

MUNDT MACGREGOR LLP.
A T T O R N E Y S A T L A W

Jay H. Zulauf
Henry Howard Happel, III
Wm. Paul MacGregor
J. David Stahl
Matthew L. Fick
Joseph M. Sullivan
Lisa Riveland Pagan

Janet H. Cheatham
OF COUNSEL

999 Third Avenue · Suite 4200
Seattle, Washington · 98104-4082

Telephone (206) 624-5950
Facsimile (206) 624-5469

November 3, 1999

John H. Chun
Christopher S. McNulty
Joe B. Stansell
Christopher R. M. Stanton
Libby A. Williams

Mr. Joel I. Klein
Assistant Attorney General
Antitrust Division
Department of Justice
Tenth and Constitution Avenue, N.W., Room 3109
Washington, D.C. 20530

SENT VIA FEDERAL EXPRESS

Re: Business Review Letter Request - Northern Victor Fleet
Cooperative

Dear Mr. Klein:

The managing owners of twelve fishing vessels that deliver Bering Sea/ Aleutian Islands pollock harvested from the "inshore" allocation to the processing vessel NORTHERN VICTOR, U.S. Official No. 248959, propose to form a shoreside fishery cooperative (the "Cooperative") pursuant to Section 210(b) of the American Fisheries Act (Division C, Title II of Pub. L. 105-277; the "AFA").

We do not believe the formation and operation of the Cooperative in anyway violates the antitrust laws. In fact, we believe the formation and operation of the Cooperative will be pro-competitive and help fulfill the conservation goals of the AFA. The Cooperative will have no ability or motive to restrict output because the volume of the allowable catch is determined by the National Marine Fisheries Service. The Cooperative will have no intention or ability to raise consumer prices because it will only process less than 4% of the BS/ AI directed pollock fishery total allowable catch. However, pursuant to Section 210(a) of the AFA and in an abundance of caution, on behalf of the vessel owners, we are hereby requesting that the Department of Justice provide us with its enforcement intentions with respect to the proposed activity described below.

1. Summary and Conclusions. The Bering Sea/ Aleutian Islands pollock resource is fully utilized and the fishery is overcapitalized. Fishery removals are limited to the "total allowable catch" ("TAC") established by the National Marine

Mr. Joel I. Klein
November 3, 1999
Page 2

Fisheries Service ("NMFS") on an annual basis. The AFA limits the class of catcher vessels eligible to harvest BS/ AI pollock from the inshore allocation to those that met specific landing requirements. See Section 208(a).

Vessels eligible to harvest BS/ AI pollock from the inshore allocation may form fishery cooperatives under Section 210 of the AFA. Duly formed cooperatives will receive an allocation of the BS/ AI pollock TAC equivalent to the aggregate percentage of the BS/ AI pollock TAC harvested by cooperative members during the years 1995, 1996 and 1997. Under the AFA, the "cooperative contract" must require that at least 90% of the cooperative's pollock allocation be delivered to the processor to which the member vessels delivered the predominance of their BS/ AI inshore pollock catch in the prior year. See AFA Sections 210(b)(1)(B) and 210(b)(6).

The Cooperative is intended to qualify as an AFA shoreside cooperative associated with the NORTHERN VICTOR. The Cooperative's purpose is to obtain an allocation under Section 210 of the AFA, and to facilitate a harvesting arrangement among its members, under which each of them will receive an individual percentage of the Cooperative's allocation. The Cooperative will not act as a marketing association. The Cooperative's activities are not expected to raise price or reduce output. Under these facts and circumstances, we respectfully submit that the Cooperative's proposed activities are properly analyzed under the rule of reason.

The Cooperative's harvesting arrangement will make it possible for its members to catch and deliver fish more efficiently, as they will be able to operate at optimal harvesting capacity and pace. The Cooperative will also enable the NORTHERN VICTOR to increase product recovery from the raw fish delivered to it. The Cooperative's proposed activities are expected to result in more products being produced from the same amount of fish at a lower unit cost. Because the vast majority of the NORTHERN VICTOR's pollock products are sold into the U.S. market in aggressive competition with other pollock processors, the effect should be pro-competitive with respect to the interests of the U.S. consumer. We respectfully request that the proposed activities be approved accordingly.

