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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT ANCHORAGE

TREFIM ANDREW, TIM ANELON, )  
GARY NIELSEN, HENRY OLYMPIC, )  
ABE WILLIAMS, and BRADEN )  
WILLIAMS, )

Plaintiffs, )

v. )

BRISTOL BAY REGIONAL )  
SEAFOOD DEVELOPMENT )  
ASSOCIATION, UNITED TRIBES OF )  
BRISTOL BAY, and SALMONSTATE, )

Defendants. )

Case No. 3AN-19-06026CI

~~PROPOSED~~ ORDER GRANTING STATE OF ALASKA'S MOTION FOR  
LEAVE TO PARTICIPATE AS AMICUS CURIAE #7

Having considered the State of Alaska's motion for leave to participate as amicus curiae in this matter, and any opposition:

IT IS ORDERED that the State of Alaska be allowed to participate as an amicus curiae in this matter. The brief lodged with the State's motion is deemed filed.

DATED May 17, 2019.

Yvonne Lamoureux  
The Honorable Yvonne Lamoureux  
Superior Court Judge

I certify that on 5/17/19 a copy  
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MAY -6 2019

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT ANCHORAGE

Trefim Andrew, Tim Anelon, Gary Nielsen,	)	
Henry Olympic, Abe Williams and	)	
Braden Williams,	)	
Plaintiffs,	)	
v.	)	
Bristol Bay Regional Seafood Development	)	
Association, United Tribes of Bristol Bay, and	)	
SalmonState,	)	
Defendants.	)	
		) Case No. 3AN-19-6026 CI

**ORDER GRANTING DEFENDANT BRISTOL BAY REGIONAL SEAFOOD  
DEVELOPMENT ASSOCIATION'S MOTION TO DISMISS [CASE MOTION #6]**

Plaintiffs filed the Complaint and Motion for Preliminary Injunction on April 1, 2019, arguing that Defendant Bristol Bay Regional Seafood Development Association ("BBRSDA") is acting outside of its statutorily limited purpose of promoting and marketing seafood by entering into contracts with Defendant United Tribes of Bristol Bay ("UTBB") and Defendant SalmonState to perform outreach, education, and technical review related to the Pebble Mine Draft Environmental Impact Statement ("DEIS"). BBRSDA filed a Motion to Dismiss and Opposition to the Motion for Preliminary Injunction on April 24, 2019, arguing that even assuming the facts alleged in the Complaint are true, it was not acting outside the scope of its authority because its activities in opposing the Pebble Mine promote its seafood products by preserving both the quantity of seafood harvestable and the quality or perceived quality of that seafood.

BBRSDA also argues that the statutory purposes of promoting and marketing seafood should not be read to impact BBRSDA's constitutional rights to free speech and freedom of association. For the reasons BBRSDA argues that Plaintiffs fail to state a claim for which relief can be granted, BBRSDA similarly argues the preliminary injunction should be denied. Defendant SalmonState filed a Concurrence in the BBRSDA's Motion to Dismiss and Opposition to Motion for Preliminary Injunction on April 26, 2019.

UTBB filed a Motion to Dismiss and Conditional Opposition to Plaintiffs' Motion for Preliminary Injunction on April 24, 2019, arguing that the claims against UTBB should be dismissed for lack of subject matter jurisdiction because it is an arm of its member tribes and has not waived sovereign immunity or consented to suit and that Plaintiffs cannot satisfy either the probable success on the merits test or the balance of hardships test used to determine whether a preliminary injunction is warranted.

Plaintiffs filed the Opposition to BBRSDA's Motion to Dismiss and the Opposition to UTBB's Motion to Dismiss on May 6, 2019. Plaintiffs also filed the Reply in support of the Motion for Preliminary Injunction on May 6, 2019. The State of Alaska filed an amicus curiae brief on May 6, 2019 arguing that the statutory text and legislative history regarding the establishment of regional seafood development associations ("RSDA") demonstrate that it was not the legislature's intent to allow RSDAs to contest industrial development that might have an effect on fish habitat. BBRSDA filed the Reply in Support of the Motion to Dismiss and Response to State of Alaska's amicus

brief on May 9, 2019. UTBB filed the Reply in support of UTBB's Motion to Dismiss on May 9, 2019. Oral argument was held on May 13, 2019.

