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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

WESTWOOD LUMBER COMPANY, et al,)
)
 Plaintiffs,) No. 3-03-00551-PA
) November 6, 2003
 vs.)
) Portland, Oregon
 WEYERHAEUSER COMPANY,)
)
 Defendant)

WASHINGTON ALDER LLC, et al,)
)
 Plaintiffs,) No. 3-03-00753-PA
)
 vs.)
)
 WEYERHAEUSER COMPANY,)
)
 Defendant)

TRANSCRIPT OF MOTION PROCEEDINGS
BEFORE THE HONORABLE OWEN M. PANNER
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES

FOR THE PLAINTIFFS: MICHAEL E. HAGLUND
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1 P R O C E E D I N G S

2 Thursday, November 6, 2003
3 2:33 p.m.4 THE COURT: All right. This is the time set
5 for defendant's Motions to Strike and Motions to Dismiss. I'm
6 not going to worry too much about the Motions to Strike. We
7 don't send these pleadings to the jury in any event, but I am
8 concerned about the Motion to Dismiss and I will give the
9 defendant a little bit of time to argue that further. I have
10 read and studied your brief and your reply memorandum and the
11 cases so I don't need a lot, but if you have any last minute
12 thoughts of genius I would be glad to hear them.13 MR. TONGUE: Thank you, Your Honor. Mr.
14 Arquit will provide that on behalf of --15 THE COURT: Mr. Arquit, spell your last name
16 for me.

17 MR. ARQUIT: Your Honor, it's A-R-Q-U-I-T.

18 THE COURT: Thank you. Pleasure to have you
19 in court.20 MR. ARQUIT: Thank you very much. I intend to
21 be brief because I think most of what has to be said was said
22 in the briefs. But as I read Your Honor's opinion in Coast
23 recently it seemed to me anyway that what the court was saying
24 to the parties was let's get away from these nuances here and
25 step back and take a look at the big picture at this stage of

1 the proceeding, what is it that Weyerhaeuser is accused of
2 doing and how is it that it harmed the plaintiff, so I'd like
3 to really focus on that.

4 Before doing that I would like to mention one
5 occurrence that occurred post briefing so I don't think that
6 it is part of the papers but I do believe that it is very
7 material to the Rule 12 Motions to Dismiss. And that, Your
8 Honor, has to do with a conference last week that I wasn't at
9 although the transcript has now come out from that. Before
10 getting to that I would just like to reference the court's
11 previous opinion in the Westwood decision where the court said
12 to the plaintiffs directly that to the extent that the
13 plaintiffs contend that Weyerhaeuser engaged in seemingly
14 irrational acts, such as raising the price of lumber, then
15 plaintiff should explain how and whether -- whether and how
16 Weyerhaeuser can reasonably expect to recoup its costs, and I
17 believe that for two reasons the plaintiffs have not done that
18 and therefore this --

19 THE COURT: Are you talking about predatory
20 pricing? Is that what you're talking about?

21 MR. ARQUIT: Your Honor, I think it would be
22 either upstream or downstream to the extent that economically
23 irrational behavior is being alleged, that there has to be a
24 story to why the defendants would engage in that, there has to
25 be a recoupment, there has to be some ultimate recovery

1 because that's presumably the benefit you're going to get from
2 doing the bad things up front.

3 THE COURT: I've looked at that and I think
4 within limits, if that's the key ingredient to the complaint,
5 I think you're right. However, if that's just a small part of
6 the complaint, one aspect, I don't think the plaintiff has
7 that duty. However, we can get to that as part of
8 instructions if we get that far so I'm not too concerned about
9 that.

10 I'll tell you what I'm really concerned about is I
11 don't think this complaint states an antitrust cause of
12 action. That's my reaction and I'm going to give the
13 plaintiff a chance to talk about it. But I don't think it
14 pulls together antitrust damages either to the plaintiff --
15 plaintiffs or to the other competitors. I don't think. So
16 I'd like for you to focus in that area, if you will.

17 MR. ARQUIT: Okay. Your Honor, I will
18 certainly do that and let me turn directly then to the
19 discovery conference that occurred on -- it was last week.
20 I'm sorry, I don't know the exact date but the transcript is
21 now out and there was a discussion about when discovery should
22 be cut off, and as I understand it the defendants had asked
23 for financial information going into 2003 and the plaintiff
24 says well, there's really no reason to do that because we're
25 cutting off our claim in the middle of 2002.

