IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

SEAWATER SEAFOODS COMPANY, *et al*,

Plaintiffs,

v.

FRANK DULCICH, *et al*,

Defendants.

Case No. 6:16-cv-01607-MC

OPINION & ORDER

MCSHANE, Judge:

Plaintiffs Seawater Seafoods Co., Front Street Marine LLC, and Bret Hamrick filed this antitrust action on 8/9/2016 against defendants Frank Dulcich, Pacific Seafood Group, Dulcich Realty Acquisition, LLC, Pacific Hooker, LLC, and Pacific Fishing, LLC (known collectively as the Pacific Seafood Group). In their Complaint, the plaintiffs allege in their first and second

claims that the defendants violated section 2 of the Sherman Act (15 USC § 2) and sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 26), by illegally leveraging their market power to interfere with the plaintiffs' business operations by blocking their access to fishing docks located in Newport, Oregon (ECF No. 1 at pp.2; 16-17). Their third claim for relief is an Oregon state law claim for Tortious Interference with Business Relations, based on allegations that the defendants (1) violated the Lease and settled Oregon law by unreasonably obstructing Seawater's commercial use of a public waterway; (2) threatened and intimidated fishermen and vessel owners; (3) negligently allowed plaintiffs' property to be damaged by vermin and noxious gas; and (4) engaged in exclusionary conduct in violation of the Sherman Act. (*Id* at p.18). The plaintiffs' fourth and fifth claims are for state law Trespass and Negligence, stemming from a February 2015 incident wherein the defendants are alleged to have "intentionally or recklessly caused an ammonia leak... to flow onto plaintiffs' facility, resulting in the loss of more than 2,500 pounds of live Dungeness crab." (*Id* at pp.19-20).

On 9/9/2016, the defendants filed a motion (ECF No. 12) to dismiss the plaintiffs' 1st and 2nd claims (the federal antitrust claims for "monopolization") pursuant to FRCP 12(b)(6), and their 3rd, 4th, and 5th claims (the state law claims for Tortious Interference with Business Relations, Trespass, and Negligence) pursuant to 28 U.S.C. § 1367(c)(3). They also moved to dismiss or stay all of the plaintiffs' claims under the Abstention Doctrine established in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). Oral arguments were heard on the defendants' motions on 1/31/2017 (ECF No. 24) and these matters are now before this Court.

For the following reasons, the defendant's Motion to Dismiss (ECF No. 12) is **DENIED.**

STANDARD OF REVIEW

To survive a motion to dismiss under FRCP 12(b)(6), a complaint must contain sufficient factual matter that "state[s] a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible on its face when the factual allegations allow the court to infer the defendant's liability based on the alleged conduct. *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009). The factual allegations must present more than "the mere possibility of misconduct." *Id.* at 678. A complaint also does not suffice if it tenders "naked assertions" without "further factual enhancement." *Twombly*, 550 U.S. at 557.

While considering a motion to dismiss, the court must accept all allegations of material fact as true and construe in the light most favorable to the non-movant. *Burget v. Lokelani Bernice Pauahi Bishop Trust*, 200 F.3d 661, 663 (9th Cir. 2000). But the court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Twombly*, 550 U.S. at 555. If the complaint is dismissed, leave to amend should be granted unless the court "determines that the pleading could not possibly be cured by the allegation of other facts." *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995).

DISCUSSION

Claims 1 & 2 – Monopolization and Attempted Monopolization:

In the plaintiffs' first claim for relief, for monopolization, they allege that Pacific Seafood's placement and "use of a hoist at the westernmost edge of tax lot 1700 will increase Pacific Seafood's existing monopoly power position in the Monopolized Markets in violation of Section 2 of the Sherman Act." (ECF No. 1 at ¶ 51). In the plaintiffs' second claim for relief, for

attempted monopolization, they allege that Pacific Seafood "is attempting to monopolize the Monopolized Markets and the Yaquina Bay market for Dungeness crab through the use of the exclusionary practices." (*Id* at ¶ 55). According to the plaintiffs, both of their claims "arise from defendants' exercise of monopoly power in the West Coast seafood product input markets for processed trawl-caught groundfish, Pacific onshore whiting, and Pacific coldwater shrimp (collectively, the Monopolized Markets), coupled with a robust course of anticompetitive conduct that PSG has successfully employed to stymie competition, erect unreasonable barriers to entry, and suppress ex vessel prices in those markets. In addition, plaintiffs' attempted monopolization claim arises from PSG's use of the same anticompetitive tactics to consolidate market power in the central Oregon Coast market for Dungeness crab (the Newport Crab Market)." (ECF No. 14 at p.24).

