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

The Willamette Valley Company ("Willamette") respectfully submits this Reply Memorandum in response to Clean Water Opportunities, Inc., d/b/a Engineered Polyurethane Patching Systems's ("EPPS") Memorandum in Opposition to Motion to Dismiss the Amended and Restated Complaint (Doc.48, the "Opposition" or "Opp,").

I. EPPS Has Not Plausibly Alleged That Willamette Sold Patch to MARTCO at a Price Less Than Its Incremental Cost or Average Variable Cost of Production.

In its Opening Brief (Doc. 40-1), Willamette argued that EPPS has not plausibly alleged that Willamette's price to MARTCO was less than its cost of producing the patch it sold. EPPS responds that such an allegation is unnecessary because Willamette "can be guilty of predatory pricing even though its prices do not fall below its production cost," Opp. at 6, citing Ninth and Fifth Circuit cases from 1983 and 1988, respectively.[1] Those cases, however, predate the 1993 Supreme Court decision in *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, which expressly rejected the proposition on which EPPS relies, stating:

[1] *See Transamerica Computer Co. v. Int'l Bus. Machines Corp.*, 698 F.2d 1377 (9th Cir. 1983) and *Phototron Corp. v. Eastman Kodak Co.*, 842 F.2d 95 (5th Cir. 1988).

> Although *Cargill* and *Matsushita* reserved as a formal matter the question 'whether recovery should ever be available . . . when the pricing in question is above some measure of incremental cost,' the reasoning in both opinions suggests that ***only below-cost prices should suffice***, and we have rejected elsewhere 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.

Id. at 223 (citations omitted) (emphasis added); *see also Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 319 (2007) (stating that in *Brooke Group*, "we specifically declined to allow plaintiffs to recover for above-cost price cutting").[2] Presumably because of this "forceful" language, Areeda & Hovenkamp, Antitrust Law ¶737a (3d ed. 2010), Willamette can find no post-1993 case holding that a defendant violates the antitrust laws by offering a low price that is above its costs. And in any event, the Fifth Circuit has clearly stated that *Brooke Group* closed the door on "the possibility that prices above a monopolist's variable costs could be predatory under certain circumstances," *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 532 (5th Cir. 1999), as this Court has already recognized.[3]

Willamette submits that EPPS argued there is no requirement of below cost pricing because its allegations of such pricing are inadequate. EPPS does *claim* that it alleged "that Willamette was selling patch below its average variable cost," Opp. at 5, citing three paragraphs of the Complaint in which that naked assertion is made based on EPPS's alleged "reasonabl[e] belie[f]." Opp. at 5.[4] But the naked assertion that a defendant priced below cost is "entirely

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[2] Even before *Brooke Group*, other circuit courts had rejected this proposition, sometimes concluding that prices above cost are lawful *per se*. *See Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 233-34 (1st Cir. 1983) (J. Breyer); *see also Morgan v. Ponder*, 892 F.2d 1355 (8th Cir. 1989); *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 729 F.2d 1050, 1056 (6th Cir. 1983); *MCI Commc'ns Co. v. AT&T*, 708 F.2d 1081, 1123 (7th Cir. 1982).

[3] Ruling and Order (Doc. 33, "Prior Ruling"), p. 2 ("To succeed on a predatory pricing claim, a plaintiff must demonstrate: '(1) the defendant's pricing is ***below*** an appropriate measure of its costs . . .'")(citing *Big River Indus., Inc. v. Headwaters Resources, Inc.*, 971 F. Supp. 2d 609, 619 (M.D. La. 2013), and *Brooke Group*, 509 U.S. at 222-24) (emphasis added).

