UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

CLEAN WATER OPPORTUNITIES, INC. D/B/A ENGINEERED POLYURETHANE PATCHING SYSTEMS,	*	Case No. 16-227-JWD-EWD
Plaintiff,	*	
vs.	*	
THE WILLAMETTE VALLEY COMPANY,	*	
Defendant.	*	

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MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE AMENDED AND RESTATED COMPLAINT

The Willamette Valley Company ("Willamette") respectfully submits this Memorandum in Support of Its Motion to Dismiss the Amended and Restated Complaint filed on April 27, 2017. (Dkt. No. 34, the "Complaint" or "Cmplt.")

INTRODUCTION

Clean Water Opportunities, Inc. d/b/a Engineered Polyurethane Patching Systems ("EPPS") filed the initial complaint in this case on April 11, 2016 (Dkt. No. 1, the "Initial Complaint"). Willamette moved to dismiss the Initial Complaint pursuant to Rule 12(b)(6) for failure to state a claim. Dkt. No. 5. After full briefing, *see* Dkt. Nos. 5-1, 22, and 23, on March 30, 2017, the Court issued a Ruling and Order, Dkt. No. 33 (the "Prior Ruling"), which dismissed EPPS's antitrust tying claim with prejudice, dismissed its other claims without prejudice, and granted it leave to amend the complaint.

The Complaint adds new allegations, but they do not save EPPS's core predatory pricing claim. To the contrary, the new allegations strengthen the grounds for dismissal. First, EPPS's new allegations provide data points about prices—EPPS's, Willamette's, and what "the

competitive price for Patch 'A' should be," Cmplt. ¶ 51—which make it clear that EPPS cannot satisfy *Twombly*'s plausibility standard because they show that EPPS's conclusory allegation that Willamette engaged in "below-cost" pricing is utterly implausible. In addition, EPPS attempted to respond to the Court's invitation to make new allegations regarding barriers to entry by adding nine paragraphs that merely describe steps one must take to enter the patch business. Those new allegations fail, however, to respond to the Court's admonition that EPPS needs to "show[] that the alleged barrier affects a new entrant significantly more than the [alleged] monopolist." Prior Ruling, p. 4. Finally, the Complaint fails adequately to allege a relevant antitrust market because its market allegations disregard the applicable legal standards.

THE ALLEGATIONS OF THE COMPLAINT

Willamette sells "a variety of products and services" used by its customers to manufacture plywood and other wood products. Cmplt. ¶ 3(b). One of its products is "patch," or "polyurethane filling and patching materials," *id.*, used to fill in knot holes and other defects in the wood's veneer. During the manufacturing process, an operator applies patch with a handheld "patch gun" as the sheets of plywood pass by. *Id.* ¶ 5. Willamette, like other patch suppliers, also provides and services the metering, mixing, and application equipment used in this process, and the cost of that equipment and service is included in the per-gallon price of patch. *Id.* ¶ 6.

EPPS is a patch company owned principally by Mr. David Edwards. *Id.* ¶ 26. EPPS alleges that Willamette illegally monopolized a purported relevant market for patch sold in a geographic area defined by "a 500-mile, six-hour drive time radius around Baton Rouge, Louisiana." *Id.* ¶ 15. Although EPPS alleges there are "significant" barriers to entering the patch business, *id.* ¶ 17, the Complaint describes three, and arguably five, instances of such entry.

- In 1990, Mr. Edwards began a patch company known as EML Enterprises that served Texas, Arkansas, Louisiana, Mississippi, and Alabama. *Id.* ¶ 26. Ten years later, EML

was successful, "enjoying approximately 10 to 15 percent of the market share for this product in this region." *Id.* ¶ 26. Nonetheless, in July 2000, Mr. Edwards chose to sell his company to Willamette. *Id.* ¶ 28.

- Prior to EML's entry, Georgia Pacific, a large manufacturer of plywood and other wood products, self-supplied patch to its mills in the "Eastern Market," including Florida, Georgia, the Carolinas, the Virginias, Tennessee, Kentucky, and Ohio. *Id.* ¶¶ 12, 26. In the mid-1990s, however, Georgia Pacific chose to sell its "patent on Patch" to Willamette and stopped self-supplying patch to its mills. *Id.* ¶ 26.
- The Complaint recites that when EML entered the market in 1990, it competed with Champion Wood Products, but does not provide any details about when or how Champion entered the patch business. *Id.* ¶ 26.
- Sometime after 2000, C. Dale Bates Company, which sold other products to the wood products industry, expanded its product line to include patch and became "a viable competitor." *Id.* ¶ 29. C. Dale Bates then also sold its patch business to Willamette. *Id.*
- In 2013, Mr. Edwards re-entered the patch market, again from scratch, establishing "a new company, EPPS." *Id.* ¶ 30. He did so because he "determined that the industry would probably embrace a second source" and because he was "confident that he could make improvements to the equipment used to apply Patch and that he would be able to outperform [Willamette] in both production efficiency and the quality of the end result." *Id.* ¶ 31.