1 And quoting from plaintiffs' counsel, the reason
2 for that was -- and this is plaintiffs' counsel, quoting from
3 page eight of the transcript, "We disagree that Weyerhaeuser
4 is now earning or anybody earning supra competitive profits
5 that are in fact monopoly profits," and so what the plaintiffs
6 are acknowledging, it seems to me from this, is that there is
7 no recoupment going on.

8 THE COURT: I think that's right. I don't
9 think that's an issue in the case.

10 MR. ARQUIT: Okay. The second thing that they
11 do is that they do not make any allegation in their complaint,
12 despite repeated 9th Circuit requirements that they do it,
13 that they're not able to expand output. A lot of cases, I
14 think they're mentioned in the brief, I won't go through it
15 now, but the whole notion of a monopolization case --

16 THE COURT: When you're saying they're not
17 able to expand output you're talking about the plaintiffs?

18 MR. ARQUIT: Correct, Your Honor. The
19 plaintiffs must allege they can't expand output because
20 monopolization comes about, or monopsonization, when a party
21 is able to restrict output. It's the restriction of output
22 that allows them either to increase prices downstream or
23 decrease prices -- decrease prices upstream. So if the
24 plaintiffs or other parties in the market are able to expand
25 their output, they can offset any of that output restriction

1 and the monopolization can have no effect, and they refuse to
2 plead that even though I think they've been asked to do that
3 several, several times. That is point one I make, Your Honor.

4 The second point that I would like to make, and I
5 think this goes to your point about well, maybe part of their
6 claim requires a recoupment theory but aren't they alleging
7 some other things too, and at least upstream I would say that
8 you probably can summarize those generically into a notion
9 that the plaintiffs claim that the defendants went out of
10 their way basically to gobble up all the supply of logs with
11 the hope that having once done so, as Your Honor said in the
12 Coast Mountain opinion, that they could slash prices and that
13 the log suppliers would not be able to do anything about it.

14 Now, to make that claim -- and there are other ways
15 that those claims are made in these kinds of cases but to make
16 that claim the plaintiffs have to allege foreclosure. They
17 have to allege foreclosure -- by "foreclosure" I mean an
18 inability to get supply.

19 THE COURT: I agree.

20 MR. ARQUIT: And what happens here is they've
21 alleged that Weyerhaeuser did all these things, and for
22 purposes of this complaint we assume it's true, but if
23 somebody in a town buys 75 percent of the sand that's
24 purchased in the town, that's irrelevant to other people if
25 there's two other sand pits or a whole lot of other sand

1 available. It's the universe --

2 THE COURT: I agree. Let me grill the
3 plaintiffs a little bit because I think you're telling me what
4 I agree with and let's hear from them and then I'll give you a
5 chance to respond.

6 MR. ARQUIT: Okay. Because the only other
7 point I wanted to -- and I will wait -- is I wanted to talk
8 about the tie-in claim that they're --

9 THE COURT: Yes, yes.

10 All right. Mr. Haglund, you've heard me express
11 serious concerns and I know it's not that you don't know how
12 to plead because you pleaded it a little bit better in the
13 Siletz case than you have here. I haven't seen the
14 allegations here that are necessary to make an antitrust
15 claim. Frankly there's no connection. There's nothing that
16 says that you can't get logs from another source. There's
17 really not any antitrust damage alleged. You simply say in
18 effect you would have made more money if they hadn't done
19 this.

20 And I've got a whole litany of things about it.
21 There's nothing that indicates anything here in this
22 complaint, and I'm using the Third Amended Complaint which was
23 tendered so that we save time, but there's nothing that
24 indicates that the defendant is forcing anybody out. Simply
25 that maybe you're not making as much money. There's no

1 indication of -- that you can't get logs otherwise. That, you
2 know, an antitrust claim requires damage to the other
3 competitors, to the world, not just to the plaintiffs in this
4 case.

5 So what I want to know is how their acts
6 unreasonably restrict competition in the relevant market. I'm
7 not seeing that. The injuring of a plaintiff without injuring
8 competition isn't an antitrust claim. There are lots of good
9 cases on that. I think it's just good competition, as you've
10 alleged it. I'm not saying you can't allege some more, I
11 don't know about that, but I'm just not seeing an antitrust
12 complaint. I recognize, and I agree with you, this is notice
13 pleadings and we've got a good 9th Circuit case that says that
14 antitrust cases are pled the same way as any other case.

