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Of Attorneys for Defendants Pacific Seafood Group et al.

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF OREGON
(Medford Division)

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

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

Defendants.

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MEMORANDUM IN OPPOSITION

I. THE DEAL IS TERMINATED

Any deal by which a Pacific Seafood entity would purchase Ocean Gold stock or membership interests from Ocean Gold shareholders is dead. The deal is terminated. Consequently, there is nothing to enjoin.

In their motion for a Motion for a Temporary Restraining Order (Doc. 3), plaintiffs claimed Frank Dulcich was

> scheduled to acquire controlling interests in the stock of Ocean Gold Seafoods, Inc. and its affiliates Ocean Protein, LLC, Ocean Cold, LLC and Ocean Gold Transport, LLC in a transaction that is scheduled to close on Friday, January 23, 2015.

Motion, at 3. They asked the Court for an order

> prohibiting defendant Frank Dulcich and the defendant entities that make up Pacific Seafood Group from entering into a transaction which transfers stock, capital assets or real property presently owned by Ocean Gold Seafoods, Inc., Ocean Cold, LLC, Ocean Protein, LLC and/or Ocean Gold Transport LLC to any of the other defendants in this action or any person or entity affiliated with Mr. Dulcich or Pacific Seafood Group.

Id.

Pacific Seafood informed plaintiffs and the Oregon Department of Justice of the proposed transaction on December 12 and 18, 2014. It was not a secret. Pacific proceeded to wait the next (almost) six weeks to hear back whether plaintiffs objected to the proposed transaction, and whether they were contending the proposed transaction was covered by ¶ 3(a) of the Stipulation and Resolution Agreement (Prior Action Doc.

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426-1, Hardiman Declaration, Ex. 6 (Doc. 16-6))—the Marketing Agreement nonrenewal provision. The reason Pacific told plaintiffs' lawyers was to avoid what has happened here—Pacific did not want to get embroiled in another antitrust lawsuit.

If Pacific had wanted to close the transaction without first determining, addressing, and resolving any objections, why would Pacific have contacted plaintiffs and the Oregon DOJ? Why would Pacific have waited six weeks? Why?

On Wednesday, January 21, 2015, plaintiffs informed Pacific that they did object to the proposed transaction and that they did contend that the proposed transaction was subject to ¶ 3(a) of the Stipulation and Resolution Agreement. Upon learning, finally, of those objections, Pacific called the deal off. This decision was reinforced later in the afternoon when Pacific received a request for information about the proposed transaction from the Oregon DOJ (Tim Nord).

First the closing was cancelled, and then, on Tuesday, January 27, 2015, Pacific sent a formal notice of termination of the Purchase Agreements explaining:

> Buyer sees no likelihood that Mr. Haglund's objections will be resolved to Buyer's satisfaction in a timely and cost-efficient manner. Buyer therefore has decided not to proceed with transactions contemplated under the Purchase Agreements.

Declaration of Robert Preston, Exhibit 1 (Doc. 15-1).

Applying the terminology found in Clayton Act § 16 and the cases, there is no "immediate," "threatened," "reasonably anticipated," "significantly threatened," or "impending" transaction. The fact there is no transaction to enjoin is fatal for plaintiffs'

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motion not only under Clayton Act § 16, but also on each of the four *Winter* requirements: Plaintiffs are not likely to succeed on the merits. They are setting up a straw man—no transaction is going to happen. Plaintiffs are not likely to suffer irreparable harm in the absence of preliminary relief because no transaction is going to happen. There are no equities to tip in plaintiffs' favor, and the public interest is not served by the entry of an unnecessary injunction. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

II. TWO OTHER MATTERS

First, defendants have filed a Motion to Dismiss and Memorandum in Support that covers most of the same issues as are raised in this Memorandum in Opposition. Because the action should be dismissed, that provides an additional basis for denying the motion for preliminary injunction.

Second, if this Court were to continue this action, it could have important ramifications particularly for members of the Rydman family. As noted in the Motion to Dismiss, Dennis Rydman, the manager and 30% shareholder of Ocean Gold just passed away in November 2014. If this action continued, it could be that his widow, Jackie Rydman, would want to intervene. Obviously, the value of her interest in the company her husband built so his family would be provided for, would be affected.

