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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 COMPANY, LLC, WASHINGTON CRAB PRODUCERS, INC., PACIFIC ALASKA

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

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Request for Oral Argument

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, DULCICH JET, LLC, and OCEAN COMPANIES HOLDING CO., LLC,

Defendants.

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I. INTRODUCTION.

The only issue raised in Pacific Seafood's Motion for Summary Judgment is whether or not three career West Coast fishermen have standing to enjoin an illegal transaction that will harm their entire industry, and render Westport, Washington a textbook "Company Town" (i.e. Pacific Seafood controlling 99% of Westport's processing capacity and buyer power). In Congress' words, the question presented here is whether or not plaintiffs face "threatened loss or damage" if Pacific Seafood acquires Ocean Gold. 15 U.S.C. § 26. If so, they "shall be entitled" to sue for injunctive relief. *Id.*

Applying the correct legal standard, the evidence demonstrates that Mr. Boardman, Mr. Rankin, and Mr. Whaley all have antitrust standing to seek an injunction against Pacific Seafood's acquisition of Ocean Gold. Each plaintiff fishes in the restrained markets for Pacific coldwater shrimp, trawl-caught groundfish, or both. Mr. Whaley and Mr. Boardman are among a small group of fishermen that hold – and pay annually to renew – permits allowing them to deliver shrimp into landing ports in the State of Washington, specifically including Westport. Mr. Whaley and Mr. Rankin also own federally issued whiting and groundfish quota that they lease on the open market. And each plaintiff has delivered into Westport when biological abundance and economic opportunity have favored doing so.

Despite all of this, Pacific Seafood miscasts plaintiffs as interlopers, meddling in a transaction that does not affect them. Defendants' mantra that these plaintiffs will not be injured by this proposed acquisition is simply wrong. Pacific Seafood's construct in which there are neatly defined groups of "Westport fishermen," or "Astoria fishermen," or "Brookings fishermen" is inconsistent with how the West Coast commercial fishing industry actually functions. Fishermen, including plaintiffs, follow biological abundance and economic

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opportunity up and down the West Coast. They benefit when a diverse range of processors in multiple ports compete for their catch, and they are injured when processing capacity and buying power is consolidated in a single dominant firm. Plaintiffs understood the anticompetitive ramifications of this acquisition, and accordingly initiated this litigation to prevent it. As Mr. Whaley succinctly explained when asked about his reasons for prosecuting this case:

> like I've said before here, the stronger [Pacific Seafood's owner Frank Dulcich] gets, the less money we [West Coast fishermen] get, and that's the way it works. . . I've watched it.

Haglund Decl. Ex. J at 2.

Indeed, Mr. Whaley and Mr. Boardman have been fighting to improve competitive conditions in Westport since 2010 and 2011, respectively.[1] Two years of intense litigation in *Whaley* ended in a Resolution Agreement that required Pacific Seafood to relinquish control of Ocean Gold through the forced expiration of a 2006 Agreement under which Pacific Seafood controlled Ocean Gold's processing operations and acted as the exclusive marketer of all of its seafood production except bait. In the event Pacific Seafood and Ocean Gold sought to enter into any new agreement under which Pacific Seafood would "act as the exclusive marketer of any seafood product produced by Ocean Gold," plaintiffs' counsel and the Oregon Department of Justice were to receive 60 days' notice and the opportunity to object to the Agreement. In the event of an objection, the Agreement could be approved only if a federal judge found it to be "pro-competitive." Haglund Decl. Ex. B at 5. The *Whaley* plaintiffs insisted on this provision

[1] Mr. Whaley filed *Whaley et al. v. Pacific Seafood Group, et al.* U.S. District Court Case No. 10-cv-03057-MC ("*Whaley*"), in June 2010. *Whaley*, Dkt. 1. Mr. Boardman joined the case in July, 2011. *Id.*, Dkt. 286.

during mediation because they understand the importance to their industry and their businesses of an independent competitive counterweight to Pacific Seafood in Westport.

Nevertheless, Pacific Seafood claims that plaintiffs lack standing because in recent years they have delivered their catch predominantly in Oregon and – quite understandably it turns out – elected to deal with other processors. Neither contention carries the significance that defendants claim. First, no rule requires plaintiffs to sell to Pacific Seafood or Ocean Gold in order to have standing to enjoin Pacific Seafood's restraint of competition in West Coast fish markets. In support of its flawed position, Pacific Seafood cites no less than eight cases, every one of which involved treble damages claims under Section 4 of the Clayton Act, and not equitable claims under Section 16. In fact, the lead appellate case that Pacific Seafood relies on reversed the district court's denial of standing under Section 16, holding that while in certain cases a plaintiff must deal directly with the antitrust violator to have standing to recover treble damages, a plaintiff seeking purely injunctive relief need not do so. This is so because many of the policy concerns that favor limiting the universe of prospective damages plaintiffs are not implicated in an injunction case.

Second, both plaintiffs and Dr. Radtke testified based on their respective experience and expertise that market consolidation in Westport will inevitably impact ex vessel prices paid by other processors in adjacent ports. The Supreme Court has explained that injury that is "inextricably intertwined" with an antitrust violation is sufficient to sustain standing even if it occurs outside of the restrained market. That is especially true where, as here, the relief sought presents no risk of duplicative recovery or speculative damages calculations. But even if the Court were to constrain its analysis exclusively to Westport, plaintiffs' ties there are sufficient to

sustain standing. Plaintiffs hold Washington shrimp permits, own vessels capable of fishing coast-wide and, historically, have delivered to Westport when the opportunity was ripe.

Pacific Seafood also contends that the acquisition will not cause plaintiffs injury because it will not affect existing market concentration. The argument – which is predicated on Pacific Seafood and Ocean Gold's historic purchase allocations (and is really an attack on the merits, not standing) – misses the point. The current market concentration is artificial. Pacific Seafood and Ocean Gold both own significant processing assets and capacity in Westport, but Ocean Gold appears to be using its shrimp processing assets exclusively to process Pacific Seafood's shrimp rather than purchase its own. At the same time, Pacific Seafood allows Ocean Gold to dominate whiting and groundfish purchases.[2] Were Ocean Gold to operate independently or if a new market entrant acquired its assets, competition would improve immediately and dramatically because Pacific Seafood and the new entrant would compete for both shrimp and groundfish rather than simply allocate the markets between themselves. If Pacific Seafood acquires Ocean Gold, that opportunity will be lost.

Pacific Seafood's false claim that the acquisition is competitively neutral also highlights a final basis for denying its motion – timing. Obviously, rebutting defendants' characterization of the acquisition's economic effects calls for responsive expert testimony. Yet Pacific Seafood filed this motion just seven days after being told that plaintiffs' testifying economist, Dr. Hans Radtke, had withdrawn from the case for personal reasons. Worse, Pacific Seafood filed its

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[2] The precise arrangement between Pacific Seafood and Ocean Gold is the subject of ongoing discovery that Pacific Seafood has refused to produce in advance of plaintiffs' response to this motion. Plaintiffs expect the requested documents and depositions to show either that Ocean Gold is the actual buyer of much of the shrimp allocated by PacFIN to Pacific Seafood, or that Ocean Gold is processing shrimp purchased by Pacific Seafood rather than purchasing its own in competition with Pacific Seafood.

motion in the middle of ongoing fact discovery and then refused to produce key documents and depositions in time for plaintiffs to incorporate them into their opposition. The timing of Pacific Seafood's motion is a transparent attempt to deny plaintiffs a full and fair opportunity to respond. For that reason too, Pacific Seafood's motion should be denied.

