IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

CONFEDERATED TRIBES OF SILETZ INDIANS OF OREGON, et al.,	)	
	)	CV 00-1693-PA
Plaintiffs,	)	
	)	
v.	)	
	)	
WEYERHAEUSER COMPANY,	)	**OPINION AND ORDER**
	)	
Defendant.	)	

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PANNER, J.

Following a two week trial, the jury returned a verdict in favor of Plaintiff Ross-Simmons Hardwood Lumber Co. on its claims for violations of the antitrust laws. Defendant Weyerhaeuser Company then filed a Renewed Motion for Judgment as a Matter of Law ("JMOL") and alternative Motion for New Trial. I deny both motions.

Defendant's Renewed Motion for Judgment as a Matter of Law

Legal Standards

Judgment as a matter of law is proper if the evidence, construed in the light most favorable to the nonmoving party, permits only a conclusion contrary to the jury's verdict. Rivero v. City & County of San Francisco, 316 F.3d 857, 863 (9th Cir. 2002). Although the court should review the record as a whole, it must disregard evidence favorable to the moving party that the jury is not required to believe, and may not substitute its view of the evidence for that of the jury. Johnson v. Paradise Valley Unified Sch. Dist., 251 F.3d 1222, 1227 (9th Cir.2001).

Discussion

Defendant contends it is entitled to JMOL because (1) the damages award was premised on a flawed model, hence the award was "inherently speculative as a matter of law," (2) Plaintiffs failed to establish certain facts essential to proving and quantifying their damages, and (3) the damages award is fatally flawed because the model on which it is based fails to account for conduct by Weyerhaeuser that is not anti-competitive as a matter of law.

Defendant also purports to "renew[] its motion for judgment as a matter of law . . . for all of the other reasons previously argued" in this case, and to "renew[] and incorporate[] herein by reference" every argument that it asserted in any of its "motions for summary judgment, motions in limine, evidentiary and jury instructions objections, and motions for judgment as a matter of law." Defendant does not even list what those reasons are, let alone offer any argument specifically regarding those grounds. I decline to speculate as to what other arguments Defendant might wish to assert, or to consider any argument not specifically set forth, and fully argued, in Defendant's motion for JMOL. Cf. United States v. Montoya, 45 F.3d 1286, 1300 (9th Cir. 1995) (issues not "specifically and distinctly raised and argued" in the opening brief need not be considered by the court).[1]

Defendant's JMOL motion is thus premised entirely upon the contention that there was no valid basis for the jury to award any sum of damages to Plaintiff Ross-Simmons. Defendant has not sought JMOL on the ground there was insufficient evidence to support the jury's finding of liability (apart from the element of damages). Defendant also has not requested a new trial on the ground that the damage award was excessive, nor asked the court to order a remittitur. Rather, Defendant has placed this court in the position of either affirming the damage award in its

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[1] Defendant's brief misstates, in part, the basis for some of the court's prior rulings, Plaintiffs' theory of the case, the evidence (which must be viewed in the light most favorable to the prevailing party), and the governing law. I will not take time to correct those errors here. The record, including the opinion denying Defendant's motion for summary judgment, will reflect what actually transpired.

entirety or else reversing the verdict outright and entering judgment for the Defendant.

Consequently, if there was evidence from which the jury could properly have awarded any measurable sum of damages to Plaintiff Ross-Simmons, then Defendant cannot prevail on its JMOL motion. A defendant may not obtain JMOL by arguing that the jury awarded more damages than was proven at trial, or because the damages model failed to exclude certain sums, unless the evidence was so speculative or otherwise flawed as to prevent any attempt at quantifying damages. For instance, if there was evidence from which the jury could have found with reasonable certainty that the Plaintiff sustained not less than $5 million (to arbitrarily pick a figure) in damages as a result of Defendant's unlawful conduct, then Defendant is not entitled to JMOL even assuming (for the sake of argument only) that the evidence of damages above that figure was less robust, or that the various damages models failed to exclude certain non-compensable sums above that amount. Plaintiff would be entitled to recover at least the $5 million in damages that it had proven.

