillary jurisdiction* here. AB 23-24. But the involvement of new parties in that now-terminated transaction does not mean that Plaintiffs, who are bound by the Resolution Agreement, are excused from complying with their obligations under paragraph 3(a).

1. By Its Terms, Paragraph 3(a) Would *Never* Create Ancillary Jurisdiction.

Plaintiffs take pains to show that the district court has no ancillary jurisdiction to resolve Plaintiffs' objections here. Pacific Seafood does not disagree with that conclusion. But Plaintiffs' argument proves too much. The district court could *never* have ancillary jurisdiction under paragraph 3(a) to resolve objections to *any* new agreement that requires Pacific Seafood to act as exclusive marketer of Ocean Gold-produced seafood, *even if the new agreement were the narrowest possible exclusive-marketing-only contract involving no new parties*. In other words, if paragraph 3(a) actually were an ancillary jurisdiction provision, it would be meaningless, because the clause would have *no* application.

a. New Facts

Plaintiffs note that post-judgment ancillary jurisdiction does not extend to disputes on "'different facts'" than the original proceeding. AB 21 (quoting *Peacock v. Thomas*, 516 U.S. 349, 354 (1996)). Paragraph 3(a) by its terms applies only to different facts: a *future* "new agreement." ER 428. Thus, the resolution of Plaintiffs' objections will necessarily involve new facts: market conditions at the time of the dispute and the new agreement itself. Those new facts would prevent ancillary jurisdiction. For instance, in *Federal Savings & Loan Insurance Corp. v. Ferrante*, 364 F.3d 1037, 1041-42 (9th Cir. 2004), this Court recognized that an instrument that had not been involved in a district court's pre-

judgment proceedings is not a proper subject of post-judgment ancillary jurisdiction. *See id.* (no ancillary jurisdiction to enforce promissory note).

b. New Theory

Plaintiffs acknowledge that a district court does not have post-judgment ancillary jurisdiction over "'new theories of liability.'" AB 21 (quoting *Peacock*, 516 U.S. at 354). But *every* paragraph 3(a) dispute would involve a new theory that was not litigated in *Whaley*, namely whether the new agreement meets the parties' contractual "pro-competitive" standard.[7] Whatever the particular details of the new agreement and whatever antitrust claims that new agreement might support, the parties agreed to have Plaintiffs' objections evaluated and resolved under the new theory that the agreement is "pro-competitive." Indeed, Plaintiffs acknowledge that the paragraph 3(a) process provides them with a new claim by shifting the burden of proof to Pacific Seafood to show that a new agreement is "pro-competitive." AB 18 n.12. The "pro-competitive" determination also does

[7] Plaintiffs contend that the contractual "pro-competitive" standard is identical to the rule-of-reason analysis. AB 18. It is not. When it is employed in antitrust cases, the rule of reason involves more than merely pro-competitiveness. "'The rule-of-reason analysis consists of three components: (1) the persons or entities to the agreement *intend* to harm or restrain competition; (2) an *actual injury* to competition occurs; and (3) the restraint is unreasonable as determined by *balancing the restraint and any justifications or pro-competitive effects* of the restraint.'" *Cal. Dental Ass'n v. FTC*, 224 F.3d 942, 947 (9th Cir. 2000) (emphases added; citation omitted).

not involve the same elements that the *Whaley* claims did.[8] Thus, the paragraph 3(a) process would *always* be based on a different (and more plaintiff-friendly) theory than any of the claims in the *Whaley* Lawsuit.

c. Relief of a Different Kind or on a Different Principle

Plaintiffs recognize that ancillary jurisdiction does not extend to proceedings "'where the relief [sought is] of a different kind or on a different principle than that of the prior decree.'" AB 21 (brackets in original; citations omitted) (quoting *Peacock*, 516 U.S. at 358). Yet here, the relief sought in the paragraph 3(a) process would *always* be of a different kind and principle than the *Whaley* judgment relief. The relief sought in paragraph 3(a) is a determination of whether "the proposed new agreement is pro-competitive and if so, it may be approved." ER 428. The new agreement will be either approved or not approved. By contrast, the *Whaley* judgment did not adjudicate the merits of Plaintiffs' antitrust claims; the parties negotiated a "No Admission" clause, and the judgment's relief