After considering the written briefing and arguments of counsel, the Court grants BBRSDA's Motion to Dismiss.

## **I. Background**

Plaintiffs seek a preliminary injunction enjoining the performance of contracts entered into between BBRSDA and UTBB and between BBRSDA and SalmonState. Plaintiffs are members of BBRSDA, a nonprofit corporation formed under AS 44.33.065(a) for the limited purpose of "promoting and marketing Alaska seafood products harvested in the region." AS 44.33.065 allows for twelve seafood development regions to elect to create RSDAs to tax themselves in order to accomplish the purposes of the RSDAs. A seafood development tax is levied on fishery resources taken in a fishery if "the tax is approved by a majority vote of the eligible interim-use permit and entry permit holders in the fishery."<sup>1</sup> The Department of Revenue collects the seafood development tax, deposits it into the general fund, and then the legislature has authority to "make appropriations based on this revenue to the Department of Commerce, Community, and Economic Development ("DCCED") for the purpose of providing financing for qualified regional seafood development associations."<sup>2</sup>

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<sup>1</sup> AS 43.76.370(b)(1).

<sup>2</sup> AS 43.76.380(d).

The DCCED commissioner assists in and encourages the formation of RSDAs for organizations which meet the statutory criteria. Specifically, the organization must be established for the following purposes:

- (A) promotion of seafood and seafood by-products that are harvested in the region and processed for sale;
- (B) promotion of improvements to the commercial fishing industry and infrastructure in the seafood development region;
- (C) establishment of education, research, advertising, or sales promotion programs for seafood products harvested in the region;
- (D) preparation of market research and product development plans for the promotion of seafood and their by-products that are harvested in the region and processed for sale;
- (E) cooperation with the Alaska Seafood Marketing Institute and other public or private boards, organizations, or agencies engaged in work or activities similar to the work of the organization, including entering into contracts for joint programs of consumer education, sales promotion, quality control, advertising, and research in the production, processing, or distribution of seafood harvested in the region;
- (F) cooperation with commercial fishermen, fishermen's organizations, seafood processors, the Alaska Fisheries Development Foundation, the Fisheries Industrial Technology Center, state and federal agencies, and other relevant persons and entities to investigate market reception to new seafood product forms and to develop commodity standards and future markets for seafood products.<sup>3</sup>

AS 10.20.016 allows a member of a nonprofit corporation to assert in a proceeding that performance of a contract is invalid because the corporation does not have the power or capacity to enter into that contract, and a court may set aside and enjoin performance

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<sup>3</sup> AS 44.33.065(a)(1).

of the contract if the court considers it equitable.<sup>4</sup> Plaintiffs allege that BBRSDA entered into contracts with UTBB and SalmonState (“the Contracts”) which were outside of BBRSDA’s statutory enumerated powers because AS 44.33.065 limits the purpose of RSDAs to the promotion and marketing of seafood products.<sup>5</sup> Plaintiffs assert that the Contracts are not for promoting or marketing seafood products but are instead to “influence the permitting process and prevent the construction of Pebble Mine.”<sup>6</sup>

The contract between BBRSDA and UTBB, entitled the “Pebble Outreach and Permitting Process Engagement Project,” includes the stated purposes of (1) “outreach and education activities related to the the National Environmental Policy Act (“NEPA”) permitting process for the proposed Pebble Mine,” (2) “[e]ducating the public about how to contact state and federal officials to communicate their views on the Pebble Mine project, and assist the public in preparing testimony regarding the same,” (3) “successfully engag[ing] all stakeholders . . . with the ultimate goal of permit withdrawal or denial,” and (4) “engag[ing] area communities in the permitting process and others through social media and technology.”<sup>7</sup>