EPPS alleges that within a year after Mr. Edwards established his new company, a plywood manufacturer called MARTCO awarded it a contract to provide patch and the related equipment "for one of two production lines at the MARTCO plant," *id.* ¶ 32, which meant that

EPPS sold "approximately 10% of the Patch sold in the relevant geographic market." *Id.* ¶ 32. Although EPPS alleges that "the competitive price for Patch 'A' today should be approximately $10 per gallon," *id.* ¶ 51, it secured the MARTCO contract by "selling 'A' Patch for $15 per gallon," when Willamette allegedly charged $17. *Id.* ¶ 32.

A bidding war then ensued between EPPS and Willamette to provide patch to *both* of MARTCO's two plywood production lines. MARTCO told EPPS that it could "take over the second Patch production line if [Willamette] does not lower its price." *Id.* ¶ 33. Willamette did, however, lower its price. It competed. Specifically, after EPPS offered to supply MARTCO's two production lines under a "five-year contract for 'A' Patch at $12.90 per gallon," *id.*, Willamette "undercut EPPS." *Id.* ¶ 34. It did so by allegedly offering discounts on "all the items [Willamette] sold to MARTCO, other than Patch," *id.*, that EPPS did not sell, if MARTCO made Willamette the patch supplier for both production lines. *Id.* ¶ 35. EPPS does not allege that Willamette has monopoly power as to these other products, which include "edge seal[s], stencil ink[s], glue[s], extender[s], and sanding belt[s]. *Id.*

EPPS alleges that it "reasonably believes and avers that when the substantial discounts on all items sold by [Willamette] to MARTCO are considered"—meaning that if all the discounts on all the products are allocated entirely to MARTCO's patch purchases—"MARTCO was buying its Patch at a price below [Willamette's] variable cost to produce it." *Id.* ¶ 40.[1] EPPS alleges that as a result, it was "driven out of the Patch market." *Id.* ¶ 41. More specifically, allegedly faced with a choice between insolvency or selling EPPS's assets to Willamette, Mr. Edwards sold the assets. *Id.* ¶¶ 47-48.

[1] EPPS alleges, with far fewer facts, that Willamette offered "a similar discount agreement" to two other plywood manufacturers, Hood Industries and Coastal Plywood, *id.* ¶¶ 37, 44, but it does not allege that in those cases, Willamette's price for patch was "below [its] variable costs to produce it." *Id.* ¶ 40.

The Complaint contains four counts. Counts I, II, and III are brought under Section 2 of the Sherman Act, 15 U.S.C. § 2, for allegedly establishing and maintaining a monopoly in a relevant market. Count I is a "catch all" count that claims that Willamette's overall "acts, policies, and conduct" violated Section 2. *Id.* ¶¶ 56-58. Count II accuses Willamette of engaging in predatory pricing by selling patch to MARTCO below the cost to make it. *Id.* ¶¶ 60-61. Count III alleges that Willamette violated Section 2 by purchasing EPPS's assets and entering a non-compete agreement with Mr. Edwards. *Id.* ¶¶ 63-64. Count IV alleges that the same conduct addressed in Counts I through III violated the Louisiana Antitrust Statute, La. R.S. 51:122, 51:123, and 51:124(A). *Id.* ¶ 65-66.

STANDARD OF REVIEW

To withstand a motion to dismiss, a plaintiff must plead facts with enough "heft" to plausibly suggest that the plaintiff is entitled to relief. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). Factual allegations that are merely consistent with an antitrust violation "stop[] short of the line between possibility and plausibility of 'entitle[ment] to relief'" and are insufficient.[2] *Id.* at 556. When ruling on a Rule 12(b)(6) motion to dismiss, a court should not accept as true conclusory allegations, unreasonable inferences, or legal conclusions. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Varela v. Gonzales*, 773 F.3d 704, 707, 710 (5th Cir. 2014).

ARGUMENT

I. The Complaint Fails to State a Claim for Predatory Pricing.

As this Court has stated, "To succeed on a predatory pricing claim, a plaintiff must demonstrate: (1) the defendant's pricing is below an appropriate measure of its costs, and (2)

[2] The Supreme Court has cautioned that it is particularly important that the plaintiff in an antitrust case allege facts that state a plausible claim because "[t]he cost of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint." *Twombly*, 550 U.S. at 558 (internal citations and quotations omitted)

there is a dangerous probability that the defendant will recoup any losses sustained during the below-cost pricing period." Prior Ruling, p. 2 (citing *Big River Indus., Inc. v. Headwaters Resources, Inc.*, 971 F. Supp. 2d 609, 619; *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-24 (1993)). The Complaint, however, does not allege facts that plausibly suggest *either* below-cost prices *or* a dangerous probability of recoupment. Accordingly, EPPS's predatory pricing claim should be dismissed.