[8] *See* ER 413-18 (*Whaley* complaint alleging Sherman Act §§ 1 and 2 claims); *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1062 (9th Cir. 2001) (elements of Sherman Act § 1 claim are "'(1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and (3) that the restraint affected interstate commerce'" (internal citation omitted)); *name.space, Inc. v. Internet Corp. for Assigned Names & Nos.*, 795 F.3d 1124, 1131 (9th Cir. 2015) (elements of Sherman Act § 2 claim are "'(a) the possession of monopoly power in the relevant market; (b) the willful acquisition or maintenance of that power; and (c) causal antitrust injury'" (internal citation omitted)).

consisted of certain prospective obligations with regard to processor-owned fishing vessels, market transparency, ex vessel pricing procedures, sale of waterfront property, and the like. ER 428-31, 435-36.

In sum, the district court could *never* have ancillary jurisdiction to conduct the agreed-upon paragraph 3(a) determination, regardless of whether the new agreement at issue entailed exclusive-marketing-alone or exclusive-marketing-plus-more. This Court should not interpret paragraph 3(a) as an illusory grant of ancillary jurisdiction that could never materialize.

2. Paragraph 3(a) Is Not an Ancillary Jurisdiction Provision Because It Selects Named Individuals as Decision-makers.

Paragraph 3(a) also cannot be an ancillary jurisdiction provision because it specifies that a named individual—not the *court*—will resolve Plaintiffs' objections. Like other forms of subject-matter jurisdiction, ancillary jurisdiction is vested in the court, not any particular federal judge. *See United States v. Kimberlin*, 675 F.2d 866, 869 (7th Cir. 1982); U.S. Const., art. III, § 1. Accordingly, unlike paragraph 3(a), the actual ancillary jurisdiction clause in paragraph 24 provides that "the Court" will retain jurisdiction. ER 437. On the other hand, as the Seventh Circuit has observed, when parties want "a system under which they could name the individual who would resolve the . . . issue," they "enter[] into a binding arbitration agreement to that effect." *Hatcher v. Consol.*

City of Indianapolis, 323 F.3d 513, 519 (7th Cir. 2003). The parties here made exactly that choice.

3. Interpreting Paragraph 3(a) as an Ancillary Jurisdiction Provision Is Not Necessary to Effectuate the *Whaley* Judgment.

Ancillary jurisdiction post-judgment is "a creature of necessity." *Peacock*, 516 U.S. at 359. It exists to enable a court "to manage its proceedings, vindicate its authority, and effectuate its decrees." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 380 (1994). The Supreme Court "reserve[s] the use of ancillary jurisdiction in subsequent proceedings for the exercise of a federal court's inherent power to enforce its judgments." *Peacock*, 516 U.S. at 356. Thus, post-judgment ancillary jurisdiction is typically invoked for matters such as garnishment, attachment, and mandamus, wherein executing the judgment would be frustrated without supplemental court action. *See id.* (listing cases). Notably lacking from the list is any post-judgment use of ancillary jurisdiction to invite and then resolve new issues of fact that may be raised by the parties' conduct following judgment, where the judgment neither necessitates nor precludes that conduct. Nor has Pacific Seafood been able to locate any such precedent—and for good reason. Such an expansive exercise of ancillary jurisdiction is *not necessary*.

Only one action is presently needed from the district court to enforce its decree with regard to paragraph 3(a): an order compelling arbitration under the parties' agreed-upon process. It is *not* necessary to effectuate the *Whaley* judgment

that the district court itself undertake that process, namely the determination whether the proposed new agreement is "pro-competitive and if so, it may be approved." ER 428. The named decision-maker will make that determination after an order from the district court compelling arbitration. Paragraph 3(a) is enforced by compelling the process, not by having the district court perform the process itself.

Under the controlling precedents of the Supreme Court and this Court, paragraph 3(a) is not an ancillary jurisdiction clause, it is an arbitration agreement. The Court's task, then, is to examine whether Plaintiffs' objections to the Proposed Transaction are within the scope of paragraph 3(a). As shown below, they are.

