No. 05-381

IN THE

Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

ROSS-SIMMONS HARDWOOD LUMBER COMPANY, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE AMERICAN ANTITRUST INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

JONATHAN W. CUNEO
CUNEO GILBERT & LADUCA, LLP
507 C Street, N.E.
Washington, D.C. 20002
(202) 789-3960

ROBERT H. LANDE
UNIVERSITY OF BALTIMORE
SCHOOL OF LAW
1420 North Charles Street
Baltimore, M.D. 21201
(410) 837-4538

JONATHAN L. RUBIN
Counsel of Record
JONATHAN L. RUBIN, P.A.
1717 K Street, N.W., Suite 600
Washington, D.C. 20036
(202) 415-0616

QUESTION PRESENTED

Whether a plaintiff alleging a combination of price and non-price predatory buying practices leading to monopolization of an input market may establish liability by persuading a jury that defendant eliminated competition "on some basis other than efficiency" under this Court's *Aspen* test; or whether the plaintiff instead must prove the defendant paid so much for the input that the price at which it sold its products did not cover its costs and created a dangerous probability of anticompetitive recoupment under this Court's *Brooke Group* test.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

IN THE

Supreme Court of the United States

No. 05-381

WEYERHAEUSER COMPANY,

Petitioner,

v.

ROSS-SIMMONS HARDWOOD LUMBER COMPANY, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE AMERICAN ANTITRUST INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

STATEMENT OF INTEREST

Amicus curiae the American Antitrust Institute ("AAI") is an independent, not-for-profit organization whose mission is to increase the role of competition and sustain the vitality of the antitrust laws.[1] This case concerns the application of

[1] The consent of all parties to the filing of this brief has been lodged with the Clerk. Pursuant to Rule 37.6, *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and that no persons other than *amicus* or its counsel have made a monetary contribution to the preparation or submission of this brief.

This filing has been authorized and approved by the directors of AAI (director Albert A. Foer, Esq. is recused from this case). The Advisory Board of AAI consists of more than 85 prominent lawyers, law monopolization and attempted monopolization principles under Section 2 of the Sherman Act to a dominant buyer's exclusionary buying conduct. AAI presents this *amicus* brief in the interests of promoting sound development of Section 2 jurisprudence in this buying context. AAI thereby seeks to ensure that the Sherman Act remains effective in preventing anticompetitive uses of "monopsony" power in markets for the purchase of goods and services generally throughout the economy.

STATEMENT

1. Petitioner, a sawmill operator, manipulated prices and supply in the Pacific Northwest alder sawlog market to eliminate competition from other sawmills. A jury found petitioner liable for both monopolization and attempted monopolization of the input market for these sawmills in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. Substantial competent evidence proved that petitioner acted with specific intent to eliminate rival sawmills. Petitioner had the power – and was aware of its power – to influence prices in the alder sawlog market. Using its market power in that market, petitioner bid up sawlog prices and created an artificial shortage of sawlog supplies for the sole purpose of driving rivals out of business.

2. The jury's verdict against petitioner for attempted monopolization required the jury to have found a dangerous probability that petitioner would become the monopoly purchaser (*i.e.*, monopsonist) of Pacific Northwest alder sawlogs. This dangerous probability of successful monopolization was supported by substantial competent direct evidence. This included substantial evidence of barriers to entry sufficient to enable the resulting monopsony

---

professors, economists and business leaders (listed on the AAI web site: www.antitrustinstitute.org). The members of the Advisory Board serve in a consultative capacity and their individual views may differ from the positions taken by AAI.

condition to continue for a substantial period of time. *A fortiori*, petitioner had a dangerous probability of recouping the expenses it incurred in prosecuting its buy-side anticompetitive scheme.

3. Petitioner's scheme threatened competition in the upstream (input) market by enabling petitioner in the long run to depress prices for alder sawlogs. Doing so allowed petitioner to appropriate the producers' surplus created when sawmills bid competitively for sawlogs. The monopolization offense in this case rests on harm to competition in the sawlog market, consistent with the theory of predatory bidding and buying in which the offender "hopes to exploit its monopsony power by purchasing the relevant input at lower prices." Brief for the United States as Amicus Curiae Supporting Petitioner at 14 (emphasis omitted). The harm to competition in this case occurred in the upstream supply market for sawlogs, not in the downstream hardwood lumber market.

4. Petitioner did not bid prices up or increase its purchases as part of a normal competitive output expansion, as a hedge against future price increases, or to ensure against supply interruptions or lapses in quality. *Cf*. Brief for the United States as Amicus Curiae Supporting Petitioner at 17. Indeed, the jury was required to rule out such theoretical procompetitive explanations for petitioner's market conduct before it could find against petitioner. More specifically, the jury was instructed to determine (a) whether petitioner purchased more logs than necessary and paid more than necessary "in order to prevent" plaintiffs from meeting their input needs; and (b) whether petitioner's conduct "lacks a valid business purpose." Pet. App. 7a n.8, 14a n.30. Given these instructions, the jury plainly rejected petitioner's contention that it bid up prices or increased its purchases for procompetitive reasons.

5. The significant reduction in the number of Pacific Northwest alder sawmills during the relevant period has not

been attributed to anything other than petitioner's anti-competitive conduct. Rather, the jury found that petitioner's rivals succumbed to the anticompetitive effects of petitioner's price and supply manipulation scheme.

6. As the court of appeals observed, the supply of alder sawlogs was relatively price inelastic. Pet. App. 11a. The response of the quantity supplied to an increase in price, therefore, would be less than proportional. The more inelastic the supply conditions, moreover, the less likely petitioner's overbidding and over-purchasing scheme would "create[ ] incentives for sellers to increase the quantity, or improve the quality, of that input." Brief for the United States as Amicus Curiae Supporting Petitioner at 17. Such a procompetitive dynamic is unlikely in the alder sawlog market in any event, since the "nature of the input supply at issue here does not readily allow for market expansion." Pet. App. 11a. Given these circumstances, there is no reasonable basis for concern that affirmance of the judgment below will somehow bias antitrust law against – or create "false positives" condemning – procompetitive conduct under other conditions in other markets.