III. LEGAL STANDARD FOR PRELIMINARY INJUNCTION

Section 16 of the Clayton Act, 15 U.S.C. § 26, permits persons to sue for injunctive

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relief, but only "against threatened loss or damage by a violation of the antitrust laws." Section 16 also permits preliminary injunctions to issue, but only upon "a showing that the danger of irreparable loss or damage is immediate." Section 16 provides in relevant part:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: …

As the Supreme Court has cautioned on several occasions, a "preliminary injunction is an 'extraordinary and drastic remedy'" and is "never awarded as of right." *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008); *Winter*, 555 U.S. at 24 (2008). In *Winter*, the Supreme Court stated four requirements that a "plaintiff seeking a preliminary injunction must establish":

> [1] that he is likely to succeed on the merits,
>
> [2] that he is likely to suffer irreparable harm in the absence of preliminary relief,
>
> [3] that the balance of equities tips in his favor, and
>
> [4] that an injunction is in the public interest.

Id. at 20.

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A. THE PACIFIC SEAFOOD–OCEAN GOLD JOINT VENTURE HAS PROVIDED SIGNIFICANT BENEFITS TO FISHERMEN, THE COMMUNITY, AND CONSUMERS SINCE 1999

[This section is also found in defendants' Motion to Dismiss and Memorandum in Support (Doc. 13).]

As the Court will recall from the *Whaley et al. v. Pacific Seafood Group*, Case No. 1—3057-PA ("Prior Action"), in 1999, Pacific Seafood began partnering with Merino's Seafood (now Ocean Gold) in Westport, Washington with a goal of trying to find and develop new markets for Pacific whiting, also known as hake. Declaration of Stephen S. Spencer on Plaintiffs' Motion for a Preliminary Injunction (Redacted Public Version, dated January 21, 2011, Prior Action Doc. 264) ¶¶ 3, 6. Steve Spencer is Pacific's Vice President of Sales and Procurement, who particularly deals with Ocean Gold. He submitted his Declaration in the Prior Action in opposition to plaintiffs' unsuccessful motion for preliminary injunction. Steve Spencer's unredacted Declaration is Prior Action Doc. 219 (filed under seal). The public redacted version is attached as Ex. 2 to the Hardiman Declaration (Doc. 16-2). To the extent that there is information redacted, defendants ask the Court to take notice of the unredacted version, Prior Action Doc. 219.

Pacific Seafood and Ocean Gold entered into a series of marketing agreements, the most recent one being the Procurement, Processing, Sales and Marketing Agreement made in February 2006. Spencer Declaration ¶¶ 25-27 & fn. 2, Hardiman Declaration,

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Ex. 2 (Doc. 16-2). Pacific Seafood and Ocean Gold continue to operate under their 2006 joint venture agreement to this day.[1] The 2006 Agreement expires of its own terms in 2016.

Ocean Gold is a source and processor of Pacific whiting. Ocean Gold is good at producing large volumes of frozen, headed and gutted (H&G) whiting that is suitable for export. Spencer Declaration ¶ 24, Hardiman Declaration, Ex. 2 (Doc. 16-2). Under the terms of the 2006 Agreement (as well as the earlier 1999–2004 agreements), Ocean Gold contributed its ability to produce large volumes of frozen H&G whiting, and Pacific contributed its services in selling, marketing, and distributing whiting according to seasonal marketing plans, and, in addition, capital. Spencer Declaration ¶ 25, Hardiman Declaration, Ex. 2 (Doc. 16-2). (Under the 1999 Agreement, Frank Dulcich became a 25% shareholder of Ocean Gold. *Id.* This later increased to slightly under 33%.)

The Pacific Seafood-Ocean Gold venture is and has been highly successful. As a consequence of their venture, Pacific was able to increase the revenue from sales of whiting almost tenfold and the volumes sold by almost five fold between 2002 and 2009. Pacific was able to expand the number of customers who purchased whiting by almost 800 per cent and the number of countries in which it sold by three hundred per

[1] As a part of the Stipulation and Resolution Agreement of Class Action Claims that resolved the Prior Action, Pacific Seafood and Ocean Gold made an amendment to the 2006 Agreement. Hardiman Declaration, Ex. 6 (Doc. 16-6).

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cent between 2002 and 2009. Spencer Declaration ¶ 13, Hardiman Declaration, Ex. 2 (Doc. 16-2).