Both the Supreme Court and the Fifth Circuit have instructed lower courts to "approach[] a predatory pricing claim with great skepticism." *See* Prior Ruling, p. 2. There are two key reasons. First, as discussed below, a "predatory" price means the seller receives neither profit nor *any* contribution to fixed costs or overhead from the sale; *i.e.*, it loses money on each sale. This is a profitable strategy only if the seller can, sometime in the future, recoup its losses by sustaining prices well above competitive levels—a speculative proposition, at best. As the Supreme Court has said, "It is plain that the obstacles to the successful execution of a strategy of predation are manifold, and that the disincentives to engage in such a strategy are accordingly numerous." *Cargill, Inc. v. Monfort of Colo.*, 479 U.S. 104, 121 n. 17 (1986); *see also Brooke Group*, 509 U.S. at 226 ("predatory pricing schemes are rarely tried, and even more rarely successful . . .").

Second, a predatory pricing plaintiff argues, in essence, that prices should have been *higher* in order to protect it from its competitor's low pricing. But "the antitrust laws were passed for 'the protection of *competition*, not *competitors*.'" *Brooke Group*, 509 U.S. at 224 (Supreme Court's emphasis). "[C]utting prices in order to increase business often is the very essence of competition. Thus, mistaken inferences in cases such as this one [a predatory pricing claim] are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986). As the Fifth

Circuit stated, "The central difficulty with such [predatory pricing] claims is that the conduct alleged is difficult to distinguish from conduct that benefits consumers." *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 527 (5th Cir. 1999). And as the Seventh Circuit summed up, "[T]he goal of antitrust law is to use rivalry to keep prices low for consumers' benefit. Employing antitrust law to drive prices up would turn the Sherman Act on its head." *Wallace v. IBM Corp.*, 467 F.3d 1104, 1106-07 (7th Cir. 2006).

A. The Complaint Does Not Plausibly Allege That Willamette's Prices Were Below Incremental or Average Variable Cost.

In its motion to dismiss the Initial Complaint, Willamette did not discuss the sufficiency of EPPS's allegation of "predatory pricing." The new allegations in the Complaint, however, demonstrate that EPPS has not plausibly alleged that Willamette's prices were "predatory."

In *Brooke Group*, the Supreme Court held that a predatory pricing plaintiff "must prove that the prices complained of are below an appropriate measure of its rival's costs." 509 U.S. at 223. The Fifth Circuit has noted that the most "appropriate measure of cost" would be incremental cost—"the precise cost to the firm of producing the extra product that it is alleged to have sold below cost." But, because true incremental costs are generally difficult to ascertain from accounting records, an appropriate proxy is the average variable cost of production, which also excludes profits and contributions toward fixed and overhead costs. *Stearns Airport Equip.*, 170 F.3d at 532.

The Supreme Court has recognized that prices which are low, but above cost, can have the same devastating effect on a competitor as below-cost prices—they can drive that competitor out of business—but the Court specifically "rejected the notion that above-cost prices that are below general market levels or the costs of a firm's competitors inflict injury to competition

cognizable under the antitrust laws." *Brooke Group*, 509 U.S. at 223 (emphasis added).[3] Thus, below-cost pricing is an "essential component[]" of a predatory pricing claim. *Id.* at 206. Any price above incremental cost is not actionable.

The Complaint fails to plausibly allege that Willamette's prices were below its incremental or average variable cost. To be sure, EPPS alleges that it "believes and avers" that if all the discounts Willamette allegedly gave on all its other products are allocated entirely to MARTCO's patch purchases, "MARTCO was buying its Patch at a price below [Willamette's] variable costs to produce it." Cmplt. ¶ 40. The Court, however, should disregard this conclusory allegation, *Iqbal*, 556 U.S. at 678, which is manifestly undercut by the few specific factual allegations that the Complaint makes about prices. Specifically, the Complaint identifies five different prices, as follows:

Patch Price	**EPPS's Allegations**
$17/gallon	Willamette's pre-bid price to MARTCO (*Id.* ¶ 32)
$15/gallon	EPPS's pre-bid price to MARTCO (its price for providing "the patch and application equipment for one of two lines at the MARTCO plant") (*Id.*)
$12.90/gallon	The price EPPS offered for a 5-year contract for supplying patch to both MARTCO production lines (*Id.* ¶ 33)
$10/gallon	What the "competitive price for Patch 'A' today should be" (*Id.* ¶ 51)
Substantially < $10/gallon	A predatory price for Patch

The key prices are the last three. EPPS alleges that Willamette undercut its price of $12.90, the price it offered MARTCO for a five-year contract to supply patch to both of

[3] "As a general rule, the exclusionary effect of prices above a relevant measure of costs either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting." 509 U.S. at 233.