Certain provisions of the AFA can be read as requiring that a shoreside cooperative qualify under the Fishermen's Collective Marketing Act, 15 U.S.C §§ 521 et seq. (the "FCMA"). Because the Cooperative does not propose to conduct activities that constitute per se violations of antitrust law, it will not need a FCMA antitrust exemption. Therefore, while it may be appropriate to require the Cooperative to satisfy

the requirements of the FCMA as to its organization and operations, it should not be required to satisfy the vertical integration standards set forth in U.S. v. Hinote, which determine exemption eligibility. However, if a determination is made that the Cooperative must satisfy the Hinote standards, it should be found to do so. The nature of its proposed activities and the character of its vertical integration relative to the functions historically performed by fishermen are not inconsistent with the intents and purposes of the FCMA.

2. Northern Victor Fleet Cooperative Characteristics. Enclosed are the following Cooperative documents:

- Articles of Incorporation;
- Bylaws; and
- Membership Agreement.

a. Cooperative Member and Processor Ownership. The ownership of the processing vessel NORTHERN VICTOR and the catcher vessels that propose to participate in the Cooperative is as follows:

The NORTHERN VICTOR and the catcher vessels STORM PETREL, COMMODORE, ANITA J, HALF MOON BAY and SUNSET BAY all have the same ownership structure. In each case a 51% majority interest is owned by two companies: NV Investment Holdings I, Inc. (50.49%), and NV Investment Holdings II, Inc. (0.51%) (together, "NV Invest"). NV Invest is an investment vehicle for several large pension funds, has no investment from either the Kuttel family or the Johannessen family, and has no other connections to the Bering Sea and Gulf of Alaska fishing industry. NV Invest's role with respect to the vessels listed above is focused on decisions concerning major transactions such as asset purchases and financing.

Pacific Seafoods Investments I, LLC holds a 49% interest in the NORTHERN VICTOR, STORM PETREL, and COMMODORE. Pacific Seafoods Investments II, LLC holds a 49% interest in the ANITA J, HALF MOON BAY and SUNSET BAY. The members of both Pacific Seafoods limited liability companies are: Pacific Storm Petrel, Inc. (75%), which is owned by Peter J. Kuttel and other Kuttel family members; John Johannessen Victor, Inc. (12.5%), which is owned by John Johannessen and other Johannessen family members; and Lloyd J. Johannessen Victor,

Inc. (12.5%), which is owned by Lloyd Johannessen and other Johannessen family members.

Mr. John Johannessen also holds an ownership interest in Johannessen Enterprises, Inc. ("JEI"). JEI owns a minority interest in the catcher vessel ARCTIC WIND, which fishes for UniSea, Inc., a 40% interest in the ROYAL ATLANTIC, which delivers to the NORTHERN VICTOR, and is the sole owner of the POSEIDON, which delivers to the NORTHERN VICTOR.

To the best of our knowledge, there is no other overlapping ownership among the NORTHERN VICTOR and the catcher vessels that deliver to it. However, several of the catcher vessels have direct or indirect common ownership with other pollock processors. An entity owned by Mr. Kaare Ness owns 40% of the ROYAL ATLANTIC. Mr. Ness also owns stock in Trident Seafoods Corporation ("Trident"), which is the largest single processor of BS/AI pollock. While Mr. Ness has not informed us of the exact percentage of the Trident stock he owns, he has informed us that it is less than 25%, and that he has no involvement in the day-to-day management of Trident or the ROYAL ATLANTIC.

The PACIFIC FURY and the NORDIC FURY are owned by Fury Group, Inc. Mr. Stan Hovik is a shareholder of Fury Group, Inc. and of entities that own interests in the Bering Sea pollock factory trawlers ARCTIC STORM and ARCTIC FJORD. Mr. Hovik has no managerial or operational responsibilities in connection with the FURY vessels, the ARCTIC STORM or the ARCTIC FJORD.

