UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

THE HON. MICHAEL J. McSHANE, JUDGE PRESIDING

JEFF BOARDMAN, et al.,
Plaintiffs,
v.
PACIFIC SEAFOOD GROUP, et al.,
Defendants.
) No. 1:15-cv-00108-MC

REPORTER'S TRANSCRIPT OF PROCEEDINGS

EUGENE, OREGON

TUESDAY, JUNE 2, 2015

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PROCEEDINGS

TUESDAY, JUNE 2, 2015

THE CLERK: Now is the time set for Civil Case 15-00108, Boardman, et al. versus Pacific Seafood Group, et al., oral argument on motion to compel.

THE COURT: Hi folks. This is Judge McShane. We are on the record, so maybe we could have the attorneys please introduce themselves for the record, spelling your last name for the court reporter, starting with plaintiff's counsel.

MR. HAGGERTY: Mike Haglund for plaintiff, H-A-G-L-U-N-D.

MR. KELLEY: And Mike Kelley for plaintiffs, K-E-L-L-E-Y.

THE COURT: All right. Thank you, Mr. Kelley, Mr. Haglund.

I will begin by apologizing to both of you. Had I been paying more attention, I would have set this, I think, in person. I kind of assumed it was in person, and I realize there were some phone calls this morning about getting people here, and I wish I was a little more on top of that because I know there's a lot of -- well, a lot of issues here that we need to discuss. But I do appreciate your patience with doing this over the phone.

I did want to focus us as much as possible this

afternoon on really, to me, what the meat of the issue is, which is, you know, what does the language in Paragraph 3(a) of the settlement agreement actually mean.

So, you know, I know there's been other issues that both sides have raised. You know, the law of the case, estoppel, the Federal Arbitration Act. Let me just kind of go through my thoughts on those because I don't think either of you is going to change my mind on those issues and pull me away from what I think is the central issue, and that is what does this language mean.

So I know, Mr. Haglund, you raised the issue of -- that I should rule -- deny the motion outright just based on the law of the case, and I understand your point. You know, I think your argument is Judge Panner -- these issues have been raised in front of Judge Panner in the motion to dismiss and in the motion for the TRO and that, by inference, your argument that he must have ruled on this issue.

You know, unfortunately, I just don't know from looking at the orders what exactly Judge Panner intended. So at this stage, really, the only inference I am willing to make from those bare orders that deny the motion to dismiss and granting the TRO is that Judge Panner just at this point wished to keep the status quo.

And I just -- you know, I don't want an inference

that could possibly be completely wrong to deny the defendant from getting a straight-up hearing on this instant motion. So I am not going to dismiss the matter based on law of the case.

Mr. Haglund, you also raised the issue of estoppel. You know, I agree with you that the actions of the parties in how they approached the agreement in light of the acquisition of Ocean Gold is certainly relevant to what they were thinking about whether they believed at the time -- whether the defendant believed at the time that the acquisition fell under the earlier Resolution Agreement, but I don't think it rises to the level of judicial estoppel. They really didn't raise the issue in a -- so much a judicial proceeding.

I am still a little confused why anybody contacted a retired judge when I just don't see what role Judge Hogan would have played in this case any further. I mean, that's really neither here nor there, but both sides have taken some somewhat inconsistent positions on whether the acquisition of Ocean Gold by Pacific fell within Paragraph 3(a) of the settlement agreement.

So I am not going to apply estoppel, although certainly there is some relevance to the actions of the parties in the case.

And then Mr. Kelley, you spent quite a bit of time

discussing the Federal Arbitration Act. I mean, the only thing I can tell you on that is, I mean, if I retained jurisdiction, ancillary jurisdiction over a settlement agreement, I would be somewhat surprised if the parties came back to me later with a dispute and told me that I had to comply with the Federal Arbitration Act. I mean, Article I judges, magistrates, are not private arbitrators. Our jurisdiction in these cases is based on ancillary jurisdiction.

So, you know, I know you have argued quite a bit that, you know, the Federal Arbitration Act should be read broadly, but in my mind, in these settlement cases, you know, the judges are not acting -- they may be the final arbiter, but they are not acting as private arbitrators. They are acting as Article III or Article I judges under the ancillary jurisdiction of the court, and that's what the parties agreed to is that ancillary jurisdiction of the court. I think Judge Hogan lost any jurisdiction the minute he retired.

The idea that somehow he was going to agree to be a private arbitrator outside of his job as a judge just doesn't make sense in light of the language of the agreement.

So what I would like to do, really, is focus on this language in Paragraph 3(a). One of you wants to read

it very narrowly and one of you wants to read it very broadly. The language is what it is, and I think really, Mr. Kelley, I need you to address this. I mean, just say you are coming to me as the settlement judge. I have got my ancillary jurisdiction. And, you know, we are not talking about, you know, an exclusive marketing agreement. We are now talking about a -- really a buyout of Golden -- Ocean Gold.