MARTCO's production lines. Cmplt. ¶ 34. EPPS also alleges that based on historical prices and inflation, "the competitive price for Patch 'A' today should be approximately $10 per gallon." *Id.* ¶ 51. But accepting that allegation as true, as the Court must, the only reasonable inference is that the incremental cost of patch is substantially below $10, because the "competitive price" of patch necessarily includes profit, fixed costs and overhead. Indeed, EPPS specifically alleges that in this industry, the per-gallon price of patch includes the cost of providing and servicing the metering, mixing, and application equipment used to apply patch to the plywood. *Id.* ¶ 6. As a result, even though the Complaint does not allege a precise incremental or average variable cost for a gallon of patch, the only reasonable inference from EPPS's allegations is that it would be substantially below $10.

EPPS has not plausibly alleged that Willamette's price to MARTCO was below its incremental or average variable cost of production. Assume, for example, that the incremental cost of producing the patch sold to MARTCO is, say, $7.00, meaning that only 30% of the "competitive price" goes to profit, overhead and fixed costs (including the cost of providing and servicing the application equipment). In that case, EPPS's allegation is that Willamette priced its patch to MARTCO at $7.00 (about 30% *below* the "competitive price") in order to respond to EPPS's bid of $12.90 (about 30% *above* the "competitive price").

That is utterly implausible. EPPS alleges no facts that would possibly explain why Willamette would price its product almost 50% below what was necessary to "undercut" EPPS's price to MARTCO. While predatory pricing claims are inherently implausible, EPPS greatly compounds that implausibility by alleging that Willamette recklessly and for no particular reason, caused its losses to mount. The Court should not, and is not required to, indulge such an implausible narrative.

Willamette does not contend that EPPS must know and allege Willamette's precise cost structure before filing a predatory pricing claim. Here, however, even though Mr. Edwards has a long history in the patch business, EPPS has not alleged *facts* about, for example, (a) the raw material cost of polyurethane, (b) the cost of mixing tubes, patch guns, and the like, (c) the cost of servicing a production line, or (d) or transportation costs, that might give some factual "heft" to its predatory pricing claim. Indeed, EPPS says nothing about its own incremental cost of patch. In short, EPPS alleges no *facts* to explain *why* it "believes and avers" that Willamette's prices were below the incremental cost of production. Under *Twombly*, a plaintiff must allege *facts* that plausibly suggest it is entitled to relief; it cannot rely on its own say-so. But say-so is all EPPS offers.

Ignoring EPPS's say-so, the only reasonable inference from the factual allegations regarding price is that Willamette quoted MARTCO a low, but above cost, price that "undercut" EPPS's price. But as *Brooke Group* held, such a price is not actionable under the antitrust laws, regardless of its effect on EPPS's business. Dismissal is therefore warranted.

B. The Complaint Does Not Plausibly Allege A Dangerous Probability That Willamette Could Recoup Alleged Predatory Losses Through Its Exploitation of Monopoly Power After the Hypothesized Predation Period.

As discussed above, a predatory pricing plaintiff must show, as an "essential component" of its claim, that after the plaintiff is driven out of business with below-cost prices (that benefit consumers), the monopolist will likely be able to charge monopoly prices for a sufficiently long period that it will "recoup[] its investment in below-cost prices." *Brooke Group*, 509 U.S. at 224; *see also Matsushita*, 475 U.S. at 588-89 ("For the investment to be rational, the [predator] must have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered"). As this court stated in *Big River Industries*, "The success of any predatory

scheme depends on maintaining monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain." 971 F. Supp. 2d at 619.

But such recoupment is not possible when barriers to entry are not significant. As the Fifth Circuit held in *Stearns Airport Equipment*, "If barriers to entry in an industry are low, new entrants into the industry will appear when the monopolist raises its prices, and the net effect of the campaign will be a loss to the predator … ." 170 F.3d at 530. Indeed, the Ninth Circuit stated in *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1208 (9th Cir. 1997), that "[e]ven a 100% monopolist may not exploit its monopoly power in a market without entry barriers."[4] The Fifth Circuit explained why in *Roy B. Taylor Sales, Inc. v. Hollymatic Corp.*, 28 F.3d 1379, 1388 (5th Cir. 1994): "In the absence of barriers to entry . . . , a competitor waiting on the sidelines can deny those in the market the power to control prices—because current players cannot exclude competition."[5]

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[4] *See also Oahu Gas v. Pacific Res.*, 838 F.2d 360, 366 (9th Cir. 1998) ("A firm with a high market share may be able to exert market power in the short run, but '[s]ubstantial market power can persist only if there are significant and continuing barriers to entry") (citations omitted); *United States v. Syufy Enters.*, 903 F.2d 659, 667 (9th Cir. 1990) (where barriers to entry are low, it is unlikely that a firm may attain monopoly power); Areeda and Hovenkamp, Fundamentals of Antitrust Law, 5.03[B] (when there are "low barriers . . . , we can have a 'monopolist' without any market power").