SUMMARY OF ARGUMENT

The court of appeals correctly applied to petitioner's conduct in the alder sawlog market this Court's definition of "anticompetitive or predatory acts" as "those that tend to exclude or restrict competition 'on some basis other than efficiency.'" *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985) (quoting ROBERT H. BORK, THE ANTITRUST PARADOX 138 (1978)). The court of appeals also correctly determined that (a) the trial court's jury instructions considered as a whole were consistent with the *Aspen* definition and (b) the evidence in the record amply supported the jury's finding that petitioner's conduct was unlawful in accordance with that test. This Court can, therefore, comfortably affirm the decision below.

Petitioner and supporting *amici* argue for reversal because the court of appeals did not apply the *Brooke Group* test for "predatory pricing" as it has evolved for sellers' pricing conduct, under which a plaintiff must prove that a seller's prices were below an appropriate measure of cost and created a dangerous probability of recoupment through subsequent supracompetitive pricing. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp*., 509 U.S. 209, 222, 223-24 (1993). The *Brooke Group* test, however, has come under serious question even as applied to selling-side conduct; it rests on an outdated economic understanding of the rationality and likelihood of predatory pricing schemes. It is in any event not suitable for buying-side conduct in a case of this kind where petitioner artificially increased input prices. A cost-based standard is all the more inappropriate here because this case involves closely connected combinations of price and non-price conduct.

Finally, there is insufficient judicial experience with and empirical analysis of overbidding, overbuying and related buying-side conduct to warrant adoption of the *Brooke Group* test for this area at this time. *Brooke Group* rests on the premise that an exceptionally strict standard for predatory pricing on the selling side is necessary to avoid excessive false positives, which are presumed to be a greater danger than excessive false negatives in that pricing context. Whatever may be the continued validity of that intuition on the selling side, not enough is known about the incentives, competitive dynamics and ultimate effects of dominant buyers' pricing and related strategies to be confident that the same bias against overdeterrence at the expense of underdeterrence is prudent for buying practices in input markets generally.

ARGUMENT

A. The Ninth Circuit's Decision Is Consistent With This Court's Long-Established Section 2 Standards.

1. The court of appeals correctly applied *Aspen Skiing Co.*

The decision below is soundly premised on this Court's established *Aspen* test: "Anticompetitive or predatory acts are those that tend to exclude or restrict competition 'on some basis other than efficiency.'" Pet. App. 17a (quoting *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985)). There is no need to search for a "new" Section 2 standard suitable for use in this case. The Court can affirm the court of appeals' decision under its well-established jurisprudence.

In *Aspen*, this Court affirmed a Section 2 judgment because the evidence supported "an inference that Ski Co. was not motivated by efficiency concerns and that it was willing to sacrifice short-run benefits . . . in exchange for a perceived long-run impact on its smaller rival." *Id*. at 610-11. The Court asked whether the defendant "impaired competition in an unnecessarily restrictive way," thereby implementing the Areeda/Turner definition of "exclusionary" as encompassing "behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way." *Id*. at 605 n.32 (quoting III PHILLIP E. AREEDA & DONALD F. TURNER, ANTITRUST LAW 78 (1978)).

In the present case, the jury instructions underlying the verdict and upheld by the court of appeals were consistent with the *Aspen* test. The jury was instructed to "consider whether the conduct lacks a valid business purpose" or "unnecessarily impedes the efforts of other firms to compete for raw materials"; whether "the anticipated benefits of the conduct flow primarily from its tendency to hinder or eliminate competition"; and, more particularly, whether petitioner "purchased more logs than it needed or paid a higher price for logs than necessary, in order to prevent the plaintiffs from obtaining the logs they needed at a fair price." Pet. App. 14a n.30.

Petitioner and all of its supporting *amici* complain that the jury instructions were too "subjective," focusing in particular (and out of context) on the inquiry into whether petitioner purchased more than it "needed" and paid more than "necessary" in order to prevent plaintiffs from obtaining their needs at a "fair" price. Considered as a whole, the instructions adequately informed the jury of its need to focus upon the motive or intent of petitioner's buying strategies. The propriety of that focus is clear from this Court's own most recent Section 2 decision. Thus, in *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), the Court explained why the conduct at issue in *Aspen* was properly found to be unlawful while that at issue in the case then before it could not similarly be found unlawful because of motive/intent differences between the two cases: the evidence in *Aspen* "suggested a willingness to forsake short-term profits to achieve an anticompetitive end" and "revealed a distinctly anticompetitive bent" while, in contrast, Verizon's conduct "sheds no light upon the motivation of its refusal to deal – upon whether its regulatory lapses were prompted not by competitive zeal but by anticompetitive malice." *Id*. at 409.

The court of appeals here was justified in determining that there was substantial evidence to support the jury's verdict. The evidence quoted in the opinion below from petitioner's own officials and documents strongly supports a finding by the jury that the defendant's buying practices lacked a valid business purpose and that its executives had formed the requisite specific intent to monopolize by anticipating the benefits from the elimination of competition.

Pet. App. 19a-20a. The jury could reasonably conclude that buying more than necessary and paying more than necessary for sawlogs for the purpose of impeding competitors' access to this input amounted to "attempting to exclude rivals on some basis other than efficiency." *Aspen*, 472 U.S. at 605 (quoting ROBERT H. BORK, THE ANTITRUST PARADOX 138 (1978)).

Both the jury instructions in this case and the Ninth Circuit's analysis of the evidence in the record supporting the verdict are consistent with those well-established *Aspen* principles.

