NO. 18-30245

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CLEAN WATER OPPORTUNITIES, INCORPORATED,
doing business as Engineered Polyurethane Patching Systems,
Plaintiff – Appellant

VERSUS

THE WILLAMETTE VALLEY COMPANY,
Defendant – Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA,
CIVIL ACTION NO. 3:16-CV-00227
THE HONORABLE JOHN W. deGRAVELLES, PRESIDING

ORIGINAL BRIEF OF APPELLANT,
CLEAN WATER OPPORTUNITIES, INCORPORATED

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualifications or recusal:

1. Clean Water Opportunities, Inc., d/b/a Engineered Polyurethane Patching Systems, Appellant
2. David E. Edwards, owner of Appellant, Clean Water Opportunities, Inc.
3. Joseph R. Ward, Jr., Appellant's Counsel
4. Ward & Condrey, LLC, Appellant Counsel's Firm
5. Stacy R. Palowsky, Appellant's Counsel
6. Palowsky Law, L.L.C., Appellant Counsel's Firm
7. The Willamette Valley Company, Appellee
8. Bradley C. Myers, Appellee's Counsel
9. Katie D. Bell, Appellee's Counsel
10. Kean Miller, LLP, Appellee's Counsel's Firm
11. John W. Treece, Appellee's Counsel
12. Robert N. Hochman, Appellee's Counsel
13. Amanda Norton, Appellee's Counsel
14. Sidley Austin, LLP, Appellee's Counsel's Firm

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to FRAP 34, Appellant, Clean Water Opportunities, Inc., d/b/a Engineered Polyurethane Patching Systems, indicates that oral argument would be helpful to the Court in its determination of the issues of whether the District Court erred in ruling that the Amended Complaint did not set forth any causes of action under the Sherman Act for predatory pricing to maintain a monopoly, under the Sherman and/or Clayton Acts for an illegal acquisition to establish an unlawful monopoly, and under the Sherman Act as well as applicable Louisiana Law prohibiting the creation of or the maintaining of an illegal monopoly.

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JURISDICTIONAL STATEMENT

This litigation arises under 15 U.S.C. §§1 and 2, of the Sherman Act, and Sections 4 and 7 of the Clayton Act, 15 U.S.C. §§ 15 and 18. Accordingly, the District Court had subject matter jurisdiction over this matter pursuant to 28 U.S.C. §1331. The District Court also had supplemental subject matter jurisdiction over any state law claims alleged pursuant to 28 U.S.C. §1367. Additionally, the District Court had jurisdiction pursuant to 28 U.S.C. §1332(a) as the matter in controversy exceeds the sum or value of $75,000 and is between citizens of different states.

On February 6, 2018, the District Court issued a Ruling and Order[1] and a Judgment[2] granting the motion to dismiss pursuant to F.R.C.P. 12(b)(6) filed by Defendant, thereby dismissing all Plaintiff's claims with prejudice and directing the clerk of court to close the case. On February 21, 2018, Plaintiff filed its notice of appeal.[3] This Court now has jurisdiction over this appeal pursuant to 29 U.S.C. §1291 because the judgment at issue is a final judgment of the United States District Court.

[1] ROA.397.
[2] ROA.416.
[3] ROA.417.

ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred in ruling that Plaintiff's factual allegations failed to state a claim for relief against Defendant for predatory pricing to maintain a monopoly under Section 2 of the Sherman Act, 15 U.S.C. § 2, because it found that Plaintiff's allegations of pricing below variable costs were implausible and because it found that Plaintiff did not plausibly plead legally significant barriers to entry.

2. Whether the trial court erred in ruling that Plaintiff's factual allegations failed to state a claim for relief against Defendant for making an illegal acquisition to establish a monopoly in violation of Section 2 of the Sherman Act, 15 U.S.C. §2, and Sections 4 and 7 of the Clayton Act, 15 U.S.C. §§15 and 18, because it found that Plaintiff made no plausible allegations that anticompetitive conduct caused the sale of Plaintiff's assets to Defendant.

3. Whether the trial court erred in ruling that Plaintiff's factual allegations failed to state a claim for relief against Defendant for illegally monopolizing the patch product and technology market in violation of Section 2 of the Sherman Act, 15 U.S.C. §2, as well as La. R.S. 51:122, 51:123, and 51:124(A), because it found that Plaintiff made no plausible allegations of anticompetitive conduct.

STATEMENT OF THE CASE

I. Factual Allegations

As this Court is aware, for the purpose of deciding a motion to dismiss pursuant to F.R.C.P. 12(b)(6), a plaintiff's factual allegations must be taken as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Accordingly, the facts alleged by Plaintiff/Appellant, Clean Water Opportunities, Inc., d/b/a Engineered Polyurethane Patching Systems ("EPPS"), in its Amended and Restated Complaint[4] ("Amended Complaint") are relevant to this Court's review of the trial court's granting of the Rule 12(b)(6) motion to dismiss filed by Defendant, The Willamette Valley Company ("Willamette").

As discussed in detail below, for well over 20 years Willamette, a privately owned multi-national corporation which manufactures and distributes a variety of products and services throughout the United States, Europe, Canada, Asia, and South America,[5] has shown a pattern of eliminating its competitors from the market for "patch," which is a polyurethane filling and patching material used in the plywood manufacturing business, so as to obtain and/or maintain a monopoly on same.[6] Notably, Willamette maintains one of its manufacturing plants in

[4] ROA.268.
[5] ROA.269.
[6] ROA.276 – 78.

Pineville, Louisiana.[7] In 2014, EPPS, a new company formed by David E. Edwards ("Edwards") to manufacture patch, obtained its first customer,[8] but within less than one year, Willamette had succeeded in driving EPPS out of business by using predatory pricing tactics, so, once again, Willamette held a complete monopoly on patch.[9]

A. Product at Issue[10]

Patch, the market product at issue in this litigation, is a two-part polyurethane wood filler. Patch part "A" is the polyurethane intermediary.[11] Patch part "B" is one of a group of chemicals referred to as isocyanates (methyl di-phenyl diisocyanate or polymeric MDI).[12] Patch is used in the "patch line" in the high volume mill production of sanded plywood where sheets of plywood are machine-fed onto a conveyor chain at the rate of 6 to 12 per minute.[13] The panels pass a routing station where the knots are routed out, then a few feet further down the line, the patch operator, or "patcher," applies the patch to the knot holes using a hand-held, two-part mixing valve, or a "patch gun," through an aluminum tube

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7 ROA.269.
8 ROA.278 – 79.
9 ROA.279 – 83.
10 The trial court did not consider whether EPPS sufficiently defined the relevant product (ROA.415); however, EPPS maintains that it did so in its Amended Complaint.
11 ROA.269.
12 ROA.269 – 70.
13 ROA.270.

with a static mixing element inside ("patch tube").[14] Patch is sold to plywood manufacturers on a per-gallon price basis, but included in the price is the use of the patch seller's application equipment.[15] Importantly, the patch seller not only provides the application equipment that is to be used by the mill, but it also services said equipment.[16]

The American Plywood Association ("APA") is the industry-based governing organization that serves to assure the quality of plywood, and the organization has set minimum standards for each grade of plywood marketed.[17] In order for a sheet of plywood to display the APA stamp, it must meet each APA standard, and the APA regularly inspects plywood mills for performance.[18] In this context, the APA puts out a guide for synthetic repairs which includes the "patch repair."[19] The APA does allow two other types of veneer repair: "wood plug" repair and "wood dough"/"wood putty" repair; however, EPPS has asserted that for various factual reasons, neither are suitable for the **high volume** production of sanded plywood.[20] Thus, there are no market substitutes for patch.[21]

[14] ROA.270.
[15] ROA.270.
[16] ROA.270.
[17] ROA.270.
[18] ROA.270.
[19] ROA.270.
[20] ROA.271.
[21] ROA.271.

