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' OPENING BRIEF

MICHAEL J. ESLER (SB #710560)
JOHN W. STEPHENS (SB #773583)
KIM T. BUCKLEY (SB #781589)
Esler, Stephens & Buckley, LLP
121 SW Morrison Street, Suite 700
Portland, OR 97204-3183
Telephone: (503) 223-1510
Facsimile: (503) 294-3995

RANDOLPH C. FOSTER (SB #784340)
TIMOTHY W. SNIDER (SB #034577)
RACHEL C. LEE (SB #102944)
Stoel Rives LLP
900 SW Fifth Avenue, Suite 2600
Portland, OR 97204
Telephone: (503) 224-3380
Facsimile: (503) 220-2480

Attorneys for Defendants-Appellants

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

Statutes

TABLE OF AUTHORITIES
(continued)

Page

Rules

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), Appellants state that all appellant entities are privately held corporations and limited liability companies, and no publicly held company owns any of their stock.

I. INTRODUCTION

In 2012, Pacific Seafood and the Plaintiffs ended a protracted antitrust class action—the *Whaley* Lawsuit—that had already cost both sides millions of dollars to litigate and that could have gone on for years to come. From Pacific Seafood's standpoint, one key thing it obtained out of the resolution of that lawsuit was an agreement by Plaintiffs that it would not happen again. The most likely source of a future controversy between the parties was the expiration of Pacific Seafood's existing agreement with its joint venture partner, Ocean Gold, in February 2016. What would replace that agreement? To ensure that the parties would not again be mired in a federal antitrust lawsuit over this foreseeable controversy, the parties provided that if any new agreement would result in Pacific Seafood acting as the exclusive marketer for Ocean Gold's seafood, Pacific Seafood would give Plaintiffs notice and an opportunity to object, with any objections to be resolved by a designated third party's determination whether the new agreement was "pro-competitive." That provision is an arbitration agreement, and Plaintiffs' objections to the Proposed Transaction fall within its scope. As a result, the parties should not be in federal court here litigating the ghost of this now-terminated transaction. This Court should correct the district court's misinterpretation of the Resolution Agreement and send this dispute to arbitration where it belongs.

II. STATEMENT OF JURISDICTION

The district court had jurisdiction of this antitrust suit pursuant to 28 U.S.C. §§ 1331 and 1337(a). The district court entered an order on June 8, 2015, denying Pacific Seafood's Motion to Compel Arbitration and Stay Proceedings. AER[1] 1-5. Pursuant to Federal Rule of Appellate Procedure 4(a)(1)(A), Appellants timely filed their notice of appeal from that order on June 18, 2015. AER 19-22. This Court has appellate jurisdiction pursuant to 9 U.S.C. § 16(a)(1) and 28 U.S.C. § 1294(1).

III. ISSUE PRESENTED FOR REVIEW

Whether the district court erred by denying Pacific Seafood's motion to compel arbitration and to stay this action challenging the Proposed Transaction, where Plaintiffs are bound by a written agreement to arbitrate their objections to any agreement that requires Pacific Seafood to act as the exclusive marketer of any seafood products processed by Ocean Gold.

[1] As used herein, the abbreviation "AER" refers to the Additional Excerpts of Record filed herewith. As used herein, "ER" and "SER" refer to the Excerpts of Record and Supplemental Excerpts of Record previously filed in the preliminary injunction appeal (No. 15-35257).

IV. PERTINENT STATUTORY PROVISIONS

Section 2 of Title 9 of the United States Code provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 3 of Title 9 of the United States Code provides:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

V. STATEMENT OF THE CASE

A. Factual Background[2]

1. The 2006 Agreement Created a Joint Venture.

In 2006, Pacific Seafood and Ocean Gold entered into a 10-year joint venture agreement (the "2006 Agreement"). ER 361-73. Although the parties sometimes refer to the 2006 Agreement as the "exclusive marketing agreement," that shorthand term describes only one aspect of the agreement. The agreement, which is titled "Procurement, Processing, Sales and Marketing Agreement," outlined a comprehensive joint venture between the companies, in which each undertook different tasks and split the profits 50-50. The 2006 Agreement included provisions addressing the following:

- procurement of seafood for processing by Ocean Gold, ER 361;
- processing of seafood by Ocean Gold, ER 361-62, 366;
- financing of Ocean Gold's procurement and processing costs by Pacific Seafood paying those costs to Ocean Gold within 14 days of product shipment, ER 365;
- marketing of Ocean Gold seafood products by Pacific Seafood, ER 362-63;

[2] Appellants ("Pacific Seafood") included a detailed description of the general background of this litigation in the Opening Brief in the preliminary injunction appeal. Appeal No. 15-35257, Dkt. 4. Because Circuit Rule 28-1(b) prohibits Pacific Seafood from incorporating by reference its previous briefing, Pacific Seafood states here the facts pertinent to its appeal of the order denying the motion to compel arbitration.

- the sale of Ocean Gold seafood products by Pacific Seafood, ER 362-63;
- sharing of the net profits from the procurement, processing, marketing, and sale of the Ocean Gold-processed seafood, ER 363-64;
- granting Pacific Seafood an option to purchase any new seafood products added by Ocean Gold, ER 362;
- controlling the amount of seafood products processed by Ocean Gold outside of the 2006 Agreement, so that that amount does not interfere with Ocean Gold's capacity for processing products under the agreement, ER 362;
- appointment of the manager for the Pacific Seafood entity, ER 364;
- use of best efforts by Ocean Gold to cause fishing vessels controlled by Ocean Gold or its officers, shareholders, or affiliated entities to deliver seafood to Ocean Gold or Pacific Seafood, ER 365;
- access to the Ocean Gold facility for Pacific Seafood to inspect Ocean Gold's facility, operations, and seafood products, ER 367;
- transfer of a facilities lease from Pacific Seafood to Ocean Gold, ER 371;[3]
- supply of ice[4] by Ocean Gold to Pacific Seafood, ER 372;
- allocating responsibility between Pacific Seafood and Ocean Gold for the staffing, maintenance, repair, and utilities for the ice house and its equipment, ER 372;

[3] The last six topics are addressed in Exhibit 2 to the 2006 Agreement and expressly incorporated by reference into that agreement. ER 372.

[4] Seafood processors maintain ice production facilities and typically supply ice to fishermen before they go out to fish. The fishermen ice their catch until it is delivered for processing.

- a promissory note for a loan from Pacific Seafood to Ocean Gold, ER 372;
- lease of Pacific Seafood equipment to Ocean Gold for a nominal rental charge of $1 per year to continue during the term of the product supply agreement, ER 372; and
- sale by Ocean Gold to Pacific Seafood of an option regarding a fish feed business, ER 372.

The 2006 Agreement provided that it would expire on February 9, 2016, but would automatically renew for successive two-year terms if neither party gave notice of an intention to terminate it. ER 361.

Pacific Seafood's relationship with Ocean Gold did not commence with the 2006 Agreement. The companies had worked together since at least 1999, when Pacific Seafood became a minority owner of the financially troubled Ocean Gold business (then called Merino's Seafoods Inc.), which was at the time much smaller than its current size. ER 298. Under a series of agreements between 1999 and 2006, Pacific Seafood provided sales, marketing, and distribution services to Ocean Gold, and Ocean Gold used financing offered by Pacific Seafood to purchase equipment and expand its capacity to take delivery of seafood, process it, and freeze it. ER 298-302. Ultimately, under the 2006 Agreement, as the *Whaley* court found, Pacific Seafood and Ocean Gold were able to expand the market for processed whiting and increase both the volume of whiting purchased from fishermen and the price paid to them. ER 422.

2. Plaintiffs Challenged Pacific Seafood's Proposal to Acquire Ocean Gold During the *Whaley* Lawsuit.

In 2010, several of the Plaintiffs commenced the *Whaley* Lawsuit against Pacific Seafood. Plaintiffs complained that the 2006 Agreement and a proposed acquisition of Ocean Gold by Pacific Seafood to replace the 2006 Agreement gave Pacific Seafood too much market power in certain seafood markets and thus violated the Sherman Act. ER 392, 394, 399-400 (*Whaley* Fourth Amended Compl., ¶¶ 37, 42, 53-55). During the *Whaley* Lawsuit, Plaintiffs moved for a temporary restraining order against the proposed acquisition, but the *Whaley* court never ruled on the application because Pacific Seafood canceled the transaction. ER 107 (Second Am. Compl., ¶ 46); AER 80. Pacific Seafood then consented to a stipulation providing that it had "no plans as of this date to resume negotiations for the Sale" and that it would not close any sale without 45 days' notice to Plaintiffs. *Whaley v. Pac. Seafood Grp.*, No. 1:10-cv-3057-PA (D. Or. June 21, 2010) (Dkt. 171-2); *see also* AER 43 (Tr. at 21:22-24).

