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Ms. Cathy Catterson
Clerk of the Court
U.S. Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103

Re: ***Confederated Tribes of Siletz Indians v. Weyerhaeuser Co.*, Nos. 03-35669, 03-35984**

Dear Ms. Catterson:

The above action is on remand from the United States Supreme Court, which has directed this Court to conduct further proceedings consistent with the Supreme Court's recent decision reversing and vacating this Court's earlier opinion and judgment. *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069 (2007). We previously wrote to this Court on March 1st ("Weyerhaeuser Letter"), requesting the Court to set a briefing schedule to determine what action is appropriate in light of that direction. Ross-Simmons responds by urging this Court simply to remand to the district court without issuing what it terms "advisory opinions" respecting "issues that must now go to the jury on an entirely different legal standard." (*See* Letter of Michael Haglund, March 6, 2007 ("Ross-Simmons Letter") at 5.)

But the further opinion sought from this Court by Weyerhaeuser is scarcely "advisory." Rather, it goes to whether there is any need for remand at all and, if so, the scope of that remand. Instead of having those issues addressed by this Court without the benefit of full input from the parties, Weyerhaeuser has merely identified the relevant issues in dispute and has requested this Court to set a schedule for addressing them in an orderly and expeditious fashion. As the exchange of letters to date vividly demonstrates, the parties have vastly different positions regarding how this Court should implement the Supreme Court's decision: Weyerhaeuser believes that judgment can be granted in its favor on all claims without any need to remand to the district court, while Ross-Simmons suggests that it is entitled to a new trial—with new evidence, to boot—on all counts involving Weyerhaeuser's upstream market conduct.

This is not the time or place to engage in a full-blown debate about the state of the record, the sufficiency of the evidence, the arguments made and waived, or the legal options that are available to this Court. If the parties' letters highlight one point, it is that the parties vehemently disagree on some critical questions of law and fact. Those issues, we suggest, are best addressed after full briefing. However, given Ross-Simmons' request for peremptory determinations by the Court, a brief response to its arguments is in order:

- In its March 1 letter, Weyerhaeuser pointed out that Ross-Simmons had conceded its inability to meet the *Brooke Group* standard which, the Supreme Court has held, applies here. (Weyerhaeuser Letter at 2-3, 5.) Ross-Simmons now claims that "Weyerhaeuser is flat wrong" in making that assertion. While Weyerhaeuser is not "wrong" (flat or otherwise) about that issue as a factual matter, the concession it relies upon here is not simply a matter of argument, but is, instead, premised on the Supreme Court's opinion which states, in unequivocal terms, that "Ross-Simmons ... conceded that it has not satisfied the *Brooke Group* standard," and thus that "its predatory-bidding theory of liability cannot support the jury's verdict." 127 S. Ct at 1078 (citing to the record). While Ross-Simmons now apparently contends that the Supreme Court misread its "concessions in its brief and at oral argument" (Ross-Simmons Letter at 2), that supposed error should have been addressed to the Supreme Court by motion for reconsideration or modification. As it is, the Supreme Court's opinion on this point governs any future proceedings. And, as Weyerhaeuser pointed out in its prior letter, "if the evidence presented in the first trial would not suffice, as a matter of law, to support a jury verdict under the properly formulated [standard], judgment could properly be entered ... at once, without a new trial." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 513 (1988).

- Moreover, Ross-Simmons' purported "explanation" for why it supposedly did, and could, meet the relevant *Brooke Group* standard actually reveals why its position is legally unavailing. As Weyerhaeuser pointed out in its prior letter, the evidence at trial was "undisputed" that "Weyerhaeuser operated profitably in the relevant market at all times." (Weyerhaeuser Letter at 5.) Ross-Simmons responds that this is mistaken because there is evidence that Weyerhaeuser understated the cost of logs it already owned and "transferr[ed]" to one of its six mills, at Longview. (Ross-Simmons Letter at 2.) Leaving aside the factual and theoretical flaws in that assertion, it simply does not establish the predicate for a viable predatory bidding claim under the Supreme Court's decision. The "relevant market" alleged by Ross-Simmons is not limited to the Longview mill or its environs, but rather comprises an alleged "Pacific Northwest" market for alder saw logs (Br. of Appellant at 3 (citing ER.581-82))—an area that included no less than six different Weyerhaeuser mills. Having thus defined the assertedly "relevant market" in that fashion, Ross-Simmons would have needed to prove that Weyerhaeuser violated the *Brooke Group* requirements in *that* market, not elsewhere (including at, or around, some single mill within it). *See, e.g., Morgan v. Ponder*, 892 F.2d 1355, 1361-62 (8th Cir 1989) (JNOV granted where plaintiff attempted to prove below-cost pricing to one customer, as opposed to "*overall* competition" in the relevant market); *Directory Sales Mgmt. Corp. v. Ohio Bell Tel. Co.*, 833 F.2d 606, 613-14 (6th Cir. 1987) (predatory pricing could not be proved other than in relevant market "as a whole"). Weyerhaeuser is, thus, entirely correct in asserting that the undisputed evidence at trial showed that it "operated profitably *in the relevant market* at all times." What is more, having not only defined what it says is the relevant market, but having proceeded to trial and succeeded on the basis of that market definition, Ross-Simmons is now judicially estopped from seeking to define a different "Longview-only" market on remand. *See Klamath Siskiyou Wildlands Center v. Boody*, 468 F.3d 549, 554 (9th Cir. 2006).

