MEMORANDUM

TO: Council, SSC and AP Members

FROM: Clarence G. Pautzke
Executive Director

ESTIMATED TIME
1 HOUR

DATE: May 31, 2000

SUBJECT: Magnuson-Stevens Act Reauthorization Issues

ACTION REQUIRED

Status report on reauthorization.

BACKGROUND

In April I gave you a marked up version of the Magnuson-Stevens Act that incorporated Congressman Gilchrist's bill, HR 4046, which would add many new provisions proposed by the environmental community. No additional legislative proposals have been submitted, though apparently House and Senate staffs are preparing separate versions of reauthorization bills to be submitted in the next few weeks. It is not anticipated that Congress will be able to process those proposals until next year, though there may be short term action to extend the moratorium on IFQs, which otherwise would lapse on October 1, 2000.

There have been eight hearings beginning last July:

July 22, 1999	Washington, D.C.	House Subcommittee
July 29, 1999	Washington, D.C.	Senate Subcommittee
September 25, 1999	Portland, ME	Senate Subcommittee
December 14, 1999	New Orleans, LA	Senate Subcommittee
January 18, 2000	Anchorage, AK	Senate Subcommittee
January 19, 2000	Seattle, WA	Senate Subcommittee
March 9, 2000	Washington, D.C.	House Subcommittee (mainly EFH focus)
April 10, 2000	Boston, MA	Senate Subcommittee

I have reviewed most written testimony provided at the hearings and developed the list of issues shown in item C-6(a). Inserted in that list are recommendations from the Regional Council Chairmen's 1999 meeting and issues raised by NMFS in testimony before the subcommittees. A more complete listing of the chairmen's recommendations from last year is under item C-6(b). The most recent proposals offered by NMFS at our chairmen's meeting this May are under item C-6(c). NMFS's only new proposal since the last hearing is the addition of seabirds to the definition of bycatch.

The regional council chairmen emphasized the following seven points at their recent meeting in Charleston on May 22-24:

1. More funds are needed to carry out current mandates already added to the Act by the SFA in 1996.

2. Sweeping changes should not be made to the Act now, though minor technical changes to improve the process would be acceptable.

3. Most of the new provisions proposed by HR 4046 are opposed by the chairmen. The provisions far outrun our current available information on and understanding of ecosystems, and will just open NMFS up for more litigation.

4. Concerning EFH, the Council chairmen maintained their previous position that either the definition should be modified, or guidance should be more specific on how to use different types of data to identify and describe EFH.

5. The basis for closed meetings needs to be expanded to include evaluation of research proposals.

6. If Congress adds any new members to any of the Councils, then additional funding needs to be granted also.

7. Concerning the collection of social and economic data, labor data need to be collected routinely. Current databases do not cover people that harvest fish for a living because they are considered self-employed and are not counted in current surveys.

The Alaska Marine Conservation Council has submitted a written comment on reauthorization (item C-6(d)). Changes proposed by the National Fisheries Institute are under item C-6(e).

Synopsis of Magnson-Stevens Act Reauthorization/Oversight Hearings 1999-2000

MSY/OY:

1. MSY is not a workable concept. MSY should be goal, not strict standard. Use an average MSY for aggregate species, rather than attempting to keep all species at high abundance despite varying environmental conditions. MSY is single-species approach, when multispecies approach is needed.
2. MSY is an effective concept and should be strictly applied to the fisheries.
3. Flexibility is needed in setting OY; a better definition of OY is needed.

Overfishing Definitions:

1. Overfishing definitions are too restrictive and rebuilding guidelines are unrealistic and impracticable. There should be more flexibility in setting rebuilding schedules so whole fisheries are not shut down. Need to be able to extend rebuilding times past 10 years if justified by social -economic impacts. Not all stocks in low abundance are overfished, but that is what the guidelines lead you to conclude.
2. Congress needs to give NMFS guidance on priority of national standards. NMFS always takes the position that conservation overrides other national standards. Need national standard oversight panel.
3. The overfishing definitions need to be strengthened and applied more diligently by the councils, especially the minimum stock size threshold component. Need to prohibit overfishing of any stock in a mixed stock fishery.
4. **Chairmen: Need greater latitude in specifying rebuilding periods and social and economic factors have to be given greater emphasis. Also, there are problems with MSY-related definitions of overfishing that need to be resolved.**

TACs and Closures:

1. Need to require the setting of hard TACs and closures to ensure conservation of the stocks.
2. Do not impose harvest quotas without hard data. Do not use quotas in recreational fisheries.
3. Compensate fishermen if there are going to be closures.

Improved Science:

1. Need to improve best available science and better define exactly what it is. It should be a guideline rather than a rigid principle. Lack of good data on stock assessments leads to use of more precautionary management and more restrictions on the fisheries.
2. Need a cooperative industry-agency science program. Industry needs to be more involved in setting research priorities. Private sector vessels should be used in stock assessment research. Need more research and surveys. Include stakeholders in research planning. Support collaborative research.
3. There should be greater cooperation and coordination between Canadian and U.S. scientists and managers in managing shared-stock fisheries.
4. Need an arbitration mechanism for resolving problems with NMFS over stock assessments and setting of quotas. NMFS must then implement results of arbitration.
5. Obtain fishery-independent data.
6. Listen to fishermen more on status of stocks.
7. Leave science centers under NOAA, but move NMFS to Agriculture.

Ecosystems/Precautionary Management:

1. Need ecosystem approach rather than using MSY single species management.
2. Incorporate concept of carrying capacity in the Act.
3. Require development and implementation of fisheries ecosystems plans.
4. Mandate the use of a precautionary approach.
5. Limit the use of the precautionary approach.

Social and Economic Data:

1. **Chairmen and NMFS: Delete prohibition on collecting economic data from processors and improve data collection.**
2. Need more studies of social and economic impacts of management measures.
3. Use fishermen's knowledge more.
4. Need to amend Act to require collection of accurate, comprehensive harvesting employment data. Harvesters are considered self-employed and therefore do not count in quarterly surveys of employers performed by the U.S Bureau of Labor Statistics and all States.

Confidentiality of Information:

1. **Chairmen: Clarify in Section 402 that proprietary or confidential commercial or financial information regarding fishing operations or fish processing operations cannot be disclosed. Includes prohibition on release of observer data from North Pacific Council program.**

Observer Programs:

1. National observer program is needed with fees to support it. If language is placed in the Act concerning a national program, it needs to leave each Council as much flexibility as possible in designing their own programs.
2. Need liability insurance against law suits filed by observers.

Fees. Rents and Loans:

1. Need to collect rents from fisheries. Need fees to support observer programs.
2. Need loan program for purchase of safety equipment.
3. **Chairmen: Need discretionary authority for fees to support observer programs, but oppose imposition of fees that are not regional in nature and dedicated to the councils. Also concerned about the ability of depressed fleets to pay fees.**

Essential Fish Habitat:

1. Enhance protection of EFH and implement measures to minimize fishing impacts.
2. Focus the definition of EFH because it is too broad and thus meaningless.
3. Do not apply EFH standards so stringently to non-fishery users such as oil and gas industry because they have to meet the requirements of many other review processes.
4. **Chairmen and NMFS: Give NMFS and Councils ability to regulate non-fishing vessel activities that affect EFH, particularly coral reefs.**
5. **Chairmen: Either modify the EFH definition to focus it, or give more specific guidance on how to use different types of data.**
6. Need marine reserves. Use marine reserves to keep out commercial fisheries, but allow recreational access. Marine reserves will be complicated by a complex array of overlapping jurisdictions.
7. Need to be careful in implementing EFH requirements in state waters.

Bycatch Reduction:

1. Need more measures to reduce bycatch and to monitor and report it.
2. Bycatch reduction devices are necessary in shrimp fishery to reduce bycatch of juvenile red snapper.
3. Bycatch reduction devices should not be imposed on the shrimp fishery.
4. **Chairmen: Highly migratory species in the Pacific, managed under a Western Pacific Council fishery management plan and tagged and released alive under a scientific or recreational fishery tag and release program, should not be considered bycatch. Turtles should be retained in the definition of "fish" because they are very important in every region and especially in past and possibly future fisheries pursued by indigenous peoples of the Western Pacific Region.**

IFQ Moratorium:

1. Continue IFQ moratorium. Need to resolve many issues before letting the moratorium expire.
2. Remove the moratorium on IFQs. Needed as management tool to alleviate overcapacity.
3. **Chairmen: Rescind the IFQ moratorium. Support allowing councils maximum flexibility in designing IFQ systems and setting the fees charged for initial allocations, first sale and leasing of IFQs.**

Council Operations and Composition:

1. **Chairmen: Remove ability of regional administrators to vote on emergency rules.**
2. Give advisory committee chair a vote on the Council.
3. Elect Council members, rather than appoint them.
4. Need to review and strengthen qualifying criteria for Council membership and conflict of interest and recusal requirements.
5. Need to be more flexible in recusal requirements so industry members have more opportunity to vote.
6. Need new representatives on Council: conservationists; lobsterman; designee for tribal seat on PFMC; more commercial fishermen.
7. New amendments should be implemented immediately after approval so that there is no lag and the industry has a better understanding of the regulations.
8. **NMFS: Allow councils to use any means to notify public about meetings.**
9. **NMFS: Include "commonwealths, territories, and possessions of the U.S. in description of Caribbean Council's authority.**
10. **Chairmen and NMFS: Allow concurrent approval of plans and amendments as well as regulations, and provide for initial 15-day disapproval process.**
11. **Chairmen: Allow councils to resubmit responsive measures without having to submit a complete FMP or amendment as now required by subsection (4) of Section 304(a). Include mandate in Act to require NMFS consult with the councils before disapproving fishery management plans, amendments, or changes made through the abbreviated rule-making process.**
12. **Chairmen: Amend Act to specify that Council member pay be based on the General Schedule that includes locality pay.**
13. **Chairmen: Give councils authority to receive funds or support from other local, state and federal government agencies and non-profit organizations.**
14. **Chairmen: Add additional At-Large seat to the Mid-Atlantic Council with funding identified.**

Alternative Management Mechanisms:

1. Explore more local approach to management. Use regional fishery plans with local management.
2. Allow for planning and implementation of innovative fishery management experiments.

Capacity Reduction:

1. Make it legal for New England and Mid-Atlantic councils to develop capacity plans for all species north of Cape Hatteras.
2. Need buyout of capacity for red snapper commercial fishery.
3. Allow community development foundations to purchase, hold and manage quota shares.
4. Participation in buyback programs should be voluntary.
5. Add Kodiak to American Fisheries Act.

(Compiled 4/26/00 by Clarence Pautzke, NPFMC)

Magnuson-Stevens Fishery Conservation and Management Act Reauthorization Issues - Council Chairmen's Recommendations presented by Joseph M. Brancaleone, Chairman, New England Fishery Management Council to the Committee on Resources House Subcommittee on Fisheries Conservation, Wildlife and Oceans Thursday, July 22, 1999

On behalf of myself and the other seven Council Chairman, I would like to thank the members of the Subcommittee for the opportunity to present our views. First let me say the Council Chairmen believe the Magnuson-Stevens Act as amended in 1996 is a good piece of legislation and it is working. Many of our most important fisheries are prospering and we are seeing significant improvements in a majority of the overfished stocks under management. The changes we suggest are not substantial, but we believe they will serve to enhance and improve the Act. The points I make in this presentation concern only the reauthorization issues on which the chairs reached consensus. I believe individual Councils have positions on additional topics which I'm sure they will communicate as the reauthorization process moves forward. The Chairs discussed this document in a fair amount of detail at our meeting in late June. I'm happy to answer questions on any of the issues we covered or on issues of concern to the New England Council.

- **Rescinding the Congressional Prohibitions on IFQs or ITQs**
  Currently Section 303(d)(1) of the Magnuson-Stevens Fishery Conservation and Management Act (M-S Act) prohibits a Council from submitting or the Secretary from approving an Individual Fishing Quota (IFQ) system before October 1, 2000. Section 407(b) prohibits the Gulf Council from undertaking or continuing the preparation of a red snapper IFQ program or any system that provides for the consolidation of permits to create different trip limits for vessels in the same class before October 1, 2000. If the reauthorization process is completed in 1999, the Council chairmen support rescinding these provisions before the year 2000 deadline. The chairmen also oppose extending the moratorium on IFQs.

- **Establishment of Fees**
  The Council chairmen are opposed to the imposition of fees that are not regional in nature and dedicated by the Councils, and are concerned about the ability of depressed fleets to pay fees. However, we do support the National Academy of Sciences recommendation that Congressional action allow the Councils maximum flexibility in designing IFQ systems and allow flexibility in setting the fees to be charged for initial allocations, first sale and leasing of IFQs [M-S Act Sections 303(d)(2-5) and 304(d)(2)].

- **Coordinated Review and Approval of Plans and their Amendments and Regulations**
  The Sustainable Fisheries Act (SFA) amended Sections 304(a) and (b) of the M-S Act to create separate sections for the review and approval of plans and amendments and for the review and approval of regulations. Accordingly, the approval process for these two actions now proceeds on separate tracks, rather than concurrently. The SFA also deleted the 304(a) provision allowing disapproval or partial disapproval of an amendment within the first 15 days of transmission. The Council chairmen recommend modification of these provisions to include the original language allowing concurrent approval of plans and amendments as well as regulations and providing for the initial 15-day disapproval process. The Councils would also

like the ability to resubmit responsive measures without having to submit a complete fishery management plan or amendment, as now required by subsection (4) of Section 304(a).

- **Regulating Non-Fishing Activities of Vessels**
  The Council chairmen recommend that Section 303(b) of the Act be amended to provide authority to Councils to regulate non-fishing activities by vessels that adversely impact fisheries or essential fish habitat (EFH). One of the most damaging activities to such habitat is the anchoring of large vessels near habitat areas of particular concern (HAPC) or other EFH (e.g., coral reefs, etc.). When these ships swing on the chain deployed for anchoring in 100 feet, 20 to 70 acres of bottom may be plowed up by the chain dragging over the bottom. Regulation of this type of activity by the Councils should be allowed.

- **Collection of Economic Data [Section 303(b)(7)]**
  Language throughout the M-S Act specifies the collection of biological, economic, and socio-cultural data to meet specific objectives of the Act and for the fishery management councils to consider this information in their deliberations. However, Section 303(b)(7) specifically excludes the collection of economic data, and Section 402(a) precludes Councils from collecting "proprietary or confidential commercial or financial information." NMFS should not be precluded from collecting such proprietary information so long as it is treated as confidential information under Section 402. Without this economic data, multi-disciplinary analyses of fishery management regulations are not possible, preventing NMFS and the Councils from satisfying the requirements of the M-S Act and the Regulatory Flexibility Act (RFA). These inconsistencies should be resolved.

  The chairmen recommend amending the M-S Act to eliminate the restrictions on the collection of economic data. Amending Section 303(b)(7) by removing "other than economic data" would allow NMFS to require fish processors who first receive fish that are subject to a plan to submit economic data. Removing this current restriction will strengthen the ability of NMFS to collect necessary data and eliminate the appearance of a contradiction in the law requiring economic analyses without allowing collection of the necessary data.

- **Confidentiality of Information [Section 402(b)]**
  Section 402 replaced and modified former Sections 303(d) and (e). The SFA replaced the word "statistics" with the word "information", expanded confidential protection from information submitted in compliance with the requirements of an FMP to information submitted in compliance with any requirement of the Act and broadened the exceptions to confidentiality to allow for disclosure in several new circumstances.
  The following draft language clarifies the word "information" in 402(b)(1) and (2) by adding the same parenthetical used in (a), and deletes the provision about observer information. The revised section would read as follows (additions in bold):

  (b) CONFIDENTIALITY OF INFORMATION.–
  *"(1) Any information submitted to the Secretary by any person in compliance with any requirement under this Act, **and that would disclose proprietary or confidential commercial***

or financial information regarding fishing operations or fish processing operations shall not be disclosed, except--

A. to Federal employees and Council employees who are responsible for fishery management plan development and monitoring;

B. to State or Marine Fisheries Commission employees pursuant to an agreement with the Secretary that prevents public disclosure of the identity or business of any person;

C. when required by court order;

D. when such information is used to verify catch under an individual fishing quota program; or

E. when the Secretary has obtained written authorization from the person submitting such information to release such information to persons for reasons not otherwise provided for in this subsection, and such release does not violate other requirements of this Act."

(2) The Secretary shall, by regulation, prescribe such procedures as may be necessary to preserve the confidentiality of information submitted in compliance with any requirement under this Act, and that would disclose proprietary or confidential commercial or financial information regarding fishing operations, or fish processing operations, except that the Secretary may release or make public any such information in any aggregate or summary form which does not directly or indirectly disclose the identity or business of any person who submits such information. Nothing in this subsection shall be interpreted or construed to prevent the use for conservation and management purposes by the Secretary or with the approval of the Secretary, the Council, of any information submitted in compliance with any requirement or regulation under this Act or the use, release, or publication of bycatch information pursuant to paragraph (1)(E).

- **Enforcement**
  The Council chairmen support the implementation of a cooperative state/federal enforcement programs patterned after the NMFS/South Carolina enforcement cooperative agreement. While it is not necessary to amend the Act to establish such programs it is consistent with the changes needed to enhance management under the Act to suggest to Congress that they consider establishing and funding such cooperative state/federal programs.

- **Council Member Compensation** The Act should specify that Council member compensation be based on the General Schedule that includes locality pay. This action would provide for a more equitable salary compensation. Salaries of members serving in Alaska, the Caribbean, and Western Pacific are adjusted by a COLA. The salary of the federal members of the Councils includes locality pay. The Department of Commerce has issued a legal opinion that prohibits Council members in the continental U.S. from receiving locality pay. Congressional action, therefore, is necessary.

- **Observer Program**
  The chairmen reaffirm their support to give discretionary authority to the Councils to establish fees to help fund observer programs. This authority would be the same as granted to the North Pacific Council under Section 313 for observers.

- **Essential Fish Habitat**
  The 1996 Act required the Councils to identify and describe EFH, but gave little direction on how to designate EFH. The EFH definition, i.e., "those waters and substrate necessary to fish for spawning, breeding, feeding or growth to maturity," allows for a broad interpretation. The EFH Interim Final Rule encouraged Councils to interpret data on relative abundance and distribution for the life history stages of each species in a risk-averse manner. This led to EFH designations that were criticized by some as too far-reaching. "If everything is designated as essential then nothing is essential," was a common theme throughout the EFH designation process, on a national and regional scale. Either the EFH definition should be modified, or the guidance on how to use different types of data should be more specific.

- **Rebuilding Periods**
  The Councils should have greater latitude for specifying rebuilding periods than is provided under the National Standard Guidelines. Social and economic factors should be given equal or greater consideration in determining schedules that result in the greatest overall net benefit to the Nation.

- **Redefine "Overfishing"**
  The chairmen believe there are a number of problems related to MSY-based definitions of overfishing. For example, data deficiencies may lead to inappropriate calculations of MSY, which in turn affect overfishing definitions. Ultimately, this could lead to unnecessary social and economic impacts for fishermen who are subject to measures that are tied to stock rebuilding schedules. While we have no specific recommendations at this time, we would like to work further with the Subcommittee in seeking solutions to our concerns as the reauthorization process proceeds. This is an extremely important issue to the Councils but, through our conversations with NMFS staff, we appreciate that there are varying viewpoints to be considered before we are able to present clear, concise and productive recommendations on what is the foundation of the SFA.

- **Receive Funds from any State or Federal Government Organization**
  Currently Councils can only receive funds through the Department of Commerce, NOAA or NMFS. The Councils routinely work with other government organizations to support research, workshops, conferences or to procure contractual services. In a number of cases, complex dual contacts, timely pass-throughs and unnecessary administration or grant oversight were required to complete the task. The Councils request a change that would give them authority to receive funds or support from other local, state and federal government agencies and non-profit organizations. This would be consistent with Section 302 (f)(4) that requires the Administrator of General Services to provide support to the Councils.

- **Bycatch Issues**
  There appears to be an inconsistent definition of bycatch, depending on geography. In the Atlantic, highly migratory species harvested in catch and release fisheries managed by the Secretary under 304(g) of the Magnuson Stevens Act or the Atlantic Tunas Convention Act are not considered bycatch, but in the Pacific they are. We suggest that highly migratory

species in the Pacific, managed under a Western Pacific Council fishery management plan and tagged and released alive under a scientific or recreational fishery tag and release program, should not be considered bycatch.

Note that there also is an inconsistency between the Magnuson-Stevens Act definition of bycatch and the NMFS Bycatch Plan. The NMFS definition is much broader and includes marine mammals and birds and retention of non-target species. The Council chairmen prefer the Magnuson-Stevens Act definition. We also wish to retain turtles in the definition of "fish" because of their importance in every region and especially in past and possibly future fisheries pursued by indigenous peoples of the Western Pacific Region.

- **FMP Review Program**
  The chairmen believe that NMFS, in its review of proposed plans, amendments and framework adjustments, has failed to adequately communicate to the Councils perceived problems in a timely manner. We propose the inclusion of a mandate in the Act to require that NMFS consult with the Councils before disapproving fishery management plans, amendments or changes made through the abbreviated rule-making process.

- **NMFS Regional Administrator Emergency Action Vote**
  For the purpose of preserving the Secretary's authority to reject a Council's request for emergency or interim action, the NMFS Regional Administrator is currently instructed to cast a negative vote even if he/she supports the action. While we recognize the extreme sensitivity in recommending a change to the voting responsibilities of our partners in the National Marine Fisheries Service -- we certainly do not wish to appear to be disparaging the Regional Administrators in any way -- the Council chairmen believe that Congressional intent is being violated by this policy. We instead suggest a modification to the language of Section 305(c)(2)(A) as follows (new language in bold):
  (A) *The Secretary shall promulgate emergency regulations or interim measures under paragraph (1) to address the emergency or overfishing if the Council, by unanimous vote of the members (excluding the NMFS Regional Administrator) who are voting members, requests the taking of such action; and . . .*

- **MAFMC At-Large Seat**
  The Council chairmen recommend that an additional At-Large seat be added to the Mid-Atlantic Fishery Management Council (MAFMC) along with funding identified for that purpose. Such a seat would, most likely, be filled by an individual from the state of North Carolina. This would allow the state to have both a recreational and commercial representative on the MAFMC.

Mr. Chairman, I would like to thank you for this opportunity to comment on the Magnuson-Stevens Act reauthorization. As I mentioned earlier, I'm also happy to answer questions or provide further information about the positions taken by the Council chairmen.

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Chairman
Joseph M. Brancaleone

Executive Director
Paul J. Howard

August 3, 1999

Ms. Penny Dalton
Assistant Administrator for Fisheries
1315 East-West Highway, SSMC3, Room 14555
Silver Spring, MD 20910

Dear Penny:

Thank you for participating and contributing so much to our annual Councils' Chairmen's Meeting. On behalf of the eight Councils I am writing to summarize the key consensus items agreed to at the meeting, all of which will require our continued collaboration and coordination with NMFS at both the regional and headquarters level. These issues are 1) timely review of Council actions, 2) ESA impacts and considerations, 3) scientific information supporting Council actions, 4) Magnuson-Stevens Act reauthorization, and 5) the 2000 budget.

Timely Review

The Council Chairmen and NOAA/NMFS representatives received recommendations on ways to improve the timely review of Council actions prior to approval by the Secretary of Commerce. These recommendations were developed through a series of regional meetings between Council and NMFS staffs, and finalized at a workshop held in Bethesda, Maryland on May 6-7, 1999. Convening this and other workshops was suggested by the Chairmen at their January 1999 meeting.

The Chairmen approved the following recommendations, and encouraged similar annual workshops in the future to improve the process.

1. NMFS's Office of Sustainable Fisheries (F/SF)/Regional Office and NOAA Regional General Counsel comments on analytical documents and proposed alternatives for Council action should be received by the Council as early as possible in the Council decision-making process, preferably within 15-20 working days from the transmittal date of the Council's request for review. This would allow time for consideration of agency comments prior to final action by the Council. Recognizing that NMFS may not always meet this deadline, and to facilitate the process, the Councils should provide documents directly to F/SF with a request for concurrent and coordinated review by the Regional Office. To receive constructive comments from NMFS and NOAA Regional General Counsel, the Councils should endeavor to provide documents that are complete.

2. NMFS should shorten the approval process for non-controversial actions by providing early opportunity possibly at the proposed rule stage, for the Assistant Administrator for Fisheries to delegate final decisions to the Regional Administrator with concurrence of F/SF.

3. F/SF, Regional Offices, and Regional General Counsels should avoid, where possible, sequential, duplicate, and uncoordinated reviews of FMPs and amendments or other proposed management actions.

4. NMFS Office of Protected Resources (F/PR) should make their comments available, along with other NMFS comments, prior to final action by a Council. NMFS should adhere to the NOAA's *Operational Guidelines for the Fishery Management Plan Process* (revised May, 1997) in the processing of Endangered Species Act-related actions such as F/PR comments and biological opinions.

5. Where feasible, Councils should strive to reduce the complexity of their documents.

6. Council and NMFS staffs should work together to develop priorities for processing Council actions, particularly in cases where Regional Offices serve more than one Council. They should strive to balance Council output with Regional Offices' throughput capabilities. Several actions might improve the review process.

    - Council and NMFS staffs should strive to create reasonable expectations for Councils about when proposed measures will be implemented, and to the extent possible, adhere to an agreed-upon schedule.

    - Council and Regional Office staffs (including NOAA General Counsel) should confer immediately after each Council meeting to clarify staff assignments and Council priorities. Those priorities should then be communicated to F/SF.

    - Regional Administrators should inform the Councils of the official transmittal date which initiates Secretarial review.

    - Regional Offices should keep the Councils informed about general progress on the review and processing of Council actions and any revisions or unanticipated delays in the review and decision-making schedule.

1. NMFS should create a mechanism for a Council to withdraw and revise, as appropriate, an FMP or amendment after formal transmittal, if it appears that the proposed action is not approvable early in the process. If a change to the Magnuson-Stevens Act is required to provide for this sort of flexibility, the Councils and NMFS should coordinate their efforts on this issue.

2. The Magnuson-Stevens Act should be amended to require that Secretarial review of FMPs or amendments and their implementing regulations occur concurrently.

Other Actions

1. F/SF and NOAA General Counsel for Fisheries (GCF) should provide guidance to the Councils on procedures to be used in expedited rule-making or the framework adjustments process. Such

guidance should specify the type of analyses necessary for review and evaluation by the public and the process for public input. Additional work may need to be done by the Regional Offices to determine when it is appropriate for Councils to take advantage of abbreviated rulemaking procedures.

2. Stock Assessment and Fishery Evaluation (SAFE) documents should be enhanced and expanded, to the extent practicable, to provide more comprehensive information relating to the analytical requirements of the Magnuson-Stevens Act and other applicable law (e.g., National Environmental Policy Act, Regulatory Flexibility Act, Endangered Species Act, and various Executive Orders). Information contained in the SAFE document could then provide the baseline analyses for management proposals under consideration during the remainder of the year could be incorporated in the new proposals by reference. These subsequent analyses should be as concise as possible. If no information is available on a particular issue, it should be indicated in the SAFE Report.

3. NMFS and Council staffs should pay particular attention to improving the overall quality of preambles to proposed rules to ensure that they are highly understandable to the general public. The preamble is a centerpiece of the document and improving its quality will help reduce the time needed for further review and edits by GCF. There also should be answers to questions and issues raised in any minority reports from a Council.

4. NMFS should update the *Operational Guidelines for the Fishery Management Plan Process* (revised May 1, 1997) to reflect the recent changes in the Magnuson-Stevens Act. The revised guidelines should be user friendly (e.g., use illustrations and flow diagrams to describe the FMP review/approval process) and written in plain English.

Additional Funding and Staff Support

1. NMFS should give priority funding and FTEs to increase the capability of the Regional Offices, NMFS Headquarters, especially in F/SF and GCF/Regional General Counsel to speed up review of Council actions. (This could be through new funding and/or reallocation of current resources.)

Timely Review Meeting/Workshop

1. Representatives of F/SF, GCF, Regional Office and Council staffs should meet annually in early May to review progress in improving timely review of Council actions.

2. F/SF and Regional Offices should hold "refresher" workshops for plan coordinators and reviewers, possibly at 2-year intervals. The workshops should focus on methods for improving the quality of decision packages to facilitate approval in a timely manner, strategies for streamlining the review process, including coordination with GCF/NOAA General Counsel in the Regions, and ideas for preventing burnout. The last workshop held for NMFS plan coordinators was in October 1991.

The Chairmen also heard a progress report from Chris Johnston of the U.S. Department of Commerce's Office of Inspector General. The IG is thoroughly reviewing the processing of Council actions by NMFS and will develop recommendations for legislative changes as appropriate. A draft report will be sent to the eight Councils in late July or early August for review and should be finalized by late September 1999.

Endangered Species Act

The Chairmen received a report of a national NMFS and Council staff workshop on ESA held in Bethesda, Maryland on May 4-5, 1999. The workshop was recommended by the Council Chairmen at their January 1999 meeting. Participants raised several important points.:

1. ESA-related issues should be considered before a Council takes final action.

2. Toward that end, the Regional Offices of Protected Resources and NMFS Headquarters needs to review documents during the Council's public review period.

3. The process could be streamlined, perhaps by expanding the annual Stock Assessment and Fishery Evaluation reports to cover the ESA , MMPA, and ecosystem considerations.

4. More coordination is needed between Sustainable Fisheries, the Council, and Protected Resources. Bottlenecks occur in the regions as well at Headquarters where there may be only two people assigned to review all eight Councils' submissions. While scientists do the formal analyses on ESA impacts, the fisheries management division of NMFS, oftentimes already overtaxed with work, must coordinate the consultations and write Biological Opinions on regulatory actions.

5. It is NMFS policy that draft Biological Opinions are not subject to review by the Councils. NMFS considers the Councils neither action agencies or applicants for purposes of reviewing draft documents. For fisheries regulations, NMFS has identified Sustainable Fisheries Division as the "action agency" and Protected Resources as the reviewing agency. Thus, the draft Biological Opinion only can be shared internally within NMFS. The Councils are not action agencies because they have no ability to file regulations. In many instances there is little time for outside review of draft documents.

6. The most effective step the Councils can take is to provide their documents to OPR during the public review process before a Council takes final action.

It was noted that NMFS worked closely with the North Pacific Fishery Management Council in late 1998 and 1999 in developing management alternatives that would satisfy the reasonable and prudent alternatives recommended by NMFS to protect Steller sea lions during the pollock fisheries off Alaska.

At the most recent Chairmen's meeting, NMFS representatives clarified that their staffs, nationwide, work on Biological Opinions and other ESA-related documents. While they can not agree to a mandatory release of draft ESA documents to the Councils for review, they encourage the respective NMFS and Council staffs to cooperatively address ESA concerns before analyses of plan and regulatory amendments are given final review and approval by the Councils. The Council Chairmen urged NMFS and NOAA to continue to address ESA-related problems via the Magnuson-Stevens Act as they pertain to fisheries management, as was done with Steller sea lion issues in North Pacific fisheries. The Councils would like to be involved as much as possible in development of management responses to ESA concerns.