A defendant can sometimes prevail on a JMOL motion that seeks to strike only a particular kind of damages (*e.g.*, punitive or consequential damages). Here, there was just a single line item for damages. Either plaintiff proved at least some quantifiable amount of compensatory damages, or else it did not.

Defendant's brief also errs by focusing upon "Scenario B." In deciding whether to submit Plaintiff's claims to the jury, the court had to consider all evidence before the jury that could

furnish a basis to make an award of some sum of damages, not just Scenario B. The precise damage figure eventually computed by the jury, or the particular method by which the jury may eventually have reached its result, is really not the issue. Had Scenario B been withdrawn as defective, the jury still could have awarded the Plaintiff at least some quantum of damages using other methodologies. Attacking Scenario B is, by itself, insufficient to entitle Defendant to judgment as a matter of law.[2]

Having presided over the trial, and having studied the parties submissions, I am satisfied there was sufficient evidence that Plaintiff Ross-Simmons suffered legally compensable antitrust injury as the result of Defendant's unlawful conduct for its claims to have been submitted to the jury. I am also satisfied that the record contains a legally and factually sufficient basis for the jury to award Plaintiff Ross-Simmons at least some measurable quantum of damages on its claims which were not "inherently speculative as a matter of law." Given the procedural posture of this motion, as framed by Defendant, it is unnecessary to decide whether the evidence was sufficient to support every last penny that the jury awarded. Defendant has requested an all-or-nothing decision here. Defendant's renewed JMOL motion is denied.

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[2] In addition, although someone did write "Scenario B" next to the damage award on the verdict form, it was not responsive to a question on the verdict form. The jury was not asked to explain how it arrived at its verdict. The words "Scenario B" were not part of the verdict read by the clerk in open court. When the jury was polled, the jurors were not asked whether those additional words were part of their unanimous verdict. It is surplusage that should be disregarded.

Defendant's Alternative Motion for a New Trial

Legal Standards

A motion for a new trial is directed to the sound discretion of the trial court. Kern v. Levolor Lorentzen, Inc., 899 F.2d 772, 778 (9th Cir. 1990). The motion may be granted if, *inter alia*, the first trial was unfair, prejudicial error was committed, or some other reason leads the court to conclude that the jury's verdict may be unreliable or there was a miscarriage of justice, notwithstanding that there was substantial evidence to support the jury's verdict. See Silver Sage Partners, Ltd. v. City of Desert Hot Springs, 251 F.3d 814, 819 (9th Cir. 2001); Oltz v. St. Peter's Community Hosp., 861 F.2d 1440, 1452 (9th Cir. 1988); Peacock v. Board of Regents, 597 F.2d 163, 165 (9th Cir. 1979). However, the district court may not grant a new trial simply because it would have arrived at a different verdict. Silver Sage Partners, 251 F.3d at 819.[3]

Discussion

Defendant engages in the same approach as in its JMOL motion, asserting that a new trial is required for a number of reasons, "some of which are discussed below." Defendant's Memorandum at 21. I will address only the reasons specifically listed and argued in Defendant's brief, and not speculate on what the other reasons might be.

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[3] Plaintiff's opposition brief frequently relies on the wrong legal standard, namely, the standard used by the court of appeals in deciding whether to reverse a jury verdict because of an erroneous evidentiary ruling.

A. Internal log transfers: Defendant contends I should have excluded all evidence concerning internal log transfer prices (*i.e.*, from one Weyerhaeuser mill or division to another). Alternatively, Defendant contends I should have instructed the jury those transfer were legal because "there is no law that requires a business to charge itself any particular internal price (or use any particular internal pricing method) . . . ."

That is an over-simplification. Something can be "legal" for one purpose or under one set of facts, yet give rise to liability in another circumstance. It is necessary to consider the reasons why this evidence was relevant.

