Michael E. Haglund, OSB No. 772030
email: mhaglund@hk-law.com
Michael K. Kelley, OSB No. 853782
email: mkelley@hk-law.com
Shay S. Scott, OSB No. 934214
email: sscott@hk-law.com
Sara Ghafouri OSB, No. 111021
email: sghafouri@hk-law.com
HAGLUND KELLEY LLP
200 SW Market Street, Suite 1777
Portland, OR 97201
Phone: (503) 225-0777
Facsimile: (503) 225-1257

Attorneys for Plaintiffs

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 SEA FOOD COMPANY, PACIFIC SEA FOOD CO., PACIFIC SURIMI CO., INC., PACIFIC TUNA

Case No.: 1:15-cv-00108-CL

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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, LLC, 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.

I. INTRODUCTION.

Despite overwhelming evidence that Pacific Seafood Group has coveted control of Ocean Gold Seafoods, Inc. and its multiple affiliates for more than 15 years and has doggedly pursued this major consolidation of the West Coast seafood industry over the past 15 months, defendants

Haglund Kelley LLP
200 SW Market Street, Suite 1777
Portland, OR 97201
Tel: (503) 225-0777 / Fax: (503) 225-1257
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castigate plaintiffs' case as "an example of manufacturing a controversy" and trying to "bootstrap" a nonissue into a preliminary injunction. Defendants' scattershot list of arguments that range from weak to frivolous reminds one of the famous line from Shakespeare's Hamlet: "The lady doth protest too much, methinks."

Yet the governing standard for granting a preliminary injunction against a proposed merger under the Clayton Act is a relatively low bar: whether the effect of the merger has some likelihood of substantially reducing competition or tending to create a monopoly. *AlliedSignal, Inc. v. B.F. Goodrich Co., Inc.*, 183 F.3d 568, 574 (5th Cir. 1999). Defendants seek to isolate the "controversy" here to a single transaction which, because it has been "terminated," makes the controversy disappear. However, Section 7 of the Clayton Act[1] prohibits the merger of companies controlling large shares of a concentrated market, "not because of their past acts, but because their past performances imply an ability to continue to dominate with at least equal vigor." *United States v. General Dynamics Corp.*, 415 U.S. 486, 501 (1974).

Defendants' past conduct in controlling Ocean Gold Seafoods, by way of a long-term exclusive contract and their more recent acts in the run-up to a post-TRO letter of January 27, 2015 terminating a merger that was to close on January 22, 2015, provide unimpeachable evidence that Pacific Seafood Group is fixated on finding a way to maintain and enhance its control of Ocean Gold Seafoods when their exclusive marketing agreement expires in early 2016. The combination of defendants' acquisitive conduct and the remarkably narrow character of their proposed stipulation with the Oregon Attorney General demonstrates the continued risk

[1] Contemporaneous with this filing, plaintiffs have filed a Motion for Leave to File a Second Amended Complaint which adds an additional necessary defendant (a Pacific Seafood Group affiliate formed as a Washington LLC on December 18, 2014) revealed in transaction documents recently produced by defendants and an inadvertently omitted claim under Section 7 of the Clayton Act.

Haglund Kelley LLP
200 SW Market Street, Suite 1777
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Tel: (503) 225-0777 / Fax: (503) 225-1257
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to competition if the existing temporary restraining order is not converted into a preliminary injunction pending a trial on the merits. Without a preliminary injunction, defendants will be free—outside the scrutiny of this Court—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.

Plaintiffs have assembled a compelling record in favor of a preliminary injunction that is supplemented here with additional authorities and the second declarations of Dr. Hans Radtke and Michael E. Haglund. There has also been a very recent development that is worthy of note: the filing of an *Amicus Curiae* Brief by the Attorney General of the State of Oregon. In that brief, Oregon's Attorney General emphasizes four points:

- The importance of private enforcement of antitrust cases, which play 'an integral part in the congressional plan for protecting competition,' quoting *AlliedSignal*, 183 F.3d at 575;
- That plaintiffs satisfy all required elements for a preliminary injunction (likelihood of irreparable harm, likelihood of success, balance of hardships and the public interest favoring an injunction);
- The proposed merger is "presumptively unlawful given the degree of market concentration"; and
- Defendants' "decision to cancel the most recent proposed merger" neither negates that prior conduct nor the fact that, based on a review of defendants' narrowly crafted declarations, "the economic environment and the parties' motivations to merge or integrate remain unchanged."