Scientific Information Supporting Council Actions

The Council Chairmen recognize that an annual SAFE Report is essential, and that successful management is dependent upon relevant, timely scientific information that has been thoroughly analyzed. The Chairmen supported the following.

1. Regionally developed SAFE Reports, as opposed to a standardized national program.

2. The Gulf Council letter concerning census information to improve the availability of economic and employment data.

3. The improved use of consumer surplus and production surplus models to assist the Councils in addressing allocation issues among different gear sectors, and between recreational and commercial fisheries.

4. A recommendation that NMFS headquarters support regionally developed SAFE Reports with a policy statement and adequate resources.

Magnuson-Stevens Act Reauthorization

The Chairmen developed a list of items for possible consideration in the next reauthorization. As you know, Joe Brancaleone, the Chairman of the New England Council, gave testimony at the first hearing on reauthorization. His testimony represented the items agreed to at the June meeting. We are interested in your feedback and ask that you comment on our enclosed list of issues (Attachment I) presented to the Fisheries Conservation, Wildlife and Oceans Subcommittee.

NMFS 2000 Budget

The Councils $15 million dollar budget request for 2000 represents an increase of 15.4% over our $13 million dollar authorized budget in 1999. The Chairs were very disappointed to learn that NOAA submitted their overall budget for 2000 with an increase for the Councils of only $300,000 dollars. This 2.3% increase is inadequate and pales in comparison to the approximate 20% increase submitted for NMFS management programs. We urge you do everything possible to satisfy our budget increase request of $2 million dollars for the year 2000 to address the following key areas.

1. Build Sustainable Fisheries
   - Adjust/develop management plans to stay on the maximum 10-year rebuilding schedules for each overfished stock
   - Develop annual SAFE (Stock Assessment and Fishery Evaluation) reports to stay on rebuilding schedules
2. Improve Habitat Conservation
   - Minimize adverse impacts of fishing and non fishing activities
3. Communities
   - Improve social and economic analysis (to meet NEPA and RFA requirements and respond to
   - National Standard 8)

1. Manage Capacity
   - Manage capacity to maintained sustainable stocks

- Reduce over-capacity
- Develop a buyback plan (NMFS proposed rule published in the Federal Register Vol. 64 No. 28, February 11, 1999, identifies the Councils as having a primary role in developing buyback programs)

2. Reduce Bycatch (Councils can direct the sampling work in a more timely basis to meet its needs)
   - Sea sampling - needed to determine bycatch
     - Reduce discards
     - Reduce economic losses to fishing industry
     - Identify changes in relative abundance of species and of fishing patterns
3. Conservation Engineering (improvements in species and size selectivity can be achieved through evaluation and design of fishing gears)
   - Reduce by-catch (reduces adverse impacts on non-target species)
   - Increase economic opportunities for fishing industry
   - Evaluate and design fishing gears to minimize the adverse impact on essential fish habitats
4. Improve Trust between Fishermen and Scientists
   - Coordinate industry participation in data collection and experimental fisheries

Again, thank you very much for taking the time to participate in our annual meeting. We look forward to working with you and please don't hesitate to call me if you have any questions.

Sincerely,

Joseph M. Brancaleone
for the eight Council Chairmen

enclosure

NMFS

PROPOSED AMENDMENTS TO THE MAGNUSON-STEVENS FISHERY CONSERVATION AND MANAGEMENT ACT (MSFCMA)
Justification Statement

AUTHORIZATION OF APPROPRIATIONS

To implement the MSFCMA for FY2000 and 2001, we are proposing $230 million and $242 million, respectively, which would include base budget, disaster funds, and construction/fleet replacement.

DEFINITIONS

Bycatch definition: The Endangered Species Act (ESA) is the primary statutory authority for addressing the incidental catch of seabirds in fisheries that may potentially take an endangered seabird species. Although the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) provides NMFS with authority to implement measures to reduce seabird incidental takes, unless certain requirements under ESA are involved, the Magnuson-Stevens Act does not specifically require the implementation of measures to reduce incidental catch of seabirds, since seabirds are not currently defined as bycatch. Given the NMFS Bycatch Plan and the proposed National Plan of Action to Reduce Incidental Catch of Seabirds in U.S. Longline Fisheries, NMFS supports an amendment to the Magnuson-Stevens Act to include seabirds in the 'bycatch' definition, which would require fishery management plans to address incidental catch of seabirds.

REGIONAL FISHERY MANAGEMENT COUNCILS

Caribbean Council jurisdiction: The current description of the Caribbean Council at section 302(a)(D) limits its jurisdiction to Federal waters off Puerto Rico and the U.S. Virgin Islands. As a result, the Council cannot develop fishery management plans governing fishing in Federal waters around Navassa Island or any other U.S. possession in the Caribbean. Jurisdiction of the Caribbean Council should be expanded to cover Navassa Island, by including "commonwealths, territories, and possessions of the United States" within the description of that Council's authority.

Council meeting notification: To meet the notification requirements of the MSFCMA, Councils spend tens of thousands of dollars a year to publish meeting notices in local newspapers in major and/or affected fishing ports in the region. By contrast, fax networks, mailings, public service announcements, and notices included with marine weather forecasts are much less expensive and could be more effective in reaching fishery participants and stakeholders. Notification requirements at section 302(i)(2)(c) and (i)(3)(b) should be modified to allow Council use of any means that will result in wide publicity.

CONTENTS OF FISHERY MANAGEMENT PLANS

Restriction on data collection: The MSFCMA currently restricts the collection of economic data at section 303(b)(7). Removal of this restriction could improve the quantity and quality of information available to meet the requirements of the laws requiring social and economic analysis.

Coral reef protection: Special management areas, including those designated to protect coral reefs, hard bottoms, and precious corals, are important commercial resources and valuable habitats for many species. Currently, we have the authority to regulate anchoring and other activities of fishing vessels that affect fish habitat. Threats to those resources from non-fishing vessels remain outside agency authority except when associated with a Federal action that would trigger EFH consultation or where addressed in regulations associated with a national marine sanctuary. Language should be added at section 303(b) to clarify, consolidate, and strengthen NOAA Fisheries' authority to regulate the actions of any recreational or commercial vessel that is directly impacting resources being managed under the MSFCMA.

ACTION BY THE SECRETARY

Review process for fishery management plans, amendments and regulations: The Sustainable Fisheries Act (SFA) attempted to simplify and tighten the approval process for management plans and regulations at section 304(a-b). However, one result of that effort has been two distinct review and implementation processes -- one for plans and amendments and another for implementing regulations. This essentially uncouples the review of plans and amendments from the process for regulations, and as a result, the decision to approve or disapprove a plan or amendment may be necessary before the end of the public comment period on the implementing regulations. We are considering amendments that would modify the process to address this issue.

Initial review of fishery management plans and amendments by the Secretary should also be reinstated. Considerable energy and staff resources are expended on plans or amendments that are ultimately disapproved because of serious omissions and other problems. At present, two to three months must elapse before the Secretary makes his determination, and if the amendment is then disapproved, it can be months or longer before the Council can modify and resubmit the plan or amendment. While the initial review was eliminated by the SFA to shorten the review process, reinstating Secretarial review may actually provide a mechanism to shorten the time it takes to get a plan or amendment approved and implemented.

OTHER REQUIREMENTS AND AUTHORITY

Statute of limitations on agency adjudications: Although section 305(f) contains a statute of limitations for challenges of regulations implementing a fishery management plan, it does not contain a statute of limitations applicable to agency adjudications. Since it does not, the general six-year federal statute of limitations applies. This is of particular concern for the issuance of limited entry permits/quota share. When NOAA Fisheries makes a final agency determination, it must issue the permit/quota share. If that determination is challenged by another claimant and

ultimately overturned by the federal courts for any reason, we cannot retrieve the originally issued permit/quota share because they have value and quite often have been conveyed to third parties in the interim. The agency must then issue a second permit/additional quota share to the successful appellant. Thus, two applicants get a permit/quota share based upon the same fishing history and the pool is diluted for the rest of the participants.

INFORMATION COLLECTION

Provisions dealing with data confidentiality: The Sustainable Fisheries Act changed the term "statistics" to"information" in the provisions dealing with data confidentiality at 402(b). The change has raised questions about the intended application of those provisions, particularly with respect to observer information, and Congressional clarification would be useful.

Restriction on data collection: The MSFCMA currently restricts the collection of economic data at section 402(a). Removal of this restriction could improve the quantity and quality of information available to meet the requirements of the laws requiring social and economic analysis. see description under contents of fishery management plans.

A BILL

To amend the Magnuson-Stevens Fishery Conservation and Management Act.

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That

AUTHORIZATION OF APPROPRIATIONS

Section 4 of the Act (16 U.S.C. § 1803) is amended –

by replacing existing paragraph to read:``There are authorized to be appropriated to the Secretary for the purposes of carrying out the provisions of this Act, not to exceed the following sums:

``(1) $230,000,000 for fiscal year 2000;

``(2) $242,000,000 for fiscal year 2001;"

DEFINITIONS

Sec. 1 Section 3 of the Act (16 U.S.C. § 1802) is amended –

(a) in paragraph (2) by –

revising it to read, "(2) The term 'bycatch' means a) fish that are harvested in a fishery, but which are not sold or kept for personal use, and includes economic discards and regulatory discards; and b) birds that are caught incidentally in a fishery. Such term does not include fish released alive under a recreational catch and release fishery management program."

REGIONAL FISHERY MANAGEMENT COUNCILS

Sec. 2 Section 302 of the Act (16 U.S.C. § 1852) is amended –

(a) in paragraph (a)(D) by –

adding the words after "...seaward of such States..." the words, "...and of the commonwealths, territories, and possessions of the United States in the Caribbean Sea"

(b) in paragraph (i)(2)(C) by –

adding the words after ..."(and in other major fishing ports having a direct interest in the affected fishery)" the words "or disseminated by any other means that will result in wide publicity."

(c) in paragraph (i)(3)(B) by –

adding the words after ... "(and in other major, affected fishing ports)" the words "or notify the public through any other means that will result in wide publicity"

CONTENTS OF FISHERY MANAGEMENT PLANS

Sec. 3 Section 303 of the Act (16 U.S.C. § 1853) is amended –

(a) in paragraph (b)(7) by –

deleting the words "(other than economic data)"

(b) in paragraph (b)(13) by –

adding new paragraph to read "designate zones encompassing specific coral reef habitats or other habitats sensitive to disturbance and restrict actions of any vessel or motorized watercraft that would adversely affect fishery resources in those zones."

ACTION BY THE SECRETARY

Sec. 4 Section 304 of the Act (16 U.S.C. § 1854) is amended –

(a) in paragraph (1) by –

adding the words after "Upon transmittal by the Council to the Secretary of a fishery management plan or plan amendment," the words "and any proposed implementing regulations prepared under section 303(c)(1)"

(b) in paragraph (1)(A) by –

replacing existing paragraph to read "immediately make a preliminary evaluation of the management plan or amendment for purposes of deciding if it is consistent with the national standards and sufficient in scope and substance to warrant review under this subsection and– (i) if that decision is affirmative, implement subparagraphs (B), (C), and (D) with respect to the plan or amendment, or (ii) if that decision is negative– (I) disapprove the plan or amendment, and (II) notify the Council, in writing, of the disapproval and of those matters specified in subsection (a)(3)(A), (B), and (C) as they relate to the plan or amendment;"

(c) in paragraph (1)(A) by –

renumbering existing paragraph (A) to (B).

(d) in paragraph (1)(B) by –

renumbering existing paragraph (B) to (C) and revising to read "by the 15th day following transmittal of the plan and proposed implementing regulations, publish in the Federal Register a notice stating that the plan or amendment is available and that written data, views, or comments of interested persons on the plan or amendment may be submitted to the Secretary during the 50-day period

beginning on the date the notice is published; and also publish in the Federal Register any proposed implementing regulations that are consistent with the fishery management plan or amendment, this Act, and other applicable law, for a comment period of 50 days. The Secretary may make such technical changes to the Council's proposed regulations as may be necessary for clarity, with an explanation of those changes."

(e) in paragraph (b)(1) by –

changing the citation "section 303(c)" to "section 303(c)(2).

(f) in paragraph (b)(1)(A) by –

replacing the words before ..."publish such regulations in the Federal Register" with the words "If the Secretary determines that the regulations are consistent, the Secretary shall, within 15 days of transmittal."

(g) in paragraph (b)(1)(B) by –

replacing the words before "notify the Council" with the words "If the Secretary determines that the regulations are not consistent, the Secretary shall, within 15 days of transmittal,"

(h) in paragraph (b)(3) by –

adding after "paragraph (1)(A)" the words "and within 45 days after the end of the comment period under subsection (a)(1)(C)."

OTHER REQUIREMENTS AND AUTHORITY

Sec. 5 Section 305 of the Act (16 U.S.C. § 1855) is amended –

(a) in paragraph (f)(3) by –

adding new paragraph to read "Limited entry eligibility adjudications made by the

Secretary under this chapter or the North Pacific Halibut Act, 16 U.S.C. 773c (c) shall be subject to judicial review if a petition for such review is filed within 30 days after final agency action, or for determinations made before enactment of this subsection, within 30 days of the effective date of this subsection."

(b) in paragraph (f)(3) and (f)(4) by –

renumbering as (4) and (5) respectively.

INFORMATION COLLECTION

Sec. 6 Section 402 of the Act (16 U.S.C. § 1881a) is amended –

(a) in paragraph (a) by –

deleting after "If a Council determines that additional information" the words "(other than information that would disclose proprietary or confidential commercial or financial information regarding fishing operations or fish processing operations)" and after "which would provide the types of information" the words "(other than information that would disclose proprietary or confidential commercial or financial information regarding fishing operations or fish processing operations)."

(b) in paragraph (b) (1) by –

adding after "Any information submitted to the Secretary by any person in compliance with any requirement under this Act" the words " and that would disclose proprietary or confidential commercial or financial information regarding fishing operations or fish processing operations."

(c) in paragraph (b)(1) by –

adding after ... "shall be kept confidential and not disclosed" the words "for a

period of ten years following the year of submission to the Secretary, except–..."

(d) in paragraph (b)(2) by –

adding after "submitted in compliance with any requirement under this Act" the words "and that would disclose proprietary or confidential commercial or financial information regarding fishing operations or fish processing operations"

Alaska Marine Conservation Council
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TO: Rick Lauber, Chair
FROM: Karen Wood DiBari
DATE: May 25, 2000
RE: Magnuson-Stevens Fishery Conservation and Management Act, Agenda Item C-6

Attached please find a summary of the Alaska Marine Conservation Council's priority issues for the reauthorization of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). AMCC is closely following reauthorization developments and other Congressional action on issues related to the conservation provisions of the Magnuson-Stevens Act.

H.R. 4046

Congressman Wayne Gilchrest (R-MD) introduced H.R. 4046, the Fisheries Recovery Act, in March of this year. AMCC views this bill as a positive approach to conservation of marine fisheries because it clarifies congressional intent for conservation requirements of the Sustainable Fisheries Act.

Essential Fish Habitat

In regard to essential fish habitat (EFH), AMCC agrees with the statement made by Dr. Clarence Pautzke in his testimony before the House Committee on Fisheries, Conservation, Wildlife and Oceans on March 9, 2000:

> Instead of attempting to tinker with the definition of EFH or the guidelines, it may be more constructive to set our sights on gathering the types of detailed information that will be required to delineate those very specific ecologically significant, spawning and nursery areas that more likely were contemplated in the initial crafting of the SFA…The [regulatory] guidelines now provide a pathway to more focused areas: identification of Habitat Areas of Particular Concern.

AMCC concurs with Council and Dr. Pautzke that the law should not be changed, but instead, focus should turn to implementation of the law and building upon the habitat protection work already in motion in the North Pacific.

Please contact our office if you have any questions.

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PRIORITY RECOMMENDATIONS FOR MAGNUSON-STEVENS ACT REAUTHORIZATION

APRIL, 2000

ESSENTIAL FISH HABITAT

- Existing provisions in the Magnuson -Stevens Act should not be modified or diluted.
- Identification and protection of EFH is vital to the central purposes of the existing law.
- Protection of marine seafloor habitat from destructive fishing practices is of the highest importance to AMCC.
- The consultation process for impacts caused by non-fishing activities has heightened awareness of marine species and their habitat needs, and should be maintained.

AUTHORITY FOR NEW LIMITED ACCESS PROGRAMS (INCLUDING IFQ SYSTEMS OR FISHING COOPERATIVES):

- AMCC opposes legislation authorizing such programs that does not subcribe to the conservation and community requirements of Magnuson-Stevens Act. The Magnuson-Stevens Act should be the statutory vehicle for any new limited access system to link objectives for limited access with national standards for conservation and to provide for a reasonable public process at the regional fishery management council level.
- To promote competition and protect fishing opportunities for independent, owner-operator fishermen, any new IFQ or fishery cooperative system should prohibit 1) closed classes of processors and 2) processor acquisition of catcher vessels within such systems.
- New IFQ or cooperative systems should provide strong incentives and penalties designed to initially award and later renew such exclusive rights through measures designed to promote habitat-friendly and low bycatch fishing gear and practices. Fishery conservation should be the continuing basis for exclusive fishery rights.

MINIMIZING BYCATCH

- Bycatch in the North Pacific remains a huge problem with no new action being taken to avoid bycatch in the Gulf of Alaska groundfish fisheries. The North Pacific section of the law should be amended to require the North Pacific Council to submit a plan to lower the total amount of bycatch, not just economic discards. Fishery management plans should include a timeline and specific goals for bycatch reduction and include incentives to avoid bycatch.

PRECAUTIONARY APPROACH

- Explicit adoption of the precautionary approach would require that the greater the unknowns, uncertainties and consequent risks a fishery presents to long term sustainability or to essential fish habitat, the more cautious the fishery management should be.

Alaska Marine Conservation Council is a community-based organization of fishermen, subsistence harvesters, scientists, small business owners and families throughout coastal Alaska. Our goals are to minimize bycatch, protect seafloor habitat, prevent overfishing, and support sustainable fishing opportunities for community-based fleets.

MORE INFORMATION: Karen Wood Dibari, (907) 277-5357

NFI

PROPOSED MAGNUSON-STEVENS ACT CHANGES

BEST SCIENTIFIC INFORMATION AVAILABLE

Section 3 (16 U.S.C. 1802) is amended by inserting a new paragraph (_) as follows:
"(_) The term 'best scientific information available' means information that
"(A) is directly related to the specific issue under consideration;
"(B) is based on a sufficient statistical sample such that any conclusions drawn are reasonably supported and not mere speculation;
"(C) is consistent with information that has been peer-reviewed and published in applicable and appropriate scientific publications;
"(D) has been collected within a time frame that is reasonably related to the specific issue under consideration;
"(E) is consistent with information that is available from other reliable sources;
"(F) has been collected and presented in a manner that is not calculated to favor any particular point of view; and
"(G) may consider, but is not based exclusively on, anecdotal information collected from the harvesting and processing of fish.
"Information that does not meet this definition shall not provide the basis for fishery management decisions and shall not be accorded deference during judicial review."

PEER REVIEW

Section 302(g) (16 U.S.C. 1852(g)) is amended by adding the following -

"(6) Each Council shall establish one or more scientific review committees to conduct peer reviews of all stock assessments prepared for fisheries under the Council's jurisdiction. Committees established under this paragraph shall, at a minimum, consist of at least one member from each of the committees established under paragraphs (1) and (3) of this subsection, one member who is not affiliated with the authors of the stock assessments under review, and such other members as the Council considers appropriate."

Section 302(h) (16 U.S.C. 1852(h)) is amended -

1) by striking "and" at the end of paragraph (5);
2) by redesignating paragraph (6) as paragraph (7); and
3) by inserting the following -

"(6) conduct a peer review of any stock assessment prepared for a fishery under its jurisdiction, utilizing the committee established under subsection (g)(6); and"

ESSENTIAL FISH HABITAT

Section 3 (16 U.S.C. 1802) is amended by inserting a new paragraph (_) as follows:

"(_) The term "habitat areas of particular concern' means an area that is a discrete vulnerable subunit of essential fish habitat that is required for a stock to sustain itself and which is designated through a specified set of national criteria which includes, at a minimum, a requirement that designation be based on information regarding habitat-specific density of that fish stock, and growth, reproduction, and survival rates of that stock with the designated area."

Section 303(a)(7) (16 U.S.C.(a)(7)) is amended to read as follows:

"(7) describe and identify essential fish habitat and habitat areas of particular concern for the fishery based on the guidelines established by the Secretary under section 305(b)(1)(A), minimize to the extent practicable adverse effects on habitat areas of particular concern caused by fishing which prevent a stock of fish from sustaining itself on a continuing basis, and identify other actions to encourage the conservation and enhancement of such habitat."

Section 305(b)(1) (16 U.S.C. (b)(1)) is amended by inserting "and habitat areas of particular concern" following "essential fish habitat" each time it appears in subparagraphs (A) and (B).

OVERFISHING / REBUILDING

Section 3 (16 U.S.C. 1802) is amended

(1) by amending paragraph (29) to read as follows:

"(29) The terms 'overfishing' and 'overfished' mean a rate or level of harvest that jeopardizes the ability of a stock of fish to produce maximum sustainable yield on a continuing basis."; and

(2) by inserting the following:

"(_) The term 'carrying capacity' means the maximum population level of a stock of fish that the current state of the environment will support while allowing for the removal of surplus production."

"(_) The term 'maximum sustainable yield' means the largest annual catch or yield in terms of weight of fish caught by both commercial and recreational fishermen that can be continuously taken from a stock under existing carrying capacity, and which is adjusted as carrying capacity changes."

"(_) The term 'surplus production' means the biomass of fish that can be removed from a stock of fish without harming the stock's ability to sustain itself."

Section 304(e) (16 U.S.C. 1854(e)) is amended

(1) in paragraph (1)

(A) by striking "(1)" and inserting in lieu thereof "(1)(A)";

(B) by striking "fisheries" each time it appears and inserting in lieu thereof "stocks of fish";

(C) by amending the last sentence to read as follows

"A stock of fish shall be classified as approaching a condition of being overfished if, based on the best scientific information available and other appropriate factors, the Secretary estimates that the stock of fish will become overfished within two years."; and

(D) by adding at the end the following

"(B) If the Secretary determines that insufficient information is available on which to conclude that a stock of fish is approaching a condition of being overfished, the Secretary shall immediately notify the appropriate Council and within six months of such notification implement a cooperative research program designed to provide the information needed to determine whether or not the stock of fish is approaching a condition of being overfished.";

(2) by amending paragraph (2) to read as follows

"(2) If the Secretary determines at any time that a stock of fish is overfished, the Secretary shall immediately notify the appropriate Council and request that action be taken to end overfishing and to implement conservation and management measures to rebuild the stock of fish. In the case of a fishery which harvests more than one stock of fish, such conservation and management measures shall not require that fishing be reduced for those stocks of fish which are not overfished. The Secretary shall publish each notice under this paragraph in the Federal Register.";

(3) in paragraph (3)--

(A) by striking "Within one year" and inserting in lieu thereof "Within three years"; and

(B) in subparagraph (A) by striking "to end overfishing" and inserting in lieu thereof "to address overfishing";

(4) in paragraph (4)

(A) by striking "For a fishery that is overfished" and inserting in lieu thereof "For a fishery involving a stock of fish that is overfished"; and

(B) by amending subparagraph (A) to read as follows

"(A) specify a time period for addressing overfishing and rebuilding the overfished stock or stocks in the fishery that is as short as possible, taking into account the status, biology, and carrying capacity of any overfished stocks, the best scientific information available, the needs of fishing communities, recommendations by international organizations in which the United States participates, and the interaction of the overfished stock or stocks within the marine ecosystem;";

(5) in paragraph (5)--

(A) by striking "within the one-year period" and inserting in lieu thereof "within the three year period";

(B) by striking "that a fishery is overfished" and inserting in lieu thereof "that one or more stocks of fish in a fishery are overfished"; and

(C) by striking "regulations to stop overfishing" and inserting in lieu thereof "regulations to address overfishing";

(6) in the second sentence of paragraph (6), by striking "to stop overfishing of a fishery" and inserting in lieu thereof "to address overfishing of a stock or stocks of fish in a fishery";

(7) in paragraph (7)--

(A) in the first sentence by inserting "and the best scientific information available related to the fishery management plan, plan amendment, or regulations" before "at routine intervals";

(B) in the second sentence by striking "ending overfishing" and inserting in lieu thereof "addressing overfishing, sufficient data collection,";

(C) by striking "or" at the end of subparagraph (A);

(D) by striking the period at the end of subparagraph (B) and inserting "; or"; and

(E) by adding a new subparagraph as follows

"(C) design and implement a cooperative program to collect the best scientific information available for such fish stocks.".

FISH AS FOOD

Section 2(a) (16 U.S.C. 1801(a)) is amended by adding the following:

"(11) Fish are an important natural renewable resource of food and fisheries have played a traditional and essential role in providing high quality protein for human use.
"(12) Fish are an important source of essential nutrients, particularly Omega-3 fatty acids, and there is agreement among medical scientists that some of the world's most serious diseases can be prevented by increased fish consumption."

Section 2(b) (16 U.S.C. 1801(b)) is amended
(1) by striking "and" at the end of paragraph (6);
(2) by striking the period at the end of paragraph (7) and inserting "; and"; and
(3) by adding at the end the following:
"(8) To promote fisheries conservation and management that will enhance our nation's food supply, income, and economic growth."

Section 2(c) (16 U.S.C. 1801(c)) is amended
(1) by striking "and" at the end of paragraph (6);
(2) by striking the period at the end of paragraph (7) and inserting "; and"; and
(3) by adding at the end the following:
"(8) that conservation and management measures shall contribute to the food supply, economy, and health of the Nation."

OBSERVERS
Section 303(a) is amended -
1) by striking "and" at the end of paragraph (13);
2) by striking the period at the end of paragraph (14) and inserting "; and"; and
3) by adding the following -
"(15) to the extent that observers are deployed on board United States fishing vessels or in United States fish processing plants under the provisions of a fishery management plan or regulations implementing a fishery management plan, comply with the goals and objectives required under subsection (e)."

Section 303 is further amended by adding the following -
"(e) OBSERVER PROGRAMS.--
"(1) Prior to establishing a program under this Act which utilizes observers deployed on United States fishing vessels or in United States fish processing plants, the Council with jurisdiction over the fishery (or in the case of a highly migratory species fishery, the Secretary) in which the observers will be deployed shall establish a set of goals and objectives and an implementation schedule for the program and a statistically reliable method for achieving the goals and objectives.
"(2) The goals and objectives required under paragraph (1) shall ensure equity among the various harvesting and processing sectors in the fishery; shall ensure that the costs of the program are appropriately shared by all beneficiaries, including participants in other fisheries; and shall ensure that those fishing vessels and processing plants where observers are deployed are not put at a disadvantage with respect to other harvesters or processors in that fishery or in other fisheries.
"(3) No observer program may be established until the provisions of paragraphs (1) and (2) are met."

CUMULATIVE IMPACTS

Section 301(a)(8) (16 U.S.C. 1851(a)(8)) is amended to read as follows

"(8) Conservation and management measures shall, consistent with the conservation requirements of this Act (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities, and the cumulative economic and social impact of fishery conservation and management measures on such communities, in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities."

OPTIMUM YIELD CAP

Section 3(28(B) (16 U.S.C. 1802(28)(B)) is amended by striking "reduced" and inserting in lieu thereof "modified".

EFFECT ON FISHING

Section 305(b)(2) (16 U.S.C. 1855(b)(2)) is amended

1) by striking the period at the end of the subparagraph and inserting "; or";

2) by inserting "(A)" following "any action"; and

3) by adding the following

"(B) authorized, funded, permitted, or undertaken, or proposed to be authorized, funded, permitted, or undertaken, by such agency that may adversely affect the catching, taking, harvesting, or processing of fish in any fishery managed under this Act."

ALASKA: DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT
Office of the Commissioner (Deborah B. Sedwick)
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February 22,2000
VIA MESSENGER
Docket Clerk
U. S. DGT Dockets
Room PL-40 1
Department of Transportation
400 Seventh Street, S.W.
Washington, D.C. 20590-0001

Re: Docket No. MARAD-99-5609 -52
(Eligibility of U.S. - Flag Vessels of 100 Feet or Greater in Registered Length to Obtain A Fishery Endorsement to the Vessel's Documentation)

Dear Sirs:

It has recently come to the attention of the State of Alaska that the determinations from the Maritime Administration's proposed rule for Docket No. MARAD-99-5609 could seriously undermine the intent of certain protections incorporated into the American Fishery Act (AFA). AFA was crafted by Congress to both allow the pollock industry to share in the benefits of rationalization while maintaining a competitive environment for buyers and sellers of raw pollock, pollock products, and associated fisheries. In particular, the control of domestic fishing power (both the harvesting history and harvesting rents) was to be held by predominantly U.S. citizen-owned firms.

Alaska is concerned with two major aspects of the proposed regulations: (1) arrangements in which executives of foreign-controlled companies become owners of vessels, and (2) the ability of fishing boats to sell or lease their pollock co-op share allocations to foreign-controlled companies, resulting in the vessels remaining tied up at the dock, not operating in any fisheries. Both of these mechanisms would essentially grant to foreign nationals control over whether a vessel may participate in the pollock fishery in Alaska, the main revenue source for most AFA-qualified vessels, and may isolate the remaining independent vessels, reducing their ability to collectively bargain for prices. The flow of rents to the foreign processing entities in this event would directly impact gross earnings and rents to vessels operating in Alaska. It is also likely to leave coastal communities with lower indirect impacts to distribute, and potentially the State with reduced fishery taxes (which are assessed upon the landed value of the catch).

The State; of Alaska requests that MARAD consider the downstream impacts of any rule making and maintain the market balance built into AFA.

The potential impacts from the proposed regulations, or industry responses to them, must be clearly understood. Therefore, the State requests MARAD to implement regulations requiring pollock firms operating in the Bearing Sea and Aleutians Islands to provide proposed merger, acquisition and other ownership changes to MARAD, NPFMC and the State of Alaska prior to finalizing any changes in organizational structure. MARAD would maintain a database and could review and report to Congress and the North Pacific Fishery Management Council periodically to assist government and the public in understanding changes to foreign ownership in processing and harvesting interest in these fisheries. Ultimately this would allow the public to monitor the effectiveness of the ownership provisions in AFA before they get out of hand. It would also provide a tool to monitor concentration of buying and harvesting firms in the pollock industry.

Thank you for the opportunity to comment on these proposed regulations. The State of Alaska believes that the final regulations should faithfully implement both the letter and the spirit of the U.S. ownership and control requirements that Congress enacted through the American Fisheries Act.