B. Geographic Market[22]

In its Amended Complaint, EPPS explained that there are three geographic markets for patch in the continental United States: (1) the Southern Market; (2) the Eastern Market; and (3) the Northwestern Market.[23] The geographic market as it relates to Plaintiff's business is in the Southern market and is defined as plywood manufacturers who utilize patch in the manufacturing process within a 500-mile, six-hour drive time radius around Baton Rouge, Louisiana.[24]

As EPPS alleged, the geographic market for patch is determined by two things. First, long transportation times degrade patch and shorten its shelf-life due to its physical characteristics as a dispersed suspension with about two-thirds by weight being solid material.[25] Second, a patch supplier must be available **at all times** to go the customer's mill to service the patch application equipment.[26] Thus, it would not be economically feasible, nor would it make sense product-wise, to have a mill located across the country from a patch supplier.[27] Accordingly, the geographic market is a function of the distance between a patch supplier and its customers.

[22] The trial court did not consider whether EPPS sufficiently defined the relevant market (ROA.415); however, EPPS maintains that it did so in its Amended Complaint.
[23] ROA.272.
[24] ROA.273.
[25] ROA.272.
[26] ROA.272 – 73.
[27] ROA.272 – 73.

C. Barriers to Entry

In all three geographic markets, Defendant has established a monopoly as it is the sole supplier of patch. EPPS has alleged that Willamette controls 100 percent of the market of patch and has the market power that said control establishes.[28] EPPS has also alleged that there are significant barriers to entry into the market by new entities.[29] Primarily, the metering and application equipment used to apply patch is not commercially available.[30] Although Willamette will install the equipment in any facility where its patch is sold, it does not allow others to purchase the equipment nor will it supply data to others on how to build the equipment.[31] The equipment must be constructed from scratch, and few individuals other than Willamette employees have the knowledge necessary to construct the equipment.[32]

EPPS has alleged that another barrier to entry is the need to have patch guns.[33] This piece of equipment is the most critical part of the application system. The equipment consists of a two-part hand held valve with a flush port that is pneumatically operated.[34] Willamette does not make its patch guns commercially available to non-customers, nor is a unit that will function on a patch application

[28] ROA.273.
[29] ROA.273.
[30] ROA.273.
[31] ROA.273.
[32] ROA.273.
[33] ROA.274.
[34] ROA.274.

commercially available anywhere.[35] The acquisition of mixing tubes is another barrier to entry in that there are only two companies which have the equipment to make them, and in order to purchase the mixing tubes at a low enough price to compete with Willamette, a patch supplier would have to purchase a minimum of 10,000.[36]

EPPS has alleged that a third barrier to entry is the necessity of developing a commercially viable patch "A" product.[37] This particular formulation's function is non-standard in the polyurethane industry, so to enter the market, a potential supplier would have to develop its own formula.[38] In order to do so, one would have to develop a non-foam formula that is fast flowing, has a set-up time of 8 to 35 seconds, has excellent adhesion, is shrink and VOC free, has hardness measuring minimum 60 durometer-A scale within a five minute of set point, is ready to be cut and sanded, and is capable of having a nail driven through it without chipping or cracking.[39] Although these performance parameters are established by the APA, it does not give any information on how to meet them.[40]

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[35] ROA.274.
[36] ROA.274.
[37] ROA.274.
[38] ROA.274.
[39] ROA.274.
[40] ROA.274.

As EPPS has asserted, yet another barrier to entry is the B component of patch, or iso-methyl diphenyl diisocyanate ("ISO").[41] Although this is an off-the-shelf product available from different sources, there are hundreds of variances, and a potential patch supplier would have to determine and locate the exact one that works.[42] Assuming the correct formulation is found, the complexities of handling ISO also make it an economic barrier.[43] This class of chemical has to be kept under a nitrogen blanket in storage or packaging, and any exposure to moisture will start a polymeric reaction causing crystals to form thereby clogging and shutting down equipment.[44] Even doing so much as removing the lid and replacing it can allow in sufficient moisture to cause crystals to form.[45] Thus, the options are to ship it prepackaged and sell it at cost or spend thousands of dollars to set up handling.[46]

EPPS has asserted that a further barrier to entry is developing a supply chain for bulk purchase of the raw material to make patch.[47] In addition to having to set up storage and handling for the bulk material purchases so competitive pricing can

[41] ROA.274.
[42] ROA.274 – 75.
[43] ROA.275.
[44] ROA.275.
[45] ROA.275.
[46] ROA.275.
[47] ROA.275.

be obtained, some of the better choices in raw materials are essentially unavailable because Willamette uses them.[48]

An additional barrier to entry is the requirement that a patch supplier have APA approval to run in a mill, and this approval is only given after a potential supplier tests its patch and equipment in a mill.[49] To gain APA approval a patch supplier would first have to convince a mill to allow it (against Willamette's pressure) to come into the mill and set up and run its equipment for the mill to use patch on its line on a test plywood panel.[50] After the test, the panel would be sanded, cut, and shipped by the mill to the APA for testing.[51] The testing and clean up afterwards not only costs the potential supplier time and money, but it also costs the mill money in terms of a lost day of production and extra work for the mill's employees; therefore, no mill would allow a potential supplier to come in and test its patch unless the mill was planning to use the supplier.[52]

Thereafter, if the APA grants approval based on the test run, the patch supplier would only have approval to run in that particular mill. The entire testing and approval process, which takes approximately six weeks, would have to be

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[48] ROA.275.
[49] ROA.275.
[50] ROA.275.
[51] ROA.275.
[52] ROA.275 – 76.

completed a second and third time at different mills before a patch supplier could receive industry-wide approval.[53]

Finally, EPPS alleged that Willamette's 100-percent monopoly on the patch market is a significant barrier to entry itself.[54] A mere suggestion by Willamette to a customer that if it uses a competitor's brand, then Willamette will no longer provide patch to a customer will, in virtually all cases, prohibit a mill from using a new patch supplier.[55]

D. EPPS' Owner's History in the Patch Market

In 1990, Edwards entered into the business of supplying patch to plywood mills.[56] The market for Edwards' company, EML Enterprises, was primarily in the Texas, Arkansas, Louisiana, Mississippi, and Alabama region.[57] At that time, Willamette was in the same market and had competition from other entities such as Georgia Pacific Chemical and Champion Wood Products.[58] Georgia Pacific focused on Georgia Pacific mills in the Eastern market area, and Champion serviced a regional area around Memphis.[59] In the mid-1990s, Willamette purchased Georgia Pacific's chemical division's patent on patch and thus removed

[53] ROA.276.
[54] ROA.276.
[55] ROA.276.
[56] ROA.276.
[57] ROA.276.
[58] ROA.276.
[59] ROA.276.