Among other things, the jury could have found that Defendant was internally transferring lumber to its Longview mill, at below cost, to conceal or compensate for the fact that Defendant's Longview log buyers were paying excessive prices for logs purchased on the open market in order to keep Ross-Simmons from obtaining those logs. This might also support an inference that Defendant was deliberately trying to evade the antitrust laws and to conceal possible antitrust violations, *i.e.*, that there was wilful misconduct, and that Defendant's course of conduct described at trial was designed to be anti-competitive and to further its dominance in the relevant market and went far beyond ordinary means of competition.

Alternatively, the jury could find that the price discrepancy illustrates the difference between what Weyerhaeuser believed those logs were actually worth versus what it was paying for equivalent logs on the open market in order to prevent Ross-

Simmons from obtaining an adequate supply of quality alder saw logs at reasonable prices. This evidence must also be considered in light of all the other evidence at trial, *e.g.*, that Defendant was accumulating far more logs than necessary at its Longview mill, even while excessive inventory spoiled in the yard, and that Defendant allegedly overpaid by $20 million per year for logs as part of a scheme to deliberately deprive Ross-Simmons of logs or forcing it to operate at a loss by driving up its costs.[4]

Under the circumstances, Defendant's proposed instruction was misleading and incomplete, at best. It is not error for a trial court to refuse to give a proposed instruction that is incorrect or misleading. See Mitchell v. Keith, 782 F.2d 385, 388 (9th Cir. 1985). The jury was instructed on the definition of anti-competitive conduct, and could decide for itself whether the conduct at issue fell within that definition. Defendant was really requesting that the court comment upon the evidence, which I declined to do.

B. Failure to instruct the jury on "tying": Defendant contends I should have instructed the jury on the concept of

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[4] These facts help distinguish this case from Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986), which Defendant cited at oral argument. In Cargill, there was no suggestion that the defendants were deliberately overpaying for livestock, stockpiling excessive inventory, and letting meat rot, in a calculated effort to keep competitors from obtaining adequate supplies of beef at reasonable prices. Rather, any price increase in Cargill was the natural result of a more efficient competitor with lower operating costs, who was able to pay higher prices for raw materials coveted both by the defendants and their rivals. Likewise, any loss of market share and profits in Cargill would have resulted only from vigorous competition by a more efficient competitor. Weyerhaeuser insists this was the situation here too, but the jury found otherwise, and there was sufficient evidence to support that determination.

"tying," only to then tell the jury that this wasn't an issue in the case. Such an instruction would merely have confused the jury. No party argued "tying" as an antitrust concept in this case, nor did the instructions invite the jury to decide that Weyerhaeuser had engaged in illegal "tying" as that term is used in antitrust law.

To the extent this issue arose at all during the trial, it was in the context of Weyerhaeuser's refusal to buy softwood unless the seller also agreed to sell Weyerhaeuser its hardwood. That conduct bears upon Weyerhaeuser's alleged efforts to obtain and perpetuate a monopoly in the alder saw log market and to strangle its competition, and Defendant's motives. That evidence was relevant in deciding whether Weyerhaeuser had engaged in anti-competitive conduct, and the jury could properly consider it for that purpose.

C. "Expert" Testimony of Gordon Boyd: Defendant contends I erroneously let Gordon Boyd give "expert" testimony when he was offered only as a lay witness. If Boyd were just a hired gun retained specifically to offer an opinion at trial, that argument might merit greater consideration. However, any "opinions" he offered were premised on his personal involvement, *e.g.*, whether he could have obtained financing for a possible deal between Ross-Simmons and Coast Mountain, and whether Ross-Simmons would still be in business if its deal with Coast Mountain had been consummated. Boyd was a high-ranking participant in those transactions. That he also possessed business expertise does not automatically preclude him from testifying about events in which

he participated. The line between lay and expert testimony is not always as bright or rigid as Defendant suggests. Defendant also failed to properly preserve some of these objections, arguing only that the "[q]uestion calls for speculation."