Given the clarity of defendants' intent as revealed by past actions, plaintiffs are entitled to a preliminary injunction to prevent Pacific Seafood Group from carrying out a deal of any kind with Ocean Gold Seafoods, its affiliates, quota and fishing permits. The broad form of preliminary injunction that is necessary in order to stop further attempts by defendants to secure

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control of Ocean Gold Seafoods, no matter how creative, is attached as Exhibit A to this memorandum. In further reply, plaintiffs submit the Second Declarations of Hans Radtke and Michael E. Haglund

II. STANDARD FOR GRANTING A PRELIMINARY INJUNCTION.

A plaintiff seeking the equitable remedy of a preliminary injunction must demonstrate four elements, including: "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

In addition, the Ninth Circuit has held that its alternative "sliding scale" approach to injunctive relief survived *Winter*, at least as to the "serious questions" element of that approach. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-32 (9th Cir. 2011). Thus, a preliminary injunction may issue if a plaintiff establishes serious questions as to the merits coupled with a balance of hardships that tips sharply in the plaintiff's favor, so long as the other two elements are satisfied, namely a demonstrated likelihood of irreparable harm and a showing that the public interest supports an injunction. *Id.*

Here, either test counsels strongly in favor of an injunction maintaining the status quo by preventing Pacific Seafood Group from acquiring any control of Ocean Gold Seafoods, its affiliated entities or assets through purchase or any contractual or other means.

III. THE RECORD STRONGLY SUPPORTS ISSUANCE OF A BROADLY WORDED PRELIMINARY INJUNCTION.

A. Plaintiffs Satisfy All Four Preliminary Injunction Criteria.

1. Loss of competition constitutes irreparable harm.

In their most recent filing opposing a preliminary injunction, defendants contention that plaintiffs have alleged only "[a] threat of monetary damages" is simply wrong. Defs' Additional

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200 SW Market Street, Suite 1777
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Tel: (503) 225-0777 / Fax: (503) 225-1257
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Memo. in Opp'n to Mos. for a Preliminary Inj. at 6. Plaintiffs' First Amended Complaint specifically alleges that the Pacific Seafood Group/Ocean Gold Seafoods merger would cause plaintiffs to "suffer irreparable harm in the form of decreased competition for the sale of their seafood commodities." First Amended Compl. ¶ 56. A similar allegation is contained in plaintiffs' proposed second amended complaint at paragraphs 57 and 64, which is attached to Plaintiffs' Motion for Leave to File a Second Amended Complaint. Antitrust case law in the Ninth Circuit and elsewhere is abundantly clear: loss of competition constitutes irreparable harm that will support the issuance of a preliminary injunction. In *State of California v. American Stores Co.*, 872 F.2d 837 (9th Cir. 1989), the California Attorney General challenged the merger of the first and fourth largest retail grocery chains in the state. In ruling on the propriety of the district court's issuance of a preliminary injunction, the Ninth Circuit declared:

> The district court decided that the irreparable harm that would result absent injunction is the lessening of competition. *American Stores*, 697 F.Supp. at 1134. We agree with the district court that this is precisely the kind of irreparable injury that injunction relief under section 16 of the Clayton Act was intended to prevent. *See* 15 U.S.C. § 26; *United States v. BNS, Inc.*, 858 F.2d 456, 466 (9th Cir. 1988).

Id. at 844.

2. Likelihood of success on the merits.

To meet the likelihood of success test on the merits of its claims, plaintiffs must demonstrate both that the effect of a Pacific Seafood Group/Ocean Gold Seafoods merger would be a substantial lessening of competition and that plaintiffs are within the class of plaintiffs with standing to assert the likely antitrust injuries. *Allied Signal, Inc.*, 183 F.3d at 574, citing *Associated General Contractors of California v. California State Council of Carpenters*, 459 U.S. 519 (1983). The substantial lessening of competition, particularly in the onshore whiting and coldwater shrimp markets, is clearly demonstrated by the testimony of fisheries economist

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200 SW Market Street, Suite 1777
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Tel: (503) 225-0777 / Fax: (503) 225-1257
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Dr. Hans Radtke. Radtke Decl., ¶¶ 25-29; Second Radtke Decl. ¶ 7. As to antitrust standing, plaintiffs have clearly alleged a direct causal connection between the proposed merger and loss of competition in the markets into which they sell their seafood products. This satisfies the direct linkage test set down by the U.S. Supreme Court for antitrust standing in *Associated General Contractors*, 459 U.S. at 537-47.