And I guess the question I would have to you is you are asking me to decide whether a merger is in fact pro-competitive or not. But how -- what about these issues that are going to be raised by Mr. Haglund that, you know, what about the, you know, antitrust kind of arguments under the Sherman Act? The legality of the merger? Those kind of arguments seem to be foreclosed by the agreement. And I guess I would look at it and maybe say, well, I only agreed to deal with exclusive marketing agreements. I didn't agree to resolve disputes around a takeover of the company.

So let me turn it over to you, Mr. Kelley.

MR. SNIDER: Your Honor, this is Mr. Snyder. I think that you are referring to the defendants' argument with respect to the Federal Arbitration Act. When you mentioned Mr. Kelley, I think you are talking about me.

THE COURT: Okay. I am sorry. I guess I didn't hear you introduce yourself, Mr. Snyder. I am sorry.

MR. SNIDER: No problem. And just for the record, this is Tim Snider, S-N-I-D-E-R, and I am appearing on behalf of defendants, and it is our motion to compel arbitration.

Mr. Esler, Mr. Stephens are also on the phone.

THE COURT: Okay. Thank you. Sorry that I must have cut you off too quickly there. Sorry.

MR. SNIDER: No. No problem. You know, you jumped right to the heart of the issue, which is what does Paragraph 3(a) mean. And, you know, the premise of our motion is that Paragraph 3(a) is an arbitration clause, and that as an arbitration clause -- and once you decide it is an arbitration clause, then this case needs to go out of federal court and into the arbitration process the parties agreed to in 3(a).

In listening to Your Honor kind of lay that issue out, it sounds like I have a little bit of an uphill battle there, but I do want to address the argument that 3(a) is an arbitration provision and is not an ancillary jurisdiction provision. And let me maybe just start there, Your Honor, with the ancillary jurisdiction idea.

Your Honor is correct and plaintiff correctly articulates that ancillary jurisdiction clauses give federal courts continuing jurisdiction to enforce settlement agreements.

Our point is that there is an ancillary jurisdiction clause in the parties' class action settlement agreement from the *Whaley* case, but that is not Paragraph 3(a). It's Paragraph 24.

And if you look at the Resolution Agreement, we argued this in our papers, and you read Paragraph 24, it is absolutely an ancillary jurisdiction clause, and it provides that the court, not Judge Hogan, not Judge Jelderks, but the court shall have continuing jurisdiction to interpret, enforce, and just implement the settlement. So Paragraph 24 really is the ancillary jurisdiction clause.

Now, Paragraph -- the other reason that Paragraph 3(a) can't be, in our view, an ancillary jurisdiction clause is something that plaintiffs also point out in their brief. They explain that ancillary jurisdiction clauses cannot extend to new disputes or to new facts.

And Paragraph 3(a), the entire premise of it, is that in the future, the parties, Pacific Seafood and Ocean Gold, might enter into some sort of a new agreement. And and it's possible that as a result of that new agreement that the plaintiff fishermen in this case will have objections to that new agreement. We don't know what that new agreement is going to be.

THE COURT: Well, we know it has to be as to the exclusive marketing of a seafood product by Ocean Gold. You

use the word -- you use the word "new agreement" without ever using in your briefing the condition on that. There is a conditional clause there that you routinely ignore when you keep saying the word "new agreement."

MR. SNIDER: And I did not intend to ignore and I don't intend to ignore it now.

THE COURT: Well --

MR. SNIDER: It's any new agreement that requires Pacific Seafood to act as the exclusive marketer. So it's not any new exclusive marketing agreement. It's any new agreement at all that might require Pacific Seafood to act as an exclusive marketer. And this goes back to the *Whaley* lawsuit, which --

THE COURT: Right.

MR. SNIDER: -- you know, back in 2010 because there were two issues that placed Ocean Gold front and center in that lawsuit, the 2010 lawsuit, the *Whaley* lawsuit. One was that the plaintiff challenged a proposed acquisition of Ocean Gold. And they said that proposed acquisition of Ocean Gold violates the federal antitrust laws, and they requested a temporary restraining on that transaction.

THE COURT: Right. And that became moot, right, when Pacific decided they were no longer going to acquire Ocean Gold?

MR. SNIDER: That's true.

THE COURT: And so as you go into the settlement, then, the issue becomes, in 2016, the exclusive marketing agreement is going to expire, right?

MR. SNIDER: That's correct.

THE COURT: And then the question is if a new marketing agreement -- excuse me. I have a bit of a cold. If there's going to be a new marketing agreement around this exclusive marketing by Pacific, there's going to be notice, there's going to be -- if there's any objections, it goes to either Judge Hogan or, if he's gone, it goes to Judge Jelderks, and they have agreed that they will decide whether it is -- that that kind of agreement is pro-competitive or not. But it doesn't say, "And in the event Pacific decides to acquire Ocean Gold once again that the plaintiff is precluded from attacking the merger or bringing a Sherman Act case." It seems you are asking a lot for that paragraph.

MR. SNIDER: Well, respectfully, Your Honor, what it says is it says any new agreement that requires Pacific Seafood to act as an exclusive marketer. It doesn't say --

THE COURT: Of any seafood product produced by Ocean Gold Seafoods.