As a consequence of the venture with Pacific Seafood, Ocean Gold grew and developed into a company that provided significant benefits to fishermen, the community, and consumers. This is borne out in the large increases in the volume of whiting that Ocean Gold bought from fishermen from 1999. Spencer Declaration ¶ 46, Hardiman Declaration, Ex. 2 (Doc. 16-2).

As a consequence of Pacific's (and Ocean Gold's) creation and development of a global demand for whiting, other processors who had not actively sold whiting in global markets entered those markets. Spencer Declaration ¶ 47. During the period of their venture, the shoreside price per pound paid to fisherman along the West Coast for Pacific whiting has generally increased since 1999.

Year	Round weight – metric tons	Round weight – price per pound	Revenue
1999	84,095.30	$0.04	$6,942,465
2000	85,853.90	$0.04	$7,617,738
2001	73,613.40	$0.03	$5,247,286
2002	45,766.40	$0.04	$4,379,657
2003	55,394.60	$0.04	$5,305,396
2004	96,588.10	$0.03	$7,398,734
2005	111,253.80	$0.05	$12,208,524
2006	127,165.20	$0.06	$15,902,597
2007	91,441.30	$0.07	$14,007,945
2008	67,759.40	$0.10	$15,162,297
2009	49,222.90	$0.06	$6,314,378
2010	64,653.80	$0.07	$9,935,220
2011	103,189.40	$0.10	$23,712,988

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2012	67,635.40	$0.14	$20,698,007
2013	103,160.00	$0.12	$27,881,531
2014	98,833.60	$0.11	$23,663,452

(These data are from the *Washington, Oregon and California (W-O-C) All Species Report 307 Commercial Landed Catch: Metric Tons, Revenue, Price/Pound* published each year by the Pacific States Marine Fisheries Commission (PSMFC) from its Pacific Fisheries Information Network (PacFIN) database. The data is collected from each of the states. (As the Court will recall, the PSMFC is an interstate compact agency that includes the states of Washington, Oregon, and California, and was established in 1947. http://www.psmfc.org/psmfc-info.)

B. PLAINTIFFS IN THE PRIOR ACTION TRIED UNSUCCESSFULLY TO ENJOIN THE SUCCESSFUL JOINT VENTURE AND TO ENJOIN COMMUNICATIONS BETWEEN FRANK DULCICH AND OCEAN GOLD

In the Prior Action, despite the increasing purchases from, and despite the increasing prices paid to, fishermen, plaintiffs attempted to bring the successful pro-fisherman, pro-community, pro-consumer Pacific-Ocean Gold venture to an end.

On December 23, 2010, plaintiffs in the Prior Action filed a Motion for a Preliminary Injunction (Prior Action Doc. 187, Hardiman Declaration, Ex. 4 (Doc. 16-4)). In response to this motion, Steve Spencer said in his Declaration:

> 43. If Mr. Rydman and I could not share information with each other on a continuous basis about what his costs of production are and about what the resale market price for product is, which is what I understand plaintiffs want to prohibit, our venture could not succeed. We would never know quickly enough, if at all, whether we were operating at a profit or a loss, and we would not be able to react quickly, if at all, by making our own changes in response to changes

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> in production costs or resale market prices. For the same kind of reasons, I must know how much fish Mr. Rydman thinks he can process, and Mr. Rydman needs to know how much fish I think I can sell. Could anyone imagine running a company with your sales disconnected from your production and operations--where you wouldn't know the cost of a product to properly price it and you wouldn't know your projected production to match your sales to production? Apart from the venture, Ocean Gold has no selling arm. They have no sales structure or outside brokering networks. Without the venture, they have no sales. This level of communication is imperative to our success.

Hardiman Declaration, Ex. 2 (Doc. 16-2).

In response to this and other evidence, this Court denied plaintiffs' Motion for a Preliminary Injunction. Order, dated February 28, 2011 (Prior Action Doc. 263, Hardiman Declaration, Ex. 5 (Doc. 16-5)). This Court noted:

> Defendants respond that the 2006 Agreement creates a legitimate joint venture, under which Pacific Gold Seafood finances the purchase of fish and processing equipment, Ocean Gold Seafoods processes the fish, Pacific Gold Seafood sells the fish, and defendants split the profits.