Cordially,

Deborah B. Sedwick
Commissioner
Department of Community and Economic Development

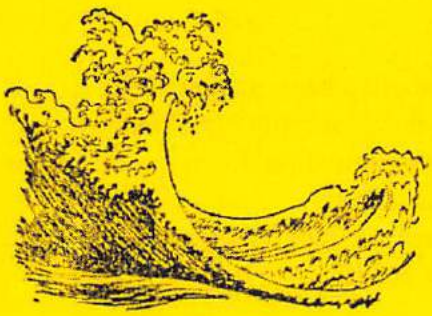
cc: Governor Tony Knowles
U.S. Senator Ted Stevens

FYI:

Internet site for Maritime Administration (MARAD) Documents:
Re Vessel Ownership testimony on American Fisheries Act

Go to http://dms.dot.gov
Click on SEARCH button at top
Go down to Docket Number search box and type in 5609
and hit Search key next to it

Then go down through documents list to Deborah Sedwick's DCED letter
Listed as number MARAD-1999-5609-52
Click it and then go down to the bottom left side "To download a document"
Section where you can click on an ADOBE.pdf
File version to download (or choose TIFF file)



The

Groundswell

Fisheries Movement

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North Pacific Fishery Management Council
144th Plenary Session – June 7 -12, 2000
Doubletree Hotel – Portland, OR

RE: AMERICAN FISHERIES ACT & COOPERATIVES (C-3)
MAGNUSON-STEVENS ACT REAUTHORIZATION (C-6)

Mr. Secretary & Council Members:

1.1.0 At this Portland meeting, the NPFMC will be putting the final touches on two issues deeply concerning to fishermen and the communities of Alaska, and to this Nation. First, you will be considering the inshore cooperative structure. Second, you will be looking at the reauthorization of Magnuson-Stevens.

1.1.1 The attached document is the *appellants' opening brief* to the Supreme Court of the State of Alaska in the Louie Alakayak, et al v. British Columbia Packers, Ltd. et al – also known as the Bristol Bay Salmon Antitrust Lawsuit.

1.1.2 During the Dept of Transportation's MARAD public testimony on inshore cooperatives, Groundswell submitted a document (under #5609 series) and worksheet on the effects of abusive transfer pricing in pollock.

1.1.3 Commissioner Deborah Sedwick of the Alaska Dept. of Economic and Community Development expressed similar concerns in her MARAD letter (also under #5609) and further outlined the need for constant monitoring of foreign ownership changes in Alaska fisheries.

1.1.4 Finally, the most recent version of the Congressional Research Staff's industry report to Congress includes further concerns about Japanese-corporately led anti-competitive effects. Specifically listed as concerns are price-powers and global tax evasion (abusive transfer pricing).

2.1.0 It is a crucial time for the Secretary and this Council to fully consider the effects of anti-competitive behaviors among foreign-owned and even US processors in Alaska, and the devastation that their abusive transfer pricing has wrought.

2.1.1 A reading of the enclosed *appellant's opening brief* appealing the Superior Court of Alaska judge's errant rejection of the antitrust suit is a good place to start to understand the actual behavior among processors, and to predict their behavior re inshore cooperatives.

2.1.2 The MARAD concerns of Alaska's DECD Commissioner, along with Groundswell/Taufen comments outline the risk of proceeding with any plans which continue to allow the cartelized operation of Alaska fisheries and propel the debt peonage system among catcher vessels.

3.1.0 During 1998-99 Council meetings, references have often been made about protecting corporate profits and powers. One could easily gather – especially after NMFS attorney-advisor to the Council parroted these protections – that multinational corporations have rights beyond the Nation and catchers, as well as fishing communities.

3.1.1 We believe that to be an errant and irresponsible approach to fisheries management.

3.1.2 It is time for greater responsibility among processors and greater rights for fleets and communities.

3.1.3 It is also time to stop bleeding taxpayer-citizens in order to feed foreign multinationals who are 'product laundering' our seafoods for the sake of their own nations, at our expense.

4.1.0 You have all heard Groundswell testimony before, and read many of the 30 articles and opinion pieces published in the industry press on these matters.

4.1.1 Please consider again that it was in 1979 that professors Heggelund and Sullivan predicted the effects of foreign ownership and the potential for abuse, especially in transfer pricing.

4.1.2 Ask yourselves why professor Matulich proclaims to be an economist yet cannot realize the importance of global tax matters when penning his processor-paid studies which are a major tool used against this Council. The Council should long ago have called the PSPA to task for its fraudulent influence and use of Matulich's errant economics.

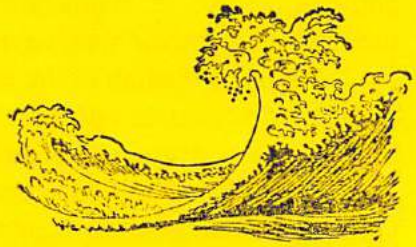
4.1.3 It is time for each of you, as Council members and as citizens, to consider carefully all of the information which Groundswell has presented over the years to you. It is time to act in favor of all fisheries interests, not just corporate ones. And it is time to save our fishing communities, one and all, not just corporate plantation towns such as Dutch Harbor.

4.1.4 Please, as you consider both inshore cooperatives and reauthorization, follow Sedwick's concerns and institute full reporting on ownership of vessels, transfers of product, and work to reveal what prices would have been if true competition existed and a comparable uncontrolled price were attainable.

In other words, I again ask you to join the Groundswell, and return the maximum net economic wealth from Alaska fisheries to the USA! Thank you.

Stephen K. Taufen

Stephen Taufen – founder of *Groundswell* Fisheries Movement



The Bristol Bay
Salmon Antitrust Suit
- Appeal to Alaska
Supreme Court

IN THE SUPREME COURT OF THE STATE OF ALASKA

LOUIE ALAKAYAK, et al., Appellants/Cross-Appellees, v. BRITISH COLUMBIA PACKERS, LTD., et al., Appellees/Cross-Appellants.	Supreme Court Case Nos.: S-09259/S-09359 Superior Court Case No.: 3AN-95-04676 Civil

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF ALASKA, THIRD JUDICIAL DISTRICT, ANCHORAGE, PETER A. MICHALSKI, JUDGE

APPELLANTS' OPENING BRIEF

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Filed in the Supreme Court
for the State of Alaska on
the ___ day of April, 2000

By:
Clerk of the Court

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Cases

STATUTES PRINCIPALLY RELIED UPON [1]

Sec. 45.50.562. Combinations in restraint of trade unlawful.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce is unlawful.

[1] Pursuant to Rule 212(c)(1)[e] of the Rules of Appellate Procedure, the plaintiffs in this case consist of a class of "all commercial fishermen holding limited entry permits, whether drift net permits, or set gill net permits in the Bristol Bay salmon fishery, and who have participated in the commercial sockeye salmon and salmon roe fishing activities in Bristol Bay during the 1989, 1990, 1991, 1992, 1993, 1994 or 1995 salmon seasons and have not requested exclusion from the class." A listing of those class members is contained as an attachment to the Revised Amended Final Judgment. [Exc. 3230-3297]. Defendants who remain in the case, with their affiliate groupings, are as follows: (1) British Columbia Packers, Ltd. ("BC Packers") and Nelbro Packing Company ("Nelbro"); (2) Icicle Seafoods, Inc. ("Icicle"); (3) North Pacific Processors, Inc. ("NPPI"), Marubeni Corporation ("Marubeni"), and Marubeni America Corporation ("Marubeni America" or "MAC"); (4) Nichirei Corporation ("Nichirei") and Nichirei Corporation of America; (5) Nichiro Corporation ("Nichiro") and Peter Pan Seafoods, Inc. ("Peter Pan"); (6) Nippon Suisan Kaisha, Ltd. ("Nippon Suisan" or "Nissui") and Unisea, Inc. ("Unisea"); (7) Ocean Beauty Seafoods, Inc. ("Ocean Beauty"); (8) Okaya & Co., Ltd. ("Okaya"), Okaya (USA), Inc., and Okaya (Canada) Ltd. ("Okaya (Canada)"); (9) Trident Seafoods Corporation ("Trident"); and (10) Wards Cove Packing Company ("Wards Cove").

JURISDICTIONAL STATEMENT

This is an appeal as of right from the final judgment dated, December 1, 1999, of the Superior Court of the State of Alaska. This Court has jurisdiction of this matter under AS 22.05.010 and Alaska Rule of Appellate Procedure 202(a).

STATEMENT OF ISSUES FOR REVIEW

A. Did the Superior Court err in granting defendants' summary judgment motions by: (1) failing to find an issue of material fact with respect to plaintiffs' claims of price-fixing and other agreements to restrain price competition, (2) invading the province of the trier of fact by weighing the evidence and as a result, refusing to draw reasonable inferences in favor of the non-moving party, and discriminating against circumstantial evidence, and (3) improperly interpreting and applying federal authority and in doing so abandoning traditional Alaska summary judgment principles?

B. Did the Superior Court err in ruling evidence inadmissible that was either not hearsay or that satisfied the co-conspirator exception to the hearsay rule?

C. Did the Superior Court err in ruling that plaintiffs did not adequately plead alter ego with respect to the vertically integrated defendants?

STATEMENT OF THE CASE

A. INTRODUCTION.

This case presents to the Court for the first time issues of significant importance to the competitive operation of one of Alaska's most important industries—its commercial fisheries. It concerns plaintiffs' and the State of Alaska's interests in ensuring that the benefits of Alaska's precious natural resources are adequately protected from those who seek to exploit them for profit through collusive activity in violation of state antitrust

laws. The case requires the Court to interpret and apply the most fundamental part of Alaska's antitrust statute—the ban on price-fixing among competitors. The issues presented take on added significance because the case involves a certified class action affecting the interests of more than 5,000 persons who have fished in Bristol Bay during the relevant period. [Exc. 3230-97]. During the class period, approximately 1.37 billion pounds of sockeye salmon were harvested in Bristol Bay. [Exc. 407]. The case is also extremely important to the state as a whole because it concerns the right to a trial by jury of genuine issues of disputed material fact guaranteed to any plaintiff seeking to remedy a violation of law. On the eve of trial, following more than four years of intense, multi-state and international discovery, the parties' expenditure of tens of millions of dollars in attorneys' fees and expenses, and the achievement of settlements on behalf of the plaintiff class amounting to more than $11 million, the Superior Court granted summary judgment to all of the defendants.

The Superior Court's "eleventh hour" dismissal of the suit could hardly have been more surprising, not merely because of its timing, but also because the court had on three previous occasions denied motions for summary judgment filed by individual defendants. [Exc. 198, 245, 388]. Even putting aside the inconsistency between those orders and the one now before this Court, the Superior Court's decision is difficult to reconcile with portions of its accompanying opinion. [Exc. 3102-167]. While purporting to discredit much of plaintiffs' evidence, the court either found or assumed the following in plaintiffs' favor:

- that the economic market at issue is one in which a limited number of competitors were strong enough to exercise influence over the price, but not strong enough to ignore each other's reactions [Exc. 3134];
- that this market structure favored collusion [Exc. 3138];

- that the defendants had a motive and opportunities to enter into the alleged conspiracy [Exc. 3138, 3151, 3160-61];
- that the prices paid by those defendants who bought directly from class members were set "interdependently" and in parallel fashion [Exc. 3139-40];
- that there was a "tacit agreement" among certain defendants to exchange information about the prices they were offering to class members [Exc. 3146];
- that high-level executives or employees of various defendants who had authority to set the allegedly collusive prices engaged in telephone conversations about their respective prices on an "as needed" basis [Exc. 3140-41];
- that some of these conversations concerned "future prices" and were not consistent with competition [Exc. 3148, 3166];
- that some of the settled defendants did agree among themselves to reduce the prices paid to class members [Exc. 3121, 3124, 3165];
- that two defendants invited two others to engage in price-fixing, and that the resulting prices were consistent with the invitation [Exc. 3130-31, 3132]; and
- that one defendant, following its receipt of complaints from other alleged conspirators, complained to a non-defendant competitor that the price it was paying was too high and that the non-defendant was taking fishers away from the complaining conspirators' fleets [Exc. 3125-26].

Notwithstanding these conclusions, the Superior Court decided that no reasonable jury could find in plaintiffs' favor. The court reached that result only by doing precisely what well-settled Alaska law on summary judgment prohibits: it weighed the evidence and repeatedly drew inferences of fact in favor of the defendants where inferences favoring the plaintiffs were at least as reasonable and often were more compelling. In so doing, the Superior Court violated basic Alaskan summary judgment principles by

treating circumstantial evidence as inferior to direct evidence. It explained away each item of such circumstantial evidence, only willing to find it supportive of plaintiffs' claims if there was no possible exculpatory explanation for it. In substance, the Superior Court's opinion gives a green light to collusion, not only among participants in Alaska's fisheries, but also among competitors in all of the economic markets vital to the State's welfare. This is the case not because the opinion approves of such behavior, but because it makes such behavior almost impossible to prove.

Plaintiffs are a class of commercial fishers who fished for sockeye salmon in Bristol Bay during 1989-95 and sold their catch to the processors operating there, including eight of the defendants, who, in turn, froze a portion of the catch and sold it to their customers, including the five Japanese importer defendants. In this action, plaintiffs allege that each defendant participated in a conspiracy to restrain trade in the purchase of raw sockeye salmon from fishers in Bristol Bay, Alaska, in violation of AS §45.50.562 et seq. The purpose and effect of the alleged conspiracy were to reduce price competition among processors in the purchase of Bristol Bay sockeye, and thereby to depress the prices paid to fishers below the prices that would have prevailed in the absence of defendants' collusive behavior. [Exc. 187].

The evidence outlined herein shows that the conspiracy included both broad agreements to limit price competition, as well as narrower agreements among some of the defendants on specific prices or other aspects of price competition from time to time. Plaintiffs contend that those narrower agreements were adopted in furtherance of the overall agreement among all of the defendants to limit competition among them in order to reduce grounds prices.[2] Plaintiffs contend that the conspiracy was organized and

[2] Grounds prices are the prices paid to fishers for raw fish; they are also referred to as "ex-vessel" prices. The Japanese market participants commonly referred to these prices as "fish prices" or "beach prices." In this brief, the term is also meant to include "post-season adjustments" or "bonuses" that are often paid to fishers after the season is over.

implemented through a variety of communications among the defendants at different times and places, all of which were done for the illegal purpose of collusively reducing grounds prices or restraining grounds price competition. The conspiracy was successful in effectuating its purpose of collectively reducing price competition and resulted in grounds prices that were far below the levels that would have resulted in the absence of collusion. [Exc. 1705-10].

Among the communications which implemented the conspiracy were the processors' participation in so-called "price verification" calls with each other as prices were being set during the season, and communications among the importer and processor participants in advance of each season regarding the processors' expected grounds prices. Each processor's representative who engaged in the "price verification" calls, typically the chief executive officer ("CEO"), was often communicating not only about what prices were being paid, but also about what prices should be paid. Even if they were doing nothing more than "verifying" the prices that were then being offered, the practice had no legitimate, pro-competitive justification, but instead had the purpose and effect of stabilizing prices at lower levels than would have existed absent defendants' collusive behavior. As described below, the importer defendants further exhorted the processor defendants to lower their grounds prices in unison and with the obvious purpose of organizing multiple processors to coordinate their actions so as to effectively implement the reduced prices.

Plaintiffs also showed that the conspiracy was economically sensible for all of its participants, because they all stood to benefit from conspiring to reduce grounds prices below competitive levels. [Exc. 1679]. The conspiracy effectively reduced the price of both raw and processed salmon, yielding benefits to both processor and importer participants. [R. 00043654]. The conspiracy was, in part, intended to protect profits

and/or reduce losses at a time when participants in the conspiracy were predicting changes in the Japanese market for processed sockeye that might reduce wholesale prices for that product in Japan, and thereby directly or indirectly depress margins at both the processor and importer levels..[Exc. 1687-88]. Each defendant perceived that lower grounds prices would be beneficial, while recognizing the need for cooperation with other participants in the conspiracy if grounds prices were to be reduced successfully. As demonstrated below, plaintiffs submitted sufficient evidence on each of these contentions to justify a trial by jury.[3]

B. STATEMENT OF FACTS.

1. The Bristol Bay Salmon Fishery.

Each summer, millions of salmon return to the rivers of Alaska to spawn. The Bristol Bay sockeye salmon fishery is the largest in the world. [R. 00034187]. Approximately 46% of the world's sockeye salmon are caught there. [Exc. 1738]. Over the course of only two or three weeks, sockeye salmon, also referred to as "red salmon," are caught by commercial fishers holding limited entry permits issued to that fishery by the State of Alaska. AS §§16.43.140, 16.43.150. [R. 00034187-88, 34193]. Drift net

[3] Three Superior Court judges have had substantial involvement in this and related cases. Given the magnitude and complexity of the case, a brief history of it at the outset may be of assistance to the Court. Events during the 1991 and prior seasons prompted the Alaska Attorney General ("AG") to begin an investigation into the possibility of price-fixing in Bristol Bay and other Alaska salmon fisheries. The AG's investigation resulted in a lengthy report that was released publicly in 1993. Soon thereafter, two of the plaintiffs in this action brought a suit under the public records statute for disclosure of the AG's investigative materials. [Exc.1821-61]. In Hansen v. State of Alaska, 3AN-94-1195 CI, the Superior Court (Judge Reese) ordered the AG to disclose the material over the objection of some of the defendants here. [Exc. 913-14] It found that there was sufficient evidence that the public interest had been violated to constitute good cause to mandate disclosure of the information. Judge Reese's assignment to this case was pre-empted by the defendants. Instead, Judge Card presided over the initial stages of this litigation, certifying the class in an opinion in which he found that there was evidence of a "pattern of dealing with the putative class members by certain defendants" (including Wards Cove) indicative of coercion and deception. "Memorandum and Opinion Regarding Class Certification," pp. 10-13. [Exc. 75-78]. During his consideration of the class certification motion, Judge Card was removed due to an administrative re-assignment and Judge Michalski was assigned to the case.

fishers harvest the majority of the catch, operating highly specialized boats uniquely designed for Bristol Bay. [Exc. 300-01]. During the relevant period, processors froze most of the catch (approximately 70 percent) either on floating processing vessels for immediate loading onto "trampers" that transported the product to Japan, or with freezing equipment installed in shore-based canneries. [Exc. 436, 453]. Due to its geographic isolation, transportation of product and supplies in and out of Bristol Bay is extremely difficult. [Exc. 310, 1739, 419].

The Bristol Bay salmon market is an oligopsony. [Exc. 306]. The market is dominated by a handful of companies (called the "major" processors or the "majors"). [R. 00043657]. The top ten processors, including all eight of the current processor defendants, account for 70 percent of all sockeye salmon purchases in the bay. [Exc. 1677, 1723-25]. Except in unusual circumstances, almost all of the catch is processed in Bristol Bay. [Exc. 1676]. No new major processors have entered the market since 1988, with smaller entrants never gaining more than a one or two percent share of the market and often leaving the market after a single year or two. [Exc. 433, 1723-25]. Over the period of the alleged conspiracy, the market shares of the major processors were highly stable from year to year, even though the overall harvest varied markedly between different seasons. [Exc. 1705, 1723-25]. All of the land-based processors operate facilities that were built many years ago. [Exc. 436]. New entrants, seeking to enter through building new shore-based facilities or through the use of floating processors, have a difficult time entering and competing in the market. [Exc. 1678, 317-18]. One defendant executive stated that it costs $5 million for the first pound of fish a major processor buys in Bristol Bay. [Exc. 1567].

Raw sockeye salmon is a homogeneous product. [Exc. 314, 1675]. The major processors paid the fishers one price for their catch regardless of the size, weight, or

quality of the fish, and regardless of whether the fish contained roe or not. Id. In-season price changes during the peak of the short fishing season were rare.[4] [Exc. 1726-33]. Thus, in general, a processor only needed to set one in-season price each fishing season that applied to the vast majority of its purchases. In such circumstances, coordination of pricing was very easy. [Exc. 1679-80, 314].

The supply of Bristol Bay salmon is price inelastic; lower prices do not reduce the amount of salmon offered for purchase, since the size of the catch is largely governed by natural factors. [Exc. 1679, 1744, 314-15]. As plaintiffs' experts testified, this fact provided the processors with a strong motive to engage in collusion, since they did not have to worry that lower prices would result in less total fish being harvested. [Exc. 1679]. The undisputed evidence demonstrated that the major processors maintained parallel prices, usually exactly matching those of their competition. [Exc. 1705, 1726-33].

Because so much activity must occur in a very short period of time, the market has a number of unique characteristics. Fishers generally commit to sell to particular processors before the beginning of the fishing season and have little opportunity to switch to processors offering higher prices during the season. [Exc. 301-03, 320]. Most of the drift-net and many of the set-net fishers do not reside in Bristol Bay. They travel there for the season from homeports throughout the West Coast. [Exc. 53, 427]. Many also have large investments in specialized boats that cannot be used outside of Bristol Bay. [Exc. 300-01, 1676]. Thus, they often must participate fully in the fishery, regardless of the price offered by the processors. [Exc. 311]. At times, processors did not disclose any price during the early portion of the season (and sometimes throughout the entire season).

[4] Before and after the peak of the season, price changes were more common. During the period before the peak, some processors set nominal or very low prices that would then be adjusted as the peak approached to be in line with the other major processors' price. After the peak, many processors closed their operations, and many visiting fishers departed, but a small market continued for "fall fish" in the following weeks, usually with a higher price called a "fall incentive" or a "specialty market bonus." See [Exc. 1726-33].

[Exc. 438]. The fishers went fishing on an "open ticket," or, in the 1993-95 seasons after a statute was passed mandating a price posting, with a posted price of some nominal amount, such as 1¢ or 20¢. Id. When the peak of the season was about to be reached, the major processors typically set their in-season price.[5] [Exc. 438, 1688-89, 1726-33]. After the season concluded, processors settled their accounts with their fleet, often paying an additional amount as a post-season adjustment or "loyalty bonus." [Exc. 303-04]. The latter type of adjustment was only paid to those fishers who delivered substantially all of their catch to that processor. [Exc. 976, 983]. Thus, in-season price shopping was further discouraged, since fishers feared losing the post-season bonuses that, by 1989, had become a regular part of the major processors' pricing. [Exc. 1680-81].

Given all these factors, Bristol Bay fishers had little economic clout vis-à-vis processors, and were compelled to accept the prices that the processors offered to them if they wanted to fish. The fishers had no way to preserve the sockeye they caught, so they did not have the luxury of waiting to get the best price. [Exc. 310, 1676]. Plaintiffs' expert, Dr. Joshua Greenberg, noted that the non-major buyers (many of whom are called cash buyers): "tend to be small firms and do not provide the range of services needed by most of the fleet. Thus, they are of limited utility to most fishers. The larger cash buyers are financed by the Japanese importers and are disciplined to pay prices in line with those of the major processors." [Exc. 318; footnote omitted]. One defendant executive testified that pricing in Bristol Bay was largely determined by the five major processors, all of

[5] In all but one of the years at issue in this case, that price was maintained throughout the remainder of the season by the major processors. [Exc. 1726-33]. This was true, despite the fact that in "almost every year" there were times when there were "upward pricing pressures on the fishing grounds." [Exc. 1005]. In 1994, after it became apparent that significant shortfalls in the sockeye salmon catches had developed throughout Alaska, Canada, and Washington, the defendant processors simultaneously raised their prices in similar amounts. See [Exc. 1726-33, 1928]. The peak in-season prices set by the major processors—Icicle, Nelbro, NPPI, Peter Pan, Trident and Wards Cove—were identical in every year except 1995. In that year, which followed the filing of the original complaint in this action, their in-season prices were either 70¢ or 73¢ per pound. Id.

whom had shore-based operations. [Exc. 1113-15, 1117].

Throughout the 1970s and early 1980s, the bulk of the Bristol Bay sockeye salmon was canned and sold to markets in the United States and Europe. [Exc. 1681]. By 1989-95, however, Japan had become the largest sockeye salmon market, absorbing about 95 percent of the Bristol Bay frozen salmon. [Exc. 1739]. Sockeye salmon is the most highly prized salmon in the Japanese market due to its firm deep red color, high oil content, and distinctive taste. [Exc. 262, 265.] Because of the preferences of Japanese consumers for sockeye salmon, the market for that commodity in Japan was not significantly affected by other species of wild or farmed salmon during the 1989-95 period. [Exc. 280].

Through 1976, high seas fleets operating out of Japanese ports supplied almost all of the sockeye salmon consumed there. [Exc. 469]. Beginning in that year, changes in various international treaties restricted the taking of Alaska fishing stocks from the high seas. In response to the enormous demand for sockeye salmon in Japan and the restrictions on the Japanese fishing fleet, Japanese importers rapidly expanded their share of purchases of Bristol Bay processed salmon. [Exc. 468-70, 1681-82]. Certain Japanese importers, including defendants Nichiro, Marubeni and Nippon Suisan, purchased U.S. processors, others developed long term purchasing relationships with those processors, and others simply purchased processed salmon from the U.S. processors on year-by-year or lot-by-lot bases, at times with profit sharing arrangements. [Exc. 1737-38, 1746-48]. This expansion fueled increasing raw fish prices, culminating in the 1988 season, when grounds prices climbed to a record high of $2.10 per pound. [Exc. 1681-84, 1687, 1734].

Beginning in 1989 and continuing through the alleged conspiracy period, grounds prices fell precipitously across the board. In 1989, average ex-vessel prices for Bristol Bay sockeye fell by nearly 50 percent from $2.10 per pound to $1.25. In 1990, they dropped further, to $1.09 per pound. [Exc. 1734]. At the beginning of the 1991 season,

the grounds price being offered by the major processors dramatically decreased again, to 50¢ per pound, a price that had been the subject of multiple discussions and agreements among the defendants as discussed below. That decrease was so severe that many fishermen went on strike and refused to fish. [Exc. 1698]. Eventually, the majors increased their offered price to 70¢, and the strike broke. [1701]. From 1992 through 1995, average grounds prices ranged between 68¢ and $1.12 per pound. [Exc. 1706-07, 1734; R. 00034263].

These price drops could not be explained by reference to any dramatic change in economic conditions. In the Superior Court, defendants principally pointed to strong catches in Bristol Bay and a "worldwide salmon glut" due to the expansion of salmon farming as the reasons that grounds prices plummeted in and after 1989. However, as plaintiffs' economic experts testified, the severe drop in grounds prices occurred in the face of stable (or even rising) consumer prices in Japan and far outstripped any declines experienced in wholesale prices in Japan. [Exc. 266-69; R. 00043662] (pointing out that Japanese wholesale prices were relatively steady between 1986-87 and 1989-95 when converted to dollars). Thus, plaintiffs' experts opined that the poor grounds prices received by the class fishers could not be attributed entirely to changes in supply and demand conditions, because the changes in those factors identified by defendants would also have impacted the Japanese retail and wholesale prices for the same fish. [Exc. 1708-09; 267]. Dr. Jeffrey Leitzinger, one of plaintiffs' expert economists, concluded that, in order to filter out the effects of Bristol Bay run size and world supply of other salmon species, it was advisable to compare the wholesale prices received in Japan with the grounds prices received by the plaintiffs, i.e., measure changes in the processor/ importer margin. [Exc. 1705-09]. Thus, for example, in 1986-88, fishers received approximately 56 percent of the wholesale price; that share decreased to about 44 percent in 1989 and

approximately 40 percent in the 1990s. [Exc. 1734]. This noncompetitive result was inexplicable with reference to changes in normal supply and demand conditions, yet the Superior Court simply ignored this evidence; no discussion of it appears anywhere in the Court's opinions.[6]

2. Defendants' Collusive Conduct.

Defendants engaged in pervasive collusive conduct in order to minimize the prices that the processors paid to the fishers. Although plaintiffs presented a variety of evidence in support of their allegations, perhaps the most striking evidence concerned what defendants referred to as "price verification" phone calls. According to the processor defendants, the CEO of a processor (or in some cases other senior managers who had pricing authority) would call a competitor's CEO (or other senior manager) and ask if the latter was paying a rumored price. The recipient of the call would provide the requested information by confirming or denying the price. Although some of the defendants' executives who made these calls denied that they had reached any agreements in them, plaintiffs presented evidence to the contrary. Plaintiffs also asserted that the exchange of the information itself had a depressing and stabilizing effect on grounds prices that constituted an illegal restraint without regard to whether specific agreements regarding price levels were also reached during the calls.

The direct evidence also showed: (1) an agreement among processors and importers to stabilize grounds prices in the 1991 fishing season; (2) an agreement among Mitsui & Co. ("Mitsui") and certain processors to punish Woodbine Alaska Fish Co. ("Woodbine"), a small processor, for paying high grounds prices; (3) an agreement among Nelbro and other processors to punish Baypack Fisheries L.L.P. ("Baypack"),

[6] Dr. Leitzinger thus concluded that class members were underpaid by amounts ranging from 30¢ to 58¢ per pound depending on the year. [Exc. 1734]. One of defendants' damages experts, Dr. Gunnar Knapp, wrote shortly after the 1991 season, in a letter to the assistant AG, that he was unable to exclude the possibility of collusion affecting Bristol Bay prices by "10-50 cents, perhaps." [Exc. 2149-50].

another small processor, for doing the same; and (4) an agreement among settled defendants Mitsui, Woodbine, New West Fisheries, Inc. ("New West"), All Alaskan Seafoods, Inc. ("All Alaskan"), a representative of Taiko America, Inc. ("Taiko"), Pan Asia, Inc. ("Pan Asia") and/or Pan Pacific Seafoods, Inc. ("Pan Pacific"), and other importers to persuade Pan Pacific, Woodbine, New West, and All Alaskan to lower their grounds prices by ten cents in 1990.[7] Plaintiffs asserted that each of these agreements was reached as part of the general understanding among the defendants to collectively reduce grounds prices. Whether a single broad conspiracy could be inferred from all of these items or whether they represent multiple narrower conspiracies is clearly a factual issue for determination by a properly instructed jury. However, even if these agreements were considered separate conspiracies unconnected to one another, plaintiffs were entitled to a trial of those parts of the case for which the jury could reasonably find an illegal agreement.

a. The 1991 Agreement To Depress Raw Salmon Prices.

Plaintiffs presented direct evidence that the processors participated in an agreement to reduce prices precipitously to 70¢ in the 1991 season. Robert Torres, superintendent of Bristol Bay operations for processor defendant NPPI, stated that:

> **Q. Do you recall if any other processors were offered [sic: offering] seventy cents around the July 3rd period?**
>
> **A. Everybody was.**
>
> **Q. Everybody was?**
>
> **A. Basically everybody. Well, they just agreed that they all pay seventy cents. [Exc. 1977-78; emphasis added].**

Other evidence confirms Mr. Torres' testimony that the processors had agreed to pay the 70¢ price. In a series of telephone calls, the CEOs and other high executives of

[7] The Superior Court found sufficient evidence to support the existence of this agreement, but erroneously concluded that plaintiffs had not presented sufficient evidence to tie any current defendant to it. [Exc. 3165-66].

several major processors (including Mr. Torres himself) discussed prices on the very days that the Bristol Bay grounds price was being decided. [Exc. 967-72, 1988-94, 1862-96]. In particular, as detailed below, the evidence strongly pointed to a specific agreement among processors in which Messrs. Torres and Akio Shiokawa, a Marubeni employee who was acting as NPPI's president, participated, that turned back price offers of 75¢ on the final day of the strike. Moreover, Mr. Shiokawa had participated in a preseason "survey" conducted by importer Mitsui, the principal purpose of which was to obtain the major processors' agreement to pay very low grounds prices in the range of 50¢ to 70¢ per pound.

