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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

**ROSS-SIMMONS HARDWOOD LUMBER
CO.,**

No. 00-CV-1693-PA

Plaintiff,

v.

WEYERHAEUSER COMPANY,

**DEFENDANT'S MEMORANDUM OF
LAW IN SUPPORT OF MOTION
FOR JUDGMENT AS A MATTER OF
LAW**

Defendant.

Defendant Weyerhaeuser Company ("Weyerhaeuser") respectfully submits this Memorandum of Law, together with the Affidavit of George J. Cooper ("Cooper Aff."), in support of its motion for judgment as a matter of law.

PRELIMINARY STATEMENT

In light of the remand of this case from the Ninth Circuit for further proceedings consistent with the Supreme Court's decision in *Weyerhaeuser Co. v. Ross-Simmons Hardware*

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Lumber Co., 127 S. Ct. 1069 (2007), Weyerhaeuser asks the Court to enter judgment as a matter of law in its favor based on the failure of Ross-Simmons Hardware Lumber Co. (“Ross-Simmons”) to have presented sufficient evidence to support its claims at trial.

In order to prevail on its predatory buying claim, Ross-Simmons had to establish that Weyerhaeuser engaged in below-cost pricing and that there was a dangerous probability of Weyerhaeuser recouping its losses. Ross-Simmons made no such showing and conceded as much, as noted by the Supreme Court. *Id.* at 1078. In fact, the evidence at trial established that Weyerhaeuser operated its alder mills at a profit during the alleged predation period and that, even if it had engaged in below-cost pricing, it had no likelihood of recouping its losses.

In order to prevail on its non-price-related conduct claims, Ross-Simmons had to establish that Weyerhaeuser’s alleged anticompetitive conduct substantially foreclosed access to the relevant market and that such conduct caused Ross-Simmons damages. Ross-Simmons made no such showing. To the contrary, the evidence at trial established that Ross-Simmons had ample access to alder sawlogs and, in any event, offered no evidence that it was damaged by the alleged non-price-related conduct because its damages model was premised exclusively on Weyerhaeuser’s alleged predatory buying of alder sawlogs.

All of this adds up to one conclusion: because Ross-Simmons did not present sufficient evidence to support its claims as a matter of law, this case can and should end now.

ARGUMENT

I. **Weyerhaeuser Is Entitled to Judgment as a Matter of Law on the Predatory Buying Claim Because Ross-Simmons Did Not Satisfy the *Brooke Group* Standard**

“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); *USA Petroleum Co. v. Atl. Richfield Co.*, 13 F.3d 1276, 1285-87 (9th Cir. 1994) (no retrial of predatory pricing claim despite intervening predatory pricing decision in *Brooke Group*). That is precisely the situation here. The Supreme Court held that the properly formulated standard for Ross-Simmons’ predatory buying claim is the standard set forth in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). Ross-Simmons, as the Supreme Court pointedly noted, “conceded that it has not satisfied the *Brooke Group* standard.” *Weyerhaeuser*, 127 S.Ct. at 1078. Thus, judgment should be entered in Weyerhaeuser’s favor now that the case has been remanded for further proceedings, and there should not be a new trial. *See Boyle*, 487 U.S. at 513.

In order to prove its predatory bidding/buying claim, Ross-Simmons had to show (1) “the alleged predatory bidding led to below-cost pricing of the [Weyerhaeuser’s] outputs,” and (2) “[Weyerhaeuser] has a dangerous probability of recouping the losses incurred in bidding up input prices through the exercise of monopsony power.” *Ross-Simmons*, 127 S.Ct. at 1078. Ross-Simmons failed to establish either of these claims at trial.

With respect to below-cost pricing, Ross-Simmons has never even alleged – much less proved – that Weyerhaeuser paid so much for alder sawlogs that it sold its finished alder lumber at a loss. In fact, it is undisputed that Weyerhaeuser’s alder lumber sawmills operated at a profit throughout the alleged predation period. *See Cooper Aff. Ex. A* (Vol. 7-B 72:11-12) (“[I]n every mill in the time period at issue in this case, [Weyerhaeuser was] making positive profits on log purchases.”); *Cooper Aff. Ex. B* (Trial Exhibit 414); *Cooper Aff. Ex. C* (Trial Exhibit 81a). And Ross-Simmons admitted that “[t]hroughout the 1990s and into 2001, Weyerhaeuser’s hardwood lumber division was consistently profitable.” *Cooper Aff. Ex. D* (Defendant’s

Concise Statement of Material Facts in Support of Motion for Summary Judgment) ¶ 15; Cooper Aff. Ex. E (Plaintiff's Amended Response to Defendants' Concise Statement of Material Facts) ¶ 15 (stating "Accept").