Id. at 2. Among other things, this Court found:

> The evidence indicates, however, that defendants' combined operations could affect only the market for whiting because Ocean Gold Seafoods has little or no share of the other allegedly affected seafood markets.
>
> The complaint alleges that since 2006, defendants' combined operations have forced plaintiffs and other fishermen to sell fish to processors at less than competitive prices. *Id.* The evidence presented, however, does not support plaintiffs' allegation. Instead, the evidence indicates that since 2006 defendants' combined operations have expanded the market for whiting. Each year since 2006 (other than 2009, when there was a worldwide recession), defendants have been paying fishermen significantly higher prices for whiting, with record prices paid in 2008. Defendants have been purchasing increasing amounts of whiting, and several new processors have entered the whiting market since 2006. I conclude plaintiffs have not shown they are likely to prevail on their claim under Section 1 of the Sherman Act.

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Id. at 3.

Note that this Court found that the evidence in 2011 indicated "that defendants' combined operations could affect only the market for whiting because Ocean Gold Seafoods has little or no share of the other allegedly affected seafood markets" at issue in the Prior Action—at that time, groundfish, shrimp, and crab. In their First Amended Complaint, plaintiffs have alleged "Pacific Seafood Group's market shares in each of these three markets have not changed materially since 2009." FAC ¶ 34 (Doc. 8). (Ocean Gold has added four shrimp peelers this last season. Those new peelers are in addition to the 32 other peelers on the West Coast. Declaration of Charles Kirschbaum (filed under seal) Prior Action Doc. 318.)

IV. PLAINTIFFS CANNOT ESTABLISH THAT THEY ARE LIKELY TO SUCCEED ON THE MERITS—THE DEAL IS TERMINATED

Because the proposed stock purchase has terminated, there is nothing to be enjoined. Clayton Act § 16, 15 U.S.C. § 26 (quoted above p. 4) In *Los Angeles Memorial Coliseum Commission v. National Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980), the Ninth Circuit said:

> The Commission demonstrated no real and concrete injury or even threat thereof when it sought the preliminary injunction. As the district court recognized, section 16 of the Clayton Act authorizes injunctive relief in reasonable anticipation of threatened as well as actual injury. 15 U.S.C. § 26; *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130 … (1969). However, the party seeking such relief must demonstrate "a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur." *Id.*

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If it had ever been Pacific Seafood's intention to close the transaction without finding out whether there were potential objections and without first resolving any objections to its satisfaction, there obviously would have been no reason to contact Mr. Haglund or Mr. Nord and there would have been plenty of time to close between December 12, the first contact with Mr. Haglund, and January 21 when Mr. Haglund responded. "Testing the waters," as Pacific has done in this case is the responsible and prudent way to conduct business. It should not become a justification for a pre-emptive lawsuit like we have here.

What this shows is that in this case, there is no "threatened conduct." There is no reasonable anticipation of threatened injury. There is no significant threat of injury. Nothing is impending. There was never any reason for this action to be filed based on the conversations between Mr. Stephens and Plaintiffs' counsel and Mr. Preston and Plaintiffs' counsel. There is no reason for this action to proceed let alone for the Court to enter a preliminary injunction.

Any action arising from any proposed stock purchase transaction between a Pacific Seafood affiliate and Ocean Gold is moot. Plaintiffs are asking the Court to decide moot and hypothetical issues. There is, therefore, no Article III case or controversy. *Mills v. Green*, 159 U.S. 651, 653 (1895)("The duty of this Court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract

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propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.").

V. PLAINTIFFS CANNOT MAKE OUT A CLAIM FOR MONOPOLIZATION; THEY HAVE NOT SUFFERED AN "ANTITRUST INJURY"; AND THEY DO NOT HAVE ARTICLE III STANDING

Although there is no reason for the Court to get to this issue in this case, plaintiffs cannot establish a case for monopolization. Plaintiffs cannot establish that they have suffered an "antitrust injury" or that they have Article III standing. None of them can show that he or it is actually injured or that there is a significant threat of injury to him or it from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur. None of them has alleged facts showing that he or it has suffered or is significantly threatened with an antitrust injury, an injury "of the type the antitrust laws were intended to prevent and that flo[w] from that which makes defendants' acts unlawful." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U. S. 328, 334 (1990) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 489 (1977)).