The defendants argue that "Once the repetitive and irrelevant allegations of the Antitrust Claims are peeled away to their operative core, it is apparent that Plaintiffs' claims for monopolization and attempted monopolization are based on a property rights dispute over Plaintiffs' alleged right to use Pacific Seafood's dock to park fishing vessels delivering seafood to Plaintiffs' inadequately sized docks." (ECF No. 12 at p.8). They argue that the monopolization claims fail because Pacific Seafood's docks are not "essential facilities" and that the "antitrust markets" the plaintiffs wish to define do not exist. (*Id* at pp. 14-15).

To state a monopolization claim under the Sherman Act (15 U.S.C. § 2), the plaintiffs must plead facts alleging that: (1) the defendants possess monopoly power in the relevant market(s); (2) willful acquisition or maintenance of that power; and (3) causal antitrust injury. *Somers v. Apple, Inc.,* 729 F.3d 953, 963 (9th Cir. 2013). To state a claim for attempted Monopolization, they must allege: (1) specific intent to control prices or destroy

competition; (2) predatory or anticompetitive conduct to accomplish the monopolization; (3) dangerous probability of success; and (4) causal antitrust injury. *Pac. Exp., Inc. v. United Airlines, Inc.*, 959 F.2d 814, 817 (9th Cir. 1992). Determinations defining relevant antitrust markets is a question of fact. *United States v. Microsoft Corp.*, 253 F.3d 34, 52 (D.C. Cir. 2001) (*en banc, per curiam*). Whether or not an entity is exercising monopoly power is a particular market is also a question of fact. *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 374 (7th Cir. 1986).

Here, the plaintiffs have alleged sufficient facts in their Complaint that antitrust markets may exist. Specifically, in terms of defining the "Newport Crab Market" as a relevant antitrust market, the plaintiffs have alleged the following in their Complaint (ECF No. 1):

> Input markets for fresh seafood products, including Dungeness crab, are geographically restricted by the perishable nature of the goods and the substantial transportation costs associated with catch delivery, particularly fuel. *Id* at ¶ 13;
>
> Due to these geographic restrictions, relevant geographic submarkets necessarily cluster around ports, with West Coast fishermen having no practical alternative but to deliver their catches to shoreside processors that are within a reasonable steaming time (approximately 60 to 100 miles) from the point of harvest. *Id.*;
>
> PSG is the single largest buyer of Dungeness crab within a 60 to 100-mile radius of Yaquina Bay, accounting for more than 50% of all Dungeness crab purchases in that zone in each of the past 10 years. *Id* at ¶ 17.;
>
> Seafood product markets are subject to significant barriers to entry including inelastic supply, uncertainty of future supply, and the limited availability of waterfront locations zoned and suitable for industry participation. *Id* at ¶ 14.;
>
> PSG achieved its substantial, sustained market share through a variety of illegal, anticompetitive tactics, including fraudulent acquisitions, secret anticompetitive dealings, aggressive consolidation of means of production, suppression of ex vessel prices, and exclusive dealing and tying arrangements. *Id* at ¶ 15 (describing in detail PSG's anticompetitive tactics in furtherance of its control of the Monopolized Markets), ¶ 17 (PSG uses the same tactics to extinguish competition and accrue market power in the Newport Crab Market);

> Through its predatory conduct, PSG has achieved vertical integration, economies of scale, and absolute cost advantages that protect its ability to maintain and expand its monopoly power. *Id* at ¶ 16; and
>
> PSG's goal is to extinguish competition in the Newport Crab Market through its exclusionary conduct. *Id* at ¶ 17.

The plaintiffs have also demonstrated sufficient intent and ability to enter the markets. Specifically, they made a substantial investment in purchasing the three parcels of bayfront property with the intent to grow their business and enter the markets (ECF No. 14 at p. 30; No. 1 at ¶ 28), they have successfully entered new markets in the past (ECF No. 1 at ¶¶ 27; 43-44). The plaintiffs have also satisfied the requirement of pleading causal antitrust injury, which according to the plaintiffs "includes, at minimum, Seawater's loss of business and threat to Mr. Hamrick's livelihood, disruption of Seawater's entry into new markets, and waste of Front St.'s property at tax lots 1800 and 2000." (ECF No. 14 at p.32; No. 1 at ¶¶ 48-49).