Ross-Simmons cannot save its predatory buying claim now by narrowing its focus to the costs at only one of Weyerhaeuser's alder mills, the Longview mill. Even putting aside the legal flaw of looking at the costs of one mill when the geographic market alleged by plaintiff (and its experts) at trial included *all* of the Pacific Northwest,¹ Ross-Simmons only presented evidence at trial that, if Weyerhaeuser cost allocations were shifted, Longview "*might* have had a loss." Cooper Aff. Ex. F (2A 71:6-19) (emphasis added). It did not show that Longview was selling its finished alder lumber at prices below an appropriate measure of its costs.² Thus, even if it could focus only on Longview – and it cannot – Ross-Simmons' evidence at trial was insufficient.

Even if Ross-Simmons had established below-cost pricing, it did not present sufficient evidence that there existed a dangerous probability that Weyerhaeuser could recoup any losses. In order to make such a showing, Ross-Simmons would have had to make an *objective* showing that Weyerhaeuser would be able to recoup *all* of its losses incurred during the predation period. *See Brooke Group*, 509 U.S. at 225 ("The plaintiff must demonstrate that there is a likelihood that the predatory scheme alleged would cause a rise in prices above a competitive level that

¹ The appropriate consideration is Weyerhaeuser's profitability across Ross-Simmons' alleged market, which includes all six of Weyerhaeuser's alder mills. *See, e.g., Morgan v. Ponder*, 892 F.2d 1355, 1361-62 (8th Cir. 1989) (judgment as a matter of law granted where plaintiff attempted to prove below-cost pricing to one customer, as opposed to "overall competition" in the relevant market).

² The appropriate measure of costs should be average variable cost. *See, e.g., Stearns Airport Equip. Co., Inc. v. FMC Corp.*, 170 F.3d 518, 532 (5th Cir. 1999) (stating that average variable cost is the best proxy for marginal cost, which is "difficult to generate"). Ross-Simmons presented no evidence regarding Longview's average variable costs, much less the average variable cost of all of Weyerhaeuser's alder mills.

would be sufficient to compensate for the amounts expended on the predation, including the time value of the money invested in it.”); III P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 729(b), at 349 (2d ed. 2002) (“*Brooke* holds that no matter what the defendant’s anticompetitive intent, likelihood of recoupment must be established by objective evidence.”). Thus, the critical question is whether Weyerhaeuser could drive down alder log prices after the predation period ended and keep prices at those low levels for a period of time sufficient to allow complete recoupment of any losses. Ross-Simmons presented *no* evidence to that effect.

In fact, the evidence at trial established that Weyerhaeuser could *not* recoup any losses. During the alleged predation period, at least two mills entered the market. *See* Cooper Aff. Ex. G (Stipulated Facts) ¶¶ 50, 51 (noting the entry into the market of Westwood Lumber Company and Washington Alder LLC during the alleged predation period). This fact is “particularly damaging” to Ross-Simmons’ case. *See* III Areeda & Hovenkamp, *Antitrust Law* ¶ 729(c)(2), at 351. As Professors Areeda and Hovenkamp have observed, “no rational firm would enter a market where incumbents are already losing money and where the addition of its own output will lower prices even further. Presumptively, therefore, entry during the alleged predation period defeats any predatory pricing claim.” *Id.*

The mere potential for entry by competitors can end the recoupment inquiry. *See Stearns*, 170 F.3d at 530 (no recoupment when court theorized that foreign competitors would enter domestic market if defendant began charging supracompetitive prices); *Nat’l Parcel Servs., Inc. v. J.B. Hunt Logistics, Inc.*, 150 F.3d 970, 971 (8th Cir. 1998). The actual entry of competitors does end it here. *See Western Parcel Express v. United Parcel Serv. of Am.* 190 F.3d 974 (9th Cir. 1999) (affirming grant of summary judgment to defendant when, during alleged predatory period, plaintiff’s profits grew and competitors entered the market); *United*

States v. AMR Corp., 140 F. Supp. 2d 1141, 1209 (D. Kan. 2001), *aff'd*, 33f F.3d 1109 (10th Cir. 2003) (finding no probability of recoupment because of arrival of successful entrants during alleged predatory period).

Ross-Simmons cannot excuse its failure to provide evidence to meet either prong of the *Brooke Group* test by arguing that the Supreme Court's decision changed the law in the Ninth Circuit. Weyerhaeuser raised the *Brooke Group* issue well before trial in a summary judgment motion, and raised it again in its proposed jury instruction and at the close of trial in a motion for judgment as a matter of law. Thus, Ross-Simmons clearly was on notice that the *Brooke Group* standard could apply to its claims at trial, and it could have attempted to present evidence sufficient to satisfy it. After years of litigation and a full trial, Ross-Simmons cannot now argue that it is entitled to a fresh start under a new theory so that it can attempt to meet a standard it knew all along might control. *See Boyle*, 487 U.S. at 513; *USA Petroleum*, 13 F.3d at 1285-87 (holding that change in law brought by *Brooke Group* did not excuse plaintiff's abandonment of its right to demonstrate below-cost pricing, where the plaintiff knew below-cost pricing was an independent available theory of predatory pricing and had a full and fair opportunity to "ventilate" its views on the issue).