A. MONOPOLIZATION

To maintain an action for monopolization under § 2 of the Sherman Act, the plaintiff must prove (1) "the possession of monopoly power in the relevant market" and (2) "the willful acquisition or maintenance of that power[,] as distinguished from growth or development as a consequence of a superior product, business acumen, or

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historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570–571 (1966). *United States v. Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945)("A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry. …The successful competitor, having been urged to compete, must not be turned upon when he wins."). Therefore, "[t]o safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*." *Verizon Communications v. Law Offices of Curtis V. Trinko*, LLP, 540 U.S. 398, 405 (2004)(emphasis in original). A merger of two firms that have operated together in a successful, procompetitive joint venture for more than 15 years is not anticompetitive, and it does not change the conditions in the market. *Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc.*, 784 F.2d 1325, 1337 (7th Cir. 1986)(merger of two firms that had operated together for 30 years "did not change the conditions of competition in the market.").

B. ANTITRUST INJURY

In addition, the plaintiff must prove that he or she has suffered, or is likely to suffer, an "antitrust injury," an injury "of the type the antitrust laws were intended to prevent and that flo[w] from that which makes defendants' acts unlawful." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)). To prove antitrust injury, "[a] private plaintiff must identify the economic rationale for a business practice's illegality under

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the antitrust laws and show that its harm flows from whatever it is that makes the practice unlawful." See 2A Areeda & Hovenkamp ¶ 391a, at 320. Proving antitrust injury is a requirement in a suit for injunctive relief as much as it is in a suit for damages. *Cargill v. Monfort*, 479 U.S. 104, 113 (1986)("we conclude that in order to seek injunctive relief under § 16, a private plaintiff must allege threatened loss or damage 'of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.'" (quoting *Brunswick*, 429 U.S. at 489).).

Here, plaintiffs have alleged only that one is a "shrimp fisherman" (FAC ¶ 6), that one "owns and operates" or is the captain of "fishing vessels" that "regularly participate(s) in the West Coast market for trawl-caught groundfish" (FAC ¶¶ 7, 8), and that two are the owners (and operator) of "fishing vessels which have regularly participated in multiple West Coast fisheries" (FAC ¶¶ 9, 10). None of the plaintiffs allege that he or it sells shrimp, groundfish, or whiting to Pacific Seafood or to Ocean Gold.

To state a claim under Sherman Act § 2, among other things, plaintiffs must allege and prove that because of an increase in the share ownership within Ocean Gold, Pacific Seafood will now be able to decrease the prices <u>other</u> processors pay plaintiffs for their fish. In this case, plaintiffs are attempting to allege a "monopsony," the equivalent of a "buying side monopoly," so everything is flipped.[2] To prove a claim for

[2] "Monopsony is defined as a 'market situation in which there is a single buyer or a

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monopolization, a plaintiff typically must prove, among other things, that the alleged monopsonist possesses sufficient "market power," *i.e.*, the power that by restricting its own input (purchases), it can restrict marketwide input (purchases of shrimp, whiting, or ground fish and, hence, decrease marketwide prices paid to fishermen delivering shrimp, whiting or ground fish to shoreside processors on the West Coast. *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995) (an alleged monopolist "has sufficient market power when, by restricting its own output, it can restrict marketwide output and, hence, increase marketwide prices.")

Plaintiffs cannot establish that a change in the share ownership within Ocean Gold—now called off—will cause the processors to whom plaintiffs sell their fish to decrease their purchases or to reduce the prices they are willing to pay for a plaintiff's fish. There is no presumption that by simply charging a "monopsony" exists, harm follows. In fact as the Court noted in the Prior Action when it denied the Motion for a Preliminary Injunction, the evidence indicated their combined operations had expanded the market for whiting, that they had been paying fishermen significantly higher prices for whiting, and that defendants have been purchasing increasing amounts of whiting. See p. 9, above.

By way of further example, in *Kartell v. Blue Shield of Massachusetts, Inc.*, 784 F.2d

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group of buyers making joint decisions. Monopsony and monopsony power are the equivalent on the buying side of monopoly and monopoly power on the selling side.'" *United States v. Syufy Enterprises*, 903 F.2d 659, 663, n.4 (9th Cir. 1990) (quoting R. Lipsey, P. Steiner & D. Purvis, Economics 976 (7th ed. 1984)).

