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

v.

THE WILLAMETTE VALLEY COMPANY,
Defendant-Appellee

On Appeal from the United States District Court for the Middle District of Louisiana, Case No. 3:16-cv-00227, The Honorable Judge John W. deGravelles

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ANSWERING BRIEF OF THE WILLAMETTE VALLEY COMPANY, DEFENDANT-APPELLEE

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The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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E. Additional Parties

In addition to the parties to this case and their counsel, David E. Edwards, owner of Plaintiff-Appellant, CLEAN WATER OPPORTUNITIES, INC. may have a potential interest in the outcome of this appeal.

/s/ Robert N. Hochman
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STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellee The Willamette Valley Company ("Willamette") respectfully submits that this Court may resolve this case without oral argument because it involves the application of settled law to the facts as alleged in the relevant complaint. However, Willamette does not object to Appellant's request for oral argument if the Court believes oral argument would be helpful.

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INTRODUCTION

It is by now almost cliché to recite that the antitrust laws are designed to protect competition, and the consumers who benefit from it, and not competitors. *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986). But it would be hard to find a clearer example of an improper effort to use the antitrust laws to protect a competitor than this case.

Defendant-Appellee The Willamette Valley Company ("Willamette") sells a variety of products to plywood mills, including a polyurethane material called "patch" and its accompanying application equipment. Patch is used to fill knot holes and other defects in plywood during the manufacturing process. Plaintiff-Appellee Clean Water Opportunities, Inc. d/b/a/ Engineered Polyurethane Patching Systems ("EPPS") competed with Willamette to sell patch. EPPS's owner had previously owned a company that competed with Willamette for about a decade before he sold that prior company to Willamette. EPPS's owner later re-entered the patch market with EPPS. This time EPPS was unable to survive as long, but that does not mean its efforts failed to benefit consumers. EPPS won the chance to supply patch to one of two plywood production lines operated by

MARTCO, a major customer. MARTCO then welcomed EPPS's bid to win the chance to supply patch to both of its production lines. Of course, MARTCO wasn't really interested in EPPS *per se*; it was interested in getting the best possible deal it could for its patch needs. So it let Willamette, its incumbent supplier, make a competing offer. Willamette's offer proved better. EPPS, having lost MARTCO's business, quit the market and sold its business to Willamette.

EPPS then sued Willamette, asserting a variety of federal and state antitrust violations. Ultimately, this case is about an incident in which EPPS lost a bid, fair and square, to Willamette—an entirely unremarkable occurrence in any industry—and EPPS has turned to the antitrust laws to seek consolation and compensation for that loss. The real winner in this story is not Willamette, but MARTCO. The competition for its business left it with lower prices for what it considers the long term. The story told in the complaint, far from raising doubts about the ability of the patch market to function to benefit consumers, confirms that it can and does function quite well on its own.

The district court rightly concluded, after allowing EPPS an opportunity to amend the complaint, that it failed to allege any plausible violation of the antitrust laws. The only allegedly wrongful, anticompetitive conduct concerns price competition for MARTCO's business that EPPS says was too fierce. EPPS's complaint fails because its own specific allegations regarding that price competition demonstrate that it has no antitrust claim. Nothing in EPPS's brief here calls the district court's conclusion into doubt. This Court should affirm.

STATEMENT OF JURISDICTION

The jurisdictional statement of the appellant is complete and correct.

STATEMENT OF THE ISSUES

1. Whether the district court correctly concluded that EPPS's predatory pricing claim failed because EPPS did not adequately allege either of the two elements required for such a claim: below-cost pricing and probability of recoupment of losses.

2. Whether the district court properly dismissed EPPS's claims for illegal monopolization, illegal acquisition to maintain a monopoly, and violation of Louisiana antitrust law because each depended on its failed predatory pricing claim.

STATEMENT OF THE CASE

A. Willamette, EPPS, And The Patch Industry.

Willamette sells "a variety of products and services" used by its customers to manufacture plywood and other wood products. ROA.269. One of the products it offers is "patch," or "polyurethane filling and patching materials," *id*., which is used to fill knot holes and other defects in the veneer of wood. Willamette's customers apply patch during the wood manufacturing process with a handheld "patch gun" as sheets of plywood pass by. ROA.270. In addition to providing the patch product, Willamette also provides and services the metering, mixing, and other equipment used in the process of applying patch. Willamette, like other patch suppliers, sells patch on a per-gallon basis, and, importantly, the price of the patch includes not only the cost of the patch itself but also the costs of the related services and patch equipment. *Id*.

The operative complaint describes some of the competition Willamette has faced over roughly the past 20 years. Mr. David E. Edwards, who owned EPPS at the relevant time, first entered the patch business in 1990 by founding a company known as EML Enterprises. EML successfully competed to supply patch to customers in Texas, Arkansas, Louisiana, Mississippi, and Alabama, "enjoying approximately 10 to 15 percent of the market share for this product in this region." ROA.277. At that time, Georgia Pacific, a large supplier of plywood and other wood products, self-supplied patch in what the complaint refers to as the "Eastern market area." *Id*. In addition, Champion Wood Products sold patch, allegedly in a "regional area around Memphis." ROA.276. According to the complaint, Willamette purchased Georgia Pacific's patent on patch and acquired Champion Wood Products sometime in the mid-1990s. ROA.277.

EML continued to compete with Willamette for ten years. In July 2000, however, Mr. Edwards sold his company to Willamette. ROA.276-77. As part of the deal, he agreed not to compete with Willamette for a period of time. ROA.277.

The complaint alleges that sometime in the 2000s, C. Dale Bates Company ("Bates"), which previously had sold unspecified products to the wood industry, started selling patch. *Id*. Bates allegedly entered the patch market in response to encouragement from plywood manufacturers concerned about Willamette potentially raising prices. *Id.* According to the complaint, at that time it took only "nine months" for a competitor to arise in response to customer concern about Willamette's supposed ability to raise prices. *Id.* Willamette allegedly purchased Bates a year after competing with it. *Id.*

After his non-compete agreement expired, Mr. Edwards chose to re-enter the patch market by founding EPPS. *Id*. He entered believing that the industry would embrace an additional source of patch in competition with Willamette, and to introduce what he believed would be new technology and improvements to the quality of patch products. ROA.278.