In opposition to Pacific Seafood's Motion for Summary Judgment, plaintiffs rely upon the record herein, the authorities below and the declarations of Richard J. Sexton and Michael E. Haglund filed herewith.

II. BACKGROUND.

A. Plaintiffs are Career West Coast Fisherman and Vessel Owners who Fish for a Variety of Species and Deliver to Ports Between Ft. Bragg and the Canadian Border, Including Westport, Washington, Based on Biological Abundance and Economic Opportunity.

Mr. Boardman, Mr. Rankin, and Mr. Whaley have made their careers as West Coast fisherman. Though Pacific Seafood goes to great lengths to miscast them as outsiders who are unaffected by competitive conditions in Westport, a careful and thoughtful review of the facts demonstrates otherwise. Plaintiffs are anything but "unaffected strangers" to the proposed transaction, and their own testimony demonstrates their standing to challenge it.

1. Lloyd Whaley.

Lloyd Whaley has been active in the West Coast fishing industry for nearly his entire adult life, and has been a vessel owner for more than three decades. Haglund Decl. Ex. J at 16-17. Throughout his career, Mr. Whaley and his vessels have fished a wide range of species, including whiting, Albacore tuna, salmon, Dungeness crab, groundfish,[3] and shrimp. *Id.* at 4, 15-

[3] Groundfish refers to a class of trawl-caught species grouped together under applicable federal regulations.

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16, 26-27. Mr. Whaley's vessels follow biological abundance and economic opportunity up and down the West Coast between California and the Canadian border. Asked in his deposition which fisheries "move up and down the coast," Mr. Whaley explained that "[i]t changes from place to place, each year. I look for Washington to have shrimp this year, and it'd be nice to have a place to deliver into Westport." *Id.* at 27. Mr. Whaley recalls one his vessels, the B.J. Thomas, delivering shrimp into Westport as recently as six to seven years ago. *Id.* at 6.

Through the years, Mr. Whaley and his vessels have delivered catch into a number of West Coast ports including, among others, Morro Bay, California; Brookings and Coos Bay, Oregon; and Westport, Washington. *Id.* at 5-6, 19, 23. Likewise, Mr. Whaley has delivered to several different processors including Eureka Fisheries, B.C. Fisheries, Hallmark Fisheries (Cal-Shell), and Pacific Seafood. *Id.* at 21-24. Mr. Whaley stopped doing business with Pacific Seafood around 2010, however, after he caught its employee stealing from him. *Id.* at 25.

Mr. Whaley currently owns two fishing vessels – the F/V Cape Sebastian and the F/V B.J. Thomas. *Id.* at 16. The B.J. Thomas is a 90-foot double rigger shrimper. Mr. Whaley purchased the vessel for $100,000 in 1985 and has invested approximately $900,000 thereafter in its upkeep and improvements. *Id.* at 7. Today, including her permits, the B.J. Thomas is worth approximately $2 million. *Id.* at 18. Mr. Whaley custom built the Cape Sebastian in 1978. She is a 60-foot double rigger shrimper. The Cape Sebastian, with her permits, is worth between approximately $1 million and $1.25 million today. *Id.*

In connection with his vessels, Mr. Whaley owns a number of federal and state issued fishing permits, as well as federally issued quota share. Mr. Whaley's permits include: two California crab permits (one for each vessel); two federal groundfish permits applicable to all West Coast states (one for each vessel); Oregon and California salmon permits (both attached to

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the Cape Sebastian); and six shrimp permits (one for each vessel issued by the states of California, Oregon, and Washington, respectively). *Id.* at 9. His annual quota includes both groundfish and approximately 240,000 pounds of whiting. *Id.* at 11.

The value of Mr. Whaley's vessels depends largely on the value of his permits. As Mr. Whaley put it during his deposition, "boats without the permits aren't worth anything anymore. I mean, you've got to have the permits or you can't fish." *Id.* at 17-18. The value of Mr. Whaley's permits, in turn, is contingent on both their scarcity and the economic value of fishing opportunity, which is a function of cost and ex vessel price.

Although at age 74 Mr. Whaley no longer actively captains his vessels, his income derives largely from ex vessel receipts, which he shares on a percentage basis with hired captains. *Id.* at 20, 28. The impact of Pacific Seafood's consolidation of buying power in West Coast markets on ex vessel prices directly affects Mr. Whaley's income. *Id.* at 2. Asked to describe the specific effect on his business of market concentration in Westport, Mr. Whaley testified:

> Well, it seems like, no matter what, Westport ends up fishing. They'll start at 40 cents and we're -- we're trying to get 50 or 55. Okay? And that seems to be what happens every year up there on their product, going cheaper. And, well, who's buying it? . . . I watched it last year. I think we were asking, it was 50 -- or whatever the price may be; and it started out [in Westport] at 42 or 44. Well, that's what we started fishing for.

Id. at 7-8.

During the last four to five years, Mr. Whaley has also earned approximately $110,000 annually by leasing portions of his quota share to other fishermen. *Id.* at 13. The lease price of Mr. Whaley's quota is contingent on competitive ex vessel prices that make fishing a valuable

economic opportunity. Basic economic theory dictates that Mr. Whaley would earn more revenue from his quota if groundfish and whiting prices improved. Sexton Decl. ¶13.

2. Jeff Boardman.

Jeff Boardman has been a commercial fisherman on the West Coast for "basically [his] whole life." Haglund Decl. Ex. I at 16. He started fishing in California with his dad when he was 11. *Id.* In 1979, he followed his then-employer to Oregon and began fishing out of Newport. In 1987, Mr. Boardman invested $50,000 in his own vessel, the F/V Miss Yvonne – a 65-foot wooden shrimper that he captains to this day. *Id.* at 17-19. In connection with the Miss Yvonne, Mr. Boardman owns two shrimp permits issued by both Oregon and Washington. *Id.* at 7, 10-11. Mr. Boardman's Washington shrimp permit which allows him to deliver shrimp to Washington ports, including Westport must be renewed annually for a fee. To date, Mr. Boardman has renewed his Washington shrimp permit every year. *Id.* at 12.

Though he now delivers to Hallmark Fisheries in Newport and Coos Bay, throughout his career Mr. Boardman has delivered shrimp to a number of processors and ports, including to Pacific Seafood and into Westport. *Id.* at 4, 6. As Mr. Boardman explained:

> I have a Washington shrimp permit that allows me to deliver into Westport, yeah. If I'm fishing up there, I would go into there and deliver. And a number of different companies -- Newport Shrimp would send trucks up, buy the product off the pier there.

Id. at 7. Now, however, times have changed. Competition in Westport is restrained and Pacific Seafood controls the port. In recent years, Mr. Boardman has been forced to steam 14 hours back to Newport to deliver shrimp caught just 10-15 miles off of Westport. *Id.* at 13-14. As Mr. Boardman put it, "you're [fishermen] more constricted by processing than you are by anything else." *Id.* at 7.