Georgia Pacific from the market.[60] EPPS has also alleged that around that same time, Willamette acquired Champion; therefore, by 1997 or 1998, Willamette and Edwards' company were the only competitors in the above-defined geographic patch market.[61]

In July 2000, EML Enterprises was selling patch out of its plant in Port Allen, Louisiana, and enjoying approximately 10 to 15 percent of the market share for this product in this region.[62] At that time, Willamette bought Edwards' company, and as part of that agreement, Edwards agreed not to compete with Willamette for 10 years.[63] EPPS has alleged that this established Willamette's nationwide monopoly for the first time.[64]

In its Amended Complaint, EPPS alleged that Willamette then either started to raise the price and/or the market, *i.e.*, the plywood mills, became concerned about the monopoly and likely encouraged C. Dale Bates Company, which was already selling its products to the wood industry, to enter the patch market.[65] Thus, about nine months after establishing the monopoly, Willamette had one competitor; however, due to the complexities of the barriers put up by Willamette

[60] ROA.276 – 77.
[61] ROA.277.
[62] ROA.277.
[63] ROA.277.
[64] ROA.277.
[65] ROA.277.

to ward off new entrants into its monopoly, Bates was only a viable competitor for approximately one year before Willamette bought it out.[66]

E. EPPS' Entry in the Patch Market

Approximately three years after the non-compete agreement with Willamette concluded, Edwards began to develop and sell patch in the market through his new company, EPPS, because he observed that the cost of producing patch components seemed to have risen only 50 percent while he was out of the business yet Willamette had raised the selling price of patch by approximately 250 percent.[67] Consequently, as alleged by EPPS, Willamette recouped many times over the cost incurred in creating the monopoly the first and the second times, and it set a precedent of what it would do in the future should it become necessary to drive out any new competitors.[68]

Moreover, Edwards realized that Willamette had become the sole seller of patch, and he determined that the industry would probably embrace a second source in competition with Willamette.[69] Edwards also recognized that the equipment Willamette had designed in the early 1990s to apply patch had never been upgraded because with little to no competition during the previous decade,

[66] ROA.277.
[67] ROA.277 – 78.
[68] ROA.278.
[69] ROA.278.

Willamette had had no incentive to do so.[70] Edwards knew there was new technology available, and 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.[71]

F. EPPS' Contract with MARTCO

Thus, in July 2014, EPPS entered into a production contract with MARTCO, a plywood manufacturing company located in Chopin, Louisiana.[72] Pursuant to this contract, EPPS provided the patch and application equipment for one of two production lines at the MARTCO plant.[73] EPPS alleged that its initial sales to MARTCO for the one production line constituted approximately 10 percent of patch sold in the relevant geographic market.[74]

At that time, EPPS was selling "A" patch for $15 per gallon while Willamette had been selling the same product to MARTCO for $17 per gallon.[75] As set forth in its Amended Complaint, EPPS was told by MARTCO that, based upon its lower price, it would allow EPPS to take over the second patch production line if Willamette did not lower its prices.[76] Obviously EPPS encouraged MARTCO to allow it to supply the patch for both lines, and it offered MARTCO a

[70] ROA.278.
[71] ROA.278.
[72] ROA.278.
[73] ROA.278.
[74] ROA.278 – 79.
[75] ROA.278.
[76] ROA.279.

five-year contract for "A" patch at $12.90 per gallon.[77] If EPPS had been able to pick up the second line, it would have raised its market share to approximately 20 percent.[78]

EPPS has alleged that because Willamette was then faced with real competition for the first time in more than a decade, it desired to remove EPPS from the marketplace and to re-establish the monopoly it had on the patch market.[79] Accordingly, representatives of Willamette offered MARTCO a substantial discount on all the items it sold to MARTCO other than patch, including products that it sold to MARTCO plants that did not even use patch.[80] These discounts were contingent upon MARTCO's purchasing all its patch from Willamette.[81] EPPS has alleged that the sole purpose of this discount was for Willamette to undercut EPPS, force it from competition, and regain its monopoly in the patch market.[82]

Though EPPS attempted to offer a discount to MARTCO, it was told that Willamette's collective discount across the board was much greater than anything EPPS was able to offer.[83] EPPS has alleged that because Willamette enjoys a

[77] ROA.279.
[78] ROA.279.
[79] ROA.279.
[80] ROA.279.
[81] ROA.279.
[82] ROA.279.
[83] ROA.280.

monopoly, it can recoup any losses associated with the MARTCO discounts by pricing patch artificially high to all its patch customers.[84]

As a result of the substantial discounts Willamette offered, which MARTCO had little choice but to accept in light of Willamette's market power, MARTCO was required to terminate its relationship with EPPS.[85] At no time during the period of July 2014 through April 23, 2015, the day EPPS removed its patch equipment, had MARTCO indicated there were any problems with the quality of the product, performance of the application equipment, or the service EPPS was providing.[86] In fact, EPPS was advised by MARTCO personnel that all aspects of its product and performance far exceeded expectations.[87] EPPS averred that the only factor that caused EPPS' termination was the substantial discount Willamette gave on all products sold to MARTCO.[88]

As stated in its Amended Complaint, EPPS believes that when the substantial discounts on all items sold by Willamette to MARTCO are considered, MARTCO was buying its patch at a price below Willamette's variable costs to produce it.[89] While Willamette did not discount the patch itself, it used the substantial discount on all its other products to disguise the fact that it was selling

[84] ROA.280.
[85] ROA.280
[86] ROA.280 – 81.
[87] ROA.281.
[88] ROA.281.
[89] ROA.281.

patch at below its variable costs in order to remove its sole competitor from the market.[90]

G. EPPS' Attempts to Obtain Other Mills as Customers

In February 2015, prior to being driven out of the market by Willamette, EPPS had contacted Hood Industries and was invited to its plant to conduct a test run.[91] The test run went well, and EPPS was looking for approval to begin supplying patch there.[92] EPPS has alleged that in early April 2015, though, communications from Hood Industries suddenly ceased.[93] Edwards began making inquiries as to what had happened, and he was advised by a representative of Hood Industries on April 14, 2015, that it had accepted a discount it had been offered by Willamette.[94]

EPPS has alleged that Willamette offered substantial discounts to Hood Industries, as it did to MARTCO, with the condition that Hood only purchase patch from Willamette in order to prevent EPPS from becoming a competitor at the Hood Industries plant.[95] EPPS has also alleged that Willamette did the same with

[90] ROA.281.
[91] ROA.281.
[92] ROA.281.
[93] ROA.281.
[94] ROA.281 – 82.
[95] ROA.282.