3. The Resolution Agreement Provided a Creative Dispute Resolution Process for Antitrust Objections to Future Agreements Between Pacific Seafood and Ocean Gold.

After almost two years of litigation, extensive discovery, 60 depositions, and millions of dollars in legal fees and costs (ER 426), the parties successfully resolved the *Whaley* Lawsuit in 2012. Pursuant to a mediation process conducted

by then-U.S. District Judge Michael Hogan, Plaintiffs, Pacific Seafood, and Ocean Gold entered into the Resolution Agreement. ER 425-39. The parties specifically acknowledged that the Resolution Agreement was "superior" to continued litigation, trial, and appeal "that could consume a number of years." ER 427.

The Resolution Agreement both resolved Plaintiffs' *Whaley* claims and looked to the future, because the parties were well aware of the upcoming completion of the 2006 Agreement's 10-year term in February 2016. Accordingly, Plaintiffs and Pacific Seafood agreed in the Resolution Agreement that:

- Pacific Seafood and Ocean Gold would not allow the 2006 Agreement to automatically renew when its term expired in 2016. ER 428.
- Plaintiffs agreed to release certain Sherman Act claims and any claim for injunctive relief "related to" those claims. ER 428.
- In exchange for giving up the right to assert claims in federal court again, the parties agreed to a creative arbitration process. In the event that Pacific Seafood[5] and Ocean Gold intended to enter into a new agreement that would have Pacific Seafood "act as the exclusive marketer" for seafood produced by Ocean Gold, Pacific Seafood would notify Plaintiffs' counsel of the agreement. ER 428. Plaintiffs would then have the right to submit any objections to that new agreement to Judge Hogan (or to U.S. Magistrate Judge John Jelderks) for a determination of whether the new agreement was "pro-competitive," and if so, it may be approved. ER 428, 432. The agreed-upon "pro-competitive" standard lifted the burden of proving the illegality of Pacific Seafood's conduct from Plaintiffs' shoulders

[5] The Resolution Agreement defines the terms "Pacific Seafood Group" and "Pacific Seafood" identically, as including "all 54 of the first named entities in this [*Whaley*] action." ER 428.

> and placed on Pacific Seafood the burden of proving the "pro-competitive" nature of a proposed new agreement.

The *Whaley* court approved the Resolution Agreement as "fair, reasonable, adequate, and in the public interest." ER 444. And the parties themselves agreed that the Resolution Agreement had the "potential to continue to make the West Coast fishing industry one of the most competitive in the world for the mutual benefit of West Coast processors and West Coast fishing vessel owners and fishermen." ER 427.

4. Pacific Seafood Prepared for the Proposed Transaction with the Expectation That the Transaction Would Go Through the Arbitration Process.

In 2014, as a means of replacing the expiring 2006 Agreement, Pacific Seafood negotiated a series of transactions whereby, after due diligence, Pacific Seafood would acquire a controlling interest in Ocean Gold and affiliated companies (the "Proposed Transaction"). SER 179-277.[6] Given the prior

[6] 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, dated February 13, 2015, and certain exhibits thereto ("February 13 Haglund Declaration") as District Court Dkt. No. 45. That docket number is mistaken; it refers to a different sealed declaration by Mr. Haglund. The February 13 Haglund Declaration was filed on February 17, 2015, thereby making it part of the record for appellate review, but was entered on the docket as District Court Dkt. No. 106. *See* AER 6, 9-10; *see also* Fed. R. App. P. 10(a)(1); Fed. R. Civ. P. 5(d)(2)(A); *Riordan v. State Farm. Mut. Auto. Ins. Co.*, 589 F.3d 999, 1003 (9th Cir. 2009).

litigation, Pacific Seafood and Ocean Gold knew that Plaintiffs might again object to an acquisition and expected that former Judge Hogan[7] would evaluate any objections to the Proposed Transaction, as provided for in the Resolution Agreement:

- In March 2014, the Pacific Seafood employee designated by the 2006 Agreement to manage Pacific Seafood's side of the joint venture (ER 364) summarized the deal points under negotiation and commented to the transactional lawyers that the "[o]nly Trick Bag for all of us is the Judges approval for the sale and purchase." AER 209.

- Several weeks later, the transactional lawyer for the Ocean Gold shareholders advised the shareholders that Pacific Seafood was bargaining for the inclusion of a specific performance term, "i.e. if we sign; they get Hogan's OK, they are ready to close, then we can't change our minds." AER 212.

- A month later, the same attorney proposed a different term to Pacific Seafood's transactional attorney and stated: "Let me know if this is a big problem. If not (and it should not be), let's get the agreements done and on their way to Hogan." AER 193.

- The Ocean Gold shareholders' attorney commented to Pacific Seafood's transactional lawyer shortly before Plaintiffs communicated their objections that "at least it should please Hogan that Haglund got the opportunity" to object. AER 195.

Consistent with the expectation that former Judge Hogan would review any objections to the Proposed Transaction, the transaction documents themselves included confidentiality provisions that expressly permitted disclosure to "Judge

[7] Judge Hogan retired from the federal bench in October 2012, six months after the parties executed the Resolution Agreement.

Michael Hogan (ret.) and any persons or organizations he may request [Pacific Seafood] contact" and persons from whom Pacific Seafood or Ocean Gold might seek "approval(s), consent(s), acquiescence(s) or non-objection(s)." SER 188, 225-26, 253-54 (¶ 4.7).

Pacific Seafood had discretion to complete the acquisition only if it were satisfied that the Proposed Transaction "will not violate or create the threat or a violation or assertion of a violation of an antitrust or security law," and the Proposed Transaction offered a similar exit for selling shareholders. SER 192-93, 229-30, 257, 259 (¶¶ 6.1(c), 6.2(b)); *see also* ER 138-39.

On November 4, 2014, one of the other shareholders of Ocean Gold, Dennis Rydman, passed away. SER 283. On December 10, 2014, the probate court issued letters of administration granting his widow authority to administer his estate. SER 279. The probate court stated that the Proposed Transaction was scheduled to close on December 15, 2014. SER 284. However, the Proposed Transaction could not have closed on December 15—even if all other prerequisites to closing had been satisfied, which was not the case—because the purchasing Pacific Seafood entities had not yet been created. The state of Washington issued a certificate of incorporation for one of the assignee entities on December 16, 2014, and a

certificate of formation for the other three days later, on December 19, 2014. SER 287, 291.

On December 12, 2014, two days after the probate court issued letters of administration to Mr. Rydman's widow, Pacific Seafood gave notice of the Proposed Transaction to Plaintiffs' counsel, as required by paragraph 3(a) of the Resolution Agreement. ER 268. On December 22, 2014, Plaintiffs' counsel stated that "we believe this deal does implicate the settlement agreement, specifically the provision under which PSG committed not to renew its exclusive dealing arrangement with Ocean Gold." ER 272. In other words, Plaintiffs' counsel promptly invoked paragraph 3(a) of the Resolution Agreement as applicable to the Proposed Transaction—the same paragraph that set forth the dispute resolution process for resolving objections to new agreements before former Judge Hogan.

Target closing dates for the Proposed Transaction were repeatedly set and then rescheduled. *See, e.g.*, SER 182, 273, 284, 307. Pacific Seafood's counsel had repeated communications with Plaintiff's counsel regarding whether Plaintiffs had any objections to the Proposed Transaction. *See, e.g.*, ER 269-72, 274 (communications with Plaintiffs' counsel on December 18, December 22, January 14, January 15, and January 20). The closing was postponed to give Plaintiffs time to assert any such objections. ER 225 (¶ 3); ER 232 (¶ 4).

5. When Plaintiffs Objected, Pacific Seafood Halted the Proposed Transaction and Attempted to Submit the Dispute to Arbitration.