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922, 927 (1st Cir. 1984)(Breyer, J.), then-Judge Breyer found an alleged monopsony produced no consumer harm:

> Blue Shield adds that the record does not prove the existence of the single harm most likely to accompany the existence of market power on the buying side of the market, namely lower seller output. *See* P. Areeda, [*Antitrust Analysis*] at 343 n. 20; R. Posner, *Antitrust*, 5-14, 91-3 (1974). Indeed, here the district court found that the supply of doctors in Massachusetts has "increased steadily during the past decade."

The circumstances in *Kartell* are similar to the circumstances here where the revenues to fishermen and the volumes of whiting purchased have increased steadily during the past 16 years.

C. NO UMBRELLA STANDING

Plaintiffs are attempting to assert what amounts to "umbrella standing"—the idea that the third party processors to whom they sell, will lower the prices they are willing to pay if a Pacific entity buys a controlling interest of Ocean Gold. Courts within the Ninth Circuit have rejected the concept that such remote persons have sufficiently alleged an antitrust injury. *Garabet, M.D., Inc. v. Autonomous Technologies Corp.*, 116 F. Supp.2d 1159, 1168 (C.D. Cal. 2000):

> In light of this trend, and under an implicit if not explicit precedent in the Ninth Circuit rejecting "umbrella" standing, this court declines to recognize purchases from a non-conspirator non-defendant as a sufficient basis to assert antitrust standing. The causative links between Defendants' alleged conduct and injuries allegedly suffered by Plaintiffs are simply too attenuated, and the Court finds a substantial risk of duplicative recovery, as the Plaintiffs now before the Court are only tangentially affected.

The court went on and addressed umbrella standing in the context of the Clayton Act §

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16, 15 U.S.C. § 26. Although the court did not decide the issue, it appeared to the court that "Section 16 standing is lacking." 116 F. Supp.2d at 1171. Among other things, there was no evidence that any plaintiff intended to purchase from (sell to) the defendants and there was no evidence that a plaintiff's injury would be "proximately caused" by an antitrust injury—proximate cause being a "doubtful" proposition in light of the reasons discussed by the court and quoted above. *Id.*

VI. PLAINTIFFS CANNOT ESTABLISH THAT THEY ARE "LIKELY TO SUFFER IRREPARABLE HARM IN THE ABSENCE OF PRELIMINARY RELIEF"; AND THEY CANNOT SHOW THAT "THE DANGER OF IRREPARABLE LOSS OR DAMAGE IS IMMEDIATE."

In addition to the general preliminary injunction requirement that a plaintiff establish that he or she is likely to suffer irreparable harm in the absence of preliminary relief, section 16 of the Clayton Act, 15 U.S.C. § 26 adds the requirement that there be "a showing that the danger of irreparable loss or damage is immediate."

How can anyone be likely to suffer harm that is irreparable from a transaction that is terminated? How can anyone be in immediate danger of irreparable loss or damage from a transaction where there is no transaction?

On top of that, in an antitrust context, monetary harm typically does not constitute irreparable harm. *Retail Imaging Management Group v. Fujifilm North America Corp.*, 841 F. Supp.2d 1189, 1194 (D. Or. 2012). Courts look for something akin to "the threatened destruction of a business." *Id.* at 1195. Where defendants and Ocean Gold have been operating in a successful pro-competitive joint venture for the last 16 years,

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defendants cannot show they are in immediate danger of irreparable loss or damage if the Court does not enjoin a non-existent transaction.

VII. PLAINTIFFS CANNOT ESTABLISH THAT THE BALANCE OF EQUITIES TIPS IN THEIR FAVOR

There being no transaction, there can be no equities that favor plaintiffs. A preliminary injunction is an even more "extraordinary and drastic remedy" when there is no basis for one. All the equities tip in favor of defendants.

VIII. PLAINTIFFS CANNOT ESTABLISH THAT AN INJUNCTION IS IN THE PUBLIC INTEREST

The public interest is not served by entry of an injunction where none of the legal or factual requirements are present.

IX. CONCLUSION ON THE MOTION FOR PRELIMINARY INJUNCTION

Any deal by which a Pacific Seafood entity would purchase Ocean Gold stock or membership interests from its shareholders is ended. The deal is terminated. Plaintiffs' motion for a preliminary injunction should be denied.