On the likelihood of success issue, the Ninth Circuit's recently issued decision in *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, _____ F.3d ____, 2015 WL 525540 (9th Cir. Feb. 10, 2015) is instructive. Merger challenges under section 7 of the Clayton Act are assessed under a "burden-shifting framework." *Id.* at 3. The plaintiff establishes a *prima facie* case that a merger is anticompetitive "simply by showing high market share." *Id.* at 5. The burden then shifts to the defendant to rebut the *prima facie* case.

In *Saint Alphonsus*, the Ninth Circuit discussed the Herfindahl-Hirschman Index (HHI), which it characterized as a commonly used metric for determining market share, and squarely held that "[a]n extremely high HHI on its own establishes the *prima facie* case." *Id.* at 7. The HHI is calculated by summing the squares of the individual firms' market shares and gives proportionately greater weight to the larger market shares. *Id.* at § 5.3. The U.S. Department of Justice and the Federal Trade Commission use the HHI in their Horizontal Merger Guidelines to classify markets into three types: an unconcentrated market has an HHI below 1,500, a moderate concentrated market has an HHI between 1,500 and 2,500, and highly concentrated market has an HHI above 2,500. U.S. Dept. Justice & FTC, Horizontal Merger Guidelines, § 5.3 (2010).

Pacific Seafood Group's attempt to acquire Ocean Gold would give them permanent monopoly power over the coldwater shrimp and whiting markets. For onshore whiting, Pacific Seafood Group and Ocean Gold Seafoods each hold roughly half of a 65% market share which

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defendants control through an exclusive marketing agreement. When the HHI index under the Horizontal Merger Guidelines is applied to the combination of these two halves of a monopoly power 65% market share, the corresponding increase in HHI is nearly ten times more than that "presumed" to likely enhance market power in a highly concentrated market. Post-merger the HHI is over 4,250, which is well over the highly concentrated floor of 2,500. Under the federal merger guidelines, "mergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power." Horizontal Merger Guidelines § 5.3. Here, the proposed acquisition would involve an increase in the HHI of more than nearly 2,000 points in onshore whiting, which is unquestionably harmful to competition under any interpretation of the guidelines.

On this record, plaintiffs unquestionably have made out a *prima facie* case, thus demonstrating a likelihood of success on the merits.

3. Balance of hardships.

The balance of hardships and equities tips sharply in plaintiffs' favor. The very purpose of a preliminary injunction is to minimize the hardship to the litigants pending the trial on the merits. Defendants suffer only a delay in their long-held consolidation plans from the issuance of a preliminary injunction whereas the markets into which plaintiffs sell will be irreparably harmed through the loss of competition resulting from a merger or any other means by which defendants maintain control of Ocean Gold Seafoods beyond February 2016.

4. The public interest favors an injunction.

On this element, plaintiffs need only point to the position of the State of Oregon's chief law-enforcer of state and federal antitrust laws. The Oregon Attorney General strongly supports

Haglund Kelley LLP
200 SW Market Street, Suite 1777
Portland, OR 97201
Tel: (503) 225-0777 / Fax: (503) 225-1257
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issuance of a preliminary injunction here and opens the relevant section of its brief with the following sentence:

> Here, the proposed merger is presumptively unlawful given the degree of market concentration.

State of Oregon's Amicus Brief at 8.

B. Defendants' New Ripeness Argument is Without Merit.

For the first time in their most recent filings, defendants argue that this Court's consideration of Plaintiffs' Motion for a Preliminary Injunction is not ripe because defendants have not had an opportunity to engage in discovery. Defs. Additional Mem. In Opp'n to Mot. For Preliminary Inj. at 10-13. This position completely misapprehends the purpose and process involved in the disposition of preliminary injunction motions. As set out in the second Haglund declaration, in over 70 preliminary injunction matters in federal court over the last 35 years, the undersigned counsel has never seen party-initiated discovery occur during the run-up to a preliminary injunction hearing that occurs during a very early stage of the case. Second Haglund Decl. ¶ 2. There are sound practical reasons for this fact: the rules in this district do not allow expedited early discovery without leave of court and there is simply no time. *Id.* In this district, the standard practices for both sides in the preliminary injunction setting is to devote their energies to preparing their briefs and supporting declarations and then to proceed to oral argument on that record.