B. EPPS And Willamette Compete For MARTCO's Business And EPPS Loses.

Within a year after Mr. Edwards established his new company, EPPS competed head-to-head with Willamette to supply patch to MARTCO, a plywood manufacturer. ROA.278-279. At the time, the complaint says, Willamette was supplying patch (and related services and equipment) to MARTCO for both of its production lines for a price of $17 per gallon. *Id*. EPPS offered MARTCO a price of $15. *Id*. MARTCO welcomed the lower price and awarded EPPS a contract to supply one of its production lines while keeping Willamette as MARTCO's supplier on the second line. *Id*. EPPS had quickly seized, according to the complaint, "approximately 10%" of the market. ROA.279.

Recognizing an opportunity to secure still better terms from its suppliers, MARTCO allegedly solicited offers from both EPPS and Willamette to become its exclusive supplier of patch for both of its production lines. *Id*. In response, EPPS sought a long-term deal. It offered to supply all of MARTCO's patch requirements for five years at $12.90 per gallon. *Id*.

Willamette fought to keep the business, which EPPS says totaled 20% of the market in the allegedly relevant region. *Id*. Willamette submitted a competing bid, offering discounts on "all the items [Willamette] sold to MARTCO, *other than* Patch" if MARTCO would agree to use Willamette as its exclusive patch supplier. *Id*. (emphasis added). These items allegedly included "edge seal, stencil ink, glue extender, and sanding belts." *Id*. EPPS does not sell these products. *Id*.[1] EPPS does not allege that Willamette has market power over any of these common items.

MARTCO preferred Willamette's offer. Indeed, the complaint characterizes Willamette's discount as "much greater than anything EPPS

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[1] EPPS also alleges that Willamette offered "a similar discount agreement" to two other plywood manufacturers, Hood Industries and Coastal Plywood. ROA.280, ROA.282.

was able to offer." ROA.280. MARTCO made its decision to go with Willamette confident that by the terms of its contract with Willamette, "it had protected itself 'long term.'" *Id*.

EPPS asserts, in conclusory fashion, 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." ROA.281. In other words, EPPS alleges that Willamette lost money on its MARTCO sales because those sales provided no contribution to overhead or profit.

Elsewhere in the complaint, however, EPPS alleges specific facts regarding patch pricing that are inconsistent with its conclusory allegation. As noted above, EPPS allegedly initially undercut Willamette's $17 price, and won the chance to supply patch for one production line, by offering a price of $15 per gallon. ROA.278-279. Then, when it tried to win the chance to supply both of MARTCO's lines, it lowered its price to $12.90 per gallon. ROA.279.

EPPS never alleges what price Willamette offered to win MARTCO's business. Instead, it alleges that the "competitive price" for patch is $10 per gallon, ROA.283, meaning that EPPS's bid price to MARTCO of $12.90 per gallon exceeded the "competitive price" by almost 30%. EPPS also alleges that Willamette's bid to MARTCO was less than the "variable cost to produce" that patch which, it says, would have been priced at $10 in a "competitive" market. ROA.281. Of course, because the $10 "competitive price" includes fixed costs like overhead and profit—and, here, the cost of providing and servicing the related patch equipment—the "variable cost to produce it" would necessarily be substantially below $10.

EPPS does not explain why Willamette would have undercut EPPS so deeply that it priced at a loss for what MARTCO considers the "long term," ROA.280, when the $10 "competitive price," or any price less than 130% of the "competitive price" (*i.e.*, $12.90 per gallon), would have won the business.

After Willamette won the bidding, MARTCO ordered EPPS to remove its patch and equipment from MARTCO's plant. ROA.280. Within sixty days of removing its equipment from MARTCO's plant, EPPS sold its remaining assets to Willamette, and exited the patch business. ROA.283.

C. District Court Proceedings.

EPPS filed this lawsuit less than one year after exiting the patch business. The original complaint asserted that Willamette's competitive bid to supply MARTCO's patch needs amounted to monopolization of the patch product market defined by what it called the south region, covering "a 500-mile radius around Baton Rouge, Louisiana," and including "portions of the states of Louisiana, Texas, Mississippi, Alabama, Florida, and Arkansas." ROA.11. The first through fourth claims for relief asserted various violations of the Sherman Act: monopolization (first claim), predatory pricing (second claim), acquisition to maintain a monopoly (third claim), and unlawful tying (fourth claim). ROA.18-20. The fifth and sixth claims for relief asserted violations of Louisiana antitrust and unfair trade practices law.

The district court dismissed EPPS's initial complaint. It dismissed the tying claim with prejudice. EPPS had not alleged that Willamette "offered to sell patch to a consumer in the relevant market on the condition that the consumer also purchase non-patch products." ROA.264. Instead, EPPS had alleged that Willamette offered a discount on non-patch products in response to a request to lower the price of patch products. That is not a "tie" at all, which requires refusing to sell one product unless the customer buys another. That is, instead, lawful bundled discounting. ROA.265. EPPS has not sought to resurrect its tying claim on appeal.

The district court also dismissed the remaining claims of the original complaint, but without prejudice. A predatory pricing claim requires plausible allegations that the defendant priced its product below the cost of producing it. *See Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222 (1993). Because EPPS had not alleged anything about the "competitive price" in its original complaint, Willamette and the district court assumed for purposes of the original motion to dismiss that EPPS's conclusory allegation of below-cost pricing sufficed. ROA.254. Still, the district court concluded that the complaint failed to allege sufficient facts to support the second element of a predatory pricing claim: that Willamette could recoup the losses it suffered from the alleged predatory pricing strategy. ROA.254-57. EPPS had not alleged sufficient facts about the patch market to support a plausible inference that Willamette could sustain a price increase and recover its alleged losses. The court gave EPPS an opportunity to replead facts about barriers to enter the market that might support EPPS's assertion that Willamette could sustain monopoly prices.

The district court also concluded that the general monopolization claim and the acquisition to maintain a monopoly claim both derived from the predatory pricing claim, so it dismissed them without prejudice as well. ROA.264-65. The court dismissed the state law claims, also without prejudice, because they could not survive if the federal claims failed. ROA.266.