In addition to his private interests, Mr. Boardman has long been a stalwart on behalf of his fellow fishermen and his industry. Mr. Boardman has worked extensively with the State of Oregon and private organizations to improve the sustainability of the shrimp fishery from both an environmental and economic perspective. *Id.* at 2. For years, he led fishermen in their collective efforts to obtain fair ex vessel prices for their catch. *Id.* at 15. As Mr. Boardman put it in response to a question about his interest in industry developments:

> I've been involved in this [West Coast fishing] industry for a long time, so I'm interested in anything that's going to keep the health of the fishery up, you know, and competition in the marketplace. And I think that's healthy, rather than one person owning everything and we have nobody else to go to.

Id. at 2.

What has not been healthy for Mr. Boardman's industry, is Pacific Seafood's consolidation of processing capacity and its ever expanding buying power. Asked how "a shrimp fisherman out of Newport decides to become a class representative" in the *Whaley* case, Mr. Boardman explained his motivations:

> Well, I think I -- I think I already told you. I care about the industry as a whole, I care about the stuff out in the ocean, and I care that we don't have a monopoly running around and we only have one fish buyer for on the West Coast. And we're getting pretty darn close to that right now.

Id. at 5. Of course, Mr. Boardman is not just an altruist. Pacific Seafood's domination of West Coast markets threatens his business as well. Although he no longer fishes for Pacific Seafood, its ability to suppress ex vessel prices provides cover for his processor (and every other processor on the West Coast) to follow suit. Discussing the impact of artificially suppressed shrimp prices in Westport, Mr. Boardman testified:

> I mean, it's going to impact me eventually if they're [Pacific Seafood] paying lower prices for their shrimp. Then that's going to impact my fish processor,

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> because they can't compete on the same market -- which, ultimately, is going to impact me.

Id. at 8. This excerpt is from the same deposition response that Pacific Seafood selectively quotes from and, amazingly, characterizes to the Court as an admission by Mr. Boardman that his business is unaffected by shrimp purchases in Westport. Def's Mot. at 14.[4]

3. Dennis Rankin.

Dennis Rankin began fishing at age 15 and has captained fishing vessels for more than 30 years. Haglund Decl. Ex. K at 11. He owns two vessels, the F/V Steve C and the F/V Ashlyne. Mr. Rankin purchased a partnership interest in the Ashlyne when he was in his late twenties, and bought her outright around 1998. *Id.* at 12. She is a 64-foot West-Coast-built vessel that has participated in several different fisheries. *Id.* at 14. Mr. Rankin purchased the Steve C around 25 years ago. *Id.* at 13. She is an approximately 75-foot gulf-built shrimper that Mr. Rankin converted to fish for groundfish. *Id.* at 14. In addition to an Oregon shrimp permit, Mr. Rankin owns two federally issued groundfish permits that allow each of his vessels to fish between the Mexican and Canadian borders. *Id.* at 9.

Over more than four decades in the industry, Mr. Rankin has delivered to a number of different processors and ports, including to Pacific Seafood in Brookings and Charleston, Oregon. *Id.* at 17. Though he now focuses on groundfish, during his career Mr. Rankin has also fished for crab and shrimp. *Id.* at 18. In recent years, Mr. Rankin has delivered most of his catch into Astoria, Oregon. He has previously delivered into Westport, however, and last season he

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[4] In the same sentence, Pacific Seafood also diverts focus from the key issue in deciding its motion. The question presented is not the effect on Mr. Boardman of Ocean Gold's activities to date, but whether or not he faces "threatened loss or damage" if Pacific Seafood is allowed to acquire all of Ocean Gold's processing capacity and market share. 15 U.S.C. § 26.

made approximately half of his deliveries into Bellingham, Washington. *Id.* at 5, 15. Like Mr. Boardman, Mr. Rankin actively participates in the commercial fishing community, and has served multiple terms on the board of the Fishermen's Marketing Association, an organization that represents trawlers in Oregon, California, and Washington, and advocated for fair ex vessel prices. *Id.* at 2, 6-8.

Regarding his motivation to become a plaintiff in this case, Mr. Rankin explained that it would be "good for the fishery" if Pacific Seafood were enjoined from acquiring Ocean Gold because "we [fishermen] need more processors." *Id.* at 3. Pressed as to why more processors would benefit his business, Mr. Rankin explained the obvious:

> Because I -- I believe that if we had more processors, we might have a chance at better pricing. There'd be more competition in the -- on that side of it, amongst the processors.

Id. at 3-4. Asked yet again why he felt entitled to "stand in the way" of the acquisition even if some of his peers might disagree with him, Mr. Rankin echoed his co-plaintiffs:

> I think I should stand in the way of that, because I've seen Pacific get too large. And I'm -- like I've said three or four times already, I believe they [Pacific Seafood] dictate the prices . . . We need more players.

Id. at 16.[5] Like his co-plaintiffs, Mr. Rankin has both a pecuniary and non-commercial interest in the competitive health of the Westport processing sector.

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[5] Pacific Seafood criticizes Mr. Rankin and his co-plaintiffs extensively for filing this lawsuit without what it considers due regard for its alleged adverse effect on Ocean Gold's current owners. But the purported impact of an injunction on the Rydmans and the Millers, however sympathetic, is wholly irrelevant to addressing plaintiffs' standing and the propriety of an injunction. *See Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 792 (9th Cir. 2015) ("courts are authorized, indeed required, to decree relief effective to redress the [unlawful merger] violations, whatever the adverse effect of such a decree on private interests.") (quoting *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 326, 81 S. Ct. 1243, 1250 (1961)).

B. Jeff Boardman and Lloyd Whaley Led a Certified Class of West Coast Fishermen in Antitrust Litigation Against Pacific Seafood that Resulted in Important Pro-Competitive Reforms.

In 2010, Lloyd Whaley, concerned by Pacific Seafood's market consolidation and anticompetitive conduct, filed suit alleging monopolization and attempted monopolization of West Coast seafood product markets. *Whaley*, Dkt. 1 at ¶¶ 85-89 In addition, the *Whaley* plaintiffs alleged that Pacific Seafood and Ocean Gold conspired to restrain trade in the same markets by cooperating to fix prices in accordance with an exclusive marketing agreement. *Id.* at ¶¶ 78-84. Mr. Boardman later joined the lawsuit in 2011. *Id.*, Dkt. 286. The complaint sought both damages and injunctive relief in the form of a broad range of pro-competitive reforms, including a declaration voiding the exclusive marketing agreement. *Id.*

Whaley was hotly litigated over the course of two years. After multiple rounds of motion practice and substantial discovery, the Court certified a plaintiff class of West Coast fishermen and denied defendants' request for a stay pending appeal of the class certification decision. *Id.*, Dkt. 418. Shortly thereafter, the parties agreed to mediation before now-retired Judge Hogan. The mediation resulted in a Resolution Agreement that included multiple procompetitive provisions, including the forced expiration of the 2006 exclusive processing/marketing agreement between Pacific Seafood and Ocean Gold. Haglund Decl. Ex. B at 5. On May 21, 2012, the Court entered final approval of the Resolution Agreement. *Whaley*, Dkt. 437.