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<sup>4</sup> AS 10.20.016(b) (“The assertion may be made in a proceeding by a member or director against the corporation to enjoin the performance of an act or the transfer of real or personal property by or to the corporation. If the unauthorized act or transfer sought to be enjoined is being or is to be performed or made under a contract to which the corporation is a party, the court may, if the parties to the contract are parties to the proceeding and if the court considers it equitable, set aside and enjoin the performance of the contract. In so doing the court may allow compensation to the corporation or to the other parties to the contract for the loss or damage sustained by either of them resulting from the action of the court in setting aside and enjoining the performance of the contract. The court may not award anticipated profits to be derived from the performance of the contract as a loss or damage sustained.”).

<sup>5</sup> Mem. in Supp. of Mot. for Prelim. Inj. at 7.

<sup>6</sup> Compl. ¶ 18.

<sup>7</sup> Compl. ¶ 19.

The contract between BBRSDA and SalmonState, entitled “BBRSDA/CFBB Pebble Mine Draft EIS Technical Review Project” is for SalmonState to provide technical analysis and review of information in the Pebble Mine DEIS, with the goal of “convinc[ing] the Army Corps to require [Pebble Limited Partnership] to seriously consider several scenarios in a supplemental EIS.”<sup>8</sup>

## II. Legal Standard

Under Civil Rule 12(b)(6), “[a] complaint should not be dismissed ‘unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim’ that would entitle him to some form of relief.”<sup>9</sup> “To survive a motion to dismiss, a complaint ‘need only allege a set of facts consistent with and appropriate to some enforceable cause of action.’”<sup>10</sup> “[A] motion to dismiss under Rule 12(b)(6) is viewed with disfavor and should rarely be granted.”<sup>11</sup> When reviewing a motion to dismiss under Rule 12(b)(6), the complaint must be construed liberally and all factual allegations are treated as true.<sup>12</sup> When ruling on a motion to dismiss, courts generally do not consider matters outside the complaint.<sup>13</sup>

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<sup>8</sup> Compl. ¶ 20.

<sup>9</sup> *Larson v. State, Dep’t of Corr.*, 284 P.3d 1, 6 (Alaska 2012) (quoting *Guerrero v. Alaska Hous. Fin. Corp.*, 6 P.3d 250, 254 (Alaska 2000)).

<sup>10</sup> *Id.* (quoting *Guerrero*, 6 P.3d at 253–54).

<sup>11</sup> *Guerrero*, 6 P.3d at 253 (citing *Kollodge v. State*, 757 P.2d 1024, 1026 (Alaska 1988)).

<sup>12</sup> *Id.* at 253 (citing *Kollodge*, 757 P.2d at 1026).

<sup>13</sup> *Larson*, 284 P.3d at 7.

### III. Discussion

The parties agree that this dispute is one of statutory interpretation. Namely, the question of law is whether BBRSDA's acts of contracting with entities to gather technical information and engage in outreach to oppose the Pebble Mine is within the scope of BBRSDA's statutory purpose of "promoting and marketing Alaska seafood products harvested in the region." When interpreting a statute, courts consider its text, legislative history, and purpose to "give effect to the legislature's intent, with due regard for the meaning the statutory language conveys to others."<sup>14</sup> Courts begin with the text and its plain meaning, and use a "sliding-scale approach" to interpret the language.<sup>15</sup>

"[T]he plainer the statutory language is, the more convincing the evidence of contrary legislative purpose or intent must be." When "a statute's meaning appears clear and unambiguous, . . . the party asserting a different meaning bears a correspondingly heavy burden of demonstrating contrary legislative intent." If an ambiguous text is susceptible to more than one reasonable interpretation, of which only one is constitutional, the doctrine of constitutional avoidance directs [courts] to adopt the interpretation that saves the statute.<sup>16</sup>

#### A. The Text of AS 44.33.065

Plaintiffs argue that AS 44.33.065 "prohibits RSDAs from engaging in activities that are unrelated to the promotion of Alaska seafood."<sup>17</sup> BBRSDA argues that the text of the statute supports a broad definition of "promote" in light of the six enumerated

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<sup>14</sup> *Alyeska Pipeline Serv. Co. v. DeShong*, 77 P.3d 1227, 1234 (Alaska 2003).