The defendants' collective efforts to depress the 1991 grounds price began well in advance of the season. On December 4, 1990, the top management of processor defendant Wards Cove, including Alec Brindle, its CEO, met with importer defendant Okaya's chief North Pacific salmon traders at its headquarters in Tokyo. [Exc. 1034-36]. A document was presented to the Wards Cove's executives to guide the discussions. [Exc. 2677-91]. Two days later, on December 6, Okaya and Nichirei provided a very similar document (in certain parts identical) to representatives of defendant BC Packers, which acted as the sales agent for its corporate affiliate Nelbro (a processor defendant). [Exc. 2623-24 (cover page) and Exc. 2614-22 (text)].[8] The memorandum provided to Wards Cove urged it to join in "**mutual cooperation among the packers and the importers**" to obtain a "**[f]ish price reduction. In the extreme Bristol Bay Sockeye price may have to be reduced down drastically.**" [Exc. 2677-91, at 2683; emphasis added]. The concluding portion of the memorandum contained Okaya's "proposal" for the 1991 season:

> **We would like to request you to keep ground price as much as lower level for coming season**, and this eventually keeps reasonable FOB price to sell in the Japanese market.

[8] The memoranda have no title. Therefore, plaintiffs will refer to them as the "Okaya Action Plan," the "Okaya/Nichirei Action Plan," or simply as the "Action Plan."

* * * * *

> **We are assure[d] that Wards Cove Packing as a leader of this industry can establish reasonable FOB prices by enforcing to control the ground prices.** Id. at [Exc. 2685; emphases added].

What was said about Okaya's proposal at the December 4 meeting is disputed. In his deposition in this case, Mr. Brindle claimed he told Okaya that the proposal was unlawful and that he could not discuss it. [Exc. 1007]. However, his claim that he verbally rejected Okaya's invitation was contradicted by his own sworn interview given during the investigation by the Alaska Attorney General's office six years earlier and only one year after the Okaya meeting. There, Mr. Brindle recalled no discussion of Okaya's suggestion at all. [Exc. 1899-900]. Furthermore, Seiya Niimi, then Sales Manager of Okaya's Marine Products Department and author of the Japanese language version of the memorandum, claimed Mr. Brindle never said anything about the illegality of Okaya's proposal. [Exc. 1939]. At Okaya's meeting two days later with BC Packers' executives,[9] a version of the same document containing the identical subparagraph (6) was handed out.[10] The version given to BC Packers contained a differently worded "proposal" for 1991. It asked that Nelbro's pricing for frozen salmon follow that established by Wards Cove and Marubeni, a price that Okaya argued was "historically speaking" the leading market price and thus would be "very useful for our reasonable pricing" in Japan. [Exc.2614-22, at 2620-21]. As is described below, Wards Cove, Nelbro and BC Packers

[9] In a unique arrangement, BC Packers and Nelbro divided responsibilities that were consolidated in every other processor. BC Packers arranged all of the overseas sales of Nelbro's frozen salmon product, while Nelbro was responsible for purchasing salmon from fishers and processing it. [Exc. 958]. During the period at issue in this case, the two companies were affiliated companies whose stock was 100 percent owned by George Weston Limited or its wholly owned subsidiaries. Id. BC Packers' chief sales executive for Japanese sales, Ike Baart, attended the December 6, 1990 meetings. He was often in communication with Trevor Beeston, Nelbro's CEO, and frequently discussed grounds price issues with him. See, e.g., [Exc. 2393, 2415, 2549, 2551, 2554, 2555, 2556, 2291, 2294, 2296].

[10] Nichirei participated in Okaya's communications with BC Packers since Nichirei purchased much of the Bristol Bay salmon which Okaya bought from BC Packers [Exc. 1912].

accepted Okaya and Nichirei's invitation to conspire by establishing very low grounds prices in the 1991 season and by playing pivotal roles in inducing their competitors to do likewise. In particular, both Wards Cove and BC Packers had extensive contacts with importer Mitsui, through which they coordinated specific price offers to the Bristol Bay fishers, even though, at that time, neither of those companies had sold any Bristol Bay fish to Mitsui for over a year. [Exc. 527, 536]. Moreover, as demonstrated below, Mr. Brindle of Wards Cove and Mr. Beeston of Nelbro were key players in the discussions among the processors concerning what prices to offer the fishers so as to bring the strike to a close.

Beginning in February, Mitsui began a campaign to convince all the major processors to pay their fishers a maximum of 70¢ per pound and preferably lower (often urging that 50¢ be adopted). The effort included discussions with Wards Cove, Icicle, Trident, Peter Pan, NPPI and other smaller processors encouraging them to set the price below 70¢. [Exc. 2151, 2637, 2049]. While engaged in these efforts, Mitsui contacted representatives of Icicle, Wards Cove, Woodbine, Nelbro, YardArm Knot, Inc. ("YardArm Knot" or "YAK"), NPPI, Okaya[11] and BC Packers. [Exc. 2050-51].[12] In one internal report, Mitsui stated that Trident "**agreed**" with "**our [Mitsui's] opinion that fishermen price shud be USC 50/lb in 1991.**" [Exc. 2152]. During this effort, Mitsui also met with Mr. Shiokawa of NPPI[13] and discussed prices for the upcoming season and the price levels at which the fishers were likely to strike. [Exc. 2050-51, 2052].

[11] The Okaya executive, Hiroshi Sakai, who met with Mitsui, had been a participant in the meetings with Wards Cove two months earlier at which the Action Plan described above was presented. [Exc. 1900].

[12] Mitsui bought no Bristol Bay salmon from most of these companies. [R. 00054923].

[13] Although Mr. Shiokawa was formally an employee of NPPI, in reality, he worked for Marubeni, NPPI's parent corporation. He was a Marubeni executive sent by Marubeni to manage NPPI on behalf of Marubeni pursuant to the Japanese practice of shukko. [Exc. 1136-37, 1138]. Shukko, as explained by Shigemi Niwa, a Marubeni and MAC employee, worked as follows: "[a]s an employee of Marubeni Company, Corporation — while I was still employed by Marubeni Corporation, I worked for [a Marubeni subsidiary] during a certain period of time." [Exc. 1951].

In the following weeks, Mitsui had numerous discussions with several processors, urging their adoption of the 50¢ price, or alternatively, asking them to keep the grounds price as low as possible. [Exc. 2053-54, 2055-56, 2078]. In one such communication, when a Wards Cove executive reported to Mitsui that his boss, Mr. Brindle, had expressed the view that there was "no need to cut fishermen price as low as [50 to 70 cents]," Mitsui countered and presented its argument that the processors should not pay as much as 70¢. [Exc. 2075].

At the same time, other importer defendants were advocating prices either identical to or in the same low range as those promoted by Mitsui. On February 7, 1991, Okaya passed on to Ike Baart, the BC Packers' executive who was responsible for sale of Nelbro's Bristol Bay frozen salmon to Japan, a rumored 50¢ grounds price. [Exc. 2157]. On March 1 or 2, 1991, Mr. Baart spoke with Kyosuke Ogaki of importer Maruha. Among the topics discussed were: "[e]xpect Bristol Strike. Some say F[ish] P[rice] 50¢–60¢ . . . Japan will ask for 10–20% price reduction. Then negotiate + compromise." [Exc. 2174]. By the end of May, Maruha was advising its Seattle affiliate that: "**The fish price in the majority view held by major domestic companies is $0.50—0.70. To put it differently, the majority view is that sure sales of Bristol Bay sockeye salmon are not possible unless the fish price is at this level.**" [Exc. 3003-06].

If the defendants' efforts to lower grounds prices were to have maximum success, the prices of certain of the more significant small processors needed to be controlled. In this vein, Charles "Chuck" Bundrant, the CEO of processor defendant Trident, met with Mitsui representatives as the 1991 season approached. Mr. Bundrant complained that Mitsui's relationship with Woodbine and YAK, another small Bristol Bay processor, was disruptive to the market: "**He is very critical to Japanese buyers who back up small size operators like Woodbine/YAK. Those operators always raise fishermen price and cause a big problem to major operators.**" [Exc. 2083-84]. Mitsui and other

importers, as discussed below, acted on this complaint and others like it, to bring Woodbine and Yardarm Knot's grounds prices under control.

Soon after the Trident communication, Mitsui told Woodbine that it would only buy its Bristol Bay fish if the grounds price were 50 to 60¢ per pound. [Exc. 2076-77]. On June 10, Mitsui warned Woodbine that the Bristol Bay fishermen's price should be as low as 50¢, in order to protect the processors' profits. [Exc. 2078].

Other defendants were working vigorously to constrain the pricing of cash buyers in the False Pass fishery, a much smaller fishery whose season occurs just in advance of the Bristol Bay season.[14] Maruha reported that Peter Pan and Trident, the dominant processors in False Pass, [Exc. 1106], were "laying the groundwork" so as to "suppress the fish price to a maximum of $1.00-$.70." The author of the memorandum observed "that there won't be anything odd about major processors actually taking action to keep the fish price as low as possible in order to prevent them from going down all together." [Exc. 2989-90].[15] Small operators in that fishery and in Chignik, armed with financing from aggressive Japanese importers, had been a thorn in side of the defendants in past years, as the Okaya/Nichirei Action Plan had explained. [Exc. 2679].

One of Peter Pan's efforts to suppress grounds prices in False Pass and Bristol Bay is reflected in a memorandum from its CEO, William Saletic, to Kirk Suzuki, the chief salmon executive of importer defendant Nichiro, Peter Pan's parent company. Earlier, Peter Pan had heard that a cash buyer was going to pay prices that Peter Pan considered

[14] The evidence shows that defendants historically used False Pass salmon prices as a benchmark in determining Bristol Bay prices. See, e.g., [Exc. 1666]. Fish caught there and at other Alaska Peninsula sites—ADF&G Management Area M—include many that are intercepted while they migrate to Bristol Bay (approximately 8.3% of the projected Bristol Bay fish run); they pass by False Pass a week or two earlier before reaching the river systems in Bristol Bay. See [Exc 952, 966, 1124]; See 5 AAC 09.365. False Pass is also a market where processor defendant Peter Pan by "tradition," always announces the first grounds price. [Exc. 1123].

[15] These prices were higher than the opening price of 50¢ that the major processors offered in Bristol Bay because traditionally False Pass fish (including those intercepted from the Bristol Bay run) had commanded a premium price in Japan. [Exc. 1050, 1101].

too high. On May 31, 1991, Mr. Saletic complained to Nichiro that an aggressive importer, Shin Nishoku, in combination with a small processor, New West, were going to offer high grounds prices and **"show Peter Pan Seafoods and Trident Seafoods how to buy Red Salmon in False Pass."** [Exc. 2660; emphasis added] He wrote:

> **As you will recall, during the last three weeks I have asked you at least ten times if some one was going to have high prices in False Pass and you indicated that there would be no one doing that this year."** Id.

Mr. Saletic requested Nichiro's help in preventing this, reminding Mr. Suzuki "as you **know high prices again in False Pass will not help False Pass or Bristol Bay."** Id.[16]

The importers and processors also worked together to lower grounds prices in Kodiak, another fishery that serves as a pre-season benchmark against which Bristol Bay grounds prices are set. [Exc. 1563]. On June 12, 1991, Mr. Brindle complained to Mitsui that Wards Cove was following the high grounds price of $.92-$.95 offered in Kodiak by processor defendant Ocean Beauty—known there by its original name, Washington Fish and Oyster Co. ("WAFICO")— and was "wondering who are buyers of WAFICO's sockeye." [Exc. 2085]. Mr. Brindle explained that Ocean Beauty's grounds price disturbed him so he asked Mitsui who could the buyer be that would justify such a high price. [Exc. 1023]. Ocean Beauty received the message that its prices were too high through importer defendant Nichirei, its buyer in the Kodiak fishery. On June 12, 1991, the same day as Mr. Brindle's discussion with Mitsui, Takeo Sato of Nicherei met with

[16] This was not the first time Peter Pan attempted to prevent competition from Shin Nishoku. On June 29, 1990, Butch Kagley of Peter Pan sent a memorandum to Messrs. Saletic and Suzuki, complaining that Nichiro was supplying trampers to a cash buyer in Bristol Bay who was offering more than Peter Pan. The memorandum recounted that the Pacific Harvest, a floating processor operated by Oceanic Seafoods, Inc. ("Oceanic") and run by Allen Searle, was selling on a cost plus basis to Shin Nishoku. Mr. Saletic immediately contacted Nichiro's tramper representative and **"expressed in the strongest possible terms that the relationship is totally contrary to the good of Peter Pan and must be broken off or the result of Pacific Harvest paying very high raw fish prices could have tremendous financial impact on Peter Pan."** Mr. Saletic suggested that Mr. Suzuki use "all efforts to see that the Nichiro Tramper department cease this operation." [Exc. 1150; emphasis added]. Mr. Saletic testified that the cash buyer was forced to cease operations in part because the tramper service was cut off and that the cash buyer at some later date went out of business. [Exc. 1120]. In fact, Oceanic ceased operations the very next year. [Exc. 435].

David Perron of Ocean Beauty, and obtained his agreement to reduce the Kodiak grounds price. Mr. Sato reported to Tokyo: "[i]n the beginning, the beach price was set at 95¢, but we had them lower it to 80¢ midstream. ... Considering that the Kodiak beach price is 80¢, the Bristol Bay ought to be 60¢." [Exc. 2845-46, 2098-03, 1959].[17] Wards Cove, in turn, was able to lower its Kodiak grounds price to $.80/lb, as it reported to Mitsui on June 14. [Exc. 1195, 1175, 2088, 1023]. Mitsui's Tokyo office, upon hearing this news, reported that Messrs. Sam Yoshida and Brindle of Wards Cove should be advised that Bristol Bay prices should be lowered by a corresponding amount: "we heard that Chignik/Kodiak fish price falling down to D 0.80 /LB [today]. **We seriously believe that packers should protect themselves by lowest grounds price like USC 50/LB to start with otherwise it will be very tough and awkward situation for packers and importers.**" [Exc. 2087]. Hoping to reduce the Kodiak price even further to 65¢, Mr. Brindle made at least one more purported "price verification" call to Ocean Beauty to confirm a rumored 65¢ price. [Exc. 2705].

The success of these collective efforts to depress 1991 grounds prices in False Pass and Kodiak provided a solid foundation for the defendants' collective efforts to reduce Bristol Bay prices as well. In the course of urging Nelbro to follow Peter Pan and Trident's lead in posting a low Bristol Bay grounds price of 40 to 50¢, Yukio Ono of Mitsui reported to BC Packers on June 19, 1991, that Kodiak prices had been successfully reduced mid-season for the first time in many years and that in False Pass cash buyers had not been able to push prices up as they had in past years. Grounds prices there had thus been maintained some 40 to 50¢ below expected levels. [Exc. 2612-13].[18] Mr. Ono reported that his market opinion was not only his own idea, but constituted the

[17] Mr. Horgan confirmed that Ocean Beauty's 65 ¢ offer to its fishers during the strike in Bristol Bay was tied to its reduced price in Kodiak, because there was a "normal differential" between the Bristol Bay and Kodiak prices. [Exc. 1563].

[18] As late as the latter part of May, Maruha was reporting that the cash buyers were planning to pay $1.25 to $1.50 in False Pass and requested that YAK follow the grounds prices of Peter Pan, Lafayette and Icicle. [Exc. 2900-02].

"industrial feeling" as of that time. Id.

The 1991 Bristol Bay season itself was a highly contentious one. Having suffered major price declines over the past two seasons, many fishers were at the limits of their tolerance. With the major processors refusing to announce a price, the fishers went on strike. Almost immediately, the processor defendants' executives began coordinating their efforts to either resolve the impasse or break the strike. Wards Cove and Nelbro took leadership roles in these efforts, secure in the knowledge that they had strong support from the Japanese importers including Okaya, Nichirei and Mitsui. For example, on June 24, Vic Horgan, Sr., Chairman of Ocean Beauty -- whose company had just reduced its price in Kodiak at Nicherei's insistence -- and Mr. Beeston of Nelbro called Mr. Brindle regarding the strike and possible responses to it. [Exc. 1199].

Mr. Beeston, using language almost identical to what had been used months earlier by Okaya and Nichirei in their meetings with BC Packers, advocated that fishers cease striking and settle on the defendants' terms. After discussing the matter with Mr. Baart of BC Packers, he told a group of his fishers that "The Japanese have indicated that our market with them is going to have to drop drastically." [Exc. 964-65, 1999-2003]. That same day, with the peak of the run approaching, two of the major processors moved to settle the strike by offering 50¢ per pound. Wards Cove posted that price on June 29.[19] [Exc. 2708]. Mr. Beeston telephoned Mr. Brindle and "confirmed" the price. Id. Peter Pan also offered 50¢. [Exc. 1154-58] Trident had also offered the same 50¢ price before the strike had commenced. [Exc. 2613].

When 50¢ did not induce the fishers to begin fishing, a group of processors offered 65¢, and then 70¢, all amid extensive communications among them concerning those

[19] On June 28, 1991, Wards Cove had accepted a very low frozen price from Mitsui on the understanding that other Japanese importers would use it as the "prevailing price" and that other packers would thus be forced to follow, resulting in "**big pressure for lower fishermen price[s]**." [Exc. 2081-82]. A reasonable inference would be that Wards Cove obtained such an understanding from its discussions with Okaya concerning its Action Plan.

prices. [Exc. 2004, 967-71, 1988-98, 2709-10]. Ocean Beauty was the first to offer 65¢ (apparently on the afternoon of June 30) and quickly assured its competitors and the defendant importers that it intended to and was simply offering the same price as other major processors. [R. 00048813.] On July 2, 1991, Kabushiki Kaisha Ocean Beauty ("KKOB"), its Japanese subsidiary, sent a fax to Ocean Beauty relaying "inquiries by Nichiro, Kyokuyo, etc. regarding rumour that Ocean Beauty has offered 65¢ high fisherman price while other majors are offering 50¢ or below and that Ocean Beauty has presold O. Pride production to a Japanese buyer (Shin Nishoku?)."[20] [Exc. 2023].[21] Nichiro's subsidiary, Peter Pan, was also interested in understanding Ocean Beauty's price move. Mr. Saletic called Mr. Horgan to "confirm" the price shortly after it was offered. [Exc. 1565]. Mr. Beeston also called to "confirm" the offer. [Exc. 2004]. With Peter Pan having matched the 65¢ offer, Ocean Beauty responded to KKOB's fax later in the day and provided its assurance that its grounds price was no higher than the other major processors: "Ocean Beauty posted price is @ 65¢ to the fishermen which is the same as other major buyers in the Bay." [Exc. 2024].

Alec Brindle's diary reflects the sequence of events that followed. On July 2, Mr. Brindle discussed offering a 70¢ price with Nelbro's Mr. Beeston: "Trev confirms .70 offer." [Exc. 1173]. On July 3, with the strike apparently breaking down, Mr. Brindle assured Peter Pan that its price had not risen to 75¢: "[b]oycott appears to be breaking. Confirm P.P. we not at .75." [Exc. 1174]. Later that day, Mr. Beeston confirmed Nelbro's

[20] Masataka ("Taka") Sueyoshi immediately denied to the inquiring importers that Ocean Beauty was selling to Shin Nishoku. [Exc. 2023].

[21] The Superior Court granted a motion by now-settled defendant Kyokuyo Co. Ltd. ("Kyokuyo") to strike the portion of this exhibit referring to Kyokuyo. "Order Striking Inadmissible Evidence From Plaintiffs' Opposition to Kyokuyo's Motion for Summary Judgment," pp. 1-2 (June 18, 1999) [Exc. 3097-01]. No other defendant challenged the admissibility of the document. In particular, Ocean Beauty did not argue that the documents were inadmissible hearsay as to it. To the extent that the order could be read as striking use of the document against any defendant other than Kyokuyo, its ruling should be reversed. The Superior Court erred in failing to treat the document as a party admission and a business record. See [Exc. 1094-95]. As for the reference to Kyokuyo and Nichiro, the Superior Court erred in not treating them as non-hearsay verbal acts.

70¢ price to Mr. Brindle: "Nelbro posted .70: Trev confirms." Id. Mr. Brindle also spoke with Peter Pan twice, to ask if it had raised its price to 70¢, which Peter Pan denied: "[c]ommittee says Nelbro + PP at .70. P Pan denies." Id. However, Peter Pan's Mr. Rawlinson later called to confirm whether Wards Cove had offered a 70¢ price: "RS [Red Salmon — one of two Wards Cove Naknek plants] fishermen accept .70¢ retro. Posted until further notice. Rawlinson calls to confirm." Id.

With negotiations to end the strike reaching a fever pitch on July 3, the processors collusively turned back a settlement of the strike at 75¢. That day, in addition to Mr. Brindle's assurance to Peter Pan that he had decided not to raise his offer to 75¢, the evidence shows that NPPI withdrew an offer of 75¢ as the result of pressure put on NPPI's Mr. Torres by Mr. Beeston. Between 11 a.m. and 1 p.m., Robert Bonanno, a fisher, met with Mr. Torres at the latter's office at Pederson Point. [Exc. 986, 988]. NPPI offered a price of 75¢ if it would end the strike, and told Mr. Bonanno to "take it back" to the meeting of fishers at the Naknek borough building, and "tell them you've got a number and let's get done with this." [Exc. 986].

After receiving the 75¢ offer, Mr. Bonanno related it to the fishers, who approved the 75¢ price. [Exc. 986]. They also demanded the same price of Nelbro as a condition to ending the strike, which was refused. [Exc. 1149]. Unbeknownst to the fishers, Mr. Beeston learned that NPPI had offered 75¢, and that Far West Fisheries, Inc. ("Far West") was going to match the price. [Exc. 1996-98, 2007, 969]. Mr. Beeston admitted that when he learned of the NPPI and Far West offers of 75¢, that such an offer would cause grounds prices to spiral all the way to $1.00 per pound: "**That if they stayed out and everybody was raising prices, that if they [the fishers] would just relax they would get their dollar a pound.**" [Exc. 1997]. It, thus, "**alarmed me greatly. I thought, well, the ball game is over, you know.**" [Exc. 1996]. He immediately called both Mr. Torres and Far West's Executive Vice President, Tom Toddhunter, to

"ask—you know, saying this has been reported publicly, can you confirm it? In both cases they denied it." [Exc. 1996-97, 2007]. Later that afternoon, Mr. Bonanno returned to Pederson Point to report to Mr. Torres that it was a "done deal" for 75¢. To his great surprise, however, Mr. Bonanno was confronted with an abusive tirade from Mr. Torres and his superior—presumably Mr. Shiokawa—who withdrew the offer and gave as a reason that the 75¢ offer had been made public. [Exc. 986-87, 988].[22]

Thus, through price communications, Wards Cove was able to assure Peter Pan that it had not moved to 75¢ and NPPI and Far West were able to give Nelbro that same assurance. After NPPI's withdrawal of its offer, the 70¢ price then offered by all of the defendant processors was maintained throughout the season.

b. Mitsui And Others Pressured Woodbine To Lower Its Grounds Prices In 1990-92.

From 1990 through 1992, seven or more of the defendants (including Wards Cove, Trident, Icicle, Nelbro/BC Packers, Okaya, Nippon Suisan and Mitsui) engaged in extensive concerted activity designed to force Woodbine to lower its grounds prices for Bristol Bay sockeye. Virginia Ferrari, manager of Woodbine, testified that its pricing philosophy was "to be aggressive, pay above what was known as the majors, pay the best possible price . . . to the fishermen." [Exc. 1044]. The defendants viewed Woodbine's early practice of paying higher prices than the major Bristol Bay processors as an extreme threat to their collusive price structure. Before 1990, Woodbine had operated a single, relatively small floating processing vessel. The threat to defendants, however, became particularly acute when, in 1990, Woodbine opened a shore-based processing facility that

[22] Of course, NPPI knew that the offer would be publicly disclosed to all of the fishers, since it had asked that the offer be taken back to the Naknek borough building where many of the fishers were convened. Possibly, NPPI may have hoped to prevent disclosure of its offer to other processors. When Messrs. Beeston and Rawlinson called to "verify" the offer, NPPI's representatives then would have realized that their hoped-for secrecy had been violated. Nonetheless, the clear inference is that NPPI believed that it was in its independent self-interest to offer 75¢ to the fishers and that the offer be maintained in secrecy and that it gave up such independence of action and withdrew the offer when the other processors found out about it and complained.

it had purchased at auction in the fall of 1989. [Exc. 1042]. To eliminate this threat, the defendants engaged in a pattern of conduct with the purpose, and the effect, of bringing Woodbine into line—i.e., forcing Woodbine to lower its grounds prices, and thereby to become part of the conspiracy.

In the 1990 season, Mitsui was Woodbine's principal customer for frozen processed Bristol Bay sockeye. [Exc. 1043]. Mitsui purchased all of Woodbine's production from its Egegik plant and approximately half of the production of Woodbine's floating processor, the M/V "WOODBINE". Id.[23] Takahashi Arai, President of Mitsui Foods Export, was well acquainted with Sam Yoshida, an employee of Wards Cove in charge of foreign sales. [Exc. 1051]. Beginning before the start of the 1990 Bristol Bay fishing season and continuing throughout the season, Mr. Yoshida had numerous conversations with Mr. Arai, in which the former requested the Mitsui executive to pressure Woodbine to lower its grounds prices. Ms. Ferrari had conversations with either Mr. Arai or another Mitsui executive named Masayuki Takayanagi (Export Sales Manager for Mitsui Foods Export) several times a week. [Exc. 1045, 1047]. The "subject of Woodbine's grounds prices" was "pretty much" brought up "in each of those conversations." Id. The conversations "went from a questioning to basically telling us [Woodbine] our grounds prices were too high." Id. Ms. Ferrari also described threats made by Mitsui in 1990 concerning its high grounds prices. [Exc. 1046]. In almost every one of their many conversations with Ms. Ferrari in 1990 and in 1991, Messrs. Arai and Takayanagi told her that Mitsui had received complaints from other Bristol Bay salmon processors about the level of Woodbine's grounds prices. [Exc. 1047, 1049]. Mr. Arai stated that "the other packers" were complaining to Mitsui about Woodbine's high grounds prices. Id. Two of the complaining processors whom the Mitsui executives

[23] Of this production, only a small portion of the M/V "WOODBINE" product, which was frozen in the round, was sold to Mitsui pursuant to a cost-plus contract. [Exc. 1059].

specifically identified were Wards Cove and Trident. [Exc. 1048-49].[24]

The gist of Mr. Arai's comments about the complaints he received from Mr. Yoshida in 1991 was that Wards Cove would not continue to deal with Mitsui if it continued to buy fish from Woodbine. [Exc. 1049]. At the same time, Ms. Ferrari also had conversations with both Mr. Arai and Mr. Takayanagi, in which they exhorted her to keep Woodbine's grounds prices as low as possible. [Exc. 1054, 1046, 1049, 2079, 2080]. Mitsui made no preseason commitment of financing for Woodbine that year. Indeed, while Woodbine was attempting to negotiate a pre-season financing arrangement, some of the importers were coordinating their responses. Thus, Mitsui explained to Nippon Suisan that it was not interested in financing Woodbine's Egegik operation and Nippon Suisan reported to Mitsui that Woodbine had asked for a $250,000 advance. [Exc. 1176, 1177]. Woodbine received no preseason support from any importer in 1992 or any year thereafter. [Exc. 1667]. As a result of the pressure from Mitsui, "Woodbine did pay lower grounds prices for Bristol Bay sockeye during the 1990 and 1991 seasons."[Exc. 1666-67]. In 1992, Woodbine again approached Mitsui about the possibility of financing, and also about the possibility of a pre-season purchase commitment. Mitsui declined both requests. [R. 00054997]. Ms. Ferrari understood that Mitsui's refusals resulted from the complaints it had received from other defendants regarding Woodbine's pricing practices:

> A. It was my opinion that, after the repeated warnings by Mitsui and Mr. Arai especially in referring to Wards Cove, and they also told us that they had shifted to Wards Cove in 1991, that they were no longer going to do business with us because of that. [Exc. 1055].

With the exception of one minor spot purchase of Woodbine's Bristol Bay sockeye, Mitsui did no business with Woodbine in 1992. [Exc. 1055-56]. In each year thereafter, from 1993 to and including 1998, Woodbine requested an opportunity to sell its Bristol Bay sockeye to Mitsui, but with the exception of a few insignificant spot sales, Mitsui consistently refused Woodbine's requests. [Exc. 1056]. In her deposition testimony, Virginia Ferrari summarized as follows the effect that the other defendants' conduct had on Woodbine's business operations:

> Well, in 1990, the effect was we did end up lowering the grounds price. The effect after 1991 was that we have, no longer have Mitsui as a customer nor as a financier. [Exc. 1057].

As Mitsui recognized in 1992, without support from a big Japanese importer, Woodbine was "quiet" in its raw fish buying attitudes. [Exc. 2092]. Woodbine shifted much of its production to canning because of its difficulty in finding any Japanese buyers who would commit to buy significant quantities of its production. [Exc. 1667].

All of this evidence shows that several of the importer and processor defendants engaged in extensive concerted action to depress Woodbine's grounds prices for Bristol Bay sockeye. As a result, in 1991-95, Woodbine's prices became highly parallel with those of the major processors. [Exc. 2337, 2338, 2339, 2340, 2341, 1726-33].

c. Defendants Agreed To Eliminate The Price Competition Presented By Baypack.

Baypack, a small Bristol Bay processor formed by a group of fishers, had outfitted a floating processor vessel, the M/V "RED SEA," to begin operations in Bristol Bay in 1995, and contracted with Nelbro for the marketing of its salmon. [R. 00039805-06, 39843]. Frederick Magill, Baypack's principal owner and manager, testified about a series of conversations with Trevor Beeston of Nelbro in 1995 in which Mr. Beeston criticized Baypack for paying too high prices. In one such conversation, Mr. Beeston's

[24] The Superior Court excluded Virginia Ferrari's testimony concerning statements made by Mitsui personnel that it was Wards Cove, Trident and other processors who were putting pressure on Mitsui to refuse to deal with Woodbine. "Order Striking Mitsui and Woodbine Evidence in Part" (July 2, 1999) [Exc. 3178-79]. Plaintiffs submit that this ruling was erroneous. Plaintiffs presented independent evidence of the conspiracy to restrain Woodbine's pricing through Mitsui's business records so that the complaints to Mitsui could be admitted as co-conspirator statements made in the furtherance of the conspiracy. For example, one such telex, specifically refers to complaints Mitsui had received from Mr. Brindle and Mr. Bundrant about Woodbine's pricing. [Exc. 2092]. Bourjaily v. United States, 483 U.S. 171 (1987) (holding that the court may consider the allegedly inadmissible statement in determining whether a sufficient showing of conspiracy has been made to bring the hearsay exception into play).

complained: **"What the hell are you doing screwing up the industry by paying $1.10 a pound in Ugashik?"** [Exc. 1936].[25] When Mr. Magill asked him where he received his information regarding Baypack's grounds price, Mr. Beeston responded that the information came from good sources, but he refused to identify them. Id. In its briefing to the Superior Court, Nelbro characterized Mr. Beeston's communication with Magill as simply "a call to verify a fish price." [Tr. 00038848, line 21.]