The Resolution Agreement provided that the case could be reopened in order to extend certain of the prescribed reforms for an additional five years if market conditions warranted. On July 5, 2017, the Court granted plaintiffs' motion to reopen the case and denied Pacific Seafood's motion to compel arbitration before Judge Hogan because he is no longer a sitting

federal judge. *Id.*, Dkt. 459. Proceedings are currently stayed pending Pacific Seafood's appeal of the Court's appointment of Judge Russo to preside over the parties' dispute. *Id.*, Dkt. 482.

C. After the Exclusive Marketing Agreement Was Close to Expiring, Pacific Seafood Attempted to Acquire Ocean Gold Outright, and Plaintiffs Sued to Enjoin the Sale.

February 2016 marked the expiration of the exclusive processing/marketing agreement between Pacific Seafood and Ocean Gold. Consistent with the spirit of the Resolution Agreement, the expiration was expected to enable Ocean Gold – or a new market entrant purchasing its assets – to emerge as a competitive counterweight to Pacific Seafood in Westport. Pacific Seafood, however, had other plans.

Just months before the exclusive marketing agreement was to expire, Pacific Seafood notified plaintiffs' counsel that it was finalizing a deal to acquire Ocean Gold outright. Dkt. 1-3. If consummated, the acquisition would have nullified certain pro-competitive benefits bargained for by the *Whaley* plaintiffs. Accordingly, on January 22, 2015, Mr. Boardman and Mr. Whaley – joined by co-plaintiffs including Mr. Rankin – filed this lawsuit and moved for a temporary restraining order.[6] The next day, the Court held an emergency hearing and granted a TRO. Dkt. 11. Five days later, plaintiffs moved for preliminary injunctive relief. Dkt. 22.

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[6] Contrary to Pacific Seafood's suggestion in its brief, plaintiffs' communications with counsel in anticipation of this litigation were entirely appropriate. Counsel did not disclose confidential information. The very reason that Pacific Seafood notified plaintiffs' counsel of the transaction was to provide plaintiffs an opportunity to object, as required by the Resolution Agreement. Pacific Seafood's apparent position now – that it was somehow improper for plaintiffs and their counsel to discuss and act on that information – makes no sense. Likewise, it is disingenuous for Pacific Seafood to criticize plaintiffs' lack of personal knowledge of the basis for certain allegations in the complaint when – as Pacific Seafood well knows – the underlying information including PacFIN data and details of the proposed transaction are subject to strict confidentiality constraints.

On March 6, 2015, the Court entered an injunction prohibiting Pacific Seafood from undertaking any act to acquire or control an interest in Ocean Gold. Dkt. 55. The Court found that plaintiffs had demonstrated a reasonable probability that the acquisition would "substantially lessen competition in the buyers' market for whiting and shrimp," and that a preliminary injunction to maintain competition was in the public interest. *Id.* at p. 6-8. The Oregon Attorney General supported the Court's decision, opining that the State considered the transaction "presumptively unlawful" given the degree of market concentration. *Id.*

Pacific Seafood appealed, Dkt. 69, and the Ninth Circuit unanimously affirmed. Dkt. 110. After denying Pacific Seafood's petitions for panel rehearing and rehearing *en banc*, the Ninth Circuit entered its mandate on July 25, 2016. *Id.* The preliminary injunction remains in effect, though plaintiffs have reason to believe that Pacific Seafood has been violating it, a belief that can only be proven when Pacific Seafood finally provides discovery that was long ago requested.

D. Key Issues in this Litigation Continue to Develop as Expert and Fact Discovery Remain Ongoing.

Proceedings in this case were held in abeyance for approximately a year while Pacific Seafood appealed the Court's orders granting a preliminary injunction and denying its motion to compel arbitration. Dkt. 103, 110. The case has been further delayed as a result of Pacific Seafood's purported inability to obtain access to PacFIN data from the States.[7] As a result, the Court struck all case management deadlines. Dkt. 186.

On June 31, 2017, before the Court struck the schedule, plaintiffs produced the expert reports of Shannon Davis and Dr. Hans Radtke. Dr. Radtke's report notes that information relevant to his opinions remained outstanding, and he expressly reserved the right to supplement

[7] This issue has also impacted discovery and scheduling in a related case, *Seawater Seafoods Company et al. v. Pacific Seafood Group et al.* U.S. District Court Case No. 16-cv-01607-MC.

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his report pending further discovery. Haglund Decl. Ex. C at 37. Thereafter, between September 25 and October 12, Pacific Seafood deposed Messers. Boardman, Rankin, and Whaley. On October 24 and 25, Pacific Seafood deposed Mr. Davis and Dr. Radtke. For its part, Pacific Seafood has not produced a single expert report, has not produced any of its personnel for deposition, and is delinquent in its production of documents and interrogatory responses. Haglund Decl. ¶¶ 2-3.

During Dr. Radtke's October 25, 2017 deposition, it became apparent that he was having difficulty answering questions and addressing economic issues in the same highly professional manner that has prevailed throughout his career. Following that deposition, Dr. Radtke notified plaintiffs' counsel of his intent to withdraw as a testifying expert. On November 28, 2017 plaintiffs notified defense counsel of their intent to designate a replacement for Dr. Radtke. Rather than work in good faith to accommodate Dr. Radtke's withdrawal while minimizing any perceived prejudice, Pacific Seafood categorically objected and, seven days later, filed this motion.

Plaintiffs objected to the timing of defendants' motion for two reasons. First, plaintiffs requested that the motion be stayed pending the Court's ruling on plaintiffs' motion to designate a replacement expert and, assuming the Court grants that motion, until the replacement expert has an opportunity to evaluate the evidence and render his opinions. Second, plaintiffs objected that key fact discovery, including documents and depositions necessary to assess the relative market shares of Pacific Seafood and Ocean Gold in Westport, remain outstanding. Despite the absence of any discovery or dispositive motions deadline, Pacific Seafood refused to stipulate to a reasonable extension.

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On December 22, 2017, plaintiffs served expedited requests for two narrow categories of documents and two key depositions needed to respond to Pacific Seafood's motion. Haglund Decl. ¶¶2-3. Pacific Seafood both refused to respond in time for plaintiffs to incorporate the needed discovery into their opposition, and refused to extend the response deadline to permit discovery to proceed in the ordinary course. *Id.* While Pacific Seafood is fond of accusing plaintiffs of a lack of diligence, it omits that the discovery deadline was struck indefinitely at its own request, and that there was no way that plaintiffs could have anticipated that defendants would file a premature, fact-laden dispositive motion while at the same time refusing to produce critical discovery materials or to make their representatives available for depositions.

To date, Pacific Seafood has produced just 16 pages of highly generalized data and no depositions in response to plaintiffs' December 22, 2017 requests. Plaintiffs have been forced to prepare this response unaided by needed discovery. *See* Fed. R. Civ. P. 56(d). In addition, plaintiffs' motion to allow a replacement for Dr. Radtke is fully briefed and under advisement. Should the Court grant their motion, plaintiffs intend to designate Dr. Richard Sexton – Professor and Former Chair of the Department of Agricultural and Resource Economics at the University of California, Davis – as their testifying economist. Dr. Sexton's declaration regarding his qualifications and preliminary review of this case is filed herewith. Should the Court permit Dr. Sexton to testify and deny or stay Pacific Seafood's motion, Dr. Sexton is prepared to issue his report within 45 days of the Court's ruling, provided PacFIN data is available by the time of the ruling.