<sup>15</sup> *State v. Planned Parenthood of the Great Nw.*, 436 P.3d 984, 992 (Alaska 2019) (citing *Ward v. State, Dep't of Pub. Safety*, 288 P.3d 94, 98 (Alaska 2012)).

<sup>16</sup> *Id.* (quoting *State v. Fyfe*, 370 P.3d 1092, 1095 (Alaska 2016)).

<sup>17</sup> Compl. ¶ 25; Mem. in Supp. of Mot. for Prelim. Inj. at 15.

purposes in (A)–(F) of AS 44.33.065(a)(1) and does not bar its capacity or authority to enter into the Contracts. Plaintiffs assert that the “promotion and marketing” of seafood products should be narrowly construed in light of the six enumerated purposes in (A)–(F) of AS 44.33.065(a)(1), which “do not allow an RSDA to take action for the purpose of environmental protection.”<sup>18</sup>

“Promote,” “promoting,” or “promotion” is not defined in any relevant statute. The plain meaning of “promote” incorporates both marketing and a broader notion of encouraging success or development. One dictionary defines “promote” as “4a: to contribute to the growth, enlargement, or prosperity of : FURTHER, ENCOURAGE . . . b : to help bring or help to bring (as a business enterprise) into being : LAUNCH c : to present (merchandise) for public acceptance through advertising and publicity.”<sup>19</sup> This definition is consistent with the common understanding that to promote a product, or industry, or business can include traditional marketing strategies, but that it also includes the broader concept of engaging to aid in the success of that product, or industry, or business without limitation to any particular method or means. There are broad associations that can be derived from the use of the term “promotion” throughout the statute. The statute’s text does not set the outer reaches of what conduct constitutes contribution to the growth, enlargement, or prosperity of Alaska seafood products

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<sup>18</sup> Pls.’ Opp. to Defs.’ Mot. to Dismiss at 5.

<sup>19</sup> *Promote*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1815 (1993).

harvested in the region. However, the statute is unambiguous in that RSDAs are not limited to conventional marketing strategies to achieve their goals.

The canons of statutory interpretation of *noscitur a sociis*,<sup>20</sup> *ejusdem generis*,<sup>21</sup> and *expressio unius est exclusio alterius*<sup>22</sup> provide little guidance in determining the legislature's intent as to the scope of "promotion." Plaintiffs would have the Court ignore the broader meaning of "promote" to limit its meaning to marketing merchandise through advertising and publicity. To do so would render "promoting" as written in the statute superfluous since "marketing" is already included as another, separate purpose of the RSDAs in AS 44.33.065(a).<sup>23</sup> The structure of AS 44.33.065 and the enumerated purposes in (A)–(F) of the statute demonstrate that "promoting" must have a separate and broader meaning than "marketing." For example, other goals listed in the subsections include education, research, and cooperation with other entities. The goal of "marketing"

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<sup>20</sup> See *Corkery v. Municipality of Anchorage*, 426 P.3d 1078, 1088 (Alaska 2018) ("Under the *noscitur a sociis* canon of statutory construction, the meaning of an ambiguous term 'may be ascertained by reference to the meaning of other words or phrases associated with it.'") (quoting *Olson v. Olson*, 856 P.2d 482, 484 n.2 (Alaska 1993)) (citing *West v. Municipality of Anchorage*, 174 P.3d 224, 228 (Alaska 2007)); SUTHERLAND STATUTORY CONSTRUCTION § 47:17, at 364–70 (7th ed. 2014)).

<sup>21</sup> See *Cable v. Shefchik*, 985 P.2d 474, 480 (Alaska 1999) (stating that pursuant to the statutory construction doctrine of *ejusdem generis*, "a general term . . . when modified by specific terms . . . will be interpreted in light of those specific terms, absent a clear indication to the contrary") (quoting *State Farm Fire & Cas. Co. v. Bongen*, 925 P.2d 1042, 1046 (Alaska 1996)); *Alaska State Emps. Ass'n v. Alaska Pub. Emps. Ass'n*, 825 P.2d 451, 460 (Alaska 1991) (defining *ejusdem generis* as "the general is controlled by the particular").