Coastal Plywood in Florida since all Edwards' discussions with Coastal about supplying patch to it were halted by Coastal around the same time.[96]

H. Willamette's Acquisition of EPPS' Assets

As set forth in EPPS' Amended Complaint, it was not financially viable for EPPS to remain business after its relationship with MARTCO was terminated and after its attempts to enter into sales agreements with Hood Industries and Coastal Plywood were blocked by Willamette.[97] Accordingly, Edwards then contacted the CEO of Willamette, John Harrison ("Harrison"), to ask him if he knew that his company had driven EPPS out of business.[98] Although Harrison claimed he had no knowledge as to why MARTCO decided to stop using EPPS, he advised he would check into it.[99]

Subsequently, Harrison offered to purchase all EPPS' equipment and to enter into a non-compete/consulting agreement with Edwards, and because it was faced with insolvency due to Willamette's actions, EPPS had no choice but to agree.[100] Accordingly, on June 17, 2015, EPPS sold its assets to Willamette, and Edwards reluctantly entered a non-competition agreement.[101] EPPS has alleged

[96] ROA.282.
[97] ROA.282.
[98] ROA.282.
[99] ROA.282 – 83.
[100] ROA.283.
[101] ROA.283.

that Willamette entered into the agreement for the purpose of maintaining its illegal monopoly well into the future.[102]

Indeed, after EPPS was forced out of the marketplace, Willamette again established 100 percent of the market for patch in the defined geographic market.[103] EPPS has averred that with that power, Willamette can and will recoup its interim loss from below cost discounts and its cost associated with purchasing EPPS' assets with its future pricing of patch.[104]

Specifically, EPPS has alleged that without any competition, Willamette is able to substantially overcharge for each gallon of patch "A."[105] Though the plywood mills are then all required to overpay for patch, they can then pass their extra costs on to plywood retailers and ultimately to consumers who pay millions of dollars extra due to the original overcharge by Willamette.[106] Accordingly, EPPS has alleged that Willamette's monopoly causes substantial damage to the competitive process and substantial harm to the ultimate consumers of plywood.[107]

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[102] ROA.283.
[103] ROA.283.
[104] ROA.283.
[105] ROA.283 – 84.
[106] ROA.284.
[107] ROA.284

II. Procedural History and Ruling Presented for Review

EPPS filed this litigation against Willamette on April 11, 2016.[108] Thereafter, Willamette filed a motion to dismiss,[109] which the trial court granted, but it also gave EPPS the opportunity to amend with respect to some of its claims.[110] Specifically, the trial court stated that EPPS could amend to further address the barriers to entry in the patch market, the substitutes (or lack thereof) for patch, and the geographic market for patch. The trial court also invited EPPS to amend, to the extent it felt necessary, to specifically allege how Willamette's conduct was unlawful. The trial court further ruled that EPPS needed to allege that Willamette's conduct was the "but for" cause of its sale of assets to Willamette. Lastly, EPPS was granted leave to amend to state a "general violation of Section 2 of the Sherman Act" and Louisiana antitrust claims.

Thus, on April 17, 2017, EPPS filed its Amended and Restated Complaint wherein it addressed all the lower court's concerns.[111] Subsequently, on May 22, 2017, Willamette filed a second Rule 12(b)(6) motion to dismiss EPPS' claims in their entirety.[112] After briefing by both sides, on February 6, 2018, the trial court

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[108] ROA.9.
[109] ROA.42.
[110] ROA.253.
[111] ROA.268.
[112] ROA.302.

granted Willamette's motion, thereby dismissing all EPPS' claims with prejudice.[113] It is this ruling which is the subject of instant appeal.

SUMMARY OF THE ARGUMENT

To put it succinctly, the trial court simply refused to believe any allegations that Plaintiff made regarding Willamette's unlawful acts with respect to establishing and maintaining its monopoly in the patch market. Instead, it believed Willamette when it argued that it did nothing wrong. In doing so, the trial court put itself in the place of the ultimate factfinder, which is not allowed at the pleading stage.

More specifically, though, the trial court erred when it found that EPPS' Sherman Act predatory pricing claim had not been sufficiently alleged because EPPS did not precisely state how Willamette's pricing was below its average variable costs. Given that EPPS is not in possession of Willamette's financial information, the trial court erred in requiring it to make such detailed factual allegations prior to discovery, and it erred in finding that the allegations EPPS did make as to Willamette's pricing were implausible. Thus, the court erred in dismissing Plaintiff's predatory pricing claim based on this factor.

The trial court also erred in finding that EPPS did not allege any significant barriers to entry in the patch market, which is another element of the predatory

[113] ROA.397.

pricing claim. Though the court claimed it accepted as true the allegations that barriers existed, it stated did not have to believe EPPS' conclusions that the barriers were significant. Once again, then, the court simply chose not to believe that the multitude of chemical, mechanical, logistical, and financial barriers detailed by EPPS could have been significant, and it did so prior to any discovery or any expert testimony on same. Consequently, the court erred in dismissing EPPS' predatory pricing claim due to a lack of plausible allegations as to significant barriers to entry.

Next, the trial court dismissed EPPS' Sherman and Clayton Act claims arising out of the sale of its assets to Willamette because the court did not believe EPPS' allegations that Willamette's anticompetitive conduct caused the sale. The court made this finding even though EPPS specifically alleged how Willamette's actions led to EPPS' financial ruin, and how Willamette established a 100-percent monopoly in the relevant geographic market after it drove EPPS out of business and purchased its assets. Accordingly, EPPS submits that the trial court erred when it found all its allegations to be simply implausible and dismissed its illegal acquisition claims.

Finally, the trial court erred when it dismissed EPPS' Sherman Act and Louisiana antitrust claims based on Willamette's maintaining of a monopoly. The court mistakenly found that for those claims to be valid, EPPS would have to prove a separate illegal act; however, that is not what the governing law provides. It is clear that even if a monopolist legally obtains its monopoly power, it can still violate antitrust laws in the maintaining of its monopoly. Under the law, EPPS' claims against Defendant for simply maintaining a monopoly and thereby harming competition are separate and apart from its predatory pricing claim and its illegal acquisition claim. Thus, the court erred when it found that EPPS' claims against Willamette for maintaining a monopoly depended on the success of its other claims.

THE ARGUMENT

I. Standard of Review and F.R.C.P. 12(b)(6) Standard

An appellate court reviews the district court's granting of a motion to dismiss on a *de novo* basis. *Armendariz v. Chowaiki,* 2017 WL 1201005, at *3 (5th Cir. 2017)(citing *Lowrey v. Tex. A&M Univ. Sys.,* 117 F.3d 242, 246 (5th Cir. 1997)). To survive a challenge under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In deciding a Rule 12(b)(6) motion to dismiss, not only must a court accept well-pleaded facts as true, it must also "construe the complaint in a light favorable to that plaintiff." *BRFHH Shreveport, LLC v. Willis Knighton*

Med. Ctr., 2016 WL 1271075, at *5 (W.D. La. 2016)(quoting *In re Great Lakes Dredge & Dock Co.*, 624 F.3d 201, 210 (5th Cir. 2010)).