2. The decision below is consistent with other well-recognized indicia of anticompetitive conduct.

The jury's verdict and the Ninth Circuit's decision are also consistent with two closely related Section 2 indicia of anticompetitiveness: the "sacrifice test," under which conduct is deemed anticompetitive if it would be "unprofitable for the defendant but for the exclusion of rivals and resulting supracompetitive recoupment"[2] and the "no economic sense test," under which conduct can be deemed exclusionary or predatory if "it would make no economic sense for the defendant but for the tendency to eliminate or lessen competition."[3]

The sacrifice test contributed to this Court's analysis of Section 2 claims in both *Aspen*, 472 U.S. at 610-11, and *Trinko*, 540 U.S. at 409; and it has played a leading role in

---

[2] A. Douglas Melamed, *Exclusive Dealing Agreements and Other Exclusionary Conduct – Are There Unifying Principles?*, 73 ANTITRUST L.J. 375, 389 (2006).

[3] Gregory J. Werden, *Identifying Exclusionary Conduct Under Section 2: The 'No Economic Sense' Test*, 73 ANTITRUST L.J. 413, 413 (2006).

Section 2 decisions from four circuits.[4] The no economic sense test has been advocated by both the Antitrust Division of the Department of Justice and the Solicitor General in recent years.[5]

Petitioner's purchase of "more logs than it needed" and paying "a higher price for logs than necessary" are, as the jury found, practices that satisfy both the sacrifice test and the no economic sense test. Indeed, how could buying more than needed or paying more than necessary ever be sensible, efficient or otherwise legitimate profit-maximizing conduct? Again, as the court of appeals recognized, evidence from petitioner's own officials and documents precluded any finding of a valid business purpose for this overbuying and overpaying. Pet. App. 19a-20a. Accordingly, the only supportable conclusion is that these practices were profitable and rational only because of their expected elimination of competition, thereby enabling eventual supracompetitive recoupment.

The court of appeals did not require respondent to meet the first prong of the *Brooke Group* test, as petitioner urged, by proving that petitioner suffered a loss in the short term as

---

[4] *See, e.g.*, *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1062 (8th Cir. 2000); *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 522, 524 (5th Cir. 1999); *M&M Medical Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc.*, 981 F.2d 160, 167-68 (4th Cir. 1992); *Neumann v. Reinforced Earth Co*., 786 F.2d 424, 427 (D.C. Cir. 1986).

[5] *See* Werden, *supra*, at 413-14 n.4-7 (citing briefs filed by the United States in four recent Section 2 cases: Brief for the United States and the Federal Trade Commission as Amici Curiae at 15, *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (No. 02-682); Brief for the United States at 28 (public redacted version), *United States v. Dentsply Int'l Inc*., 399 F.3d 181 (3d Cir. 2005) (No. 03-4097); Brief for the United States at 2, 30 (public redacted version), *United States v. AMR Corp*., 335 F.3d 1109 (10th Cir. 2003) (No. 01-3202); Brief of the Appellees United States and States Plaintiffs at 48, *United States v. Microsoft Corp*., 253 F.3d 34 (D.C. Cir. 2001) (Nos. 00-5212, 00-5213)).

determined by the relationship between petitioner's costs (including the prices paid for inputs) and the amount of revenue that petitioner received (or expected to receive) for its finished product. It is sufficient for petitioner to have devoted resources to carrying out its scheme in the sawlog market. As explained below, it was not necessary for petitioner's expenses to have been of such a magnitude to represent a loss on products sold in the downstream (output) market for hardwood lumber. This is because the monopolized market was the *upstream sawlog market* and the harm to competition occurred in that market.

With respect to the second prong of the *Brooke Group* standard, it was unnecessary in this case to require the jury to find a dangerous probability of "recoupment" of its expenses in its anticompetitive scheme. The very nature of becoming an upstream monopolist by illegitimate means in a market surrounded by high entry barriers implies ability to recoup the expense incurred to achieve the monopoly power and more. It would thus have been redundant to require the jury to make a specific finding that the defendant had a dangerous probability of recouping its loss in the long term because a dangerous probability of recoupment follows in this case from the attempted monopolization verdict itself.

B. There Is No Economic Or Legal Justification For Extending *Brooke Group* To Bidding Practices On The Buying Side.

The *Brooke Group* test has come under question as inadequate, even as applied to predatory pricing claims on the selling side. Growing doubts about the validity of its underlying premises militate against its extension to new applications such as practices on the buying side of the kind here at issue.

1. *Brooke Group* is based on an outdated economic understanding of the rationality and likelihood of sell-side price predation.

The Supreme Court has most recently addressed predatory pricing claims in three decisions: *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986), *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986), and *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). In all three cases, the Court characterized predatory pricing as "speculative" and "inherently uncertain," emphasizing its "general implausibility" and the "obstacles to [its] successful execution." In *Matsushita*, the Court concluded that "there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful." *Matsushita*, 475 U.S. at 589.

The presumed "consensus" in that regard rested upon empirical analyses of predatory pricing conduct published in 1958 and 1971 by John McGee and Roland Koller,[6] whose studies of cases from the first half of the twentieth century led to their conclusion that predatory pricing was irrational and unlikely to occur.[7] Those studies remained persuasive to the Court seven years later when, in *Brooke Group*, the Court announced the current liability standard for predatory pricing under Section 2 of the Sherman Act.

The McGee/Koller conclusions, however, have been undermined by more recent scholarship on dominant firms'

---

[6] *See Matsushita*, 475 U.S. at 590 (citing Roland Koller, *The Myth of Predatory Pricing: An Empirical Study*, 4 ANTITRUST L. & ECON. REV. 105 (1971) and John S. McGee, *Predatory Price Cutting: the* Standard Oil (N.J.) *Case*, 1 J.L. & ECON. 137 (1958)).