EPPS tried again in an amended complaint. EPPS dropped its Louisiana state unfair trade practices claim but retained four claims: monopolization, predatory pricing, unlawful acquisition to maintain a monopoly, and violation of Louisiana antitrust law. ROA.285-87. The amended complaint added a variety of allegations about alleged barriers to entry into the patch market. ROA.273-76. In addition, as noted above, the amended complaint also importantly asserted that the "competitive price" for patch is "approximately $10 per gallon," ROA.283 ¶ 51, an allegation that EPPS's brief simply ignores.

The district court dismissed the amended complaint, this time with prejudice in its entirety. The amended complaint, rather than correcting the oversights in the original complaint, pled an even "*less* plausible" claim. ROA.414 (emphasis in original).

Once again, all of EPPS's claims hinged on the legal validity of its predatory pricing allegations with respect to the bidding for MARTCO's business. And EPPS's new price-related allegations rendered "implausible" the conclusory assertion that Willamette priced below its costs of producing patch. ROA.407. EPPS now alleged that the competitive price for patch is approximately $10 per gallon, so that a "predatory price" at or below the average variable cost of producing that $10 patch would be substantially less than $10. EPPS also alleged that the lowest price it offered was $12.90 per gallon. ROA.408. In light of the space between the predatory price (substantially less than $10) and EPPS's lowest price ($12.90), and the obvious ease of pricing *above* variable cost and still winning the business, the district court concluded that "it is wholly speculative that Defendant reduced its price not only below Plaintiff's offered price, but unnecessarily reduced it below variable cost . . . ." *Id.* On that basis alone, EPPS's predatory pricing claim failed as a matter of law.

In addition, the district court concluded that EPPS had failed to plug the previous gap in its complaint. The new allegations concerning supposed barriers to entry in the patch market (which would support EPPS's view that Willamette could recoup its supposed losses after driving EPPS from the market) also failed as a matter of law. EPPS had not alleged any barriers to entry that would deter a new entrant any more than what the incumbent faced when it entered the market. ROA.409. To be sure, there are costs and challenges associated with entering the patch market, but, the district court reasoned, the law requires legally significant barriers that distinguish between the cost anyone (including the incumbent) faced upon entering the business in the past and what a new entrant now faces. ROA.410. The mere fact that a new entrant faces a market with an established incumbent is not legally significant. ROA.409.

Finally, the district court reasoned, EPPS's remaining claims all "rise and fall" with its predatory pricing claim; there is no alleged unlawful conduct that undergirds EPPS's other claims beyond the inadequately alleged predatory pricing. The district court thus rejected the illegal acquisition, illegal monopolization, and Louisiana state law counts. ROA.411-12.

SUMMARY OF THE ARGUMENT

The district court properly dismissed EPPS's amended complaint. Each claim hinges on the legal sufficiency of EPPS's predatory pricing claim. And that claim fails as a matter of law for two independent reasons.

First, EPPS failed to plausibly allege that Willamette sold its patch below its incremental cost of producing it. EPPS does not even try to explain why Willamette would have priced below its cost of production—thereby losing money on every sale—when its own allegations about its best offer and the competitive price of patch make clear that below-cost pricing, or anything anywhere near it, was far below what was necessary to win MARTCO's business.

Instead, EPPS urges this Court to allow the case to proceed because it does not and cannot know without discovery Willamette's precise variable cost of patch. But that is misdirection. To dismiss the claim on the pleading, the district court did not need to know Willamette's actual variable cost of patch. It needed to evaluate the plausibility of the conclusory assertion that the price Willamette offered MARTCO was below its variable cost. A rational business does not incur the substantial risk of pricing below cost (especially for a multi-year contract) when doing so is unnecessary to win business. EPPS offers no reason why Willamette would have done so here. On that basis alone, the judgment dismissing the predatory pricing claim should be affirmed.

Second, EPPS failed to adequately allege that conditions in the patch market, including any barriers to entry, would enable Willamette to recoup any supposed losses. That is an independent element of a predatory pricing claim, and EPPS twice failed to plead a plausible basis for it. EPPS offers up as supposed barriers to entry into the patch market nothing but generally applicable costs of beginning a business. The law requires more. Generic costs of doing business, like manufacturing costs and challenges in winning the confidence of customers, are not legally significant barriers to entry. EPPS asks this Court to change the law to make nearly universally applicable costs of starting a business qualify as entry barriers. The district court refused the invitation. This Court should as well.

EPPS's remaining claims fail because their success is linked to the validity of the predatory pricing claim. In addition to the predatory pricing count, EPPS alleges that Willamette also violated Section 2 of the Sherman Act by illegally acquiring EPPS's assets (Count III) and illegally maintaining a monopoly (Count I). To state a valid claim under either of these theories, however, a plaintiff must point to some anticompetitive or exclusionary conduct by the alleged monopolist that either forced the sale of assets or maintained the monopoly. The only allegedly anticompetitive conduct that EPPS recites in its complaint is the predatory pricing scheme. EPPS raises no other remotely colorable anticompetitive or exclusionary conduct in its complaint that would satisfy the legal standard for pleading Counts I or III. So those claims fall with its predatory pricing claim. And Louisiana law tracks federal antitrust law. So if the federal claims fail, as they do, so does the Louisiana state claim.

STANDARD OF REVIEW

This court reviews a district court's order granting a motion to dismiss de novo. *Midwest Feeders, Inc. v. Bank of Franklin*, 886 F.3d 507, 513 (5th Cir. 2018). To withstand a motion to dismiss, a plaintiff must plead facts with enough "heft" to plausibly suggest that the plaintiff is entitled to relief. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556-57 (2007). The Supreme Court has cautioned that it is particularly important that the plaintiff in an antitrust case allege facts that state a plausible claim because "[t]he cost of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint." *Id.* at 558 (internal citations and quotations omitted). Factual 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. *Id*. A court should not accept as true conclusory allegations, unreasonable inferences, or legal conclusions when ruling on a motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Varela v. Gonzales*, 773 F.3d 704, 707, 710 (5th Cir. 2014).