15 I've got that in mind. But we got a lot of other
16 9th Circuit cases that say what you have to put into a
17 complaint to make an antitrust claim. We're not going to go
18 to trial on a complaint that doesn't state an antitrust claim.
19 So tell me about it.

20 MR. HAGLUND: Well, let me say, first of all,
21 Your Honor, that when we read your order following the initial
22 set of motions perhaps we took too much comfort in the
23 suggestions in parts of that order that we didn't need to, in
24 effect, put into the complaint the equivalent of our closing
25 argument, and --

1 THE COURT: Well, that's right, you don't have
2 to do that, but what you have to do is allege some facts that
3 justify an antitrust complaint.

4 MR. HAGLUND: Well, Your Honor, what we have,
5 and I think it's clear from the inferences drawn from the
6 complaint, but if we need to get more --

7 THE COURT: I'm not -- I'm looking at the
8 complaint and you tell me where there's any indication that
9 you can't get logs someplace else.

10 MR. HAGLUND: That is not -- Your Honor, that
11 is not specifically laid out and we can do so.

12 THE COURT: And it's -- you know, there's
13 nothing about what's happened to other competitors, whether
14 they're getting all the logs they need. There's nothing about
15 the growth of Weyerhaeuser in this area if that's what's
16 happened. There's -- and I think -- I think what's happened
17 is that you know this case so well because of the previous
18 case that you just assumed a lot of things but that won't --
19 that's not going to go. Injuring a plaintiff without injuring
20 competition is not an antitrust violation. That's pretty
21 clear and I haven't seen anything in here that any of your
22 other competition was injured.

23 MR. HAGLUND: Well, Your Honor, in fact there
24 are other competitors who were put out of business during this
25 exact --

1 THE COURT: That's not in here.

2 MR. HAGLUND: I understand, Your Honor, and we
3 can --

4 THE COURT: I'm dealing now with a Motion to
5 Dismiss.

6 MR. HAGLUND: Your Honor, I guess I would ask
7 if you decide that, as I can see you're leaning toward,
8 granting the motion as to these areas of lack of detail, we
9 would ask that it be without prejudice and we have the
10 opportunity to reamend promptly, which we can do within a few
11 days. We'll cure these issues. We frankly have been focused
12 on discovery and they filed an answer, Your Honor, and then
13 renewed these motions and in all --

14 THE COURT: Well, they're entitled to do that,
15 aren't they?

16 MR. HAGLUND: I understand.

17 THE COURT: They were trying to expedite
18 things.

19 MR. HAGLUND: I understand. We can address
20 every single one of the items that you have raised here, Your
21 Honor, with specific allegations and I'll just recite them in
22 broad brush right now. A, there are other competitors in
23 addition to Ross Simmons who died or were put out of the
24 business during this period. B, there is a limited amount of
25 alder in the way of saw log resource that comes into the

1 market each year, partly because it's, as Weyerhaeuser has
2 noted throughout the trial, a come along species affected by
3 the volume of softwood harvests.

4 Where we can show Your Honor the connection between
5 irrational pushing up log prices and increased costs to these
6 competitors, one of whom, Morton Alder, is in extremely dire
7 financial condition, we have I think clearly the facts to show
8 that we're entitled to present an antitrust case on behalf of
9 each of these four plaintiffs. I apologize for lack of
10 specificity.

11 THE COURT: How long do you want to amend?
12 Five days?

13 MR. HAGLUND: That's plenty of time.

14 THE COURT: I know you're familiar with this.
15 Anything further you want to say? I am going to allow the
16 Motion to Dismiss.

17 MR. ARQUIT: May I just be heard for ten
18 seconds on that, Your Honor?

19 THE COURT: Yes, you may.

20 MR. ARQUIT: I do understand in the 9th
21 Circuit it's not required that somebody actually make a formal
22 motion in order to amend a complaint. The courts have allowed
23 it when there's merely been a request for it so that's not my
24 point. But there have been three chances already. We are now
25 however many months into this case. We're nearing trial.

1 This is a case where the plaintiffs seek divestiture, it's a
2 case where we are working day and night to try to do
3 discovery, and as a judge very colorfully recently said, the
4 intention of pleadings is not for the lawyers to play a
5 rhetorical game of tennis, hitting the ball back and forth
6 across the net with the judge supervising to come up with
7 something that works.

