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 RESPONDENT

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QUESTIONS PRESENTED

1. Whether the *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), price-cost test applicable to predatory selling should be extended to immunize bidding conduct by a dominant buyer that is part of a multi-pronged monopolization scheme?

2. Whether petitioner preserved any objection, other than *Brooke Group*, to the jury instructions below defining anticompetitive conduct?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Ross-Simmons Hardwood Lumber Company, Inc. states that it has not issued shares to the public and has no affiliates, parent companies, or subsidiaries issuing shares to the public.

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COUNTERSTATEMENT

Introduction: Weyerhaeuser Employed a Multi-Tactic Scheme to Monopolize the Alder Industry.

The version of the facts and issues presented by petitioner is so misleading and materially incomplete that respondent is compelled to restate the case from start to finish.

In 1980, Weyerhaeuser entered the alder lumber business with the purchase of two sawmills in Washington. In 1985, after Ross-Simmons Hardwood Lumber Company, Inc. (Ross-Simmons) rejected its purchase offer, Weyerhaeuser converted a softwood mill to manufacture alder lumber on a site immediately adjacent to Ross-Simmons in Longview, Washington. By 1995, with a market share of 50%, petitioner's alder division managers devised a multi-pronged plan to consolidate the industry in Weyerhaeuser's hands and to amass an 85% market share. The primary components were competitor acquisitions, exclusive supply agreements and exclusionary bidding practices.

By 1998, Weyerhaeuser controlled 65% of the alder sawlog market in Oregon and Washington; a position achieved primarily through non-price tactics including three recent acquisitions. In Oregon, for example, a 1997 Weyerhaeuser supply projection showed petitioner controlling over 60% of supply through a variety of oral and written exclusive arrangements and that only 33% of supply was subject to competitive bid. J.A. 901a. In this constrained "open market," Weyerhaeuser used manipulative bidding practices to push log costs up for the purpose of either depriving competitors of needed raw materials or saddling them with high cost inputs.

This antitrust case arose at a point when Weyerhaeuser, having just acquired control over alder sawlogs in British Columbia, was forging ahead with plans to eliminate most of its remaining competition in Oregon and Washington and then to reduce raw material prices across the region. One of defendant's primary targets was Ross-Simmons, an alder

industry pioneer in the 1960s that grew to become the industry's no. 2 producer before succumbing to Weyerhaeuser's massive consolidation and closing its doors in 2001.

This is *not* a predatory pricing case. With one exception, it was pled and tried as a garden-variety monopolization case in which the defendant was accused of multiple acts of anticompetitive conduct. Despite what its brief suggests, Weyerhaeuser did not defend this case as if all exclusionary conduct allegations could be collapsed into a single predatory pricing theory. In fact, Weyerhaeuser never submitted a predatory pricing jury instruction, either before or during trial.

Instead, Weyerhaeuser's counsel in opening acknowledged that respondent's claims were "serious charges" that would be answered by evidence showing that each was false. The factual issues in this case, many of which turned largely on credibility, were decided against petitioner. No doubt recognizing the futility of challenging a jury's assessment of witness credibility, petitioner has tried to recast this case as nothing other than a predatory pricing case that founders on the shoals of *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), because symmetry and logic purportedly dictate that a bright line rule applicable to predatory selling must also apply to predatory buying.

This antitrust case generated four others (involving 11 plaintiffs),[1] which revealed a mass of relevant materials withheld by Weyerhaeuser in this case that were subsequently unsealed over Weyerhaeuser's vigorous objections. In finding

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[1] *Westwood Lumber Co. v. Weyerhaeuser*, Civil No. 03-0551-PA (D. Or.); *Coast Mountain Hardwoods v. Weyerhaeuser*, Civil No. 03-0552-PA (D. Or.); *Washington Alder v. Weyerhaeuser*, Civil No. 03-073-PA (D. Or.); and *Smith Street Mill, Inc. v. Weyerhaeuser*, Civil No. 04-1049-PA (D. Or.). *Westwood Lumber*, involving four alder sawmill plaintiffs, settled for $34.5 million, *Coast Mountain Hardwoods* settled for $14 million, and *Smith Street Mill,* including five plaintiffs, was settled for $13.1 million. *Washington Alder* proceeded to trial in June 2004 and concluded in a jury verdict for $5.2 million, which was trebled to $15.6 million, and is now on appeal.

that the public interest strongly outweighed Weyerhaeuser's confidentiality claims, the district judge declared:

> To the extent these exhibits furnish a "window" that lets the public peer inside Weyerhaeuser's alder business and observe years of conduct that a jury has pronounced illicit, that result is consistent with the intent of the antitrust laws notwithstanding that Weyerhaeuser might prefer to keep that window shuttered.

Confederated Tribes of Siletz Indians of Or. v. Weyerhaeuser Co., 340 F. Supp. 2d 1118, 1124 (D. Or. 2003).

The evidence that Weyerhaeuser withheld below but disgorged in later cases is now in the public domain and cited here where appropriate to fill out the factual history of Weyerhaeuser's deliberate multi-tactic scheme to monopolize the alder industry.[2] Weyerhaeuser's own strategic plans, resource studies and associated communications stand on no different footing than the hundreds of empirical data sources cited in the original Brandeis brief[3] or, for that matter, Weyerhaeuser's citation to "facts" from a single slide in a PowerPoint presentation by a wood products consultant in 2000. Pet. Br. 43. These materials are germane, particularly in an antitrust context where this Court needs a complete understanding of the relevant marketplace before deciding a case addressing the rules of competitive engagement in that sector of the U.S. economy. Further, although not necessary to support the jury's verdict, this information helps demonstrate that the inferences drawn and the conclusions reached by this jury were in fact reasonable. This case is no false positive.

A. Industry Structure and Relevant Markets.

In the western United States, where softwoods predominate, the only concentration of hardwood trees sufficient to support a hardwood lumber industry is in the

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[2] All extra record documents including unpublished opinions in the follow-on cases are available at www.alderantitrust.com.

[3] Citation to extra record facts is common in this Court dating back to the first so-called "Brandeis brief" in 1907. *Muller v. Oregon*, 208 U.S. 412 (1908).

Pacific Northwest. This region is often referred to as the alder region because approximately 95% of the hardwood manufactured in western Oregon, Washington, and British Columbia is alder. This is in considerable contrast to the hardwood lumber regions east of the Mississippi where the forests contain a highly varied mix of commercial hardwoods.

The significance of alder to the hardwood industry in the Pacific Northwest was undisputed at trial. Multiple Weyerhaeuser executives conceded that the region's hardwood industry would disappear if alder were suddenly declared off-limits and unavailable for harvest. J.A. 584a; Tr. 5B at 109. The parties stipulated that there was virtually no movement of hardwood logs into or out of the Pacific Northwest. J.A. 153a. That is a function of two factors: the substantial transportation costs and the fact that alder suffers significant degradation in the form of discoloration within several weeks after harvest, depending upon weather conditions. J.A. 184a. Alder therefore cannot be shipped long distances without a significant decline in sawlog value, and the parties stipulated that alder sawlogs typically are processed within 100 miles of harvest. J.A. 153a.

The overall market structures of the U.S. hardwood regions also vary dramatically when comparing the alder region in the Pacific Northwest to the hardwood lumber regions east of the Mississippi. As a result of acquisitions by Weyerhaeuser and the closure of dozens of alder sawmills since 1970, the existing number of market participants in Oregon and Washington has dropped by 75% from more than 60 in 1970 to 15 by 2001 (all single mill operations plus six mills owned by Weyerhaeuser). J.A. 741a, 744a. In contrast, the hardwood lumber industry in the East is characterized by scores of sawmills of widely varying capacities in every state with a substantial hardwood inventory.

Weyerhaeuser understood these structural differences. In a 2001 strategic planning document, defendant noted that the outlook for its eastern hardwood lumber operations was "for

consistent margins due to a rational market."[4] In support of this conclusion, the document notes that the relationship between "raw material and product realizations" was consistent "due to large number of landowners, brokers, manufacturers and low entry costs." *Id.* The market dynamics for alder in the Pacific Northwest were considerably different, a condition defendant sought to exploit. According to its own studies, over 80% of the alder log supply was inelastic, which meant that this harvest volume would flow into the market if the price was above the costs of logging and transportation.[5] In the alder region, Weyerhaeuser considered barriers to entry to be high[6] and the opportunity for further consolidation to be considerable. J.A. 744a-745a.