In a subsequent conversation between Messrs. Magill and Beeston, the latter revealed that he was motivated by the interests of his "neighbor" processors to suppress grounds price competition. Mr. Beeston described "the damage we [Baypack] had done to his neighbors by taking their fishermen from them." [Exc. 1935-36]. Mr. Beeston identified Ocean Beauty, Trident and Unisea as the neighbors to which he referred. [Exc. 1934] . With respect to Trident, Mr. Beeston passed on to Mr. Magill Mr. Bundrant's threat that "he was going to bury [Baypack]."Id.[26] Notwithstanding Nelbro's independent interest, pursuant to its contract with Baypack, that Baypack succeed, Nelbro gave preference to the anticompetitive interests of its co-conspirators.

Mr. Magill's story concerning how Baypack was collusively driven from the market is strongly corroborated by a document found in the files of Okaya, Nelbro's primary customer, and one who purchased some of Baypack's processed salmon. In an April 27, 1995 memorandum by Katsunori Mori of Okaya (Canada) to Okaya's Tokyo office, it was noted that Baypack was paying higher prices to fishers; Mr. Mori remarked

[25] Ugashik is one of the fishing districts within the Bristol Bay commercial salmon fishery (ADF&G Management Area T).

[26] This was not the only time that Mr. Bundrant threatened a small processor that he perceived was paying high prices. For example, he pressured Robert Seidel, President of New West, to maintain lower grounds prices. One May during the late 1980s, Messrs. Bundrant and Seidel happened to be on the same charter flight from Dillingham to Nunachuak. Mr. Bundrant told Mr. Seidel that "he could eat bean counters like me for lunch." [Exc. 1126]. Mr. Bundrant said this because New West was paying higher prices for his fish than the major processors. Id. Mr. Seidel took this as a threat to his livelihood. He testified that "the tenor and the format of his discussion was that he [Bundrant] was going to try to smash me like an ant." [Exc. 1128].

that Baypack was "stealing fisherman from all processors." [Exc. 3017].

d. The Conspiracy To Reduce Prices In 1990.

The Superior Court found sufficient evidence of a conspiracy between Mitsui, Woodbine, New West, All Alaska and Mr. Endo (representing Taiko, Pan Asia, and/or Pan Pacific), to reduce the price paid by various processors, including Woodbine, by 10¢ per pound during the 1990 season. [Exc. 3165]. The Court concluded, however, that none of the current defendants were tied to that conspiracy and that it was limited to a single price reduction in a single season. In fact, the direct evidence presented by plaintiffs demonstrated that the pressure exerted by Mitsui, which resulted in Woodbine's price reduction, was simply part of an agreement among Mitsui, Wards Cove, Icicle, BC Packers and others to restrain Woodbine's aggressive pricing. On June 26, 1990, just days before the defendants engineered the Woodbine price drop, Mitsui reported on its discussions with Mr. Brindle of Wards Cove and representatives of Icicle and BC Packers.[27] [Exc. 2342] Each of these companies had expressed to Mitsui concern regarding competition from Woodbine, since Woodbine was reopening a shore-based plant in the Egegik fishing district of Bristol Bay that had been shuttered years earlier:

> [t]herefore we should say that everybody now knows our business with Woodbine naturally, and it sounds like a kind of news, hoping that Woodbine do not take extra aggressive attitude for fish purchase, since WC Egegik is a new element. [Exc. 2342].

At least one executive, BC Packers' Mr. Baart, had expressed his concern so strongly that Mitsui perceived that its dealings with Woodbine were creating an "anti-Mitsui attitude." Id. Mitsui personnel immediately passed on those concerns to Ms. Ferrari, thus demonstrating that it took the threat seriously. Ms. Ferrari then assured Mitsui that Woodbine would not "lead prices" and would take a "reasonable attitude" toward fish

[27] Mr. Brindle's diary confirms that he did meet with Mitsui representatives on June 26th. [Exc. 1020].

purchasing. Id.[28]

The evidence also shows that the conspiracy was much broader than the single price reduction implemented by the smaller processors. Before its meetings with Wards Cove and Icicle on June 26, Mitsui learned that the fishermen's price was "dropping down to 1.00." [Exc. 2638].[29] This report came well before any of the major processors had actually posted a price that low. At the meeting, there was a discussion of grounds prices including Icicle's report that it was using an "open ticket." [Exc. 2342].

That state of affairs continued at least through June 29, when Mr. Baart's notes of a discussion with a Nelbro representative, presumably Mr. Beeston, reflected that no major processor had yet posted a price, but that the Nelbro representative understood that a "**major advance at $1.00 is most likely.**" [Exc. 2554; emphasis supplied.] Indeed, it was not until on or about July 1, that Trident made known its support for the $1.00 price -- far below prices that it thought might be possible. Trident "suggested a rumor through their tenders . . . that they were going to pay somewhere between $1.00 and $1.50." [Exc. 2095-96]. Nelbro (shortly after the communications between Mr. Baart of BC Packers and Mitsui) posted a $1.00 advance price, effective July 1. [Exc. 2097]. Far West's operations manager, Malcolm Wyer, immediately called Mr. Beeston: "**[a]t the time I talked to Trevor to confirm this rumor, he mentioned that he had confirmed with Trident that they were paying $1.00.**" [Exc. 2095-96, 2097]. See also [Exc. 2097]. At the same time, Robert Barcott of Unisea noted: "**[a]dvised Trident and Nelbro will**

[28] This Mitsui telex provides a strong inference that the processors had been discussing Woodbine's entry and its pricing practices among themselves as well as with Mitsui. Not only did three separate processors all register complaints with Mitsui almost simultaneously, but the language of document itself strongly suggest such industry-wide discussions through its use of the terminology that "everybody" was "hoping that Woodbine" would not take an "aggressive attitude," and that Woodbine was "famous" and its relationship with Mitsui was "kind of news." This inference is bolstered further by the evidence concerning the subsequent entry of Baypack that led to inter-processor discussions of that company's activities in "stealing" of their fishers as discussed above.

[29] As early as May 23, Marubeni ("Bene") was suggesting to Mr. Baart that the grounds price was likely to be $1.00. [Exc. 2535]. Maruha advised Mr. Baart on June 6 that it expected prices of up to $1.00. [Exc. 2543].

announce a 1.00 advance price today." [Exc. 2676]. Wards Cove posted $1.00 on that same day, a price that it maintained through the rest of the season. [Exc. 1021]. Thus, within four days after Mitsui discussed prices with Wards Cove and Icicle and learned that prices were dropping down to **$1.00**, Icicle and Wards Cove both adopted the $1.00 price, matching exactly the grounds prices paid by Trident, Nelbro, Peter Pan, and North Pacific. [Exc. 1726, 14, 1107]. Unisea adopted the same price.[30] [Exc. 953].

Mitsui's records also place Ms. Ferrari's testimony about Woodbine's own price reduction in 1990 in context. On July 2, the day after the major processors all adopted their $1.00 price, Mitsui headquarters in Tokyo telexed a message to Mitsui's Seattle office complaining that a 35¢ premium, which some cash buyers were paying over the majors' price, was unnecessarily large. [Exc. 2642]. On July 3, Mr. Baart discussed grounds prices with Mr. Beeston, who reported that the $1.00 price was holding. [Exc. 2556]. Two days later, on July 4, another Mitsui telex reported that Mr. Yoshida of Wards Cove called and reported that "**[f]ishermen's price for major packers are fixed at USD1.00 until further notice.**" [Exc. 2640]. Mitsui's Tokyo office concluded that there was no need for cash buyers to pay a 30 to 35¢ premium and requested that these points be explained to Woodbine. Id. On July 5, after further discussions with Mr. Baart (who had been vociferously complaining about Mitsui's support of Woodbine), Mitsui asked that Woodbine be informed that its $1.35 price was unacceptable under the cost plus contract that covered a portion of its purchases. [Exc. 2639]. Woodbine then reduced its price to $1.25. [Exc. 1052-53]. Ms. Ferrari testified that this price reduction was the

[30] Robert Barcott of Unisea called Norm Van Vactor of Peter Pan on June 20, 1990 regarding Peter Pan's grounds price in Port Moller, one of the fisheries an the Alaskan Peninsula. [Exc. 1159]. He also talked to Lloyd Guffey of Peter Pan on June 20, 1990 about Peter Pan's grounds price in Port Moller and False Pass. [Exc. 1161]. These calls were not simply "price verification" calls, since matters such as the size of the catch were discussed and Mr. Barcott did not have a specific price he was verifying. Mr. Barcott admitted that he made the call because the seasons in those fisheries begin before Bristol Bay, and "you know, kind of an idea of, you know, what the other prices are being paid in the state." [Exc. 952].

direct result of the pressure exerted on Woodbine by the other processors and Mitsui. Id.

e. The Agreement To Exchange Current Pricing Information.

As described above, the evidence demonstrates that the processor defendants regularly and routinely communicated with each other concerning the prices they were paying to the fishers. The record shows so-called "price verification" conversations that spanned the complaint period, involving the top executives of each of the processor defendants. The "verifications" were reciprocal; each defendant would call a competitor and learn what its current (and impliedly, future) grounds prices were, and would in turn supply its prices to competitors when they called. For example, Mr. Beeston described his practice of calling his competitors to "verify" their prices as "fairly common." [Exc. 1991-92, 1995]. Indeed, he testified that when he heard a rumor about a price that would have some bearing on his own decisions his "normal procedure" would be to call that processor. Id. He did this throughout the period from 1989 to 1995. [Exc. 960, 972-73]. Other processors also called him to "verify" Nelbro's grounds prices, and Mr. Beeston responded in kind. [Exc. 963]. He recalled "verifying" prices with Messrs. Brindle (Wards Cove), Bundrant (Trident), Saletic (Peter Pan), Torres (NPPI), and Toddhunter (Far West), and individuals at Unisea, Sno-Pac Products, Inc. ("Snopac"), YardArm Knot and Baypack. [Exc. 974-77]. See also [Exc. 2008-20].[31]

Similarly, Jay Cherrier, CEO of settled defendant Dragnet Fisheries ("Dragnet"), also testified that it was fairly common for the processors to confirm prices with each other. [Exc. 140]. Wards Cove's Mr. Brindle testified to his participation in numerous

[31] Nelbro's own counsel, in a December 15, 1990 presentation "Antitrust Developments: The Grand Jury Is Watching You," wrote of the strong camaraderie that developed over time among the CEOs of the processors, that an "accepted norm" had developed allowing for price verification calls, and that the Bristol Bay market had reached a level of chaos that inspired risky conduct. He thus recommended that because "price verification" evidence could in certain circumstances be used to infer "an agreement for setting or stabilizing prices: the naked price fix," such information should not be directly exchanged, but rather should be gathered by an "independent staff" who could aggregate it for dissemination. [Exc. 1807-15].

price verification calls, a number of which were recorded in his diaries. [See Exc. 1000, 1002-03, 1011-12, 1014, 1016, 1017, 1018, 1024, 1025, 1027-28; see also Exc. 1202-04, 1400, 1485, 1538]. Mr. Saletic of Peter Pan admitted verifying prices with the CEOs of Nelbro, Wards Cove and Trident—the three major competitors that he identified as having some influence on Peter Pan's grounds prices in Bristol Bay. [Exc. 1113-14]. He testified that the calls had to be between CEOs because "the price you pay to the fishermen and the price you sell it has to be done by the top dog. That's the difference in making money or losing money. It's that important." [Exc. 1116].[32] Peter Pan's managers, including Don Rawlinson and Norman Van Vactor, were also involved in other price verification discussions with Unisea, NPPI, Ocean Beauty, Dragnet, YardArm Knot, and Snopac. [Exc. 1104, 1202-03, 1400, 1413, 1098-99, 1145-47]. Trident, Icicle, Unisea, NPPI, and Ocean Beauty also participated in many price verification calls. Indeed, the record contains evidence of numerous price verification communications among the processors.[33]

These documented instances constituted only a small portion of the number of calls actually made. Some of defendants' executives testified that they participated in verification calls, but could not recall how many times they had or the specific circumstances of the ones that they did recall. For example, Mr. Saletic testified "I get calls all year because we're in other fisheries besides salmon. I can't remember all those calls." [Exc. 1116]. Another executive, Mr. Bundrant, claimed that he could not recall a

[32] These executives also appear to have made the calls without engaging in any significant effort to verify the price information through alternative means. For example, calls came quickly on the heels of unconfirmed price information, such as Mr. Beeston's call to Mr. Torres immediately after he learned with "great alarm" that NPPI had offered 75¢ to end the 1991 strike. [Exc. 1996-97].

[33] These contacts are summarized in a chart set forth in an Appendix A to this brief. As discussed herein, plaintiffs submit that a reasonable juror could infer that much more extensive discussion of prices occurred during these phone calls. As an example, plaintiffs have listed Mr. Beeston's testimony that he verified publicly posted prices with Mr. Magill of Baypack [Exc. 962, 984], even though that characterization conflicts sharply with Mr. Magill's testimony concerning his communications with Mr. Beeston.

single instance of a price verification call [Exc. 1915-16], even though a number of other executives, including Mr. Beeston and Terry Gardiner, President of NorQuest Seafoods, Inc. ("Norquest"), testified to such calls with Mr. Bundrant. [Exc. 960, 979, 1925]. Unisea's manager, Mr. Barcott, testified to one call he received from Mr. Bundrant when a fleet bonus they paid "caused a little bit of a furor." [Exc. 948]. None of the defendants had a policy requiring the documentation of such contacts, except for Ocean Beauty, which instituted such a policy very late in the relevant period after the 1994 season. See [Exc. 223-24]; see also [Exc. 2346-49].

The prices being "confirmed" were not invariably public information. Moreover, as Mr. Brindle testified, "the general public information is not always correct." [Exc. 1004]. Mr. Horgan testified that Ocean Beauty did not have a bulletin board on which it posted its prices. Prices were normally communicated to Ocean Beauty's fleet verbally either on its dock or in its office. [Exc. 1564]. Even during the period that Alaska law required posting (covering the 1993-95 fishing seasons), other processors could not easily see their competitors' posting. Mr. Seidel of New West testified that price postings occur on private property and he doesn't wander on the property of his competitors. [Exc. 1133].

Despite defendants' executives' attempt to portray these telephone calls as lasting only five to fifteen seconds, with no discussion other than the confirmation or denial of a specific price, substantial evidence belies these assertions. For example, Norman Dubé, a representative of settled defendant Pan Pacific, engaged in numerous telephone conversations with other processors to verify and discuss their grounds prices. [Exc. 1613-14]. While the conversations commenced with a discussion of current prices being paid or future prices to be paid by a particular processor, they would "usually lead into general discussions about the grounds prices being paid by all processors of Bristol Bay sockeye." [Exc. 1613]. Mr. Gardiner testified similarly. [Exc. 1925-28]. In telephone

calls with Trident's Mr. Bundrant, Mr. Gardiner would discuss general market information, sales prices in Japan, and market trends, in addition to verifying specific grounds prices. Id. Moreover, notes of some of the calls showed more extensive discussion of prices than simply an affirmative or negative response to a question about some particular price level. For example, as discussed elsewhere, Messrs. Beeston and Wyer discussed Trident pricing at the beginning of the 1990 season. [Exc. 2095-96]. Messrs. Brindle and Beeston discussed supply conditions on June 26, 1992, when the latter called to "confirm" Wards Cove's price that season. [Exc. 1272]. Messrs. Barcott and Van Vactor discussed the price adjustments made by all of the major processors after the 1991 season, along with prices in False Pass and Port Moller. [Exc. 1163-64].[34]

The price verification calls were also not invariably used to confirm higher prices, and, at times, were made without any real indication that the "rumored price" even existed. For example, a representative of settled defendant Big Creek Fisheries, Inc. ("Big Creek"), looking for an opportunity to lower Big Creek's price, reported to Tokyo: "[l]owering the fish price: Although I checked with each company yesterday, I did not hear any information about lowering the fish price." [Exc. 3049-51].

Finally, a jury could reasonably infer, in light of all of the other evidence presented by plaintiffs, that the processor defendants used these high-level conversations to do more than simply "verify" or "confirm" prices, and that understandings or agreements were reached on the prices that would be paid to fishers.[35]

[34] Another example is contained in Mr. Baart's notes of his discussion with a representative of Peter Pan on June 17, 1992. That discussion included, among other things: (1) expected grounds prices in Bristol Bay, (2) the status of the pink salmon catch in three different fisheries, (3) sockeye salmon grounds prices in False Pass, (4) the contracting practices of the floating processors, (5) the current status of the catch in False Pass, (6) the ability of the processors to make money on roe herring and crab, (7) Icicle's grounds prices for roe herring, (8) Peter Pan's production levels, and (9) the sockeye salmon grounds prices in Kodiak and Chignik. [Exc. 1569].

[35] Other evidence concerning these "price verification" calls shows that they were often done in a manner suggesting that the defendants recognized their illegal nature. For example, Wards Cove's antitrust compliance policy prohibited such calls entirely, but Mr. Brindle claimed that the policy only applied to lower level managers. [Exc. 1001-02]. Ocean Beauty's policy was to "[n]ever attempt to confirm a price via radio

f. Evidence Of Price Discussions And Agreements In Other Years.

In addition to the abundant evidence of agreements in 1990 and 1991, plaintiffs presented substantial direct and circumstantial evidence of agreements on the in-season prices established for other seasons as well. For example, in 1989, the Japanese importers coordinated a large price decline after the leading Japanese trade journals suggested that competition be avoided and grounds prices be reduced to $1.00 per pound or lower. The June 10, 1989 issue of Hokkai Keizai, one of the leading newspapers reporting on the seafood industry, under the heading "**Avoid excessive competition**" signaled that coordination and discipline were needed. It reported that pricing the previous year was "a big failure" and that the "North American syndrome" of intensive competition was being departed from in 1989. [Exc. 2625-26].[36]

communication (either SSB or VHF)."[Exc. 2347]. Mr. Cherrier testified regarding his own and other processors' discomfort with providing the price information over the telephone. [Exc. 140]. As noted above, one of defendants' lawyers advised Wards Cove employees that direct competitor-to-competitor phone calls among the Bristol Bay processors were unnecessary and constituted "risky conduct" that should be avoided despite any "theoretical rationales" that might be advanced to justify them. [Exc. 1807-15].

[36] The Superior Court refused to consider various Japanese trade journal articles for the truth of their contents, but held that plaintiffs could use them for non-hearsay purposes. "Order on Plaintiffs' Use of Japanese Trade Journal Articles for the Truth of the Matters Asserted Therein" (April 26, 1999) [Exc. 2837-38]. Plaintiffs do not challenge that ruling here. Rather, the evidence shows that the importer defendants' executives regularly read the leading trade journals including the Hokkai Keizai and The Suisan Keizai and that information in those reports was regularly reported to the processor defendants. See [Exc. 2647-48, 2649-52, 2653-59, 2715-16, 1959, 1963-64]. The jury could therefore reasonably infer that those periodicals were used by the importer defendants in formulating their suggestions of acceptable grounds prices to the processor defendants each year. Indeed, the president of NPPI, Hasashi Sugiyama, testified that his price decision-making was based on only two sources of information: Mr. Torres and the Japanese trade press [Exc. 1963-64]. Thus, the truth of the report is not at issue; the mere fact that the articles were published and read provides evidence of the state of mind of the defendants' executives when they in turn suggested grounds prices to the processor defendants. See Pan-Islamic Trade Corp. v. Exxon Corp., 632 F.2d 539, 556 (5th Cir. 1980) (suggesting in dicta that newspaper reports "are arguably admissible as public announcements enabling co-conspirators to coordinate their activity"); In re Dual-Deck Video Cassette Recorder Antitrust Litigation, 1990-2 Trade Cas. (CCH) ¶69,141 at 64,251-52 (D.Ariz. 1990) (stating in dicta that Japanese trade journal articles "may be admissible as evidence of the medium by which defendants allegedly coordinated their activities"and holding that newspaper reports about opposition to dual-deck VCRs were "admissible as possible evidence of an initiating event and motive for defendants' alleged conspiracy").

As the Bristol Bay season approached, Mr. Beeston advised Mr. Baart that hoped-for low prices were being offered in False Pass and predicted that the Bristol Bay price would be $1.25. [Exc. 2415]. Nevertheless, that price was still too high to suit the defendants. Before any major processor had announced prices, on June 20, 1989, defendant Nippon Suisan's Seattle office, under the heading "salmon (please handle this with caution)" reported to Tokyo:

> **The major Alaska companies have not yet established anything. There is a desire to start under $1.00. There is also the intention to bring the current price of $1.25 down later after seeing how the fishing is going.** [Exc. 3013-15].

Two days later, and still before any prices for the peak of the season had been announced by the major processors, a Marubeni representative spoke with Mr. Baart of BC Packers,[37] saying that the grounds price should be $1.00. [Exc. 2419]. The following day, Nippon Suisan reported to Tokyo that the major processors "**show signs that their beach prices will start at $1.00/lb.**" [Exc. 3094-96]. Nelbro reduced its grounds price from $1.25 to $1.00 on June 25. [Exc. 50-59]. Within ten minutes of the first opening after the price drop, Mr. Saletic prepared a memorandum reporting that Trident, Nelbro, Wards Cove, Icicle and All Alaskan had all adopted the $1.00 price. [Exc. 2037]. NPPI also reduced its price from $1.25 to $1.00 on June 25. [Exc. 1726-33]. The Trident and Nelbro prices represented a reduction from their prices of $1.25 paid up to June 23 and June 24, respectively. Id.

Plaintiffs also presented substantial evidence of advance discussion among

[37] A month earlier, Mr. Baart had discussed grounds prices with a representative of Peter Pan. The discussion included prices concerning the Copper River run in Southeast Alaska that was ongoing and the fact that they were $1.00 less than they had been at the height of the 1988 season. They also discussed the fact that Bristol Bay pricing for the upcoming season needed significant revision. In light of the fact that the run looked like it would exceed the capacity of the Bristol Bay fishery, it was suggested that a two-tier pricing system may be appropriate. [Exc. 2394]. A reasonable inference to draw from this comment is that under such a system the major processors would be able to get plenty of fish, despite paying low prices, while the small operators and cash buyers paid higher prices. Such a system actually developed during the 1989 and 1990 fishing seasons, but became unnecessary as their Japanese customers brought the small processors under stronger control.

defendants of the in-season grounds price for 1992. Discussion of 1992 grounds prices once again began during Okaya and Nichirei's year-end discussions with BC Packers. After explaining to the latter how low prices for the previous season were the result of pressure from buyers within Japan and not the "idea by trading cos.," Okaya began to agitate for a low price in 1992: "91 we had low fish price. It would be bad to show strong interest during fishing season 92. Affect fish price." [Exc. 2160-61]. In April, Koji Otsuka of Nichiro (the parent of Peter Pan) met with Masatoshi Yamada, the former General Manager of Marubeni America, and Akio Shiokawa, the CEO of NPPI. Mr. Otsuka, a Nichiro employee who weeks later was seconded to Peter Pan, also met with Larry Hill of Icicle. [Exc. 1086-87]. In his report of the discussions with these competitors, Mr. Otsuka relayed that: "[t]here was information exchanged on the contents of businesses or operations and prospects and/or forecasts of this year, et cetera. But comments common to all in attendance included poor business performance by other salmon-related companies. ... And the prospect of this year's fish prices expected to take stable movement (BB sockeye, $1)." [Exc. 1086].[38] In fact such stability did occur, at that very price.[39]

[38] The official interpreter who served at most of the depositions translated the document slightly differently: "[c]ommon understanding included the fact that other companies handling salmon ... are not doing well. And that this year's fish price movement would be a stable one. In parentheses it says BB in upper case letters, red $1.00." [Exc. 2797-98].

[39] Regular discussions among the importers of grounds prices can be inferred from documents identifying the duties of Nichiro's Seattle representatives. Mr. Otsuka of Nichiro/Peter Pan identified his work responsibilities while in Seattle to include the collection of information about "market situation, sales and other companies buying situation" from representatives of both processors and importers, including Shinichi Tonochi of Kyokuyo, Mr. Niwa of Marubeni, Mr. Shiokawa of NPPI, Katsuya Sumida of Trident, Shinji Hayashi of Togiak (NPPI), and Masao Tanaka of Western Alaska (Maruha). [Exc. 2906-66, at 2920]. Yoshio Yoshida, another Nichiro/Peter Pan representative, prepared a similar report. He noted under the title "[c]ollection of information of Japanese industry people in Seattle" that "[j]ust before a salmon, crab, etc. season began, I wanted to find out about the movements of [illegible] in particular and other companies (especially FOB prices). To this end, I contacted industry people on the attached list." [Exc. 2968-87, at 2968]. His contacts included: Mr. Tonochi, Mr. Miyasi of Marubeni America, someone from Nichirei, Mr. Ode of Icicle, Mr. Sumida, Shigeo Fukaya of Nippon Suisan, Mr. Yoshida of Wards Cove, Mr. Tanaka, Mr. Shiokawa, and Mr. Hayashi. [Exc. 2984-85].

Indeed, the evidence showed that: (a) NPPI opened the season paying $1 per pound for raw Bristol Bay sockeye and paid that price throughout the season; (b) Peter Pan, Nichiro's subsidiary, also announced the same price on June 22, 1992 and paid it throughout the season; and (c) Icicle adopted the same price sometime between June 23 and June 26, 1992, and paid it throughout the season. [Exc. 2854, 2863, 2868, 2869].

Beginning soon after the Marubeni/NPPI/Peter Pan/Icicle meetings, Mitsui once again began to coordinate efforts to have the defendant processors adopt its desired price of $1.00 for the 1992 season. On May 21, 1992, Mitsui's Seattle office reported to Tokyo that the "U.S. packers will face serious counter attack from fishermen for way higher price" and that it needed to formulate a position for a "reasonable starting price of Alaskan reds for 1992 products." Mr. Arai warned: "**[w]e better give guidance to U.S. packers as Japanese voices.**" [Exc. 2057]. A few days later, the Seattle office asked for a recommendation on prices to suggest to Wards Cove, YardArm Knot and others. [Exc. 2089].

A May 26, 1992 report was prepared by Mr. Ono, Mitsui's chief salmon trader in Japan. [Exc. 2633-36, 1954-55]. According to Mr. Ono, the report was either distributed to processors with whom Mitsui dealt or explained verbally to them. Id. With respect to grounds prices, the report concluded "**that packers can sell with fishing ground price at USD 1.00/lb.**" [Exc. 2635]; emphasis added. Mr. Arai passed the report on to Mr. Brindle of Wards Cove with a cover letter drawing attention to the price recommendations. [Exc. 2692-96]. Mr. Brindle's planned trip to Tokyo provided another opportunity for Mitsui to present its view of the Japanese market situation to Wards Cove, i.e., to provide the "**real voice of the Japanese salmon dealers.**" [Exc. 2644].

By June 6, Mr. Ono was hearing that the proposed $1.00 price was acceptable to the American processors. He reported: "**ACC[ording] to packers in SEA[ttle], they can pay USD1.00/lb to fishermen for Bristol red salmon** as canned red salmon market in

Europe is good and can make money even if they paid USD1.00 as fish cost." [Exc. 2086]. Although Mr. Ono failed to recall who the reference to "packers in Seattle" included [Exc. 1956], a reasonable inference would be that the term at least covered all of the firms covered by Mitsui's 1991 pricing survey, i.e., Trident, Icicle, Peter Pan, NPPI, and Wards Cove (all of whom have offices in Seattle), along with YardArm Knot, one of the anticipated recipients of Mr. Ono's 1992 analysis. See [Exc. 2089].

Other evidence shows that the $1.00 price had become the industry's expected opening price for the 1992 season before any processor had publicly adopted it. On June 17, 1992, Mr. Baart of BC Packers had a discussion with a representative of Peter Pan in which Peter Pan reported on its False Pass prices, its prices in Kodiak and Chignik, two other Alaskan salmon fisheries, and that it would set its Bristol Bay fish price to $1.00 per pound. [Exc. 1569]. This conversation occurred in advance of Peter Pan's announcement of that price on June 22. [Exc. 2869].

At about the same time, Okaya was preparing to begin negotiation with Nelbro and its other suppliers. On June 18, 1992, Okaya provided its North American offices with its market analysis including the prices that were "desired from Japan." The report stated that the grounds price "is expected to start at $1.00." [Exc. 3029-41]. Okaya reported that it desired a $1.00 grounds price. To further this goal, it warned its local offices in Seattle and Vancouver, Canada that in negotiating with Nelbro (and Mr. Baart), it should follow the F.O.B. prices of Wards Cove and not let Nelbro, or its other Bristol Bay suppliers, Dragnet and YardArm Knot, think that they would be paid any more than Wards Cove. [Exc. 3032-33].[40] During this same period immediately preceding the Bristol Bay season, Mr. Baart was discussing grounds prices with Mitsui, Maruha (called "Taiyo" in his notes) and Okaya, presumably hearing the latter's recommendation of $1.00. [Exc. 2292].

[40] Thus, in similar fashion to its "Action Plan" for 1991, Okaya encouraged Nelbro and others to follow the lead of Wards Cove, a company that it had confidence would set low grounds price "in order to enforc[e] control of the grounds prices." [Exc. 2614-22.]

On June 19, the majors had still not announced an opening price and the Japanese buyers were taking a "wait and see" attitude. [Exc. 2292-93]. On June 20, Mr. Beeston, still considering what price to offer Nelbro's fishers, called Mr. Brindle allegedly to discuss the processors' jointly-financed run prediction for the Bristol Bay run. [Exc. 1269].[41] On June 22, 1992, Nelbro announced its opening $1.00/lb price. [Exc. 1559, 2294]. That same day, Wards Cove, at Mr. Brindle's direction from Japan, matched Nelbro's price.[42] [Exc. 1559, 1270]. Peter Pan also posted its $1.00 price that day. [Exc. 2868]. Icicle also adopted the $1.00 price at that time. [Exc. 3052-55].[43]

As in 1990 and 1991, defendants worked jointly to control prices being offered by the smaller processors in False Pass in 1992. At the beginning of the False Pass season, Mitsui received a communication from a customer citing its concern over a plan by Mitsui to buy from Yard Arm Knot ("YAK") on a cost plus basis. [Exc. 2090]. Mitsui assured the customer that it too was concerned that such contracts had a tendency to raise grounds prices. It explained, however, that its price with YAK was tied to Trident and Peter Pan's prices and thus, as long as Peter Pan and Trident maintained a reasonable price level, YAK's prices "won't be raised abnormaly." Id.