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III. LEGAL STANDARD.

A. Summary Judgment.

A party is entitled to summary judgment only where it "shows that there is no genuine dispute as to any material fact" and it is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party has the burden of establishing the absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). On a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in the non-moving party's favor. *Clicks Billiards Inc. v. Sixshooters Inc.*, 251 F.3d 1252, 1257 (9th Cir. 2001).

B. Antitrust Standing – 15 U.S.C. § 26.

Section 16 of the Clayton Act creates a private cause of action for injunctive relief from antitrust violations, and states in relevant part:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity.

15 U.S.C. § 26. Like plaintiffs seeking treble damages under Section 4, a Section 16 plaintiff must demonstrate antitrust standing, including that the alleged injury is of the type the "antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S. Ct. 690, 697 (1977).

Establishing standing under Section 16, however, is less onerous than under Section 4. *Bubar v. Ampco Foods, Inc.*, 752 F.2d 445, 449 at n.2 (9th Cir. 1985) ("An equitable action to

enjoin [an antitrust violation] can be brought under section 16 of the Clayton Act, 15 U.S.C. § 26 (1982), which has standing requirements less stringent than those under section 4 of the Clayton Act.") (also quoting 2 Areeda & D. Turner, *Antitrust Law* § 335e (1978) ("[S]tanding to enjoin an antitrust violation is and should be more readily accorded than standing for treble damage purposes.")); *Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc.*, 140 F.3d 1228, 1234 (9th Cir. 1998) ("a party too remote for [antitrust] damages might be granted an injunction"); *Mid-W. Paper Prod. Co. v. Cont'l Grp., Inc.*, 596 F.2d 573, 591-92 (3d Cir. 1979) ("the test for standing under s 16 has been framed in terms of a proximate cause standard that is 'less constrained' than that under s 4 and which might in fact be no more rigorous than the general rule of standing") (footnote omitted).

The reason that standing is more readily established under Section 16 than under Section 4 derives from differences in both the text and the policy considerations implicated by each section. Textually, Section 16 requires only a showing of "threatened" rather than actually sustained injury. Moreover, unlike Section 4, actionable injury need not be to the plaintiff's "'business or property,' and courts accordingly have held that noncommercial interests are also protected." *Mid-W. Paper*, 596 F.2d at 591 (citing, *inter alia*, *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122, 130-131 (9th Cir. 1973)).

From a policy perspective, the standing requirements under Section 16 are relaxed because injunctive relief does not implicate many of the concerns that lead courts to restrict the universe of proper treble damages plaintiffs. Most significantly, claims for injunctive relief do not create problems of duplicative recovery and complicated damages calculation and apportionment. *Bubar*, 752 F.2d at n.2; *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d at 130. As the Supreme Court put it, "100 injunctions are no more effective than one."

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Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 261, 92 S. Ct. 885, 891 (1972), *superseded on other grounds by* 15 U.S.C. § 15c (authorizing *parens patriae* actions by state attorneys general).

In sum, provided that a plaintiff faces threatened antitrust injury from an antitrust violation, standing should be accorded under Section 16. That is so even if the plaintiff might be denied standing under Section 4. *See, e.g., Mid-W. Paper*, 596 F.2d 573.[8]

IV. ARGUMENT.

A. Pacific Seafood's Motion for Summary Judgment is Premature.

As a threshold matter, Pacific Seafood's motion should be denied because it is premature and is intended to capitalize on incomplete discovery and Dr. Radtke's unexpected withdrawal as plaintiffs' testifying economist. Although Pacific Seafood claims to have begun work on its motion before Dr. Radtke's deposition, the timing of its filing is hardly a coincidence. Defendants' motion is predicated on its interpretation of Dr. Radkte's report. Having withdrawn from the case, Dr. Radtke is not in a position to explain his opinions or respond to Pacific Seafood's characterization of them, as is typical in this situation. By filing its motion immediately after Dr. Radtke's resignation and before the Court rules on his replacement, Pacific

[8] Pacific Seafood may argue that the Supreme Court's decision in *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 107 S.Ct. 484 (1986) – which held that it would be "anomalous" to award an injunction against an injury not recognizable under Section 4 – abrogated distinctions in the standing analysis between Section 4 and Section 16. The Court should reject such argument. Applying *Brunswick*, the *Cargill* court held only that under "both § 16 and § 4 the plaintiff must still allege an injury of the type the antitrust laws were designed to prevent." *Cargill*, 479 U.S. at 111, 107 S. Ct. at 490. In other words, *Cargill* stands only for the proposition that non-antitrust injury – e.g. lost profits suffered as a result of increased competition – will not support standing under Section 16. *See Lucas Automotive*, 140 F.3d at 1235. *Lucas Automotive*, which postdates *Cargill*, further confirms that the Ninth Circuit continues to recognize that standing is more readily afforded under Section 16.

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Seafood is forcing plaintiffs to respond to a dispositive motion based on expert opinion without the benefit of rebuttal expert testimony. That is fundamentally unfair.

Moreover, plaintiffs' proposed replacement expert – Dr. Sexton – has not had a reasonable opportunity to review the evidence or form his own opinions on relevant subjects. Geographic market definition, for example, is a complicated issue that has been the subject of nuanced differences of opinion since the outset of the *Whaley* case. Plaintiffs' key expert in *Whaley*, Dr. James Wilen, recognized that "fuel and perishability constraints generally limit a West Coast fishing vessel to delivering to processing plants within 60 to 100 miles of their fishing grounds," but nonetheless concluded that the relevant geographic market encompassed all of the West Coast between the Canadian border and Fort Bragg, California. Haglund Decl. Ex. E at 11-12. In Dr. Wilen's view:

> [Geographic constraints of a particular voyage and delivery] does not mean, however, that each port is a distinct market with a captive group of suppliers delivering quantities just sufficient to serve that port's plants. If one examines the landings data on a port-by-port basis for each of these three fisheries, it is apparent that the volume of landings by port varies from year to year with the changing biological abundance of the particular species in the waters off the coasts of Oregon, Washington and northern California.

Id. at 12. Dr. Wilen also adopted a coast-wide geographic market definition because "fishboats are mobile over the longer run," citing Mr. Boardman as a "good example" of a fisherman that participates in a broad market area based on where the target fish type "is abundant and can be delivered efficiently." *Id.*

During *Whaley* and in the initial stages of this case, Dr. Radtke largely concurred with Dr. Wilen's geographic market definition. Although Dr. Radkte later came to place more significance on geographic constraints on individual voyages, he maintained that the 60 to 100 mile geographic construct was "generally reflective" of the geographic scope of the relevant

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product markets. Haglund Decl. Ex. C at 6. As of the June 30, 2017 submission of his initial expert witness disclosure, a point in time before any defense expert had offered an opinion and long before the close of discovery or the preparation of Dr. Radtke's supplemental/rebuttal report, there was certainly the opportunity for Dr. Radtke to refine his opinion on the geographic market definition applicable to the seafood input markets in this case.