[5] It is widely recognized that while high market share in the relevant market is generally necessary for monopoly power, it is not sufficient because high market share does not always confer market power. *Topps Mkts, Inc. v. Quality Mkts, Inc.*, 142 F.2d 90 (2d Cir. 1998) (collecting cases: "A court will draw an inference of monopoly power only after full consideration of the relationship between market share and other relevant market characteristics"). As the cases cited above indicate, a market with low barriers to entry is a classic example. But a second example applies here as well. If a supplier sells a product that has a very high share of its market (Product A) to the same customers to which it sells other products which face meaningful competition (Products B, C, and D), it will likely be unable to charge monopoly prices for Product A because customers have leverage over the seller due its desire to sell Products B, C, and D as well. *See* Fed. Trade Comm'n & U.S. Dep't of Justice Horizontal Merger Guidelines (2010), § 8 ("The Agencies consider the possibility that powerful buyers may constrain the ability of the merging parties to raise prices."); *F.T.C. v. Ovation Pharms, Inc.*, FTC File No. 081-0156 (Dec. 16, 2008) (Rosch, concurring) (finding Merck could not sell a specific hospital-used drug with 100% market share at a monopoly price because Merck had a large product portfolio of hospital-used drugs and hospitals could refuse to buy Merck's other products if it attempted to exploit its monopoly over one specific product), *available at* https://www.ftc.gov/system/files/documents/public_statements/418091/081216ovationroschstmt.pdf. When sellers have good customer relationships, as is typical, this dynamic results from the natural course of negotiation ("what price will you charge me for monopolized product A if I buy B, C, and D from you instead of from your competitors?). Alternatively, it can result from a threat ("if you increase the price of A, I won't buy B, C, or D from you). Either way, the effect is the same: Product A's high share does not give the supplier the ability to charge supracompetitive prices for it. Here, of

This Court dismissed the predatory pricing claim in the Initial Complaint precisely because EPPS "failed to sufficiently allege facts showing that there are high barriers to entry." Prior Ruling, p. 5. EPPS has now added nine paragraphs that purport to address the barriers to entry issue, mostly by reciting steps a company must take to enter the patch business. Despite EPPS's prolixity on this subject, however, its conclusory allegations cannot make up for the failure of its factual allegations to plausibly show high barriers.

EPPS's amended "barriers to entry" allegations fail for three fundamental reasons. First, they ignore the specific meaning of "barriers to entry' in an antitrust case that this Court previously noted: EPPS must "show[] that the alleged barrier affects a new entrant significantly more than the monopolist," Prior Ruling, p. 4 (citing *Stearns Airport Equipment*, 170 F.3d at 530 ("[T]here must be a showing that in a particular industry the costs incurred by new entrants significantly exceed the [] costs incurred by the monopolist.")); *see also Los Angeles Land Co. v. Brunswick Corp*., 6 F.3d 1422, 1428 (9th Cir. 1993) ("The disadvantage of new entrants as compared to incumbents is the hallmark of an entry barrier.").

Second, EPPS's conclusory allegations about barriers to entry cannot be squared with other allegations that there has been entry in fact. Mr. Edwards himself has entered the patch business twice, once in 1990 and again in 2013. Tellingly, despite the Court's admonition to improve on the "barrier to entry" allegations, there is no allegation that Mr. Edwards' entry required intellectual property, unique expertise, or anything else not available to other potential entrants. In addition, the Complaint adds that C. Dale Bates Company entered the market after 2000, and demonstrates that large plywood manufacturers like Georgia Pacific have the option to self-supply patch. "'Repeated past entry in circumstances similar to current conditions' is 'reliable evidence of low [entry]

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course, EPPS has alleged that Willamette sells, to the same set of customers, both patch (which allegedly has a high market share), and a variety of other products and services (none of which are alleged to have high market shares). Cmplt. ¶ 3(b).

barriers.'" *See In re: Pool Prod. Distrib. Mkt. Antitrust Litig*., No. 2328, 2016 WL 3567059, at *12 (E.D. La. July 1, 2016), appeal dismissed (Oct. 27, 2016).

Third, EPPS's specific new allegations simply do not demonstrate barriers to entry.