EPPS spills much ink in support of its view that antitrust claims should not be dismissed on the pleadings. Br. 23-27. EPPS points to a First Circuit decision that warns against imposing too high a pleading standard on antitrust claims. Br. 26 (quoting *Evergreen Partnerning Grp., Inc. v. Pactiv Corp.*, 720 F.3d 33, 44 (1st Cir. 2013)). But *Evergreen* emphasizes that *Twombly* provides the standard, and Willamette and the district court here agree. The law is clear: there are no special pleading rules for antitrust claims; they are as amenable to dismissal as a matter of law (at the pleading or summary judgment stage) as any other claim. *See Twombly*, 550 U.S. at 556-57; *Felder's Collision Parts, Inc. v. All Star Advert. Agency, Inc.*, 777 F.3d 756, 760 (5th Cir. 2015); *Concord Assocs., L.P. v. Entm't Properties Tr.*, 817 F.3d 46, 52 (2d Cir. 2016). The Supreme Court and this Court have both dismissed antitrust claims at the pleading stage. *See Twombly*, 550 U.S. 544; *Felder's*, 777 F.3d 756. And that is for a simple reason: antitrust plaintiffs, just like any other, can plead facts which render liability entirely implausible.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DISMISSED EPPS'S PREDATORY PRICING ALLEGATIONS FOR FAILURE TO STATE A CLAIM.

There are two basic elements to a predatory pricing claim. Failure to plead facts that plausibly support either element independently warrants dismissal of the complaint.

First, a plaintiff must plead that the defendant's prices were below an appropriate measure of the defendant's costs, generally held to be the average variable cost of producing the product alleged to have been sold below that cost. *Brooke Grp.*, 509 U.S. at 222; *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 528 (5th Cir. 1999). Liability does not follow just because the defendant beat its competitors on price, even if the plaintiff was unable to match that price. *Brooke Grp.*, 509 U.S. at 223. Predatory pricing occurs only when the defendant has priced so low that it is losing money on its sales.

Second, the alleged monopolist must allegedly have a reasonable chance of later recouping the losses it suffered through its below-cost pricing. *Stearns Airport*, 170 F.3d at 528; *see also Taylor Pub. Co. v. Jostens, Inc.*, 216 F.3d 465, 477–78 (5th Cir. 2000). That is, the plaintiff must allege facts about the relevant market that make it reasonable to believe that the defendant could charge supracompetitive prices for long enough "to compensate for the amounts expended on the predation, including the time value of the money invested in it." *Brooke Grp.*, 509 U.S. at 225.

As the Supreme Court has noted, "predatory pricing schemes are rarely tried, and even more rarely successful, and the costs of an erroneous finding of liability are high." *Id.* at 226 (citing *Matsushita*, 475 U.S. at 589). The reasons for courts' "extreme skepticism," ROA.88, of predatory pricing claims are twofold. First, predatory pricing claims challenge behavior that is difficult to distinguish from conduct that benefits customers. Indeed, "[l]ow prices benefit consumers and are usually the product of the competitive marketplace that the antitrust laws are aimed at promoting." *Felder's*, 777 F.3d at 760–61; *see also Stearns Airport*, 170 F. 3d at 527. It would be perverse to allow the antitrust laws to punish a successful competitor for winning business with a lower price. *Brooke Grp.*, 509 U.S. at 223. The economic costs of an erroneous finding of liability are thus potentially severe: deterrence of the legitimate price competition that is the hallmark of a functioning market and a backbone of "sound antitrust policy." *Id.* at 224; *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 122 n.17 (1986); *Matsushita*, 475 U.S. at 594.

Second, successfully carrying out a strategy of willingly taking losses for a period of time with the hope of recouping those losses (and more) after driving competitors out of the market is difficult "if not impossible" for a business to attain; it is "unlikely to be attempted by rational businessmen." *Stearns Airport*, 170 F.3d at 527–28. Indeed, in this Circuit, "the economic disincentives to predatory pricing often will justify a presumption that an allegation of such behavior is implausible." *Stitt Spark Plug Co. v. Champion Spark Plug Co.*, 840 F.2d 1253, 1255 (5th Cir. 1988). Accordingly, the standard this Court has set for "inferring an impermissible predatory pricing scheme is high." *Stearns Airport*, 170 F.3d at 527–28.

EPPS failed to plead facts that demonstrate either element of a predatory pricing claim. The district court properly dismissed the complaint for both independent reasons.

A. EPPS Did Not Plausibly Allege Willamette's Prices Were Below Incremental or Average Variable Cost.

In *Brooke Group*, the Supreme Court held that a predatory pricing plaintiff "must prove that the prices complained of are below an appropriate measure of its rival's costs." 509 U.S. at 222. It did not define what precise measure of "cost" courts should use. This Court has noted that the most "appropriate measure of cost" would be incremental cost: "the precise cost to the firm of producing the extra product that it is alleged to have sold below cost." *Stearns Airport*, 170 F.3d at 532. But because true incremental costs are generally difficult to ascertain from accounting records, an appropriate proxy is the average variable cost of production, which excludes profits and contributions toward fixed and overhead costs. *Id*. The question what measure of "cost" to use is "settled" in the Fifth Circuit; this Court "use[s] average variable cost." *Felders*, 777 F.3d at 761. In short, a predatory price is one which makes no contribution to fixed costs, overhead or profit; the seller loses money on every sale.

The complaint alleges facts that make it decidedly *im*plausible that Willamette's prices were below its average variable cost. To be sure, EPPS "believes and avers" that if all the discounts Willamette allegedly gave on all its other products are allocated entirely to MARTCO's patch purchases, "MARTCO was buying its Patch at a price below [Willamette's] variable costs to produce it." ROA.281. But such a conclusory allegation cannot suffice. *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 557. The law that prohibits relying on conclusory allegations cannot be evaded by the simple expedient of adding the phrase "on information and belief" or "believes and avers" to the front of conclusory allegations where, as here, the plaintiff has access to information that could provide at least *some* factual basis for the conclusory allegation. In this case, EPPS certainly could have pled specific facts about the cost of producing patch rather than relying on "information and belief," but it didn't. EPPS's owner has competed on and off in the patch market for 20 years. He clearly has access to information about his own costs, some of which form the basis of his (deficient) allegations of barriers to entry. Yet he has chosen to allege *no* specific facts about the costs of any components of patch or means of producing it. If he has any "information" on which EPPS could base its "belief" that Willamette priced below its costs, he has withheld it. The Supreme Court's pleading standards demand more.