D. The Threat Against Grant Wheeler. Defendant contends I erred by allowing Grant Wheeler to testify about threatening statements allegedly made to him by David Weyerhaeuser, a high-ranking Weyerhaeuser official, concerning what Weyerhaeuser would do if Wheeler went ahead with plans to open his own alder sawmill. While this testimony undoubtedly was "prejudicial" to Weyerhaeuser, it was not unfair prejudice, and it was highly relevant to the key issues in this case. Cf. United States v. Hankey, 203 F.3d 1160, 1172 (9th Cir. 2000) (relevant evidence is inherently prejudicial, but it is only unfair prejudice, substantially outweighing the probative value, that warrants exclusion of relevant evidence under FRCP 403).

E. "Hearsay" Testimony from Log Buyers. Defendant contends I erred by letting professional log buyers testify about out-of-court statements made to them by log suppliers (that Weyerhaeuser sometimes did increase its bid in order to trump a competing bid, contrary to the testimony of some Weyerhaeuser executives). These veteran log buyers simply told the jury what they had observed and heard during the usual course of conducting their business, and related their understanding of industry practices. This was the kind of information log buyers rely upon in the course of performing their job, and it was appropriate for the jury to hear that evidence, particularly in light of the

contrary assertions made by Weyerhaeuser executives. The log buyer's testimony regarding industry practices and increased bids was corroborated by other industry veterans, such as Bill Nelson.

Defendant had ample notice that this testimony would be offered, and countered with its own witnesses who denied that Weyerhaeuser ever increased a bid. It was for the jury to decide which testimony to believe.

F. Bill Nelson's "Antitrust Expert" Testimony: Defendant contends that I erroneously allowed Bill Nelson to offer an opinion regarding the scope of the "relevant market." Defendant did not cite, and I did not find, any place in the transcript where that term appears in Nelson's testimony or in the questions posed to him by Mr. Haglund. Even assuming that Nelson did testify regarding this subject, the scope of the relevant market is largely a factual inquiry he was qualified to address given his extensive experience in the industry.

Likewise, Nelson's opinion on whether log prices were inflated, whether Weyerhaeuser was able to affect prices or constrict supply, and his testimony regarding damages, were all largely factual questions that he was well qualified to address. An ivory tower economist can offer an opinion on this topic, derived through statistical analysis of data reported by other people, but that is not the only permissible source for such information. A proper foundation was established, the jury was told the basis for any opinion Nelson offered, and Defendant was given ample opportunity to examine and challenge his testimony, both on cross-examination and through its own witnesses.

G. The Alleged Bias of Cliff Chulos: Defendant complains that it was not allowed to cross-examine Cliff Chulos on the subject of his present company's relationship with Washington Alder, which sells wood to North American Wood Products.

Defendant did not just want to ask Chulos about Washington Alder. Rather, Defendant wanted to delve into the relationship between Washington Alder and Plaintiffs' lead counsel, Mike Haglund, ostensibly to show that Chulos might be motivated to give testimony favoring Haglund's client because Haglund was formerly an officer and shareholder of Washington Alder, which is a supplier for North American Wood Products. This line of questioning had minimal probative value. It also appeared to have been part of a calculated strategy by Defendant to distract the jury by making Mr. Haglund an issue in the trial. Defendant repeatedly sought to elicit information regarding Haglund, not just through Chulos but through other witnesses as well, including Mark Bamber. Defendant even proposed calling attorney Haglund as a defense witness.

Any limited probative value that might be derived from this line of questioning was greatly outweighed by the risk of unfair prejudice and the complications that may arise in a jury trial when the conduct of a party's attorney becomes an issue in the case. I permitted Defendant to show the circumstances under which Chulos left Weyerhaeuser, and to explore any bitterness he might harbor toward his former employer and toward Arnold Curtis and David Weyerhaeuser. Defendant was allowed to question Chulos about whether his present employer competes with Weyerhaeuser,

and even about allegations that Chulos had embezzled money. Defendant also presented testimony by Weyerhaeuser executives who sought to portray Chulos as mentally unstable and acting "bizarre" near the end of his tenure at the company. At some point, these attacks on his credibility became cumulative.