MR. SNIDER: Right. And our point is that -- I want to kind of go through this just briefly, Your Honor.

THE COURT: Okay. Go ahead.

MR. SNIDER: Yes. The first point is this is not an ancillary jurisdiction clause. It's a clause that would resolve future disputes as to future agreements that haven't been proposed yet or entered into or even objected to.

And if that is an arbitration clause, and we submit that it is, the question then becomes, okay, how do you interpret that agreement to arbitrate. And that brings in, you know, the entire federal panoply of case law that says that when you interpret an agreement to arbitrate certain disputes, and all an arbitration agreement is in the Ninth Circuit is an agreement to submit a dispute for decision by a third party. That's all it is. And this is clearly that.

And so if this is an arbitration clause, then you have to look at that language and say, okay, what are the new agreements that would require Pacific Seafood to act as an exclusive marketer. We know that one agreement, and I think everybody would agree that if Pacific Seafood proposed an exclusive marketing agreement No. 2 and submitted that, that that would absolutely, 100 percent fit within the dispute resolution provision of 3(a).

THE COURT: Right.

MR. SNIDER: And the question is does 3(a) -- can it be read more broadly under the federal law that presumes

and construes things in favor of arbitration to encompass an agreement that is, in many ways, like an exclusive marketing agreement because it would require Pacific Seafood to act as the exclusive marketer. Pacific Seafood, by acquiring Ocean Gold, acquires all of Ocean Gold's seafood. So it is the exclusive seller, owner, marketer of any seafood produced by Ocean Gold post-transaction. And because of that, you look at the actual agreement. And this agreement is in the record. I believe it's attached to Mr. Haglund's declaration.

THE COURT: I have the agreement.

MR. SNIDER: It's Docket 35-1.

And so when the parties, Ocean Gold and Pacific Seafood, are putting together this agreement, they are thinking that this agreement is subject to this Provision 3(a). And we know that because they bake in specific terms into the agreement that shows that they are going to be submitting this agreement if there are objections to both the plaintiff and to Judge Hogan.

That's found at Paragraph 4.7 of the proposed purchase agreement that's the subject of this case. It's the July, 4, 2014 agreement. And Paragraph 4.7 says that the parties have to keep the agreement confidential except that they can let Judge Hogan know about it because there might be objections. And it also permitted the parties to

disclose it to people to whom they needed to obtain approvals or, quote, non-objection, which is a reference to 3(a) because the parties recognized that this agreement is going to have the effect of requiring Pacific Seafood to act as an exclusive marketer for all the seafood that it will now own, not just contract with to sell, but own as the owner of Ocean Gold.

And so from even in the formation transactional documents that are the subject of this case, on the defendants' side of the equation, defendants are thinking, okay, we have got to disclose this transaction to the other side. The other side may object. And the fact that Judge Hogan is no longer a federal judge is not going to mean that he's not the person who can decide this --

THE COURT: You are not going to convince me on that one. The idea that a federal judge would bind himself to a private arbitration is a conflict. I mean, that just isn't going to happen.

Let me ask you this, then, Mr. Snider:

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.

This is a very -- I mean, if you asked a group of business students, is the acquisition of a company the same thing as acting as an exclusive marketer and reaching a marketing agreement, I mean, wouldn't they all say no? I think your argument is the effect is the same, but aren't they different agreements?

MR. SNIDER: I will concede, absolutely, Your Honor, an acquisition agreement is a different agreement than an exclusive marketing agreement. And if this language said that in the event Pacific Seafood and Ocean Gold intend to enter into any new exclusive marketing agreement, we wouldn't be here.

The language is "intend to enter into any new agreement that requires Pacific Seafood Group to act as an exclusive marketer." And my point is and I think our point is that given the *Whaley* lawsuit, given the challenge to an acquisition on the one hand, given the challenge to an exclusive marketing agreement on the other hand, the parties said Pacific Seafood is going to keep buying fish, these fishermen are going to keep fishing, this exclusive marketing agreement is going to expire.

It's very likely these parties are going to try to enter into some other type of arrangement, be it an exclusive marketing agreement, be it another type of agreement that has that effect. And so they used broad

language to ensure that the plaintiffs in this case got notice, got an opportunity to object, and to ensure that the defendant and plaintiff had a -- what I will call a quick and -- you know, ideally a quick and efficient means of resolving those objections before a decision maker who was provided with a specific standard, not whether the proposed new agreement is a violation of Sherman Act 1 or 2 or Clayton. It's whether the agreement is pro-competitive, and, if so, it may be approved. It wasn't we were going to have a full-blown federal lawsuit. They had just tied that federal lawsuit up and ended it, and one of the big motivators for that was, as you can imagine, Your Honor, these cases are very expensive. The parties are spending millions of dollars on legal fees.

THE COURT: Mr. Snider, I know that. But where anywhere in this agreement does it say the word "acquisition"? It seems to me that the fact is by the time you were in settlement, the issue of acquisition was out of the case. The only issue was the fact that a 2016 expiration date on the exclusive marketing agreement was coming up and that it was looking forward to any new kind of agreement that would continue that 2000 -- continue past 2016.