[7] "The Court's skepticism about the rationality of predatory pricing was justified by the now dated economic authorities on which the Court relied." Patrick Bolton et al., *Predatory Pricing: Strategic Theory and Legal Policy*, 88 GEO. L.J. 2239, 2263 (2000).

incentives to engage in predatory pricing strategies of various kinds. "It is now the consensus view in modern economics that predatory pricing can be a successful and fully rational business strategy." Patrick Bolton et al., *Predatory Pricing: Strategic Theory and Legal Policy*, 88 GEO. L.J. 2239, 2241 (2000).[8] The judiciary's skepticism of predatory pricing "assumes that predation is extremely rare, but sound empirical and experimental studies, as well as modern economic theory, do not justify this assumption." *Id*. at 2249. Most fundamentally, it ignores "sophisticated modern economic theories founded on more realistic assumptions of imperfect and asymmetric information, where much is unknown and where one party may have more knowledge than the other." *Id*. *See also* David Easley et al., *Preying for Time*, 33 J. INDUS. ECON. 445, 446 (1985) ("When the problem is seen as one of incomplete information, the standard reasons for saying predation is rare are not compelling."); Garth Saloner, *Predation, Mergers, and Incomplete Information*, 18 RAND J. ECON. 165, 183 (1987) (concluding that "when one abandons the assumption of complete information, there are numerous ways in which rational predatory pricing can arise").

Current economic understanding of predatory pricing no longer accepts the "static, non-strategic view" of predatory pricing on which *Matsushita* and *Brooke Group* are based. *See, e.g.,* Bolton, *supra*, at 2241-50; Janusz A. Ordover & Garth Saloner, *Predation, Monopolization, and Antitrust, in* 1 HANDBOOK INDUS. ORG. 537, 581-90 (Richard Schmalensee & Robert D. Willig eds., 1989); Alvin K. Klevorick, *The Current State of the Law and Economics of Predatory Pricing*, 83 AM. ECON. REV. 162, 166 (1993). *See*

[8] Federal courts have also recognized new economic understandings of the rationality of predatory pricing behavior: "[R]ecent scholarship has challenged the notion that predatory pricing schemes are implausible and irrational." *United States v. AMR Corp*., 335 F.3d 1109, 1114 (10th Cir. 2003).

also Richard Craswell & Mark R. Fratrik, *Predatory Pricing Theory Applied: The Case of Supermarkets v. Warehouse Stores*, 36 CASE W. RES. L. REV. 1, 3-8 (1985).

To the contrary, recent economic scholarship reveals that predatory pricing is rational, it does occur, and it is profitable and consistent with profit-maximizing behavior. *See, e.g.*, Richard O. Zerbe, Jr. & Michael T. Mumford, *Does Predatory Pricing Exist? Economic Theory and the Court After* Brooke Group, 41 ANTITRUST BULL. 949, 956-68 (1996) (collecting economic literature and concluding that the "empirical evidence regarding predation does not suggest it is either rare or unsuccessful"); Malcolm R. Burns, *New Evidence of Price-cutting*, 10 MANAGERIAL & DECISION ECON. 327, 327 (1989) ("Predatory pricing is a rational strategy in game-theoretic models of oligopoly, based on informational asymmetries, that consider signaling, signal-jamming and reputation effects."); Richard O. Zerbe, Jr. & Donald S. Cooper, *An Empirical and Theoretical Comparison of Alternative Predation Rules*, 61 TEX. L. REV. 655, 674-77, 699-708 (1982); Paul Milgrom & John Roberts, *Predation, Reputation, and Entry Deterrence*, 27 J. ECON. THEORY 280, 281 (presenting an economic model in which predation is a "rational, profit-maximizing strategy").

2. The *Brooke Group* test evolved from cases involving allegations of coordinated predation among multiple firms operating in oligopolistic markets.

Neither *Matsushita* nor *Brooke Group* involved claims that a single dominant firm engaged in predatory pricing. Rather, both cases concerned allegations of "coordinated" predation among several rivals in an oligopolistic market. While skepticism about the plausibility of predation in that context appeared well-founded, that does not justify skepticism about predation incentives of a single dominant firm in all market environments.

In *Matsushita*, two American television manufacturers sued a group of Japanese manufacturers, alleging that the defendants unlawfully conspired to charge below market prices for televisions in the United States to eliminate competition. *Matsushita*, 475 U.S. at 590. The Court stated that "[s]uch a conspiracy is incalculably more difficult to execute than an analogous plan undertaken by a single predator" because "[t]he conspirators must allocate the losses to be sustained during the conspiracy's operation, and must also allocate any gains to be realized from its success." *Id*. In this instance, the Court explained, because "success is speculative and depends on a willingness to endure losses," firms have a "strong incentive to cheat" and "[t]he necessary allocation is therefore difficult to accomplish." *Id*.

The Court's skepticism toward coordinated predation resonated again in *Brooke Group*. There, a generic cigarette manufacturer sued another cigarette manufacturer, alleging that the defendant pressured the plaintiff to raise its prices to more profitable levels "through a process of tacit collusion with the other cigarette companies." *Brooke Group*, 509 U.S. at 227. The Court rejected the plaintiff's theory as unavailing because "tacit cooperation among oligopolists must be considered the least likely means of recouping predatory losses." *Id*. at 228. *See also* Bolton, *supra*, at 2258 ("[T]he Court's view of the predatory pricing claim was colored by its doubts that predation by tacit coordination could realistically occur.").

The Court has thus not heretofore considered and ruled on the entirely different circumstance of unilateral price predation by a single dominant firm.[9] This makes it all the

[9] *Cargill, Inc. v. Monfort of Colorado, Inc*., 479 U.S. 104 (1986), did not involve allegations of unilateral price predation under Section 2 of the Sherman Act; rather, it examined whether a competitor suffered the requisite antitrust injury to have standing to enjoin a proposed merger under Section 16 of the Clayton Act, 15 U.S.C. § 26. One of the plaintiff's theories of antitrust injury was that, after the merger was

more prudent for the Court to consider the new economic learning about predation incentives discussed hereinabove before deciding whether the *Brooke Group* test should apply to any single-firm predation, but particularly to buy-side purchasing.