Indeed, evidence did develop in discovery after Dr. Radkte submitted his report, which he specifically reserved the right to supplement, showing that at least one of the plaintiffs have regularly traveled in excess of 100 miles from the point of harvest to deliver catch in recent years. Haglund Decl. Ex. K at 19-20. Mr. Rankin also testified that during the last groundfish season for which PacFIN data is not yet available, he made multiple deliveries to Bellingham, Washington. *Id.* at 15. Dr. Radtke did not know this information at the time of his report, and specifically excluded Bellingham from the geographic market based on a perceived lack of significant landed volume. Haglund Decl. Ex. C at 9-10. Dr. Sexton may agree with Dr. Radkte, Dr. Wilen, or neither of them. Regardless, fundamental fairness dictates that Dr. Sexton be permitted to independently evaluate the evidence, apply his professional judgment and experience, and draw his own conclusions.

Pacific Seafood is also forcing plaintiffs to respond to its motion without key fact discovery. One of Pacific Seafood's main arguments is that its acquisition of Ocean Gold will have no effect on competition in Westport. In an ironic twist, defendants defend this proposition by claiming that Ocean Gold and Pacific Seafood are each already monopolists, just in different fisheries. The argument is flawed for several reasons, including that Pacific Seafood's consolidation of processing capacity, not just purchase volume, makes the acquisition anticompetitive. Sexton Decl. ¶14. But even if evaluating the transaction's effect on

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competition were as simple as glancing at Pacific Seafood's and Ocean Gold's historical purchase data, plaintiffs still lack the necessary discovery to do so.

It is true that PacFIN data from recent years shows Ocean Gold purchasing large percentages of whiting and groundfish but only minimal amounts of shrimp, while Pacific Seafood does the opposite. Haglund Decl. Ex. C at 55-56. Plaintiffs have requested limited discovery necessary to determine whether the PacFIN records accurately reflect the situation on the ground, or whether Pacific Seafood and Ocean Gold have coordinated their purchasing activities to mask the extent of Ocean Gold's involvement in the shrimp market and vice versa. Given Pacific Seafood's and Ocean Gold's long track record of joint marketing and cooperation – including illegal coordination on price – plaintiffs' concerns are justified.

In short, Pacific Seafood filed a fact-laden dispositive motion in the midst of discovery, just days after learning that plaintiffs' testifying economist had withdrawn and before plaintiffs could designate a replacement. It then refused either to produce needed discovery in time for plaintiffs to incorporate it into their response, or to agree to an adequate extension. Pacific Seafood's goal, of course, is to force plaintiffs to oppose its motion based on an undeveloped factual record and without the benefit of expert testimony to support their rebuttal.

The Court should reject such transparent gamesmanship. The improper timing of Pacific Seafood's motion requires that it be denied with leave to refile at the close of discovery or, at minimum, stayed until plaintiffs have a fair opportunity to supplement their briefing with the benefit of expert testimony and the narrow discovery they have already requested. *See* Fed. R. Civ. P. 56(d). For the reasons set forth below, however, the motion should be denied with prejudice now.

B. Plaintiffs Face Threatened Loss or Damage if Pacific Seafood Acquires Ocean Gold.

Based on PacFIN data, Pacific Seafood owns substantial processing capacity and market share in Westport. Haglund Decl. Ex. C at 55-56. So does Ocean Gold. *Id.* The two companies are by far the largest purchasers and processors in the port. *Id.* The proposed acquisition would give Pacific Seafood exclusive control over effectively all purchases and processing of whiting, groundfish, and shrimp in Westport. Plaintiffs claim that consolidation will injure them by creating a monopsony that enables Pacific Seafood to suppress ex vessel prices it pays its own suppliers and, in turn, compel other processors to follow suit.

The suppression of ex vessel prices that plaintiffs will face if Pacific Seafood acquires Ocean Gold is antitrust injury. Over and over in this and related cases, Pacific Seafood misunderstands – or misrepresents – the holding of the Supreme Court's decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S. Ct. 690 (1977) and its progeny, *Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc.*, 140 F.3d 1228 (9th Cir. 1998). *Brunswick* held that lost opportunity for profit as a result of competition itself was not antitrust injury. Similarly, *Lucas Automotive* held that a plaintiff who lost a fair, competitive bidding process did not suffer antitrust injury based solely on its rival's size. Neither case is relevant here.

While it is true that the plaintiffs in *Brunswick* also challenged an acquisition based on the acquiring firm's dominant size, the analogy to this case ends there. The *Brunswick* plaintiffs were bowling alley owners who complained that but for a monopolist competitor's acquisition of their failing rivals, competition would have been reduced and they would have reaped greater profits as a result. The defendant's alleged market power had nothing to do with plaintiffs' injury, which stemmed from an increase in competition, not a restraint. The Court found it "inimical" to the purpose of the antitrust laws to provide a remedy for an injury suffered as a

result of competition itself. *Brunswick*, 429 U.S. at 488, 97 S. Ct. at 697. Similarly, in *Lucas Automotive*, the Ninth Circuit held that the plaintiff lacked standing because robust competition during the bidding process, not the defendant's alleged monopoly power, caused its injury. *Lucas Automotive*, 140 F.3d at 1230-1231 (describing defendant's superior bid). Here, by contrast, plaintiffs' threatened injury flows directly from the illegality of the proposed acquisition – namely, that it would result in a substantial consolidation of Pacific Seafood's monopsony power and enhance its ability to suppress price.

Pacific Seafood's claim that "no matter *who* might acquire Ocean Gold" there will be "very little change in Pacific Seafood's share of the shrimp purchases" is a fallacy. Def's Mot. at 28. Although recent PacFIN data shows Ocean Gold purchasing only a modest amount of shrimp, it owns substantial processing capacity. Currently, Ocean Gold utilizes that capacity to process shrimp ostensibly purchased by Pacific Seafood. Whether the PacFIN data accurately reflects the purchase allocation between Pacific Seafood and Ocean Gold is a matter of ongoing discovery. If Pacific Seafood is manipulating the purchase accounting or coercing Ocean Gold to process its purchases rather than operate independently, that may constitute a violation of the Court's injunction. Regardless, the key point is that Ocean Gold's processing assets – whether operated by a genuinely independent Ocean Gold or a new market entrant – are critical to improving competition in Westport. The proposed acquisition would consolidate those assets with Pacific Seafood, eliminating competition now and in the future.

In short, plaintiffs would not suffer that same injury regardless of who acquired Ocean Gold's assets. Acquisition by a new market entrant would spur competition with Pacific Seafood instead of eliminate it. It would reduce Pacific Seafood's ability to suppress ex vessel prices

rather than exacerbate it. Unlike in *Brunswick and Lucas Automotive*, plaintiffs' injury derives directly from the threat of restrained competition. That is antitrust injury.

The acquisition would injure plaintiffs in other ways as well. Both Mr. Whaley and Mr. Rankin own groundfish and whiting quota that they lease to other fishermen on an open exchange. Haglund Decl. Ex. J at 11, 13; Ex. K at 10. The lease price of their quota derives from the economic value of the opportunity to go fishing which, in turn, is a function in large part of ex vessel price. Sexton Decl. ¶13. By diminishing the economic benefits of going fishing, the proposed acquisition threatens to devalue Mr. Whaley and Mr. Rankin's quota.