IV. HANS RADTKE'S DECLARATION IN SUPPORT OF A PRELIMINARY INJUNCTION IS ADMISSIBLE EXPERT OPINION.

In their motions to strike, defendants argue that certain statements in Hans Radtke's declaration are inadmissible under Federal Rule of Evidence (FRE) 602 (need for personal knowledge), FRE 701 (opinion testimony by lay witness), and FRE 702 (testimony by expert

Haglund Kelley LLP
200 SW Market Street, Suite 1777
Portland, OR 97201
Tel: (503) 225-0777 / Fax: (503) 225-1257
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witness). Docket No. 41. Specifically, defendants take issue with paragraphs 12, 19-21, and 28 of Radkte declaration, in which Dr. Radtke states that he learned that during trade shows it is common for Pacific Seafood personnel to emphasize that the Pacific Seafood "controls" and "makes" certain markets, that he learned about multiple companies who are interested in acquiring Ocean Gold Seafoods, and that there is a high risk that the Pacific Seafood's plant at Warrenton will not be rebuilt or will be a much smaller operation. *See* Radtke Decl. at ¶¶ 19-21, 28. In defendants' view, the Radtke declaration does not contain sufficient facts to support he had personal knowledge of the information that was the bases of his statements and, instead, he impermissibly relied on hearsay information. Defs. Additional Mem. In Opp'n to Mot. For Preliminary Inj. at 10-13; Defs' Mot. to Strike at 3-4.

It is worth emphasizing that all of Dr. Radtke's statements were made in his capacity as an expert witness and therefore the Federal Rules of Evidence related to lay witnesses (FRE 602 and 701) are irrelevant to determine admissibility. Instead, the requirements for expert witnesses under FRE 702 are controlling, which provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

FRE 702.

Although they criticize Dr. Radtke's opinions as based on inadmissible hearsay, defendants completely ignore the broad provision of FRE 703, which specifically states that

Haglund Kelley LLP
200 SW Market Street, Suite 1777
Portland, OR 97201
Tel: (503) 225-0777 / Fax: (503) 225-1257
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"[a]n expert may base an opinion on facts or data in the case that the expert *has been made aware of or personally observed.* If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, *they need not be admissible for the opinion to be admitted.*" FRE 703 (emphasis added). The Federal Rules of Evidence contemplate that unlike ordinary witnesses, "an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 (1993). The purpose behind this relaxation of the firsthand knowledge requirement is to direct attention "to the validity of the techniques employed [by the expert] rather than to relatively fruitless inquiries whether hearsay is involved." FRE 703 advisory committee's note. Accordingly, defendants' assertions that certain portions of Dr. Radtke's declaration should be disregarded for lack of personal knowledge and hearsay are erroneous and should be rejected.

V. CONCLUSION.

Based on the record herein and the reasoning of the *amicus* brief filed by the State of Oregon, the Court should issue a broadly worded preliminary injunction in the form attached as Exhibit A, which will prevent irreparable harm to competition in three important West Coast seafood markets pending the ultimate resolution of this case.

DATED this 23rd day of February, 2015.

HAGLUND KELLEY LLP

By: /s/ Michael E. Haglund
Michael E. Haglund, OSB No. 772030
Attorneys for Plaintiffs

Haglund Kelley LLP
200 SW Market Street, Suite 1777
Portland, OR 97201
Tel: (503) 225-0777 / Fax: (503) 225-1257
0000031556H073PL23

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of February, 2015, I served the foregoing **PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**, the following by the following indicated method(s):

Michael J. Esler
John W. Stephens
Kim T. Buckley
Esler Stephens & Buckley, LLP
121 SW Morrison St., Ste. 700
Portland, OR 97204-2021
esler@eslerstephens.com
stephens@eslerstephens.com
buckley@eslerstephens.com

☐ by **mailing** a full, true and correct copy thereof in a sealed first-class postage prepaid envelope, addressed to the foregoing attorneys at their last known office address, and deposited with the United States Post Office at Portland, Oregon on the date set forth above.

☐ by **emailing** a full, true and correct copy thereof to the foregoing attorneys at their last known email addresses on the date set forth above.

☐ by causing a full, true and correct copy thereof to be **hand delivered** to the attorneys at their last known address listed above on the date set forth above.

☐ by sending a full, true and correct copy thereof via **overnight mail** in a sealed, prepaid envelope, addressed to the attorneys as shown above on the date set forth above.

☐ by **faxing** a full, true and correct copy thereof to the attorneys at the fax number shown above, which is the last-known fax number for the attorneys' office on the date set forth above.

☒ by transmitting full, true and correct copies thereof to the attorneys through the court's Cm/ECF system on the date set forth above.

/s/Michael E. Haglund