The company pursued a policy of participating only in those markets where Weyerhaeuser was one of the top three players, and CEO Steve Rogel and his lieutenants promoted the benefits of industry consolidation in multiple speeches.[7] Alder competitors were not the only acquisition target. In 1999-2002, Weyerhaeuser bought up British Columbia's largest forest products company, the largest U.S. producer of trusses and I-joists, and successfully executed a hostile takeover of Willamette Industries, a company with sizable alder holdings in the Pacific Northwest.[8]

The market structure that Weyerhaeuser pursued through its ongoing consolidation efforts was not a free and competitive market. Rather, Weyerhaeuser coveted oligopoly through consolidation, a point made abundantly clear by Mr. Rogel in a speech in 2001 in which he criticized the pace of paper industry consolidation in Europe and noted the unfortunate continued existence of "small or medium-sized family firms," whom he characterized as "marginal producers" who made it hard "to avoid price wars when

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4 *Westwood* Ex. 2640 at 36.
5 J.A. 750a; *Westwood* Ex. 2740 at 1.
6 *Westwood* Ex. 2685 at 1.
7 *See generally* Exs. 466, 469-475, 477.
8 Ex. 477 at 5.

demand for paper has fallen." J.A. 823a. Clearly, Weyerhaeuser craved the supra-competitive profits that come with oligopoly, which Mr. Rogel also considered the key to superior returns in U.S. equity markets. *Id.*

1. Alder sawlog market. Weyerhaeuser disputed at trial but now concedes that alder sawlogs are a relevant product market geographically confined to the Pacific Northwest, specifically the western thirds of Oregon, Washington, and British Columbia. Even within the Pacific Northwest, the alder sawlog market is distinct from other log markets. Alder sawlogs are segregated from other species during harvesting in the woods and trucked to specialized production facilities that utilize different technology than that of the softwood industry. J.A. 152a. While most of the softwood lumber generated from Pacific Northwest forests goes into structural applications like two-by-four studs, alder is an appearance wood resawn by remanufacturers into a host of different products. Common uses include furniture parts (for cabinets, tables and chairs), electric guitar blanks, paint brush handles and hangers. *Id.* Alder is generally referred to as "come-along volume" because it is almost always harvested as a by-product of the region's much more dominant softwood harvest.[9]

Weyerhaeuser forest inventory experts used satellite technology, harvest records and other data to inventory the standing alder throughout the Pacific Northwest by owner and location. Defendant classified alder log suppliers into four categories: Weyerhaeuser fee lands; large private or industrial landowners; small private landowners; and public timber sales. J.A. 747a. As explained below, Weyerhaeuser used a variety of tactics to lock up most of the supply from large industrial landowners and the supplies from public lands. With control of the harvest from its own lands and most industrial landowners at rational prices, Weyerhaeuser then concentrated its overbidding strategies in that fraction of the market where it

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[9] J.A. 145a, 750a; *Westwood* Ex. 2740 at 1.

faced competition from its rivals, sourced primarily from small non-industrial log suppliers.

Within six years of its 1980 entry, Weyerhaeuser's share of the Pacific Northwest alder sawlog market was 50%. J.A. 260a. By 1996, this share was 65% and by 2001, it had reached 75%. J.A. 921a. At trial, two former top executives for defendant's hardwood division acknowledged that Weyerhaeuser had substantial market power in the alder sawlog market. J.A. 259a, 341a. A single firm market share of 75% was unprecedented in the forest industry; no other wood products company had amassed more than a 50% market share in any other U.S. wood products market. J.A. 663a-664a.

2. Finished alder lumber market. Weyerhaeuser and its amici treat Ross-Simmons' failure to carry its burden of proof on the question whether there was a relevant market for finished alder lumber in the U.S. as *establishing* that defendant had no power in the output market. In fact, the jury made no such finding and the record evidence shows that this was a very close issue. Weyerhaeuser in 2000 listed its alder lumber market share at 75% and that of all other species at less than 1%. J.A. 753a. Even the district judge noted, "The jury ultimately didn't find for the Plaintiffs on the finished lumber claim, but there was evidence from which it could have."[10]

B. Purchasing Conduct Was Only Part of a Complex Monopolization Scheme.

1. Acquisitions. Weyerhaeuser used strategic acquisitions in 1996-2000 to increase its then 50% alder sawlog market share to over 75%, eliminating three major competitors and extending Weyerhaeuser's reach to every corner of the relevant geography for standing alder. Defendant's acquisition in 2000 of British Columbia's "dominant" and only significant alder producer exemplifies the anticompetitive character of these acquisitions. J.A. 422a. The target, Coast

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[10] *Coast Mountain*, Opinion and Order denying motion to dismiss at 17, available at www.alderantitrust.com. This was also the opinion of four experts whose conclusions were substantiated by a price correlation analysis. J.A. 384a-392a.

Mountain Hardwoods, purchased 90% of the alder log supply in the province.[11] Much of this volume was generated by the company's five exclusive alder-specific forest licenses with terms of 15 to 20 years. J.A. 158a-159a. Provincial regulations also allowed Coast Mountain to block the export of alder sawlogs harvested under forest licenses held by other companies. J.A. 429a. In B.C., where over 95% of the timber supply is on public lands, the power to block exports to interested buyers in Washington could be a potent anticompetitive weapon. The 90% control enjoyed by Coast Mountain resulted in dramatically different and much lower market prices for alder sawlogs in British Columbia compared to northern Washington. *Compare* J.A. 845a ($299 in B.C.) *with* J.A. 865a, 895a ($504-$524 in Washington).

In an effort to gain access to that low cost resource, Ross-Simmons made a bid for Coast Mountain in early 2000, but needed a number of months to raise the capital.[12] Weyerhaeuser immediately proposed an all cash deal and a quick closing, which is what occurred. As it proceeded toward that closing, Weyerhaeuser sought to maintain the combination of exclusive long-term supply agreements *and* the power to block alder log exports out of the province. Weyerhaeuser sought[13] and received a clarification of existing regulations that it would be able to block alder log exports despite its status as a softwood log exporter.[14] The net result is Weyerhaeuser's powerful control over the alder sawlog resource in British Columbia. Weyerhaeuser enjoys log costs in British Columbia that are only 60% of its average log costs in Oregon and Washington. J.A. 832a-896a.

In early 2001, Weyerhaeuser projected that its growing monopsony power would enable it to reduce log costs in Oregon/Washington, and that every $10 per 1,000 board foot

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11 *Westwood* Ex. 2538 at 1.

12 Stip. Certifying Supp. Record, Ex. B at 24 (G. Boyd testimony).

13 *Smith St*. Exs. 15440, 15441.

14 British Columbia Ministry of Forests letter dated September 28, 2000, available at www.alderantitrust.com.

drop in log costs would add $2 million in profits to the division's bottom line. J.A. 903a. If that scheme had not been disrupted by this litigation, there is every reason to believe that Weyerhaeuser would have succeeded in pushing alder sawlog prices in Oregon and Washington down to the levels prevailing in British Columbia. Based upon the 2001 data, this increase in profits was close to $40 million annually. J.A. 832a-896a, 903a.

2. Exclusive contracts (written and oral). Weyerhaeuser locked up most of the alder sawlog market through a variety of exclusive arrangements: 15 to 20-year exclusive forest licenses in British Columbia; exclusive log supply contracts; quasi-tying arrangements; and oral agreements. A 1997 action plan following a meeting of the division's log buyers lists "lock up more wood" as the objective and identifies long-term arrangements as a primary means using "money, log trades, chip for logs or any combination."[15] The memo also lists 12 of the largest industrial landowners in the region, including five of Weyerhaeuser's *amici*,[16] for this approach. Weyerhaeuser eventually attracted most of these companies into exclusive agreements of one kind or another or oral arrangements where the parties agreed to sit down each quarter and negotiate a price for that quarter's volume. Evidence in the follow-on cases ultimately established conclusively that Weyerhaeuser generally paid less to these industrial sellers than the prices paid in that smallest segment of the market where Weyerhaeuser competed for and/or manipulated prices to higher levels.[17]

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15 *Westwood* Ex. 2657 at 2.

16 These include five of eight companies signing on to the Timberland Owners and Managers *amicus* brief supporting petitioner, including The Campbell Group, Hampton Resources, Inc., Hancock Natural Resources Group, Inc., Menasha Forest Products Corp., and Plum Creek Timber Company as successor-owner of Georgia-Pacific's Pacific Northwest timberlands. *Id.*, J.A. 829a, 901a.

17 *Smith St.* Exs. 15951-15954.