On January 21, 2015, Plaintiffs' counsel informed Pacific Seafood that Plaintiffs objected to the Proposed Transaction. ER 269. Pacific Seafood informed Ocean Gold that same day that "there would be no closing at least until such time as Mr. Haglund's objections were addressed and resolved to [Pacific Seafood]'s satisfaction." ER 225-26; *accord* ER 232. The following day, Pacific Seafood's litigation counsel began preparing an email to former Judge Hogan to invoke the agreed-upon dispute resolution process. ER 277.

B. Procedural Background

On January 22, 2015, as Pacific Seafood was preparing to contact former Judge Hogan, Plaintiffs filed the present suit and moved for a temporary restraining order. ER 277, 488-94, 495-515. Plaintiffs' original complaint, which was largely a cut-and-paste of their *Whaley* complaint, asserted monopolization and attempted monopolization claims under § 2 of the Sherman Act. ER 513-14 (Compl.); *see also* ER 379-418 (*Whaley* Fourth Am. Compl.). Plaintiffs also asserted a declaratory judgment claim relying on paragraph 3(a) of the Resolution Agreement. ER 514-15. They alleged that the Proposed Transaction "will clearly violate this provision" because paragraph 3(a) prohibits renewal of the 2006 Agreement. ER 514 (Compl., ¶ 68); *see also* ER 497 (Compl., ¶ 3). On the

afternoon of January 22, Pacific Seafood's litigation counsel emailed former Judge Hogan in an attempt to initiate arbitration.[8] ER 276-77.

The next day, on January 23, 2015, Plaintiffs did a 180-degree turn. They amended their complaint to withdraw their claim that the Proposed Transaction violated the Resolution Agreement. ER 469-87. Plaintiffs did so in an effort to avoid arbitration before former Judge Hogan or Magistrate Judge Jelderks, the individual designated as former Judge Hogan's replacement for the agreed-upon dispute resolution process in paragraph 3(a) of the Resolution Agreement. ER 432. Plaintiffs explained to the district court that they dropped the breach of contract claim because it "would have to go before Judge Jelderks." ER 453 (Tr. at 7:2-6).

In opposition to the request for a temporary restraining order, Pacific Seafood informed the district court on January 23, 2015, that the suit breached the Resolution Agreement, that former Judge Hogan or Magistrate Judge Jelderks had been designated by the parties in the Resolution Agreement to resolve the dispute,

[8] In this email, Pacific Seafood's litigation counsel initially stated that arbitration was required under a different dispute resolution provision, paragraph 10 of the Resolution Agreement, and not paragraph 3(a). ER 276. It is clear from the record, however, that both Pacific Seafood and Ocean Gold believed objections to the Proposed Transaction were to be determined by former Judge Hogan under the paragraph 3(a) process. *See supra* at 10-11 (citing AER 193, 195, 209, 212; SER 188, 225-26, 253-54). Moreover, Pacific Seafood has consistently argued to the district court that the parties' dispute must be arbitrated. *See, e.g.*, ER 186, 276-77, 450-52, 455-56; AER 77.

and that Pacific Seafood would be moving to dismiss or abate the action. ER 450-52, 455-56; AER 77.

On January 27, 2015, Pacific Seafood terminated the Proposed Transaction and moved to dismiss Plaintiffs' antitrust claims against the then-terminated Proposed Transaction, relying in part on the Resolution Agreement. ER 226-29, 234, 256. The next day, Plaintiffs moved for a preliminary injunction, based on their Sherman Act claims[9] and the *Whaley* evidentiary record. ER 189-208, 212-14 (Radtke Decl., ¶¶ 5, 7-9). In Pacific Seafood's opposition to the motion for a preliminary injunction, it again informed the district court that the dispute should be addressed by Judge Hogan or Magistrate Judge Jelderks pursuant to the Resolution Agreement. ER 186. On March 6, 2015, the district court denied Pacific Seafood's motion to dismiss and issued a preliminary injunction. ER 1-9.

Pacific Seafood appealed the grant of preliminary injunctive relief and moved to compel arbitration. ER 54-62; Dist. Ct. Dkt. 71. Plaintiffs opposed the motion to compel, arguing that paragraph 3(a) is an ancillary jurisdiction clause rather than an arbitration agreement, and that the Proposed Transaction does not fall within the scope of paragraph 3(a). Dist. Ct. Dkt. 75.

[9] Plaintiffs later amended their complaint to add a claim under § 7 of the Clayton Act. ER 112-13.

On June 8, 2015, the district court denied Pacific Seafood's motion to compel arbitration. AER 1-5. The district court properly declined to interpret paragraph 3(a) as a second, overlapping ancillary jurisdiction provision as Plaintiffs contended. The district court based its ruling instead on a narrow interpretation of the scope of paragraph 3(a). At the outset of its analysis, the district court characterized the 2006 Agreement as a "marketing cooperation agreement" (AER 4), apparently overlooking what Plaintiffs themselves concede is the "comprehensive" nature of the 2006 Agreement, which they allege "controls virtually all aspects of the business operations of Ocean Gold." ER 101. The district court then held that paragraph 3(a) "requires that any proposed new marketing agreements between Pacific Seafood and Ocean Gold be submitted to the designated settlement judge if there are objections." AER 4. However, the district court ruled that "a merger[10] is categorically different from an exclusive marketing agreement." AER 4. Recognizing that Plaintiffs "were aware that Pacific Seafood had attempted in 2010 to acquire Ocean Gold," the district court reasoned that "[i]f the parties in *Whaley* had intended to refer proposed mergers to

[10] The district court inadvertently misstated that the Proposed Transaction was a "merger" when it was, in fact, the purchase of stock or membership interests from existing shareholders or members, giving Pacific Seafood controlling ownership interests in Ocean Gold and its affiliates. SER 179-277; ER 139; AER 81.

mediation [sic[11]], the Resolution Agreement could have specifically mentioned the issue." AER 4. The district court did not address the rule that any ambiguities in an arbitration agreement must be resolved in favor of arbitration. AER 1-5. Instead, the district court concluded that "Pacific Seafood has failed to show that the Resolution Agreement applies to the proposed merger" and, accordingly, denied the motion. AER 5.

Pacific Seafood appealed the denial of its motion to compel arbitration. AER 19-22. This Court granted Pacific Seafood's motion to consolidate its two appeals. Appeal No. 15-35504, Dkt. 9. The district court then granted Pacific Seafood's motion for a stay of the district court proceedings pending this appeal. AER 18. In granting the motion to stay, the district court explained that although it had previously concluded that the Resolution Agreement "did not require

[11] The district court's reference to "mediation" appears to have been a typographical error, which the district court corrected in a later order. *See* AER 16 ("I denied Defendants' motion to compel arbitration because I concluded that the parties' settlement agreement in their prior litigation did not require *arbitration* here." (emphasis added)). The text of paragraph 3(a) would flatly contradict any attempt to construe it as an agreement to *mediate* Plaintiffs' objections and, indeed, no party even suggested such an interpretation. Paragraph 3(a) expressly provides that former Judge Hogan "*shall determine* whether the proposed new agreement is pro-competitive." ER 428 (emphasis added). Mediators do not determine facts. "Mediation is distinguished from arbitration and some other dispute resolution alternatives specifically by the neutral role of the mediator, a role in which making any kind of findings or rulings is inappropriate." *Lopez v. Admin. Office of Courts*, 719 F.3d 1178, 1181 n.2 (10th Cir. 2013).

arbitration here," the motion to compel arbitration nevertheless raised a "substantial question on the merits." AER 16.

VI. SUMMARY OF ARGUMENT

The *Whaley* Lawsuit was expensive both in time and money, and the parties voluntarily called a halt to it. But they also recognized the risk of a future dispute that would land them right back in federal court. They knew that the comprehensive long-term joint venture agreement between Pacific Seafood and Ocean Gold would be expiring in 2016 and that those companies might look to replace it with a new arrangement. In settling the *Whaley* Lawsuit, Plaintiffs and Pacific Seafood did not decide whether such a new agreement would be permissible. Instead, they punted—but in a manner designed to keep them out of federal court in the future.