Precluding Defendant from inquiring about Washington Alder's supplier relationship with North American Wood Products did not deny Defendant a fair trial. Defendant was allowed to ask Chulos how long he had known Mr. Haglund and when they had first met. Chulos responded that they first met when his deposition was taken in this case. Defendant quickly dropped that subject.

This was a hard-fought case in which both sides were represented by very capable counsel. The jurors gave careful consideration to the testimony, instructions, and the arguments by both sides, as evidenced by the split verdict they reached. In any trial, let alone one lasting two weeks, there will be rulings with which one party or the other takes issue. However, I am satisfied Weyerhaeuser received a fair trial, and there was no miscarriage of justice. The motion for a new trial is denied.

Noerr-Pennington Doctrine

At oral argument on the post-trial motions, Defendant asserted that one specification of anti-competitive conduct in Plaintiffs' claims is barred by the Noerr-Pennington doctrine. Defendant never asserted that argument either prior to or during the trial, or in its post-trial motions, or even in its reply brief in support of its post-trial motions. Defendant candidly conceded this during oral argument on its post-trial motions:

> THE COURT: * * * Let me ask you this: Can't you waive a Noerr-Pennington argument? I don't recall that was ever presented to me before.
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> MR. SIMON: I don't know the answer to your first question. With respect to your second question, I believe, Your Honor, you are correct. And that is why I raise it to the attention of the Court right now, both as a constitutional argument and as -- under the argument of plain error and manifest justice.

May 29 Transcript, p. 21.

Defendant now makes the belated contention, in a post-argument memorandum, that it somehow hinted at this doctrine earlier in the case. I don't recall the hint. Defendant did object to the evidence and claims on a variety of other grounds, but never asserted the Noerr-Pennington doctrine, whether by name or otherwise, at any time during the proceedings.[5] Even Weyerhaeuser's motion for JMOL, at the close of all the evidence, argued only that the Plaintiffs had not proven the statements were intentionally false or had caused them harm. Defendant's Motion for JMOL (Liability) at 11. That is a far cry from invoking the Noerr-Pennington doctrine.

Throughout this case, Defendant was represented by very experienced antitrust counsel who are intimately familiar with Noerr-Pennington and know how to raise that issue if inclined to do so. That never happened.

Although the Noerr-Pennington doctrine arises in part from the First Amendment, "even constitutional rights can be waived if not timely asserted." Hill v. Blind Industries and Services of

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[5] It is therefore unnecessary to decide whether the Noerr-Pennington doctrine is an "avoidance or affirmative defense" within the meaning of FRCP 8(c).

Maryland, 179 F.3d 754, 758 (9th Cir. 1999), amended on denial of rehearing en banc, 201 F.3d 1186 (2000). I find that such a waiver occurred here.

I further find that it would be extremely prejudicial to let Defendant assert this argument for the first time at such a late date. As Defendant implicitly acknowledges by asserting this argument only in the context of its new trial motion, this is not a situation in which the Defendant would have been entitled to judgment as a matter of law. Plaintiff pled and offered evidence of other anti-competitive conduct by the Defendant. Had Defendant timely asserted the Noerr-Pennington doctrine as to some allegations and events, Plaintiff could have limited its claims and evidence, if necessary, and the court could have given the jury any required limiting instructions. By waiting until over a month after the end of a two-week trial to raise this issue for the first time, Defendant denied Plaintiff--and the court--the opportunity to avoid the alleged errors about which Defendant now complains.

Furthermore, even if the state lands transaction could not itself have been a basis for liability, evidence regarding that transaction would likely have been admissible for other purposes, such as showing market share, the extent of any log sources available to competitors, the scope of the relevant market or markets, the manner in which Weyerhaeuser allegedly obtained and maintained its monopoly, the company's motives and intent, and to impeach credibility. See United Mine Workers v. Pennington, 381 U.S. 657, 670, n. 3 (although the defendant could not be held

liable for certain conduct, evidence of those events might still be admissible for other purposes, such as to show the "purpose and character of the particular transactions [that were] under scrutiny"). Thus, the jury likely would have heard much of this same evidence regardless of whether Defendant had asserted a Noerr-Pennington defense.