For forest landowners in western Oregon or Washington, the highest value and volume on any stand of timber is softwood. In this region, Weyerhaeuser was the "dominant" exporter of the high grade Douglas fir that qualifies for the Asian markets. J.A. 332a. During its drive to monopolize the alder industry, log buyers in Weyerhaeuser's timberlands division, which purchased export grade softwood logs as part of its export business, were told to assist the alder division by tying their willingness to buy a logger's export grade softwood logs to that logger's commitment to deliver alder sawlogs from the stand being harvested to Weyerhaeuser's alder division on an exclusive basis. J.A. 330a-331a. Weyerhaeuser denied this quasi-tying tactic, but once again likely lost the credibility contest.

3. Exclusionary bidding practices. To listen to petitioner's "factual" account, Weyerhaeuser was nothing more than an innocent (but large) buyer of alder sawlogs, competing vigorously for its share of a limited supply of inputs. The impression advanced by petitioner and its *amici* is that prices were established in a transparent market by competitive bid. In fact, the market was anything but transparent. Weyerhaeuser engaged in manipulative buying procedures calculated either to push prices up or hold them at high levels while minimizing the volume of high-priced logs it actually bought.

With most of its supply already controlled through exclusive written and oral agreements, Weyerhaeuser needed only to focus on pricing in the fractional remainder of the market to impose higher costs on its rivals. It did buy some of that volume at high prices, but generally used two tactics to push prices up (or hold them up) while strategically avoiding the actual purchase of these higher cost inputs. Its competition, however, was forced to fill most of its needs from this so-called "open" share of the market.

Bear in mind that this log market, like most in the U.S., lacks transparency, depends largely on oral communications, and is therefore highly susceptible to manipulation. As the

dominant buyer throughout the region, Weyerhaeuser had the power to set log prices through its bidding. Multiple witnesses testified at trial that alder sawlog prices were set at whatever price Weyerhaeuser was paying in the market. J.A. 231a-233a, 343a, 661a. But in this high-priced segment, Weyerhaeuser sought to minimize its purchasing while maximizing the harm inflicted on its competitors. It employed two tactics: "last look" oral bidding and market-making sealed bids.

In 1999, Weyerhaeuser further undermined market transparency by adopting a proprietary log grading system adding high, medium, and low classifications to each diameter class and different pricing for each. J.A. 789a-790a. This classification system was very subjective, enabling defendant, which graded its customers' logs delivered to its mills, to mitigate high costs quoted to suppliers by manipulating the subjectivity in its grading system. J.A. 135a, Tr. 6A at 105.

The geographic market proved in this case was the Pacific Northwest, specifically the temperate marine zone west of the Cascade Mountains in Oregon, Washington, and British Columbia. Log market competition, however, was focused in smaller "sourcing areas," consistent with the location of mills and their 100-mile radius supply zones. J.A. 153a, 677a.

By 1998, there were five or fewer bidders in each of these areas (J.A. 740a, 741a; Exs. 16, 17) and each bidder participated in the market through a log buyer whose job was to talk to potential suppliers, primarily landowners and loggers, about the price the mill was willing to pay for delivered logs. The pricing was generally by diameter and quoted on a per thousand board foot basis. The larger the diameter of the sawlog, the higher the price. *See, e.g.,* J.A. 781a. Within this market segment, some larger landowners who had not been enticed into written or oral exclusive agreements with Weyerhaeuser put up their volume for sale quarterly by sealed written bid. But most of the selling in this "open" market segment was oral, through bids over the phone, with the seller

ultimately asking the high bidder to issue a purchase order that was valid for deliveries over 30 to 60 days. Tr. 6A at 112.

Weyerhaeuser used the "last-look" buying practice to minimize its own purchases and impose high prices on its competition, which was relatively easy. Once having received a commitment from a supplier to give it the opportunity to bid last, it was Weyerhaeuser's choice following multiple rounds of upward bidding to stop and let the competitor have the volume at the elevated price.[18] The sellers profited in the short term from a process that appeared to generate higher pricing compared to securing just one set of independent bids from each log buyer.

Sealed written bidding in this market was also subject to manipulation. Because of the largely oral nature of market information and the easy access to the prices being quoted by competitors, Weyerhaeuser was in a position to submit sealed bids just below what it expected its competitors to bid, knowing that the losing (but high) bid would continue to signal a high-priced market to sellers while shifting that volume to Weyerhaeuser's competitors. Weyerhaeuser carefully monitored its competitors' alder log inventories with regular drivebys and aerial reconnaissance and surreptitiously gained access to Ross-Simmons' planned bids through an employee. Tr. 2A at 61-65. This facilitated more precise "market-forcing" but *losing* bids on quarterly volume sold by sealed bid.

The above behavior is far different from predatory output pricing by sellers in a highly competitive market with many buyers. In *Brooke Group*, Brown & Williamson had no ability to drop its price for generic cigarettes and avoid the cost of this strategy in terms of lower revenue. Here, in contrast, Weyerhaeuser manipulated input prices upward and then, rather than pay the full consequences of that manipulation in

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[18] *See* Tr. 1B at 120-127 (explaining the process, with a historical example).

that fraction of the market where it faced competition, largely avoided those costs.

4. Overbuying. Weyerhaeuser's overbuying, which the jury instructions referred to as "purchas[ing] more logs than it needed . . . in order to prevent plaintiffs from obtaining the logs they needed at a fair price," was accomplished in two ways. First, Weyerhaeuser attempted on several occasions to force shutdowns or curtailments of Ross-Simmons by stockpiling huge volumes of sawlogs which then rotted in the log yard, suffering enormous devaluation from sawlog to pulp log. Major episodes of this tactic occurred in 1993 and 1989, causing Ross-Simmons to suffer curtailment or to shift its purchasing into lower grade logs which were not the focus of Weyerhaeuser's overbuying. Tr. 2A at 32, 38-44.

The second type of overbuying occurred in 1997-2000, a time of declining lumber prices brought on by the Asian economic crisis which greatly reduced demand for hardwood lumber in Asia. The result was an excess of supply in the U.S. and lower prices. Weyerhaeuser's CEO pointed out the financial impact of the declining Asian market on the company's overall results in its 1998 annual report and noted that defendant had taken "downtime to balance inventory levels with market conditions." Ex. 458 at 4. But not Weyerhaeuser's alder division. It continued to run at capacity and built up staggering all-time high lumber inventories, which exerted downward pressure on the market for finished alder lumber. J.A. 547a, 922a.

In a case like this, where defendant is largely manipulating input prices up (as opposed to purchasing inputs at prices set in a genuinely competitive market) while simultaneously and irrationally building inventories that push output prices down, how does one extract the pricing conduct and apply the *Brooke Group* price-cost test?

5. Transfer Pricing. Late stage discovery in this case revealed that defendant, contrary to company policy and repeated representations at depositions, was transferring up to half of the raw material needs of its Longview alder sawmill

from company lands at below market prices. At trial, one Weyerhaeuser witness after another had no explanation for records showing that the prices for identical grades of sawlogs from defendant's Longview tree farm delivered to its Longview mill were substantially below identically graded logs delivered to other mills from other Weyerhaeuser tree farms. J.A. 897a-900a; Tr. 6B at 142, 7A at 81-82, 7B at 19. If the average price of this volume is adjusted to the average price paid for sawlogs from all third party suppliers, the financial impact was a multi-million dollar subsidy to the Longview plant in 1997-2001. J.A. 831a ($14.7 million in total). For part of this period, eliminating a subsidy not enjoyed by any of Weyerhaeuser's other alder plants caused the Longview mill – located directly adjacent to Ross-Simmons – to run at a loss.

Judge Panner held:

> Among other things, the jury could have found that Defendant was internally transferring lumber [*sic*., logs] to its Longview mill, at below cost, to conceal or compensate for the fact that Defendant's Longview log buyers were paying excessive prices for logs purchased on the open market in order to keep Ross-Simmons from obtaining those logs. This might also support an inference that Defendant was deliberately trying to evade the antitrust laws and to conceal possible antitrust violations, *i.e.*, that there was willful misconduct, and that Defendant's course of conduct described at trial was designed to be anti-competitive and to further its dominance in the relevant market and went far beyond ordinary means of competition.

Pet. App. 33a.

6. False representations to state governments. The new interpretation of British Columbia forestry regulations in 2000 that empowered Weyerhaeuser to block alder log exports out of the province was not the first time that defendant had secured regulatory change that enhanced its market power over alder sawlogs. Weyerhaeuser is the largest private forest

landowner in Oregon and Washington and the largest exporter of softwood logs to Asia. Weyerhaeuser's status as a log exporter disqualifies it from purchasing public timber from U.S. National Forests and, until it secured special exemptions from state regulators, disqualified Weyerhaeuser from purchasing logs (softwood or hardwood) generated from the sizable state forests in Oregon and Washington.

