No. 04-905

In the Supreme Court of the United States

VOLVO TRUCKS NORTH AMERICA, INC.,
Petitioner,

v.

REEDER-SIMCO GMC, INC.,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to Rule 25.5 of the Rules of this Court, petitioner Volvo respectfully submits this supplemental brief to present a single late authority that was not available to be included in Volvo's brief or reply brief on the merits. Specifically, Volvo calls to the Court's attention the newly published second edition of volume 14 of the treatise *Antitrust Law* by Herbert Hovenkamp. The second edition bears a 2006 copyright date and was received by petitioner's counsel October 4, 2005, well after the completion of merits briefing in August 2005.

Volume 14 of *Antitrust Law* is highly relevant to this case and was cited in both petitioner's and respondent Reeder's opening briefs. Most important, Reeder's opening brief – which, according to its table of authorities, cites volume 14 of *Antitrust Law* "*passim*" (as does Volvo's opening brief as well) – claims at page 25 that "it is ironic that Volvo block-quotes a passage on competitive injury from the Hovenkamp treatise, * * * which (as noted above) supports Reeder on this point." Resp. Br. 25 (citing 14 HERBERT HOVENKAMP, ANTITRUST LAW ¶ 2333b (1999)). At page 23 and in footnote 4, the same brief cites the same authority and claims that "[t]he 'relevant market,' and the existence of competition within that market, do not shift or shrink with the vagaries of a specific customer's shopping choices. 'Competition' under the RPA and other antitrust laws is simply not defined on a transactional, or customer-specific, basis." Resp. Br. 23 & n.4 (citing 14 HERBERT HOVENKAMP, *supra,* ¶ 2333b, at 89-90).

Volvo explained at page 9 of its reply brief why Reeder's position constituted a serious misreading of the Hovenkamp treatise, Paragraph 2333b in particular, by citing it as if it stood for the proposition that geographic market definition was the right approach to ascertaining what constitutes "competition with any person who either grants or knowingly receives the benefit of" discrimination in price between different purchasers of commodities. 15 U.S.C. § 13(a). "[I]n his view, the contours of the relevant market provide the 'most obvious' criteria for

determining whether favored and disfavored purchasers are competitors for purposes of the RPA, but not the *right* criteria." Pet. Reply Br. 9 (citing 14 HOVENKAMP, *supra*, ¶ 2333b, at 89-90).

The second edition of the treatise confirms with crystalline clarity that Volvo's understanding of Professor Hovenkamp's treatise in this regard was right and Reeder's was wrong. The very portion of the treatise that both parties cited – Paragraph 2333b – contains lengthy criticism of the Eighth Circuit decision in Reeder's favor:

> In *Reeder-Simco* the plaintiff bid on truck sales to customers after receiving a wholesale price quote from the defendant manufacturer. It actually purchased the trucks only if the bid was accepted. As a result, the plaintiff always made the sale with respect to those trucks that it actually purchased and for those sales on which it was not bidding against another Volvo dealer. Nevertheless, the Eighth Circuit found liability based on these instances because the plaintiff paid a higher wholesale price than other dealers paid during that time period, although those dealers were engaged in transactions different from the one that the plaintiff won. However, as a result of these lower wholesale prices, the favored dealers earned more money on these other sales to other customers.
>
> *But basing liability on these facts ignores the statute's requirement that the effect of the discrimination must be to "injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination."* The plaintiff was simply claiming that it would have earned more on the sales that it actually made had it been able to purchase those trucks at a lower price. Such a reading views the statute as a guarantee of equal profit margins on sales actually made, rather than a protection against injuries from sales that are not made because they were lost to a dealer who paid less. The plaintiff did not lose sales to a dealer who "receive[d] the benefit" of

> discrimination. Rather, it simply lost money on the actually made sales because other dealers made different sales to different customers at higher margins. The Eighth Circuit's reading would require manufacturers to charge uniform prices to their dealers, because any dealer who paid more could show that it would have earned more had it obtained a lower price than another dealer paid.

14 HERBERT HOVENKAMP, ANTITRUST LAW ¶ 2333b, at 109 (2d ed. 2006) (footnotes omitted and emphasis added).

Elsewhere in Paragraph 2333b, Professor Hovenkamp explains in the new edition that the Eighth Circuit's decision failed to take adequate account of the fact that the "favored" dealers were not in competition with Reeder for the relevant sales:

> The *Reeder-Simco* decision discussed above involved dealers who did not buy the Volvo trucks that they resold until after they had a deal with the customer. In those cases the plaintiff never purchased the trucks at all, so there was no qualifying upstream "sale," as the Robinson-Patman Act requires. However, the Eighth Circuit found liability based on four situations where the plaintiff actually won the bid, purchased the trucks, and resold them. The court reasoned that although the plaintiff won these deals, other dealers during the same time period made different sales to different purchasers and earned higher margins on their sales because they paid a lower price for trucks than the plaintiff paid. There was apparently no truck that the plaintiff actually purchased and for which it lost the opportunity to make a resale because of a lower price obtained by a rival dealer. The injury that the court recognized could have occurred even if the dealers were thousands of miles apart and never competed for the same customers at all. In sum, for those prospective deals where the dealer lost out to a competing dealer it was not a purchaser, for those deals where the dealer made a purchase it also made a successful resale. The fact that other dealers may have made more money on *their* sales to different customers is an injury in the sense that the

> plaintiff might have made more as well, *but it is not the injury to competition that the Robinson-Patman Act requires*.

Id. ¶ 2333b, at 104 (footnote omitted; final emphasis added).

Rule 25.5 requires that a supplemental brief be "restricted to * * * new matter," and therefore this supplemental brief discusses only the new edition of the Hovenkamp treatise. Volvo's opening and reply briefs, and the amicus briefs of the United States and others, however, show that it is not just the views of treatise writers but also the statutory text and consistent judicial interpretations that require reversal of the judgment of the court of appeals. The new edition of the treatise confirms that clear conclusion. Reeder has shown no violation of the Robinson-Patman Act in this case.

CONCLUSION

For the reasons stated above and in petitioner's opening and reply briefs and the amicus briefs supporting petitioner, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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OCTOBER 2005