Finally, plaintiffs also have standing based on their personal stake in the overall competitive health of the West Coast fishing industry. Unlike Section 4, Section 16 "does not state that the threat must be to the plaintiff's 'business or property,' and courts accordingly have held that noncommercial interests are also protected." *Mid-W. Paper*, 596 F.2d at 591 (citing, *inter alia*, *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d at 130 ("standing under section 16 does not require an injury to 'commercial interests' but only an injury cognizable in equity")).[9] As commercial fishermen, plaintiffs have a personalized interest in the health of their industry that extends beyond their own profits. Mr. Boardman, for example, has dedicated himself over many years to promoting the biological and competitive sustainability of West Coast fisheries. Boardman Dep. Tr. 23:17-24:23, 109:13-20. Plaintiffs' non-commercial

[9] Incredibly, Pacific Seafood relies on *Mid-W. Paper* for the proposition that plaintiffs lack standing under Section 16 unless they deal directly with the antitrust violator. Def's Mot. at 25. The *Mid-W. Paper* court – which reversed the district court's denial of Section 16 standing – held no such thing. *Id.* at 595 ("The judgment of the district court with respect to the supermarket plaintiffs will be affirmed insofar as it denies them treble damages, but reversed and remanded insofar as it precludes them from obtaining injunctive relief.").

interest in the sustainability of their industry is legally protectable under Section 16. For this reason too, Pacific Seafood's motion must be denied.

C. Plaintiffs' Ties to Westport are Sufficient to Support Standing.

As an initial matter, Pacific Seafood's claim that a plaintiff can never suffer cognizable antitrust injury in an adjacent market is a significant overreach. It is true that, as a general matter, market participation is an element of antitrust standing. But even *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of California*, 190 F.3d 1051 (9th Cir. 1999), the lead case relied on by defendants, recognized an exception to the requirement for plaintiffs who's injuries are "'inextricably intertwined' with the injuries of market participants." *Id.* at n.5 (citing *Blue Shield v. McCready*, 457 U.S. 465, 102 S. Ct. 2540 (1982)).[10] The Ninth Circuit has previously accorded antitrust standing to non-market participants where it "would serve the public interest in effective antitrust enforcement and present none of the concerns counseling limitations on the right to sue under section 4." *Ostrofe v. H.S. Crocker Co.*, 740 F.2d 739, 746 (9th Cir. 1984) (explaining that "[a] wooden application of a technical requirement of 'antitrust injury' narrowly defined would have little to recommend it. As the [Supreme] Court said in *Associated General Contractors* [103 S.Ct. at 908], it is 'virtually impossible to announce a black-letter rule that will dictate the result in every case.'").

United States v. Marine Bancorporation, Inc., 418 U.S. 602, 624, 94 S. Ct. 2856 (1974) also does not help Pacific Seafood. *Marine Bancorporation* involved the United States' challenge to bank merger in which a large national bank sought to acquire a small local bank in Spokane, Washington. The government argued that in defining the relevant geographic market,

[10] Notably, the Supreme Court recognized standing for certain non-market participants even under Section 4's more demanding standard.

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the Court should include the area that the acquired firm allegedly would have expanded into but for the acquisition. *Id.* at 605. ("[The United States] contends that if the merger is prohibited, the acquiring bank would find an alternative and more competitive means for entering the Spokane area and that the acquired bank would ultimately develop by internal expansion or mergers with smaller banks into an actual competitor of the acquiring bank and other large banks in sections of the State outside Spokane."). The Court rejected the argument as too speculative and, instead, constrained the geographic market to the area where the target bank was and actual competitor. *Id.* at 641.

Plaintiffs here do not allege injury based the speculative notion that, but for Pacific Seafood's acquisition, Ocean Gold might expand its geographic reach outside of Westport. They contend that the acquisition will eliminate both actual and potential competition in Westport, resulting in suppressed ex vessel prices in adjacent ports. *Marine Bancorporation* is inapposite. Moreover, because the government was the plaintiff in *Marine Bancorporation*, standing was not even at issue. *Marine Bancorporation* does nothing to support Pacific Seafood's incorrect assertion that antitrust injury can never be suffered in an adjacent market.

The other non-controlling authority that Pacific Seafood relies on does not help it either. The plaintiff in *Killian Pest Control, Inc. v. HomeTeam Pest Def., Inc.*, No. 14-CV-05239-VC, 2015 WL 13385918, at *2 (N.D. Cal. Dec. 21, 2015), a competing service provider in Fresno and Bakersfield, claimed standing to challenge the defendant's exclusion of other competitors in 35 far-flung markets that it did not participate in. There was no indication that anything that the defendant did in those markets had any impact on his business. The only authority that even arguably supports defendants' position is dicta in an isolated case out of New York. *See Reading Int'l, Inc. v. Oaktree Capital Mgmt. LLC*, 317 F. Supp. 2d 301, 311 (S.D.N.Y. 2003). But even

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the *Oaktree Capital* court, which did not rule on the issue and instead denied standing on other grounds, acknowledged that "[a] bright-line rule that would under *no* circumstances recognize antitrust injury [based on injury sustained in an adjacent geographic market] might well be problematic." *Id.* at 314 (emphasis in original).[11] Neither case involved a situation where, as here, a supplier challenged consolidation of market power in one region based on suppressed prices paid to suppliers in an adjacent geographic area.[12]

For the above reasons, Pacific Seafood's argument that plaintiffs categorically lack standing unless they are "Westport fishermen" fails. But even if the Court did constrain its analysis exclusively to Westport, and even if it forced Dr. Sexton to adopt all of Dr. Radtke's opinions wholesale without any right to conduct his own analysis or incorporate any new relevant evidence, Plaintiffs would still have standing. No rule requires that plaintiffs deliver catch into Westport, let alone in any particular year, in order to be market participants there. *See Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of California*, 190 F.3d 1051, 1057-1058 (9th Cir. 1999) ("GTE claims that the 'market participant' test has been narrowed by our case law to a 'consumer or competitor' test. Because American is not its consumer or competitor, GTE argues American has no antitrust injury. We reject GTE's contention. The Supreme Court has never

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[11] The facts of *Oaktree Capital* were also highly distinguishable. The plaintiff challenged multiple mergers that were "not only geographically dispersed, but also span a time period stretching back over fifteen years." Moreover, the plaintiff's injuries were the result not of the mergers themselves, but of subsequent illegal agreements and actions commenced many years later." *Id.*

[12] The corollary to plaintiffs' case in a monopoly – rather than a monopsony – context would be a dominant seller in one region that spurs higher consumer prices in an adjacent an adjacent market.

imposed a 'consumer or competitor' test but has instead held the antitrust laws are not so limited.").

But every single plaintiff has delivered into Westport, and Mr. Whaley recalls doing so as recently as 2010. Every single plaintiff annually renews permits that allow them to deliver to Washington ports. Jeff Boardman recently fished just 15 miles off of Westport, only to haul his catch 14 hours south to Newport because fisherman are "constricted by processing" and Pacific Seafood's control over shrimp processing in Westport. Haglund Decl. Ex. I at 12-14.