- EPPS alleges that a new entrant would have to make, or have made, "metering and application equipment," as well as a "Patch gun" and "mixing tubes," because Willamette does not provide those items to its would-be competitors.[6] *Id.* ¶¶ 17-18. But Willamette has no obligation to help its competitors,[7] and the fact that one needs to make the products it wants to sell is not a barrier to entry; Willamette had to make the products it sells, and a new entrant should expect the same. In any event, these allegations parrot the allegations of paragraph 6 the Initial Complaint,[8] which this Court already found insufficient to allege meaningful barriers to entry. Prior Ruling, p. 4.[9]
- EPPS next alleges that a new entrant would have to "develop its own formula" for Patch "A" and pick from among "hundreds" of "off-the-shelf" products for Patch "B." Cmplt. ¶¶ 19-20. Again, an allegation that a new entrant must make (or have made, or select) the products it wants to sell does not demonstrate a significant barrier to entry; that logic would "impl[y] that there are barriers to entry, significant in an antitrust sense, in all markets." *Stearns Airport Equip.*, 170 F.3d at 531. EPPS also alleges that Patch "A" must

[6] EPPS alleges that "[t]he acquisition of mixing tubes" is a barrier because "there are only two companies that have the equipment to make them" and that in order to get a good price, the new entrant would need to "purchase a minimum of 10,000." Cmplt. ¶ 18. But there is no allegation that the two companies would not sell the tubes to a new entrant, no allegation that an order of 10,000 is out of line, and of course, no allegation that Willamette does not itself have to order a minimum of 10,000 tubes in order to get a good price.

[7] *Verizon Comm'ns Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 407-08 (2004) (alleged monopolists have no duty to help their competitors).

[8] "The patch seller not only provides the application equipment that is to be used by the purchaser's employees, but it also services said equipment." Initial Complaint ¶ 6.

[9] "Although Plaintiff alleges the fact a seller of patch must both supply and service equipment, this appears to present an issue for both new entrants to the market and for Defendant itself." Prior Ruling, p. 4.

meet certain performance requirements. Cmplt. ¶ 19. This adds nothing—having to make a product that actually works is not a barrier to entry, either—and in any event, there is no allegation that Willamette did not have to do the same. Likewise, EPPS complains about "the complexities of handling ISO," *id.* ¶ 20, but there is no allegation (and no reasonable inference) that Willamette does not face the same issues.

- EPPS next alleges that in order to obtain "APA approval," a patch supplier must test its products in the specific plywood mill in which it will be used. *Id.* ¶¶ 22-24. There is no allegation that Willamette did not have to do the same as part of its sales process.[10]
- Finally, EPPS alleges that Willamette's presence in the market is itself a "significant barrier to entry." *Id.* ¶ 25. This Court already correctly rejected this argument. Prior Ruling, p. 5 (" . . . Plaintiff's allegation that Defendant itself is a barrier to entry is unavailing."). Courts reject arguments that an alleged monopolist's effectiveness as a competitor creates a structural barrier to entry, *see Syufy Enters.*, 903 F.2d at 668, and to the extent EPPS means that Willamette could hypothetically create a barrier, it is misguided.[11] Entry conditions are assessed in an antitrust case to determine if the defendant will likely have the market to itself once it has driven out its competitor, *i.e.*, once the allegedly illegal conduct ceases. Accordingly, a plaintiff must demonstrate a barrier to entry *other than* the defendant's conduct. *Big River Indus.*, 971 F. Supp. 2d at 620 ("It is, in fact, the condition of the market following the defendant's removal of rivals to which courts should turn in analyzing [antitrust claims].")

[10] EPPS alleges that because of the disruption caused by a test, "no mill would allow a potential supplier to come in and test its material unless the mill was planning to use the supplier." *Id.* ¶ 23. Thus, the mill test is not a special barrier to entry; it is simply part of the sales process.

[11] Paragraph 25 of the Complaint alleges that "[Willamette's] mere suggestion to a customer that if it uses a competitor's brand then [Willamette] will no longer provide Patch to a customer" is a barrier to entry, but there is no allegation that Willamette ever made such a "mere suggestion."

In sum, the Court should dismiss the predatory pricing claim in the Complaint for the same reason it dismissed that claim in the Initial Complaint: EPPS has "failed to sufficiently allege facts showing that there are high barriers to entry." Prior Ruling, p. 5.

II. The Complaint Does Not Adequately Allege A Relevant Antitrust Market

"[A] claim for a violation of § 2 of the Sherman Act may be dismissed for failure to define the relevant market." Prior Ruling, p. 6.