[4] *See* Amended Cmplt.(Doc. 34) ¶ 40 ("EPPS reasonably believes and avers that … MARTCO was buying its Patch at a price below WVCO's variable costs to produce it."); *id*. ¶ 50 ("… WVCO can … recoup its interim loss from

conclusory and unavailing" and cannot save a complaint. *Affinity LLC v. GfK Mediamark Research & Intelligence, LLC*, 2013 WL 1189317, at *4 (S.D.N.Y.), *aff'd*, 547 F. App'x 54 (2d Cir. 2013) (dismissing predatory pricing claim for failure to plausibly allege that the prices complained of were below cost when plaintiff cited only to its own costs).[5]

Here, EPPS fails to allege *any* facts that reasonably support its conclusory allegation that Willamette sold patch at less than cost. It alleges that it "belie[ves]" Willamette did so, but a plaintiff cannot satisfy *Twombly* by merely alleging its own belief. And, EPPS's pleading failure goes even deeper. As previously shown, EPPS alleges Willamette responded to EPPS's $12.90 price with a price far below $10; *i.e.*, assuming a $7 cost of production, Willamette allegedly offered a price about 50% less than what it took to win the business. Opening Brief at 8-10. Those allegations are utterly implausible, and in its Opposition, EPPS does *not even attempt* to argue otherwise. EPPS's claim must be dismissed.

II. EPPS Has Not Adequately Alleged the Likelihood of Recoupment of Losses Because It Has Not Adequately Alleged High Barriers to Entry

EPPS does not dispute that, as discussed in the Opening Brief (at page 11), the cases hold that recoupment of predatory losses is not possible when barriers to entry are not significant.

Nor does EPPS contest that, as discussed in the Opening Brief (at page 6), a high barrier to entry in an antitrust sense means that a new entrant must incur significantly higher costs to enter the market than the incumbent incurred. EPPS argues, however, it has adequately alleged high barriers merely because "Willamette has been in the patch market since 1990, [and]

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below cost discounts …"); *id.* ¶ 54 ("[I]t is averred that the discounts WVCO did give to MARTCO and did offer to Hood … represented a benefit below WVCO's cost to produce Patch . . . .").

[5] *See also Astra Media Grp., LLC v. Clear Channel Taxi Media, LLC*, 414 F. App'x 334, 336-37 (2d Cir. 2011) (holding that predatory pricing claim is insufficiently pled where a complaint is "silent" with respect to defendant's actual costs); *Vesta Corp. v. Amdocs Mgmt. Ltd.*, 129 F. Supp. 3d 1012, 1030-33 (D. Or. 2015) (dismissing predatory pricing claim where plaintiff "[did] not identify any figures or estimates of Defendants' costs").

therefore … does not have to take any of the steps described by EPPS [in the Complaint] to gain entry in the market." Opp. at 8. But the fact that an incumbent incurred its entry costs years earlier does not satisfy the "showing" required by *Stearns Airport Equipment,* 170 F.3d at 730, that "the costs incurred by new entrants significantly exceed the costs incurred by the monopolist." EPPS's argument proves too much; it implies high barriers to entry would almost always be found when an incumbent had been in the market for some time. No case says that.

III. The Amended Complaint Cherry-Picks The Alternative Products It Considers As Substitutes For Patch And Therefore Has Not Adequately Alleged the Product Market.

As this Court previously ruled, a product market determination requires consideration of all reasonably interchangeable substitute products. Prior Ruling, p. 6. In its Opening Brief (at pp. 15-17), Willamette showed that EPPS's allegations that there are no substitutes for patch were based on cherry-picking information from the APA documents cited in its Amended Complaint. Specifically, the Amended Complaint compares patch to wood plug and putty, while ignoring epoxies which are described in the APA documents as "approved synthetic materials."