I would think if the parties really wanted to say, you know, and if there was going to be a new attempt at an

acquisition of Gold that that would have been included in the language.

MR. SNIDER: Well, the parties were certainly, I think, concerned that there could be an acquisition in the future. In fact, and I think both sides of the equation thought before this lawsuit, before the issue came up that Paragraph 3(a) governed. I mean, it's interesting because when the defendants raised this issue in December of 2012, Mr. Haglund, and you have this in the record, he sends an e-mail saying, well, this clearly implicates Paragraph 3(a). You can't get around Paragraph 3(a) by calling it an acquisition. You have to -- you know, Paragraph 3(a) is directed to exclusive marketing agreement that -- any agreement that would have that effect.

He then files this lawsuit, Your Honor, and had Claim 3 in the original complaint which accuses Pacific Seafood of breaching Paragraph 3(a) by entering into this agreement.

THE COURT: Right.

MR. SNIDER: This proposed acquisition agreement. So both sides, on the defense side in putting the transactions together, is contemplating this has to go to Hogan if there's objections. They notify them of objections. And on the plaintiffs' side, they are looking at the agreement going, yeah, that breaches the agreement.

THE COURT: How quickly between the notice and -- I mean, there is an accusation here, we'll call it that, is that the defense gave us notice just days before the acquisition was to be perfected.

MR. SNIDER: So I think that that is disputed in the record, but I think the undisputed facts are as follows:

The notice is given on December 12 of the transaction. And for the next six weeks, five to six weeks, defendants sit back and wait to hear from Mr. Haglund if the plaintiffs objected to the transaction. And they waited and they waited. And Mr. Haglund asked for more time, and Pacific Seafood Group, the defendants, waited.

And then on the 21st of January, Mr. Haglund advised that there were objections, and Mr. Stephens prepared an e-mail to Judge Hogan because that was the thinking. Judge Hogan -- okay. There's an issue under agreement 3(a) or maybe it's under Paragraph 10, which is the broader dispute resolution provision, and an e-mail was written off to Judge Hogan. Before that e-mail could be sent, however, this lawsuit was filed alleging, by the way, breach of contract under 3(a).

THE COURT: Right.

MR. SNIDER: As well as Sherman Act violations and then the TRO motion, and then everybody was off to the races on whether this transaction would be enjoined.

THE COURT: Okay.

MR. SNIDER: And then we have now circled back to say, okay, there's an injunction now. Are we in the right forum. Didn't we agree to resolve this a different way.

And that's the motion.

THE COURT: Sure. All right. I appreciate that.

Mr. Haglund, can I hear from you?

MR. HAGLUND: Yes, Your Honor.

First off, let me just cover some of the facts that I think are not completely accurate regarding the development of the settlement agreement. I served as lead counsel with Mr. Kelley throughout the entirety of the *Whaley* case and now in the *Boardman* case.

Mr. Stephens and Mr. Esler and the Mayer Brown firm out of Washington, D.C. were the lawyers for Pacific Seafood throughout the *Whaley* case.

When we were negotiating this settlement agreement with Judge Hogan, I never in my wildest dreams thought that Paragraph 3(a) could be construed to cover the acquisition.

It was a completely moot issue at that point. The record in the *Whaley* case makes clear that we learned about this after filing the case, I believe in June, in the fall, and we filed a second amended -- actually, we -- let me back up a second.

We filed the case in the summer of 2010. And then

in early discovery, we got access to what we consider to be a highly extraordinary contract, that being the Ocean Gold-Pacific Seafood Group contract. And it contained provisions that were very troubling in that they very clearly granted Pacific Seafood Group the power to direct its competitor in the input markets for these deliveries of fish from our clients, to direct Ocean Gold what it was going to pay for whiting, shrimp, ground fish, et cetera. And we immediately, after receiving that contract from Alaska counsel for Ocean Gold, filed to amend our complaint in *Whaley*, which occurred on October 8th, 2010, and we sought only to -- a declaration that that contract was void because it required price fixing. And we added a claim under Section 1 of the Sherman Act for restraint of trade.

There was no reference in the complaint to any acquisition. It wasn't until mid-November, Your Honor, of 2010, about a little over a month later, when sources within the industry advised us that Pacific Seafood, now in the midst of an antitrust case, was proceeding to acquire Ocean Gold and its affiliates. And we immediately filed a motion for a TRO, which was granted by Judge Panner, and within a matter of days Pacific Seafood Group called off the transaction, mooted the entire point, and that became the subject of a stipulation. And we never amended the complaint to add an unlawful merger claim under the Clayton

Act as now exists in the *Boardman* case.

The issue of Pacific Seafood Group acquiring Ocean Gold never came up again in the history of the litigation throughout all of 2011 and half of 2012 when the case was concluded by virtue of the resolution or settlement agreement.

We have a situation here where this is a case that involves an entirely new claim for unlawful merger under the Clayton Act and new Sherman -- a new Sherman Section 2 monopolization claim that are based on entirely new facts. This is the second, you know, subsequent 2013-2014 effort through these extensive negotiations and multiple variations of the documents to acquire a complete takeover of a major competitor.

