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January 29, 1992

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DEPARTMENT OF JUSTICE
JAN 31 1992
ANTITRUST DIVISION
SAN FRANCISCO OFFICE

BRS  
ESC  
RBC

Department of Justice  
Director of Operations,  
Antitrust Division  
Room 3214  
Tenth and Constitution N.W.  
Washington, D.C. 20530

Re: **Fishermen's Marketing Association, Inc.**  
**Request for Business Review**

Dear Sir or Madam:

This firm represents Fishermen's Marketing Association, Inc. of Eureka, California. The purpose of this letter is to formally request, on behalf of our client, a written business review letter pursuant to 28 CFR 50.6.

I am enclosing a request for business review which includes a detailed description of the proposed business conduct, pertinent background information, an analysis of relevant statutes, and other relevant data.

In early January, 1991, Bill Burge of our office spoke with Lisa Phelan of your office concerning the business review procedure. Ms. Phelan referred him to Richard Cohen of the Department of Justice, Antitrust Division, in San Francisco, California. Mr. Cohen advised Mr. Burge that he is very familiar with the activities of Fishermen's Marketing Association and that this request is likely to be forwarded to him for review. In accordance with Mr. Cohen's request, we are forwarding a copy of this request directly to him.

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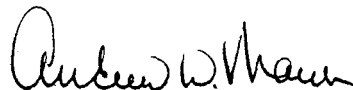
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Department of Justice  
January 29, 1992  
Page 2

Please contact the undersigned at (206) 682-3333 if you require further information regarding this request.

Very truly yours,

SHORT, CRESSMAN & BURGESS

A handwritten signature in cursive script, appearing to read "Andrew W. Maron".

Andrew W. Maron

WAB/vh

Enclosure

cc: Richard Cohen ✓

Peter Leipzig, General Manager

Fishermen's Marketing Association, Inc.

# REQUEST FOR BUSINESS REVIEW

## 1. INTRODUCTION

Pursuant to 28 CFR 50.6, Fishermen's Marketing Association, Incorporated ("FMA") requests an Antitrust Division business review and statement of intentions with respect to specific proposed business activities described below. FMA's proposed business conduct involves both domestic and foreign commerce. In accordance with 28 CFR 50.6, this request includes a full and true disclosure of FMA's proposed business conduct and all relevant data and background information known to FMA.

## 2. QUESTION FOR REVIEW

Whether the extension of FMA membership to Canadian fishermen that sell their catches to northern Puget Sound processors violates any antitrust law of the United States?

## 3. BACKGROUND

### A. FMA's Legal Status

FMA is a tax-exempt, nonprofit, trade association representing commercial trawlers located in Washington, Oregon and California. FMA's current bylaws (a copy is enclosed) extend membership to any owner, captain or deck hand of a commercial trawl vessel operating in those states. FMA negotiates collectively on behalf of its member-fishermen with processors of fish and shrimp to establish minimum prices for its members'

products. FMA enters into a Dealer Agreement (a copy is enclosed) with each processor which establishes the general terms and conditions of the parties' business activities.

Additionally, FMA and processors enter into a Market Order Price Agreement (a copy is enclosed) which establishes prices to be paid by the processor to FMA members for each species of fish delivered to the various ports. The Market Order Price Agreement is periodically modified upon a written proposal for price change submitted by either party and subsequent agreement to such change by the other party.

FMA was organized in 1952, as a result of passage of 15 U.S.C. §521 which expressly exempts fishermen's marketing associations from U.S. antitrust laws. Before enactment of 15 U.S.C. §521, individual fishermen lacked any real bargaining power and were forced to negotiate separately with a small number of relatively large fish processors. This resulted in destructive local price competition. Additionally, independent fishermen increasingly had to compete with government-subsidized foreign fishermen. The combination of these factors produced a disorganized industry, characterized by unstable prices ineffective marketing channels, low economic returns for fishermen and relatively high consumer prices. S.Rep 1108, 73rd Cong., 2nd Sess. (1934).

To address these conditions, 15 U.S.C. §521 was enacted to allow fishery industry cooperative associations, such as are provided for farmers by the Capper-Volstead Act, 7 U.S.C. §291.

Id. The act permits producers of aquatic products to form cooperative marketing associations to negotiate collectively with processors to obtain fair, stable prices and establish effective marketing channels for their products.