A claim is "facially plausible" when a plaintiff pleads facts that permit the court to "reasonably infer a defendant is liable for the alleged misconduct." *Id.* (citations omitted). As long as the complaint raises a plausible right of recovery and puts the defendant on notice of the plaintiff's claim and grounds upon which it rests, "the complaint **does not need to specify detailed factual allegations**." *Id.* at 15 (citing *Twombly*, 550 U.S. at 555)(emphasis added). In fact, "[i]nitial pleadings are only required to give notice of a claim, and must be construed liberally so as to do substantial justice." *St. Martin v. Jones*, 2008 WL 4412267, at *7 (E.D.La. 2008)(citing *U.S. v. Uvalde Consol. Independent School Dist.*, 625 F.2d 547, 549 (5th Cir. 1980)).

Consequently, "[a]sking for plausible grounds to infer . . . does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Twombly,* 550 U.S. at 556. Importantly,

> [i]t is not for the court to decide, at the pleading stage, which inferences are more plausible than other competing inferences, since those questions are properly left to the factfinder.

Evergreen Partnering Grp., Inc. v. Pactiv Corp., 720 F.3d 33, 45 (1st Cir. 2013)(citations omitted). In other words, a court cannot properly dismiss a complaint "that states a plausible version of the events merely because the court finds a different version more plausible." *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 185 (2d Cir. 2012).

Notably, "[i]n the use of Section 4 of the Clayton Act, the courts have attributed to a private litigant the role of an ancillary force to supplement governmental enforcement of the antitrust laws." *Knuth v. Erie-Crawford Dairy Co-op. Ass'n,* 395 F.2d 420, 423 (3d Cir. 1968)(citing *U.S. v. Borden Co*., 347 U.S. 514 (1954)). As such, there was historically a "'liberal' approach to the consideration of antitrust complaints . . . ." *Id.*

Certainly it is true that in antitrust cases, there is no requirement of "heightened fact pleading of specifics . . . ." *Twombly*, 550 U.S. at 570. In fact, it has been said that

> summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.

Poller v. Columbia Broad. Sys., Inc., 368 U.S. 464, 473 (1962). Thus, because most of the proof in antitrust cases is possessed by the defendants, "dismissals prior to giving the plaintiff **ample opportunity for discovery** should be granted very sparingly." *Blanchard & Co. v. Barrick Gold Corp.,* 2003 WL 22071173, at *3 (E.D. La. 2003)(quoting *Hosp. Bldg. Co. v. Trustees of Rex Hosp.,* 425 U.S. 738, 746 (1976))(citations omitted)(emphasis added).

Indeed, one court has criticized the "slow influx of unreasonably high pleading requirements at the earliest stages of antitrust litigation," which it says has resulted in part "from citations to case law evaluating antitrust claims at the summary judgment and post-trial stages . . . ." *Evergreen Partnering Grp., Inc.*, 720 F.3d at 44. In fact, "*Twombly's* articulation of the pleading standard for § 1 [Sherman Act] cases draws from summary judgment jurisprudence," but the "standards applicable to Rule 12(b)(6) and Rule 56 motions remain distinct." *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 323 n. 21 (3d Cir. 2010).

Significantly, many of the cases relied on by Willamette and the trial court were decided either after discovery or after a full trial on the merits. Moreover, while Defendant asserted in its motion that under *Twombly,* "[f]actual 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,"[114] that is inaccurate. What *Twombly* actually states is as follows:

> **An allegation of parallel conduct** is thus much like a naked assertion of conspiracy in a § 1 complaint: it gets the complaint close to stating a claim, but **without some further factual enhancement** it stops short of the line between possibility and plausibility of "entitle[ment] to relief."

[114] ROA.309.

Twombly, 550 U.S. 557 (citation omitted)(emphasis added). EPPS asserts that, as shown herein, its Amended Complaint contains much "factual enhancement" of its allegations of antitrust activities; therefore, the trial court erred in dismissing same.

II. The Trial Court Erred in Ruling That EPPS Failed to State a Claim for Relief Against Defendant for Predatory Pricing to Maintain a Monopoly Under Section 2 of the Sherman Act.

The Sherman Act, 15 U.S.C. § 2, makes it illegal to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce . . . ."

> The purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which **unfairly tends to destroy competition itself**. It does so not out of solicitude for private concerns but out of concern for the public interest.

Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993)(citations omitted)(emphasis added).

Predatory pricing claims under the Sherman Act arise when an entity forgoes "present revenues" to drive a competitor out of the market with the hope of recouping its losses through higher prices in the future. *Felder's Collision Parts, Inc. v. All Star Advert. Agency, Inc.*, 777 F.3d 756, 759 (5th Cir.), *cert. denied*, 136 S. Ct. 39 (2015). "Most courts analyze predatory pricing claims as 'an attempt by the defendant to preserve or extend its monopoly power' under section 2 of the Sherman Act." *Id.* (citation omitted).

Here, the trial court ruled that EPPS failed to state a claim for predatory pricing because it was "wholly speculative that Defendant reduced its price not only below Plaintiff's offered price, but unnecessarily reduced it below variable cost in order to drive Plaintiff out of the market."[115] It also ruled that the predatory pricing claim failed because EPPS had not "plausibly pled legally significant barriers to entry . . . ."[116]

A. Below Cost Pricing

The trial court found that "Plaintiff's allegations of pricing below variable cost are implausible."[117] It must be emphasized, though, that EPPS' allegations at this juncture have been based only information within its custody and control, which clearly does not include any information on Willamette's actual costs or profits. In reviewing the granting of a motion for summary judgment, not a mere motion on the pleadings, the Fifth Circuit in *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518 (5th Cir. 1999), explained how average variable costs are considered:

> Ideally, an inquiry into whether a monopolist had sold his product below cost would look at the true marginal cost—we would attempt to discover the precise cost to the firm of producing the extra product that it is alleged to have sold below cost. But because the true marginal costs of production are difficult to generate, this Court attempts to estimate them by using average variable costs. . . . In this

[115] ROA.408.
[116] ROA.410.
[117] ROA.407.

> analysis, we attempt to distinguish between costs that are fixed—at least over the short term—and costs that vary with the amount produced. . . . Thus **salaried labor costs, rent or depreciation on real estate, and certain capital expenses** are considered fixed. But inputs like **hourly labor, the cost of materials, transport, and electrical consumption at a plant** will vary, and are relevant to a predation inquiry.

Id. at 532 (internal citations omitted)(emphasis added). Here, EPPS could understandably make no specific allegations as to Willamette's fixed or variable costs because it simply **does not possess that information** at this stage of litigation.

In *Felder's Collision Parts, Inc.*, 777 F.3d 756, an initial Rule 12(b)(6) motion was denied even though the trial court noticed several defects in the antitrust allegations, including that of not sufficiently pleading below cost pricing. Thus, the trial court allowed the plaintiff an opportunity to amend, and

> [i]n hopes that more information would help cure these defects, the district court also compelled Defendants **to turn over documents relevant to their costs and profits.**

Id. at 759 (emphasis added).