The vessel GOLD RUSH is owned by Gold Rush LLC, which in turn is owned by entities that are owned by three long term Bering Sea fishermen, Messrs. Bill Jacobson, Michael Jones and Bert Ashley. While they have ownership interests in other fishing vessels, none of these gentlemen have direct or indirect ownership interests in or management authority over a pollock processor.

The vessel EXCALIBAR II is owned by Excalibar II LLC, which is in turn owned by Messrs. Bill Jacobson and Kent Lesley. Neither of these gentlemen have an ownership interest in or management authority over a pollock processor.

The vessel COLLIER BROTHERS is owned by James A. and Sandra L. Schones. Neither of them holds an ownership interest in or management authority over a pollock processor.

b. Member and Processor Operations. Messrs. John and Lloyd Johannessen are fleet managers for the catcher vessels STORM PETREL, COMMODORE, ANITA J, HALF MOON BAY, SUNSET BAY, POSEIDON and ROYAL ATLANTIC. They recruit captains, insure crews are hired, and oversee vessel provisioning, maintenance and repair. Notwithstanding their ownership interest in the Pacific Seafoods Investments LLCs, neither John nor Lloyd are involved in management of the NORTHERN VICTOR.

The NORDIC FURY and the PACIFIC FURY are managed by Mr. Scott Hovik, who also serves as a vessel skipper. The GOLD RUSH and the EXCALIBAR II are managed under Mr. Bill Jacobson's direction. The COLLIER BROTHERS is managed by the Schones family.

The NORTHERN VICTOR is a pure processor, i.e., it does not catch any of the fish it processes; rather, it takes delivery of raw product from its fleet of catcher vessels. The NORTHERN VICTOR's primary activity is processing BS/ AI pollock. However, it has also processed Bering Sea crab and Gulf of Alaska salmon from time to time.

Mr. Peter J. Kuttel is ultimately responsible for NORTHERN VICTOR operations and product sales. Mr. Kuttel also represents the NORTHERN VICTOR in negotiating prices and other terms of its purchases from catcher vessels. Notwithstanding the Kuttel family's ownership interest in the Pacific Seafoods Investments LLCs, neither Mr. Kuttel nor any other members of the Kuttel family are involved in managing the catcher vessels that deliver to the NORTHERN VICTOR.

3. Cooperative Structure and Function. The Cooperative's purpose is to obtain an aggregate annual allocation of BS/ AI pollock pursuant to Section 210(b)(1) of the AFA, distribute that allocation among its members, and insure that members' fishing activities comply with the AFA's requirements. The only activities the Cooperative is intended to conduct are those necessary to implement a contractual harvesting arrangement among its members.

The collective activity conducted within the Cooperative is not intended to extend to processing, marketing or sales of product. The Cooperative's Articles of Incorporation specifically provide that under no circumstances is the Cooperative to engage in the sale of products or engage in price negotiations or other pricing activity.

See Article IV, Section G. Rather, such activity is expected to be conducted either on an independent basis between each vessel and the operators of the NORTHERN VICTOR, or through a separate, duly qualified fishermen's collective marketing association. See Membership Agreement, Section 10.

Further, distribution of the Cooperative's aggregate pollock allocation among its members is in accordance with the contribution that each member makes to that allocation. See Membership Agreement, Section 3. Therefore, the members' percentages are not the subject of negotiating activity within the Cooperative, but rather, are "pass-through" amounts that reflect the NMFS calculations as to each member vessel's catch history during the relevant base years.