In paragraph 3(a) of the Resolution Agreement, Plaintiffs, Pacific Seafood, and Ocean Gold agreed that, in the event of *any* new agreement that would have Pacific Seafood acting as the exclusive marketer of Ocean Gold-processed seafood, Pacific Seafood would give Plaintiffs advance notice and an opportunity to object. If Plaintiffs objected, the parties designated a decision-maker to determine whether the new agreement was "pro-competitive"—a standard that shifted the burden from Plaintiffs to Pacific Seafood. If the new agreement was pro-competitive, it could proceed. Plaintiffs and Pacific Seafood coupled this creative alternative dispute

resolution process with a release of any claims "related to" the *Whaley* claims, all to ensure that the foreseeable future dispute over a new agreement involving exclusive marketing *would not trigger another federal lawsuit.*

Under governing precedent, the Resolution Agreement's alternative dispute resolution provision is an arbitration agreement, because it provides that a dispute will be submitted to a third party for a decision. And because both Plaintiffs and Pacific Seafood stood to benefit greatly from the specified arbitration process, they used broad language to describe what new contracts would be subject to it. They chose to arbitrate "any" new agreements that entailed exclusive marketing. That expansive term meant that neither side would be able to evade arbitration, no matter what other activities the new agreement might cover or what form it might take. The broad text and context of the arbitration agreement show that it unambiguously applies to the Proposed Transaction, which would have Pacific Seafood, by virtue of owning Ocean Gold, controlling the seafood processed by Ocean Gold and acting as the exclusive marketer for it. At the very least, the arbitration agreement is *susceptible* to such an interpretation, and it is well-established that any ambiguity in the scope of an arbitration agreement must be construed in favor of arbitration. The district court's conclusion that the arbitration

agreement does not apply to the Proposed Transaction was erroneous and should be reversed.

VII. ARGUMENT

A. Standard of Review

This Court reviews de novo a district court order denying a motion to compel arbitration. *Cape Flattery Ltd. v. Titan Maritime, LLC*, 647 F.3d 914, 917 (9th Cir. 2011). This Court also reviews de novo the scope of an arbitration agreement. *Id.*

B. The Resolution Agreement Is an Enforceable Agreement to Arbitrate Plaintiffs' Objections to the Proposed Transaction.

The Federal Arbitration Act ("FAA") reflects an "'emphatic federal policy in favor of arbitral dispute resolution.'" *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 25 (2011) (per curiam) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985)). It provides that "[a] written provision in any . . . contract evidencing a transaction involving commerce *to settle by arbitration a controversy thereafter arising out of such contract* or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added).

The FAA's "'principal purpose' . . . is to 'ensure that private arbitration agreements are enforced according to their terms.'" *AT&T Mobility LLC v.*

Concepcion, 131 S. Ct. 1740, 1748 (2011) (brackets and citation omitted). This includes enforcement of terms that specify "the issues [the parties] choose to arbitrate" and "who will resolve specific disputes." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010). Parties may agree to arbitrate federal antitrust claims. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309-10 (2013); *Mitsubishi Motors*, 473 U.S. at 632-37.

The FAA requires courts to compel arbitration if (1) a valid agreement to arbitrate exists, and (2) the dispute falls within the scope of that agreement. *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). When both elements are satisfied, the FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (emphasis in original). Here, both requirements are met. The Resolution Agreement is a valid and binding agreement to arbitrate, and Plaintiffs' objections to the Proposed Transaction are within the scope of that agreement. Therefore, the district court erred by denying Pacific Seafood's motion to compel arbitration.

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

a. The Parties Entered into a Valid, Written Agreement to Arbitrate.

Paragraph 3(a) of the Resolution Agreement is a valid and enforceable written agreement that binds Plaintiffs to arbitrate the claims it specifies.

As an initial matter, the Resolution Agreement is a written agreement, and there can be no doubt that it is valid and enforceable. ER 425-39. The district court in the *Whaley* Lawsuit reviewed the Resolution Agreement and approved it as "fair, reasonable, adequate, and in the public interest." ER 444.

Furthermore, both Plaintiffs and Pacific Seafood are bound by the Resolution Agreement. Each Plaintiff is either a class representative or a member of the certified class in the *Whaley* Lawsuit and, as such, bound by its terms. ER 425, 439, 514. Pacific Seafood was a party to the Resolution Agreement. ER 425, 439. The Resolution Agreement also expressly binds Pacific Seafood's successors and assigns, including the new entities to which Pacific Seafood's purchase rights in the Proposed Transaction were assigned. ER 437 (¶ 21); SER 274.

Finally, paragraph 3(a) is an agreement to arbitrate. In light of the congressional policy in favor of arbitration, "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). Furthermore, this Court

holds that "'[n]o magic words such as "arbitrate" or "binding arbitration" or "final dispute resolution" are needed to obtain the benefits of the [FAA].'" *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205, 1208 (9th Cir. 1998) (citation omitted). Other courts concur. *See, e.g.*, *McDonnell Douglas Fin. Corp. v. Pa. Power & Light Co.*, 858 F.2d 825, 830 (2d Cir. 1988) ("It is, in our estimation, irrelevant that the contract language in question does not employ the word 'arbitration' as such."). This Court's rule is simple: "'If the parties have agreed to submit a dispute for a decision by a third party, they have agreed to arbitration.'" *Wolsey*, 144 F.3d at 1208 (emphasis and citation omitted).

Here, Plaintiffs and Pacific Seafood meet all of those criteria. They agreed to (1) submit a dispute (2) for a decision (3) by a third party. *First*, Pacific Seafood and Plaintiffs agreed on a dispute to submit. They agreed to submit any objection by Plaintiffs to any new agreement that would require Pacific Seafood to act as the exclusive marketer of any seafood product produced by Ocean Gold. ER 428. *Second*, Pacific Seafood and Plaintiffs agreed on the decision to be made. They agreed that the designated third party would decide whether the proposed new agreement is "pro-competitive" and that, if so, the new agreement may be

approved.[12] ER 428. *Third*, Plaintiffs and Pacific Seafood agreed on the third party decision-maker. They agreed that the federal mediator, former Judge Hogan or, if he was not available, Magistrate Judge Jelderks, would make the decision. ER 428, 432. Under *Wolsey*, then, by agreeing "'to submit a dispute for a decision by a third party,'" 144 F.3d at 1208 (citation omitted), Plaintiffs and Pacific Seafood entered into an arbitration agreement.

b. Plaintiffs Tacitly Admit That Paragraph 3(a) Is an Arbitration Agreement.

In opposing Pacific Seafood's motion to consolidate, Plaintiffs represented to this Court that the present appeal "will focus *solely* on whether the transactional documents for the acquisition are categorically different than the types of 'exclusive marketing agreements' required to be resolved by Judge Jelderks under Section 3(a)." Appellees' Opposition to Motion to Consolidate (Appeal No. 15-

[12] This decision, it should be noted, is not the same one that would be made by a federal court adjudicating an antitrust claim. In an antitrust claim, the court's inquiry is not whether a proposed acquisition is pro-competitive. Rather, an antitrust plaintiff has the burden of proving that the defendant's actions are anti-competitive. *See, e.g.*, *Name.Space, Inc. v. Internet Corp. for Assigned Names & Nos.*, — F.3d —, No. 13-55553, 2015 WL 4591897, at *5 (9th Cir. July 31, 2015) ("'There are three essential elements to a successful claim of [Sherman Act] Section 2 monopolization: (a) the possession of monopoly power in the relevant market; (b) the willful acquisition or maintenance of that power; and (c) causal antitrust injury.'" (citation omitted)). Here, the parties agreed that the new agreement would instead be judged under a higher standard of whether it was "pro-competitive."