To the contrary, in the subject case, there has been no discovery as to Defendant's costs or profits associated with patch. EPPS has had to allege that Willamette is guilty of below cost pricing without any specific information as to its finances. Still, EPPS certainly did allege that Willamette was selling patch below its average variable costs,[118] and it set forth facts supporting this allegation. For example, it pled that discounts Defendant offered to two mills, MARTCO and Hood Industries, were substantial and represented a benefit below Willamette's cost to produce Patch.[119] EPPS acknowledges that it cannot allege detailed facts as to the exact costs that go into Willamette's production of patch, but it should not have to at this stage of litigation.

Finally, this Court must be cognizant of the allegation, which must be accepted as true at this point, that Willamette has a 100-percent monopoly on patch in the subject geographic market. The cases relied on by Willamette and the trial court, in addition to being decided after discovery, do not involve 100-percent monopolists and consequently are legally and factually distinguishable.

> The Supreme Court on more than one occasion has emphasized that economic realities rather than a formalistic approach must govern review of antitrust activity.

U.S. v. Dentsply Intern., Inc., 399 F.3d 181, 189 (3d Cir. 2005). "Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law . . . ." *Id.* (quoting *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 466–67 (1992)). In other words, antitrust "policy requires the courts to seek the economic substance of an arrangement, not merely its form." *Id.* (citation omitted).

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[118] ROA.281, 283 – 84.
[119] ROA.281, 284.

In the matter at hand, EPPS urged the trial court to consider Willamette's actions, and its allegations in its Amended Complaint, in light of the market power that having 100 percent of the market share gives Willamette.[120] The trial court apparently did not do so. Instead, it found that EPPS' predatory pricing claim had not been sufficiently alleged because EPPS did not specifically allege how Willamette's pricing was below its average variable costs. EPPS submits that the trial court erred in requiring it to make such specific factual allegations prior to having done any discovery, and it erred in finding that the allegations EPPS did make as to Willamette's pricing were implausible.

B. Barriers to Entry

Even though the trial court found that EPPS did not meet the first element of a predatory pricing claim, it still, "out of an abundance of caution,"[121] analyzed the second prong, that being Defendant's ability to recoup any losses it might have incurred during any below cost pricing. A plausible claim of recoupment requires that the pleadings show as follows:

> (1) that the predatory scheme "could actually drive the competitor out of the market," and (2) "... evidence that the surviving monopolist could then raise prices to consumers long enough to recoup his costs without drawing new entrants to the market."

[120] ROA.354.
[121] ROA.408.

Big River Industries, Inc. v. Headwaters Resources, Inc., 971 F.Supp.2d 609, 619 (M.D. La. 2013)(quoting *Stearns Airport Equipment Co*., 170 F.3d at 528 – 29).

1. Barriers to Entry Alleged by EPPS

As to the first factor, EPPS clearly alleged that it was taken out of the market due to Willamette's predatory pricing scheme. Thus, the trial court focused on the second factor, and more specifically whether there were barriers to entry to the patch market. Though the court stated that it was accepting EPPS' allegations as to the barriers to entry, it did not accept EPPS' "conclusions about the legal significance of these barriers."[122] In other words, it simply did not believe what EPPS had to say about the difficulty of entering the patch market.

In its Amended Complaint, EPPS discussed in detail what hurdles a new entrant to the patch market would have to clear. For example, EPPS discussed that the application and metering equipment must be built from scratch.[123] EPPS stated that Willamette will not allow others to purchase its equipment; therefore, that excludes even the possibility that another mill could buy the equipment and allow a patch seller to solely supply the patch itself.[124] Therefore, anyone who wants to supply patch **must** build the equipment, too.[125]

[122] ROA.410.
[123] ROA.273.
[124] ROA.273.
[125] ROA.273

EPPS also described in its Amended Complaint the complexities of developing the chemical formulation of patch as well as the mechanical engineering of the equipment.[126] EPPS also alleged that developing a supply chain for bulk purchase of the raw material to make patch is yet another barrier.[127] Moreover, EPPS alleged that in addition to having to set up storage and handling for the bulk material purchases so competitive pricing can be obtained, some of the better choices in raw materials are essentially unavailable because Willamette uses them.[128]

Another significant barrier which EPPS alleged is the requirement that a patch supplier have APA approval to run in a mill, and this approval is only given after a potential supplier tests its patch and equipment in a mill.[129] The testing process takes approximately six weeks and costs the potential supplier time and money, and perhaps more importantly, it costs **the mill** money because it loses production time during testing.[130] If a supplier gets APA approval based on a test run, the approval is good for that mill only.[131] The entire testing and approval

[126] ROA.274 – 75.
[127] ROA.275.
[128] ROA.275
[129] ROA.275
[130] ROA.275 – 76.
[131] ROA.276.

process would have to be completed a second and third time at different mills before a patch supplier could receive industry-wide approval.[132]

Despite all these allegations, the trial court found it "significant that the Amended Complaint acknowledges some actual entry in a '100 percent monopoly' market in response to rising prices, one instance of which occurred only nine months after the monopoly was first established."[133] The entry of which the trial court speaks is that of EPPS and C. Dale Bates Company, neither of which managed to stay in the market for more than a year or so.[134] Regardless, EPPS submits that the entry of two suppliers, one being itself, in the patch market in the span of roughly 15 years does not demonstrate low barriers to entry.

2. Relevant Jurisprudence

As this Court has said, "for a potential entrant or the threat of a potential entrant to act as a competitive constraint on incumbent firms, entry—at least for that firm—must be easy." *Chicago Bridge & Iron Co. N.V. v. F.T.C.*, 534 F.3d 410, 428 (5th Cir. 2008)(quoting *U.S. v. Baker Hughes, Inc.*, 908 F.2d 981, 986 (D.C. Cir.1990)). Furthermore, for entry to "constrain supracompetitive prices, the entry has to be of a 'sufficient scale' adequate to constrain prices and break entry barriers." *Id.* at 429 (citations omitted). As the Supreme Court has stated:

[132] ROA.276.
[133] ROA.410.
[134] ROA.277 – 83.

> The existence of an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be a substantial incentive to competition which cannot be underestimated.

U.S. v. Falstaff Brewing Corp., 410 U.S. 526, 531–32 (1973).

> Entry barriers are defined as being
>
> "additional long-run costs that were not incurred by incumbent firms but must be incurred by new entrants," **or "factors in the market that deter entry while permitting incumbent firms to earn monopoly returns."**

Rebel Oil Co., Inc. v. Atlantic Richfield Co., 51 F.3d 1421, 1439 (9th Cir. 1995)(citation omitted)(emphasis added). Notably, the trial court herein seemed to ignore the second definition of entry barriers and to only focus on whether a new entrant would have to incur costs that Willamette had not already incurred.

> Nonetheless, the following have been held to be barriers to entry:
>
> (1) legal license requirements; (2) control of an essential or superior resource; (3) entrenched buyer preferences for established brands; (4) capital market evaluations imposing higher capital costs on new entrants; and, in some situations, (5) economies of scale.

Id. (citations omitted). In evaluating entry barriers, a court should focus on "their ability to constrain not 'those already in the market, but . . . those who would enter but are prevented from doing so.'" *Id.* (citation omitted). In short, and as stated by one court,

> Any market condition that makes entry more costly or time-consuming and thus reduces the effectiveness of potential competition as a constraint on the pricing behavior of the dominant firm should be

> considered a barrier to entry, regardless of who is responsible for the existence of that condition.