In both states, however, Weyerhaeuser successfully leveraged false representations into special exemptions allowing it to purchase alder sawlogs from state forests, provided it did not export hardwood (as opposed to softwood) logs from its own lands. The Oregon example is the most egregious. In public testimony before Oregon's state forester, Weyerhaeuser grossly exaggerated the levels of its Eugene and Garibaldi mills' dependence on alder sawlogs from Oregon's state forests. Defense witnesses weakly contended at trial that a major upward change in the relevant figures between draft and final versions of public testimony was an inadvertent error.[19] In disposing of defendant's post-trial motions, the district judge said the following on this issue:

> The Plaintiffs pled, and presented evidence, that Defendant knowingly made false statements to the Oregon Department of Forestry to obtain an exemption from log export regulations that allowed Defendant to obtain alder from state lands and, by design, also had the effect of denying those same logs to the Plaintiff mills. There was evidence from which the jury could readily conclude that the misstatements were deliberate, the deviation from the truth was substantial, and the misstatements were intended to and did influence the outcome of that proceeding. The jury could also have found that these actions were not undertaken for legitimate business reasons but rather as part of a pattern of deliberate anti-competitive conduct.

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[19] Documentation produced by Weyerhaeuser in follow-on cases shows this to be utterly false. *Compare Westwood* Exs. 2651, 2652, 2653 *with* J.A. 784a.

Pet. App. 42a.

C. Weyerhaeuser Unquestionably Sought Monopoly Power in a Vulnerable Market.

It is no surprise that Weyerhaeuser lost the credibility contest below. Defendant's own planning documents exposed its strategy: acquire competitors and expand plants to become the dominant buyer in every part of the region; control most of the raw materials supply through exclusive arrangements; and manipulate the balance of the so-called "open" market to levels that killed off competition. Each element of the strategy was deployed through multiple complementary means, all the while focused on the opportunity to restructure a largely inelastic, regionally constrained raw material market into a dominant Weyerhaeuser monopsony.

In its acquisitions, Weyerhaeuser sought market control. In aggressively fending off its competitors to acquire British Columbia's 90% consumer of alder sawlogs, Weyerhaeuser knew that future market entry in B.C. was unlikely[20] and that denying its Washington competitors access to the low-cost provincial resource likely would cause one of those competitors (not Ross-Simmons) to go out of business.[21] Defendant's hostile takeover of industry giant Willamette Industries, an effort that began in 2001 and closed in 2002, was parallel in tactic to its entry into the alder business in Oregon in late 1995. When its friendly negotiations to acquire privately-owned Diamond Wood Products and its major presence in Oregon stalled, Weyerhaeuser division chief Arnold Curtis threatened to use available Weyerhaeuser land in close proximity to Diamond's Oregon plants to construct competing mills if the deal was not finalized soon. The deal promptly closed. J.A. 247a-248a.

In its exclusive supply arrangements, Weyerhaeuser sought market power. Defendant developed a massive database of standing alder by owner classification and then focused its

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20 *Smith St.* Ex. 15406 at 3.

21 *Westwood* Ex. 2426 at 1.

exclusive contracting efforts on the most promising of those classes – large industrial owners who could be attracted into exclusive oral or written arrangements with special cash advances, trades of other species, or other incentives.[22] Weyerhaeuser's clear objective was, in its own words, to be "the consolidator" in the Pacific Northwest, the only hardwood region west of the Mississippi. J.A. 745a. Significantly, defendant had no such plans for the eastern U.S. because the rationality of that marketplace with its large number of competitors of varied size at every market level made such a strategy impractical.

In its bidding behavior, Weyerhaeuser sought market power. In that smallest segment of the market not controlled by Weyerhaeuser through fee ownership or exclusive contracts, its bidding behavior was primarily designed to manipulate log prices upward to eliminate competition rather than to compete on fair terms for a share of a limited resource. There is no other explanation for Weyerhaeuser's tracking of every competitor's profit margin and the directive in its planning documents that log prices "be such that the highest cost competitors drop from the market."[23]

At trial, two former Weyerhaeuser executives admitted that manipulating log prices upward was part of Weyerhaeuser's consolidation strategy. Weyerhaeuser could not execute this strategy in the "open" market segment without buying some of that volume, which eroded the division's profit margins. When a Weyerhaeuser senior business analyst, who prepared a financial model showing the "disconnect" between rising log prices and declining lumber prices, questioned the division's finance director about this market development, she twice stated, "that was the business strategy, to price logs up to deal with competition." J.A. 357a. This same analyst participated in a series of early 2001 high level meetings in which division head Robert Taylor candidly admitted that Weyerhaeuser

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22 J.A. 747a, 750a, *Westwood* Exs. 2657 at 2, 2682 at 20.

23 *Westwood* Ex. 2725 at 21.

"had given up about $20 million in potential log cost opportunity within the last year." J.A. 354a. Another former Weyerhaeuser executive testified that the wisdom of incurring higher log costs had been questioned in senior management meetings, but division chief Arnold Curtis repeatedly brushed them aside with the statement that Weyerhaeuser would "recoup the costs manyfold" once competition was eliminated. J.A. 260a.

Notably, as the dramatic difference between 2001 log price levels in British Columbia compared to Oregon and Washington shows, Weyerhaeuser had its eyes on log prices that would reduce its costs by nearly $40 million annually. Any doubt about Weyerhaeuser's perceived ability to drive log costs down is belied by a planning exhibit, J.A. 903a, and an email issued when the closure of Ross-Simmons was imminent. In that 2001 email, division head Rob Taylor directed his management team that the time had come in the year's "strategic plan" to push log prices down. His specific language was: "We are in position to accelerate lower log prices AGGRESSIVELY."[24] This was obviously to be accomplished by Weyerhaeuser reversing its previous pattern of manipulative bidding and exercising its market power to drive prices downward.

D. The Alder Sawlog Market, Like Most Timber Markets, Is Inelastic.

Relying largely on the Campbell Group/Timberland Owners' amicus briefs, Weyerhaeuser argues that timber markets are "quintessentially elastic," and that the Ninth Circuit was wrong in concluding that the market here is "relatively inelastic." Pet. Br. 33. In its merits amicus brief, the Timberland Owners expand on this point, claiming that "[e]conomists have long recognized that the supply of timber is highly price-sensitive," citing four articles from forest economics literature. Timberland Owners Br. at 15. Close examination of these authorities reveals that this amicus brief

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[24] *Westwood* Ex. 2688 at 2.

both mischaracterizes the appropriate conclusions and inexplicably ignores more relevant literature on the elasticity issue, some of it by the federal government and by the very authors of the articles cited.

In two of the most glaring overstatements, the Timberland Owners quote the highly generalized first sentence or two from the introductions to these articles as if the quotations represented the authors' ultimate conclusions.[25] When read in the context of the full article, each quote stands for no more than the general proposition that timber markets respond to price. Most significantly, these vague statements do not stand for the proposition urged – namely, high elasticity in timber markets – because of what distinguishes these markets from most natural resource markets: the time period for production. The time to produce commercially merchantable sawtimber is 30 to 50 years. This is far different from resource markets for minerals and most agricultural products, which can be produced at least seasonally and often year round. In fact, Wear and Parks make this point in the summary and conclusions section of one of the other cited articles:

> It is this essential role of *time in production* that sets forestry apart from most other applications of resource economics. Accounting for the resulting age structure of forest capital remains one of the most substantial challenges for timber supply modelers.[26]

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[25] Timberland Owners Br. at 15-16 n.8, specifically the quotations from Irma A. Gomez, et al., *Alternative Price Expectations Regimes In Timber Markets*, 5 J. Forest Econ. 235 (1999); and Jeffrey R. Prestemon & David N. Wear, *Inventory Effects on Aggregate Timber Supply*, Proceedings of the 1998 S. Forest Econ. Workshop 26 (1999).

[26] David N. Wear & Peter J. Parks, *The Economics of Timber Supply: An Analytical Synthesis of Modeling Approaches,* 8 Natural Res. Modeling 199, 217 (1994) (emphasis added). The Timberland Owners' brief creates a misimpression by quoting half of one sentence from this article from a section analyzing one of seven different timber supply models. The entire sentence, contained in a section discussing "engineering supply" models, is as follows: "Supply in the short and medium runs may be highly variable in response to market fluctuations and the most obvious criticism of this

Weyerhaeuser and its amici ignore other literature co-authored by Wear estimating sawtimber log supply elasticities for industrial and non-industrial private timberland owners in the U.S. South.[27] In a 1993 article, the stumpage supply was found to be highly inelastic in the short-run (0.273 for forest industry and 0.224 for non-industrial private land owners; less than 1.0 is inelastic) and more elastic in the long-run.