35504, Dkt. 7), at 12 (emphasis added). Thus, Plaintiffs appear to have conceded that paragraph 3(a) *is* an arbitration agreement and waived any argument to the contrary, leaving only the scope of the provision in dispute.[13]

2. Plaintiffs' Objections to the Proposed Transaction Are Unambiguously Within the Scope of the Arbitration Agreement.

Not only is paragraph 3(a) a written agreement to arbitrate, but Plaintiffs' objections to the now-terminated Proposed Transaction are within its scope. As noted above, the district court must compel Plaintiffs to arbitrate if their dispute falls within the scope of the arbitration agreement. *Chiron*, 207 F.3d at 1130. In determining whether a dispute falls within an arbitration agreement, a court must "construe ambiguities concerning the scope of arbitrability in favor of arbitration." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 66 (1995); *accord Ferguson v. Corinthian Colls., Inc.*, 733 F.3d 928, 938 (9th Cir. 2013) ("'[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.'" (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983))); *Industra/Matrix Joint Venture v. Pope & Talbot, Inc.*, 142 P.3d 1044, 1052 (Or. 2006) ("If an examination of the text and context reveals an

[13] At the district court, Plaintiffs argued that paragraph 3(a) was a duplicative ancillary jurisdiction clause. (Dist. Ct. Dkt. No. 75.) The district court did not adopt this interpretation of paragraph 3(a) and, as noted above, Plaintiffs appear to have abandoned the argument.

ambiguity, we resolve any doubts concerning the scope of arbitrable issues in favor of arbitration.").

This Court interprets an arbitration agreement "by applying general state-law principles of contract interpretation, while giving due regard to the federal policy in favor of arbitration by resolving ambiguities as to the scope of arbitration in favor of arbitration." *Wagner v. Stratton Oakmont, Inc.*, 83 F.3d 1046, 1049 (9th Cir. 1996). "[A]n order to arbitrate the particular grievance should not be denied unless it may be said 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) (internal quotation marks and citation omitted).

Under Oregon law, a court first considers "'the text of the disputed provision, in the context of the document as a whole.'" *Wicker v. Oregon ex rel. Bureau of Labor*, 543 F.3d 1168, 1174 (9th Cir. 2008) (quoting *Yogman v. Parrott*, 937 P.2d 1019, 1021 (Or. 1997)). The context includes "the circumstances underlying the formation of the contract." *Riverside Homes, Inc. v. Murray*, 214 P.3d 835, 841 (Or. Ct. App. 2009) (internal quotation marks and citation omitted). In construing a contract, a court is "'not to insert what has been omitted, or to omit what has been inserted.'" *Yogman*, 937 P.2d at 1021 (quoting Or. Rev. Stat.

§ 42.230). Contract provisions are ambiguous "when they reasonably can, in context, be given more than one meaning." *Id.* at 1022 (internal quotation marks and citation omitted). "If an examination of the text and context reveals an ambiguity," an Oregon court—like this Court—"resolve[s] any doubts concerning the scope of arbitrable issues in favor of arbitration." *Industra/Matrix*, 142 P.3d at 1052. These principles make clear, as discussed below, that paragraph 3(a) must be construed as covering a "new agreement" such as the Proposed Transaction.

a. The Text of the Arbitration Agreement Applies to the Proposed Transaction.

The text of paragraph 3(a) applies to the Proposed Transaction. Paragraph 3(a) provides that the parties are to arbitrate Plaintiffs' objections to "any new agreement that requires Pacific Seafood Group to act as the exclusive marketer of any seafood product produced by Ocean Gold Seafoods," and the Proposed Transaction is just such an agreement. ER 428.[14] The Proposed Transaction

[14] Paragraph 3(a) provides as follows:

> 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 Group 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 Group shall first give 60 days' notice to class counsel and the Oregon Department of Justice and an opportunity to object to the

comprised purchase contracts pursuant to which Pacific Seafood would have acquired a controlling ownership interest in Ocean Gold and its affiliates. SER 179-277; ER 139. Pacific Seafood, then, by virtue of its ownership of Ocean Gold, would have controlled Ocean Gold-processed seafood and thereby would have "act[ed] as the exclusive marketer," *i.e.*, the seller, of Ocean Gold's produced seafood products. ER 428.

Indeed, Plaintiffs themselves admit that one result of the Proposed Transaction would be that Pacific Seafood would be the exclusive marketer of Ocean Gold-processed seafood. To obtain a preliminary injunction, Plaintiffs argued to the district court that

> [t]he marketing agreement is a *subset* of the broad scope of what [Appellants] were seeking to accomplish in the now terminated transaction . . . .

ER 69 (Tr. at 7:18-21) (emphasis added).[15] To be sure, an acquisition would have other effects as well, as Plaintiffs have stressed. But exclusive marketing would

---

> agreement. In the event of any 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.

[15] Consistent with Plaintiffs' admission, Plaintiffs' expert opined that the Proposed Transaction would mean Pacific Seafood would continue to control the marketing of Ocean Gold's processed seafood, as it had under the 2006 Agreement:

undeniably be one of the aspects of Ocean Gold's business that Pacific Seafood would control.

The question for this Court, then, is whether the arbitration agreement is limited to contracts that are *solely* marketing agreements, or whether it also applies to contracts that entail exclusive marketing *plus more*. The latter is plainly correct, because the parties used a key word: "any." The text of paragraph 3(a) expressly provides that the designated third party shall determine the pro-competitive nature of "*any* new agreement" that requires Pacific Seafood to act as the exclusive marketer of any Ocean Gold-processed seafood product. ER 428 (emphasis added). The word "any" unambiguously covers both kinds of new agreements—agreements that are *solely* exclusive marketing agreements, as well as those that involve exclusive marketing *plus more*.

> If Pacific Seafood Group acquires a controlling interest in Ocean Gold Seafoods and its affiliates, Pacific Seafood Group would effectively avoid the impact of the requirement in the *Whaley* case Class Action Settlement Agreement that the exclusive marketing agreement between the two companies not be renewed when it expires in February 2016. With an acquisition of Ocean Gold Seafoods, Pacific Seafood Group's *control of the output* from the West Coast's highest capacity and most modern seafood processing plant *would become permanent*.

ER 220 (¶ 26) (emphases added).

Under Oregon law, the term "any" is "broadly inclusive."[16] *State v. Meier*, 314 P.3d 359, 362 (Or. Ct. App. 2013). It "is an adequate term to express the idea of 'every.'" *Totten v. N.Y. Life Ins. Co.*, 696 P.2d 1082, 1086-87 (Or. 1985). It "is often used '. . . to indicate one that is not a particular or definite individual of the given category but whichever one chance may select.'" *Meier*, 314 P.3d at 362 (citation omitted). Indeed, it means "any kind . . . regardless of classification," and "'precludes limiting the application of the phrase to a particular kind.'" *Argonaut Ins. Co. v. Ketchen*, 413 P.2d 613, 616 (Or. 1966) (citation omitted). In other words, the "natural, plain, and obvious meaning" of the modifier "any" "encompasses the gamut" of the given subject. *SAIF Corp. v. Wright*, 817 P.2d 1317, 1320 (Or. 1991). In the specific context of an arbitration agreement, for instance, the Oregon Court of Appeals explained that the phrase "'[a]ny controversy, dispute or disagreement arising out of or relating to this [employment] Agreement, or the breach thereof'" is "expansive language" that "encompasses *any* controversy, dispute, or disagreement, as long as the subject matter of the dispute arises out of or relates to the employment agreement." *Livingston v. Metro.*

[16] Federal courts similarly construe the term as having an expansive meaning. *See, e.g.*, *United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" (citation omitted)).

Pediatrics, LLC, 227 P.3d 796, 804 (Or. Ct. App. 2010) (emphasis and first brackets in original).

Under these Oregon precedents and in light of the word's ordinary meaning, the parties' use of the term "any" precludes limiting the kinds of agreements that are included in paragraph 3(a). The word "any" signifies that the arbitration provision applies to *all kinds* of agreements that would require Pacific Seafood to act as the exclusive marketer of any seafood product processed by Ocean Gold, *whatever other characteristics, properties, or additional effects those agreements might have*. An agreement solely for exclusive marketing would be covered by the arbitration provision. A relatively narrow agreement for exclusive marketing plus just ice would still be covered. So would an agreement for exclusive marketing, plus ice, plus financing. Or exclusive marketing, plus ice, plus financing, plus procurement. Or exclusive marketing, plus all the combined operations provided for under the expiring 2006 Agreement. Or anything all the way up to exclusive marketing plus absolutely everything else that Ocean Gold does, like a merger or acquisition agreement. The word "any" encompasses them all. Therefore, because the Proposed Transaction here is an agreement that would require Pacific Seafood to act as the exclusive marketer of Ocean Gold-processed seafood, its form and its

other effects are irrelevant to the arbitration agreement. The plain text applies to the Proposed Transaction.

b. The Context of the Arbitration Agreement Supports Construing It to Cover the Proposed Transaction.