**B. Current FMA Membership**

Current FMA membership includes 600 west coast fishermen associated with 200 vessels. FMA membership is voluntary on the part of all eligible parties. Members are free to terminate their membership in the association after proper notice. During 1990, FMA members accounted for approximately 40% of all groundfish landings on the U.S. west coast. Although 27 of Washington state's 45 trawlers are FMA members, these members accounted for only 18% of all U.S. boat landings in Washington in 1990, and 22% in 1991. In the northern Puget Sound area, specifically, four of twelve Washington-based trawlers are FMA members.

**C. Current North Puget Sound Market Conditions**

Approximately 18 trawlers deliver their catches into the northern Puget Sound Washington ports of Blaine, Bellingham and Anacortes. Of these trawlers, 4 are FMA members, 8 are nonmember U.S. vessels and 4-6 are Canadian.

There are four processors in the northern Puget Sound area, two of which frequently purchase the catches of Canadian trawlers. One of these processors, Bornstein, dominates this market. Bornstein also operates receiving and processing facilities in Canada.

The 4-6 Canadian trawlers delivering to northern Puget Sound processors differ from their U.S. counterparts both in size and in harvesting practices. U.S. trawlers average 75 feet in length, and deliver a maximum of 40,000-50,000 pounds of fish per trip. U.S. policy is to manage the trawlfish harvest in an effort to provide a relatively constant workload for the fishing fleet and a consistent supply of regulated species to processors and consumers throughout the year. Canadian fishermen, on the other hand, utilizing trawl vessels averaging 100 feet in length and capable of delivering an average of 112,000 pounds of product, tend to harvest regulated species solely until reaching the limit for that species, and then switch over to the harvesting of unregulated species. Canadian trawl fishermen individually negotiate their selling prices with northern Puget Sound processors. While the price received by these fishermen is generally higher than that paid at Canadian ports, it is lower than that received by FMA and non-FMA U.S. fishermen at the same ports.

All of these factors contribute to unstable prices in the U.S. First, the increased capacity of a Canadian vessel on a single trip (112,000 average versus 40-50,000 average) enables its managers to sell at prices that are lower than those required by U.S. fishermen. Second, the Canadian practice of unrestricted harvesting of regulated species until a quarterly limit is exhausted tends to flood northern Puget Sound processors with product during these all-out harvesting times, resulting in

depressed prices and poorer quality. During these all-out harvesting times, the entire U.S. market frequently becomes overwhelmed with both processed and unprocessed fish. Prices after the limits are reached then tend to be significantly higher. This glut and drought cycle has a deleterious effect on processors, wholesales, utilities, users (e.g., restaurants), and consumers. Finally, independent negotiation of selling prices by each Canadian trawler creates an imbalance of bargaining power between the fishermen and the processors which further contributes to price instability.

As a result of these three interrelated factors, the northern Puget Sound processors have far greater access to inexpensive regulated species than their more southerly counterparts. In 1990, average groundfish prices in northern Puget Sound ports were the second lowest of any west coast port. Only the port of Crescent City, which processes more than half of the west coast's whiting, a very inexpensive fish not available in the northern Puget Sound area, paid a lower average price. This competitive advantage is then used by the northern Puget Sound processors to undersell the more southerly west coast processors, resulting in price instability in the entire U.S. market and depressing the prices received by U.S. fishermen.

#### **4. PROPOSED BUSINESS CONDUCT FOR REVIEW**

Some Canadian fishermen that currently deliver to northern Puget Sound processors have expressed a desire for FMA

membership. Therefore, FMA proposes to extend membership to the four to six Canadian trawlers which frequently deliver to northern Puget Sound ports.

## **5. LEGAL ANALYSIS**

### **A. The Federal Exemption for Fishermen's Marketing Cooperatives.**

U.S. antitrust laws prohibit competitors from combining or conspiring to fix prices, or otherwise restrain trade. Fishermen's marketing cooperatives are specifically exempt from the prohibitions of the antitrust laws by 15 U.S.C. § 521, which provides in relevant part:

Persons engaged in the fishery industry, as fishermen, catching, collecting, or cultivating aquatic products, or as planters of aquatic products on public or private beds, may act together in associations, corporate or otherwise, with or without capital stock, in collectively catching, producing, preparing for market, processing, handling, and marketing in interstate and foreign commerce, such products of said persons so engaged.