I should point out, Your Honor, that this -- a number of the issues before you are also the subject of a Ninth Circuit appeal that's being prosecuted by Pacific Seafood Group, and it happens that our brief in response to their appeal of Judge Panner's preliminary injunction order was due yesterday.

And as I am sure you can understand, when you go to the lengths that are necessary to prepare what we believe is a quality brief on issues that were decided in a context that required some significant speed in the District Court involving TROs and a preliminary injunction, you come across

other authority. And I had hoped we would be in person before you, but I do have some e-mails to send if Your Honor wishes.

But one point that I think is really worth making here on this topic, the new aspect of these claims and the fact that the prior effort to take over Ocean Gold was resolved by stipulation is that there is controlling Ninth Circuit authority, specifically a case that is *Sekaquaptewa* --

(Reporter interrupted.)

MR. HAGLUND: I think I am going to -- it appears to be *Sekaquaptewa v. MacDonald*.

THE COURT: Could you spell that for us, please.

MR. HAGLUND: Yes, Your Honor. It is S-E-K-A-Q-A-E-T-E-W-A [sic] *v. MacDonald*, M-A-C, and it is at 575 F.2d 239 (9th Cir. 1978).

And what that case stands for is that when a -- for issue preclusion purposes I am quoting the case, and an issue is not deemed to be actually litigated if it is the subject of a stipulation between the parties, which is exactly what happened here.

This issue was not litigated, was not a part of any relief, was not a part of a merger into the judgment, and it is a clearly new claim.

THE COURT: But Mr. Haglund, isn't there an

argument that -- I mean, it's hard to imagine that you weren't contemplating that there would be some new attempts at acquisition. I mean, there was nothing in your agreement with Pacific Seafood that they would not in the future try to do the very thing that you had initially objected to, and that is acquire Pacific Gold, right? I get these names -- Gold -- Ocean Gold. Sorry. And that, you know, that should -- that failure should be, I guess, read into this agreement that all of these kinds of disagreements down the road were going to be handled by either Judge Hogan or Judge Jelderks.

MR. HAGLUND: Well, there was -- the only issue that we are going to be subject to the provision for alternative dispute resolution by a federal judge under the ancillary jurisdiction that allows the judge to interpret or enforce this agreement, which was incorporated into the judgment of dismissal, is the -- the only provision that the defendants are relying on here is 3(a). And if you look at 3(a), one has to look at it, I think, from an antitrust perspective. The *Whaley* case and the *Boardman* case are about the input market, which is the ex vessel prices that the seafood processers, Pacific, Ocean Gold, the other fairly few competitors on the West Coast pay for the raw fish that are delivered from fishermen.

The marketing agreement addresses the output

market, what does Pacific Seafood do with the --

THE COURT: Mr. Haglund, could I stop you for just a second. I think we have may have -- somebody may have been disconnected. Let me --

(A conversation was had off the record.)

THE COURT: Could I just ask, starting with plaintiffs, who we have. We have Mr. Haglund on the line, Mr. Kelley.

Mr. Snider, are you still on the line?

Mr. Snider?

All right. Sounds like we lost him.

Do we have anyone else on the line other than Mr. Haglund? Mr. Kelley? You are both here, right?

MR. ESLER: Yeah. Your Honor, you have Mr. Esler on the line as well.

THE COURT: Okay. I think we lost Mr. Snider. I am sorry, Mr. Haglund.

Again, in retrospect, I wish we were all here in person. But let's get everybody back on the line and we'll have to have you back up a little bit. Okay?

MR. HAGLUND: So do you want me to just wait?

THE COURT: Yeah. If you could just wait until we get Mr. -- it sounds like we need to get Mr. Snider back on the line.

THE CLERK: I will have to call them all back.

THE COURT: Sorry. We'll have to hang up. The only way we can do this is to call you onto one conference line. We can't bring somebody in. So if you would just hang up, all of you, for a moment, I will have Ms. Pew recall all of you and reset the conference.

MR. HAGLUND: Okay. Thank you.

MR. ESLER: Thank you, Your Honor.

(A conversation was had off the record.)

THE CLERK: Counsel.

THE COURT: All right. This is Judge McShane again. Thanks for your patience, folks.

Let me just make sure we have everyone. We have got Mr. Haglund, Mr. Kelley?

MR. HAGLUND: Yes, Your Honor.

THE COURT: All right. And then we have the Esler/Stephens group.

MR. ESLER: Correct.

THE COURT: All right. And Mr. Snider, we have you and whoever might be with you from the Stoel Rives group?

MR. SNIDER: Yes, Your Honor.

THE COURT: Okay. Great.

So Mr. Haglund -- well, actually, Mr. Snider, I think you were the group that got cut off. Maybe you can give us a little better sense of what you last remember

Mr. Haglund saying.

MR. SNIDER: Yes. Mr. Haglund was just talking about the *MacDonald* case with a very hard to pronounce first party name and he had cited the case. And that's when we lost the thread.