3. The intolerable risks of chilling legitimate price-cutting present in *Brooke Group* are not present in this case where the defendant increased the price of raw materials paid by sawmills.

Because of the need to ensure that antitrust rules do not discourage or punish conduct consisting of directly lowering prices to consumers, this Court in *Brooke Group* adopted an exceptionally strict test for predatory pricing. There, the Court explained that the "mechanism by which a firm engages in predatory pricing – lowering prices – is the same mechanism by which a firm stimulates competition." *Brooke Group*, 509 U.S. at 226. In that light, a strict test was deemed necessary to avoid discouraging procompetitive price-cutting.

Unlike those kinds of predatory pricing cases, the present case involves predatory bidding in which petitioner artificially *increased* the prices it paid for inputs used in its operation. Liability for increasing prices in the manner found by the jury in this case does not create disincentives to procompetitive pricing on the selling side. While there may be limited instances in which overbidding can benefit competition, it can do so only quite indirectly. *See, e.g.*, John B. Kirkwood, *Buyer Power and Exclusionary Conduct: Should Brooke Group Set the Standards for Buyer-Induced*

---

consummated, the merged firm would engage in predatory pricing and thereby drive plaintiff out of the market. This Court rejected that argument, concluding that the plaintiff lacked standing to enjoin the proposed transaction under the Clayton Act because it "never raised nor proved any claim of predatory pricing." *Cargill*, 479 U.S. at 119.

Price Discrimination and Predatory Bidding?, 72 ANTITRUST L.J. 625, 655 (2005) ("[I]t seems indisputable that any negative impact of a predatory bidding case on downstream price competition is less direct and less certain than the impact of a predatory pricing case, which is a direct assault on a seller's decision to lower prices to its customers.").

In short, any negative consequence for consumers of deterring desirable bidding practices on the buying side is far more remote and uncertain than that entailed in punishing firms for directly lowering their downstream prices. Because of this difference, *Brooke Group* should not be extended to predatory bidding claims. As the court of appeals in this case observed, "[The] benefit to consumers and stimulation of competition do not necessarily result from predatory bidding the way they do from predatory pricing." Pet. App. 9a.

4. A cost-based test for buy-side predation is inappropriate.

Cost-based tests for anticompetitive conduct may on the surface appear "objective" but contain substantial elements of subjectivity and are exceptionally difficult to administer. *See, e.g.*, Oliver E. Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 YALE L.J 284, 305 (1977) (presenting arguments why cost-based standards for predatory pricing are insufficient and problematic); Joseph F. Brodley & George A. Hay, *Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards*, 66 CORNELL L. REV. 738, 756-57, 765-69 (1981); Peter C. Carstensen, *Predatory Pricing in the Courts: Reflection on Two Decisions*, 61 NOTRE DAME L. REV. 928, 945-46 (1986). Extending *Brooke Group*'s cost-based test to overbidding in the purchase of inputs in upstream markets would be all the more problematic for two additional reasons.

First, there is no satisfactory way to measure cost when a dominant buyer cross-subsidizes the amount it overpays for one input with a second input that could have been purchased at a reduced price. In this scenario, the available cost information may not reveal that a firm has overbid or overpaid for the input at issue because the buyer is able to account for the overpayment on one input through cross-subsidization from one input to another. There is no good means to account for that possibility or its effects in the application of a cost-based test in this upstream context.

Second, it is also quite unclear how a cost-based test for overbidding would allocate fixed costs. For example, would fixed costs include the average cost to purchase current inventory, or would the cost measure only be concerned with the incremental price of each additional sawlog? This difficulty in determining how a cost standard would account for fixed costs militates against the extension of *Brooke Group*'s cost-based test to buy-side conduct such as overbidding.

C. Cost-Based Tests Are Particularly Inappropriate For Claims Involving Closely Connected Combinations Of Price And Non-Price Conduct On Either The Selling Or Buying Side, As With The Combination Of Overbidding And Overbuying Along With Other Non-Price Conduct In The Present Case.

Petitioner and its *amici* urge the adoption of a safe harbor that would allow any buyer to escape liability for "predatory buying" of an essential input if it is able to demonstrate that the buying conduct did not result in selling its goods incorporating that input below the pertinent measure of the cost of those goods. This incorrectly assumes that the sole measure of wrongdoing under the Sherman Act is the price a company charges an end-use consumer. Under both the Sherman and Clayton Acts, courts have regularly recognized that harm to competition is not so restricted. *See, e.g.*, *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 719 (D.C. Cir. 2001); *see* *also Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699-700 (1962).

For the reasons explained above, there should be no such safe harbor for petitioner here. This is especially so since the conduct at issue involved closely connected combinations of price and non-price conduct.[10] Predatory "pricing" in the form of "overpaying" for sawlogs was only one among several related practices supporting the jury verdict and district court judgment that the court of appeals affirmed in this case.

The record below establishes all of these facts:

- Petitioner owns seven hardwood sawmills in the Pacific Northwest. J.A. 158a.
- It both drove up sawlog prices and restricted access to sawlogs. Pet. App. 3a.
- It overbought. *Id*. at 3a-4a.
- It "tracked competitors' profit margins and estimated the potential effects of targeted increases in sawlog costs on the ability of low-margin competitors to survive." *Id*. at 20a.
- It entered "restrictive or exclusive agreements with sawlog suppliers." *Id.* at 4a.
- It made "misrepresentations to state officials in order to obtain sawlogs from state forests." *Id*.
- During the relevant period, the "supply of alder sawlogs remained relatively stable or declined." *Id*. at 11a.

[10] Petitioner's *amici* assert that non-price conduct played no role in the court of appeals' affirmance of the district court's judgment. Although we do not believe this to be the case, the Ninth Circuit's grounds for affirmance would not in any event constrain the scope of this Court's review. This is "because the prevailing party may defend a judgment on any ground which the law and the record permit that would not expand the relief it has been granted." *United States v. New York Tel. Co.*, 434 U.S. 159, 166 n.8 (1977) (internal citations omitted).