4. AFA Background. In the recent past, the worldwide supply of groundfish has dwindled and the demand for Alaska pollock has increased. Increasing demand coupled with years of "open access" fishery management lead to overcapitalization of the BS/ AI pollock fleet. The result has been a seasonal race for fish, with each vessel striving to catch as much as possible before the quota harvest limits set by NMFS are reached.¹

The AFA was passed to address this situation. It eliminated certain vessels from the BS/ AI pollock fishery, changed the annual allocation among sectors of the industry, and set up a structure for forming fishery cooperatives. Cooperatives were expected to eliminate the race for fish by permitting their members to allocate percentages of the BS/ AI TAC among themselves, which could then be harvested at a rational pace that maximized value and recovery rather than sheer volume.²

At its simplest, an AFA shoreside cooperative could be premised on an agreement among the cooperative's members (who, under the AFA, must be owners of 80% of the vessels qualified to deliver to the processor) to (i) obtain a cooperative allocation; (ii) distribute it among themselves in proportion to their individual catch histories (on which the cooperative's aggregate allocation would be based under Section

¹ See generally "Market Impacts of the American Fisheries Act on the Production of Pollock Fillets", United States General Accounting Office Report to Congressional Committees and Requesters, GAO/RCED-99-196, June 1999 (the "GAO Report"); pages 1-4 (copy enclosed).

² See Id., pages 4, 7.

210(b)(1) of the AFA); (iii) establish a system to monitor each member's catch; and (iv) enforce the individual harvest allocations.

In addition, the AFA requires agreement on the part of the processor with which the cooperative is associated that it will process the cooperative's fish. See Section 210(b)(1)(B). However, the AFA does not require that the agreement between the processor and the cooperative members specify the price or other terms at which the members will sell and the processor will buy. The agreement with the processor need extend no further than a contractual commitment by the cooperative's members to deliver at least 90% of their allocation to the processor and a contractual commitment by the processor to process it. The terms and conditions of delivery and sale could be negotiated with the processor on a seasonal, annual or multi-year basis by individual members or a duly qualified marketing association acting as their agent, independent of the processor's AFA "agreement to process." Under this scenario, an AFA fishery cooperative need not be a vehicle for joint price or sales terms negotiations.

5. Antitrust Analysis. While the AFA contemplated formation of fishery cooperatives, it did not provide for their status vis-à-vis antitrust law. Rather, the AFA provisions regarding filing of "cooperative contracts" with the North Pacific Fishery Management Council (the "Council") and the provisions concerning shoreside cooperative formation, read together, imply that shoreside sector cooperatives are to be formed under the FCMA. See AFA Sections 210 (a) and (b).

In the absence of a specific AFA provision addressing shoreside cooperatives' antitrust status, we assume that a cooperative's proposed activities will be analyzed by the Antitrust Division under the draft "Guidelines for Collaboration Among Competitors" issued by the Department of Justice and the Federal Trade Commission on October 1, 1999 (the "Guidelines"). We also understand that the Department of Justice is in the process of preparing a legal opinion for NOAA General Counsel regarding the extent to which such cooperatives will be required to meet the standards of the FCMA. We respectfully propose an approach to that issue in Section 6, below.

When it is considered in the context of BS/ AI pollock fishery management, there is no reason to expect that the Cooperative's proposed activities will raise prices or reduce output. As noted above, the BS/ AI pollock fishery has been constrained for some time by the TAC limits set by NMFS. The fishery is further constrained by seasonal and area apportionments adopted to mitigate the effects of

fishery removals on Steller sea lions. Also, under both a license limitation program NMFS is implementing as of January 1, 2000 and the eligibility requirements of Section 208(a) of the AFA, the set of vessels eligible to harvest from the fishery is limited in number, and is closed to new entrants.

As a consequence of these government restraints, the raw resource output from the BS/ AI pollock fishery is already limited. The Cooperative's proposed harvesting arrangement will not further limit that output. Rather, the arrangement is intended to result in Cooperative receiving and its member vessels harvesting a pro rata share of the annual TAC equivalent to their percentage harvest in the years 1995, 1996 and 1997, pursuant to the AFA. We expect that the balance of each annual BS/ AI inshore pollock TAC will be harvested by other shoreside cooperatives. If one or more of the eligible fleets fail to form a cooperative, the related percentage of the TAC will remain eligible for harvest on an Olympic competition basis by all qualified shoreside catcher vessels that have not joined shoreside cooperatives. There is no reason to expect that such vessels would fail to harvest the entire pool of non-cooperative quota.