D. The Proposed Transaction Is Within the Scope of the Arbitration Agreement.

Plaintiffs argue that the Proposed Transaction is not within the scope of paragraph 3(a), based on a narrow and overly formalistic interpretation of the types of "new agreement[s]" the parties agreed to submit to Judge Jelderks for resolution. Plaintiffs claim that paragraph 3(a) only applies to "future exclusive marketing agreements" that contain language *expressly* requiring Pacific Seafood to act as the exclusive marketer of Ocean Gold-produced seafood. AB 26 ("That is the language required to invoke Section 3(a)."). Even though Pacific Seafood will act as exclusive marketer of the Ocean Gold-processed seafood it will own and control by virtue of the Proposed Transaction, Plaintiffs' claim that the Proposed

Transaction falls outside the scope of paragraph 3(a) because "the requisite 'exclusive marketing' language is absent from those transactional documents." AB 27. Plaintiffs' construction of paragraph 3(a) cannot be squared with paragraph 3(a)'s text or context, or the economic realities of the Proposed Transaction. Moreover, it ignores the rule that arbitration provisions must be construed broadly in favor of arbitration.

1. Plaintiffs' Textual Arguments Fail.

Plaintiffs acknowledge that Oregon contract interpretation begins with the text and that the Court cannot "'insert what has been omitted, or . . . omit what has been inserted.'" AB 25-26 (quoting Or. Rev. Stat. § 42.230). Yet Plaintiffs then propound a textual interpretation of paragraph 3(a) that runs afoul of this basic principle.

a. Paragraph 3(a) Is Not Limited to Agreements That Expressly Require Exclusive Marketing.

Plaintiffs' argument that the "new agreement" must include language expressly requiring Pacific Seafood to act as an exclusive marketer forces the Court to insert words that were omitted by the parties. Paragraph 3(a) does not state: "any new agreement . . . that [*expressly*] requires Pacific Seafood Group to act as the exclusive marketer." Nor does it state: "any new agreement . . . that [*provides that*] Pacific Seafood Group [*shall*] act as the exclusive marketer." Plaintiffs would have the Court read in those words, but the actual language of

paragraph 3(a) broadly defines the new agreements subject to arbitration as "*any* new agreement" that has a certain *effect*—"that requires Pacific Seafood Group to act as the exclusive marketer of any seafood product produced by Ocean Gold." ER 428; *see* OB 30-31.

Plaintiffs' cramped interpretation also ignores the economic reality of the Proposed Transaction. Plaintiffs point out that it is "no surprise" that "exclusive marketing" language is absent from the transactional documents for the Proposed Transaction, as if that fact shows that the parties intended to *exclude* acquisitions from paragraph 3(a). AB 27. But there would be no reason to include language expressly authorizing Pacific Seafood to act as the exclusive seller of assets it owns and controls by virtue of an acquisition. Plaintiffs recognize as much in their Answering Brief, noting that "[a]s the owner of these assets and companies, Pacific Seafood would have full authority to make those decisions," AB 27, and that Pacific Seafood "is free to use its newly acquired assets as it chooses," AB 30.

In fact, Plaintiffs argued to the district court that exclusive marketing rights were a "subset" of what Pacific Seafood would obtain through the Proposed Transaction: "The marketing agreement is a subset of the broad scope of what [Appellants] were seeking to accomplish in the now terminated [Proposed Transaction]." ER 69 (Tr. at 7:18-21). Plaintiffs' expert similarly testified that the Proposed Transaction would result in Pacific Seafood continuing the effects of

the "exclusive marketing agreement" and its "control of the output" of Ocean Gold's processed seafood. ER 220. The Proposed Transaction is precisely the type of agreement the parties intended to make subject to the paragraph 3(a) process because it results in Pacific Seafood acquiring exclusive marketing rights, whether or not it includes language expressly stating the obvious.

Finally, Plaintiffs' contention that paragraph 3(a) is only triggered by specific text in a new agreement would mean that Pacific Seafood could unilaterally trigger (or avoid) rights and obligations under paragraph 3(a) by using (or not using) magic words in a transaction document. In other words, Plaintiffs are now inviting exactly the kind of manipulative contract drafting that they have always been so vigilant against in the past. OB 37-38.