EPPS now complains that it was inappropriate for Willamette to demonstrate its cherry-picking to the Court by attaching the APA documents to its brief.[6] EPPS is wrong. EPPS claims that under *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496 (5th Cir. 2000), the Court cannot consider the APA documents unless EPPS consents. But later decisions have cited *Collins* for the proposition that a court may "consider documents that are essentially 'part of the pleadings,'" regardless of whether a plaintiff consented. *See Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 288 (5th Cir. 2004); *Chisesi Bros. Meat Packing Co. v. Transco*

[6] EPPS's claim that it did not, in fact, reference Exhibit A (the list of APA-approved synthetic material suppliers) or Exhibit B (the APA standards) is belied by Paragraphs 7-11 of the Amended Complaint. *See* ¶ 7 (referencing that sheets of plywood "must meet each APA standard" and "[i]n this context, the APA puts out a guide for synthetic repairs," *i.e.*, Exhibit B); *id.* ¶¶ 8-10 (referencing a subset of materials that the APA "allows" and are "approved" per Exhibit A); *id.* ¶ 11 (referencing the APA standards set forth in Exhibit B).

Logistics, Inc., No. 17-CV-2747, 2017 WL 2573992, at *2 (E.D. La. June 14, 2017). In any event, the Court may exercise its discretion under Federal Rule of Evidence 201(c) to take judicial notice of the APA documents under Rule 201(a) & (b).[7] Indeed, if the Court were not free to do so for the limited purpose Willamette requests,[8] plaintiffs could often avoid dismissal of complaints through highly selective and misleading document quotations.

Because EPPS has cherry-picked the APA documents to avoid considering *all* reasonably interchangeable substitute products, its product market allegations fail.

IV. The Amended Complaint Fails To Adequately Allege a Geographic Market.

Willamette *agrees* with EPPS that "the distance between a patch supplier and its customer" is a *relevant* (and even, important) *factor* in determining a proper geographic market. But EPPS's Opposition clearly demonstrates that it has improperly substituted this single factor for the proper legal test when defining the market boundaries here. The market is defined not by what customers EPPS (or Willamette) can serve from a plant, 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). Because the Amended Complaint allegations ignore the proper legal standard, the Complaint should be dismissed.

V. Based On This Court's Prior Ruling, Counts I, III, and IV Should Be Dismissed.

EPPS argues that Count I of the Amended Complaint can stand on its own, separate from the predatory pricing and sale of assets claims. Opp. at 13-14. But, the Court has already dismissed this exact claim as "merely a 'catch-all' claim that adds nothing to Plaintiff's lawsuit,"

[7] Under FRE 201(a) & (b), the Court may take judicial notice of any adjudicative fact that is "not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."

[8] Willamette only asks the Court to take judicial notice of the fact that the APA documents, on which Plaintiff relies, identify substitutes for patch beyond the two examples EPPS addresses in its Complaint, *i.e.*, that EPPS cherry-picked the APA documents.

Prior Ruling, p. 13, and, rather than taking advantage of its leave to amend this claim, Plaintiff simply repeated, word for word, its original claim in its Amended Complaint. *Compare* Amended Cmplt., Doc. 34 ¶¶ 56-59 *with* Original Cmplt., Doc. 1 ¶¶ 32-35.

Similarly, this Court made clear that the claims asserted in Counts III (asset sale claim) and IV (Louisiana state claim) depend upon the success of the federal predatory pricing claim. *See* Prior Ruling, pp. 12 (asset sale), 14 (Louisiana state antitrust). EPPS does not dispute that conclusion.[9] Because the predatory pricing claim is deficient, so, too, are Counts III and IV.

CONCLUSION

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

Respectfully submitted,

/s/Bradley C. Myers

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[9] EPPS recycles a case upon which it previously relied to argue that acquisitions of viable competitors ***alone*** may violate 15 U.S.C. § 15, but EPPS advanced this exact argument 13 months ago, and this Court found it unavailing. *See* Doc. 23 (May 31, 2016) at 6 (citing *BRFHH Shreveport, LLC v. Willis Knighton Med. Ctr.*, 2016 WL 1271075, at *9 (W.D. La. 2016)).

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply Memorandum in Support of Defendant's Motion to Dismiss the Amended and Restated Complaint 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 26th day of June, 2017.

s/Bradley C. Myers
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