<sup>22</sup> *Cent. Recycling Servs., Inc. v. Municipality of Anchorage*, 389 P.3d 54, 59 (Alaska 2017) ("*Expressio unius* operates when 'a statute expressly enumerates the things or persons to which it applies.' The maxim embraces the negative implication, 'establish[ing] the inference that, where certain things are designated in a statute, all omissions should be understood as exclusions.'") (quoting *Ranney v. Whitewater Eng'g*, 122 P.3d 214, 218 (Alaska 2005)).

<sup>23</sup> See *State v. Thompson*, 435 P.3d 947, 955 (Alaska 2019) (courts "presume that no words or provisions in a statute are superfluous and that the legislature intended every word, sentence, or provision of a statute to have some purpose, force, and effect") (quotations and citations omitted).

is further fleshed out in subsections which specifically reference “sales promotion” (as distinguished from the standalone “promotion”) and the “preparation of market research and product development plans.”

AS 44.33.065(a)(1)(A) begins with the stated purpose of “promotion of seafood and seafood by-products that are harvested in the region and processed for sale.”<sup>24</sup> Plaintiffs attempt to emphasize the fact that AS 44.33.065 refers to “seafood” and “seafood products” instead of “fish” or “fish habitat” to draw the conclusion that the legislature only intended for RSDAs to be concerned with selling the product once it is flopping on the deck. That interpretation would render the enumerated purpose in (a)(1)(B) meaningless. Subsection (a)(1)(B) further expands the notion of “promotion” to capture non-marketing efforts of the RSDAs to include “promotion of improvements to the commercial fishing industry and infrastructure in the seafood development region.” Subsection (a)(1)(B) suggests that RSDAs can spend funds to improve the fishing industry in the region. Both “improvements” and “infrastructure” are undefined, and the plain text of the statute sets no limitations to their characterization separate from their plain meaning.

Subsection (a)(1)(C) provides for the “establishment of education, research, advertising, or sales promotion programs for seafood products harvested in the region.”

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<sup>24</sup> AS 44.33.065(a)(1)(A).

“Research” in subsection (a)(1)(C) means something broader than “market research” as that term is used in subsection (a)(1)(D). Subsection (a)(1)(D) further explains that marketing efforts include “preparation of market research and product development plans for the promotion of seafood and their by-products that are harvested in the region and processed for sale.”

Another purpose of RSDAs as listed in subsection (a)(1)(E) is to cooperate and contract with other public or private entities for programs of “consumer education, sales promotion, quality control, advertising, and research in the production, processing, or distribution of seafood harvested in the region.” Lastly, subsection (a)(1)(F) provides that another purpose of RSDAs is to cooperate “with commercial fishermen, fishermen’s organizations, . . . state and federal agencies, and other relevant persons and entities to investigate market reception to new seafood products forms and to develop commodity standards and future markets for seafood products.”

While AS 44.33.065(a)(1) lists the purposes of RSDAs, the plain text of the statute does not explicitly authorize or prohibit RSDAs from taking specific actions or otherwise governs use of their funds. Nothing in AS 44.33.065 specifies that a RSDA is not allowed to use its funds to state its opinion or oppose an effort that the RSDA believes would affect the quantity, quality, perceived quality, or price of its seafood products. Instead, the plain meaning of “promote,” along with the enumerated purposes of RSDAs in AS 44.33.065, allow for RSDAs to take steps to inform themselves and the public on their opposition to development projects that they believe could directly impact the

quantity and value of seafood products in their region. Nothing in AS 44.33.065 suggests that in promoting the growth of the fishing industry and seafood, RSDAs may not expend funds to research and oppose potential threats to fish habitat or seafood quality control, whether such concerns are real or perceived. AS 44.33.065 simply does not proscribe any specific method of promotion or marketing of seafood.