For example, under Plaintiffs' interpretation, Pacific Seafood could enter into an output contract[9] with Ocean Gold that was silent about whether Pacific Seafood would sell the output it purchased from Ocean Gold. In such circumstances, Pacific Seafood could not seriously contend that it was not the exclusive marketer of Ocean Gold-produced seafood on the basis that it did not *expressly* agree in the output contract to be the exclusive marketer. Unquestionably, the output contract would require Pacific Seafood to be the

[9] An "output contract" is a "contract in which a seller promises to supply and a buyer to buy all goods or services that a seller produces during a specified period and at a set price." *Black's Law Dictionary* 371 (9th ed. 2009).

exclusive marketer of that seafood. Yet by Plaintiffs' interpretation of paragraph 3(a), the contract would be exempt from notice and arbitration for lack of a provision specifically stating that Pacific Seafood would market the seafood it bought from Ocean Gold.

The Proposed Transaction is no different in this regard. Although the transaction documents do not expressly provide that Pacific Seafood will be the exclusive marketer of all the Ocean Gold-produced seafood that it will own and control by virtue of that acquisition, that is the effect of the Proposed Transaction. By acquiring Ocean Gold and thus its seafood inventory and processing capabilities, Pacific Seafood will become the exclusive seller of seafood produced by Ocean Gold. No one else will own it or have the power to sell it. It was for that reason that Plaintiffs initially alleged in this lawsuit that the Proposed Transaction breached paragraph 3(a). ER 514-15.[10] Plaintiffs' overly narrow reading of paragraph 3(a)'s text should be rejected.

[10] Plaintiffs later voluntarily dismissed their breach of contract claim to avoid their arbitration obligation under paragraph 3(a). Contrary to their representation to this Court about their motivations (AB 12), Plaintiffs explained to the district court that they had dismissed the breach of contract claim "because we do believe it would have to go before Judge Jelderks." ER 453 (Tr. at 7:2-6). Thus, Plaintiffs, like Pacific Seafood, initially viewed the Proposed Transaction as subject to paragraph 3(a) because it had the effect of giving Pacific Seafood exclusive marketing rights as to Ocean Gold-produced seafood.

b. Plaintiffs' Interpretation Improperly Omits the Broad Term "Any New Agreement."

Plaintiffs' interpretation also requires the Court to omit critical language the parties inserted: "*any* new agreement" with the specified effect. Plaintiffs give the term "*any* new agreement" no meaning, effectively reading it out of paragraph 3(a) in favor of "only exclusive-marketing-alone agreements." But as Pacific Seafood explained in its Opening Brief, under Oregon law, the word "any" means that paragraph 3(a) encompasses *all* agreements, regardless of their form or other effects, that result in Pacific Seafood necessarily acting as exclusive marketer of Ocean Gold-produced seafood. OB 27-32. "*Any* new agreement" with that effect includes a narrow exclusive-marketing-only agreement, a broader joint venture agreement like the 2006 Agreement, or an acquisition in which Pacific Seafood by virtue of its ownership and control of Ocean Gold-produced seafood would necessarily be required to act as the exclusive seller of those products.

Plaintiffs' sole response is to flatly deny that "any new agreement" includes both agreements that entail exclusive-marketing-*only* and agreements that result in exclusive-marketing-*plus-more*. AB 26 n.14. Plaintiffs' myopic argument—that the phrase "that requires Pacific Seafood Group to act as the exclusive marketer" limits what *other* effects the new agreement can have—finds no support in paragraph 3(a)'s actual text. It is contrary to Oregon precedent. *Livingston v. Metro. Pediatrics, LLC*, 227 P.3d 796, 804 (Or. Ct. App. 2010). And it contradicts

Plaintiffs' own admissions that paragraph 3(a) encompasses any new agreements that are similar to the 2006 Agreement, which included far more obligations than merely marketing. OB 33 & n.18.

2. The Context of Paragraph 3(a) Does Not Support Plaintiffs' Interpretation.

Under Oregon law, a court considers the disputed text "in the context of the document as a whole." *Yogman v. Parrott*, 937 P.2d 1019, 1021 (Or. 1997). That context includes both other provisions of the document and "'the circumstances underlying the formation of the contract.'" [11] *Riverside Homes, Inc. v. Murray*, 214 P.3d 835, 841 (Or. Ct. App. 2009) (citation omitted). The context of paragraph 3(a) confirms that it applies to the Proposed Transaction.

a. Plaintiffs Fail to Counter Pacific Seafood's Context Arguments.