On June 17, 1992, the story of the Mitsui/YAK cost plus contract broke more widely, causing a chorus of complaints from the processors and importers alike. [Exc. 2092] Mitsui, still stung by the complaints it had received for supporting Woodbine in the

[41] All the major processors financed forecasts of the fish run size prepared by a University of Washington fisheries scientist before and during each season. The evidence shows that the processor defendants' senior executives met in Bristol Bay during the season to discuss the forecasts and at times manipulated the timing of their public release to further their common interests in low grounds prices. [Exc. 2069-70, 2111, 2120-22; R. 00046796].

[42] This was the day (June 23 in Japan) that Messrs. Brindle and Yoshida met with Mr. Ono and others at Mitsui in order for the latter to provide the "real voice of the Japanese salmon dealers" to the American processors, including the suggestion of a $1.00 grounds price. [Exc. 1270, 2091].

[43] On June 26, 1992, days after the Wards Cove price was well known, Mr. Beeston called Mr. Brindle in Tokyo to advise him of a large run, that Nelbro was looking for export tenders (due to oversupply conditions) and to "confirm" Wards Cove's posting. [Exc. 1272].

previous two years, became concerned over how Wards Cove would react to the story:

> Alec [Brindle]told us repeatedly that as far as Mitsui support Woodbine as we did business, Mitsui is creating problem to others. Not so much mentioned YAK. While Trident Chuck Bundrant was also blamed us to do business with Woodbine saying the industry is simply suffering. Lafayette's Bingham also blamed Japanese approach on basis of cost plus, saying it simply increase shore price, and does not encourage quality enhancement, which is bad for total Alaskan operation in marketing to Japan.
>
> * * * * *
>
> Now Chaffee is taking this kind of role this year at Falls Pass. ...
>
> However, pls keep in mind that Alec might say something when he visit your office, saying this time YAK(?) instead of Woodbine. [Exc. 2092].[44]

Mitsui immediately contacted Mr. Chaffee of YAK, who reconfirmed that Mitsui's purchases were conditioned on the Peter Pan grounds price plus a processing fee. On June 18, Mitsui's Tokyo office again reiterated its explanation of the YAK "cost plus" contract, this time for the benefit of the defendant importers:

> [t]he contents of the contract are strictly confidential. Even if Wards Cove hears from Okaya/Taiyo or others that this deal is cost plus, we positively deny it. (We plan to buy at the market price, which is the Peter Pan/Trident price plus. As you already know, we are not letting Chaffee purchase fish just at any price). [Exc. 3008-11].

In sum, the evidence of widespread pre-season discussion among the defendants of desired prices among the defendants in advance of the season, combined with the importer defendants' strong influence over their processor suppliers, and the parallel adoption of the very prices discussed, provides powerful evidence of either explicit or tacit agreements and understandings to restrain price competition.

C. PROCEEDINGS BELOW.

Plaintiffs commenced this class action in June of 1995. On January 3, 1997, after a misleading campaign by some defendants to convince fishers to oppose the lawsuit, the trial court (Judge Card) certified a class of commercial fishers who fished Bristol Bay

[44] Wards Cove has no False Pass operation. [Exc. 1006]. Lafayette Seafoods, Inc. was a predecessor company to settled defendant Norquest Seafoods, Inc. ("Norquest"). [R. 00054777A].

during any of the seasons between 1989 and 1995. [Exc. 60-65]. Judge Card refused to credit statements of certain fishers who opposed the suit based in part on evidence that some defendants had coerced and misled the fishers in obtaining the statements. [Exc. 75-78]. This Court refused to disturb the order certifying the class and Justice Compton denied certain defendants' "Emergency Motion to Stay." Wards Cove Packing Company v. Louie Alakayak, S-07955, Orders (March 27 & March 28, 1997). Notice of the action was mailed to all known class members and they were given an opportunity to opt-out of the action. Approximately 95 percent of the class chose to stay in. [R. 00013353].

Discovery thereafter commenced on the merits of the plaintiffs' claims. During the course of discovery, the trial court (Judge Michalski) issued orders denying three motions for summary judgment. Two of the orders denied summary judgment motions filed by Icicle and Ocean Beauty that directly addressed the question of whether plaintiffs' evidence was sufficient to raise a material issue of disputed fact concerning the participation of those defendants in the alleged conspiracy. In both orders, the Superior Court found that "a genuine issue of material fact" existed concerning those defendants' liability. [Exc. 388, 198].

The Superior Court prohibited plaintiffs from obtaining discovery regarding and asserting a claim of alter ego with respect to various vertically integrated defendants. The Superior Court ruled that plaintiffs' Fourth Amended Complaint failed to provide adequate notice of the alter ego argument to those defendants. [Exc. 389-404]. At the completion of discovery and shortly before the scheduled trial of the action, each of the remaining defendants filed individual motions for summary judgment and five additional joint motions for summary judgment. The trial court granted two of the joint motions concerning the merits of plaintiffs' antitrust claims—one jointly filed by all of the defendants and one jointly filed by the importer defendants. [Exc. 3102-67, 3167A-67E].

On December 1, 1999, the court below entered a Revised Amended Final Judgment for all of the remaining defendants. [Exc. 3230-97].

STANDARDS OF REVIEW

This Court recently reiterated the well-established principles governing the grant of summary judgment:

> [w]e review grants of summary judgment de novo. We must "determine whether any genuine issue of material fact exists and whether the moving party is entitled to judgment on the law applicable to the established facts." All factual inferences are drawn in favor of the non-moving party, and the existence of a dispute regarding any material fact precludes summary judgment.
>
> The party opposing summary judgment need not produce all of its evidence but instead must only show the existence of a genuine factual dispute. In rendering its summary judgment determination, the court should examine the pleadings, affidavits, and discovery answers to ascertain whether any genuine issues of material fact exist. We have noted that "any evidence sufficient to raise a genuine issue of material fact" precludes a summary [judgment].
>
> The court does not weigh the evidence or witness credibility on summary judgment. (Meyer v. State of Alaska, 994 P.2d 365, 367 (Alaska 1999) ("Meyer"); citations omitted)).

With respect to issues of whether the complaint sufficiently pleads an alter ego theory of liability, since this Court is in virtually the same position as the trial court in its ability to assess the adequacy of the pleadings, the review is de novo. Gamble v. Northstore Partnership, 907 P.2d 477, 482 (Alaska 1995).

With respect to issues concerning the exclusion of evidence, a refusal to apply the co-conspirator exception on the basis of a finding of insufficient evidence of a conspiracy is subject to plenary review by this Court. See Rossi v. Standard Roofing, Inc., 156 F.3d 452, 468 n.11 (3rd Cir. 1998) ("Rossi"). As to other issues concerning the admissibility of evidence, an abuse of discretion standard applies. Keogh v. W.R. Grasle, Inc., 816 P.2d 1343, 1349 (Alaska 1991). However, questions of law presented by evidentiary rulings are subject to de novo review. M.R.S. v. State, 897 P.2d 63, 66 (Alaska 1995).

ARGUMENT

A. DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED.

1. Introduction.

The Superior Court erred in usurping the function of the jury by resolving issues of fact that were in sharp dispute. Although much of the evidence plaintiffs presented was circumstantial, there was also direct evidence of conspiracy. Many of the errors in the Superior Court's analysis of the evidence can be traced to its misreading of the principal antitrust cases upon which it relied. However, at critical junctures, the court simply ignored plaintiffs' evidence or failed to credit reasonable inferences from the evidence that must, under Alaska law, be drawn in favor of the non-moving party.

The Alaska Antitrust Act was patterned after the federal Sherman Act. Plaintiffs' claims in this case concern joint action among the defendants to restrain trade. As such, those claims fall within the terms of Section 1 of the Sherman Act (15 U.S.C. §1). A civil plaintiff who seeks recovery under Section 1 must allege and ultimately prove: (1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint of trade in the relevant market; and (3) an accompanying injury. Denny's Marina, Inc. v. Renfro Productions, Inc., 8 F.3d 1217, 1220 (7th Cir. 1993).[45]

Recently, this Court reiterated those elements and set forth some basic principles in resolving motions for summary judgment in antitrust cases. Odom v. Lee, Slip Op. No. 5250 (March 17, 2000) ("Odom"). Citing its own decision in KOS v. Alyeska Pipeline Serv. Co., 676 P.2d 1069 (Alaska 1983), and the U.S. Supreme Court's decision in Poller

[45] Elements two and three are presumed when the plaintiff is the victim of a price-fixing conspiracy. It has long been the law that "[u]nder the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se." United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940) ("Socony-Vacuum"). A horizontal agreement among competing fish processors (aided and abetted by importers) to reduce prices or restrain price competition is unquestionably a per se violation of Section 1 of the Sherman Act and thus constitutes an unreasonable restraint of trade. See Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 647-48 (1980).

v. Columbia Broadcasting Sys., Inc., 368 U.S. 464 (1962) ("Poller"), this Court pointed out that since most antitrust disputes must be determined on the facts of each case, "summary judgment should be used sparingly in antitrust litigation." Odom, at 16. Poller even more explicitly articulates why summary judgment is disfavored in such cases:

> where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.' (Id., at 473.)

Poller sets forth a sensible rule, given how antitrust conspiracies are typically proven. A finding of conspiracy does not require an explicit agreement; a tacit understanding will suffice. United States v. General Motors Corp., 384 U.S. 127, 142-43 (1966). An understanding can arise without verbal communication; "[a] knowing wink can mean more than words." Esco Corp. v. United States, 340 F.2d 1000, 1007 (9th Cir. 1965) ("Esco"). As the Supreme Court explained in American Tobacco Co. v. United States, 328 U.S. 781, 809-10 (1946):

> [n]o formal agreement is necessary to constitute an unlawful conspiracy ... The essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealings or other circumstances as well as in any exchange of words. Where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement, the conclusion that a conspiracy is established is justified. Id.

So-called "smoking gun" evidence is simply unnecessary. Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc., 998 F.2d 1224, 1230 (3rd Cir.), cert. denied sub nom. Moyer Packing Co. v. Petruzzi's IGA Supermarkets, 510 U.S. 994 (1993). ("Petruzzi's"). "Conspiracy, by its very nature, is almost never susceptible to direct proof. It is most often a matter of inference, apprehended and proven circumstantially." Trist v. First Federal Savings & Loan Ass'n, 466 F.Supp. 578, 590 (E.D.Pa. 1979). See also Sun Dun, Inc. of Washington v. Coca-Cola Co., 770 F.Supp. 285, 288 (D.Md. 1991) ("[c]onspiracy is, by its clandestine nature, difficult to prove

directly..."). Indeed, the United States Supreme Court has observed that it is "usual in cases of alleged unlawful agreements to restrain commerce" that the plaintiff "is without the aid of direct testimony" of the agreement and "is compelled to rely on inferences drawn from the course of conduct of the alleged conspirators." Interstate Circuit, Inc. v. United States, 306 U.S. 208, 221 (1939). The Court recently reconfirmed the wide scope of permissible inferences in antitrust conspiracy cases:

> [a]ntitrust law forbids all agreements among competitors . . . that unreasonably lessen competition among or between them in virtually any respect whatsoever ... Antitrust law also sometimes permits judges or juries to premise antitrust liability upon little more than uniform behavior among competitors, preceded by conversations implying that later uniformity might be desirable ... or accompanied by other conduct that in context suggests that each competitor failed to make an independent decision. (Brown v. Pro Football, 518 U.S. 231, 241 (1996).)[46]

The "unity of purpose" required by American Tobacco can be found either in an explicit exchange of words or in a course of dealing or both. "Conscious parallelism is uniform business conduct by competitors that permits a court to infer the existence of a conspiracy between these competitors." Todorov v. DCH Healthcare Authority, 921 F.2d 1438, 1456 n.30 (11th Cir. 1991). While such parallelism alone may at times be insufficient to establish a conspiracy, it is a factor "to be weighed, and generally to be weighed heavily, in the determination" of whether competitors have reached an understanding. Morton Salt Co. v. United States, 235 F.2d 573, 577 (10th Cir. 1956). "[A]dditional indicia of concerted action above and beyond mere parallelism ordinarily will allow a case to reach the jury." In re Mid-Atlantic Toyota Antitrust Litigation, 560 F.Supp. 760, 772 (D.Md. 1983). It is settled law that an inference of conspiracy may properly be drawn in cases where, in addition to conscious parallelism, there also exist "plus factors." Wilcox v. First Interstate Bank, N.A., 815 F.2d 522, 525-26 (9th Cir. 1987); Bogosian v. Gulf Oil Corp., 561 F.2d 434, 446 (3rd Cir. 1977), cert. denied, 434

[46] As the Ninth Circuit stated in Esco, 340 F.2d at 1008, "written assurances . . . are unnecessary. So are oral assurances, if a course of conduct . . . once suggested or outlined by a competitor in the presence of other competitors, is followed by all."

U.S. 1086 (1978). Evidence of such "plus factors" tends to exclude the possibility that defendants acted independently, and creates a question of disputed fact on the issue of conspiracy.

Proof of a conspiracy necessarily involves considering the plaintiff's evidence as a whole rather than in a piecemeal fashion. Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699 (1962) ("[p]laintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. '... [T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.'"). As explained in the Second Circuit's opinion in Apex Oil Co. v. DiMauro, 822 F.2d 246 (2d Cir.), cert. denied, 484 U.S. 977 (1987), an antitrust court deciding a motion for summary judgment "should not view each piece of evidence in a vacuum":

> Seemingly innocent or ambiguous behavior can give rise to a reasonable inference of conspiracy in light of the background against which the behavior takes place. Evidence can take on added meaning when viewed in context with all the circumstances surrounding a dispute. Thus, while we must carefully determine what inferences reasonably may be drawn from each piece of evidence, we must make this determination in light of all of the evidence proffered by Apex. (822 F.2d at 255; emphasis supplied.)

The Superior Court rejected many of the inferences plaintiffs sought to draw from the evidence based on its reading of Matsushita Elec. Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986) ("Matsushita"). Even more fundamentally, it committed error in applying to this case the Matsushita summary judgment principles at all. First, because the plaintiffs have direct evidence of the conspiracy they allege, the federal case law is clear that Matsushita's concern regarding the proper inferences to be drawn from ambiguous evidence simply does not apply. Rossi, 156 F.3d at 466; Petruzzi's, 998 F.2d at 1233; In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 906 F.2d 432, 441 (9th Cir. 1990), cert. denied sub nom. Chevron U.S.A., Inc.

v. State of Ariz., 500 U.S. 959 (1991) ("Petroleum Products").[47] Second, the Superior Court's application of those principles to this case ignored traditional summary judgment practice that has developed in Alaska under Civil Rule 56(c). Moreover, even if Matsushita were relevant, the Superior Court misapplied it.

2. The Superior Court Improperly Applied Federal Antitrust Standards To Plaintiffs' Evidence.

Matsushita cannot be properly understood unless its rather unique facts are considered and it is read together with the Supreme Court's subsequent decision in Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451 (1992) ("Kodak"). As the Court in Kodak underscored, plaintiffs in Matsushita attempted to prove a conspiracy through evidence of rebates and other price-cutting activity to gain business at their competitors' expense—the kind of behavior that the Matsushita Court characterized as "the very essence of competition." 475 U.S. at 594 (emphasis added). As the Court in Kodak explained, permitting a jury to infer concerted action from "the very essence" of pro-competitive behavior would undermine the antitrust laws and would not be "reasonable." 504 U.S. at 468-69. See W. Schwarzer, A. Tashima & J. Wagstaffe, Federal Civil Procedure Before Trial, §14:151, at 14-40 (1999) ("[i]ndeed, the Supreme Court itself has indicated that Matsushita has very limited application being basically confined to cases where the evidence consists of prima facie legitimate and procompetitive conduct").[48]

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[47] For example, plaintiffs presented, and the Superior Court found, an agreement among the defendant processors to exchange price information.

[48] In Kodak, the Supreme Court pointed out that where a plaintiff attempts to prove conspiracy through activity that is facially anticompetitive, such as price increases (in an alleged sellers' conspiracy) and market foreclosure, "Matsushita does not create any presumption in favor of summary judgment for the defendant." 504 U.S. at 478. See also Helicopter Support Sys., Inc. v. Hughes Helicopter, Inc., 818 F.2d 1530, 1534 (11th Cir. 1987); De Long Equip. Co. v. Washington Mills Abrasive Co., 887 F.2d 1499, 1508-09 (11th Cir. 1989), cert. denied, 494 U.S. 1081 (1990); City of Long Beach v. Standard Oil Co. of Calif., 872 F.2d 1401, 1407 (9th Cir. 1989); In re Bulk Popcorn Antitrust Litigation, 783 F.Supp. 1194, 1197-98 (D.Minn. 1991).

However, where circumstantial evidence offered as proof of a conspiracy consists of conduct that is not clearly pro-competitive, then a different analysis is required. As Matsushita itself recognized, for circumstantial evidence to be probative of a conspiracy it need only tend to exclude the possibility of independent action. Matsushita, 475 U.S. at 587. By definition, it would be reasonable for a jury to infer the existence of a conspiracy from such evidence. The fact that defendants might have an explanation or arguable business justification for the conduct does not mean that summary judgment in their favor is warranted.[49] So long as the evidence consists of conduct that tends to exclude the possibility of non-collusive behavior, then it is for the jury—not the trial court—to consider and weigh that evidence. Conversely, a trial court that decides whether defendants' explanations of their conduct are more persuasive than the inference of collusion invades the province of the jury.[50]

That is precisely what happened in this case. The trial court—in the course of purportedly assessing whether plaintiffs' evidence tended to exclude the possibility of collusion—engaged in a weighing of evidence. The Superior Court should have limited its analysis to whether the plaintiffs' evidence, considered in its totality, would have supported a jury verdict, i.e., whether it would have been reasonable for a jury to infer the existence of the alleged conspiracy from the direct and circumstantial proof. Rejecting circumstantial evidence, even when it tends to support an inference of collusion, whenever the defendant can offer a competing interpretation or justification, would, as a practical matter, require direct evidence in order to overcome summary judgment. By

[49] Evidence can tend to exclude the possibility of independent (non-collusive) behavior and still be explained or interpreted in a self-serving manner by a defendant. Indeed, it is only direct, eyewitness-like evidence of conspiracy that may not be subject to such an explanation.

[50] As one noted jurist and a leading commentator on summary judgment practice has phrased it, "Kodak certainly rejects the view that Matsushita affords an across-the-board defense for antitrust defendants whenever the conduct complained of can be considered economically justified business conduct." W. Schwarzer & A. Hirsch, "Summary Judgment After Eastman Kodak," 45 Hastings L.J. 1, 7 (1993).

making decisions about the persuasiveness of plaintiffs' and defendants' arguments, the Superior Court exceeded its role and its authority under Rule 56. That result, if allowed to stand, would not only be inconsistent with a vast body of precedent, but would dramatically undermine the effectiveness of Alaska's antitrust laws.[51]

Here, plaintiffs presented an abundance of evidence that "tends to exclude the possibility of independent action." They showed lock-step pricing behavior by the processor defendants. They showed severely depressed prices and fisherman margins in the face of economic conditions that did not compel any fundamental change in the relationship of grounds prices to Japanese wholesale prices. They showed that some of the defendants expressly invited other defendants to join in a conspiracy to fix prices. They showed that certain defendants discussed, suggested and demanded that other defendants lower their grounds prices, sometimes in direct response to complaints of high prices made by other defendants. They showed that defendants' top executives communicated about their current prices at the very time they were making their price-setting decisions. They showed communications of future prices between some of the defendants, and they showed extensive evidence of defendants' motive and opportunity to conspire. All of this evidence, viewed together, was certainly sufficient to allow a reasonable jury to conclude that collusion was the reason prices fell, not independent action, and to do so without simply engaging in bare speculation.[52]

[51] The Alaska courts have consistently rejected efforts to disadvantage circumstantial evidence by way of a jury instruction to the effect that "the jury must eliminate every hypothesis reasonably consistent with innocence." See Esmailka v. State, 740 P.2d 466 (Alaska App. 1987), citing Des Jardins v. State, 551 P.2d 181, 184-85 (Alaska 1976); Jacobson v. State, 551 P.2d 935 (Alaska 1976), quoting Allen v. State, 420 P.2d 465, 468 (Alaska 1965).

[52] This is all that the federal authorities require of plaintiffs. See II P. Areeda & H. Hovenkamp, Antitrust Law ¶322, p. 70, n.30 (1995) ("[r]equiring plaintiffs to exclude the possibility of defendant's innocence would increase the burden of proof beyond the usual civil standard of 'a preponderance of the evidence' to 'beyond a reasonable doubt' or even to 'certainty.' Monsanto meant no such revolution, for evidence that 'tends to exclude' independent conduct may allow a jury to tilt the balance of inferences in favor of the alleged conspiracy.").

In Matsushita, the defendants were accused of collusively selling their products at a loss in this country for at least two decades. 475 U.S. at 578. Despite this effort, the American manufacturers Zenith and RCA still held the two largest shares, controlling together approximately 40 percent of the sales. Id. at 591. The Supreme Court found that "[t]he alleged conspiracy's failure to achieve its ends in the two decades of its asserted operation is strong evidence that the conspiracy does not in fact exist." Id. at 592. It pointed out that if such a conspiracy did exist, its participants would have incurred such losses over the 20 years that even if they did succeed in driving out the plaintiffs, they "would most likely have to sustain their cartel for years simply to break even." Id. at 593. Accordingly, the Court found that the defendants had "no rational economic motive to conspire." Id. at 596.[53]

All of the direct evidence cited by plaintiffs in Matsushita related to conspiracies that would not have harmed them, and, thus, could not be used to infer a conspiracy to drive them out of business. Id. at 583, 596. The plaintiffs were therefore left only with the circumstantial evidence that the defendants all priced their products at a low level. Because the parallel adoption by sellers of low prices could be competitive, there was no basis on which to prefer an inference of conspiracy to one of independent action. Thus, the Court ruled that in such circumstances a reasonable jury could not infer a conspiracy without the presentation of evidence "'ten[ding] to exclude the possibility' that petitioners underpriced respondents to compete for business rather than to implement an

[53] The Superior Court brushed plaintiffs' evidence of motive aside, asserting "it is hard to imagine an industry where it cannot be argued that competitors have a motive to fix prices." [Exc. 3138]. However, there are many industries where competitors would have no motive to conspire because they have no market power even when they act in concert. Clearly, in an oligopsonistic market, with high barriers to entry and extreme price inelasticity of supply, there is a strong motive to conspire. Although such evidence of motive may not, in and of itself, prove conspiracy, it must be considered together with the other evidence of defendants' conduct, their intent in engaging in that conduct, and the effects of the conduct, in deciding whether an illegal understanding was reached. The Superior Court failed to consider the evidence of motive in this context and erred in concluding that the issue of agreement should not be presented to a jury.

economically senseless conspiracy." Id. at 597-98.

The facts of this case are not even remotely similar to those present in Matsushita. What is alleged in this case is that, inter alia, the Bristol Bay processors and the Japanese importers collectively agreed to reduce or stabilize raw fish prices and to refrain from vigorous competition in that market. Here, the conspiracy alleged was eminently plausible, because it was in both the processors' and importers' short- and long-term profit interests to artificially depress grounds prices. The evidence also showed that the defendants were successful both in reducing the level of the grounds prices and in increasing the share of the Japanese wholesale value that they obtained vis-à-vis the share that the fishers received.

The first issue to be addressed in considering the Superior Court's application of Matsushita to this case is to what extent the Alaska courts should adopt its summary judgment principles. In analogous situations, Alaska summary judgment practice has diverged from that followed by the federal courts. For example, this Court has declined to incorporate federal substantive evidentiary standards that may conflict with the "no genuine issue of fact" standard contained in Alaska Rule 56(c). Moffatt v. Brown, 751 P.2d 939, 943 (Alaska 1988) ("Moffatt") (holding that clear and convincing evidence standard applied to actual malice determination in a libel case does not affect summary judgment determinations); Gablick v. Wolfe, 469 P.2d 391, 395 (Alaska 1970) (similar holding in context of reformation of contracts).

Moffatt presented a question of Alaska summary judgment practice quite similar to that presented here. In that case, this Court refused to follow the U. S. Supreme Court's holding in Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) ("Anderson"). Anderson, Matsushita and a third case, Celotex Corp. v. Catrett, 477 U.S. 317 (1986), all were decided during the U.S. Supreme Court's 1986 term. These three cases constitute what commentators and lower federal courts have described as a "trilogy" of cases in

which the Court modified what had been traditionally accepted summary judgment principles in order to increase the utility of summary dispositions in the federal courts.[54] See Schwarzer, Hirsch & Barrans, "The Analysis and Decision of Summary Judgment Motions," 139 F.R.D. 441, 490-91 (1991) (pointing out that Matsushita "reflects the same rationale as Anderson. ... And, as in Anderson, the Court held that the controlling substantive law applies at the summary judgment stage.").

This Court in Moffatt, however, refused to follow Anderson, citing Justice Brennan's dissent as more properly balancing the roles of the judge and jury in interpreting and weighing evidence in accordance with the requirements of Alaska R.Civ.P. 56. 751 P.2d at 944 n.8. In that dissent, Justice Brennan quoted a portion of a prior dissent by Justice White in Matsushita: "'[i]f the Court intends to give every judge hearing a motion for summary judgment in an antitrust case the job of determining if the evidence makes the inference of conspiracy more probable than not, it is overturning settled law'." 477 U.S. at 261 n.2 (Brennan, J., dissenting). Justice Brennan then noted that in his view, "these words are as applicable and relevant to the Court's opinion [in Anderson] as they were to the opinion of the Court in Matsushita." Id. In Moffatt, this Court held that having trial courts make determinations of whether the evidence met the substantive evidentiary standard of proof would invade the province of the jury:

> [s]imilarly, when choosing between the summary judgment standard handed down in Anderson and the traditional summary judgment test, the New Jersey Supreme Court chose the latter. Dairy Stores, Inc. v. Sentinel Publishing Co., 104 N.J. 125, 516 A.2d 220, 235-36 (1986). In retaining the "genuine issue of material fact" test for summary judgment determinations, the New Jersey court explained "that the clear-and-convincing test inevitably implicates a weighing of the evidence, an exercise that intrudes into the province of the jury." Id. at 236. We agree. (Moffatt,751 P.2d at 943-44.)[55]

[54] See Meyer, 994 P.2d at 369, n.3 (Eastaugh, J., concurring).

[55] As recently as last year, this Court twice reaffirmed its refusal to follow Anderson because that decision conflicted with the principle that a court should not weigh evidence or decide which party will ultimately prevail at trial. In Philbin v. Matanuska-Susitna Borough, 991 P.2d 1263 (Alaska 1999), the Court reversed summary judgment against the plaintiff even where plaintiff's burden was to show by clear and convincing evidence that a release into which he entered should be set aside. In Meyer, this Court held that a putative father's burden to prove non-paternity by clear and convincing evidence was irrelevant on summary judgment. Meyer, 944 P.2d at 367.

That is just the type of determination the Superior Court believed Matsushita required of it in this case. Quoting a leading antitrust treatise, the lower court read Matsushita and Monsanto Co. v. Spray-Rite Corp., 465 U.S. 752 (1984) ("Monsanto") to require that plaintiffs must show that the evidence as a whole would allow a reasonable fact-finder to conclude that the alleged conspiracy is "more probable than not." [Exc. 3106]. That interpretation put the court squarely in the role of determining whether the party "will ultimately prevail at trial," rather than simply determining whether a dispute concerning a material issue of fact existed. See Moffatt, 751 P.2d at 943-44.

The second issue to consider is that in this case, unlike Matsushita, there was substantial direct evidence of conspiracy. Indeed, in the instance of the industry-wide practice of exchanging current pricing information, the Superior Court accepted that the plaintiffs had shown an agreement among the processors. In particular, it found a "tacit agreement" to exchange current price information. [Exc. 3146]. In such circumstances, a jury could not draw an inappropriate inference of concerted action from conduct that was in fact independent. Similarly, other evidence strongly pointed toward concerted activity. For example, in addition to the lock-step grounds price reductions implemented by the processors, plaintiffs' evidence showed: (1) the multiple complaints Mitsui received regarding Woodbine's pricing, (2) Nelbro's assertion that Baypack was stealing fishers by offering higher grounds prices that were "screwing up the industry," (3) NPPI's withdrawal of a higher price offer after communicating with two of the other processors, (4) the admission by one of the defendant executives that the processor defendants agreed to the prices they paid in the 1991 season, and (5) the adoption in at least two of the seasons at issue of suggested prices discussed widely among the processors and importers before each season. This evidence is a world apart from the attempt in Matsushita to infer agreement from the parallel adoption of predatorily low prices unaccompanied by any

evidence of communications among the defendants about those prices.

Even if the Matsushita decision were fully applicable, the Superior Court still erred in apparently interpreting Matsushita to require that it analyze each piece of evidence offered by plaintiffs to determine if, standing alone, such evidence indicated activity undertaken against each defendant's independent interests. If there was any possible interpretation of the evidence suggesting that it was consistent with the defendants' self-interest, the Superior Court concluded that plaintiffs had not met their burden under Matsushita. However, that case concerned the permissible inferences that may be drawn from "ordinary business conduct" such as the parallel price-cutting of which the Japanese electronics defendants were accused.[56] The Court in Matsushita was concerned that inferences improperly drawn from such conduct would discourage competition. 475 U.S. at 593-94. However, that concern is not present when the issue is whether an agreement can be inferred from documentary evidence of intercompetitor price discussions—something that cannot be viewed as independent business conduct—followed by parallel pricing activity consistent with the prices discussed.[57] Matsushita presented no issue concerning the inferences to be derived from such evidence, because the record revealed no evidence of any such communications concerning the alleged price-cutting agreement in the U.S. television market.

Other cases have recognized that the type of evidence that falls outside the

[56] At various points in its opinion, the Superior Court recognizes that Matsushita applies to limit the inferences to be drawn from conduct that is "competitive." See, e.g., [Exc. 3107]. As discussed below, communications and meetings among competitors, many of them conducted in secret, are not the sort of conduct that may support equally an inference of collusion or independent activity.

[57] Indeed, Professor Phillip Areeda asserts that such communications alone can satisfy the concerted action requirement of Section 1 of the Sherman Act, because the competitors are agreeing to engage in the communication: "a meeting among competitors might lead to a price-fixing agreement. But even without such a price-fixing agreement, the meeting itself may tend to 'facilitate' unilateral anticompetitive behavior" ... "the meeting itself can be understood as a contract, combination, or conspiracy" and "such collaboration is the core of the §1 conspiracy concept." VI P. Areeda, Antitrust Law, ¶1406 at 23-24 (1986); footnotes omitted.

concerns of Matsushita can be circumstantial in nature, as well as direct. For example, in In re Brand Name Prescription Drug Antitrust Litigation, 186 F.3d 781 (7th Cir. 1999), cert. denied, 120 S.Ct. __ (2000), the Seventh Circuit, citing Monsanto and other cases, held that "the interpretation of ambiguous documentary evidence of collusion is for the jury."[58] 186 F.3d at 788. As was noted by the Third Circuit in Petruzzi's, the Supreme Court in Matsushita did not draw a distinction between direct evidence on the one hand and circumstantial evidence on the other. Rather, it directed the trial courts to consider whether plaintiff put forward "sufficiently unambiguous" evidence that the defendants conspired. Thus, the Third Circuit held that it was unnecessary in a Section 1 case to distinguish strong circumstantial evidence from direct evidence since both would be sufficiently unambiguous to allow a jury to infer conspiracy. Indeed, as that court noted, "a smoking gun might be circumstantial unless the witness saw it fired." 998 F.2d at 1230 n.5. The Superior Court's weighing and analyzing the evidence piece by piece failed to properly apply Matsushita's principles and intruded upon the function of the jury in this case to make the determination of whether the conspiratorial explanation for the low grounds prices paid to the plaintiffs is more probable than not.