In the absence of any indication that the Cooperative's proposed activities will raise price or reduce output, the activities are properly analyzed under the rule of reason. Because it is a market allocation, we look first to determine whether it is "reasonably related to, and reasonably necessary to achieve pro-competitive benefits from, an efficiency-enhancing integration of economic activity." Guidelines, page 4.

The race for fish that characterizes the Alaska pollock fishery in the absence of such arrangements creates incentives to maximize catch volume rather than product recovery and value.³ From the perspective of the U.S. consumer, there are several adverse affects associated with harvesting on an Olympic competition basis from a common pool. The cost of catching the fish is unnecessarily inflated, because excess harvesting effort is employed to maintain a competitive edge. The percentage of finished product recovered from each unit of raw fish is less than optimal as the result of high throughput volumes. The pace of the fishery creates an incentive to produce surimi, which can be made quickly from a wide range of sizes of fish, rather than fillets, which take more time to produce, and are best made from large, consistently sized fish. This is important to U.S. consumers, as NMFS analyses completed as recently as August

³ See Hardin, Garret, 1968, The tragedy of the commons, Science, 162: 1243-48.

1998 showed that almost all U.S. fillet production is consumed domestically, while pollock surimi is primarily produced for export to Asia.⁴

By stopping the race for fish, cooperative arrangements address each of these adverse effects. By consolidating allocations, cooperative members are able to reduce harvesting effort to more efficient levels. Harvesting rates can be set to match the processing rate that maximizes product recovery and product quality, without losing a competitive advantage with respect to harvest volume. The type of products produced is less influenced by the need for speed, and more influenced by consumer demand. See GAO Report, page 7. Cooperative harvesting arrangements are therefore "reasonably related to achieving a pro-competitive benefit from an efficiency-enhancing integration of economic activity."

Are cooperative agreements also reasonably necessary to do so? As Hardin illustrates, the "tragedy of the commons" is that harvesting from a common pool of resources almost inevitably leads to overcapitalization and inefficient use. The classic method for dealing with this issue in the fisheries context has been adoption of some sort of governmental individual fishing quota ("IFQ") program.

However, that method is not available here, as the Magnuson-Stevens Fishery Conservation and Management Act currently prohibits the Council from adopting an IFQ. See 16 U.S.C. § 1853(d) (1999). Even if it had the option of adopting a pollock IFQ, given the political controversy associated with comparable programs adopted in the past, it is not clear the Council would do so. In the absence of some type of IFQ, there is no method we are aware of for obtaining the benefits associated with rational fishing activity in the BS/ AI pollock fishery, other than through a cooperative harvesting agreement.

Based on the foregoing, the Cooperative's proposed activities are properly the subject of rule of reason analysis. The "central question" of that analysis is whether the relevant agreement likely harms competition by "increasing the ability or incentive

⁴ See Environmental Assessment/Regulatory Impact Review/Initial Regulatory Flexibility Analysis for Inshore/Offshore 3 (Amendments 51/51 to the Bering Sea/Aleutian Islands and Gulf of Alaska Groundfish Fishery Management Plans . . . respectively); Council, NMFS and Alaska Fishery Science Center Staff, August 26, 1998, Section 3.8 (copy enclosed).

profitably to raise price above or reduce output, quality or service below what likely would prevail in the absence of the agreement." Guidelines, page 4.

We respectfully submit that there is no indication that the Cooperative will raise prices or reduce output, quality or services. The Cooperative is not intended or structured to function as a marketing association on behalf of its members. Price and delivery volume negotiations between the NORTHERN VICTOR management and the managers of the catcher vessels that deliver to it will be conducted on the same terms and conditions as they have been in the absence of the Cooperative.