THE COURT: Okay. So Mr. Haglund, you were doing such a wonderful job, and now you are going to have to repeat yourself. I am sorry. If you'd like to go ahead and kind of go from the case with the name we are all having a hard time pronouncing and maybe, again, go from there, if you could.

MR. HAGLUND: Certainly, Your Honor. I think that with respect to the case, the only other point that I made, and I quoted from the case, that in a situation where you have a stipulation in the middle of a case that resolves an issue and in effect sets it aside as not an issue in the case, you don't have a situation where there can be any release or merger of that contention or claim for purposes of res judicata or the release language or the merger in the judgment, and the language I quoted from the case was simply, quote, For issue preclusion purposes, an issue is not deemed to be actually litigated if it is the subject of a stipulation between the parties.

Now, I then turned back to, I think, your question regarding the language that is in Section 3(a) of the

Resolution Agreement.

And I think that's where -- I think that catches us up, and I am going to move forward from there.

THE COURT: Okay.

MR. HAGLUND: The language in that agreement, as you pointed out, talks about a new agreement, and then it's very specific, that requires Pacific Seafood Group to act as the exclusive marketer of any seafood product produced by Ocean Gold Seafoods.

I think Your Honor is right on the money that any MBA class would absolutely say no to the effort to equate a merger or a takeover of a competitor with a company simply having the right to market all of a competitor's production or finished products.

An economist would -- an antitrust economist would also agree that they are as different as night and day. The merger, Your Honor, eliminates a company. This language talks about exclusive -- to act as the exclusive marketer of any seafood product produced by Ocean Gold Seafoods. Post-transaction there is no Ocean Gold Seafoods.

Everything is subsumed within, and that's what their documents showed. There is nothing left of Ocean Gold Seafoods. This is a stock acquisition. Everything folds into the entity of Pacific Seafood Group that was acquiring all of these different assets. You have a situation where

the competitor that existed before is completely removed from the marketplace. And that's exactly why the State of Oregon in the attorney general's amicus brief characterized the proposed merger as, I quote, presumptively unlawful.

And I think it's worthwhile to point out, Your Honor, I don't know how much of that 2006, ten-year agreement between Pacific Seafood and Ocean Gold you have reviewed, but there are actually two provisions in the Resolution Agreement that relate directly to the agreement. One is the one that you have heard so much about in the briefing. One that wasn't brought up in anyone's brief but I think it's worth mentioning and addressing is that Section 3(b) required Ocean Gold and Pacific Seafood to amend that agreement to eliminate a number of offending provisions.

And those provisions were the ones that were the reason the attack on this contract by way of a Sherman Act Section 1 claim was originally asserted once we got the contract because it included provisions that gave Pacific power over Ocean Gold's pricing, which price fixing is an absolute no-no between competitors under the antitrust laws.

THE COURT: So Mr. Haglund, that -- okay. So I am looking at 3(b). So the amendments to the February 9th, 2006, agreement, that's the same agreement that's going to expire in 2016?

MR. HAGLUND: Right. And the point I am trying to make here is that one of -- and I'd point out to Your Honor, again, this is not in the record at this moment, but it is something you can take judicial notice of, the *Whaley* case, second amended complaint that we filed in -- I don't know exactly the date, but attached to it is a copy of this agreement. And one of the provisions in the agreement, and there are a couple like this; I will just read one of them, stated, "Pacific Gold shall be solely responsible for determining raw material costs regardless of whether purchased by Ocean Gold or by others at the direction of Ocean Gold"; in other words, clear statements that Pacific was responsible for determining what Ocean Gold offered to fishermen in the marketplace for ground fish, whiting, et cetera.

And they denied that they ever implemented these provisions, but they agreed in the settlement agreement that they would be stricken from the document so that we have a situation with the Resolution Agreement in place, Your Honor, where Pacific Seafood and Ocean Gold are operating as competitors competing on the West Coast for not only fishing vessels but, most importantly, the catches from those vessels that come to their production plants. So you have a situation, Your Honor, where, from our client's standpoint, they, at least from a post-Resolution Agreement standpoint,

have a situation where Ocean Gold is operating -- is supposed to be, with these provisions eliminated, operating out there in the marketplace as an independent buyer competing on price with Pacific and its other plants on the West Coast.

And the most pro-competitive feature -- one of the most pro-competitive features of this Resolution Agreement in our view and I believe that of the attorney general was the fact that although Ocean Gold was independent in the input market for the sale of fish to be processed in its plant competing with Pacific and others, the 2006 agreement, which affected the output market and gave Pacific control over where and how and at what price the processed seafood products from the Ocean Gold plant were sold at, that was only related to the output market. And the most pro-competitive feature that -- or one of the most pro-competitive features that we saw in the agreement was the prospect that Ocean Gold, in 2016, the end of February 2016, would become completely independent.

And I think the larger point I am making here, Your Honor, is that when you look at the language of 3(a), the idea that it can be stretched to cover a merger or a takeover where Ocean Gold is completely eliminated as a competitor is just not a reasonable -- not anywhere near a reasonable approach to interpreting what that sentence

means.