Similarly, the issue of whether or not the docks (and access to them via the adjacent waterways) are "essential facilities" is also a question of fact that has yet to be determined. This issue is simple. According to the plaintiffs, adequate access to the docks to unload and process seafood is not only "essential," it is "absolutely imperative" to their entry into the alleged monopolized markets. (ECF No. 14 at pp. 35-37; No. 1 at ¶ 14; Hamrick Decl. ¶ 7; Webster Decl. ¶ 3). By definition, "absolutely imperative" demonstrates an "essential" need, especially in terms of the standard for surviving a motion to dismiss, where the pleadings must be accepted as true. *See Wilson v. Hewlett–Packard Co.*, 668 F.3d 1136, 1140 (9th Cir. 2012).

Therefore, because whether or not antitrust market(s) exist and whether or not the docks are "essential facilities" are both questions of fact which have yet to be determined, the defendants' motion to dismiss the plaintiffs' antitrust claims is denied.

Claims 3-5 – State Law Claims:

The plaintiffs' third, fourth, and fifth claims for relief are based on Oregon state law for tortious interference, trespass, and negligence. Their tortious interference claim is based on the alleged interference by the defendants with their ability to use tax lots 1800 and 2000 for their "intended purpose" and with interference in their business relationships with fishermen and vessel owners. (ECF No. 1 at ¶¶ 61-62). Their trespass and negligence claims are both based on an alleged "ammonia leak" on February 12, 2015, that they claim originated from Pacific Seafood's cold storage facility located on tax lot 1700, which allegedly damaged live crab stored by Seawater on tax lot 1800. (*Id* at ¶¶ 71-72, 75-76).

The defendants argue that these state law claims should be dismissed only if the plaintiffs' antitrust claims are also dismissed, by this court declining supplemental jurisdiction, pursuant to 28 U.S.C. 1367(c)(3). (ECF No. 12 at p.29). Because the defendants' motion to dismiss the plaintiffs' antitrust claims is denied for the reasons stated above, these claims have not been addressed by a state court, and because these claims form part of the same case or controversy at issue in this case, the defendants' motion to dismiss them is denied.

Colorado River Abstention Doctrine:

The defendants argue that even if the Court determines that the pleadings are sufficient to survive a motion to dismiss, the Court should exercise use the *Colorado River* (424 U.S. 800 (1976)) abstention doctrine to dismiss or stay this action to allow the parties to litigate the underlying state law property issues that are pending in state court.

As an initial matter, it should be noted that the plaintiffs filed notice to voluntarily dismiss their state court action in Lincoln County (Lincoln County Circuit Court case number

16cv25418) *before* filing this case in federal court. (ECF No. 17 Ex. F). However, after the plaintiffs filed to dismiss their state case in order to file this case in federal court, the defendants filed an objection to the plaintiffs' notice and the case continued, in essence with the defendants (Pacific Seafoods) then seeking declaratory relief, asking the state court to find that their right of access to the water in front of their docks was superior to Seawater's rights, and that any obstruction of Pacific Seafood's access would be a violation of their rights as a riparian owner. (ECF No. 30 at pp. 2; 9-10).

On 5/30/2017, summary judgment was granted in Pacific Seafoods' favor by Lincoln County Circuit Court Judge Paulette Sanders. (ECF No. 30 at p.49). Plaintiffs filed a notice of appeal to the Oregon Court of Appeals and a motion for stay of the judgment (ECF No. 33-1). As of today, neither the appeal nor the motion for stay have been ruled on by the state courts. But this is irrelevant in terms of this case because Judge Sanders' two sentence decision in the state court case (ECF No. 30 at p.49) does not address the claims in this case. Even if the Oregon Public Trust Doctrine does *not* apply (as inferred but not specifically stated in Judge Sanders' ruling), it does not address the plaintiffs' claims that the defendants violated the antitrust laws of the Sherman and Clayton Acts, nor does it address the plaintiffs' state law claims for tortious interference, trespass, and negligence.

According to the Ninth Circuit, the *Colorado River* abstention doctrine is never appropriate if the state court proceeding will not resolve all issues in the concurrent federal litigation. *Holder v. Holder*, 305 F.3d 854, 859 (9th Cir. 2002). Such is the case here. Therefore, the *Colorado River* abstention doctrine does not apply.

CONCLUSION

For these reasons and those stated on the record during oral arguments on 1/31/2017, the defendants' Motion to Dismiss (ECF No. 12) is **DENIED.** The Court will set a date for a Rule-16 Conference to set new case management deadlines and a trial date.

IT IS SO ORDERED.

DATED this 17th day of July, 2017.

Michael J. McShane
United States District Judge