Weyerhaeuser and its amici also ignore a highly relevant government study showing low elasticity for all timber markets in this country. The Forest Service Pacific Research Station maintains an econometric model of the forest products sector of the U.S. economy. This model makes heavy use of elasticities of supply and demand, both for stumpage and end-products in various regions of the U.S. A 1996 publication lists the stumpage price elasticities of private timber supply by region, all of which are low, ranging from 0.145 to 0.784, with most well below 0.500.[28] In fact, supplies tend to follow the cycle of optimal crop rotation, which is measured in decades, not days, months, or years. It is this focus on a long-term production cycle that underlies the recognition by forest economists that both industrial and non-industrial forest owners – *in the long run* – "will alter their management behavior to take advantage of changed market conditions."[29]

Sustained periods of high stumpage prices will stimulate more investment in replanting and more intensive volume-enhancing management. Those same forest landowners, however, respond to a monopsonized log market with

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approach is that the long run is typically so far off in forestry as to be irrelevant to the supply problems at hand." *Id.* at 211; *compare with* Timberland Owners Br. at 15-16 n.8.

[27] David N. Newman & David N. Wear, *Production Economics of Private Forestry: A Comparison of Industrial and Nonindustrial Forest Owners*, 75 Amer. J. Agr. Econ. 674 (1993), available at www.alderantitrust.com.

[28] Darius M. Adams & Richard W. Haynes, *The 1993 Timber Assessment Market Model: Structure, Projections and Policy Simulations*, U.S.D.A. Forest Service, Pacific Northwest Research Station, PNW-GTR-368 at 23 (1996), available at www.alderantitrust.com.

[29] Newman & Wear, *supra* note 27 at 683.

replanting decisions that drop the affected species. In its complaint, Ross-Simmons alleged that Weyerhaeuser's monopolization of the alder sawlog market was "causing industrial and small woodland owners not to plant alder seedlings because of the expectation that alder sawlog prices will fall as Weyerhaeuser gains complete control of the alder manufacturing capacity in the region." J.A. 142a. Witness statements in the follow-on cases from a tree farmer and a consulting forester advising small woodland owners made exactly this point.[30] Even Weyerhaeuser's forest inventory experts estimated the byproduct or come-along component of the alder log market at 83% and "less sensitive to alder log price."[31]

In sum, the Ninth Circuit was clearly correct in concluding that the alder sawlog market at issue here is inelastic. Any market that is predominantly a byproduct of another market is classically inelastic, and that is particularly true when supply is largely a function of planting decisions made decades before.

E. Proceedings Below.

1. The district court proceedings. This case was litigated over 28 months. Following a nine day trial, the jury returned a verdict of $26 million, which was trebled to $78 million. Utilizing a number of the time-saving methods long advocated by jurists like Judge Schwarzer,[32] the district judge used eight pretrial conferences to rule on all objections to documentary

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[30] George S. Fenn and James Wick witness statements, *Westwood*, available at www.alderantitrust.com.

[31] Westwood Ex. 2740 at 1. Petitioner mistakenly cites to an exhibit as showing that annual alder harvests correlated strongly with alder log prices. Pet. Br. 4 *citing* J.A. 921a. In fact, that chart shows only average log prices and contains no information regarding volumes. Rather, the undisputed data is consistent with alder's "byproduct" character: In 1997-2001, alder sawlog harvest was strongly correlated to the level of softwood harvest; supplies were the same or slightly down year-to-year in that period showing *no* correlation with rising log prices. *Compare* J.A. 923a *with* Ex. 80.

[32] William Schwarzer, *Managing Antitrust and Other Complex Litigation: A Handbook for Lawyers and Judges* (1982).

evidence before trial and prodded the parties to hammer out extensive stipulated facts, a glossary of terms and list of key persons. Each member of a highly educated jury[33] received a notebook containing these materials as well as 10 exhibits selected by each party.

In the district court, Weyerhaeuser argued that Ross-Simmons' conduct allegations amounted to nothing more than a novel "raising rivals' costs" theory which was not a recognized or cognizable antitrust theory. This was defendant's primary argument in summary judgment, trial and post-trial motions. In the Ninth Circuit and now this Court, it has shifted grounds to generalizing Ross-Simmons' proof of 15 separate conduct categories into "essentially predatory pricing" that must be measured by *Brooke Group*. Neither this case nor *Reid Bros. Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292 (9th Cir. 1983), the only other comparable case in American jurisprudence involving log markets, can be pigeonholed into the "predatory pricing" rubric.

In contemplation of potentially asserting a predatory pricing claim in the event Weyerhaeuser had no explanation at trial for the subsidy to its Longview mill, Ross-Simmons submitted a standard *Brooke Group*-type predatory pricing instruction. J.A. 91a-96a. The district court's first draft of the jury instructions included a paragraph that addressed plaintiffs' contentions regarding overbuying and log pricing, which followed the standard instructions regarding the purpose of the Sherman Act, the elements of monopolization and how to define anticompetitive conduct, modeled after the American Bar Association's *Sample Jury Instructions in Civil Antitrust Cases*, C-2 to C-24, C-80 to C-89 (1999). J.A. 954a-963a. These ABA model instructions had been submitted in very similar forms by both sides. *Compare* J.A. 70a-87a *with* J.A. 99a-114a.

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[33] The jurors included a Ph.D. in physics, an accountant, an engineer, a grocery chain store manager, a banker, a retired farmer, a bookkeeper, and a mechanic.

The judge's original draft of the paragraph of the instructions specifically addressed to overbidding included a sentence regarding the recoupment requirement in a predatory pricing claim, but no discussion of the price-cost test. J.A. 960a. Defense counsel had no objection to the standard instructions which preceded it, but did object to this paragraph because it was "akin to a predatory pricing instruction" and *Brooke Group* required plaintiffs to show "below-cost pricing or that the defendant operated at a loss." J.A. 725a. In an extended colloquy, the district judge first inquired whether there was evidence to support a predatory pricing instruction. Ross-Simmons' counsel reviewed that evidence and advised the judge that the paragraph needed substantial change because, without the price-cost test, the original draft "as it stands it is really not a predatory pricing paragraph." J.A. 726a. The district judge and plaintiffs' counsel then discussed how to add that element to the draft instruction. The net result was to be two paragraphs: one for predatory pricing including the price-cost test and recoupment requirement and a second that "bidding to exclude a competitor can be an anticompetitive act." J.A. 729a.

Ultimately, however, because the log subsidy to the Longview mill complicated plaintiffs' proof of a region-wide market geography, Ross-Simmons' counsel withdrew its request for a predatory pricing instruction. J.A. 730a. The district judge then substantially reworded the original draft instruction to eliminate the recoupment sentence, reducing the original draft text from 108 to 58 words. At this point, Weyerhaeuser's counsel, without citing any ground, stated only that defendant took exception to that instruction "as modified." *Id.* Weyerhaeuser did not object to the general instructions on anticompetitive conduct and also failed to make any specific objection to the overbidding instruction after it was read to the jury and before the jury retired to deliberate. Tr. 8B at 153. Thus, except for inconsistency with *Brooke Group*, Weyerhaeuser lodged no other objection to the

instruction on overbidding that has now become the centerpiece of its appeal in this Court.

2. The court of appeals' affirmance. The unanimous Ninth Circuit panel affirmed, concluding that *Brooke Group*'s price-cost test should not apply to the bidding and overbuying behavior of Weyerhaeuser in this inelastic input market and that substantial evidence supported the jury's finding of anticompetitive conduct on the issue of Weyerhaeuser's bidding behavior. Although it was unnecessary for the Ninth Circuit to consider the alternative grounds for affirmance, the factual discussion above exposes the baselessness of Weyerhaeuser's argument that Ross-Simmons' "remaining Section 2 conduct allegations are insubstantial." Pet. Br. 49. Each allegation is, in fact, an alternative basis for affirming the general verdict invited by Weyerhaeuser. J.A. 931a-932a; Pet. App. 18a n.42. If the complexity and character of Weyerhaeuser's conduct is taken into proper account, this case cannot be shoehorned into the "predatory pricing" box urged by Weyerhaeuser and its amici.

Because Weyerhaeuser's sole contention below was that *Brooke Group* must apply, the Ninth Circuit rejected Weyerhaeuser's claim for JMOL on the overbidding issue and further held:

> Our conclusion that *Brooke Group* does not apply here *disposes* of Weyerhaeuser's challenge regarding a new trial due to erroneous jury instructions *in its entirety*.

Pet. App. 5a (emphasis added).