THE COURT: Okay. Anything else, Mr. Haglund, from you?

Mr. Haglund, are you still there? Anything else?

MR. HAGLUND: I am, Your Honor. Let me just double-check something.

THE COURT: I guess the only question I have, maybe, is that -- and, again, this is always in retrospect, but it does seem remarkable that the parties weren't contemplating at the time that there might be another attempt at an acquisition and that you would not have wanted to, I guess, settle that issue within the agreement. I mean, was your thinking simply you would just bring another lawsuit? I mean, I am not sure -- or was it --

MR. HAGLUND: Well, Your Honor, in fact, we believe that because -- I mean, you see from the AG's papers, you know, this sort of merger, when you look at the Hirschman-Herfindahl index that the FTC and DOJ put out where you take the square of the market shares of the two competitors that are proposing to merge, and if it increases the -- if it increases by more than 200 points, you have a presumption that there are potential problems with the merger. Here the increase is over 2,000 -- or nearly, not quite, 2,000 points.

Given the market shares that we learned Pacific

had and Ocean Gold had during the course of that litigation and given how quickly they abandoned the merger and it never saw the light of day in any further pleading, it was never a matter that was discussed in any negotiations. The idea that they would attempt to do this was not something that we thought they'd ever do. And I think it would -- from a policy standpoint, Your Honor, it would do a tremendous disservice to, I think, the way in which class action agreements of this type are interpreted if the 400 fishermen who made up this certified class are deemed as Pacific Seafood's lawyers seek here to have waived or subjected themselves to arbitration over claims they never made that are based upon facts that occurred, you know, two years later and are -- you know, the other aspect I'd note is that the character of the transaction is actually much larger in this instance than the one that was contemplated and dropped by Pacific Seafood and Ocean Gold in 2010.

This one not only -- it includes more companies. It includes more assets. It includes four fishing vessels. It amazingly increases the quota share of Pacific Seafood Group in these federally regulated fisheries where the National Marine Fisheries Service actually has -- when they implemented the quota system in 2011, the amount of quota was issued to fishermen and some to processers just in whiting on the basis of catch history. And the government

imposed what they call accumulation limits on how much quota share of any given species anyone could hold. Pacific -- and if you -- based on this catch history -- and this is all in the record, Your Honor. Based on this catch history, if you were above the accumulation limit, which was the government's way of trying to prevent too much concentration in these quota shares because it would lead to anti-competitive results, you had a certain number of years to divest yourself if you were over. The acquisition Pacific is making and in a situation where they are already over those limits on virtually every species only would increase that. That's just an aside.

But the other aspect is that this transaction involves many more parties than what was contemplated back in 2010. Our brief is incorrect when we say that there are two parties that weren't a party to the Resolution Agreement. There are 12. Two happen to be Pacific affiliates that were formed in late 2014. But there are -- interestingly enough, the Ocean Gold entities that were originally part of an amended complaint were dropped, all but one, when they entered into that stipulation. And a subsequent amended complaint dropped four different Ocean Gold parties.

There are a total of ten different Ocean Gold affiliates or owners who are parties to the complicated,

multi, you know, 41-million-dollar transaction that was enjoined by Judge Panner. They aren't subject to the ancillary jurisdiction of this court. And it just creates an impossible situation, I think, to stretch the interpretation of Section 3(a) to do what the defendants urge you to do.

THE COURT: Okay. Thank you, Mr. Haglund.

And Mr. Snider, I am unclear. Are you speaking for all the defendants today or Mr. Esler, are you also going to --

MR. SNIDER: No. I am speaking for all of the defendants today.

THE COURT: All right. Mr. Snider, any rebuttal you would like to add?

MR. SNIDER: Yeah. Just a couple things, Your Honor.

To your last question, it struck you as surprising that acquisition was not in the contemplation of the parties given the history here. And you are correct. That is surprising. And it's because that was absolutely within the contemplation of the parties, which is why, I am not going to belabor it, but when you get back to the language they chose, they didn't limit this to an exclusive marketing agreement. They said any new agreement that requires Pacific Seafood to act as an exclusive marketer.

And the reason that broad language was used and the basis for the entire *Whaley* lawsuit was that Pacific Seafood was gaining monopoly power by virtue of acquisition. Acquisition, including the acquisition or the joint venture or the exclusive marketing agreement with Pacific Seafood, was absolutely front and center. That was what the case was about.

So much of Mr. Haglund's arguments go to the merits here, Your Honor, and --

THE COURT: Right.

MR. SNIDER: -- and this motion is not about the merits. This motion is who is supposed to hear those merits.

And, you know, we submit, again, that 3(a) says that if there was an agreement that had the effect of Pacific Seafood being required to act as the exclusive marketer, whether it's an exclusive marketing agreement or an acquisition, that has to go to Judge Jelderks to determine whether the new agreement is pro-competitive. And Mr. Haglund can make all the arguments he has made to you today as to why it's anti-competitive.