- A companion case had specifically recognized the significance of allowing surplus logs to rot. *Id*. at 9a n.14.
- Alder sawlogs are a natural resource that has a limited annual supply and is a "highly inelastic" market that is a byproduct of the "more important softwood harvest." *Id*. at 11a & n.20.
- 95 percent of hardwood lumber in the Pacific Northwest is alder, and the mills at issue are the only hardwood mills in the western United States. *Id*. at 2a.

And the parties stipulated that the alder was "typically, but not always, harvested within 100 miles of the sawmill in which [it was] processed into hardwood lumber, chips, and other products." J.A. 153a. As well, petitioner embarked on an aggressive acquisition program that enabled it to control the market. In their stipulated facts, the parties recounted petitioner's acquisitions: one in 1980, three in 1995, and one in 2000. *Id*. at 158a.

In short, this is a case involving substantial elements of non-price buying conduct and a case in which the geographic and product characteristics of the supply market are particularly significant.

Even assuming that the *Brooke Group* test is appropriate to apply to pricing conduct on the buying side, it cannot reasonably apply to the combination of buying practices established on the record of this case.[11] Because *Brooke*

[11] Indeed, at the recent hearings on Section 2 policy conducted jointly by the Federal Trade Commission and the Department of Justice, much of the discussion during the "buy-side" session focused on how to characterize the non-price conduct; regardless of the label, the participants agreed that it was not appropriate to lump such conduct in with predatory pricing. *See* Transcript of Hearing on Predatory Pricing, *Federal Trade Commission and Department of Justice Hearings on Section 2 of the Sherman Act: Single-Firm Conduct As Related to Competition* (June 22, 2006) at 162-67, *at*

Group focuses on predatory pricing, petitioner and its supporting *amici* have glossed over the distinction between overbidding and overbuying.[12] This is a mistake, *first*, because overbuying is a distinct form of exclusionary conduct, independent of pricing and *second*, because the other aspects of anticompetitive conduct are not even arguably captured by a predatory pricing analysis. Thus, for example, Blair and Harrison highlight the strategy employed in *American Tobacco Co. v. United States*, 328 U.S. 781 (1946), in which tobacco companies bid aggressively for tobacco they did not utilize in their own cigarettes, in order to restrict the supply available to companies that would use it. *See* ROGER D. BLAIR & JEFFREY L. HARRISON, MONOPSONY: ANTITRUST LAW AND ECONOMICS 34 (1993).

On occasion, other companies have employed such tactics in order to restrict supply. *See, e.g.*, *Poller v. Columbia Broad. Sys. Inc*., 368 U.S. 464 (1962) (examining the purchase of UHF stations that were then abandoned); *Spirit Airlines, Inc. v. Northwest Airlines, Inc*., 431 F.3d 917 (6th Cir. 2005) (examining the expansion of gate capacity and flights that were dropped after Spirit, the low-cost carrier, exited the market); *George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp*., 554 F.2d 551 (2d Cir. 1977) (denying summary judgment where plaintiff alleged that the sources of gravel and grit supplies were bought up by defendants to deny plaintiff access).

---

http://ftc.gov/os/sectiontwohearings/docs/ 60622FTC.pdf (testimony of Prof. John Kirkwood, Seattle University School of Law; Prof. Tim Brennan, University of Baltimore, Maryland County; Prof. Steven Salop, Georgetown University Law Center; Frederick Warren-Boulton, Microeconomic Consulting & Research Associates, Inc.; Janet McDavid, Hogan & Hartson LLP) [hereinafter Section 2 Hearing Transcript].

[12] One *amicus* brief went so far as to state that it was treating the overbidding and overbuying claims as “functionally interchangeable.” Brief for Law Professors as Amici Curiae in Support of Petitioner at 3 n.2.

As Blair and Harrison have recognized, even though there are seldom "pure monopsonists," dominant buyers can "impose monopsonistic welfare losses." BLAIR & HARRISON, *supra*, at 49. These losses result ultimately in too few resources being purchased because a dominant firm's privately optimal level of purchase is different from the socially optimal level. *See id*. at 39. The *Brooke Group* test takes no account of this kind of upstream harm; its sole concern is the rationality of a downstream pricing decision.

The case of *Reid Bros. Logging Co. v. Ketchikan Pulp Co*., 699 F.2d 1292 (9th Cir. 1983), was one of a handful of cases in which price and non-price conduct were separate but related parts of a systematic attack on competition. In *Reid Bros.*, in addition to collusive bidding, the court of appeals found that otherwise undesirable purchases were made in order to deny competitors access to timber; defendants also extended credit to loggers, thus giving the defendants the power to "cut off a logger's financing, force the logger out of business, and acquire the company or its assets." *Id*. at 1298. Another such case was *Swift & Co. v. United States*, 196 U.S. 375, 391-92 (1905), in which the purchasers of live stock had engaged in a combination of practices that included restrictive contracts with railroads and stockyards, complemented by alternately bidding prices up to induce shipments to a given location and then manipulating bidding so that the live stock was purchased at a reduced price. Another was *Spirit Airlines*, in which Northwest Airlines was found to have not only manipulated prices but also to have increased the number of flights to selected destinations, even though it had planned to reduce the number of flights prior to Spirit's entry into the market. 431 F.3d at 923-24.

In cases of this kind, involving combinations of price and non-price conduct, "plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962). Indeed, this Court recognized in

Continental Ore that even acts that might be legal in themselves could "lose that character when they become constituent elements of an unlawful scheme." *Id*. at 707.