In addition, DCCED regulations are silent on the issue of what constitutes promoting and marketing. But the regulations expressly provide that state financial assistance under AS 44.33.065(d) cannot be used (1) to the disadvantage of an unrepresented seafood development region, (2) for price negotiations between fishers and processors, or (3) to pay lobbying expenses.<sup>25</sup> The DCCED regulations reflect that DCCED established clear restrictions on RSDAs' use of state financial assistance, none of which would restrict BBRSDA's challenged use of funds at issue in this case even if the funds constituted state financial assistance.

Interpreting the statute as restricting RSDAs' abilities to devote efforts regarding environmental concerns in their regions has the potential to produce some absurd results. For example, a RSDA could advertise and market its salmon as wild, pristine, and sustainable but would not be able to spend funds in a way to keep those brand identities authentic in its view or spend funds to signal to its consumers its efforts to maintain that

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<sup>25</sup> 3 AAC 149.080. The parties dispute whether state financial assistance includes the self-assessed tax that is ultimately distributed to the RSDAs by the Department of Revenue, or whether it only includes separate grants that are distributed. But it is undisputed that BBRSDA has not received grants and that BBRSDA is not engaging in any of the three activities prohibited by the regulation.

brand identity. Moreover, a RSDA could educate the public and consumers as to the sustainable qualities of the fish it harvests, but then take no action when the RSDA and the market view a threat to the sustainability of the fishery. A RSDA could create a labelling and quality-control standard, but then spend no funds to confirm that a proposed industrial development would not affect those quality-control standards even though a RSDA is allowed to promote “improvements to the commercial fishing industry and infrastructure in the seafood development region.” In that vein, under the Plaintiffs’ proposed reading of the statute, BBRSDA could spend funds to construct a barrier in the event of a tailings dam failure, but could not spend funds to comment on the construction of the tailings dam itself.

Plaintiffs’ interpretation of the statute would lead to the conclusion that BBRSDA is unable to spend funds to conduct a technical analysis to determine whether the Pebble Mine will affect the quantity, quality, and value of seafood in its region. Such an interpretation contradicts the express purpose of the establishment of research for seafood products harvested in the region under subsection (a)(1)(C). In addition, Plaintiffs’ interpretation of the statute would prevent BBRSDA from spending funds to provide comments to the DEIS to either prevent permitting of the mine, or allow permitting of a mine which would have a minimized potential impact on the resource its members harvest and sell. The plain meaning of the text of AS 44.33.065 does not support Plaintiffs’ narrow view of what RSDAs are authorized to do to promote seafood products and the commercial fishing industry in the region. BBRSDA’s decision to take steps it

views as protecting the resource that enables the commercial fishing industry and seafood products is consistent with the plain language of the statute expressing RSDAs' purpose of promoting the commercial fishing industry and seafood.

### **B. The Legislative History of AS 44.33.065**

The parties agreed at oral argument that none of the discussion in the legislative history of the bill creating RSDAs addresses the dispute at issue. Still, the parties and the State of Alaska in its amicus brief argue that the legislative history supports their respective interpretations.

BBRSDA asserts that the legislative history supports a broad reading of "promotion." Specifically, BBRSDA points to testimony of the bill sponsor, Representative Ogg, that RSDAs could "utilize those taxes for the development of their fishery resources in that region."<sup>26</sup> BBRSDA also cites to testimony of the bill sponsor that RSDAs "would provide a valuable tool for Alaska's commercial fishermen. Regional associations are able to focus on the unique areas where the fish are harvested, building on Alaska's reputation for pristine waters that yield superior fish."<sup>27</sup> BBRSDA suggests that these statements from Representative Ogg contemplate that RSDAs would be able to build on and defend the reputation of Alaska's seafood as coming from an unspoiled environment.<sup>28</sup>

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<sup>26</sup> Minutes, House Resources Comm. Hearing on H.B. 419, 23rd Legis., 2nd Sess. (March 5, 2004) (statement of bill sponsor Rep. Ogg).