Further, even if the Cooperative harvesting arrangement made it possible for fishermen to obtain a higher price for the catch delivered by their vessels, neither the structure of the pollock market nor the NORTHERN VICTOR's position in that market suggest that the ex-vessel price increase would pass through to consumers of pollock products. The U.S. pollock product market is supplied by a diverse group of companies. Given the relatively large number of competitors, and the inherent efficiencies associated with the integration of harvesting and processing operations in the catcher/processor sector, it is reasonable to expect aggressive competition among pollock product producers. Further, the NORTHERN VICTOR's market share is relatively small. According to a NMFS analysis prepared in connection with another AFA issue, the NORTHERN VICTOR processed approximately 8.5% of the BS/ AI pollock inshore TAC in 1998 which is equivalent to slightly less than 4% of the BS/ AI directed pollock fishery TAC. We have been informed by NORTHERN VICTOR representatives that the vessel is not currently capable of processing a substantially higher percentage on a daily basis. However, under cooperative operations, it could process more on an annual basis.

As noted above, the Cooperative's proposed activities are expected to actually increase outputs and quality by eliminating inefficiencies associated with Olympic competition.

There is no indication that the Cooperative poses a problem with respect to the rule of reason's "central question". Therefore, under the analytic structure of the Guidelines, there should be no need to undertake a "pro-competitive vs. anti-competitive" balancing test under the rule. See Guidelines, pg. 4. However, there are several pro-competitive aspects to the Cooperative's proposed operations.

The NORTHERN VICTOR does not produce surimi. Its primary product is fillets. It also produces minced block and fish meal from pollock. The NORTHERN VICTOR's operators project an increase in fillet recovery (i.e., the amount of fillets made per unit of raw fish) under Cooperative operations of approximately 20%. The gain is expected to result from increased fillet yields achieved through tuning the processing line to Cooperative operations, and the ability to selectively target larger fish, which yield more fillet product per pound than smaller fish. In an aggressively competitive pollock product market, the production increase should have pro-competitive results with respect to the interests of U.S. consumers.

6. FCMA Standards. We recognize that the Act contains language that could be interpreted as requiring AFA shoreside fishery cooperatives be formed in compliance with the FCMA. However, even if the AFA is interpreted as doing so, we respectfully submit that determining which of those cooperatives must comply with the vertical integration standards of U.S. v. Hinote (823 F. Supp. 1350 (D.Miss. 1993)) should be a separate matter.⁵

As Mr. Douglas M. Fryer pointed out in his August 6, 1999 letter to Mr. Howard Blumenthal of the Antitrust Division, an association formed under the FCMA need not exercise all of the functions available to it.⁶ Therefore, it should not be

⁵ We have been informed by several parties who participated in the AFA development process that, notwithstanding the references to the FCMA in the Act, it was the explicit intent of the parties involved that all qualified shoreside catcher vessels be eligible to participate in shoreside coops, including the vessels owned by or in common with processors. We also understand that Senators Stevens and Gorton have confirmed this Congressional intent in a letter to the Attorney General.

⁶ Capper-Volstad cases are commonly considered valid precedent for purposes of construing the FCMA. See Hinote, footnote 4. Mr. Fryer cites the following Capper-Volstad cases in support of the proposition: Central California Lettuce Producers Cooperative, 90 F.T.C. 18, 1977 FTC Lexis 152, 182-83 (July 25, 1977), Northern California Supermarkets, Inc. v. Central California Lettuce Producer's Cooperative, 413 F. Supp. 984, 991 (N.D.Cal. 1976); Treasure Valley Potato Bargaining Association v. Ore-Ida Foods, Inc., 497 F.2d 203, 214-216 (9th Cir. 1974), cert. denied, 419 U.S. 999 (1974); United States v. Dairymen, Inc., 600 F.2d 192,194 (6th Cir. 1981); and Fairdale Farms v. Yankee Milk, Inc., 635 F.2d 1037, 1040 (2nd Cir. 1980), cert. denied, 454 U.S. 816 (1981).

necessary for an AFA cooperative to do more than provide the opportunity for fishermen to act together in "collectively catching" aquatic products to qualify as an FCMA association. See 15 U.S.C. § 521.