Plaintiffs ignore almost all of the context arguments made by Pacific Seafood in its Opening Brief. Plaintiffs do not deny that the "any new agreement" clause in the second sentence of paragraph 3(a) must be interpreted in light of the comprehensive joint venture (the 2006 Agreement).[12] OB 32-33. They do not

[11] Thus, contrary to Plaintiffs' pre-*Yogman* authority, although contract interpretation must "'begin'" with the words used, it does not "'end'" there. AB 25-26 (quoting *Criterion Interests, Inc. v. The Deschutes Club*, 902 P.2d 110, 113 (Or. Ct. App. 1995)).

[12] Contrary to Plaintiffs' astonishing claim (AB 7), the joint venture did not cease being a joint venture in 2012 when the parties amended two ex vessel pricing provisions in their comprehensive agreement. *See Resolution Tr. Corp. v. BVS*

contest that paragraph 3(a)'s purpose was to steer future objections to the designated new agreements to an expedited process under a burden-shifting "pro-competitive" standard. OB 34-35. They do not dispute the backdrop against which paragraph 3(a) was conceived or the negotiating incentives of the parties. OB 37-38. Nor do they provide a cogent explanation for their about-face in this lawsuit on whether paragraph 3(a) applies to the Proposed Transaction (which alone would be sufficient to show an ambiguity that must be construed in favor of arbitration).[13] OB 39-41. Pacific Seafood's context arguments stand unrebutted.

b. Paragraph 16(c) Does Not Support Plaintiffs' Narrow Interpretation of Paragraph 3(a).

The only context that Plaintiffs affirmatively contend supports their interpretation of paragraph 3(a) is paragraph 16 of the Resolution Agreement, titled

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Dev., Inc., 42 F.3d 1206, 1214 (9th Cir. 1994) (defining "joint venture"). Plaintiffs also claim that the 2006 Agreement included "obviously illegal provisions," AB 7, but Plaintiffs never obtained any such ruling. To the contrary, the *Whaley* court concluded that Pacific Seafood's and Ocean Gold's combined operations "expanded the market for whiting," resulting in "significantly higher prices" paid to fishermen. ER 422.

[13] Plaintiffs also fail to confront the detailed factual record showing that Pacific Seafood and Ocean Gold understood that the Proposed Transaction was subject to paragraph 3(a). OB 10-11. Plaintiffs attempt to dismiss that record as "cherry-picked references," AB 29 n.15, but one is hard-pressed to think of any better indicia of Pacific Seafood's understanding than the parties' contemporaneous emails during negotiations of the Proposed Transaction and the transactional documents' terms, which specified that former Judge Hogan could review the confidential agreements, along with other persons from whom Pacific Seafood and Ocean Gold may require a "non-objection" (*e.g.*, Plaintiffs).

"No Admission by Parties." AB 27-30. Paragraph 16 provides, in pertinent part, that the Resolution Agreement shall not be "construed to have any impact on any other relationship between Pacific Seafood and Ocean Gold." ER 435-36. Plaintiffs claim that an acquisition is the type of "other relationship" excluded by paragraph 16. AB 30. But obviously paragraph 16 cannot be read as referring to existing or future relationships between Pacific Seafood and Ocean Gold that are specifically addressed by other Resolution Agreement provisions, such as the 2006 Agreement or the paragraph 3(a) "any new agreement[s]." To do so would negate paragraph 3(a).

Paragraph 16, therefore, begs the question: is the Proposed Transaction the type of agreement subject to paragraph 3(a), or an "other relationship" outside of the Resolution Agreement? Paragraph 16 itself provides no direction one way or the other.

The record before this Court, however, provides the answer. It demonstrates that paragraph 16's reference to "any other relationship" was not a back-door way of excluding a future acquisition like the Proposed Transaction from paragraph 3(a)'s scope. There were many "other relationship[s]" between Pacific Seafood and Ocean Gold at the time the Resolution Agreement was executed, apart from

the 2006 Agreement. For example, Frank Dulcich[14] was a shareholder of Ocean Gold. SER 180. Mr. Dulcich was also a director of Ocean Gold. ER 215. Pacific Seafood and Ocean Gold had other financial arrangements apart from the 2006 Agreement. ER 307. And a Pacific Seafood entity and Ocean Gold were both members of Ocean Protein, LLC. SER 245. Given these myriad "other relationship[s]," paragraph 16 simply means that the Resolution Agreement will have no impact on, for example, Mr. Dulcich's status as a director of Ocean Gold.