The "constituent elements of an unlawful scheme" analysis is particularly important here. As Blair and Harrison suggest:

> There is a bright line test that would be highly indicative of a predatory buying effort. As noted earlier, the seller engaged in such an effort must consider what it will do with the inputs it is required to buy at the artificially high price. *Rather than produce more of the output, it may find it less costly to destroy a perishable input or to hoard an input that is not perishable*. *This type of behavior, especially when accompanied by a bidding war for the input, is hard to interpret as anything other than an effort to deny the competing buyers access to the input*. Indeed, in a case in which the input is destroyed, the welfare loss could not be more obvious.

BLAIR & HARRISON, *supra*, at 156 (emphasis added). In other words, when a buyer deliberately pays a price substantially higher than what would be appropriate and economically justifiable in a competitive market, society's limited assets are wasted and the overall economy is made less efficient – a result that is just the opposite of the policy embedded in antitrust. Overbidding and overbuying of logs that ultimately were used for a low-return purpose (pulpwood) because they were no longer suited for sawlogs would fit that scenario.

As this Court recognized in *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219 (1948), distortions in a supply market will ultimately affect related end products and thus consumers. Thus, it was deemed "inconceivable that the monopoly so created will have no effects for the lessening of competition in the later interstate phases of the overall activity or that the effects in those phases will have no repercussions upon the prior ones, including the price received by the growers." *Id*. at 240. And, in any event, the Sherman Act "does not confine its protection to consumers, or to purchasers, or to competitors or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Id*. at 236.

The Sherman Act thus appropriately condemns buyer predation that injures the competitive process generally in upstream markets without regard to whether related adverse effects have yet materialized downstream. Such conduct creates supply inefficiencies and resource allocation distortions that produce long-term welfare losses. This is particularly so when the conduct at issue promotes the dominant buyer's predation reputation and thereby raises input market barriers to entry. This case exemplifies dangers of this kind from a combination of price and non-price conduct, thus calling for robust application of Section 2 standards to an evidentiary record that flatly contradicts petitioner's proffered "efficiency" justifications.

D. Indicia Of Anticompetitive Conduct Unlawful Under Section 2 Of The Sherman Act Should Be Sufficiently Robust To Avoid Not Only Excessive "False Positives" But Equally Undesirable Excessive "False Negatives."

Dominant firm practices with the potential to be anticompetitive are far too diverse in nature and effects to be susceptible to one overarching test under Section 2 of the Sherman Act. As one recent commentator emphasized, there is no "one size fits all"; the appropriate test for any case should take into account "the likely consumer harms and benefits from the conduct, but also the risk of false positives, false negatives, and legal process costs." Mark S.

Popofsky, *Defining Exclusionary Conduct: Section 2, the Rule of Reason, and the Unifying Principle Underlying Antitrust Rules*, 73 ANTITRUST L.J. 435, 437 (2006). Section 2 standards that "wrongly curb a monopolist's incentive to compete *or* that improperly enable a monopolist to impede or vanquish would-be rivals threaten significant and lasting harm to both competition and consumers." *Id.* at 436 (emphasis added).

Recent scholarship is in agreement that Section 2 standards for exclusionary conduct should seek to minimize *both* the underdeterrence and overdeterrence of anti-competitive conduct. *See, e.g.*, A. Douglas Melamed, *Exclusive Dealing Agreements and Other Exclusionary Conduct—Are There Unifying Principles?*, 73 ANTITRUST L.J. 375, 383 (2006) (explaining that Section 2 standards should seek "to minimize the sum of the costs of enforcement errors and transaction costs overall"); Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 ANTITRUST L.J. 311, 345-54 (2006); Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 ANTITRUST L.J. 3, 68-69, 74-76 (2004).

In short, courts overseeing Section 2 cases should be sensitive to the need to minimize *both* false positives and false negatives. Most recently, this Court in *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), was concerned with false positives involving a dominant firm's refusal to deal with a competitor when the conduct at issue was regulated by a comprehensive regulatory scheme. There, the Court "weigh[ed] a realistic assessment of [antitrust]'s costs" against "the slight benefits of antitrust intervention," concluding that "[t]he cost of false positives counsels against an undue expansion of §2 liability" in that context. *Id.* at 414.

While the Court in *Trinko* focused on the risk of false positives, minimizing false negatives is equally important.

Indeed, a "Section 2 standard that is animated by greater tolerance of aggressive dominant firm [ ] strategies that both exclude and do not benefit consumers will . . . very likely lead to 'false negatives' and under-deterrence, with uncertain, but very likely substantial adverse consequences for the nascent competition that is often its target." Gavil, *supra*, at 5. Standards that "are likely to lead to an increased incidence of false negatives" can "seriously undermine Section 2's vitality as a shield that guards the competitive process." *Id*.

As discussed above, the Court in *Brooke Group* deemed it necessary to adopt an exceptionally strict test for predatory pricing because of the considerable risk of chilling procompetitive conduct that would result in lower prices for consumers. Here, there is far less risk of that sort. Predatory bidding involves increasing the price of inputs; a strict test is not necessary to avoid disincentives to engage in pro-competitive conduct. Because there is no reason to believe the risk of false positives is greater than the risk of false negatives in applying Section 2 to predatory bidding and related practices on the buying side, the Court should not extend *Brooke Group*'s test to this domain.

E. There Is Insufficient Judicial Experience With And Empirical Analysis Of Overbidding, Overbuying And Related Buying-Side Conduct To Warrant Adoption Of A Single Predation Test For This Area At This Time.