The Ninth Circuit noted in dictum that the jury instructions were consistent with Supreme Court precedent, stating that a defendant violates the Sherman Act by using monopoly power "to foreclose competition, to gain a competitive advantage, or to destroy a competitor." *Id.* at 14a-15a. Thus, in the Ninth Circuit's view, the jury instructions "fairly and adequately cover[ed] the issues presented, correctly state[d] the law, and [we]re not misleading." *Id.* at 15a.

SUMMARY OF ARGUMENT

The Counterstatement demonstrates that by any measure, other than perhaps a *Brooke Group* standard, the jury properly could have found Weyerhaeuser liable for its anticompetitive conduct. Weyerhaeuser engaged in a multifaceted, long-term, intentional course of conduct to monopsonize the inelastic natural resource market for alder sawlogs. Weyerhaeuser acted on its own to drive a leading competitor for those inputs out of business so that it could both control the resource and secure and maintain its monopsony power.

The posture of this case thus presents this Court with a stark choice, whether or not to superimpose the *Brooke Group* requirements for a predatory pricing claim onto the existing requirements for Section 2 liability for any and all claims of anticompetitive conduct by an input buyer engaged in predatory bidding. Yet, none of the conditions that produced *Brooke Group* exists here:

– Unlike with *Brooke Group*, there is no history of case law, data, economic analysis, and concordant professional antitrust literature from which the Court may reason and on which the Court may rely.

– Unlike with the common problem of predatory low pricing by sellers, where the Court relied heavily on the conclusion that the price-cutting mechanism for the predation promotes a core purpose of the Sherman Act, *viz*., low prices for consumers, here the relatively uncommon circumstance of predatory overbidding for limited natural resource inputs promotes no such value.

– Unlike the concern of the Court in *Brooke Group* for a high risk of false positives that could chill otherwise manifestly procompetitive behavior, here there is no such risk; indeed, adoption of *Brooke Group* in this context is far more likely to create a high risk of anticompetitive false negatives while doing little to stem an already low risk of false positives.

– Unlike in *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) and *Brooke Group*, this case concerns

the conduct of a single business, engaged in a multifaceted course of anticompetitive conduct. This is not a multi-firm, pricing-only case as those cases were, and it would be particularly inappropriate to impose a *Brooke Group* predatory pricing rule to pigeonhole the overbidding claim in this case.

The briefs of Weyerhaeuser, the Solicitor General and the Federal Trade Commission, and Weyerhaeuser's various amici all share some incorrect fundamental assumptions. They start from the premise that *Brooke Group* is so correct that it only makes sense to extend it to buy-side transactions. However, they ignore the modern consensus view of economic and legal scholarship that has undermined *Brooke Group*'s central economic assumptions that predatory pricing is economically irrational, rare, and rarely successful. The proper exercise of judicial restraint would not impose the *Brooke Group* requirements on yet other markets when its economic foundation in its own context is so uncertain.

Although the position of Weyerhaeuser and its amici is predicated transparently on their own disputed view of favorable economic policy, the legal question presented in this case ultimately is one of statutory interpretation. This Court has provided incremental guidance for decades in interpreting Section 2 by balancing factors that have become a part of the fabric of that law. The Court requires a "special justification" to depart from established statutory interpretation and has consistently preferred reliance on the rule of reason to creation of fixed and absolute standards of antitrust liability. There is nothing in the general terms of Section 2 or in the intent of the Sherman Act to support the proposition that Congress intended to carve out a safe harbor for all monopsonists, for whatever intentional and otherwise anticompetitive bidding conduct they engage in, so long as they do not lose money while in the act.

The Ninth Circuit correctly refused to accept Weyerhaeuser's invitation to create a large class of exempt conduct applicable to a broad range of purchasing

transactions. In so doing, the Ninth Circuit properly distinguished Weyerhaeuser's conduct and the market in this case from the rationales that animated the decision in *Brooke Group* and thus concluded, in an explicitly narrow holding, that *Brooke Group* did not apply on the facts of this case. That holding resolved both Weyerhaeuser's claim for JMOL and also its objection to the jury instructions "in its entirety." In *dictum* after the holding, the Ninth Circuit discussed the jury instructions and correctly concluded that they were consistent with Supreme Court precedent and acceptable in this case when considered as a whole.

ARGUMENT

The Court of Appeals Correctly Decided that *Brooke Group* Does Not Apply.

Brooke Group started from the premise, based on the then-current economic literature, that predatory pricing schemes by sellers, in which they cut prices to consumers for the purpose of acquiring or maintaining monopoly power, are economically irrational, "rarely tried, and even more rarely successful." *Brooke Group*, 509 U.S. at 226 (quoting *Matsushita*, 475 U.S. at 589). That premise provided the springboard for the two central analytic conclusions drawn by the Court, that lawsuits alleging predatory pricing have a very high likelihood that they cannot prove a violation of Section 2 and that there is a consequently high risk of false positive results that will chill price-cutting behavior that is manifestly procompetitive. *Id.* at 223-24, 226-27. Indeed, the opinion states that the "mechanism by which a firm engages in predatory pricing – lowering prices – is the same mechanism by which a firm stimulates competition." *Id.* at 226 (quotation marks omitted). The Court concluded that those circumstances warranted a departure from established Section 2 balancing principles and imposition of a strict, bright-line test for plaintiffs to meet in a predatory pricing case, *i.e.*, they must establish that the defendant's products were sold below

"an appropriate measure of its rival's costs" (the generally-accepted cost tests being either average variable cost or marginal cost), and that there was a "dangerous probability" that the defendant would recoup its losses. *Id.* at 222-24.

The Ninth Circuit here, faced with Weyerhaeuser's single contention that the two-prong *Brooke Group* test should be extended to apply to all monopsony pricing cases, systematically analyzed the applicability of the rationales underlying *Brooke Group*. Pet. App. 6a-13a. In an opinion by Circuit Judge Thomas G. Nelson, joined by Circuit Judge Johnnie Rawlinson and Senior District Judge William Schwarzer, the Ninth Circuit concluded:

> [T]he concerns that led the *Brooke Group* Court to establish a high standard of liability in the predatory pricing context do not carry over to this predatory bidding context with the same force. Therefore, the standard for liability in this predatory bidding case need not be as high as in predatory pricing cases.

Id. at 11a. When presented with this "legal question of first impression" (*id.* at 5a), the court was careful to repeat throughout its opinion that its holding was limited to the facts of this case, which involved predatory overbidding that artificially raised the cost of a limited supply of alder sawlogs, a natural resource that was necessary for competing mills to survive.

The court addressed itself specifically to the core concerns of *Brooke Group* regarding low prices and false positives. After a lengthy analysis of the comparative effects on consumers and the market of raising input prices in what it labeled a "relatively inelastic" natural resource market, the Ninth Circuit stated that "at least in this case, predatory bidding is less likely than predatory pricing to result in a benefit to consumers or the stimulation of competition." Pet. App. 8a-11a. The court's analysis went well beyond the most obvious differences, which are that Weyerhaeuser's behavior does not save consumers money (thereby distinguishing "the concerns that *Brooke Group* expressed about depriving consumers of the

temporary benefit of low prices," *id.* 10a), and that the temporary enrichment of a few sellers is not a manifest goal of the Sherman Act. *See, e.g.*, *id.* 9a & n.14, citing, *inter alia*, John B. Kirkwood, *Buyer Power and Exclusionary Conduct: Should Brooke Group Set the Standards for Buyer-Induced Price Discrimination and Predatory Bidding?*, 72 Antitrust L.J. 625, 655, 667 (2005).

Notwithstanding the manufactured complaint of Weyerhaeuser and its amici that the Ninth Circuit's analysis fails to take account of the purportedly salutary economic effect on competition of short-term higher prices for suppliers/sellers, the opinion does, in fact, recognize that the expected benefits to competition from high prices to suppliers/sellers in some markets do not exist here:

> Although in some situations rising input prices might encourage new companies to enter the supply side of the market and expand output, thereby increasing innovation and efficiency so that consumers benefit in the long run through price decreases and product improvements, this is not such a situation. The nature of the input supply at issue here does not readily allow for market expansion. The evidence shows that, during the alleged predation period [when prices for alder sawlogs soared], the supply of alder sawlogs remained relatively stable or declined. Nothing suggests this situation will change – alder sawlogs are a "natural resource of limited annual supply in a relatively inelastic market."

Pet. App. 11a (quoting Richard O. Zerbe, Jr., *Monopsony and the Ross-Simmons Case: A Comment on Salop and Kirkwood*, 72 Antitrust L.J. 717, 722 (2005), and noting that Professor Zerbe also characterizes the market here as "highly inelastic," Pet. App. 11a n.20.)