Plaintiffs contend again that "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.'" AB 28. The email upon which Plaintiffs rely, however, was not an argument to the district court—it is an email from Pacific Seafood's litigation counsel to former Judge Hogan "invoking the Dispute Resolution provision to resolve this and all other disputes." ER 276-77. The email also cannot be construed as a concession that this lawsuit is properly before the district court. In fact, at every procedural juncture, Pacific Seafood argued that this lawsuit should be compelled to arbitration. AER 77; ER 450-52, 455-56; ER 186; ASER 1-20. Paragraph 16 and

[14] Mr. Dulcich was included in the definition of "Pacific Seafood Group" and "Pacific Seafood" used throughout the Resolution Agreement, including paragraph 16. ER 428.

counsel's email, therefore, do nothing to support the narrow interpretation of paragraph 3(a) advanced by Plaintiffs.

c. The Paragraph 2 Release Confirms the Broad Scope of Paragraph 3(a).

In response to Pacific Seafood's argument about the context provided by paragraph 2 of the Resolution Agreement (OB 35-37), Plaintiffs assert that the release is too narrow to indicate that the Proposed Transaction is within the scope of paragraph 3(a). AB 31. Even if Plaintiffs were correct that paragraph 2 does not encompass Plaintiffs' claims in this lawsuit, that would not mean that the Court should deny arbitration of Plaintiffs' objections to the Proposed Transaction. If the Proposed Transaction is the type of agreement covered by paragraph 3(a), then Plaintiffs' objections must be resolved by Judge Jelderks under the agreed-upon process. But Plaintiffs' paragraph 2 argument fails in any event.

The language of paragraph 2 does not support Plaintiffs' contention that the release was limited to "only claims that existed on the date the release was signed covering the delivery time period at issue in *Whaley*." AB 31 (emphasis omitted). In fact, Plaintiffs released claims concerning a particular delivery time period, plus "*any* claims for . . . injunctive relief *related to* those claims." ER 428 (emphases added). An attempted acquisition of Ocean Gold by Pacific Seafood was at issue in the *Whaley* Lawsuit and formed part of the basis for the monopolization and attempted monopolization claims asserted in that lawsuit. ER 394 (*Whaley* Fourth

Amended Compl., ¶ 42); ER 107 (Second Amended Compl., ¶ 46). Plaintiffs' present challenge to a substantially identical acquisition of Ocean Gold as that at issue in the *Whaley* Lawsuit easily fits within the meaning of "related" claims, OB 36 n.19, and Plaintiffs advance no alternative reading of the "related to" clause or the context it provides for the arbitration agreement.[15]

3. Paragraph 3(a) Must Be Construed Broadly in Favor of Arbitration.

Finally, Plaintiffs ignore the fundamental principle for interpreting the scope of an arbitration agreement: "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). Plaintiffs do not acknowledge their burden to show "'with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986) (citation omitted). Thus, even if Plaintiffs' limiting interpretation of paragraph 3(a) were plausible—

[15] Plaintiffs also object to Pacific Seafood's use of the word "waiver" in its Opening Brief. AB 32. It is well established, however, that an agreement to arbitrate is a waiver of a judicial forum in favor of an arbitral forum. *See, e.g., Ashbey v. Archstone Prop. Mgmt., Inc.*, 785 F.3d 1320, 1326 (9th Cir. 2015) ("We hold that Ashbey knowingly waived his right to a judicial forum for his Title VII claim and equivalent state-law claims. . . . The district court erred in denying Archstone's Motion to Compel Arbitration."); *Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756, 760 (9th Cir. 1997); *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1144 (9th Cir. 1991).

and it is not, as explained above—at a minimum, paragraph 3(a) *is* susceptible to an interpretation that it applies to the Proposed Transaction. For this reason alone, this Court should compel arbitration.

III. CONCLUSION

Pacific Seafood respectfully requests that the Court reverse the district court's denial of the motion to compel arbitration.

DATED: September 16, 2015

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, I electronically filed the **APPELLANTS' REPLY BRIEF** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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