To set aside the verdict, and order a new trial, would be unfair to the Plaintiff and represent a manifest waste of resources by both the parties and the court. It also would be disrespectful of the time and efforts of the jurors who devoted two weeks to this trial, and the many witnesses who traveled to Portland to give testimony. To the extent the Defendant has allegedly sustained any harm because its Noerr-Pennington defense was not considered, that wound was entirely self-inflicted.

Defendant also contends that, notwithstanding the late hour, the court should consider its defense under the "plain error" doctrine. I disagree. It is not clear that there was any error, let alone the sort of "plain error" that would warrant consideration of Defendant's argument at this late date. The parties have not fully briefed this issue, since Defendant first raised it after the briefing was complete, but the court's own research suggests that the allegations in question fall within the "fraud" exception to the Noerr-Pennington doctrine.

The Plaintiffs pled, and presented evidence, that Defendant knowingly made false statements to the Oregon Department of Forestry to obtain an exemption from log export regulations that allowed Defendant to obtain alder from state lands and, by

design, also had the effect of denying those same logs to the Plaintiff mills. There was evidence from which the jury could readily conclude that the misstatements were deliberate, the deviation from the truth was substantial, and the misstatements were intended to and did influence the outcome of that proceeding. The jury could also have found that these actions were not undertaken for legitimate business reasons but rather as part of a pattern of deliberate anti-competitive conduct.

The Noerr-Pennington doctrine seeks to reconcile the antitrust laws with the First Amendment right to free speech and to petition the government, to request modification of the laws, and otherwise "to make their wishes known to their representatives." See, e.g., Eastern R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 135-39 (1961). However, the First Amendment "has not been interpreted to preclude liability for false statements." Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240, 1261 (9th Cir. 1982).

In Walker Process Equipment Co. v. Food Machinery and Chemical Corp., 382 U.S. 172 (1965), the Supreme Court rejected a Noerr-Pennington-style defense to an antitrust claim premised upon enforcement of a patent that was procured by "knowingly and willfully misrepresenting facts to the Patent Office." Id. at 177. Similarly, in California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972), the Supreme Court observed that:

> There are many . . . forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations. Misrepresentations, condoned in the

> political arena, are not immunized when used in the adjudicatory process . . . . Insofar as the administrative or judicial processes are involved, actions of that kind cannot acquire immunity by seeking refuge under the umbrella of 'political expression.'

Id. at 512-13.

In Clipper Express, the Ninth Circuit applied the "fraud" exception to the intentional provision of false information to the Interstate Commerce Commission in connection with a rate proceeding. "We hold that the fraudulent furnishing of false information to an agency in connection with an adjudicatory proceeding can be the basis for antitrust liability, if the requisite predatory intent is present and the other elements of an antitrust claim are proven." Id., 690 F.2d at 1261. Unlike the "political sphere," in which statements are subject to public debate that may reveal their falsity, in the "adjudicatory sphere . . . information supplied by the parties is relied on as accurate for decision making and dispute resolving." Id. "Administrative bodies . . . seldom, if ever, have the time or resources to conduct independent investigations." Id. at 1262. "The supplying of fraudulent information thus threatens the fair and impartial functioning of these agencies and does not deserve immunity from the antitrust laws." Id. at 1261.[6]

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[6] Other circuits also have recognized a "fraud" exception. See Oberndorf v. City & County of Denver, 900 F.2d 1434, 1440 (10th Cir. 1990) (Noerr-Pennington does not provide immunity where legitimate lobbying efforts are accompanied by illegal or fraudulent actions); Wright v. DeArmond, 977 F.2d 339 (7th Cir. 1992) (Noerr-Pennington "does not exempt from the antitrust laws fraudulent appeals to judicial, administrative, or legislative bodies"); Westborough Mall, Inc. v. City of Cape Girardeau, Missouri, 693 F.2d 733, 746 (8th Cir. 1982) ("Noerr-Pennington "was not 'intended to protect those who employ illegal means to influence their representatives in government'").

In Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49 (1993), the Supreme Court clarified the "sham" exception. In the process, it left open the possibility that it might re-examine the "fraud" exception. Id. at 61, n. 6 ("We need not decide here whether and, if so, to what extent Noerr permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations").

Subsequent decisions from several circuits, including the Ninth Circuit, have assumed the continuing vitality of the "fraud" exception. See Hydranautics v. Filmtec Corp., 70 F.3d 533, 538 (9th Cir. 1995) (attempt to enforce a patent known to have been procured by intentional fraud is not shielded by Noerr-Pennington); Whelan v. Abell, 48 F.3d 1247 (D.C. Cir. 1995) (neither the Noerr-Pennington doctrine nor the First Amendment petitions predicated on fraud or deliberate misrepresentation); Cheminor Drugs, Ltd. v. Ethyl Corp., 168 F.3d 119, 124 (3d Cir. 1999) (a material misrepresentation that affects the very core of a litigant's case will preclude Noerr-Pennington immunity).

In Armstrong Surgical Center, Inc. v. Armstrong County Memorial Hosp., 185 F.3d 154 (3d Cir. 1999), another panel seemingly created an intra-circuit conflict, as the dissent noted. Id. at 164. However, Armstrong is distinguishable from the instant case because a decisive consideration was a finding that the agency knew there was a factual dispute, conducted its own independent factual investigation and made its own credibility findings, and there was ample opportunity for all interested parties to set the record straight. Id. at 163.

Armstrong carefully distinguished two other "fraud" cases in which the agencies were wholly dependent upon the antitrust defendants for the factual information on which the agency predicated its decision. Id. at 164, n. 8. The Armstrong majority also questioned whether the alleged misstatement was even material to the agency's decision. Id. at 163.

By contrast, the false statements in the instant case concerned the percentage of log consumption at Defendant's mills that was derived from state lands. There is little doubt that this information was material; it was the foundation for the exemption request. Only Defendant knew the true figures. The State did not know this information, nor did the Plaintiffs or any of Defendant's other competitors. The agency necessarily relied upon the information furnished by the Defendant, and it was unlikely that the falsity of that information would be revealed by "public debate." Indeed, a jury could find that this low risk of discovery was a principal reason why Defendant decided to risk submitting false data.

In Kottle v. Northwest Kidney Centers, 146 F.3d 1056 (9th Cir. 1998), the Ninth Circuit reiterated the Clipper Express distinction between fraud in a judicial versus a legislative forum, because the "political arena has a higher tolerance for outright lies than the judicial arena does." Id. at 1061. With regard to administrative proceedings, the breadth of the sham exception varies according to "our estimation of whether the executive entity in question more resemble[s] a judicial body, or more resemble[s] a political entity." Id.

This standard is difficult to apply here, as the parties had no occasion to make a record regarding that issue or to brief this question. The limited information in the record suggests that the decision to grant the exemption more closely resembled an adjudicatory decision, ruling upon an individual application for exemption as opposed to legislation prospectively impacting a broader class. Once again, though, Defendant's failure to timely raise this issue poses a serious obstacle to analyzing its Noerr-Pennington contentions, and weighs heavily in favor of deeming that defense to have been waived.

To summarize, Defendant waived its Noerr-Pennington argument by failing to timely assert it. The conduct in question also appears to come within the "fraud" exception to Noerr-Pennington. Regardless, the jury would have heard essentially the same evidence even if Noerr-Pennington had been timely asserted, and would likely have reached the same verdict. Finally, there was sufficient evidence to support the jury's verdict.

Conclusion

Defendant's renewed motion for judgment as a matter of law (# 242-1), and alternative motion for a new trial (# 242-2), are both denied.

IT IS SO ORDERED.

DATED this 5 day of July, 2003.

OWEN M. PANNER
U.S. DISTRICT JUDGE