8 It's the plaintiffs' burden to establish a
9 complaint and we still don't have it and even in what
10 plaintiffs' counsel has just said now he has said nothing
11 about --

12 THE COURT: Well, wait a minute, wait a
13 minute. I don't think you're going to be surprised by
14 anything that's in the new complaint. Weyerhaeuser was in
15 this case before. They know this case, Mr. Arquit, so I'm
16 going to give them five days. I'm not saying whether I'll
17 allow them to amend again if your next Motion to Dismiss is
18 successful or not. I don't know that I will or won't. But I
19 think they have to go back to the law books and figure out, if
20 they can, how to allege an antitrust complaint.

21 MR. ARQUIT: Very well, Your Honor. I accept
22 that. May I speak very briefly on the tie-in allegations that
23 have been added?

24 THE COURT: Yes, I would be glad to have you.

25 MR. ARQUIT: I'll be very brief.

1 THE COURT: Let me ask the plaintiff. Is this
2 -- are you presenting this as a tie-in case? Is there a
3 tie-in aspect to this?

4 MR. HAGLUND: With respect to the lumber
5 market we have made one allegation regarding tying. We're
6 asking some questions. We have some evidence to show it. I'm
7 not sure we're going to keep it by the time we get to trial,
8 Your Honor. It's not, in my view, a significant addition to
9 the discovery in the matter.

10 MR. ARQUIT: Your Honor, actually I understand
11 -- I've read parts of the first trial and I guess use of the
12 word "tie-in" created a lot of controversy so -- but leaving
13 that to one side, the claim here is for a tie-in and in the
14 claim --

15 THE COURT: The claim is for what?

16 MR. ARQUIT: That there has been an illegal
17 tie-in, tying behavior.

18 THE COURT: I'm not sure I even understand the
19 plaintiffs' allegations in that regard.

20 MR. ARQUIT: They can probably describe it
21 better than I can.

22 THE COURT: The allegation that -- this is
23 with respect to the lumber market, as I recall. Is that it?

24 MR. ARQUIT: You're correct.

25 THE COURT: Let me look at that paragraph and

1 see if the plaintiff can explain it to both of us.

2 MR. ARQUIT: They flush it out a little bit
3 more in the Third Amended Complaint.

4 THE COURT: I'm looking at the Third Amended
5 Complaint. Where is that in the Third Amended Complaint?
6 Because I couldn't quite --

7 MR. ARQUIT: It's right near the back of it.

8 THE COURT: I couldn't quite understand that
9 either. It looked to me like it could work several ways. It
10 says, "Illegally tying the sale of finished alder lumber
11 produced by Weyerhaeuser to customers' commitments to purchase
12 eastern hardwood lumber products produced by Weyerhaeuser's
13 hardwood sawmills." Does that mean that an eastern customer
14 buying lumber can't get Weyerhaeuser's hardwood unless they
15 buy Weyerhaeuser's alder, or does it mean they can't buy
16 alder, or what's it mean?

17 MR. HAGLUND: What it means is that the
18 evidence that we were pursuing, and we have some to back up
19 this allegation, is that there are some personnel in the
20 Portland sales office who, with respect to a hot item in the
21 alder lumber market, would say to a customer that wants that
22 item, you're not going to get it unless you also buy other
23 hardwood species from our other sawmills in the east, tying
24 the product in which they have the monopoly power to other
25 products back east.

1 THE COURT: All right. Now you understand at
2 least what he's saying.

3 MR. ARQUIT: And I would first suggest, Your
4 Honor, that that is completely contrary to the rest of their
5 case because to the extent that Weyerhaeuser's engaging in
6 this behavior to annoy its alder customers, it's going to
7 drive those customers into the arms of competitors.

8 THE COURT: That's kind of the way I read it
9 if that was the interpretation. It seems to me that's not
10 reducing the supply of alder, may be even increasing it, so I
11 don't know.