3. Price Communications Among The Processor Defendants.

The Superior Court accepted plaintiffs' proof that defendants had engaged in both parallel and interdependent pricing. [Exc. 3139-40]. Ultimately, however, it concluded that no triable issue of fact existed on the presence of any plus factor, including plaintiffs' claim that the regular exchange of current pricing information among representatives responsible for establishing prices at the very times that they are engaged in determining

[58] One document at issue in that case was quite similar to the Torres testimony in this case. It stated, "the industry has generally agreed to informally keep its prices in line with CPI [consumer price index] or CPI plus 1 to 2 %." The Seventh Circuit recognized that the document was subject to interpretation, but held that it sufficiently supported an inference of collusion that a question of fact was presented. 186 F.3d at 788.

their own companies' prices constituted such a "plus factor."[59]

Plaintiff's evidence demonstrated that the major processors adopted a single price as the peak of the season approached each year, and in every year except 1994 maintained that price through the season. Thus, through the seven seasons covered by the complaint, the vast bulk of the catch each year was sold at one of those seven in-season prices. Plaintiffs' evidence also demonstrated that virtually every one of those in-season prices was the subject of "price verification" calls among the processors.

Numerous cases hold that communications concerning current prices among executives having pricing authority in combination with the parallel adoption of those prices presents sufficient evidence of agreement to support a jury verdict in favor of the plaintiff. The lower court addressed only two of them, United States v. United States Gypsum Co., 438 U.S. 422, 456 (1978) ("Gypsum") and United States v. Container Corp. of America, 393 U.S. 333 (1969) ("Container"). In these two cases, the United States Supreme Court held that communications among competitors concerning current prices are likely to be illegal if done on a regular or reciprocal basis. The Superior Court distinguished those cases by either erroneously construing their holdings or relying on factual distinctions premised on matters that were sharply in dispute.

In Container, defendants, in an industry structured very similarly to the Bristol

[59] The Superior Court appeared to be confused as to whether plaintiffs claimed that the defendants' price verification practice would violate the law in the absence of any other evidence. In its order, it claimed that plaintiffs did not contend that the price verifications were significant as evidence of conspiracy. [Exc. 3142]. On the contrary, plaintiffs argued that such evidence, combined with the parallel interdependent pricing that the court readily found, was sufficient to permit a jury to find an antitrust violation. "Plaintiffs' Opposition To All Defendants' Motion For Summary Judgment Dismissing Plaintiffs' Claims Of An Alleged Conspiracy To Fix Prices In Bristol Bay," pp. 53-54 (March 5, 1999) ("Plts. Opp. to All Def. Mot.") [Exc. 750-51]. Plaintiffs also argued that the evidence of price communications presented in this case, particularly when combined with all of the other evidence presented, was such that further agreements to establish specific price levels or to generally reduce grounds price could reasonably be inferred by the trier of fact. Nowhere did plaintiffs admit or in any way concede that defendants' price verification practices are not legally significant, or that they, in themselves, did not constitute evidence of conspiracy.

Bay raw sockeye salmon market, utilized a price verification practice that was almost identical to that utilized by the defendant processors here. The Court found the "inferences are irresistible that the exchange of price information has had an anticompetitive effect in the industry, chilling the vigor of price competition." 393 U.S. at 337. The Court concluded that "[p]rice is too critical, too sensitive a control to allow it to be used even in an informal manner to restrain competition." Id. at 338. The Superior Court distinguished Container on the ground that plaintiffs had not shown any stabilization of prices resulting from the communications.[60] In fact, plaintiffs' evidence of overall impact on prices in this case was much stronger than that shown by the government in the Container case. In that case, prices were falling, with substantial variations in price among the defendants. The district court specifically found "the corrugated container market was highly competitive and that each defendant engaged in active price competition." See 393 U.S. at 345 (Marshall, J., dissenting). Here, prices were parallel; they seldom changed during the course of a season; and they were at extremely low levels both absolutely and in comparison with Japanese wholesale prices,

[60] The Superior Court also misconstrued the Container opinion's use of the term "stabilization," interpreting it as entirely different from an effect on price levels. The court, thus appeared to require that plaintiffs show a lessening in the volatility of prices. Thus, it asserted that plaintiffs had not shown increased stability of prices during the damage period. [Exc. 3145]. However, plaintiffs claimed that the price verification calls both produced a stabilizing effect and reduced the level of prices as well. Although it is true that plaintiffs did not submit a study showing that the "stability" of prices at times within the conspiracy period was greater than outside, such a study is not required by Container. Indeed, in this case, the stability of defendants' pricing was never in doubt; during the relevant period prices were extremely uniform and seldom changed during the fishing season. This was not a case where defendants had complex and differentiated pricing practices with discounts (or premiums) offered to various fishers. The effect of the price communications was thus far more extensive than that described in Container, since all price levels received by all fishers selling to the defendants were directly impacted. Moreover, it is also difficult to perceive how the trial court's observation that defendants' conspiratorial price communications may also have occurred before the rise of the alleged conspiracy changes their obvious tendency to impact price competition. Plaintiffs' damages expert, Dr. Leitzinger, opined that the period from 1986 to 1988 was more competitive than the conspiracy period, largely because of the aggressive attitude of certain non-defendant Japanese buyers. He did not opine that the former period was perfectly competitive or that the major processors were not attempting to restrain price competition during that period as well. [Exc. 1681-88].

when compared to the period immediately preceding the alleged conspiracy.

With respect to the Gypsum case, the Superior Court distinguished it based on the fact that the price concessions made in that case were "secret."[61] But the Superior Court had to resolve a significant issue of fact in order to assert that price concessions in Bristol Bay would have been immediately known to other processors even if they had not agreed to exchange the information through the direct price verification phone calls. Indeed, at one point in its opinion, the Superior Court recognized that the extent of public knowledge of the prices that were being verified was an issue of fact.[62] See [Exc. 3140-41]. Plaintiffs vigorously disputed that the defendants could readily obtain the

[61] The Container case did not involve "secret" price discounts; the Supreme Court recognized that the data being exchanged was often already in the records of the defendants or could be obtained from the customers themselves or be computed from manuals in their possession. 393 U.S. at 335-36. Nor was secrecy a significant feature in American Column & Lumber Co. v. United States, 257 U.S. 377 (1921), where defendants asserted that an extensive exchange of information including past prices was legal because customers frequently provided misleading or colored statements regarding competitive pricing and because no agreement as to production and prices was reached. The Supreme Court held in that case that the combination element was supplied "by the disposition of men 'to follow their most intelligent competitors,'" by "the steady cultivation of the value of 'harmony' of action," and by "the system of reports, which makes the discovery of price reductions inevitable and immediate." The sanctions of the plan included "intimate personal contact, and business honor." Id. at 399. Secrecy was also not significant in United States v. American Linseed Oil Co., 262 U.S. 371 (1923). There, the Supreme Court rejected defendants' assertion that their price information exchange was to substitute "intelligent competition" for "unintelligent selfishness" and to establish "100 per cent. Confidence," and thus was not a restraint of trade. Id. at 388.

[62] The Superior Court never addressed plaintiffs' argument that if the pricing information being exchanged was public, why were defendants' respective CEOs communicating with each other, rather than utilizing other alternatives, such as having a secretary of one company call a secretary of the competitor to confirm the price. Sweeping aside such vexing questions, the lower court cited the business judgment rule as not allowing the substitution of the trier of fact's judgment for that of the defendants. [Exc. 3143-44]. The court cited no case, and plaintiffs are aware of none, for the proposition that the business judgment rule can provide a justification for direct collaboration among competitors. On the contrary, proof of an anticompetitive purpose is a well-established means by which a plaintiff may establish the anticompetitive effects of a practice. That purpose is often established by showing the absence of a legitimate business purpose for the complained-of practice. The Supreme Court in Gypsum itself found that compliance with the good faith meeting competition defense of the Robinson-Patman Act could be accomplished by means other than direct competitor contacts. The Court concluded that "[t]o recognize even a limited 'controlling circumstance' exception for interseller verification in such circumstances would be to remove from scrutiny under the Sherman Act conduct falling near its core with no assurance, and indeed with serious doubts, that competing antitrust policies would be served thereby." 438 U.S. at 458.

information that was disclosed in their direct contacts. As many executives testified, they needed to talk directly with each other because the information available from other sources was incomplete or inaccurate. [Exc. 1004, 1115]. Thus, the advantage given to a competitor by the answering party is as great, and arguably greater, where the competitor's concession was given to all customers (or here, to all fishers), as opposed to a more limited group. Just as in the case of a secret price concession, one competitor has no legitimate interest in assuring that its competition has timely and accurate knowledge about its actual prices; its truly competitive self-interest would be to let its competition act on the basis of imperfect knowledge obtained without enlisting the support of rivals.[63]

In Gypsum, the Supreme Court concluded that "[r]egardless of its putative purpose, the most likely consequence of **any such agreement to exchange price information** would be the stabilization of industry prices." 438 U.S. at 457; emphasis added. The Court went on to express its strong concern that such agreements be closely scrutinized under the antitrust laws. Not only do such information exchanges have a strong potential to stabilize prices, they, in the Court's view, have the added potential of the development of a full fledged price-fixing arrangement either through their use as a "cover for price-fixing" or since it would be relatively common that certain understandings would accompany the exchange such as that the participants would not undercut each others prices. Id. at 457-58.

[63] Even if it were in the interest of the answering party to deny that its prices were higher than they actually were, it certainly would not be in its interest to confirm its actual posted price when the calling party's posted price is lower. Nor would it be in its independent interest to confirm or deny a price that is equal to the calling party's price if the calling party might reduce its price absent the information. Indeed, without knowing the calling party's price, the called party would often not know whether its own self-interest is to provide the information or not provide it. In any case, the long-term reciprocal nature of defendants' agreement to exchange current price information implies that the responding party will answer truthfully regardless of its own competitive interests. Such a practice, therefore, simply allows the competitor "confidently to name a price equal to that which their competitors were asking," the very vice that caused the Supreme Court in Container to conclude that the obvious effect of the joint arrangement was to stabilize prices. 393 U.S. at 340 (J. Fortas, concurring).

Here, almost identical concerns regarding communications among the defendants are presented. Defendants' sole justification for the sharing of price information was their claimed need to establish prices in parallel to those of their competitors. There is certainly no evidence in this record that any processor used the price verification calls to lead a price increase. Indeed, the rarity of price increases during the seasons at issue itself demonstrates strongly that price verification was a means of avoiding price competition.[64]

Other cases have followed Container and Gypsum in holding that price verification practices support a finding of conspiracy. For example, in the Petroleum Products case, the Ninth Circuit reversed a defense summary judgment based in part on evidence of pre-Container and post-Container pricing contacts among the defendants, including direct conversations among executives relating to price or other "market intelligence," confirmations of dealer allowances, and discussions of retail price levels. 906 F.2d at 448-55. Even more clearly in this case, the direct price communications among defendants had no purpose other than the coordination of prices. Indeed, in this case no party has suggested otherwise.

In the critical concluding paragraph of the lower court's treatment of defendants' price verification practices, it made findings of fact that not only were the subject of extensive conflicting evidence, but also contradicted other parts of its own opinion. First, the court concluded that plaintiffs' evidence "is not evidence which tends to exclude the possibility that the price verifications were independent behavior by the processors."

[64] Perhaps recognizing the weakness of its earlier attempt to distinguish Gypsum, the lower court asserted that "[u]nlike in the tacit agreement in Gypsum, it was not contrary to the answering processor's interest because it would allow them to receive the same information when needed." [Exc. 3146]. However, in Gypsum the same could be said concerning the discounting manufacturer. In a later transaction, it might have been placed in the situation of trying to match its competitor's price and would want to obtain reciprocal treatment. If it were true as a matter of law that a competitor acts in its independent interest whenever it obtains a quid pro quo from its competitors, a plaintiff could never demonstrate that the competitor acted against its independent self-interest. Such cooperation is anticompetitive and collusive on its face; it is not independent and procompetitive, as the Superior Court concluded.

[Exc. 3146]. Not only does this finding fail to credit plaintiffs' evidence of the anticompetitive purpose and effect of the practice, but it also contradicts the court's prior finding that the exchange of information was pursuant to "agreement" among the defendants. Id. Second, the lower court found that "[t]he tacit agreement in Bristol Bay to exchange price information was essential to competition because it allowed processors to verify prices when needed." Id.[65] Defendants never even argued that this practice was essential to competition, and it is ludicrous to think that would be the case.[66] Since the Container and Gypsum cases, the exchange of current price information has been treated as highly suspect activity. As Phillip Areeda observed:

> Telephone calls among rivals are not inevitable and inherent in doing business. This is extra-market behavior involving consensual and collaborative activity. Nothing more is needed. The respondent forms an agreement to give information to his interrogator when he answers the question.
>
> * * * * *
>
> Thus, a conspiracy among competitors to transmit price information is dangerous and should be subject to careful antitrust scrutiny. (VI P. Areeda, Antitrust Law, ¶1406 at 27 (1986); footnotes omitted.)

[65] This followed from the court's unsupported finding that "there was a competitive necessity for price verifications in Bristol Bay where it was in each processor's interest to meet only prices that were actually offered by a competing processor." [Exc. 3146]. The notion of any such competitive necessity to meet but not beat the prices of others was not supported by any evidence or expert testimony. If such necessity existed in Bristol Bay, it would be similarly needed in every other oligopolistically structured market, a proposition that is contrary to experience throughout the United States economy. Moreover, it is extraordinary on its face to suggest that Bristol Bay processors must engage in this practice that involved secretive phone calls among their senior officers in order to make the market more competitive, and thereby, raise grounds prices. Surely, a jury could reasonably conclude that the defendants used this practice to benefit themselves by depressing grounds prices, rather than to increase grounds prices and hurt their own profits. Otherwise, one might ask why would they have continued the practice for so many years if it simply strengthened competition for the benefit of the fishers?

[66] The Superior Court's determination that the price verification calls were used for legitimate competitive purposes was based on nothing more than defendants' assertions that it was so. Courts have often expressed the view that summary judgment should be used sparingly in antitrust cases such as this, where issues of motive or intent or of whether challenged practices suppress competition are in dispute. See, e.g., Poller, 368 U.S. at 473; In re Workers Compensation Ins. Antitrust Litigation, 867 F.2d 1552, 1563 n.19 (8th Cir.), cert. denied sub nom. Workers' Compensation Insurers Rating Ass'n of Minn. v. Austin Products Co. 492 U.S. 920 (1989); Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc., 824 F.2d 582, 585 (8th Cir. 1987), cert. denied, 484 U.S. 1010 (1988).

A finding such as that proposed by the lower court here—that price verification is essential to competition—would make an agreement to exchange prices so difficult to challenge that it would be freed from serious antitrust scrutiny, a result that would represent a 180° turn from all previous judicial treatment.[67]

In sum, the Superior Court's determination that defendants used the price verification calls for pro-competitive purposes improperly resolved a disputed question of fact. Such disputed issues concerning the intent of the defendants or effects of their conduct have often resulted in denials of summary judgment. In Rosefielde v. Falcon Jet Corp., 701 F.Supp. 1053 (D.N.J. 1988), for example, the court denied summary judgment where defendants had exchanged public price information in a market involving non-fungible goods that was not nearly as susceptible to price coordination as the Bristol Bay salmon market. The court held that questions of fact made it impossible to determine as a matter of law the effect of the information exchange on competition. Id. at 1066.[68]

Indeed, in the Odom case cited earlier, this Court rejected a similar incursion into the fact-finding function of the jury. The plaintiff, an anesthesiologist, alleged that his contract with four other doctors and their contract with the local hospital constituted an unreasonable restraint of trade. This Court reversed summary judgment for the

[67] Indeed, the Superior Court's conclusion that the practice was procompetitive was, at a minimum, the resolution of a question of fact that was significantly in dispute. One of plaintiffs' experts, Dr. Greenberg, concluded that defendants' price verification practice was used to "prevent cheating on price agreements." [Exc. 315]. Dr. Leitzinger, another of plaintiffs' experts, reached a similar conclusion. [Exc. 1688, 1690-91]. Neither of these opinions was inadmissible and both would have supported a jury determination that the practice had an anti-competitive purpose and/or effect. Expert opinions such as these were held to be sufficient to create a genuine issue of material fact on the issue of anticompetitive effect in Rosefielde v. Falcon Jet Corp., 701 F.Supp. 1053, 1069 (D.N.J. 1988).

[68] Plaintiffs have asserted throughout the case that the defendants' practice of exchanging current price information for the purpose of matching each other's prices was necessarily also an agreement to restrain price competition. Having found a "tacit agreement" to exchange current price information and having found that defendants established parallel prices, the Superior Court should have allowed a jury to decide whether that agreement restrained price competition. Indeed, in Petroleum Products, the Ninth Circuit noted that since data dissemination practices designed only to provide competitors with accurate price information have no significant procompetitive purpose, they clearly present issues for a jury. 906 F.2d at 448 n.15.

defendants, concluding that the Superior Court's decision rested on its balancing of the restraints on competition with the public interest in the provision of reliable and constant anesthesia coverage to the hospital. That balancing raised a question of fact that was to be determined by the jury, not the court on summary judgment. Odom, slip op. at 22.[69]

4. Price Communications Between The Processor And Importer Defendants.

The Superior Court rejected all of plaintiffs' evidence regarding the pressure exerted by the importer defendants to have the processor defendants pay reduced grounds prices. The evidence supplied by documents produced by Mitsui most clearly shows how the processor defendants coordinated with their common customers, the importer defendants, to maintain artificially reduced prices. Although plaintiffs focus on that evidence here, there is substantially similar evidence as to each of the other importer defendants, which allows the reasonable inference that they too participated in the alleged conspiracy.

The Superior Court dismissed all of the evidence that Mitsui agreed, pursuant to pressure from various processor defendants, with Woodbine and YardArm Knot to lower their ground prices. Although the court never addressed plaintiffs' evidence concerning YardArm Knot, it found that Mitsui's self-interest was to ensure low grounds prices since it had a cost plus contract with Woodbine. See [Exc. 3120-21]. In fact, this was not true. Woodbine's cost plus contracts with Mitsui primarily related to False Pass. With respect to Bristol Bay, Woodbine had only one cost plus contract relating only to a small portion of the product sold to Mitsui in 1990. [Exc. 1043, 1059]. The Superior Court also appears

[69] In many other cases, evidence of exchanges of price and price-related information, when combined with evidence of parallel interdependent pricing, has been held sufficient to justify denials of summary judgment. This occurred, for example, in Penne v. Greater Minneapolis Area Bd. of Realtors, 604 F.2d 1143, 1147-48 (8th Cir. 1979), where interseller price verification was shown. It also occurred in In re Medical X-Ray Film Antitrust Litigation, 946 F.Supp. 209 (E.D.N.Y. 1996), where there was evidence of exchange of current and future price information sufficient to defeat summary judgment. Id., at 219-20 ("evidence of price verification must be scrutinized carefully, 'since it carries the potential for price-fixing agreements,'" quoting Vermont Int'l Petroleum Co. v. Amerada Hess Corp., 492 F.Supp. 429, 434 (N.D.N.Y. 1980)).

to have dismissed almost all of the evidence of importer-processor grounds price fixing on the basis that it is "competitive" for an importer to try to reduce its input prices. [Exc. 3152]. This view fundamentally misconceives the antitrust laws as only protecting consumers and not protecting sellers against monopolistic buying practices. The federal authorities are clear that price-fixing is illegal *per se*, and cannot be justified by claims that it has some other value such as lowering input costs. See Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 434 (1990); Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 350-51 (1982).[70]

The Superior Court also misinterpreted Monsanto, the primary case it relied upon in its analysis of the Mitsui evidence. In that case, the Supreme Court upheld a jury verdict in favor of the plaintiff, finding that the defendant, Monsanto, had terminated the plaintiff's dealership as part of a conspiracy between it and other distributors to maintain minimum resale prices. The Supreme Court ruled that, in the dealer termination context, showing only that other distributors had complained to the manufacturer about price-cutting by the plaintiff distributor before its termination was not enough to show an agreement. Nevertheless, the Court upheld the jury verdict, finding sufficient evidence of agreement from Monsanto's active efforts to ensure that its distributors followed the retail prices it suggested and acquiescence by the dealers in that endeavor. Thus, evidence of threats of lessened supply, followed by acquiescence in the suggested price, in the Court's view, was sufficient to present a jury question on meeting of the minds. 465 U.S. at 765. Other even more ambiguous evidence, such as a newsletter that reported on an interview with Monsanto executives, was also deemed to be properly submitted to the jury for interpretation. Id. at 765-66.

[70] In a recent Tenth Circuit case, the court rejected a cost containment justification to the anticompetitive abuse of market power against a supplier in an input market. Law v. NCAA, 134 F.3d 1010, 1023 (10th Cir.), cert. denied, 119 S.Ct. 65 (1998) ("If holding down costs by the exercise of market power over suppliers, rather than just increased efficiency, is a procompetitive effect justifying joint conduct, then Section 1 can never apply to input markets or buyers cartels. That is not and cannot be the law.").

The other dealer termination case that the Superior Court discussed — Isaksen v. Vermont Castings, Inc., 825 F.2d 1158 (7th Cir. 1987), cert. denied, 486 U.S. 1005 (1988) — was similar. The Seventh Circuit followed the Monsanto finding that the evidence was sufficient to support a jury finding that the terminated distributor had knuckled under to the pressure of its manufacturer by raising its prices.

Monsanto and Isaksen are also distinguishable from this case. Since those cases involved allegations of agreement among entities that were legally cooperating in the manufacturer's distribution system, the freedom of a manufacturer to organize its sales effort to maximize its competitive efforts vis-à-vis its own competitors was implicated. In such circumstances, the court must consider potential benefits to interbrand competition that might outweigh the harms to intrabrand competition caused by restraints on competition between a particular manufacturer's distributors. See Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54-59 (1977). In this case, no such possible procompetitive effects have any similar significance. Mitsui, for example, had no significant business relationship with Trident, Icicle, Nelbro/BC Packers, NPPI or Wards Cove concerning the purchase of Bristol Bay salmon.[71] Indeed, if one were to accept the Superior Court's conclusion that cost plus contracts made Mitsui the "real" buyer of the raw fish ([Exc. 3121]), then the communications with the other processors can be seen even more clearly as naked horizontal price-fixing among competing raw fish buyers. Nor have the defendants pointed to any procompetitive justification for their contacts with Mitsui, such as the elimination of "free-riding" by distributors, which is so important in

[71] During the years that Mitsui was pressuring Woodbine, it did buy some salmon and salmon roe from Nelbro and purchased some sockeye salmon from Wards Cove's Kodiak plant, but plainly, its primary interest in communicating with various processors other than Woodbine concerning Bristol Bay grounds prices was the general benefit all processors and importers obtained from collusively depressed fisher prices. Indeed, the Superior Court simply assumed that it was invariably in Mitsui's self-interest to have Woodbine paying low grounds prices. But paying a higher price could also be in Mitsui's interest if it were able to expand its production and thus increase its volume of sales. Such a higher price was discouraged when Trident and Wards Cove threatened to punish Mitsui through refusals to deal in other markets.

the dealer termination context.

In return for pressuring Woodbine, Mitsui received continued business relations and potential future business from Trident, Wards Cove, Icicle and Nelbro/BC Packers. Such an agreement clearly falls within the prohibition of the antitrust laws. See JTC Petroleum Company v. Piasa Motor Fuels, 190 F.3d 775 (7th Cir. 1999). Similarly, each processor adopted Mitsui's suggested prices knowing that Mitsui and other importers had been discussing and soliciting agreements concerning them with other processors. Again, there is no legitimate justification for Mitsui's activity; defendants did not even try to articulate one – except as discussed above, the illegitimate justification that consumers in Japan could be benefitted if the defendants passed the collusively reduced grounds prices on to their customers. The Superior Court also committed plain error in interpreting the Mitsui-Woodbine evidence in a number of other respects. First, its finding that "the evidence relied on by plaintiffs indicates that the [processor defendants'] concern was over Mitsui's relationship with Woodbine, not about Woodbine's grounds prices" [Exc. 3117] makes no sense. As demonstrated by dozens of Mitsui records and by Ms. Ferrari's undisputed testimony, the only concern that any of the other defendants had with Woodbine related to its aggressive pricing. The court identified no other concern, nor does the record reveal any.[72] Moreover, even if some other reason for the complaints existed, it is for a jury to decide whether defendants' purpose in complaining was to restrain Woodbine's pricing.

Second, the Superior Court erred in concluding that "[t]here is no evidence that

[72] Indeed, in another portion of the lower court's opinion, discussing one of Trident's complaints to Mitsui regarding Woodbine, the Superior Court used this evidence to conclude that pressuring Woodbine to lower its prices was in Mitsui's own interest (as well as Trident's). It therefore refused to find that Mitsui's pressuring of Woodbine to lower its grounds prices immediately following Trident's complaint was proof of collective activity. [Exc. 3121]. If this were the appropriate analysis, proof of price-fixing would require direct evidence of conspiracy because it would always appear that the price moves collectively organized by a group of competitors would be in their own self-interest, since otherwise why would they make the effort to join together in the first place?

during 1991 Woodbine lowered its grounds price in reaction to Mitsui's pressure." [Exc. 3118]. This conclusion is a non sequitur. In the 1990 season, Woodbine lowered its price in midseason because Mitsui thought the 35¢ gap between it and the major processors was too great. In the 1991 season, after a great deal of pressure from Mitsui, Woodbine adopted the very same price as the majors—70¢ per pound; a price that was substantially below those paid in any of the five previous years. There was no need to obtain a further reduction during the season, since Woodbine was already paying the price that the major processors had collusively established. Even more importantly, Ms. Ferrari specifically explained that Woodbine had paid low prices in 1991 as a result of Mitsui's pressure. [Exc. 1666-67]. Certainly, a triable issue of fact is presented regarding the effect of Mitsui's pressure in 1991.[73]

Third, the Superior Court erred in finding some inconsistency in plaintiffs' claim that the Mitsui-Woodbine conspiracy extended beyond 1990 because "[i]f the 1990 agreement to lower Woodbine's grounds prices was ongoing, it makes no sense that Mitsui pressured Woodbine to lower grounds prices in the following season." [Exc. 3121]. No inconsistency is present, however. Mitsui reached agreements with the complaining processors to work for lower grounds prices. It implemented that agreement by both pressuring for specific reductions, such as the 10¢ reduction in 1990, and for general reductions, such as the effort to have Woodbine price as low as possible in 1991 and 1992. None of those actions is inconsistent with a general conspiracy to lower Bristol Bay grounds prices well below the level that would be possible absent defendants'

[73] The Superior Court was also mistaken in asserting that the plaintiffs did not rely on the fact that Mitsui ceased doing business with Woodbine after 1992 as evidence of the conspiracy. [Exc. 3119]. Rather, plaintiffs argued that the defendants engaged in concerted conduct from 1990 through 1992 that was calculated to force Woodbine to lower its grounds prices. [Exc. 756]. In addition, plaintiffs asserted that Mitsui's refusal to provide financial assistance furthered the conspiracy by undermining Woodbine's ability to engage in aggressive price competition for each of the years after 1990, resulting in Woodbine's prices being virtually the same as the major processors' in each of those years.

collusion.[74] Nor is there any requirement that a cartel work so smoothly that its members never need to discuss implementation issues after the initial agreement is reached in order for the cartel to be illegal. It is well recognized that an antitrust conspiracy need not be perfect for it to be illegal. Socony-Vacuum, 310 U.S. at 224 n.59.

Finally, the Superior Court rejected much of plaintiffs' other Mitsui evidence, such as its efforts to coordinate lower grounds prices through its price surveys conducted during the 1991 and 1992 pre-seasons, as not even being some evidence of an agreement:

> Plaintiffs also present no evidence in their briefing from which it can be reasonably inferred that the companies Mitsui had contact with conspired with Mitsui during these surveys. Plaintiffs' own briefing indicates that Mitsui's price suggestion was only discussed. Additionally in both Monsanto and Isaksen, the manufacturer had suggested retail prices. These decisions did not indicate that suggesting or discussing a suggested price is evidence of an agreement. The plaintiffs point to no authority that supports a conclusion that a suggestion of an input price by a customer is evidence of a conspiracy. Thus it is speculative to infer an agreement between Mitsui and the processors it surveyed. [Exc. 3121-22].

Once again, the Superior Court appears to be requiring "smoking gun"-type evidence, such as testimony of a participant to the meeting that the processors "agreed" with Mitsui's suggested prices. In fact, however, the industry-wide discussions among defendants about future prices that the plaintiffs did demonstrate are highly suspect; for what purpose could Mitsui have for such discussions other than to organize the industry to reduce grounds prices? Evidence of suggestions as to appropriate pricing levels, combined with evidence of acquiescence in the suggested pattern of behavior, is often the only kind of evidence available in a price-fixing case, where the parties seldom reduce their agreements to writing. As discussed above, the cases are uniform in permitting an inference of conspiracy where pricing suggestions and discussions are followed by the uniform adoption of parallel prices. In some circumstances, the inference of agreement

[74] In United States v. Conneaut Indus., Inc., 852 F.Supp. 116, 121 (D.R.I. 1994), the court held that the "key in determining whether the conspirators were involved in a single or in multiple conspiracies is the existence of a common goal or over-all plan." In this case, the common goal of reducing grounds prices by joint action ties together all of defendants' efforts.

from such evidence is almost irresistible. It is for this reason that companies ordinarily forbid price communications among their rivals, even though such communications do not constitute price-fixing in and of themselves. At least one processor defendant (Wards Cove) in its antitrust policy recognized the danger of, and flatly prohibited, communicating both current and future pricing information to importers, because those importers could serve as conduits for the information to other processors. [Exc. 1557]. In the circumstances presented here, where the importers had no significant justification for their pricing suggestions other than to implement industry-wide coordination of prices, evidence of the suggestion of prices, followed by action consistent with the suggestions is sufficient to create an issue of fact concerning the existence of an agreement.[75]

In this case, a jury could easily conclude that each processor discussing expected prices with Mitsui was well aware that other processors were also being contacted and urged to post the same low prices. Indications of agreement with Mitsui's suggested prices provided during those discussions would likely be construed as invitations to Mitsui to continue its efforts to coordinate all the processors in an effort to obtain the specific prices agreed upon. Plaintiffs presented evidence that the prices Mitsui suggested before the season in fact became the uniform price offered by the processor defendants during the season.[76] If the court truly believed that plaintiffs did not contend that the suggestions and discussions resulted in agreements, it committed plain error. In one clear

[75] As discussed in the text, the Superior Court's reading of dealer termination cases to permit the suggestion of prices fails to recognize the different antitrust treatment of suggested resale prices in that context. The Mitsui evidence in this case would be much more equivalent to an arrangement whereby Ford Motor Co. suggested high retail prices to groups of Chevrolet, Buick, Chrysler, Toyota, and Honda dealers for the models that competed with Ford's own vehicles. If those dealers then raised their prices along with Ford's own dealers, one would have little difficulty finding an anti-competitive agreement had been reached.