The term "aquatic products" includes all commercial products of aquatic life in both fresh and salt water, as carried on in the several states, the District of Columbia, the several territories of the United States, the insular possessions, or other places under the jurisdiction of the United States.

The difficulty in determining whether the exemption for fishermen's marketing cooperatives applies to an association which includes Canadian fishermen arises because of the definition of the term "aquatic products." That definition refers to "all commercial products . . . as carried on in the several states . . . or other places under the jurisdiction of



the United States." If this term is interpreted to mean that associations may only be comprised of fishermen catching U.S. product, then an association involving Canadian fishermen might not be permissible.

At the time of the passage of 15 U.S.C. §521, and until 1979, U.S. fishermen were permitted to fish in Canadian waters for processing in the U.S. Therefore, it seems unlikely that legislators intended the definition of "aquatic products" to exclude from FMA association membership those who do not fish in U.S. waters.

No interpretive case law has been located which addresses the permissibility of foreign membership under either 15 U.S.C. § 521 or the Capper-Volstead Act, 7, U.S.C. §291.

**B. Inclusion of Canadian Fishermen in FMA Will Not "Unduly Enhance" the Price of Aquatic Products.**

The immunity offered by 15 U.S.C. § 521 is not complete; the Secretary of Commerce is authorized to file a complaint to the extent that he finds the price of any aquatic product is "unduly enhanced" by reason of the activities of a cooperative association. 15 U.S.C. §522. (To FMA's knowledge, no such complaint has ever been filed.) In this case, allowing Canadian fishermen to join FMA will further the objective of the law, i.e., price stability and product availability for the consumer.

Extending FMA membership to Canadian fishermen will not "unduly enhance" the price of aquatic products for a number of interrelated reasons. First, extension of FMA membership to the

four to six Canadian trawlers that frequently deliver to northern Puget Sound processors would not increase FMA member landings in Washington state to more than 50% of the total.

Second, FMA, on behalf of its members, negotiates a "market order" or minimum price with processors on a species-by-species basis. This minimum price is modified periodically to reflect market conditions which are established by the activities of the market participants, including processors, wholesalers, distributors, retailers and consumers. Thus, severely competitive market forces limit FMA's ability to establish or to maintain minimum prices which are significantly above market prices.

Finally, FMA membership is voluntary and may be terminated upon proper notice. Even if market forces and non-member fishermen were unable to limit FMA's influence, members unable to sell their catches because of unreasonably high minimum prices would be sure to terminate their membership. These interrelated factors make it unlikely, if not impossible, for FMA to monopolize or "unduly enhance" the price for aquatic products.

### **C. Conclusion.**

15 U.S.C. §521 authorizes the combining of individual fishermen into marketing cooperatives which negotiate on behalf of their members with U.S. fish processors. The purpose for the enactment of 15 U.S.C. §521 was to stabilize prices paid by consumers and other market participants by providing fishermen a means to obtain fair economic returns, which, in turn, would

allow development of effective marketing channels.

Canadian fishermen delivering to U.S. processors in the northern Puget Sound negotiate their selling prices individually and generally receive prices below that received by FMA and non-FMA U.S. fishermen. These conditions create price instability and product uncertainty to consumers in the U.S. market and threaten the economic return of U.S. fishermen.

15 U.S. Code does not expressly prohibit inclusion of Canadian fishermen as FMA members. That statute's definition of "aquatic products" is inartfully drafted and could be interpreted to limit association membership to fishermen operating in U.S. waters. It is unlikely that the legislature intended such a restrictive interpretation given that U.S. fishermen were permitted to harvest Canadian fish at the time of the statute's enactment.

Inclusion of Canadian fishermen as FMA members, will not "unduly enhance" the price of aquatic products. Inclusion of the Canadian fishermen who frequently deliver to northern Puget Sound ports will not increase FMA landings to more than 50% of all Washington landings. Additionally, market forces, independent of FMA influence, limit FMA's ability to establish unreasonably high minimum prices. Finally, the voluntary nature of FMA membership ensures that minimum prices are established at levels which allow FMA members to compete with non-member U.S. and foreign fishermen.