The context of the arbitration agreement, which includes both other provisions of the Resolution Agreement and the circumstances of its making (*see supra* at 26), also confirms its broad scope.

(i) The Two Halves of Paragraph 3(a) Work Together.

The context provided by the initial sentence of paragraph 3(a) indicates that the new agreements referred to in the second half of the paragraph include more than merely agreements for exclusive marketing alone. The first sentence of paragraph 3(a) prevents the 2006 Agreement from automatically renewing in 2016, while the paragraph goes on to provide a mechanism for evaluating any new agreement that involves Pacific Seafood acting as Ocean Gold's exclusive marketer. This juxtaposition in the very same paragraph indicates that the contemplated "new agreement[s]" include agreements similar to the 2006 Agreement, which the parties themselves have commonly referred to as an exclusive marketing agreement,[17] as well as any other agreements that have the

[17] *See*, *e.g.*, Appeal No. 15-35257, OB at 8, 10, 12 (Pacific Seafood referring to 2006 Agreement as "exclusive marketing agreement"); Appeal No. 15-35257, AB at 8, 21, 25-26, 39, 41 (Plaintiffs referring to 2006 Agreement as "exclusive

same effect. *Plaintiffs themselves* admitted to this Court that the scope of the arbitration agreement in paragraph 3(a) encompasses any new agreements that would duplicate the 2006 Agreement or be similar to it:

> Section 3(a) requires *challenges to an existing exclusive marketing contract* between Pacific Seafood Group and Ocean Gold Seafoods dated February 9, 2006, *or a new marketing agreement of that type*, to be resolved through alternative dispute resolution . . . .

Appeal No. 15-35257, AB at 21 (emphases added and omitted).[18] Crucially, as discussed above, the 2006 Agreement itself involved far more than merely exclusive marketing, and extended to procurement, processing, financing, profit-sharing, fishing vessel deliveries, leases, and more. *See supra* at 4-6 (citing ER 361-73). Thus, the most natural reading of the arbitration agreement in the second half of paragraph 3(a) is that it specifies new agreements with what the parties viewed as perhaps the most salient effect of the 2006 Agreement (exclusive

---

marketing agreement"); ER 196, 497 (same); ER 220 (Plaintiffs' expert declaring same); AER 80 (Plaintiffs' counsel declaring same).

[18] *See also, e.g.*, Appeal No. 15-35257, AB at 25 ("[T]he entire reason for Section 3(a) was to preserve the *Whaley* plaintiffs' ability to *challenge an existing exclusive marketing contract* between Pacific Seafood Group and Ocean Gold Seafood *in the event those Defendants attempted to renew* their marketing relationship . . . ." (emphases inserted and omitted)); *id.* at 26 ("Section 3(a) is very specific in referring to an *existing exclusive marketing contract* between Pacific Seafood Group and Ocean Gold Seafood dated February 9, 2006, *or a new marketing contract of that type*." (emphases added)).

marketing), even if such a new agreement also were to involve many other aspects of Ocean Gold's business, just as the 2006 Agreement did.

(ii) The Parties Anticipated a Future Acquisition Proposal and Sought to Avoid Burdensome Federal Litigation.

Provisions of the Resolution Agreement demonstrate that the *Whaley* parties anticipated a potential future acquisition and disputes concerning the same. As the initial sentence of paragraph 3(a) shows, the parties agreed that the status quo would not continue beyond 2016. ER 428. In other words, the existing joint venture relationship—through which Plaintiffs allege that Pacific Seafood "controls *virtually all aspects* of the business operations of Ocean Gold," ER 101(emphasis added)—would end in February 2016. As of that date, the 2006 Agreement would no longer provide for procurement, processing, marketing, sale, financing, running an ice house, and more—all important components of a seafood processor's operations. So, as the arbitration agreement itself proves, the parties knew that Pacific Seafood and Ocean Gold might well be interested in creating a new arrangement. Yet although all parties were aware that Pacific Seafood had attempted to acquire Ocean Gold in 2010 and that Pacific Seafood had not agreed to permanently forgo such an acquisition, *no clause in the Resolution Agreement prohibited Pacific Seafood from structuring that new arrangement as an acquisition of Ocean Gold*. Thus, having left the door open for an acquisition

proposal, future disputes over such an agreement were entirely foreseeable. Moreover, the Resolution Agreement demonstrates that the parties were familiar with the tremendous cost of antitrust litigation in the federal courts. *See* ER 426-27 ("voluminous documentary and data discovery and a total of 60 depositions"; "could consume a number of years"). In this context, if Plaintiffs and Pacific Seafood had intended that the battle over a future acquisition agreement or other type of exclusive-marketing-plus-more agreement like the 2006 Agreement would be fought in federal court under the normal standard for antitrust claims, one would expect the parties to have specifically excluded such agreements from the scope of the arbitration provision. Yet the parties did no such thing.

(iii) Plaintiffs Exchanged a Right to Future Federal Litigation for a Right to Notice and Arbitration of Their Objections Under a Favorable "Pro-Competitive" Standard.

Providing further context for interpreting paragraph 3(a), the parties complemented the arbitration agreement with a broad release of Plaintiffs' right to assert antitrust claims about a new acquisition proposal in federal court. In a settlement agreement, each party agrees to extinguish one or more legal rights "in exchange for those rights secured by the contract." *Jeff D. v. Andrus*, 899 F.2d 753, 759 (9th Cir. 1990) (internal quotation marks and citations omitted). Here, Plaintiffs exchanged their legal right to pursue certain federal claims for a

contractual right to have their objections to any new agreement that included exclusive marketing decided through an expeditious arbitration process under a favorable "pro-competitive" standard. In paragraph 2 of the Resolution Agreement, Plaintiffs agreed to release or waive their right to assert in federal court certain Sherman Act claims that included the claims pled in the *Whaley* Lawsuit, and *any injunctive relief claims "related to" those claims.* ER 428 (emphasis added). An acquisition of Ocean Gold by Pacific Seafood is "related to" the *Whaley* claims,[19] and thus in the Resolution Agreement Plaintiffs agreed to give up their right to litigate this claim in federal court. If the arbitration agreement were as narrow as Plaintiffs argue—encompassing nothing except agreements that are solely for exclusive marketing services—the breadth of the "related to" release would make less sense. The exchange would have been an uneven bargain. Considering paragraphs 2 and 3(a) in light of the context that each

[19] Several facts demonstrate the relationship. First, the 2010 attempted acquisition formed part of the basis for the *Whaley* claims and is again relied on in Plaintiffs' current claims. ER 394 (*Whaley* Fourth Amended Compl., ¶ 42); ER 107 (Second Amended Compl., ¶ 46). Second, the *Whaley* evidentiary record overlaps extensively with the evidence that Plaintiffs would use to challenge a new proposed acquisition, as Plaintiffs demonstrated when they relied on that same evidence to obtain a preliminary injunction against the Proposed Transaction. *See* ER 212-14 (Radtke Decl., ¶¶ 5, 7-9). And third, any reasonable person would recognize the close relationship between the *Whaley* Lawsuit and a new acquisition—as the district court recognized and *Plaintiffs themselves* argued at the preliminary injunction stage. ER 2, 67, 70, 76, 91, 122-23, 492; *see also* ER 514-15 (Compl., ¶¶ 66-69).

provides for the other, the most natural reading is that Plaintiffs and Pacific Seafood agreed to arbitrate under a "pro-competitive" standard any objections to a future acquisition, rather than take those antitrust claims to federal court.

(iv) The Circumstances Show That Both Parties Benefited from the Certainty Created by a Broad Arbitration Agreement.

The circumstances of the Resolution Agreement negotiations confirm the broad scope of the arbitration agreement. Neither side wanted loopholes. Plaintiffs were creating a mechanism to receive advance notice and to have their objections arbitrated under a plaintiff-friendly "pro-competitive" standard. By using broad language to define what would be arbitrated, Pacific Seafood could not avoid the agreed-upon process merely by expanding a new contract's subjects beyond exclusive marketing alone or by modifying the contract's form. Conversely, Plaintiffs could not hale Pacific Seafood into federal court simply because a proposed new agreement involved more than just exclusive marketing or because the new agreement took the form of a joint venture agreement, lease, purchase, or any other type of contract.