Weyerhaeuser's conduct poses clear harms and risks of harm to consumers and competition. Short-term monetary gains to sellers will be more than offset by Weyerhaeuser aggressively forcing prices down once it effectively eliminates its competition, which also will decrease the value of standing

alder and will not result in lower prices for consumers downstream. Faced with the prospect of Weyerhaeuser's control over price, woodland owners will curtail or eliminate planting alder, which ultimately will result in decreased supplies and higher prices to consumers. There will be fewer loggers and sawmills, thereby eliminating competition, decreasing consumer choice, and creating market inefficiencies, unused capacity, and "monopsonistic welfare losses." *See* Roger D. Blair & Jeffrey L. Harrison, *Antitrust Law and Economics* 39, 49 (1993).

The Ninth Circuit thus considered the evidentiary record and the specific characteristics of this market, consistent with the historic admonition of this Court reiterated most recently in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 411 (2004), that "[a]ntitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue." And in so doing, the Court not only concluded that the pricing concerns of *Brooke Group* do not apply "with the same force" here but also that *Brooke Group*'s concern with a high risk of false positives was not present in this market. The court recognized that Weyerhaeuser could effectively target cost-price squeezes aimed at lower margin competitors (while costing Weyerhaeuser extra only in that slice of the market), Pet. App. 9a-10a, and that recoupment was a viable strategy in a market with limited supply, *id.* 10a-11a.

The Ninth Circuit also found significant barriers to entry: high capital costs, limited raw materials, Weyerhaeuser's bidding practices and its dominance in the market. Pet. App. 24a. The court rejected Weyerhaeuser's argument that the entry of four new mills during the predation period demonstrated a lack of barriers to entry because these entrants failed to "take *significant* business away from the predator," 31 rivals exited, and Weyerhaeuser's market share actually increased during the relevant time frame. *Id.* at 23a. As Professors Areeda and Hovenkamp have noted, the likelihood of entry in this context means "profitable" entry for

considerable time, not merely a "cycling, small fringe" of entering rivals. 4C Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶¶ 422a, 422c (2nd ed. 2002).

A. *Reid Bros.* Demonstrates that this Scheme Has Worked Before. It Is No False Positive.

The Ninth Circuit had another important reason to understand that this case did not produce a false positive result. The Ninth Circuit relied on its prior decision in *Reid Bros.*, where an almost identical combination of price and non-price anticompetitive conduct enabled dominant buyers to monopsonize the sawlog market in Alaska. In *Reid Bros.*, the defendants combined captive long-term raw material supplies, aggressive use of acquisitions and expansions, and exclusionary bidding practices. The bidding behavior was designed either to deprive competitors of access to raw material or to inflict irrationally high input costs on that competition.

In *Reid Bros.*, two large wood products companies conspired to restrain trade and to monopolize the softwood log market in southeast Alaska. That log market was geographically confined to the harvest from the Tongass National Forest, which contained 97% of all woodland in southeast Alaska, and was highly inelastic because the annual harvest was limited by statutory sustainability requirements. National Forest Management Act, 16 U.S.C. § 1611. As a result, timber sale offerings by the U.S. Forest Service were fixed annually; stumpage prices paid to the federal government in one year had no impact on the level of timber sales in the next.

The "two giants of the southeast Alaska lumber industry" divided the Tongass National Forest between them and agreed not to bid against each other in these "spheres of influence." 699 F.2d at 1296-97. The two defendants also pursued "well-orchestrated and successful" efforts to "eliminate independent mills and prevent the establishment of new operations through control of the timber supply," including one "well-documented example" that is the equivalent of Weyerhaeuser's use of "last look" bidding. *Id.* at 1297.

Knowing that a competitor was "desperately in need of timber," one *Reid Bros.* defendant suggested to the other that it "run [the bidding] up on [the competitor] to the point it will really hurt," noting, however, to beware of "the danger of making one bid too many." *Id*. In little more than one year, the targeted competitor was "unable to acquire a timber supply" and eventually sold out to one of the defendants. *Id.* The Ninth Circuit also affirmed the district court's finding that defendants blocked entry of new mill competitors by bidding "preclusively" on federal timber sales.

After eliminating its sawmill competition and combining to possess over a 90% market share, defendants conspired to pay artificially low prices for logs and logging services. In paying loggers on the basis of the loggers' cost rather than log value, defendants "created a network of 'captive' loggers heavily indebted to the defendants." 699 F.2d at 1298. With such financial control, defendants systematically eliminated contract loggers. By the time *Reid Bros.* reached trial, 23 loggers had been eliminated and Reid Bros. was the "only remaining independent purchase logger in southeast Alaska." *Id*.

In their appeal, the *Reid Brothers* defendants raised the very issue Weyerhaeuser presents in this case by arguing that the district court erred in its finding of predatory bidding because there was no evidence that the high prices paid for standing timber would prevent the defendants from recovering their marginal costs on the ultimate sale of the processed timber. The Ninth Circuit rejected the application of this "rigid objective test" with the following statement:

> Where, as here, there is direct evidence that the defendants aimed to exclude competition in order to enhance their long-term market position, the blind application of a numerical test would only frustrate the intent of the Sherman Act.

699 F.2d 1298 n.5.

Heedless of the relevant facts and unwilling to so much as cite to *Reid Bros*., petitioner's argument here mischaracterizes

this case with a "predatory pricing" label[34] and then proceeds to trumpet logic and symmetry in urging the imposition of *Brooke Group's* price-cost test. The law, however, is no slave to symmetry. As Justice Holmes has written, in what has been characterized as "the most famous sentence in American legal scholarship:"[35] "The life of the law has not been logic: it has been experience."[36]

Reid Bros. underscores the general importance of experience in antitrust law and, in particular, of focus on a fact-specific, industry-sensitive approach to Section 2 liability. Moreover, this Court has recognized that the combination of conduct—the "constituent elements of an unlawful scheme"—should entitle plaintiffs to receive "the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699, 707 (1962). *Reid Bros.* is a potent reminder that geographically-constrained natural resource markets are especially susceptible to coordinated predatory schemes involving price and non-price conduct. *See American Tobacco Co. v. United States*, 328 U.S. 781 (1946) (finding Section 2 liability for a combination of price and non-price conduct in a tobacco market).

In fact, the federal government, which is a significant timber seller primarily from the national forests, has acted in the past out of a concern that large businesses with huge private timber holdings were bidding preclusively against small companies and moving the industry toward an oligopolistic structure. In 1958, Congress amended the Small Business Act to require a "fair proportion" of total sales of

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[34] Judge Schwarzer has warned that proper analysis "requires one to escape the tyranny of labels which is so often destructive of sound reasoning, particularly in the antitrust field." *In Re Airport Car Rental Antitrust Litig.*, 521 F. Supp. 568, 574 (N.D. Cal. 1981), *aff'd*, 693 F. 2d 84 (9th Cir. 1982).

[35] Richard A. Posner, *The Federal Courts* 304-05 (1996).

[36] Oliver Wendall Holmes, Jr., *The Common Law* 1 (1881).

government property go to small business "to preserve free competitive enterprise." 15 U.S.C. § 631(a). When the Small Business Administration and the Forest Service adopted regulations in 1971 establishing defined standards for how and when to reserve sales for exclusive bidding by small business, big business filed suit. That legal challenge was rejected, based in part on testimony from a top SBA official showing that the previous program had been ineffective at preventing preclusive bidding by large companies and their "increasing quasi-monopoly." *Duke City Lumber v. Butz*, 382 F. Supp. 362, 367, 370 (D.D.C. 1974), *aff'd*, 539 F.2d 220 (D.C. Cir. 1976).

The Solicitor General acknowledges that a predatory bidding scheme is more readily accomplished in a natural resource market with limited supply, *see* U.S. Br. 24, which translates into a far lower risk for false positives than the highly accentuated apparent risk that triggered the Court's concern in *Brooke Group*. Indeed, this Court has recognized in another monopsony case involving a natural resource market that the plaintiff does not need to prove that the monopolist controls the entire industry so long as "control is exercised effectively in the area concerned," and that such control is "magnified" in a regionally-constrained market. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948).

Generally, one would expect that supply elasticity for inputs would be significantly lower than demand elasticity in cases of monopoly power. Input markets also tend to be more geographically local, due to the cost of shipping relative to value. In addition, input markets are more likely to be bidding markets than output markets. Thus, when discrimination is possible, a dominant firm that overbids for inputs in an effort to exclude competitors can target cost increases at rivals. That imposes an exacting toll on the target, while limiting the cost increase to the predator to only the targeted slice of the market. That dynamic can be amplified when, as in this case, the dominant buyer has locked up a substantial part of the market other than the piece that is subject to bidding with its

competitors, so that the dominant buyer already has a substantial supply in hand and its competitors are bidding and competing on the open market for only the small remaining piece of the overall market.