Moreover, Ross-Simmons cannot claim that it did not present evidence to satisfy *Brooke Group* because it relied on *Reid Bros. Logging Co. v. Ketchikan Pulp*, 699 F.2d 1292 (9th Cir. 1983). *Brooke Group*, which was decided ten years after *Reid Bros.*, effectively overruled that case. In fact, by citing the Ninth Circuit's then-applicable sell-side predatory pricing standard to support its buy-side holding, the *Reid Bros.* court recognized, as the Supreme Court confirmed in *Ross-Simmons*, that the same standard should apply to sell-side and buy-side predatory pricing claims. *Reid Bros.*, 699 F.2d at 1298 n.5 (citing *William Inglis v. IIT Cont'l Baking Co.*, 668

F.2d 1014, 1034 (9th Cir. 1981); *Cal. Computer Prods., Inc. v. IBM Corp.*, 613 F.2d 727, 743 (9th Cir. 1979)).

Because Ross-Simmons failed to satisfy either prong of the *Brooke Group* standard, the Court should enter judgment as a matter of law in favor of Weyerhaeuser.

II. Weyerhaeuser Is Entitled to Judgment as a Matter of Law on the Non-Price-Related Conduct Claims Because Ross-Simmons Did Not Establish Substantial Foreclosure or Damages

At trial, Ross-Simmons alleged assorted non-price related conduct that it claimed to be “anticompetitive.” Weyerhaeuser is entitled to judgment as a matter of law on the non-price-related conduct because Ross-Simmons failed to satisfy the “substantial foreclosure” standard and, as importantly, failed to prove that it was damaged by the alleged non-price-related conduct.

For non-price-related conduct to be “anticompetitive,” it must “substantially foreclose” competitors’ access to the relevant market. *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 328 (1961) (“[C]ompetition foreclosed by [conduct] must be found to constitute a substantial share of the relevant market.”); *Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1163-64 (9th Cir. 1997) (holding that plaintiff failed to establish that defendants’ non-price-related conduct foreclosed existing competitors or new entrants from competition in the relevant market); *CDC Techs., Inc. v. IDEXX Lab., Inc.*, 186 F.3d 74, 80 (2d Cir. 1999) (finding insufficient evidence that defendant’s non-price conduct “impeded [the plaintiff’s] ability to reach the ultimate customers”). Ross-Simmons presented no evidence that Weyerhaeuser’s conduct foreclosed a substantial percentage of the market. In fact, the record leaves no doubt that Ross-Simmons always was able to obtain alder logs to process at its mill. *See Cooper Aff. Ex. H* (Vol. 2A 36:14) (Bill Nelson testifying that Ross-Simmons’ log supply was “stable and a lot more than we needed”); *Cooper Aff. Ex. I* (Vol. 2A 148:18-24) (same).

Even if Ross-Simmons had established that Weyerhaeuser's alleged non-price-related conduct foreclosed a substantial percentage of the market, it presented no evidence that Weyerhaeuser's non-price-related conduct caused it *any* damages. Ross-Simmons' damage claim had two components: lost profits during the period of alleged predation and lost going-concern value. Both of these components were based on "but for" log prices if Weyerhaeuser had not allegedly engaged in predatory buying of alder sawlogs and derived from Weyerhaeuser's profit margins from the period before the alleged predatory buying began. See Cooper Aff. Ex. J (Vol. 3A 116-121); Cooper Aff. Ex. K (Vol. 3B 34-37, 41-44); Cooper Aff. Ex. L (Vol. 5A 86-103, 117). By attributing its damages solely to Weyerhaeuser paying too high a price for alder sawlogs, Ross-Simmons failed to show that it suffered any damages related to the non-price-related conduct. *Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 572-73 (1990) ("[A] plaintiff may not recover damages merely by showing a violation of the Act; rather, the plaintiff must also 'make some showing of actual injury attributable to something the antitrust laws were designed to prevent.'") (internal citations omitted); *Simon v. Value Behavioral Health, Inc.*, 208 F.3d 1073, 1082 (9th Cir. 2000) ("Federal antitrust laws provide a private right of action only to individuals who are 'injured in [their] business or property by reason of' a federal antitrust violation.") (quoting 15 U.S.C. § 15(a)).

Because Ross-Simmons failed to establish substantial foreclosure or that it was damaged by Weyerhaeuser's alleged non-price-related conduct, Weyerhaeuser is entitled to judgment as a matter of law with regard to that alleged conduct.

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CONCLUSION

For all the foregoing reasons, Weyerhaeuser respectfully requests that this Court grant it judgment as a matter of law.

DATED this 4th day of May, 2007

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