Had Pacific Seafood suggested defining what would be subject to arbitration as only agreements that were solely for exclusive marketing or in terms of the form of agreement, Plaintiffs would have strenuously objected that such language would allow Pacific Seafood to circumvent its obligations. *Cf.* AER 68 ("If this case is

dismissed, defendants will be in a position to pursue an alternative means of controlling Ocean Gold Seafoods: a long-term lease with or without an option to buy; or any one of dozens of contractual arrangements that arguably do not constitute an 'exclusive' marketing agreement."). Indeed, when Pacific Seafood offered in this litigation to stipulate that it would not enter into "any purchase transaction" without giving notice (ER 136), *Plaintiffs made that very argument about what they contended was a too-narrow provision*.[20]

By bargaining for the term "any," the parties obtained *certainty* about the process that a new contract would trigger, without sacrificing either Pacific Seafood's flexibility to structure that contract in whatever manner made the most commercial sense at the time, or Plaintiffs' assurance that any such new agreement would still go through the agreed-upon process under the agreed-upon standard.

---

[20] *See* ER 123 ("[D]efendants will be free . . . to pursue a myriad of mechanisms to extend their control of the largest seafood processor on the West Coast. The many options include a long-term lease, a production agreement, some form of near-exclusive marketing agreement and another outright purchase."); ER 123-24 ("The broad form of preliminary injunction . . . is necessary in order to stop further attempts by defendants to secure control of Ocean Gold Seafoods, no matter how creative . . . ."); ER 66-68, 72 (Tr. at 4:11- 6:12, 10:1-10) (arguing that proposed stipulation as drafted would not prevent Pacific Seafood from pursuing alternative means of controlling Ocean Gold, including long-term lease, long-term production agreement, or less-than-exclusive marketing agreement); Appeal No. 15-35257, AB at 47 (arguing to this Court that proposed stipulation as drafted "did not prevent other ways in which Pacific Seafood Group could achieve the fundamental equivalent of an acquisition of Ocean Gold . . . through a long-term lease or other contractual means").

The ultimate outcome of the arbitration process might not be certain, AER 209, but the process itself *could be planned for*. *See* AER 193, 195, 212; SER 188, 225-26, 253-54. Despite Plaintiffs' efforts to now deprive Pacific Seafood of the benefit for which it bargained, the circumstances underlying the arbitration agreement confirm that it applies to the Proposed Transaction.

(v) Plaintiffs' Admissions and Tactical Strategy Underscore That the Proposed Transaction Is Among the Agreements Addressed by Paragraph 3(a).

Finally, Plaintiffs' first reaction to the Proposed Transaction, before they changed course, was to repeatedly assert that it violates paragraph 3(a).[21] In other words, Plaintiffs themselves effectively admitted that they considered the Proposed Transaction to be covered by paragraph 3(a). Plaintiffs and their expert repeatedly took the position that the Proposed Transaction violated paragraph 3(a), because

[21] The Proposed Transaction does not, of course, violate either the letter or the spirit of the prohibition on renewal of the 2006 Agreement. The Proposed Transaction is not a renewal and it contains different terms than the 2006 Agreement. Furthermore, the spirit of the renewal provision does not forbid Pacific Seafood and Ocean Gold from entering into a new agreement duplicating the effects of the 2006 Agreement. Rather, the provision prevented the automatic renewal of the 2006 Agreement—which would have otherwise occurred without any action by Pacific Seafood and Ocean Gold (ER 361)—so that the "pro-competitive" scrutiny would apply to future agreements involving exclusive marketing, whether they fell short of the 2006 Agreement's scope, replicated it, or went beyond it.

the effect of the acquisition would be that Pacific Seafood would maintain the control that it had under the 2006 Agreement:

- "The Class Action Settlement Agreement prohibits the renewal of the February 9, 2006 agreement . . . . The acquisition of a controlling ownership interest in Ocean Gold Seafoods and its affiliates by Pacific Seafood Group *will clearly violate* this provision of the Class Action Settlement Agreement by subverting the intent of the Agreement through a device designed to sidestep Pacific Seafood's obligations under the Class Action Settlement Agreement . . . ." ER 514 (Compl., ¶ 68) (emphasis added); *see also* ER 497 (Compl., ¶ 3).

- "[T]he acquisition of Ocean Gold Seafoods and its affiliates by Mr. Dulcich *would* . . . *violate* the terms of the [Resolution] Agreement by enabling Pacific Seafood to sidestep the prohibition on renewal of its exclusive marketing agreement with Ocean Gold Seafoods." AER 81 (emphasis added).

- "In plaintiffs' view, this proposed (but now suspended) acquisition is a bold effort by defendants to *subvert the terms* of the settlement agreement . . . ." ER 196 (emphasis added).

- "Pacific Seafood Group would effectively avoid the impact of the requirement in the [Resolution Agreement] that the exclusive marketing agreement between the two companies not be renewed when it expires in February 2016. With an acquisition of Ocean Gold Seafoods, Pacific Seafood Group's control of the output from the West Coast's highest capacity and most modern seafood processing plant would become permanent." ER 220 (Radtke Decl., ¶ 26).

But as soon as Pacific Seafood invoked the dispute resolution process, Plaintiffs back-pedaled from pressing their breach of contract claim, *precisely because they did not want to go into arbitration*. Plaintiffs admitted to the district court that they had withdrawn their claim because "we do believe it would have to go before

Judge Jelderks." ER 453 (Tr. at 7:2-6). Yet Plaintiffs now contend that the arbitration agreement in the second half of paragraph 3(a) has nothing to do with the Proposed Transaction. Their initial assertion that the Proposed Transaction "does implicate" paragraph 3(a) is a telltale sign of the parties' intent as to the arbitration agreement's scope. ER 272.

3. Even if the Arbitration Agreement Were Ambiguous About Whether It Applies to the Proposed Transaction, Ambiguity Must Be Construed in Favor of Arbitration.

As discussed above, the text and context of the arbitration clause unambiguously indicate that an acquisition agreement such as the Proposed Transaction is within the scope of paragraph 3(a). However, that degree of clarity is not even necessary here. Because any ambiguity must be construed in favor of arbitration, it would be sufficient if paragraph 3(a) were at least "'*susceptible* of an interpretation that covers the asserted dispute.'" *AT&T Techs.*, 475 U.S. at 650 (emphasis added; citation omitted); *accord Mastrobuono*, 514 U.S. at 66; *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25; *Ferguson*, 733 F.3d at 938; *Wagner*, 83 F.3d at 1049; *Industra/Matrix*, 142 P.3d at 1052; *Livingston*, 227 P.3d at 803. For example, in *Livingston*, 227 P.3d at 804, the Oregon Court of Appeals held an arbitration agreement was susceptible of such an interpretation—thus requiring the court to compel arbitration—because the phrase "'[a]ny controversy, dispute or disagreement arising out of or relating to this [employment] Agreement, or the

breach thereof'" could "*plausibly*" be read to include disputes pursued after termination of employment, as well as claims of intentional torts. (Emphasis added; first brackets in original.)

Here, paragraph 3(a) is more than merely "'susceptible of an interpretation'" that covers the Proposed Transaction. *AT&T Techs.*, 475 U.S. at 650 (citation omitted). In the context of other provisions in the Resolution Agreement and the circumstances of the Resolution Agreement's making, the text "*any* new agreement that requires Pacific Seafood Group to act as the exclusive marketer of any seafood product produced by Ocean Gold" unambiguously applies to an acquisition. ER 428 (emphasis added). But susceptibility alone required the district court to compel arbitration.

4. The District Court Erred in Its Interpretation of the Scope of Paragraph 3(a).

The district court erred in holding that paragraph 3(a) is limited to "proposed new marketing agreements" and therefore does not apply to the Proposed Transaction. AER 4. The district court's interpretation is incorrect for several reasons.