Southern Pacific Comm. Co. v. AT & T Co., 740 F.2d 980, 1001 (D.C. Cir. 1984).

As discussed above, EPPS alleged many specific barriers to entry with respect to the development, purchase, and storage of the patch formula and application equipment. In addition, EPPS alleged in its Amended Complaint that Willamette's power as a 100-percent monopolist over its customers was a barrier to entry.[135] While Defendant denied that this could be the case, a similar argument was accepted in *Dentsply Intern., Inc.,* 399 F.3d 181. Therein, the court stated as follows:

> Entrants into the marketplace must confront Dentsply's power over the dealers. The District Court's theory that any new or existing manufacturer may "steal" a Dentsply dealer by offering a superior product at a lower price, . . . simply has not proved to be realistic. To the contrary, purloining efforts have been thwarted by Dentsply's longtime, vigorous and successful enforcement actions. **The paltry penetration in the market by competitors over the years has been a refutation of theory by tangible and measurable results in the real world.**

Id. at 194 (internal citation omitted)(emphasis added). As stated above, any potential patch supplier must confront Willamette's power over the mills, and it simply cannot "steal" a mill by offering a better formulation of patch or a lower price.

[135] ROA.276.

Willamette also argued that the fact EPPS had entered the market was evidence of the lack of barriers to the patch market. This position simply has no merit. In *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 762 F.3d 1114 (10th Cir. 2014), the defendant made that same argument, which was soundly rejected.

> Medtronic argues that Lenox's own entry into the bone-mill market shows that entry was neither time-consuming nor costly. But we measure entry barriers for new entrants, not incumbents. . . . To measure the barriers for new entrants, we must view the evidence in the light most favorable to Lenox.

Id. at 1125. Thus, the fact that EPPS entered the market, after its owner had been in the market some 13 years before, should not have been a factor in the trial court's consideration of EPPA' allegations of barriers to entry.

Likewise, the fact that one other company managed to enter the patch market, but not remain there long, in the last 15 years should not have led to a finding that EPPS failed to allege significant barriers to entry. The fact that entry into a particular market has occurred "does not necessarily preclude the existence of 'significant' entry barriers." *Rebel Oil Co., Inc.*, 51 F.3d at 1441.

> If the output or capacity of the new entrant is insufficient to take significant business away from the predator, they are unlikely to represent a challenge to the predator's market power. . . . Barriers may still be "significant" if the market is unable to correct itself despite the entry of small rivals.

Id. (citations omitted).

For example, in *Trendsettah USA, Inc. v. Swisher Int'l Inc.*, 2016 WL 6822191, at *7 (D.C. Cal. 2016), the defendant argued at the summary judgment stage that there could be no genuine issue of material fact as to whether the entry barriers were significant because “there were **many** entrants into the cigarillo market from **2011 to 2013**, and there are now **over 30 competitors** in the cigarillo market.” (emphasis added). In rejecting that argument, the court found as follows:

> The Court agrees that the number of market entrants suggests that the barriers to entry to the cigarillo market are not insurmountably high. But the number of new competitors alone does not necessarily indicate whether these barriers are significant.

Id. (citing *Rebel Oil*, 51 F.3d at 1440).

As another example, in *Lenox MacLaren Surgical Corp.,* 762 F.3d 1114, the appellate court held that the entry into the market by one strong competitor did not call for a finding that the barriers to entry were low.

> From Lenox’s evidence, the fact-finder could regard Stryker as an atypical competitor, for it enjoyed three attributes—an existing distribution network, credibility among institutional buyers, and a vast supply of capital to invest in a market generating limited revenues—that provided a competitive edge uniquely suited to the bone-mill market. . . .
>
> Stryker’s entry into the bone-mill market would not preclude the jury from finding significant barriers to entry in the bone-mill market. Notwithstanding Stryker’s successful entry, a fact-finder could reasonably infer that Medtronic had monopoly power in the bone-mill market from 2007 to 2010 based on its high market share and the presence of barriers to entry.

Id. at 1126.

Thus, the fact that one other company besides EPPS entered the patch market in the last 15-plus years does not mean that there are low barriers to entry. The trial court simply erred when it found that it was "significant" that some entry had occurred in the patch market since Willamette established its monopoly.

Finally, EPPS notes that the issue of whether barriers to enter a market are significant is often decided after discovery has taken place. For example, this issue was decided in *Lenox MacLaren Surgical Corp.*, 762 F.3d 1114, on summary judgment and in light of testimony from experts. In particular,

> Lenox's economic expert opined that significant barriers to entry had existed in the bone-mill market, including: (1) the need to develop and research the product, (2) comply with FDA rules, (3) develop a sales channel, and (4) overcome existing relationships between market incumbents and large-scale purchasers. . . .
>
> Lenox also presented sworn testimony by a designer and engineer of medical devices. . . . This expert testified about the significance of five barriers to new entry into the bone-mill market:
>
> - the necessity of a design and development phase,
> - the need to find a manufacturer offering sufficient reliability at attractive prices,
> - the need to make a name for oneself among influential surgeons,
> - the need to build and supervise a distribution channel, and
> - the need to overcome powerful bundling tactics employed by existing competitors in the sale of medical devices.

Id. at 1125 (internal citations omitted). Notably, these barriers to entry, which were enough to preclude summary judgment for the defendant in *Lenox*, are very similar to the ones alleged in EPPS' Amended Complaint.

Thus, EPPS once again states that the trial court erred in finding that it did not allege any significant barriers to entry in the patch market. Because EPPS did allege significant barriers, and because it also alleged, based on information available to it at this time, that Willamette engaged in below cost pricing to force EPPS out of the patch market, the trial court erred in finding that EPPS did not set forth a predatory pricing claim against Defendant. This Court should now correct that error and reinstate EPPS' predatory pricing claims.

III. The Trial Court Erred in Ruling That Epps Failed to State a Claim for Relief Against Defendant for Making an Illegal Acquisition to Establish a Monopoly in Violation of Section 2 of the Sherman Act and Sections 4 and 7 of the Clayton Act.

The trial court found that EPPS did not state a claim for relief with respect to the sale of its assets to Willamette because it set forth "no plausible allegations that anticompetitive conduct by Defendant caused the sale."[136] Nonetheless, EPPS did set forth factual allegations showing it was, indeed, Willamette's anticompetitive activities that led to the sale of its assets well below fair market value.[137] EPPS certainly alleged that after its business relationship with MARTCO was terminated due to Willamette's unlawful actions, and after its attempts to enter into sales agreements with two other mills were blocked by Willamette, it was not financially

[136] ROA.411.
[137] ROA.282 – 83, 287 – 88.

viable to continue business.[138] It was only then that EPPS sold its assets to Defendant and entered into a non-competition agreement.

Section 7 of the Clayton Act prohibits acquisitions "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." *Chicago Bridge & Iron Co. N.V.*, 534 F.3d at 422 – 23 (quoting 15 U.S.C. § 18). EPPS has alleged that when Willamette bought its assets and had it sign a non-compete agreement, Willamette returned to having a 100-percent monopoly in the subject geographic market. EPPS also alleged that Defendant committed predatory pricing to drive it out of business.