The complaint here not only fails to allege facts that support its conclusory assertion of below-cost pricing. It actually alleges specific facts making that conclusory assertion especially implausible. The key allegation concerns the "competitive price" for patch. That price was $10 per gallon at the relevant time. ROA.283. Accepting that allegation as true, the only reasonable inference is that the incremental cost of patch is substantially below $10. The "competitive price" of patch necessarily includes profit, fixed costs, and overhead. Indeed, EPPS specifically alleges that in this industry, the per-gallon price of patch includes the cost of providing and servicing the metering, mixing, and application equipment used to apply patch to the plywood. ROA.270. So it does not matter that the complaint never alleges Willamette's specific average variable cost to produce a gallon of patch. The facts EPPS does allege in the complaint allow only one reasonable inference: Willamette's average variable cost for a gallon of patch must have been substantially below $10 at the relevant time.

Given that the facts alleged in the complaint support no other plausible inference about Willamette's average variable cost, what becomes decisive is that EPPS *never offered a competing price* that is *anywhere near* Willamette's average variable cost. If one assumes that a mere 30% of a $10 "competitive price" that EPPS says Willamette should be charging would go to profit, overhead and fixed costs (including the cost of providing and servicing the application equipment), then Willamette's average variable cost for patch would have been $7 per gallon. By contrast, EPPS's lowest bid was $12.90 per gallon (for a five year contract to supply both of MARTCO's product lines). ROA.279. That is nearly 30% *above* the "competitive price" and almost *double* the average variable cost of the product—which Willamette would have to charge to offer a predatory price.

EPPS has alleged no facts and offers no argument in its brief that could explain why Willamette would, under any circumstances, cut its previous $17-per-gallon price more than in half so that it can lose money on patch, when nothing suggested that such economically unjustified behavior was required. No rational firm would compete for business by dropping prices so dramatically, all the way to pricing at a loss. That is even more obviously true when, as EPPS alleges, Willamette was making an offer that MARTCO believed provided assurance on price "long term." ROA.280.

To allow EPPS's claim to proceed, this Court would have to indulge the following narrative. Willamette could have offered the "competitive price" of $10 per gallon and still been nearly 30% below EPPS's best price ($12.90 per gallon). But rather than just win the business and obtain profits at the competitive level, Willamette chose not even to try to compete at a profitable level and jumped straight to losing money on what its customer considered a long term contract. This Court should not, and need not, indulge such an implausible narrative.

EPPS never even tries to deal with or explain the inferences that can reasonably be drawn from its own specific allegations of price. Instead, in its brief, EPPS largely argues that it need not allege Willamette's average variable costs because it can't know them. Br. 29-30. But that is beside the point. EPPS did not lose in the district court because it does not know what it cannot yet know. It lost because it chose not to allege any facts at its disposal regarding the costs of producing patch, and instead, alleged specific facts about *other* prices, including the "competitive price" of patch plus related services and equipment. The only reasonable inferences from the facts EPPS itself alleged renders entirely implausible its conclusory assertion that Willamette priced below cost.

EPPS suggests that its claim should survive because it alleged that Willamette has 100 percent of the market; that is, its allegations of predatory pricing should be evaluated in light of the market power that follows from allegedly possessing 100 percent of the market. Br. 30-31. EPPS has confused the two distinct elements of a predatory pricing claim. Willamette's alleged market share may be relevant to (but does not establish) the likelihood that Willamette would be able to recoup its losses from driving EPPS out of the market with below-cost pricing. *See infra* p. 33. It is not evidence that Willamette priced below cost. Those two elements are distinct and independent. *Stearns Airport*, 170 F.3d at 528 (noting successful predatory pricing claim must demonstrate "*both*" elements (emphasis in original)).

In sum, only one plausible inference follows from the specific facts alleged regarding price: Willamette quoted MARTCO a low, but above cost, price that beat EPPS. That is a wholly insufficient basis for EPPS's predatory pricing claim. *Felder's*, 777 F.3d 756 (dismissing predatory pricing claim for failure to allege pricing below cost). As EPPS elsewhere alleges, what happened reflects "real competition." ROA.279. The beneficiary of this competition was MARTCO, the consumer. It received a lower price that will, in its view, benefit MARTCO "long term." ROA.280. This is precisely the kind of conduct and result that the antitrust laws should protect, not chill. *Matsushita*, 475 U.S. at 594. For this reason alone, this Court should affirm the dismissal of EPPS's predatory pricing claim.

B. EPPS Did Not Adequately Allege Willamette Could Recoup The Losses It Supposedly Sustained From The Predatory Pricing Scheme.

The second element of a predatory pricing scheme, recoupment, is designed to ensure the claimed scheme not only "makes economic sense," *Stearns Airport*, 170 F.3d at 528, but, more importantly, produces antitrust injury. *Advo, Inc. v. Philadelphia Newspapers, Inc.*, 51 F.3d 1191, 1200 (3d Cir. 1995) ("Predatory pricing schemes that fail at the recoupment stage may injure specific competitors . . . , but do not injure competition (*i.e.* they do not injure consumers) and so produce no antitrust injury."). This element requires a claimant to allege (i) that the predatory scheme could drive the competitor out of the market and (ii) a dangerous probability that, after the predatory pricing scheme ends, "the surviving monopolist could then raise prices to consumers long enough to recoup his costs without drawing new entrants to the market." *Taylor Pub.*, 216 F.3d at 478 (quoting *Stearns Airport*, 170 F.3d at 528-29). Without recovering its losses, the monopolist's conduct is not only economically irrational but its futility (*i.e.*, low-cost pricing without recoupment) also "effectively bestows a gift on consumers." *Advo*, 51 F.3d at 1200.

The recoupment prong of a predatory pricing claim often devolves into a discussion of barriers to entry. Without significant barriers to entry, even a dominant firm with extremely high market share cannot maintain supracompetitive prices long enough to recover its losses sustained while pricing below cost; without such barriers, rising prices will entice new entrants to seize market share with lower-than-supracompetitive prices. *See C.A.T. Indus. Disposal, Inc. v. Browning-Ferris Indus., Inc.*, 884 F.2d 209, 211 (5th Cir. 1989); *see also Stearns Airport*, 170 F. 3d at 530; *Matsushita*, 475 U.S. at

591 n.15 ("[W]ithout barriers to entry it would presumably be impossible to maintain supracompetitive prices for an extended time.").