First, the district court mistook the full extent of the 2006 Agreement, deeming it to be merely a "marketing cooperation agreement." AER 4; *see also* AER 34, 37 (Tr. at 12:2-4, 15:20-25) (district court describing the 2006 Agreement

as an exclusive marketing agreement). This characterization contributed to the district court's conclusion that, for purposes of the arbitration agreement, an acquisition is "categorically different from an exclusive marketing agreement." AER 4.[22] *Yet Pacific Seafood and Ocean Gold never had an agreement for exclusive marketing alone*. Rather, as discussed above, the 2006 Agreement created a comprehensive profit-sharing joint venture that spanned procurement, processing, marketing, sale, financing, fishing vessel deliveries, inspection, leases, ice production, and more. *See supra* at 4-6 (citing ER 361-73). The district court's mistaking the 2006 Agreement for a narrow exclusive-marketing-only agreement supplied a faulty premise for the court's ultimate conclusion that the second half of paragraph 3(a) was intended to apply just to exclusive-marketing-only agreements.

Second, the district court overlooked that paragraph 3(a) does not itself use the terms "marketing agreement" or "exclusive marketing agreement." Paragraph 3(a) identifies the 2006 Agreement only by its date.[23] ER 428. And paragraph 3(a)

---

[22] As the district court reasoned at the hearing: "When we are talking about any new agreement, doesn't it have to refer back to the prior marketing agreement that was going to expire on—in 2016? I mean, we weren't—the 2016 agreement that's going to expire isn't an acquisition agreement. It is an agreement to be the exclusive marketer." AER 37 (Tr. at 15:20-25).

[23] The parties have often referred to the 2006 Agreement as an "exclusive marketing agreement" as a shorthand description (*see supra* at 32 n 17), but the 2006 Agreement also involves many other functions of Pacific Seafood's and

describes the future agreements subject to arbitration in terms of something that the agreement *does*—Pacific Seafood acting as the exclusive marketer, ER 428—rather than by using the label "exclusive marketing agreement."

Third, the district court read into paragraph 3(a) a limitation that is entirely absent from its text—namely, that the *only* new agreements subject to the arbitration clause were those that involved nothing more than exclusive marketing. In construing a contract, a court must not "'insert what has been omitted.'" *Yogman*, 937 P.2d at 1021 (quoting Or. Rev. Stat. § 42.230). Yet the district court interpreted paragraph 3(a) as if it stated that the parties would arbitrate any objections to "any new agreement that requires Pacific Seafood Group to act as the exclusive marketer of any seafood product produced by Ocean Gold Seafoods *but that grants Pacific Seafood no other rights with respect to Ocean Gold*." That inserted limitation was error.

Fourth, the district court omitted what was inserted in the Resolution Agreement by the parties. That too was error. *See Yogman,* 937 P.2d at 1021; Or. Rev. Stat. § 42.230. The parties inserted the term "any," an expansive word that signifies under Oregon law an intent to include without limitation *all* types of agreements that meet the condition of having Pacific Seafood act as an exclusive

---

Ocean Gold's operations as part of the joint venture, as set forth above. *See supra* at 4-6.

marketer. *See supra* at 30-31. In other words, the term "any" encompasses even agreements that are "categorically different" from each other, AER 4, so long as each agreement possesses the key characteristic that it would make Pacific Seafood act as the exclusive marketer of Ocean Gold-produced seafood. Yet the district court read the word "any" out of paragraph 3(a) without acknowledging its broad meaning.

Fifth, the district court reasoned that if the parties had intended to include proposed acquisitions, "the Resolution Agreement could have specifically mentioned the issue." AER 4. But, as noted above, the Resolution Agreement used the phrase "*any* new agreement," which *does* include proposed acquisitions. ER 428 (emphasis added). Moreover, the single word "any" not only efficiently resolves the acquisition issue, but also addresses all the other possible contractual permutations that Pacific Seafood and Ocean Gold might employ. *See supra* at 37-38 & n. 20.

Finally, the district court overlooked the rule that any ambiguity must be resolved in favor of arbitration. At worst, paragraph 3(a) gives rise to competing inferences. Even if the district court's reasoning that the parties could have specifically included acquisitions were plausible, the converse is also true. If the parties had intended a narrow arbitration clause, *they could have specifically*

limited the new agreement to an exclusive-marketing-only agreement. Confronted with competing inferences—the parties could have specifically included acquisitions, versus the parties could have specifically limited arbitration to exclusive-marketing-only contracts—the district court chose the narrow interpretation. But all federal courts are bound to resolve any ambiguity in the scope of an arbitration agreement in favor of arbitration. *Mastrobuono*, 514 U.S. at 66; *AT&T Techs.*, 475 U.S. at 650; *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25; *Ferguson*, 733 F.3d at 938; *Wagner*, 83 F.3d at 1049; *Industra/Matrix*, 142 P.3d at 1052; *Livingston*, 227 P.3d at 803. The district court's departure from this well-established rule requires reversal.

C. Because Paragraph 3(a) Is a Written Agreement to Arbitrate Plaintiffs' Objections to the Proposed Transaction, the District Court Erred by Denying the Motion to Compel Arbitration.

In the face of an arbitration agreement such as paragraph 3(a), a district court has no discretion. The FAA provides that an arbitration agreement "*shall*" be enforceable and that a district court "*shall* on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. §§ 2, 3 (emphases added). "By its terms," the FAA "'mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.'" *Chiron*, 207 F.3d at 1130 (emphasis omitted) (quoting *Dean Witter Reynolds*, 470 U.S. at 218).

Here, Pacific Seafood applied to the district court for an order compelling Plaintiffs to arbitrate and staying the district court proceeding pending the arbitration. Dist. Ct. Dkt. 71. As established above, the Resolution Agreement constitutes an agreement to arbitrate Plaintiffs' objections to the Proposed Transaction. Therefore, the district court possessed no discretion to deny Pacific Seafood's motion and erred by so doing.

VIII. CONCLUSION

For all the foregoing reasons, Pacific Seafood respectfully requests that the Court reverse the district court's denial of the motion to compel arbitration and stay proceedings pending the arbitration.

DATED: August 17, 2015

Respectfully submitted,

STOEL RIVES LLP
900 SW Fifth Avenue, Suite 2600
Portland, OR 97204

By: /s/ Timothy W. Snider
RANDOLPH C. FOSTER, OSB NO. 784340
TIMOTHY W. SNIDER, OSB NO. 034577
RACHEL C. LEE, OSB NO. 102944

MICHAEL J. ESLER, OSB NO. 710560
JOHN W. STEPHENS, OSB NO. 773583
KIM T. BUCKLEY, OSB NO. 781589
ESLER, STEPHENS & BUCKLEY, LLP
121 SW Morrison Street, Suite 700
Portland, OR 97204-3183

Attorneys for Defendants-Appellants

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Appellants state that this case is consolidated with a related case, No. 15-35257, which is an appeal from the district court's order issuing a preliminary injunction.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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

Certificate of Compliance With Type-Volume Limitation, 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 11,012 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or

   ❑ this brief uses a mono-spaced typeface and contains [state the number of] 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 in 14-point Times New Roman font.

   ❑ this brief has been prepared in a mono-spaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

Dated: August 17, 2015.

By: /s/ Timothy W. Snider
Timothy W. Snider
OSB No. 034577

CERTIFICATE OF SERVICE

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

Michael E. Haglund, OSB No. 772030
Michael K. Kelley, OSB No. 853782
Shay S. Scott, OSB No. 934214
Haglund Kelley LLP
200 SW Market Street, Suite 1777
Portland, OR 97201
Telephone: (503) 225-0777
Fax: (503) 225-1257
Email: mhaglund@hk-law.com
kelley@hk-law.com
sscott@hk-law.com

Attorneys for Plaintiffs-Appellees

John W. Stephens, OSB No. 773583
Michael J. Esler, OSB No. 710560
Kim T. Buckley, OSB No. 781589
Esler, Stephens & Buckley, LLP
121 SW Morrison Street, Suite 700
Portland, OR 97204-3183
Telephone: (503) 223-1510
Fax: (503) 294-3995
Email: stephens@eslerstephens.com
esler@eslerstephens.com
buckley@eslerstephens.com

Attorneys for Defendants-Appellants

DATED: August 17, 2015

Respectfully submitted,

STOEL RIVES LLP
900 SW Fifth Avenue, Suite 2600
Portland, OR 97204

By: /s/ Timothy W. Snider
RANDOLPH C. FOSTER, OSB No. 784340
TIMOTHY W. SNIDER, OSB NO. 034577
RACHEL C. LEE, OSB NO. 102944

Attorneys for Defendants-Appellants