<sup>27</sup> Minutes, House Finance Comm. Hearing on H.B. 419, 23rd Legis., 2nd Sess. (March 23, 2004) (statement of bill sponsor Rep. Ogg).

<sup>28</sup> BBRSDA Mem. in Supp. of Mot. to Dismiss at 12.

The State of Alaska cites the numerous times in the legislative history where testimony refers to the ability of the RSDAs to market their seafood, or advertise, or develop infrastructure to increase the value of the product.<sup>29</sup> The Court does not find that testimony particularly instructive, in that it simply reiterates the undisputed interpretation that RSDAs can market the seafood products harvested in their regions. Two notable portions of the minutes that the State of Alaska cites give some insight into the RSDAs' purposes and parameters. First, as noted previously, the testimony demonstrates that as development associations, RSDAs are allowed to use their funding for infrastructure improvements as part of their goals of promotion and marketing.<sup>30</sup> Second, the minutes and testimony demonstrate that the legislation was prompted in part by a threat to the commercial fishing industry by farmed salmon.<sup>31</sup> In that sense, the legislature appears to have contemplated that RSDAs could advocate for their natural resource as a contrast to the farmed salmon industry.

Given that the statutory text provides for a broad meaning of "promoting," the legislative history does not contradict that interpretation. The legislative history is silent on the issue of whether RSDAs can allocate funds in order to comment publicly on

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<sup>29</sup> Br. of Amicus Curiae at 11–15.

<sup>30</sup> Minutes, Senate Labor and Commerce Comm. Hearing on H.B. 419, 23rd Legis., 2nd Sess. (April 27, 2004) (statement of bill sponsor Rep. Ogg that "[t]his bill also gives [RSDAs] the power to provide an infrastructure for improvements like fish chillers for members' use"); *Id.* (statement of Jerry Mckune [sic] that "[t]his [legislation] will also allow fishermen to work with processors and others in the communities to put promotional programs together and get more value off the salmon and work on quality problems, such as installing ice machines in remote areas.").

<sup>31</sup> Minutes, House Finance Comm. Hearing on H.B. 419, 23rd Legis., 2nd Sess. (March 23, 2004) (statement of bill sponsor Rep. Ogg that "farmed salmon production has increased dramatically over the past decade, exceeding the wild salmon catch and causing prices to plummet.").

threats or perceived threats to their industry and brand. At most, the legislative history suggests that “promoting” is something more than presenting merchandise for public acceptance through advertising and publicity because allowing for infrastructure improvements enhances the quality of the product itself and is consistent with contributing to the growth, enlargement, and prosperity of the fishing industry and seafood products in the region.

### **C. The Purpose of AS 44.33.065**

The RSDA statutory scheme establishes a mechanism for fishers in a region to band together, tax themselves, and use those funds for their common interest of promoting the monetary value of the seafood products found and harvested in the region. AS 44.33.065 gives some guidance on the ways that goal can be accomplished, by promoting the product, by investing in infrastructure to preserve or increase the value of the seafood, by educating the public on the seafood, by researching the product, by advertising the product, by researching markets, and by cooperating with other entities for quality control measures and commodity standards. Read together, the provisions in the statutory scheme suggest an expansive range of methods and activities to increase the value of the seafood products and the livelihood of its members from the sale of those products.

The scheme does not proscribe any particular method of increasing or maintaining the value of the seafood. Consistent with that scheme, it is not outside BBRSDA’s power or authority to conduct technical research of a proposed mine which relates to and may

affect seafood in the region, to conduct outreach and advocacy on the same, or to participate and encourage others to participate in commenting on the DEIS as to the potential effect of the mine on their marketable seafood resource. The language and structure of the statutory text does not limit BBRSDA's promotional activities such that it is outside of its power to research the proposed Pebble Mine and participate and comment on the DEIS that assesses the potential impact of the mine on seafood products harvested in the region. BBRSDA's chosen methods of promotion in an effort to maximize both the abundance and value of seafood in its region via the Contracts appear consistent with and in furtherance of its purposes.