Barriers to entry in a market are not the costs of starting a business that every entrepreneur faces. First, this Court has emphasized that barriers to entry must be "significant" in an antitrust sense. *See Stearns Airport*, 170 F. 3d at 530 (citing *Cargill*, 479 at 119 n.15). Second, in *Stearns Airport*, this Court repeatedly rejected asserted barriers to entry that were merely the kinds of costs that all firms might face when they enter a market; instead barriers to entry are costs that new entrants incur that are significantly greater than the costs to enter incurred by incumbents. 170 F.3d at 530 (transportation costs are not an entry barrier unless "the costs incurred by new entrants significantly exceed the transport costs incurred by the monopolist"); *id.* at 531 (manufacturing costs and brand recognition of incumbents are not entry barriers because "entrants to a market will always face these kinds of entry costs").[2] That approach is sound. Any other approach that might allow

[2] The district court collected various other cases making the same point. ROA.409-10 (citing *HTI Health Servs., Inc. v. Quorum Health Grp., Inc.*, 960 F. Supp. 1104, 1133 (S.D. Miss. 1997) ("This record contains no evidence whatsoever of new primary care physicians incurring longterm costs that *were not incurred* by already-established physicians." (emphasis added)); *E. Portland Imaging Ctr., P.C. v. Providence Health Sys.-Oregon*, 280 F. App'x 584,

routine costs of starting or conducting a business to stand as proof of entry barriers "proves too much." *Advo*, 51 F.3d at 1201. It cannot be, for example, that the need to develop a reputation in the industry is an entry barrier because "[n]ew entrants and customers in virtually any market emphasize the importance of a reputation for delivering a quality good or service." *Id.* at 1202. The concept of entry barriers requires some "limiting principle" to avoid contradicting Supreme Court precedent by becoming meaningless. *Id.* (citing *Brooke Grp.*, 509 U.S. at 226).

The district court rightly concluded that the entry barriers that EPPS alleged are not the kind of legally significant barriers that can support a predatory pricing claim. EPPS points to the need to design and build its own "application and metering equipment" to sell. Br. 32. But that is nothing more than the kind of start-up manufacturing costs that all sellers, including

586 (9th Cir. 2008) ("Plaintiffs have failed to create a factual issue regarding the barriers to entry and expansion in the diagnostic imaging market. They have not provided evidence that new entrants face long-run costs that were not or will not be incurred by incumbent providers." (emphasis added)); *Moecker v. Honeywell Int'l, Inc.*, 144 F. Supp. 2d 1291, 1308 (M.D. Fla. 2001) ("The disadvantage of new entrants as compared to incumbents is the hallmark of an entry barrier. However, the mere fact that entry requires a large absolute expenditure of funds does not constitute a 'barrier to entry'; a new entrant is disadvantaged only to the extent that he must pay more to attract those funds than would an established firm.")).

Willamette, face or have faced. This Court in *Stearns Airport* said such manufacturing costs are not a legally significant entry barrier. 170 F.3d at 531. The same is true for EPPS's allegation that it has to develop a supply chain for its raw materials. Br. 33. That's just another universally applicable manufacturing cost in *any* industry. So is the need "to set up storage and handling for the bulk material purchases." *Id.*

The same is also true for the supposed "complexities of developing the chemical formulation of patch as well as the mechanical engineering of the equipment." *Id*. If you want to sell patch, you have to develop a formulation for patch. That's not a legally cognizable entry barrier; anyone who wants to sell a product needs to design and make it. Moreover, it makes especially no sense here to treat that as an entry barrier in light of EPPS's allegation that it sought to enter the market, in part, because its owner believed he already had improvements to offer in the quality of the product. ROA.278.

Certain other supposed entry barriers are nothing more than the costs of competing with Willamette. For example, EPPS asserts that "some of the better choices in raw materials are essentially unavailable because Willamette uses them." ROA.275. But the allegation on its face reveals that there are many raw material options available. And in any event, the law rejects the notion that having to compete with the incumbent is an entry barrier. As the Ninth Circuit long ago observed, "when a producer . . . operates his business so as to meet consumer demand and increase consumer satisfaction, the goals of competition are served." *U.S. v. Syufy Enters.*, 903 F.2d 659, 668 (9th Cir. 1990). "[A]n efficient, vigorous, aggressive competitor is not the villain antitrust laws are aimed at eliminating." *Id.* at 669.

The final entry barrier on which EPPS relies concerns the need to obtain the approval of an industry standards-setting organization for its product, a process that allegedly includes running the product for six weeks on a line at a mill. Br. 33. As with so many of the other supposed entry barriers, there is no allegation that this required testing costs a new entrant significantly more than what it cost Willamette, the incumbent, and so is not "a true barrier." *Stearns Airport*, 170 F.3d at 530.

Once again, EPPS's own allegations suggest that these supposed entry barriers are really no barriers at all. EPPS won MARTCO's business on one line before it lost it after MARTCO preferred Willamette's better offer. Further, EPPS was owned by an individual who used to own a prior competitor of Willamette. That competitor managed not only to overcome the industry standard and other alleged "entry barriers," but competed with Willamette for a decade. ROA.276-77. Another competitor is alleged to have entered the market months after Willamette was supposedly in a position to raise prices in the 2000s. ROA.277. The complaint also notes that large plywood manufacturers, like Georgia Pacific, have the ability to self-supply if it is in their economic interests to do so. ROA.276. Indeed, the district court observed that actual market entry has been occurring. ROA.410. "Repeated past entry in circumstances similar to current conditions' is 'reliable evidence of low [entry] barriers." *See In re: Pool Prods. Distrib. Mkt. Antitrust Litig.*, No. 2328, 2016 WL 3567059, at *12 (E.D. La. July 1, 2016), *appeal dismissed*, No. 16-30885 (5th Cir. Oct. 27, 2016) (quoting 2B Areeda & Hovencamp ¶ 420b, at 77 (2014)).