Hinote is a case concerning eligibility for an exemption from per se liability for price fixing. As demonstrated above, if a BS/ AI shoreside pollock fishery cooperative does no more than the minimum necessary under the AFA to obtain a cooperative allocation and facilitate a collective harvesting arrangement, it should qualify for and pass examination under the rule of reason. If it does so, it does not need an exemption from antitrust liability. Therefore, it should not be required to meet the Hinote standards.⁷

Relieving a fishery cooperative of the requirement that it satisfy the Hinote standards would not relieve it of other FCMA obligations. All members would be required to be engaged in the fishing industry, as fishermen. This requirement would prohibit a pure processor such as the NORTHERN VICTOR from being a member. The cooperative would be required to be operated for the mutual benefit of its members, and to satisfy the voting requirements, dividend requirements and limits on dealing in non-member products of Section 1 of the FCMA. Under both the rule of reason analysis and the per se/FCMA exemption analysis, the cooperative would be barred from monopolizing or restraining trade to the extent that prices were unduly enhanced, and it would be barred from predatory conduct.

On the other hand, the Cooperative should survive scrutiny even if the Hinote standards are determined to apply. The Hinote court identifies three factors to be considered in determining whether a vertically integrated person or entity may be a "fisherman" for purposes of availing himself/herself/itself of the FCMA's exemption to antitrust liability: (i) the nature of the producer's activities; (ii) the degree of vertical integration of the producer; and (iii) the functions historically performed by farmers (or fishermen) in the industry.

⁷ We recognize that shoreside cooperatives whose members propose to collectively negotiate prices, cooperatives that sell their members' catch, or cooperatives that otherwise conduct activities that constitute per se violations of antitrust law may find it necessary to qualify for the FCMA exemption. In those cases, we expect that application of the Hinote vertical integration standards would be appropriate.

The producer activity at issue in Hinote was price fixing, a "hard core" cartel agreement that is typically prosecuted criminally. The proposed producer activity in this case is conducting a collective harvesting arrangement in a regulated output setting, a pro-competitive, efficiency enhancing integration of economic activity.

The degree of vertical integration present in Hinote was extraordinary. The putative "farmers" or "fishermen" were subsidiaries of ConAgra and Hormel, each of which is described by the court as "large conglomerates with multi-billion dollar annual sales in the production of a wide variety of food products." Hinote, footnote 6. The subsidiaries purchased substantial amounts of catfish from independent growers, as well as producing products for themselves. The court found that the subsidiaries were acting as traditional "middlemen" from whom the FCMA was intended to protect fishermen.

The degree of vertical integration present among Cooperative members and the NORTHERN VICTOR is benign by comparison. The Johannessen and Kuttel families are certainly not comparable to ConAgra and Hormel in market position or character of their operations. The Johannessen family's upward integration was undertaken to obtain a market for their fishing vessels to replace the foreign flag vessel "joint venture" market that was phased out in the 1980's under the Magnuson-Stevens Fishery Conservation and Management Act's "Americanization" program. The Kuttel family's investment in the NORTHERN VICTOR catcher vessel fleet is characteristic of arrangements that are traditional in the fishing industry. It is not unusual for parties that invest capital in a fish processing operation to invest capital in the fleet that delivers to it. Rather, as Mr. Fryer points out on page 6 of his letter to Mr. Blumenthal of August 6, 1999, such investment was common at the time the FCMA was adopted.

The Johannessen and Kuttel vertical integration is also essentially distinguishable from that of Hormel and ConAgra in several other respects. There is no question that Hormel and ConAgra's primary interest was obtaining product from farmers/fishermen at the lowest possible price. Here, the success of the enterprise composed of the NORTHERN VICTOR and the fleet that delivers to it depends in large part on attracting and keeping highly skilled and successful skippers and crewmembers. The skippers and crew are compensated on a share system, under which they receive a percentage of the vessel's revenues as their wages. Therefore, there is a fundamental incentive in the enterprise structure to insure that the ex-vessel price is not depressed below fair market value.