#### **D. Ultra Vires**

"A transaction is ultra vires when it is 'beyond the powers of the corporation as those powers are conferred by law and the terms of the articles of incorporation.'"<sup>32</sup> "The burden of proving ultra vires is on the party pleading it."<sup>33</sup> Plaintiffs argue that this case is like the Alabama case of *Blue Cross & Blue Shield of Alabama v. Protective Life Ins. Co.*, where the Alabama Court of Appeals held that Blue Cross acted outside the scope of its legislatively created powers to maintain a healthcare service plan for providers by

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<sup>32</sup> *Askinuk Corp. v. Lower Yukon Sch. Dist.*, 214 P.3d 259, 266 n.14 (Alaska 2009) (quoting Commentary on the Alaska Corporations Code, Senate–House Joint Journal Supp. No. 9 at 14, 1987 House–Senate Joint Journal).

<sup>33</sup> 7A FLETCHER CYC. CORP. § 3438 (citing *Kelley, Glover & Vale v. Heitman*, 44 N.E.2d 981, 983 (Ind. 1942); *Am. Employers' Ins. Co. v. H.G. Christman & Bros. Co.*, 278 N.W. 750, 753 (Mich. 1938)). See also *Conley v. Johnson*, 54 P.2d 585, 590 (Mont. 1936) ("The general rule of law is that there is a presumption that the acts of a corporation are not ultra vires.").

acquiring a life insurance company.<sup>34</sup> That case is not particularly instructive. BBRSDA is not a non-profit seeking to acquire a for-profit entity, nor is it analogous to say that because life insurance is not health insurance, opposing Pebble Mine is not promoting seafood products. Instead this is more like *Arkansas Unif. & Linen Supply Co. v. Institutional Servs. Corp* where the Supreme Court of Arkansas determined that it was reasonably necessary to carry out the purposes of a nonprofit hospital for the hospital to form a subsidiary to perform laundry service for itself and other hospitals.<sup>35</sup>

The parties do not articulate a particular standard for the Court to apply to determine whether BBRSDA has the capacity or power to enter into the Contracts. Still, under the various formulations referenced in the briefing and cases cited, BBRSDA's acts of entering into the Contracts can be reasonably construed as related to and furthering its statutory purpose of promoting and marketing seafood. Treating all facts alleged in the Complaint as true, Plaintiffs have failed to state a claim for which relief can be granted because Plaintiffs have not demonstrated that BBRSDA's acts are outside the scope of its powers as a nonprofit corporation formed under AS 44.33.065. Therefore, the Court does not consider it equitable under AS 10.20.016 to set aside and enjoin the performance of the Contracts.

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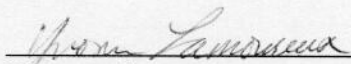
<sup>34</sup> 527 So. 2d 125, 128 (Ala. Civ. App. 1987).

<sup>35</sup> 700 S.W.2d 358, 361 (Ark. 1985).

#### IV. Conclusion

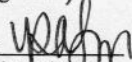
For the reasons stated herein, the Court grants BBRSDA's motion to dismiss for failure to state a claim upon which relief can be granted. Plaintiffs' claims are dismissed. Plaintiffs' motion for preliminary injunction is moot. UTBB's motion to dismiss for lack of subject matter jurisdiction is moot. Defendants are the prevailing parties and the Court orders that judgment will be entered in favor of Defendants. Motions for attorney's fees pursuant to Civil Rule 82(c) and a cost bill pursuant to Civil Rule 79(b) must be filed within ten days of the distribution of this order.

DATED this 17th day of May 2019, at Anchorage, Alaska.

  
\_\_\_\_\_  
Yvonne Lamoureux  
Superior Court Judge

I certify that on 5/17/19  
a copy of the above was served on:

D. Bledsoe  
S. Schirack  
S. Kendall  
M. Newman  
J. Geldhof  
D. Borghesan, W. Furlong, M. Condon

Pa Lee   
Judicial Assistant