EPPS urges this Court to ignore those allegations merely because entry has not happened more frequently and Willamette ultimately purchased those companies and now allegedly posseses 100% market share. Br. 34. That is non-responsive. From the point of view of predatory pricing law, it does not matter whether new entrants thrive. Rather, what matters is whether the *prospect* of new entrants disciplines even a dominant supplier. "If a dominant supplier acts consistent with a competitive market—out of fear perhaps that potential competitors are ready and able to step in—the purpose of the antitrust laws is amply served." *Syufy*, 903 F.2d at 68-69. EPPS's own allegations make clear that the prospect of new entrants is real, despite the alleged need to meet industry standards and the other alleged entry barriers.[3]

EPPS tries to evade the consequences of its own allegations by contorting the law. It suggests that three cases from outside this Circuit all contradict the common-sense view this Court adopted in *Stearns Airport* that prevents generally applicable costs of starting a business from qualifying as

[3] Even a seller with a dominant market share over one product (product A) may not be able to raise its price if it also sells other products (products B, C, and D) to the same buyer. If the buyer can readily find new sellers in the *other* product markets, then the buyer could penalize a seller for raising prices for product A by buying products B, C, and D elsewhere. *See* Fed. Trade Comm'n & U.S. Dep't of Justice Horizontal Merger Guidelines (2010), § 8 ("The Agencies consider the possibility that powerful buyers may constrain the ability of the merger parties to raise prices."); *F.T.C. v. Ovation Pharms, Inc.*, FTC File No. 081-0156 (Dec. 16, 2008) (Rosch, concurring) (finding that Merck could not sell a specific hospital-used drug with 100% market share at a monopoly price because Merck had a large portfolio of hospital-used drugs and hospitals could refuse to buy Merck's other products), *available at* https://www.ftc.gov/system/files/documents/public_statements/418091/081216ovationroschstmt.pdf. Here, EPPS has alleged that Willamette beat EPPS's price by lowering the price of *other* products Willamette sells to MARTCO and over which Willamette is not alleged to have any market power.

legally sufficient entry barriers. Br. 35-40 (discussing *Rebel Oil Co., Inc. v. Atl. Richfield Co.*, 51 F.3d 1421 (9th Cir. 1995); *U.S. v. Dentsply Int'l, Inc.*, 399 F.3d 181 (3d Cir. 2005); *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 762 F.3d 1114 (10th Cir. 2014)). But those cases, neither individually nor collectively, provide any reason for this Court in this case to depart from the sound path it (and the Third Circuit in *Advo*) has laid out.

In *Rebel Oil*, the Ninth Circuit observed that "[e]ntry barriers are 'additional long run costs that were not incurred by incumbent firms but must be incurred by new entrants.'" 51 F.3d at 1439 (quoting *L.A. Land Co. v. Brunswick Corp.*, 6 F.3d 1422, 1427-28 (9th Cir. 1993)). EPPS notes that the Ninth Circuit added that entry barriers might also be "factors in the market that deter entry while permitting incumbent firms to earn monopoly returns." *Id.* But there is no reason to believe that additional language authorizes treating routine manufacturing costs and the like as entry barriers. To the contrary, the Ninth Circuit further explained that "entry barriers must be significant—they must be capable of constraining *the normal operation of the market* to the extent that the problem is unlikely to be self-correcting." *Id.* (emphasis added). EPPS has pointed to costs that are part of the normal operation of the market, not unique features of the market for patch that might limit the disciplining effects of a functioning market. In *Rebel Oil*, a combination of legal licensing restrictions and "the unique nature and structure of the gasoline market in Las Vegas" functioned to bar major refineries from entry. *Id.* Nothing of the sort is alleged here.

The nature of the particular market at issue also distinguishes this case from *Lenox*. *Lenox* discusses some of the common business costs EPPS relies upon here when talking about barriers to entry, 762 F.3d at 1125, but that cannot and should not be divorced from the factual context of the case. *Lenox* involved the bone mill market, which is a heavily regulated medical device. *Id.* at 1116. There is no reason to believe that the market for patch presents similar complex market access issues.

Likewise, EPPS over-reads *Dentsply* to support its view. *Dentsply* involved a market that was heavily dependent on a very small number of dealers to get products to customers. 399 F.3d at 190 ("The reality in this case is that the firm that ties up the key dealers rules the market."). There is no reason to believe that there are a similarly small number of choke points here. To the contrary, EPPS effectively engaged MARTCO, the main relationship at issue here. MARTCO used the prospect of expanding its relationship with EPPS as leverage to extract price concessions from

Willamette. And the allegations also make clear that mills can, if they want, self-supply patch. ROA.276. There is no reason to believe this market is structured such that Willamette controls the mills the way Dentsply controlled its dealers.[4] Indeed, the facts alleged suggest the mills have meaningful ability to move price if they want to.

In sum, EPPS failed to plausibly allege either element of a predatory pricing claim. Instead, what EPPS alleged amounts to this: Competition occurred and the customer prevailed. The predatory pricing claim fails as a matter of law.

II. THE DISTRICT COURT CORRECTLY DISMISSED THE REMAINING COUNTS BECAUSE THEY DEPEND ON THE VIABILITY OF EPPS'S PREDATORY PRICING CLAIM.

The complaint contains three other counts aside from the predatory pricing claim, which is Count II: Count I is a "catch all" that claims Willamette's overall "acts, policies, and conduct" violated Section 2 of the Sherman Act, 15 U.S.C. § 2. ROA.259. Count III alleges that Willamette

[4] Moreover, the defendant in *Dentsply* used its control over those small number of dealers by threatening the dealers' business beyond the product market if they went with a competitor in the product market. 399 F. 3d at 190. Here, by contrast, the suggestion that Willamette engaged in unlawful tying not only failed as a matter of law, but has been abandoned on appeal.

violated Section 2 by purchasing EPPS's assets and entering a non-compete agreement with Mr. Edwards. ROA.286. Count IV alleges that the same conduct addressed in Counts I through III violated the Louisiana Antitrust Statute, La. R.S. 51:122, 51:123, and 51:124(A). ROA.287.

In each of its rulings on Willamette's motions to dismiss, the district court made clear that Counts I, III, and IV of EPPS's complaint depend upon the success of the predatory pricing claim. ROA.263-266, ROA.411-12. Thus, once the district court dismissed the predatory pricing claim, dismissal of the remaining claims followed. This Court should apply the same logic and affirm the judgment in its entirety.