A. The Complaint Does Not Adequately Allege The Product Market

In its Prior Ruling, the Court found that EPPS's naked allegation that patch is the product market was "not enough" because of EPPS's "failure to discuss economic substitutes for patch …." Prior Ruling, p. 6. In response, EPPS has added allegations about the quality differences between patch and "two other types of veneer repair"—wood plug and wood putty. Cmplt. ¶¶ 8-11. Relying on an American Plywood Association ("APA") guide, EPPS alleges that patch is technically superior to wood plug and putty; that it is "the only repair method for high production of sanded plywood," *id.* ¶ 11; and that therefore, "there are no market substitutes for Patch," *id.*

As an initial matter, determining the appropriate product market requires consideration of *all* reasonably interchangeable substitute products. Prior Ruling, p. 6 (citing *Big River Indust.*, 971 F. Supp. 2d at 617). EPPS's focus on solely wood plug and wood putty is, however, quite selective. The APA guide, on which EPPS relies, clearly identifies both patch (polyurethane) ***and*** epoxies, which the Complaint does not mention, in its list of "Approved Synthetic Material Suppliers" (attached as Exh. A).[12] And, a second APA publication (Exh. B) indicates that contrary to the suggestion in the Complaint, wood putty is approved for use in "'B' and Better

[12] In deciding a 12(b)(6) motion to dismiss, this Court can consider the APA materials setting forth standards for synthetic repair because they were "referred to in the plaintiff's complaint and are central to [its] claim." *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000).

Grade Panel Faces," suggesting that wood putty is used for at least some of the same applications as patch and epoxy. EPPS's selective consideration of a subset of patch substitutes dooms its Complaint. *Concord Assocs., L.P. v. Entm't Properties Trust*, 817 F.3d 46, 55 (2d Cir. 2016) ("[B]y arbitrarily excising those alternative options and essentially arguing that there are no comparable competitors, Plaintiffs exempt themselves from the requirement of defining the market according to the rules of interchangeability and cross-elasticity.") (citation omitted).

Moreover, EPPS's factual allegations do not support its conclusory allegation that patch is its own market. EPPS's allegations that there are technical or quality differences between patch, epoxy, putty, and plug does not mean that they are not in the same relevant market. Most markets include differentiated products.

> "Most courts correctly define the presumptive market to include similar products, though differentiated by brand or features. … Many machines performing the same function—such as copiers, computers, or automobiles—differ not only in brand name but also in performance, physical appearance, size, capacity, cost, price, reliability, ease of use, service, customer support, and other features. Nevertheless, they generally compete with one another sufficiently that the price of one brand is greatly constrained by the price of others.

Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law, ¶563a at 383-84 (3d ed. 2007); *see also H.J., Inc. v. Int'l Tel. & Tel. Corp.*, 867 F.2d 1531, 1540 (8th Cir. 1989) (submersible liquid manure pumps not in a separate market from other pumps even though submersible pumps had advantages); *Murrow Furniture Galleries, Inc. v. Thomasville Furniture Indus., Inc.*, 889 F.2d 524, 528 (4th Cir. 1989) (rejecting product market limited to high-quality furniture).[13]

[13] Similarly, the fact that patch might be preferred by some buyers or for some specific uses does not mean that it is its own market. "[T]he question is not whether one product is a perfect substitute for another . . . but rather, whether two products are 'reasonably interchangeable.' . . . [A] mere preference for a specific manufacturer's brand . . . is not sufficient for purposes of establishing a relevant product market." *McLaughlin Equip. Co., Inc. v. Servaas*, No. IP98-0127-C-T/K, 2004 WL 1629603 at *18 (S.D. Ind. 2004); *see also Global Disc. Travel Servs., LLC v. Trans World Airlines, Inc.*, 960 F. Supp. 701, 705-06 (S.D.N.Y. 1997) (Sotomayor, J.) (rejecting product market limited to travel on TWA, explaining argument was "analogous to a contention that a consumer is 'locked into' Pepsi because she prefers the taste, or NBC because she prefers 'Friends,' 'Seinfeld,' and 'E.R.,' . . . but at base, Pepsi is just one of many sodas, and NBC is just another television network" and consumers are not "locked in" to either.)

EPPS has simply not made allegations that go to the relevant product market issue, *i.e.*, whether there exists cross-elasticity between patch and other synthetic wood fillers, such that the price of one product constrains the price of others. *See Buccaneer Energy (USA) Inc. v. Gunnison Energy Corp.*, 846 F.3d 1297, 1313 (10th Cir. 2017). The APA documents on which EPPS relies suggest that wood putty and patch *are* interchangeable for at least certain uses, but then the Complaint provides no facts about the price of the possible substitute products vis-a-vis patch,[14] much less allegations of cross-elasticities.

EPPS's product market allegations therefore fail. As the court said in *PSKS, Inc. v. Leegin Creative Leather Prod., Inc.*, 615 F.3d 412, 417-18 (5th Cir. 2010), "[w]here the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient, and a motion to dismiss may be granted" (citation omitted).