And the defense will -- you know, although the agreement is terminated, which is an issue for another day as to -- you know, as to why this case continues to go forward notwithstanding the fact that the agreement is

terminated, that's an issue for another day, but if forced to defend the case, we will defend the case and argue that the agreement is pro-competitive. And Judge Jelderks will say yes or no, and if he says no, under 3(a) the parties can try something else out.

That was the reason why 3(a) was put in place, to provide a mechanism for resolving future disputes as to agreements between Ocean Gold and Pacific Seafood that would have this effect.

And just to clear up the record, the transaction that's proposed and at issue here would not eliminate Ocean Gold. Ocean Gold still will, post-transaction, if it were approved, would still exist. It would just be controlled by Pacific Seafood. And Pacific Seafood is the entity which actually has a selling arm. Ocean Gold does not. Pacific Seafood would therefore be selling -- acting as the exclusive marketer for all that Ocean Gold processed seafood.

THE COURT: Okay.

All right. Thanks, Mr. Snider.

MR. HAGLUND: Your Honor.

THE COURT: Yeah. Is this Mr. Haglund?

MR. HAGLUND: Mr. Haglund, yes. Just one very quick point.

The idea that a merger -- I mean, a merger just

transcends by a leap and a bound the exclusive marketing of product in the output market. The merger eliminates a competitor who is actively involved in the input market.

THE COURT: Right.

MR. HAGLUND: It is a hugely different situation than a marketing agreement alone.

THE COURT: Okay. Well, I appreciate both sides. You know, both sides are doing their job.

The one thing I would say if we do go forward, I will be sending back briefs that use terminology and adjectives like ludicrous arguments. And, you know, I would -- you guys both are doing your job, and I am not ascribing any bad faith to anyone here, but it seems like the parties, some of your briefings, I would like them to be a little bit more professional, and I will send them back with an overabundance of adjectives describing your opponents arguments with things like ludicrous or unbelievable. So let's be a little more careful about that.

I do think we will be going forward.

Mr. Snider, I appreciate your arguments and I will give some more thought to them, but I am having just a hard time imagining that Paragraph 3(a) ever contemplated an acquisition, especially in light of the history of this February 9th, 2000 [sic] agreement that the Resolution Agreement seems to be focused on.

So I will look at it some more. I would like to get you an opinion out quickly and I think I will. I think I have already kind of put to rest these other issues around Rule -- law of the case and estoppel. I am just simply not going there, Mr. Haglund.

But I do want to get a decision out quickly. At the current moment, although both of you have done a very good job, I think I am leaning towards Mr. Haglund's argument that it simply -- 3(a) does not contemplate acquisition. It's just a very, very different animal than an exclusive marketing agreement.

So I want to think a little bit more about it, but we'll get an opinion out in two weeks. Okay?

Could I ask, if we are going forward here, did Judge Panner set dates that were in place for trial?

MR. HAGLUND: Yes, he did, Your Honor. This is Mike Haglund. And he set an expedited trial date of July 21, which you have now stricken. We would like to --

THE COURT: All right.

MR. HAGLUND: We would hope to -- it's a very narrow factual situation. We'd hope to be in a position to see the case tried before the February expiration date of the 2006 contract. And I believe that can be accomplished if a schedule is set in the very near future.

THE COURT: Okay.

MR. STEPHENS: Yeah. Your Honor?

THE COURT: Yes.

MR. STEPHENS: I am sorry. This is John Stephens. What Mr. Haglund has described is correct in so far as Judge Panner having set a trial date and you vacated it.

We do think that it isn't going to be possible to get -- if we are required to go forward, as we have indicated, the proposed transaction has been terminated, but if we are required to go forward with the case, then it would be a situation where in order for us to, you know, I think fully develop all of our arguments with respect to expert testimony and that kind of thing that we'd be looking at a trial date that would be somewhere beyond that, late spring, early summer, somewhere in there.

THE COURT: Of next year?

MR. STEPHENS: Correct.

THE COURT: That's not going to happen. It's going to be a lot sooner than that. Both sides have been on notice by Judge Panner that this is going to be expedited. And I am going to -- this will be decided this fall.

So what I need you folks to do, and I would suggest doing it now, is start talking about if we are going forward, when we are going to try the case and see if you can compromise between what Mr. Haglund wants, which is probably that July date, which I think is just simply too

fast given the posture of the case being transferred to me, and a date next year. This case is going to be done this year. So we need to come up with something that can satisfy both of you with that understanding.

So get talking about that and then we'll set a status conference as soon as I issue an opinion in about two weeks.

Okay? Anything else we need to discuss?

MR. HAGLUND: Not for the plaintiffs, Your Honor. Thank you.

THE COURT: Okay. Thank you very much, we'll talk to you soon.

MR. SNIDER: Thank you, Your Honor.

MR. HAGLUND: Thank you.

THE COURT: Bye-bye.

(The proceedings were concluded this 2nd day of June, 2015.)

I hereby certify that the foregoing is a true and correct transcript of the oral proceedings had in the above-entitled matter, to the best of my skill and ability, dated this 26th day of June, 2015.

/s/Kristi L. Anderson

Kristi L. Anderson, Certified Realtime Reporter