Management responsibilities have been divided such that the Johannessen family manages catcher vessel operations and Mr. Peter Kuttel manages the NORTHERN VICTOR. Thus, notwithstanding the commonality of capital investment, the catching and processing aspects of the joint operation are independently managed and controlled.⁸ This lessens the risk that the catcher vessels would be operated purely for the benefit of the NORTHERN VICTOR.

Both the Johannessen and Kuttel families own substantial interests in the vessels that deliver to the NORTHERN VICTOR, and several Johannessen family members are employed in the fleet. They have a commensurate interest in seeing the vessels operate profitably.

The vertical integration associated with Mr. Ness's ownership of Trident stock and Mr. Hovik's ownership interest in entities that own the ARCTIC STORM and ARCTIC FJORD is minor, and not of a character that would be expected to affect the competitiveness of Cooperative operations. Neither Mr. Ness nor Mr. Hovik are involved in the day-to-day operations of either the fishing vessels or the pollock processing entities in which they hold an interest.

We respectfully submit that the degree of vertical integration represented by this cross-investment, when examined in the context of the nature of the Cooperative's proposed activities and the functions historically performed by fishermen, does not make the Cooperative's members "middlemen" from which the FCMA was intended to protect fishermen.

As noted above, the nature of the function being performed by the putative "association" in Hinote was fixing the price of finished products. The defendants were not acting as farmers or fishermen in doing so, but as processors. See Hinote 1359. On the other hand, the function to be performed by the Cooperative is facilitating a collective harvesting arrangement among its members. This activity is a well established activity of fishermen as fishermen.

⁸ As noted in section 2, above, we have been informed that NV Invest is owned by several large pension funds that have no involvement in management or operations of the NORTHERN VICTOR or the related catcher vessel fleet. Therefore, NV Invest's common interest in both is treated as "neutral" for purposes of the Hinote analysis.

Mr. Joel I. Klein
November 3, 1999
Page 15

MUNDT MACGREGOR LLP
ATTORNEYS AT LAW

Further, the members of the Cooperative have agreed that the harvesting arrangement will essentially be "transparent" with respect to the share each of them receives, i.e., each vessel will receive the percentage that is contributed to the Cooperative's aggregate allocation in connection with that vessel's catch history. The vertical integration between the NORTHERN VICTOR and the catcher vessel fleet therefore does not give the processor additional leverage in the allocation process.

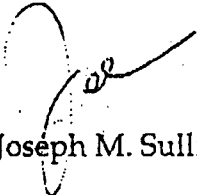
7. Conclusion. In summary, we respectfully suggest that the Cooperative's proposed activities are properly evaluated under the rule of reason for purposes of determining their compliance with antitrust law. We respectfully suggest that doing so leads to the conclusion that the Cooperative's proposed activities not only are unlikely to harm competition, but rather, are more pro-competitive than anti-competitive in nature when viewed with the interests of the U.S. consumer in mind.

We further suggest that the Cooperative's status as an FCMA association be measured with respect to its compliance with the FCMA itself, and that application of the vertical integration standards of the Hinote case is not necessary in this case. However, even if the Hinote standards are applied, we respectfully suggest that the Cooperative qualifies under the FCMA. The nature of the Cooperative's proposed activities, relative to the degree of vertical integration present and the functions historically performed by fishermen in the industry, do not suggest that result would be inconsistent with the intents and purposes of the FCMA.

Should you have any questions or concerns regarding this matter, or if additional information would be helpful, please feel free to contact me.

Very truly yours,

MUNDT MacGREGOR L.L.P.



Joseph M. Sullivan

JMS:mg

Enclosures

cc: Northern Victor Fleet Members

\\MUNDT\USERDOCS\MST\LETTERS\I.KLEIN(2)-2796-001A.DOC