- Ross-Simmons also is mistaken in attempting to distinguish the closely parallel situation and decision in *USA Petroleum Co. v. Atlantic Richfield Co.*, 13 F.3d 1276 (9th Cir 1994), in which a plaintiff that voluntarily chose not to present evidence of below-cost pricing (to meet the *Brooke Group* standard) because it wanted to pursue a different liability theory "waived its right to adduce evidence" on below-cost pricing on remand. *See id.* at 1282. In both cases, the viability of a below-cost pricing claim was put in issue before trial (on motions for summary judgment) and the plaintiffs in both instances chose to rest on the inapplicability of a below-cost requirement as opposed to asserting that they could, in any event, meet such a test.

- Ross-Simmons' sole response to Weyerhaeuser's assertion that its non-price claims are legally insufficient to support the jury's verdict is to observe that it offered evidence of allegedly anticompetive sawmill acquisitions that "any antitrust lawyer worth his or her salt" would acknowledge as raising a viable Section 2 claim. However, as Weyerhaeuser pointed out in its opening brief on the initial appeal, Ross-Simmons never proved that these acquisitions (none of which was ever challenged by the reviewing federal antitrust agencies) interfered with its ability to obtain an adequate log supply for its operations—an essential element for such a claim. (*See* Br. of Appellant at 36-38.) In addition, to the extent Ross-Simmons' thesis is that these acquisitions made Weyerhaeuser a stronger rival, any harm that Ross-Simmons suffered as a result would not constitute "antitrust injury" as a matter of law, under *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). In fact, that was the precise argument rejected in *Brunswick*, itself.

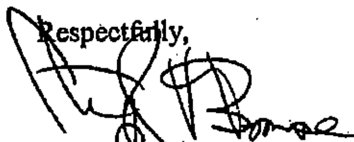
- Weyerhaeuser's March 1 letter also explained that there is no basis for a new trial as to Ross-Simmons' non-price claims because Ross-Simmons did not attempt to prove any damages flowing from those acts, as distinct from Weyerhaeuser's supposed over-payment for logs. (Weyerhaeuser Letter at 4.) Ross-Simmons takes no issue with that assertion as a legal proposition. Instead, it asserts that Weyerhaeuser is factually "incorrect." (*Id.*) However, its explanation, again, fails to support its position. According to Ross-Simmons, its CPA offered a damages calculation at trial based on a comparison of Ross-Simmons' profits "before and after" Weyerhaeuser's alleged predation. However, a review of the evidence Ross-Simmons submits with its letter shows that its accounting witness was merely asked to assume predation and, then, extrapolate the plaintiff's earlier profits (1993-95) into future years (1996-2001), with an allegedly appropriate percentage growth factor. (*Id.*) Nothing in these bare projections even begins to suggest how any conduct by Weyerhaeuser—other than alleged over-bidding or over-buying—had any adverse impact on Ross-Simmons. The only damages evidence presented by Ross-Simmons, as Weyerhaeuser explained in its March 1 letter, was limited to the supposed effect of Weyerhaeuser's alleged over-payment for logs. Having, thus, failed to offer anything further, Ross-Simmons' damages case as to non-price conduct is insufficient as a matter of law and Weyerhaeuser is entitled to judgment on that ground alone. *See Seattle Totems Hockey Club, Inc. v. Nat'l Hockey League*, 783 F.2d 1347,1351 (9th Cir. 1986) ("There must … be sufficient evidence from which a jury could determine the amount of damages ….").

- Finally, Ross-Simmons protests that its claims should not be viewed in isolation from each other, citing *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962). But this cannot mean that multiple legally flawed liability theories can somehow coalesce into a single successful one. As one district court recently explained in a predatory-pricing case, there is no general rule requiring a court to "view [a] Defendant's conduct 'as a whole' rather than examine specific anticompetitive conduct." *Invacare Corp. v. Respironics, Inc.*, 2006 WL 3022968, at *8 (N.D. Ohio 2006) (citing *Le Page's, Inc. v. 3M*, 324 F.3d 141, 162 (3d Cir. 2003)). Rather, a court must first "examine[] each of the types of conduct that the plaintiff ... allege[s]" and only "after finding evidence of such bad acts," individually should the court "view[] those actions together." *Id.* Thus, "the court must first find that Defendant has done something wrong before the court can view such conduct in the aggregate." *Id.* Given the absence of any adequately proven predatory acts, there is nothing to add together. As Judge Becker once famously put the point in rejecting an aggregation argument under *Continental Ore*, "[n]othing plus nothing times nothing still equals nothing." *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100, 1311 (E.D. Pa. 1981).

While Weyerhaeuser believes that the appropriate outcome in this Court is an order directing judgment in its favor, it also believes that such a conclusion ought to be reached only after each side has had a fair opportunity to make its case, factually and legally. Therefore it, again, respectfully urges the Court to set a supplemental briefing schedule in this matter.

We propose the following schedule, mirroring Federal Rule of Appellate Procedure 31(a)(1): Weyerhaeuser shall file its supplemental brief 40 days after this Court orders such briefing; Ross-Simmons shall file its opposition brief 30 days after Weyerhaeuser's brief; and Weyerhaeuser may file a reply brief 14 days after Ross-Simmons' brief. In addition, due to the nature and extent of the issues involved, Weyerhaeuser respectfully requests that, upon completion of such briefing, the matter be set down for oral argument at a date convenient to the Court.

Respectfully,



Stephen V. Bomse
Counsel for Weyerhaeuser

cc: All counsel