A. The District Court Correctly Dismissed Count III (Sale of Assets).

The district court ruled that Willamette's 2015 purchase of EPPS's assets did not violate Section 2 of the Sherman Act because Willamette did not engage in any anticompetitive conduct that caused the sale. In order for Willamette's acquisition of EPPS to amount to a violation of Section 2, anticompetitive conduct on the part of the alleged monopolist must have been the *but-for* cause of the disposition. Otherwise, EPPS's sale constitutes a voluntary withdrawal from the market, and such withdrawals present no antitrust injury. *See Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1235 (6th Cir. 1981) (holding that the sale of plaintiff's assets does not present antitrust injury unless the loss can be attributed to anticompetitive conduct on the part of the alleged monopolist). So EPPS must plead that some anticompetitive conduct by Willamette caused EPPS's sale of assets.

Though EPPS offers the legal conclusion that Willamette's actions were the sole cause of EPPS's sale to Willamette, *see* Br. 22, the complaint points only to Willamette's supposed predatory pricing in connection with the MARTCO bid. Thus, the predatory pricing claim becomes a "necessary element" of EPPS's sale of assets claim.[5] ROA.263. Because EPPS did not state a viable predatory pricing claim, there is no anticompetitive conduct by Willamette that could have caused the sale of its assets and Count III, in turn, fails.

[5] Despite EPPS's attempts to paint them otherwise, Br. 40-41, Willamette's prior acquisitions, including the 2015 sale of EPPS's assets, are not anticompetitive conduct and are thus irrelevant to EPPS's claims. As noted above, an acquisition is not illegal unless it was caused by some *other* anticompetitive conduct. *Chrysler*, 643 F.2d at 1235.

B. The District Court Correctly Dismissed Count I (Illegal Monopolization).

Count I is "merely a 'catch-all' claim that adds nothing to Plaintiff's lawsuit." ROA.265. As explained above, EPPS has failed to state a single valid claim under Section 2, and, where no alleged conduct is illegal, adding up all the alleged conduct doesn't magically transform innocent competition into actionable misconduct. Indeed, as the Second Circuit has held, "[where] alleged instances of misconduct are not independently anti-competitive, we conclude that they are not cumulatively anti-competitive either." *Eatoni Ergonomics, Inc. v. Research in Motion Corp.*, 486 F. App'x 186, 191 (2d Cir. 2012) (affirming dismissal of course of conduct claim); *see also* Daniel Crane, *Does Monopoly Broth Make Bad Soup?,* 76 Antitrust L.J. 663, 668 (2010) ("Where there are developed tests for a particular species of competitive conduct such as predatory pricing, a plaintiff must first satisfy the test as to each species of allegedly anticompetitive conduct before measuring the cumulative or 'synergistic' effect of the conduct.").

EPPS faults the district court for supposedly concluding that EPPS could not bring a Section 2 claim for "simply maintaining a monopoly," "separate and apart from its predatory pricing claim and its illegal acquisition claims." Br. 44. Willamette does not take issue with the notion that "maintaining a monopoly" can be a violation of the antitrust laws, and neither did the district court. But simply having and holding a large market share is not unlawful monopoly maintenance; possession of monopoly power in the relevant market is not enough.[6] Even EPPS acknowledges that, to plead maintenance, monopolist must act "'in an unreasonably exclusionary' or 'anticompetitive' way toward competitors." *Id*. at 43. Indeed, this Court has stated clearly:

> [a] finding of exclusionary conduct requires some sign that the monopolist engaged in behavior that—examined without reference to its effects on competitors—is economically irrational. When there is no other possible explanation for an action, there is a strong inference that it was taken for the purpose of harming competitors rather than otherwise advancing the monopolist's business.

Stearns Airport, 170 F.3d at 523; *see also Taylor Pub.*, 216 F.3d at 475 (5th Cir 2000). In other words, to meet the standard for stating a claim of "illegal maintenance of a monopoly," EPPS must allege that the monopolist engaged in some conduct that was "taken for the purpose of harming competitors."

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[6] Willamette argued in the district court that EPPS did not adequately allege a relevant market, but the district court did not need to reach that issue. If further proceedings are necessary, the trial court should, in the first instance, consider that argument.

The simple fact is this: the *only* allegations of conduct that are even arguably economically irrational except for their potential to harm competitors concern the allegations of predatory pricing.[7] While the act of maintaining a monopoly certainly *could* be a separate and distinct offense from a predatory pricing offense, EPPS pled facts that merged the two. If EPPS had pointed to any other exclusionary conduct on the part of Willamette aside from predatory pricing, then the district court could have treated the monopoly maintenance claim "separate and apart" from the predatory pricing claim. Br. 44. But EPPS did not. Thus, like Count III, Count I cannot stand on its own without a valid predatory pricing claim. The district court properly dismissed this claim.

C. The District Court Correctly Dismissed Count IV (Louisiana State Law).

The district court also dismissed Count IV, which alleges that Willamette violated the Louisiana Antitrust Statute. Louisiana antitrust law

[7] EPPS cites decisions from other circuit courts that offer further guidance on what might constitute exclusionary conduct, noting the acts or practices at issue do not necessarily need to be "illegal" and "otherwise might comply with antitrust law." Br. 43. That may be true, but it is certainly irrelevant here. EPPS's complaint fails to allege any conduct, aside from supposed predatory pricing, that could qualify under any meaning of "exclusionary conduct."

mirrors federal antitrust law, *S. Tool & Supply, Inc. v. Beerman Precision, Inc.*, 862 So.2d 271, 278 (La. App. 4th Cir. 2003); *see also Felder's*, 777 F.3d at 759, and EPPS does not argue otherwise. Thus, the district court "applied the same analysis here as it did with respect to Plaintiff's claims arising under federal law." ROA.266. In doing so, the district court correctly held that, because the federal claims fail, so, too, does Count IV.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's judgment dismissing with prejudice EPPS's claims in their entirety.

Respectfully submitted,

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May 25, 2018

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of May, 2018, an electronic copy of the foregoing brief was filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

May 25, 2018

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because it contains 9,039 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Fifth Circuit Rule 32.2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Book Antiqua font.

May 25, 2018

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