B. The Complaint Does Not Adequately Allege The Geographic Market

EPPS offers two conflicting explanations for how it has defined the geographic market. First, EPPS says, "The geographic market for patch is limited by the location of mills that produce plywood that require Patch . . . ," *i.e.*, the customers' locations. Cmplt. ¶ 12. That allegation fails as a matter of law because it reflects an incorrect legal standard. The market is not defined by where the customer is located, but by "the market area . . . to which the purchaser can practicably turn for supplies." *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961); *see also Sidibe v. Sutter Health*, 667 F. App'x 641, 642 (9th Cir. 2016) ("the area where

[14] Plaintiff makes a fleeting comment that wood plugging is "cost/production prohibitive," *see* Cmplt. ¶ 9, but makes no mention of the price of wood dough/putty, *see id.* ¶ 10.

buyers can turn for alternative sources of supply") (citation omitted). Second, after defining three geographic market, EPPS takes a new tack, saying the markets are defined "by the location of [Willamette's] production facilities." Cmplt. ¶ 12 (emphasis added). But again, the market is not defined by where "a seller attempts to sell its product," *Tunis Bros. Co. v. Ford Motor Co*., 952 F.2d 715, 726 (3rd Cir. 1991), but by "how far consumers will go to obtain the product or its substitute in response to a given price increase." *In re Zinc Antitrust Litig*., 155 F. Supp. 3d 337, 378 (2nd Cir. 2016) (internal citations omitted).

EPPS's insistence on defining the geographic market by drawing big circles around its or Willamette's production facilities, instead of applying the proper legal standard, predictably leads to absurd results. As EPPS has defined the Eastern and Southern markets, the distance between a consumer and a manufacturing plant within one of the alleged markets can be greater than the distance between a consumer in one of the alleged geographic markets and a manufacturing plant in another. *See* Cmplt. ¶ 12 (assigning Alabama to the Southern Market and Georgia to the Eastern Market, even though customers in Alabama may be closer to Willamette's Georgia manufacturing plant than its Louisiana manufacturing plant.)

EPPS's geographic market definition fails because it reflects an incorrect legal standard.

III. Plaintiff's Claim, in Count III, That The Sale of Its Assets to Willamette Violated Section 2 of the Sherman Act Does Not State A Claim.

Count III alleges Willamette violated Section 2 of the Sherman Act by purchasing EPPS's assets and entering a non-compete agreement with Mr. Edwards, *id.* ¶¶ 63-64, the same claim EPPS made in Count III of its Initial Complaint (at ¶¶ 39-40). In the Court's Prior Ruling, it held this claim "will rise and fall with Plaintiff's predatory pricing claim" because in the absence of a viable predatory pricing claim, EPPS's "alleged injury from the sale of assets

cannot be considered antitrust injury to give Plaintiff standing."[15] Prior Ruling, p. 12. Because EPPS has not stated a viable predatory pricing claim, Count III must be dismissed.

IV. The Court Should Dismiss Count I, Plaintiff's Catch-All Count, and Count IV, Alleging Violations of The Louisiana Antitrust Statute.

Count I of the Complaint "realleges all the allegations" that go before and asserts that "[b]y such acts, practices, and conduct," Willamette violated § 2 of the Sherman Act. Cmplt. ¶¶ 56-57. This count should be dismissed for the same reason Count I of the Initial Complaint was dismissed: It is a "catch-all" claim that alleges nothing that is not in the other claims. *See* Prior Ruling, p. 13. If neither EPPS's predatory pricing claim nor its "sale of assets" claim is valid, adding them together does not magically transform them into actionable conduct. *See Eatoni Ergonomics, Inc. v. Research in Motion Corp.*, 486 F. App'x 186, 191 (2d Cir. 2012) ("[when] alleged instances of misconduct are not independently anti-competitive, we conclude that they are not cumulatively anti-competitive either").

Likewise, Count IV of the Complaint "realleges all the allegations" that go before and asserts that the "aforementioned acts of Defendant" violate the Louisiana Antitrust Statute. In its Prior Ruling, however, the Court noted that because the "parties concur that Louisiana antitrust law mirrors federal antitrust law, … the Court applies the same analysis here as it did with respect to Plaintiff's claims arising under federal law." Prior Ruling, p. 14. Accordingly, EPPS's Louisiana antitrust claims should be dismissed for the same reasons its federal antitrust claims should be.

[15] To suffer antitrust injury adequate to confer standing, EPPS must allege that (i) separate and distinct from the purchase of its assets, Willamette engaged in an antitrust violation that (ii) was the "'but for' cause of" of its injury. Prior Ruling, p. 11; *see Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1233-34 (6th Cir. 1981). Otherwise, EPPS suffered no injury that would satisfy the "aims of the antitrust laws necessary to establish standing." *Id.* at 1235.

CONCLUSION

For the reasons stated herein, The Willamette Valley Company respectfully requests that the Court dismiss the Amended and Restated Complaint.

Dated: May 22, 2017

Respectfully submitted,

s/Bradley C. Myers

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Memorandum of Law in Support of Defendant's Motion to Dismiss for Failure to State a Claim Under FRCP 12(b)(6) was filed electronically with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent to all counsel of record by operation of the Court's electronic filing system.

Baton Rouge, Louisiana, this 22nd day of May, 2017.

s/Bradley C. Myers
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