There is another reason that this Court should not rush to adopt a test in this case that may be underinclusive. There has been very limited experience with or analysis of litigated cases involving buy-side conduct.[13] Indeed, there have been

[13] Prof. John B. Kirkwood raised precisely this point at the joint FTC-DOJ Section 2 Hearing on Predatory Pricing. *See* Section 2 Hearing Transcript, *supra*, at 107-08 (testimony of Prof. John Kirkwood, Seattle University School of Law).

none involving single-firm monopsony conduct under Section 2 prior to this case. *See* BLAIR & HARRISON, *supra*, at 17. Jacobson and Dorman included a list of the cases they were able to locate, 39 altogether, in which "antitrust violations based primarily on the acquisition or abuse of buyer power have been found." Jonathan Jacobson & Gary Dorman, *Monopsony Revisited: A Comment on Blair & Harrison*, 37 ANTITRUST BULL. 151, 159-60 (1992) (hereinafter Jacobson & Dorman, *Monopsony Revisited*). Although many cases included Section 2 allegations, all of them concerned collusive or concerted action (or challenged mergers under Section 7 of the Clayton Act, 15 U.S.C. § 18). It thus made sense that, when Blair and Harrison analyzed non-price buying practices, they did so only for concerted action cases. *See* BLAIR & HARRISON, *supra*, at 76-81.

It is much easier to evaluate – and fashion judicial remedies to redress – concerted action than unilateral conduct. *See* Herbert Hovenkamp, *Exclusion and the Sherman Act*, 72 U. CHI. L. REV. 147, 163-64 (2005). Indeed, at the introductory session of the recent joint Federal Trade Commission-Department of Justice hearings on Section of the Sherman Act, Federal Trade Commission Chairman Deborah Platt Majoras characterized the issue of how unilateral conduct should be evaluated as having "dominated our antitrust debate for several years" and as "the most heavily discussed and debated area of competition policy in the international arena." Transcript of Hearing, *Federal Trade Commission and Department of Justice Hearings on Section 2 of the Sherman Act: Single-Firm Conduct As Related to Competition* (June 20, 2006) at 10, *at* http://ftc.gov/os/sectiontwohearings/docs/60620FTC.pdf (testimony of Deborah P. Majoras, Chairman, Federal Trade Commission).

Caution is appropriate in allowing acts that would be "in restraint of trade" if undertaken by agreement among rivals to subject a single firm to liability if the firm unilaterally engages in those acts. But caution is also called for in *ignoring* buying-side conduct of the kind at issue here. These claims have rarely been litigated, and there is no present basis for adopting sweeping judgments about their marketplace effects. Where a single firm has become dominant enough to inflict welfare harms in its buying practices, there is good reason for heightened vigilance.

Cartels are inherently unstable. Thus, concerted exclusionary conduct can be undermined by defectors.[14] Unilateral exclusionary conduct – if coupled with power-entrenching market characteristics such as high barriers to entry – can be more enduring and cannot readily be rectified. There is accordingly significant risk in adopting an especially strict test for condemning conduct of that ilk, particularly when it occurs on the buying side where courts have little experience in examining its economic implications. There are many possible strategies apart from predatory bidding that might be utilized by power buyers for anticompetitive purposes. A clear danger in prematurely establishing a single, formulaic test in the context of predatory bidding is that it might have unfortunate spillover effects as other strategies emerge, possibly even encouraging the emergence of such strategies.

There is certainly no need to expand the *Brooke Group* test to the buying side to avoid a new flood of indeterminate litigation of the sort suggested by some of the *amici* supporting the appeal in this case. As Jacobson and Dorman have explained, the exercise of monopsony power requires three conditions: "(1) the buyer or group of buyers must represent a substantial portion of total purchases in the market; (2) the supply curve must be upward-sloping; and (3) there must be some barriers to entry into the buyers'

---

[14] Blair and Harrison describe the incentive for collusive buyers to cheat: "Since each member of the cartel will be confronted with the same temptation, it is not unlikely that the agreement will be undermined through clandestine defections." BLAIR & HARRISON, *supra*, at 46.

market." Jonathan Jacobson & Gary Dorman, *Joint Purchasing, Monopsony and Antitrust*, 36 ANTITRUST BULL. 1, 10 (1991). The authors posit, and the cases bear out, that only certain industries, such as agriculture, natural resources, and labor, possess all of these characteristics. *See* Jacobson & Dorman, *Monopsony Revisited*, *supra*, at 162 n.32.[15]

Without agreeing that those traditional conditions of monopsony power must always be present in order to find Section 2 liability, we note that all of them are present here (as the court of appeals recognized). The alder sawlog market also shares another characteristic that, as a practical matter, permits the rise of monopsony in such industries in particular: alder sawlogs are limited to a narrow (and thus more easily dominated) geographic area, particularly given that most sawlogs are processed within 100 miles of the site of harvest. J.A. 153a. Alder forests cannot be replicated in, say, Nevada. As a practical matter, alder's tendency to stain makes storage and lengthy transport economically infeasible. The converse is also true: alder is the predominant hardwood in the Pacific Northwest, and the only hardwood mills in the Western United States are located there. Pet. App. 2a. Thus, control over alder sawlog supply in the Pacific Northwest is tantamount to control over western hardwood supply.[16] Treating the unusual facts at issue here as a basis for declaring buying practices generally to be lawful unless a

---

[15] Although Jacobson and Dorman did not mention the movie industry, the cases they cite are replete with challenges that arise when a theater is able to dominate a local geographic market for first-run films. *See* Jacobson & Dorman, *Monopsony Revisited*, *supra*, at 159-60.

[16] It is true that globalization has altered the analysis applied to most geographic markets, because manufacturing and even services can be delivered virtually anywhere. At the same time, there remain resources that have unique properties narrowing the scope of the relevant supply market significantly. From the facts found below, alder is one such resource.

victim of them meets the *Brooke Group* test would be dangerous indeed.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

JONATHAN L. RUBIN
Counsel of Record
JONATHAN L. RUBIN, P.A.
1717 K Street, N.W., Suite 600
Washington, D.C. 20036
(202) 415-0616

JONATHAN W. CUNEO
CUNEO GILBERT & LADUCA, LLP
507 C Street, N.E.
Washington, D.C. 20002
(202) 789-3960

ROBERT H. LANDE
UNIVERSITY OF BALTIMORE
SCHOOL OF LAW
1420 North Charles Street
Baltimore, M.D. 21201
(410) 837-4538

OCTOBER 12, 2006