As discussed above, the trial court erred by finding that EPPS did not set forth a claim for predatory pricing. Likewise, the trial court erred in finding that EPPS had stated no plausible allegations of anticompetitive conduct which led to Willamette's purchase of its assets. Accordingly, EPPS submits that this Court should reverse the trial court and reinstate its claims arising out of the illegal acquisition of its assets.

[138] ROA.282.

IV. The Trial Court Erred in Ruling That Epps Failed to State a Claim for Relief Against Defendant for Illegally Monopolizing the Patch Market in Violation of Section 2 of the Sherman Act as Well as Louisiana Antitrust Laws.

The trial court dismissed EPPS' claim for relief under Section 2 of the Sherman Act and identical Louisiana antitrust laws that Willamette has "unlawfully monopolized the patch product and technology market."[139] In doing so, it agreed with Willamette that these claims were merely "catch all" claims, and that "where no piece of conduct is illegal, adding them together doesn't magically transform them into actionable conduct."[140] The trial court concluded that these claims must be dismissed because EPPS "lacks plausible allegations of anticompetitive conduct (especially ones distinct from its predatory pricing claim) . . . ."[141] In ruling as it did, the trial court misinterpreted the governing law and essentially held that only a separate illegal act could support a claim for relief against a monopolist. That is not the case, however,

The act of maintaining a monopoly is a separate and distinct offense from others alleged by EPPS. As explained by the Supreme Court,

> the offense of monopoly . . . has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

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[139] ROA.285.
[140] ROA.411.
[141] ROA.412.

U.S. v. Grinnell Corp., 384 U.S. 563, 570–71 (1966). Moreover, "[i]t is clear that a monopolist is prohibited from engaging in certain conduct that **would be lawful if performed by a competitive firm**." *Paschall v. Kansas City Star Co*., 695 F.2d 322, 333 (8th Cir. 1982)(citation omitted)(emphasis added).

In other words, "the acts or practices upon which a monopolization claim may rest **need not be in themselves illegal**." *D.E. Rogers Associates, Inc. v. Gardner-Denver Co*., 718 F.2d 1431, 1438 (6th Cir. 1983)(citations omitted)(emphasis added). Further, it is not necessary for the monopolist to have had the specific intent to eliminate competition when it committed the otherwise legal acts. *Id.* Generally, a monopolist uses its monopoly power in a manner prohibited by section 2 when it acts "in an unreasonably exclusionary" or "anticompetitive" way toward competitors. *Id.* (citations omitted).

Thus, to be clear, "[b]ehavior that **otherwise might comply with antitrust law** may be impermissibly exclusionary when practiced by a monopolist." *Dentsply Intern., Inc*., 399 F.3d at 187. A monopolist is simply "not free to take certain actions that a company in a competitive (or even oligopolistic) market may take, because there is no market constraint on a monopolist's behavior." *Id.* (citation omitted). For example, while an exclusive dealing arrangement is not in and of itself illegal, it can be "an improper means of maintaining a monopoly." *Id.* (citations omitted).

Accordingly, even if a monopoly is lawfully obtained, the later use of that power to harm competition is illegal.

> As was stated by the Supreme Court in *United States v. Griffin*, "[t]he anti-trust laws are as much violated by the prevention of competition as by its destruction. It follows *a fortiori* that the use of monopoly power, **however, lawfully acquired**, to foreclose competition, to gain a competitive advantage, or destroy a competitor, is unlawful.

Strong v. BellSouth Telecommuniations, Inc., 1994 WL 1016699, at *3 (W.D. La. Jan. 24, 1994)(quoting *U.S. v. Griffin*, 334 U.S. 100, 106 (1947))(emphasis added).

It should be clear then that the trial court erred in finding that EPPS could not have a claim against Willamette for illegally maintaining a monopoly unless there was a **separate illegal act**. EPPS' claim against Defendant for simply maintaining a monopoly and thereby harming competition is separate and apart from its predatory pricing claim and its illegal acquisition claim, and it should have been allowed to stand on its own regardless of the merits of the other claims. Moreover, and contrary to the trial court's finding, EPPS alleged that Willamette did commit anticompetitive conduct in the maintaining of its monopoly, and that it injured competition in doing so.[142]

Consequently, the trial court erred in finding that EPPS failed to state a claim for relief under Section 2 of the Sherman Act for illegally maintaining a monopoly. In addition, "violations of federal antitrust law can support a claim that

[142] ROA.283 – 85.

Louisiana's antitrust law has been violated" if the federal violations have been adequately pled. *Felder's Collision Parts, Inc. v. Gen. Motors Co.*, 960 F. Supp. 2d 617, 638 (M.D. La. 2013). Thus, the trial court also erred in dismissing EPPS' Louisiana law claims based on Willamette's maintaining of a monopoly, and this Court should now correct that error on appeal.

CONCLUSION

As shown herein, the trial court essentially handled Willamette's Rule 12(b)(6) motion as a trial. Instead of accepting EPPS' allegations as true as is required in the consideration of 12(b)(6) motions, the court chose not to believe them and found EPPS' "evidence" to be lacking. As the court repeatedly stated, it simply did not find EPPS' allegations of any unlawful behavior by Willamette to be plausible. In other words, the Court believed Willamette's version of events rather than Plaintiff's.

As stated by one court,

> [i]t is not for the court to decide, at the pleading stage, which inferences are more plausible than other competing inferences, since those questions are properly left to the factfinder.

Evergreen Partnering Grp., Inc., 720 F.3d at 45 (citations omitted). Yet, that is just what the trial court did when it dismissed EPPS' claims based on the pleadings alone. Accordingly, and for all the foregoing reasons, EPPS respectfully submits that the trial court erred when it granted Willamette's Rule 12(b)(6) motion to dismiss and found that its factual allegations could not possibly support a single valid claim under the Sherman or Clayton Acts or Louisiana antitrust law.

Wherefore, EPPS respectfully requests that this Court reverse the judgment of the district court, reinstate its claims against Willamette, and remand this matter to the district court for further proceedings on the merits of its claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have on the 10th day of April, 2018, served the foregoing brief on the following counsel of record through the ECF system pursuant to Fifth Circuit Rules 25.2 and 25.2.5. Additionally, a copy was served on counsel of record via electronic mail:

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)(7)(B) AND LOCAL RULE 32

Pursuant to 5th Cir. R. 32.2 and .3, the undersigned certifies this brief complies with the type -- volume limitations of F.R.A.P. 32(a)(7)(B).

1. Exclusive of the exempted portions in F.R.A.P. 32(a)(7)(B)(iii) and 5th Cir. 32.2, this brief contains 10,195 words.

2. This brief was prepared using Microsoft Word 2010 in proportionally spaced typeface using "Times New Roman" font, 14-point.

3. The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in F.R.A.P. 32(a)(7)(B), may result in the Court's striking the brief and imposing sanctions against the person signing the brief.

/s/Joseph R. Ward, Jr.
This 10th day of April, 2018