X. THE ALTERNATIVE DISPUTE RESOLUTION UNDER THE STIPULATION AND RESOLUTION AGREEMENT SHOULD BE ENFORCED

A. DISPUTES ARE TO BE DECIDED BY JUDGE HOGAN OR JUDGE JELDERKS

When the parties entered into the Stipulation and Resolution Agreement (Prior Action Doc. 426-1, Hardiman Declaration, Ex. 6 (Doc. 16-6)), they anticipated that disputes could arise and they created an alternative dispute resolution process. The

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Stipulation (contains two dispute resolution provisions. First, ¶ 3(a) provides:

> 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.

Second, ¶ 10 provides:

> 10. Dispute Resolution. The parties to this Agreement stipulate that U.S. District Judge Michael R. Hogan shall have continuing jurisdiction over all aspects of this Agreement including the power to resolve any and all disputes through appropriate orders entering injunctive relief and/or awarding damages, legal fees and costs. In the event that Judge Hogan is not available to consider any particular dispute, his replacement shall be U.S. Magistrate Judge John Jelderks.

Note, ¶ 10 expressly provides that Judge Hogan or Judge Jelderks will have "**the power to resolve any and all disputes**," including whether a transaction or conduct is covered by the Stipulation and Resolution Agreement.

With respect to the Marketing Agreement provision, ¶ 3(a), there is no proposed new contractual arrangement, so it would seem at this point, there is nothing for Judge Hogan (or Judge Jelderks) to determine.

When plaintiffs filed this action, defendants' lawyers were discussing the best way to invoke the ADR provisions as a mechanism for better determining what plaintiffs' objections were, to find out whether the Oregon DOJ had any objections, to

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address all objections, and to get them all resolved one way or the other in an cost-effective manner under the terms of the Stipulation and Resolution Agreement. (John Stephens and Mike Haglund had discussed ¶ 3(a) and whether the matter would be decided by Judge Hogan or Judge Jelderks.)

With respect to the issue whether the issues related to ¶ 3(a), there are two things to note. First, ¶ 3(a) specifies, by name, that Judge Hogan, will determine the issue. Second, the Pacific parties, at least, were made aware that Judge Hogan might be retiring, but would be available to decide these issues as an arbitrator.

If disputes are not resolved by Judge Hogan, they should be resolved by the designated replacement, Judge Jelderks. Whether the dispute is resolved by Judge Hogan or by Judge Jelderks, the alternative dispute resolution provisions agreed upon by the parties should be enforced.

B. IN THIS CASE, THERE IS A DISPUTE UNDER THE STIPULATION AND RESOLUTION AGREEMENT

As the Court will recall, when plaintiffs filed their original complaint, they filed a third claim under the Stipulation and Resolution Agreement. Although plaintiffs had second thoughts and dropped the claim, there is still no question but that plaintiffs' action give rise to a dispute under the Stipulation and Resolution Agreement. In their First Amended Complaint, plaintiffs also seek to enjoin communications between Frank Dulcich and Ocean Gold based on the conduct that was the basis of the Prior Action. Plaintiffs have breached ¶ 16(c) of the Stipulation and Resolution Agreement.

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The Stipulation and Resolution Agreement of Class Action Claims (Prior Action Doc. 426-1, Hardiman Declaration, Ex. 6 (Doc. 16-6)) contained a release:

> Plaintiffs and all class members who do not request exclusion [no class member did], release defendants...from the "Released Claims," which are defined as follows:
>
> > Any and all claims for monopolization, attempted monopolization or conspiracy to restrain trade under Sections I 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.

Id. at 5. The filing of this action is a breach of the release provision.

In addition, "plaintiffs on behalf of class members" stipulated that the Agreement would not be

> (c) construed to have <u>any impact on any other relationship between Pacific Seafood and Ocean Gold Seafoods and no person bound by this Agreement will contend otherwise</u>.

Id. ¶ 16(c), at 12-13 (emphasis added). By seeking to enjoin communications between Frank Dulcich and Ocean Gold based on the conduct that was the basis of the Prior Action, plaintiffs have breached ¶ 16(c) of the Stipulation and Resolution Agreement. This is a dispute that should be resolved by Judge Hogan or Judge Jelderks aside from the ¶ 3(a) Marketing Agreement issues.

XI. CONCLUSION ON ALTERNATIVE DISPUTE RESOLUTION

For the foregoing reasons, the all disputes arising under or related to the

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Stipulation and Resolution Agreement should be decided by Judge Hogan or Judge Jelderks.

DATED this 28th day of January, 2015.

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