12 MR. ARQUIT: Precisely so, Your Honor, and
13 also tie --

14 THE COURT: I'm not going to worry about it
15 right now. Let's see where we go.

16 MR. ARQUIT: Is there leave to amend that?
17 Because if there is I want to make one other point with
18 respect to it, because a tie-in case, Your Honor, is not a
19 section two claim. A tie-in claim is under section one of the
20 Sherman Act and we've had nothing in this case about
21 agreements --

22 THE COURT: If it's a pure tie-in case that's
23 one thing, but to me this is much like the cost issue that you
24 raised awhile ago. It's simply one element of the plaintiffs'
25 monopoly case otherwise, and I'm not sure how it fits and as I

1 say, these pleadings don't go to the jury. I'm sure that I
2 will get summary judgment motions and we'll have several
3 pretrial conferences and we'll find out what is going to go to
4 the jury and you can argue it further at that time.

5 MR. ARQUIT: I know Your Honor wants to reduce
6 the number of motions. If I could just say one more thing
7 then I really will stop. I would like one more on this
8 because the tie-in claim as alleged as just explained by
9 plaintiffs' counsel has absolutely nothing to do with the
10 alder lumber market. A tie-in claim, you're tying product,
11 you're assuming a monopoly and Jefferson, Parrish, all the
12 Supreme Court cases, the competitive harm in a tie-in case is
13 the effect in the tied market.

14 So what we're going to have to do, if this claim is
15 made, is now enter into a whole new realm of discovery. What
16 is this secondary market? Is it all other hardwoods? Is it
17 some other hardwoods? What is the rate of substitution
18 between the same? Are these two separate products? This
19 really opens up a whole new area of discovery that I believe
20 was not part of the first trial and certainly has not been
21 part of this trial up until now, again at a very late stage of
22 the proceeding.

23 THE COURT: What do you say about that, Mr.
24 Haglund?

25 MR. HAGLUND: We're going to give some

1 serious --

2 THE COURT: I don't want you to agree with
3 him. That would be too much.

4 MR. HAGLUND: I'm not going to do that, Your
5 Honor, but I think it's not correct that it's going to
6 substantially increase discovery but we're going to give some
7 thought to whether we keep it in.

8 THE COURT: All right. I'm not going to
9 strike it out at this time. All right. Anything further?

10 MR. HAGLUND: Only thing, Your Honor, we would
11 like not to treat what we attached to the memo as a filed
12 amended complaint and --

13 THE COURT: It's not, it's not, and the only
14 thing I can see is you better -- you've talked about markets
15 there, relevant markets. You better look at that again
16 because you got some time periods involved here because when
17 you say British Columbia came into the market and there's a
18 little confusion in my mind about what's in the Third Amended
19 Complaint on that score.

20 MR. HAGLUND: I understand, Your Honor.

21 THE COURT: Mr. Tongue.

22 MR. TONGUE: Yes, Your Honor. Mr. Bannon is
23 here and we had suggested that if possible these two motions
24 might be heard at the same time. Mr. Bannon's motion, I think
25 he would concede, would be -- we would prevail on that if we

1 prevailed on this and if Mr. Bannon would agree then we could
2 dispense of that hearing tomorrow.

3 THE COURT: That's good. Do you agree, Mr.
4 Bannon?

5 MR. BANNON: Your Honor, I think that under
6 ordinary circumstance I might be able to change your mind and
7 reach a different result tomorrow but I don't think that will
8 happen and so --

9 THE COURT: I haven't really studied that
10 motion yet but I'm assuming it's about the same so if it's the
11 same, well, you better file an amended complaint again.

12 MR. BANNON: Absolutely. That's what I was
13 planning on doing. That way we would avoid having to take
14 your time up tomorrow for it.

15 THE COURT: That's good because I've got a
16 couple other things tomorrow.

17 MR. TONGUE: Freed your late afternoon.

18 THE COURT: Thank you, gentlemen. We'll be in
19 recess.

20 (The hearing concluded at 2:55 p.m.)

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C E R T I F I C A T E

STATE OF OREGON)
) ss:
County of Columbia)

I, Karen M. Smith, a Certified Shorthand Reporter for Oregon, do hereby certify that at the time and place set forth in the caption herein I reported in Stenotype all testimony adduced and other oral proceedings had in the foregoing matter; that thereafter my notes were reduced to computer-aided transcript; and that the foregoing 19 pages constitutes a full, true, and accurate record of all such testimony adduced and oral proceedings had, and of the whole thereof.

IN WITNESS WHEREOF I have hereunto set my hand this 7th day of November, 2003.

Karen M. Smith
Certified Shorthand Reporter
for the State of Oregon
Certificate No. 00-0369