[76] As shown above, the target price for the 1991 season was from 50¢ to 70¢ per pound, with 50¢ as the preferred price. The latter price may well have become the price of all the majors had the strike not intervened. Moreover, the pre-season discussions of prices ranging from 50 to 70¢ provided an understanding among the processor that offers above 70¢ would have dire potential consequences.

instance, the Mitsui report itself reflects that Trident agreed with the suggested price.[77] In other instances, it is clear that no objection was interposed. Indeed, with respect to the 1992 "survey," Mitsui reported the packers' indication that they "could pay" the suggested $1.00. Thus, the Superior Court's conclusion that Monsanto and Isaksen stand for the proposition that suggested prices alone cannot be evidence of agreement is simply beside the point. Plaintiffs submitted additional evidence that the processors agreed with Mitsui's suggested prices and actually adopted them. Moreover, in sharp contrast to the dealer-distribution pattern of cases, Mitsui had no legitimate interest in suggesting prices to companies from which it bought no salmon. It was not seeking to operate its own business more efficiently or even to help its suppliers run theirs more efficiently. Rather, it was attempting to organize all of the processors in an effort to cooperatively lower grounds prices.[78]

5. Defendants Wards Cove And BC Packers Accepted Okaya's And Nichirei's Invitations To Collude.

The Superior Court's treatment of the Okaya/Nichirei invitation to collude and

[77] Vertical minimum price fixing is per se illegal, due, in part, to its likely function in facilitating cartelization "by reducing the manufacturer's incentive to cheat on a cartel" and by being "used to organize cartels at the retailer level." Business Electronics v. Sharp Electronics, Inc., 485 U.S. 717, 725-26 (1988).

[78] The Superior Court also rejected other evidence presented by plaintiffs relating to the importer defendants on the purported basis that it did not fit with its conception of the conspiracy being alleged by plaintiffs. For example, it rejected all of plaintiffs' evidence relating to other fisheries, such as False Pass, except for the May 31, 1991 memorandum from Mr. Saletic to Mr. Suzuki, on the basis that plaintiffs must "tie" the communications regarding those fisheries to Bristol Bay. [Exc. 3154]. This ruling improperly resolved a significant factual issue in the case. Abundant evidence, in addition to the powerful inference that comes directly from the May 31 memorandum, showed that the defendants recognized that competition from small operators in False Pass backed by certain Japanese importers was a significant impediment to achieving low grounds prices in Bristol Bay. [Exc. 2660]. The Okaya/Nichirei Action Plan complained of certain importers' "speculative" buying in False Pass at a high price. [Exc. 2614-22, at 2614]. The rationale that Mitsui provided to BC Packers for a very low price in Bristol Bay for the 1991 season included the fact that cash buyers had not been able to push up the False Pass grounds price as they had done in previous years. [Exc. 2612-13] Finally, the May 31 memorandum concludes with the comment "as you know high prices again in False Pass will not help False Pass or Bristol Bay," [Exc. 2660] a point Mr. Saletic confirmed in his testimony. [Exc. 1122-24] Certainly, this evidence is sufficient to present a factual issue as to whether these efforts impacted Bristol Bay grounds prices.

plaintiffs' identification of the evidence demonstrating Wards Cove's and BC Packers' acceptance of the invitation also contains glaring errors. The trial court claimed that plaintiffs relied on three types of evidence to show acceptance of the Okaya/Nichirei Action Plan: (1) Wards Cove's hosting of a cocktail party a few days after the meeting with Okaya; (2) the fact that the document given to BC Packers requested it to follow Wards Cove's lead on processed salmon prices; and (3) that Wards Cove adopted prices that were parallel to other processors. [Exc. 3130]. This listing did not include the principal evidence that plaintiffs relied upon to prove acceptance or acquiescence by Wards Cove.[79] Rather, plaintiffs first argued that Mr. Brindle agreed during the course of the meeting with the plan, if not explicitly, at least by failing to object to it. Plaintiffs next rebutted Mr. Brindle's testimony that he refused the invitation because the plan was illegal with the evidence that he joined Mitsui two months later in agreements to offer a grounds price of 50¢ and to eliminate Woodbine's price competition. Plaintiffs also pointed to the fact that both Mr. Brindle and Mr. Beeston communicated with other processors regarding their prices and engaged in concerted efforts to break the strike at a price acceptable to Okaya, Nichirei and other importers. Finally, plaintiffs argued that Wards Cove's actual posting of a "drastically reduced" price showed its acceptance of the mutual cooperation that Okaya had offered. Plaintiffs were not claiming that parallel pricing alone proved Wards Cove's and Nelbro/BC Packers' acceptance of the Okaya/Nichirei Action Plan. Rather, it was the low prices that they uniformly offered and the manner in which those prices were determined that demonstrated their acceptance.

[79] With respect to the cocktail party hosted by Wards Cove on December 7, 1990 at the Imperial Hotel in Tokyo, at which multiple representatives of defendant importers attended, including those from Okaya, Nichirei, Mitsui, and Marubeni [Exc. 1165-69], plaintiffs did not argue, as the Superior Court appears to have believed, that the convening of that meeting showed Wards Cove's acceptance of the Action Plan. [Exc. 3131]. It is quite correct that the party was an annual affair scheduled long before the Okaya meeting. Rather, the meeting at which the "major buyers" identified in the Action Plan gathered was one rife with opportunity to bring about the mutual cooperation of both importers and processors that Okaya and Nichirei advocated.

Plaintiffs' first argument that Wards Cove and BC Packers indicated their acquiescence during the meetings in December of 1990 at which the proposals were first advanced is the subject of a classic factual dispute that does not implicate any of the concerns voiced in Matsushita. Substantial evidence contradicts Mr. Brindle's assertion that he voiced his disagreement with the proposal to Okaya. First, in his own sworn testimony given only one year after the meeting, Mr. Brindle had no recollection of discussing the Okaya grounds price proposal. Second, he made no notation on the document indicating his disapproval of the proposal. Third, Okaya over the next two days revised the document and presented it to BC Packers without any change in the invitation to collude, something that would be odd, had Wards Cove voiced disagreement with the proposal on legal grounds. Finally, other participants in the meeting had no recollection of the claimed statement by Mr. Brindle.

The Superior Court also erred in finding that the Okaya/Nichirei invitation was unconnected to the conspiracy that plaintiffs alleged. Throughout this case, the plaintiffs have alleged a conspiracy to reduce grounds price joined by both processors and importers. This is, of course, exactly the conspiracy proposed by Okaya and Nichirei. The Superior Court's observation that the vertical conspiracy being proposed is not somehow tied directly to a horizontal conspiracy among the processors is beside the point.[80] An antitrust conspiracy need not have some central organizing committee directing all of its actions. Conspirators need not know all the activities of their co-conspirators or even know who they are, so long as they (or their co-conspirator agents) have reached a common scheme with a common illegal purpose.[81] See United States v. Consolidated

[80] Indeed, it is flatly wrong. Okaya and Nichirei invited Wards Cove and Nelbro to join a horizontal conspiracy to reduce grounds prices—"**mutual cooperation between the packers and the importers**"—not simply vertical agreements between certain packers and certain importers.

[81] The Superior Court also questioned how the Okaya/Nichirei invitation in 1990 could be consistent with plaintiffs' allegation that the conspiracy began in 1989. Among the many plausible answers to this question is that Okaya and Nichirei were reinforcing and strengthening the efforts of the defendants to obtain even lower prices than the conspiracy had been able to accomplish during it's the first two years. Alternatively, they were simply voicing their views concerning the specific manner in which the general agreement to cooperate in reducing prices should be handled for the particular season that was approaching. Finally, Okaya and Nichirei could have been joining a conspiracy already in progress. When one joins an ongoing conspiracy, he becomes liable for all the injuries caused by that conspiracy. Lile v. United States, 264 F.2d 278, 281 (9th Cir. 1958). In any event, plaintiffs are entitled to the inferences that may be drawn from the memoranda concerning the existence of the conspiracy after 1990, even if the document might arguably be used by the defendants to assert that no conspiracy existed in 1990 or 1989.

Packaging, 575 F.2d 117, 121 (7th Cir. 1978) (not necessary that the members of a conspiracy perform or have knowledge of every act establishing the conspiracy); American Tobacco Co. v. United States, 147 F.2d 93, 118-19 (6th Cir. 1944), aff'd, 328 U.S. 781 (1946) (no relief from liability because alleged co-conspirators did not all take part in the same acts; "[p]articipation by each conspirator in every detail in the execution of the conspiracy is unnecessary to establish guilt . . . ."); United States v. Ward Baking Co., 224 F.Supp. 66, 69-70 (E.D.Pa. 1963) (a co-conspirator need not know and come in direct contact with all other members in relation to the conspiracy; even if such a co-conspirator plays a "minor" or "lesser" part, it can still be held liable).

6. The Baypack Incident Constitutes Strong Evidence Of Defendants' Conspiracy.

Reaching agreement or understanding among the well-established members of a highly concentrated industry concerning the manipulation of prices is not always the most difficult aspect of a price-fixing conspiracy. Maintaining collusive price levels in the face of smaller competitors attempting to enter or expand their market share can also pose a problem. As discussed above, plaintiffs presented a wealth of evidence concerning efforts by the major processors and importers to maintain discipline over the smaller processors, including Woodbine, YAK, Pan Pacific, Oceanic, New West, and Baypack. The Superior Court essentially dismissed this evidence, finding in each instance no proof that tied more than one processor to the schemes. However, that analysis both failed to give plaintiffs the reasonable inferences to which they were entitled and violated the admonition of the United States Supreme Court not to compartmentalize an antitrust plaintiff's proof. See

Big Apple BMW, Inc. v. BMW of No. America, Inc., 974 F.2d 1358 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993).

With respect to Baypack, the Superior Court found that Mr. Beeston's blatant efforts to force Baypack to raise its prices after complaints by Nelbro's competitors that it was "taking" fishers was not evidence from which an inference of conspiracy could be drawn. [Exc. 3126]. The court concluded that there was no evidence to suggest that Mr. Beeston's complaints regarding pricing were made at the "behest of the other processors." Id., pp. 25-26 [Exc. 3126-27]. Quite the contrary, when one processor complains to a second that a third processor is complaining of being damaged by the former's "taking" of its fishers, only one inference is possible—that the second processor is competing too hard and must be restrained. But that inference is not all that the plaintiffs have here. They have the additional fact that three different processors all complained, apparently using the phrase that Baypack was "stealing" their fishermen. And, even more significantly, plaintiffs have Mr. Beeston's own statement that points strongly to collusion. He rebuked Baypack for "screwing up the industry," not for just disturbing Nelbro's own pricing practices. Clearly, a jury could reasonably infer that Mr. Beeston's complaint was at least in part at the behest of the other processors.[82]

7. Discussions Of Future Pricing Constitute A Strong Plus Factor Entitling Plaintiffs To A Jury Trial.

The Superior Court's treatment of various instances where the evidence demonstrated that processors had discussed future pricing was similarly erroneous. After reviewing the evidence that plaintiffs presented, the Superior Court concluded that much

[82] The lower court's treatment of the Baypack incident, and its compartmentalization of the evidence, vividly demonstrates its failure to give plaintiffs the full inferences to which they were entitled in opposing summary judgment. Mr. Beeston was the executive who was at the center of many of the price verification phone calls. He made one to Mr. Torres in 1991 when he was "alarmed" that the latter's company had made an excessively high offer to settle the strike that year and successfully obtained the withdrawal of that offer. The credibility of Mr. Beeston's denial of any anti-competitive intent in making these calls can be sharply disputed, in light of the Baypack testimony.

of it did not amount to evidence of future price discussions—often after weighing and interpreting the evidence in a manner favorable to defendants. [Exc. 3148]. Next, the Superior Court refused to give any credence to plaintiffs' contention that, given the stability of pricing in Bristol Bay, each discussion of a current price among the processors was also necessarily a discussion of future prices. It did find that some of the evidence was probative of future price discussions and concluded that these communications qualified as a plus factor. [Exc. 3148-49]. The court further recognized that defendants had not shown how these discussions were "consistent with competition" and thus "support[ed] an inference of conspiracy without showing evidence that tends to exclude the possibility of independent conduct." [Exc. 3147]. Inexplicably, the court then found fault with the reasonableness of an inference of conspiracy that plaintiffs sought to draw from the evidence as a whole, calling any assertion that agreement was reached during these discussions speculative.[83] [Exc. 3149]. This was hardly consistent with the lower court's introduction to the same paragraph, where it appeared to conclude that plaintiffs had shown "that there is some evidence tending to exclude the possibility that the processors set grounds prices independently." Id. Plaintiffs should have been allowed to present that evidence to a jury.

In fact, in each instance, plaintiffs demonstrated that a given pricing discussion was followed by the adoption of the specific future prices that were discussed. Although only a few such instances were documented, plaintiffs submit that, in combination with all the other evidence, and in particular the extensive "price verification" evidence, a jury could reasonably conclude that understandings were reached to coordinate future prices and maintain them at depressed levels. These discussions, which involved very high-

[83] The court also rejected one instance of a discussion between representatives of Peter Pan and BC Packers because the latter company was not a processor. [Exc. 3149]. Given the close coordination of Nelbro and BC Packers on all aspects of their business, and the evidence that Mr. Baart discussed grounds prices with Mr. Beeston regularly, a jury could reasonably infer that the former employee was simply acting as a conduit for the information. The perception of at least one very knowledgeable processor executive, Mr. Alec Brindle of Wards Cove, was that BC Packers and Nelbro were "one and the same." [Exc. 1019].

ranking officers of defendants, strongly support an inference of price coordination. They thus lend great weight to the claim that these defendants reached a broader agreement to depress grounds prices throughout the 1989 to 1995 period. Although the Superior Court seemed to conclude that there were only three documented incidents of this nature (after excluding a number of others that plaintiffs submit are subject to similar inferences),[84] one would not expect such conversations to be documented at all. They were, after all, against the policies of each of the companies involved. The Superior Court should have reserved to the jury the proper inference regarding collusion to be drawn from these three conversations, the multitude of price verification discussions, and the numerous importer-processor price communications.[85]

B. PLAINTIFFS ADEQUATELY PLED ALTER EGO.

Should the Court reverse and remand the case for trial, the Superior Court's ruling that plaintiffs did not plead alter ego should also be reversed. Plaintiffs' Fourth Amended Complaint ("FAC") provides notice to defendants that alter ego liability is at issue. FAC ¶¶ 24, 27, 30, 33, 44, 49, 50. [Exc. 164-66, 172-73, 177-78]. For example, the FAC alleged that Marubeni (one of the vertically integrated processor/importers defendants) "either by itself, or through its affiliates, its agents, its instrumentalities, its co-conspirators, and/or via its subsidiaries, has been engaged in the purchasing of Bristol Bay salmon and/or Bristol Bay salmon roe in Alaska from plaintiffs" and that it "did exercise or retained the right to exercise control over" MAC and NPPI, and, with respect to those companies, "is liable for the actionable and culpable conduct complained of

[84] For example, there were the discussions among Nichiro, Marubeni America, NPPI and Icicle concerning the $1.00 grounds price set for the 1992 season reflected in Mr. Otsuka's report. The Superior Court did not include this communication because it read the document as demonstrating a discussion of "expected grounds prices" rather than "future pricing intentions." However, a jury could reasonably infer that a discussion of the former was also intended to provide information regarding the latter as well.

[85] The Superior Court also rejected plaintiffs' evidence of opportunity contacts, finding that such evidence can be circumstantial evidence of a conspiracy, "but only when considered with other evidence that already shows that there was a conspiracy." [Exc. 3161]. This is emblematic of the Superior Court's entire approach to the evidence. It impermissibly compartmentalized each piece of evidence and then wiped the slate clean before addressing the next piece.

herein." (FAC ¶ 44). [Exc. 172-73].Plaintiffs similarly alleged that Peter Pan and UniSea were wholly owned and controlled subsidiaries of Nichiro and Nippon Suisan. FAC ¶¶ 27, 33, 49, and 50. [Exc. 164, 166, 177-79].

This Court's decision in Murat v. F/V Shelikof Strait, 793 P.2d 69, 74 (Alaska 1990), controls the disposition of this case. In Murat, plaintiffs named Murat as both a general partner in a corporation and as the shareholder of the corporation. The complaint requested joint and several relief against each of the defendants. This Court held that the complaint provided Murat with sufficient notice that the plaintiffs wanted to hold him personally liable for the corporate liabilities. Plaintiffs' allegations here are more comprehensive than the allegations in Murat.

In a decision on this issue, which was affirmed without further elaboration by the Superior Court [Exc. 389-404], the Discovery Master concluded that the FAC "at a minimum, must contain either some of the conclusory references associated with the corporate piercing doctrine or sufficient factual allegations from which defendants could infer a piercing claim." [Exc. 392-93] The Discovery Master found that plaintiffs' complaint did not contain any references "such as 'mere agent,' 'mere instrumentality' or 'piercing the corporate veil,' which could clearly alert [defendants] of plaintiffs' intent to pursue a piercing claim." [Exc. 396]. The Discovery Master noted that "[w]hile notice pleading rules do not require any magical incantations, the absence of the term 'mere' in conjunction with the terms 'agent' and 'instrumentalities' makes plaintiffs' piercing claim too subtle." [Exc. 396]. Here, plaintiffs pled more than just the word "instrumentality." Plaintiffs also alleged that the parent controlled the subsidiary, that the parent had a duty to remedy the culpable conduct, and that the parent was liable for the acts of the subsidiary. This was more than sufficient to put defendants on notice of an alter ego claim.

C. THE SUPERIOR COURT ERRED IN EXCLUDING VARIOUS ITEMS OF EVIDENCE AS HEARSAY.

As discussed above in notes 21 and 24, the Superior Court improperly excluded

evidence that was either not hearsay, was an admission of a party, or fell within the co-conspirator exception to the hearsay rule. In the event the summary judgments are reversed, these rulings also should be reversed.

CONCLUSION

For these reasons, the Superior Court's judgment in favor of defendants should be reversed and remanded, with all remaining issues to be determined at trial.

DATED at Anchorage, Alaska, this 28th day of April, 2000. #8606031

By _____
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Pursuant to Rule 513.5 of the Appellate Procedure, counsel represents that the typeface used in this brief is Times New Roman and the point size is 13.

By _____

APPENDIX A: DOCUMENTED PRICE VERIFICATION COMMUNICATIONS

	DATE	CALLING PARTY	CALLED PARTY	EXCERPT OF RECORD
1	1989	Bob Barcott (Unisea)	Jon Black (Ocean Beauty)	Exc. 1152; Exc. 949
2	1989	Bob Barcott (Unisea)	Tom King (Icicle)	Exc. 1153; Exc. 949
3	1/19/90	Don Giles (Icicle)	Ocean Beauty	Exc. 2832
4	1/19/90	Don Giles (Icicle)	Peter Pan	Exc. 2832
5	1/19/90	Don Rawlinson (Peter Pan)	Alec Brindle (Wards Cove)	Exc. 1003
6	1/24/90	Trevor Beeston (Nelbro)	Diane Bundrant (Trident)	Exc. 2020; Exc. 977
7	1/24/90	Trevor Beeston (Nelbro)	John Gilbert (Wards Cove)	Exc. 2020; Exc. 977
8	6/18/90	Malcolm Wyer (Far West)	Don Rawlinson (Peter Pan)	Exc. 2094-96; Exc. 1982
9	7/1/90	Malcolm Wyer (Far West)	Trevor Beeston (Nelbro)	Exc. 2097; Exc. 1980-81
10	7/3/90	Malcolm Wyer (Far West)	Don Rawlinson (Peter Pan)	Exc. 1982
11	7/3/90	Malcolm Wyer (Far West)	Red Salmon (Wards Cove)	Exc. 2094-96; Exc. 2097
12	1991	Chuck Bundrant (Trident)	Bob Barcott (Unisea)	Exc. 948
13	1991	Don Rawlinson (Peter Pan)	Bob Barcott (Unisea)	Exc. 948
14	1991	Robert Torres (NPPI)	Don Rawlinson (Peter Pan)	Exc. 1976
15	1991	Robert Torres (NPPI)	Trevor Beeston (Nelbro)	Exc. 1976
16	6/21/91	Alec Brindle (Wards Cove)	Ocean Beauty	Exc. 1011
17	6/23/91	Malcolm Wyer (Far West)	Don Rawlinson (Peter Pan)	R. 00042263-64; R. 00053531-32
18	6/23/91	Malcolm Wyer (Far West)	Gary Johnson (Trident)	Exc. 2094; Exc. 1982
19	6/23/91	Malcolm Wyer (Far West)	Kenai (NPPI)	R. 00042263-64; R. 00053531-32
20	6/23/91	Malcolm Wyer (Far West)	Red Salmon (Wards Cove)	R. 00042263-64; R. 00053531-32
21	6/23/91	Malcolm Wyer (Far West)	Trevor Beeston (Nelbro)	R. 00042263-64; R. 00053531-32
22	6/29/91	Trevor Beeston (Nelbro)	Alec Brindle (Wards Cove)	Exc. 2004; Exc. 967; Exc. 1013
23	6/30/91	Trevor Beeston (Nelbro)	Stuart Lutton (Ocean Beauty)	Exc. 2004; Exc. 960; Exc. 967
24	7/91	Don Rawlinson (Peter Pan)	Robert Torres (NPPI)	Exc. 1975-76; Exc. 1097-98

	DATE	CALLING PARTY	CALLED PARTY	EXCERPT OF RECORD
25	7/91	Trevor Beeston (Nelbro)	Robert Torres (NPPI)	Exc. 1975-76; Exc. 961-62; Exc. 969
26	7/1/91	Bill Saletic (Peter Pan)	Tim Horgan (Ocean Beauty)	Exc. 1072
27	7/1/91	Alec Brindle (Wards Cove)	Don Rawlinson (Peter Pan)	Exc. 1202; Exc. 1014
28	7/1/91	Trevor Beeston (Nelbro)	Alec Brindle (Wards Cove)	Exc. 1202; Exc. 1014
29	7/1/91	Trevor Beeston (Nelbro)	Malcolm Wyer (Far West)	Exc. 2004; Exc. 961; Exc. 967
30	7/2/91	Alec Brindle (Wards Cove)	Trevor Beeston (Nelbro)	Exc. 1202; Exc. 1015-16
31	7/2/91	Trevor Beeston (Nelbro)	Alec Brindle (Wards Cove)	Exc. 1202; Exc. 1015-16
32	7/3/91	Trevor Beeston (Nelbro)	Tom Toddhunter (Far West)	Exc. 2007; Exc. 967
33	7/3/91	Trevor Beeston (Nelbro)	Robert Torres (NPPI)	Exc. 2007; Exc. 967
34	7/3/91	Alec Brindle (Wards Cove)	Don Rawlinson (Peter Pan)	Exc. 1203; Exc. 1016-17
35	7/3/91	Alec Brindle (Wards Cove)	Trevor Beeston (Nelbro)	Exc. 1203; Exc. 1016-17
36	7/3/91	Don Rawlinson (Peter Pan)	Alec Brindle (Wards Cove)	Exc. 1203; Exc. 1016
37	7/3/91	Bill Saletic (Peter Pan)	Chuck Bundrant (Trident)	Exc. 1114
38	7/7/91	Akio Shiokawa (NPPI)	Alec Brindle (Wards Cove)	Exc. 1204; Exc. 1018
39	7/7/91	Trevor Beeston (Nelbro)	Alec Brindle (Wards Cove)	Exc. 1204; Exc. 1018
40	1/29/92	Bob Barcott (Unisea)	Jon Black (Ocean Beauty)	Exc. 950-51
41	5/6/92	Alec Brindle (Wards Cove)	Bob Brophy (Icicle)	Exc. 1260; Exc. 1024
42	6/9/92	Bob Barcott (Unisea)	Norm Van Vactor (Peter Pan)	Exc. 1163-64; Exc. 954; Exc. 1145
43	6/26/92	Trevor Beeston (Nelbro)	Alec Brindle (Wards Cove)	Exc. 1272; Exc. 1025
44	1/13/93	Rob Rogers (Icicle)	Bob Barcott (Unisea)	Exc. 949
45	6/17/93	Trevor Beeston (Nelbro)	Alec Brindle (Wards Cove)	Exc. 1334
46	6/18/93	Alec Brindle (Wards Cove)	Bill Saletic (Peter Pan)	Exc. 1334
47	6/23/93	Trevor Beeston (Nelbro)	Alec Brindle (Wards Cove)	Exc. 1336
48	1994	Greg Blakey (Snopac)	Terry Gardiner (Norquest)	Exc. 1927-28
49	6/15/94	Alec Brindle (Wards Cove)	Peter Pan	Exc. 1400
50	6/19/94	Trevor Beeston (Nelbro)	Alec Brindle (Wards Cove)	Exc. 2011; Exc. 974
51	6/19/94	Trevor Beeston (Nelbro)	UniSea	Exc. 2011; Exc. 974

	DATE	CALLING PARTY	CALLED PARTY	EXCERPT OF RECORD
52	6/20/94	Trevor Beeston (Nelbro)	Snopac	Exc. 2011; Exc. 974
53	7/13/94	Trevor Beeston (Nelbro)	Peter Pan	Exc. 2012
54	7/13/94	Trevor Beeston (Nelbro)	Trident	Exc. 2012
55	7/14/94	Trevor Beeston (Nelbro)	Peter Pan	Exc. 2012
56	7/14/94	Trevor Beeston (Nelbro)	Wards Cove	Exc. 2012
57	7/15/94	Alec Brindle (Wards Cove)	Peter Pan	Exc. 1413; Exc. 1030
58	7/18/94	Trevor Beeston (Nelbro)	Diane Bundrant (Trident)	Exc. 2015; Exc. 975
59	1995	Robert Torres (NPPI)	Ivan Fox (Ocean Beauty)	Exc. 1923
60	2/8/95	Trevor Beeston (Nelbro)	Trident	Exc. 2017; Exc. 975
61	3/13/95	Ron Nebert (Ocean Beauty)	Robert Torres (NPPI)	Exc. 220-22
62	6/12/95	Ron Nebert (Ocean Beauty)	Bobby (Inlet Salmon)	Exc. 226; Exc. 215-16
63	6/18/95	Ron Nebert (Ocean Beauty)	Jill (NPPI)	Exc. 218-19
64	6/29/95	Alec Brindle (Wards Cove)	Trevor Beeston (Nelbro)	Exc. 1485; Exc. 1031
65	7/95	Trevor Beeston (Nelbro)	Virginia Ferrari (Woodbine)	Exc. 1058
66	1993-95	Alan Chaffee (YAK)	Terry Gardiner (Norquest)	Exc. 1925-26
67	1993-95	Alan Chaffee (YAK)	Terry Gardiner (Norquest)	Exc. 1925-26
68	1993-95	Alan Chaffee (YAK)	Terry Gardiner (Norquest)	Exc. 1925-26
69	1993-95	Bill Terhar (Ocean Beauty)	Terry Gardiner (Norquest)	Exc. 1925-26
70	1993-95	Bill Terhar (Ocean Beauty)	Terry Gardiner (Norquest)	Exc. 1925-26
71	1993-95	Bill Terhar (Ocean Beauty)	Terry Gardiner (Norquest)	Exc. 1925-26
72	1993-95	Chuck Bundrant (Trident)	Terry Gardiner (Norquest)	Exc. 1925
73	1993-95	Chuck Bundrant (Trident)	Terry Gardiner (Norquest)	Exc. 1925
74	1993-95	Chuck Bundrant (Trident)	Terry Gardiner (Norquest)	Exc. 1925
75	1993-95	Chuck Bundrant (Trident)	Terry Gardiner (Norquest)	Exc. 1925
76	1993-95	Chuck Bundrant (Trident)	Terry Gardiner (Norquest)	Exc. 1925
77	1993-95	Terry Gardiner (Norquest)	Vince Goddard (Inlet Salmon)	Exc. 1928
78	n/a	Bill Saletic (Peter Pan)	Alec Brindle (Wards Cove)	Exc. 1114

	DATE	CALLING PARTY	CALLED PARTY	EXCERPT OF RECORD
79	n/a	Bill Saletic (Peter Pan)	Trevor Beeston (Nelbro)	Exc. 1114; Exc. 979
80	n/a	Chuck Bundrant (Trident)	Trevor Beeston (Nelbro)	Exc. 963; Exc. 979
81	n/a	Don Rawlinson (Peter Pan)	John Gilbert (Wards Cove)	Exc. 1098
82	n/a	Don Rawlinson (Peter Pan)	Trevor Beeston (Nelbro)	Exc. 1098
83	n/a	Jay Cherrier (Dragnet)	Norm Van Vactor (Peter Pan)	Exc. 1145
84	n/a	Ken Fayer (Togiak/NPPI)	Peter Pan	Exc. 1932
85	n/a	Ken Fayer (Togiak/NPPI)	Wards Cove	Exc. 1932
86	n/a	Malcolm Wyer (Far West)	Harold Brindle (Wards Cove)	Exc. 1981-82
87	n/a	Malcolm Wyer (Far West)	Ron Nebert (Ocean Beauty)	Exc. 1982
88	n/a	Martin Clark (YAK or Snopac)	Norm Van Vactor (Peter Pan)	Exc. 1146
89	n/a	Marty Morin (All Alaskan)	Norm Van Vactor (Peter Pan)	Exc. 1145
90	n/a	Norm Van Vactor (Peter Pan)	Bob Barcott (Unisea)	Exc. 1147
91	n/a	Norm Van Vactor (Peter Pan)	Jay Cherrier (Dragnet)	Exc. 1147
92	n/a	Norm Van Vactor (Peter Pan)	Mark Carpenter (Ocean Beauty)	Exc. 1147
93	n/a	Terry Gardiner (Norquest)	Alan Chaffee (YAK)	Exc. 1928
94	n/a	Trevor Beeston (Nelbro)	Bill Saletic (Peter Pan)	Exc. 960; Exc. 979
95	n/a	Trevor Beeston (Nelbro)	Chuck Bundrant (Trident)	Exc. 960; Exc. 979
96	n/a	Trevor Beeston (Nelbro)	Don Rawlinson (Peter Pan)	Exc. 1099
97	n/a	Trevor Beeston (Nelbro)	Jon Black (Ocean Beauty)	Exc. 960
98	n/a	Trevor Beeston (Nelbro)	Rick Magill (Baypack)	Exc. 962; Exc. 984
99	n/a	Don Giles (Icicle)	Inlet Salmon	Exc. 135
100	n/a	Jay Cherrier (Dragnet)	n/a	Exc. 139

'85, '87
'84
'82, '86