Moreover, Mr. Rankin and Mr. Whaley own groundfish and whiting quota that they lease on an open exchange. The lease price of their quota is contingent on competitive ex vessel prices that make the opportunity to go fishing economically valuable. Thus, suppression of ex vessel prices in Westport threatens them with economic injury regardless of whether or not they deliver there in a particular year. *See American Ad Mgmt.*, 190 F.3d at 1058 ("it is not the status as a consumer or competitor that confers antitrust standing, but the relationship between the defendant's alleged unlawful conduct and the resulting harm to the plaintiff").

Finally, the Court should not ignore plaintiffs' significant non-commercial interest in the acquisition's anticompetitive impact. Fishermen are stewards of their unique industry, charged with caring for its biological and economic sustainability. Plaintiffs have a long history of performing that obligation, and this case is a continuation of their commitment. *See, e.g.,* Haglund Decl. Ex. I at 2, Ex. J at 2, 6-7. To cast plaintiffs as "strangers" to an acquisition that would undoubtedly have a dramatic impact on the competitive trajectory of their industry is a woeful mischaracterization. The threatened injury to plaintiffs' non-economic interests is cognizable under Section 16, and the Court should uphold standing on that basis.

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D. The Fact that Plaintiffs do not Deliver to Pacific Seafood or Ocean Gold is Irrelevant to Their Standing to Enjoin the Proposed Acquisition.

Pacific Seafood argues that plaintiffs lack standing to enjoin the acquisition because they do not deal directly with either it or Ocean Gold. Simply stated, Pacific Seafood is wrong. While Courts have sometimes found claims derived from dealings with third parties to be too speculative to support a claim for treble damages under Section 4, the analysis under Section 16 is different. That is because in the injunctive context, awarding standing based on an indirect relationship with the antitrust violator does not risk duplicative recovery or complex damages apportionment. *See Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. at 261, 92 S. Ct. at 891 ("100 injunctions are no more effective than one").

Every single one of the eight cases that Pacific Seafood cites for the proposition that an antitrust plaintiff lacks standing if it does not "directly deal with the alleged antitrust violators," Def's Mot. at 26, so held in the context of claims for damages, not under Section 16. *See, e.g.,* In *re Coordinated Pretrial Proceedings in Petroleum Prod. Antitrust Litig.*, 691 F.2d 1335, 1339 at n.2 (9th Cir. 1982) ("Plaintiffs claim standing to assert an umbrella claim under § 4 of the Clayton Act"); *In re Vitamins Antitrust Litig.*, No. 99CIV5134, 2001 WL 855463, at *1, n.1 (D.D.C. July 2, 2001) ("Defendants do not seek dismissal at this time of plaintiffs' claims for injunctive relief under Section 16 of the Clayton Act; instead, their Motion is directed solely at plaintiffs' monetary damage claims under Section 4 of the Clayton Act."). Pacific Seafood's failure to cite any on point authority is not a coincidence. The policy concerns that sometimes favor limiting the universe of treble damages plaintiffs to parties that deal directly with the defendant are absent from this case.

The only case that defendants misleadingly suggest stands for their position in the Section 16 context, *Antoine L. Garabet, M.D., Inc. v. Autonomous Techs. Corp.*, 116 F. Supp. 2d

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1159, 1170 (C.D. Cal. 2000), in fact does not. ("an indirect purchaser may obtain injunctive relief, even though such a plaintiff would be barred from damages claims"). Although the *Garabet* court made "no findings" as to Section 16 standing because the relief sought was barred by laches, it did explain that:

> [Standing under Section 16] lacks several important limitations that have been applied to Section 4. First, the injury can be threatened rather than actual. Second, the court need not consider the danger of duplicative recovery. Third, the "directness" of the injury seems less important, given the Ninth Circuit's statement in *Lucas Automotive* [that a party "too remote for damages might be granted an injunction"], and given that injunctive relief does not require the same "apportionment" among multiple plaintiffs that would be required for damages. Thus, the access to injunctive relief is broader than the access to damages.

Id. at 1171.

The principal appellate case that Pacific Seafood relies on, *Mid-W. Paper Prod. Co. v. Cont'l Grp., Inc.*, 596 F.2d 573 (3d Cir. 1979), even more thoroughly undermines its position. After rejecting indirect purchaser plaintiffs' standing under Section 4, the *Mid-W. Paper* court reversed the district court's denial of standing to pursue an injunction under Section 16. In so holding, the court explained:

> In contradistinction to s 4, s 16 does not ground injunctive relief upon a showing that "injury" has been already sustained, but instead makes it available "against Threatened loss or damage." Furthermore, s 16 does not state that the threat must be to the plaintiff's "business or property," and courts accordingly have held that noncommercial interests are also protected. Most significantly, however, s 16 by its terms entitles a party to injunctive relief "when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity." Mindful of these distinctions, courts have held that for purposes of s 16 the complainant "need only demonstrate a significant threat of injury from an impending violation of the antitrust laws . . . and that a person may have standing to obtain injunctive relief even when he is denied standing to sue for treble damages. Indeed, the test for standing under s 16 has been framed in

> terms of a proximate cause standard that is "less constrained" than that under s 4 and which might in fact be no more rigorous than the general rule of standing.

Mid-W. Paper Prod. Co. v. Cont'l Grp., Inc., 596 F.2d 573, 591–92 (3d Cir. 1979).[13] The Ninth Circuit agrees. *See, e.g., Lucas Automotive*, 140 F.3d at 1234; *Bubar*, 752 F.2d at n.2.

To be sure, plaintiffs must still demonstrate threatened antitrust injury from the transaction. *See Cargill*, 479 U.S. at 111, 107 S. Ct. at 490. As described in detail above, plaintiffs, even without critical discovery and an opportunity for meaningful expert rebuttal, have done so. But it is irrelevant under Section 16 whether or not plaintiffs' injury is suffered through direct dealings with Pacific Seafood or Ocean Gold. If plaintiffs sought damages under Section 4, perhaps Pacific Seafood might argue that they lacked standing on that basis. For purposes of determining standing to pursue an injunction, however, it is insignificant.

V. CONCLUSION.

For all of the foregoing reasons, Pacific Seafood's Motion for Summary Judgment should be denied. In the alternative, ruling on the motion should be stayed under FRCP 56(d) until

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[13] Judge Higginbotham would also have upheld standing under Section 4 because "[i]t is foreseeable if not inevitable that, when those with a substantial share of the market fix prices, their competitors will also raise prices under the anti-competitive umbrella established by the price-fixers." *Id.* at 597 (Higginbotham, J., dissenting in part). In a monopsony case, it is likewise foreseeable that when a dominant purchaser suppresses input prices, its competitors will follow suit.

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plaintiffs have a fair opportunity to complete discovery and prepare a supplemental response.

Dated this 19th day of January, 2018.

HAGLUND KELLEY LLP

By: /s*Michael E. Haglund*
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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of January, 2018, I served the foregoing **PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**, the following by the following indicated method(s):

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☐ by **email**.

☐ by **hand delivery**.

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☒ by transmitting full through the court's Cm/ECF system.

s/*Michael E. Haglund*
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