The Ninth Circuit's conclusion that a strict numerical test for antitrust liability in this context would "frustrate the intent" of Section 2 of the Sherman Act is assuredly correct.

B. Recent Scholarship Has Undermined *Brooke Group*'s Underlying Economic Assumptions.

The economic assumptions underlying *Brooke Group* have been subject to reconsideration and serious criticism from modern economists. The briefs of amici curiae American Antitrust Institute and the Forest Industry Participants detail the professional literature that not only has contradicted the factual premises but also has undermined the theoretical premises that had led economists and the Court, relying on those economists, to conclude that predatory pricing was economically irrational, rare, and rarely successful. Those conclusions expressly provided the basis for the position that imposition of a restrictive *Brooke Group* test was appropriate and necessary to protect against the threat of a spate of false positive results that would chill procompetitive conduct in the form of lower prices for consumers. *Brooke Group*, 509 U.S. at 226-27.

As early as 1976, however, Judge Posner correctly warned that the literature on predatory pricing had been "excessively" influenced by a 1958 "pathbreaking" article on the Standard Oil Trust. Richard A. Posner, *Antitrust Law: An Economic Perspective* 185 (1976). As recently as August 2006, eminent regulatory economist Alfred Kahn stated:

> [O]nly the economically brainwashed can deny that price discrimination has also been used as a means of predation, to the ultimate injury of consumers. . . .[37]

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[37] Alfred E. Kahn. *Telecommunications, the Transition from Regulation to Antitrust*, 5 Journal on Telecommunications & High Technology Law 159,

Summarizing the evolution of economics since the professional literature that was relied on in *Brooke Group*, three other noted economists, Professors Bolton, Brodley, and Riordan recently concluded:

> [It] is now *the consensus view in modern economics that predatory pricing can be a successful and fully rational business strategy.* In addition, several sophisticated empirical studies have confirmed the use of predatory pricing strategies. The courts, however, have failed to incorporate the modern writing into judicial decisions, relying instead on earlier theory that is no longer generally accepted.

Patrick Bolton, et al., *Predatory Pricing: Strategic Theory and Legal Policy*, 88 Geo. L.J. 2239, 2241 (2000) (emphasis added; footnote omitted).

Indeed, according to Professors Bolton, Brodley, and Riordan, "perhaps the most striking development" since *Brooke Group* has been the recognition by the government in regulating the airline industry that there are effective industry-specific predatory strategies, including "reputation effects," the ability "to discriminate between customers with great precision," and the ability to mobilize assets based on 'real-time' information about rivals that warrant utilizing a rule of reason approach to regulation rather than a strict cost-based approach. *Id.* at 2261-62.

The assumptions of complete information that underlie *Brooke Group* and the work it relied upon, and the dated theoretical world of partial equilibrium that focused strictly on static and direct effects, have been overtaken since *Brooke Group* by materially more sophisticated general equilibrium analysis that takes into account long and short run effects in a broad range of markets in a world of incomplete and often asymmetric information. *See, e.g.*, Brief of Amicus Curiae American Antitrust Institute at 11-13 (citing a large number of economic and legal analyses).

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171 (2006); also published at American Enterprise Institute – Brookings Joint Center For Regulatory Studies Publication 06-21, 13 (rev. August 14, 2006).

Indeed, although there has been a recent surge of interest in the general subject of exclusionary conduct under Section 2 (most of it focused on monopoly, with only very recent and preliminary attention paid to the buy-side), neither Weyerhaeuser nor the Solicitor General can cite to a single journal article or empirical study that actually has analyzed the matter at issue here and recommended adoption of a bright-line *Brooke Group* test for buy-side anticompetitive conduct.[38] *See* Albert A. Foer, *Introduction to Symposium on Buyer Power and Antitrust*, 72 Antitrust L.J. 505, 508 (2005) (summarizing the symposium and concluding that "[w]hat is plainly needed is a good deal of additional work … that begins with empirical studies of particular industries."); John B. Kirkwood, *Buyer Power and Exclusionary Conduct*, 72 Antitrust L.J. at 656 (2005) ("As any antitrust expert knows, predatory pricing has generated an enormous literature . . . .In contrast, there is little legal or economic analysis of predatory bidding.")

By contrast, in addition to the position rejecting application of *Brooke Group* in the Kirkwood and Zerbe articles relied on by the Ninth Circuit, Alfred Kahn has criticized *Brooke Group* for the economics it relied upon and for its over-emphasis on the supposed risk of false positives. He has proposed a test for price predation that not only would take market realities into account but also would require, as a clear guide for potential monopolists, that they maintain their predatory prices for a period of time "following the departure of the object of the predation." Alfred Kahn, *Telecommunications, the Transition from Regulation to Antitrust*, 5 J. on Telecomms. & High Tech. L. at 171-73 & n. 45.

C. Judicial Restraint Counsels Against Imposing *Brooke Group* in this Context.

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[38] Even Professor Salop, who served as a consultant to Weyerhaeuser in this case, contends in his most recent law review article on the subject that a "consumer welfare rule of reason standard," coupled with a *Brooke Group* test, is the appropriate rule of law. Steven C. Salop, *Anticompetitive Overbuying by Power Buyers*, 72 Antitrust L.J. 669, 704-705 (2005).

In antitrust, where the Court has acquired a role that places it in the position of directly setting national economic policy through statutory interpretation, the fundamental importance of judicial restraint and 'getting it right' is most apparent. Although one might miss the point altogether from reading the briefs of petitioner and its amici, this is a case of statutory interpretation. Weyerhaeuser is asking this Court to replace the rule of reason balancing test that has prevailed for a century in Sherman Act Section 2 purchasing cases and to impose in its stead the fixed and absolute requirements of *Brooke Group*.

This Court repeatedly has reaffirmed the proposition that "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation," and that a party that seeks a departure by the Court from established interpretations bears a greater burden, to provide a "'special justification.'" *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989) (quoting *Arizona v. Ramsey*, 467 U.S. 203, 212 (1984)) (Kennedy, J.). *Patterson* is a leading decision for this proposition, and *Patterson* relied in turn on *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977) (application of the principle in antitrust: "[W]e must bear in mind that considerations of *stare decisis* weigh heavily in the area of statutory construction"). The principle goes back at least as far as The Federalist No. 78 (Alexander Hamilton) (Clinton Rossiter ed., 1961), and it not only respects the judgment and wisdom embodied in prior judicial decisions, but it also promotes important values including stability and the integrity of the judicial process.

Brooke Group could and did 'specially justify' its departure from rule of reason balancing in the context of predatory pricing by sellers for several important reasons. The case law in the lower courts had been given a chance to develop and the Court itself had signaled its readiness to consider the departure. Circuit conflicts required resolution. There was a large body of generally harmonious economic and legal literature that had analyzed the matter empirically and theoretically and that provided the underpinnings for the

decision's conclusion that the rarity and general economic irrationality of a true predatory pricing scheme translated into an unacceptably high risk of false positives. Moreover, the underlying behavior of sellers cutting prices for consumers was so manifestly pro-competitive and at the core of the Sherman Act itself, that a special rule was deemed necessary to protect against the apparently high risk of false positives.

None of those preconditions exists in this case of first impression. In the quest to assure the right result and to avoid the adoption of a rule with unknown and potentially deleterious consequences, the expansion of a precedent to its outer limits based on a grand theory of "symmetry" is not advisable. *Compare State Oil Co. v. Khan*, 522 U.S. 3, 20-22 (1997) (the Court will reconsider its prior decisions when a "serious question" is raised concerning its theoretical underpinnings); *see also Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 538-39 (1994) (Thomas, J., concurring) (recognizing the inadvisability of expanding an uncertain precedent to its "outer limits").

This Court has emphasized the historic importance of market realities in antitrust law. *E.g., Verizon Communications v. Trinko*, 540 U.S. at 411. That recognition is coupled with a concomitant general distrust of rigid rules that would cement the Court to a fixed theoretical position that cannot evolve: "Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law." *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 466-67 (1992).

Indeed, those considerations recently caused this Court to abandon an absolute and fixed rule of *per se* antitrust liability for vertical maximum price fixing as anticompetitive conduct in restraint of trade. *State Oil v. Khan*, 522 U.S. at 20-22. Disavowing the prior rule of *per se* liability in favor of a return to the rule of reason, Justice O'Connor's opinion for the Court recognized the generality with which the antitrust laws express liability and interpreted the law as follows:

> It would make no sense to create out of the single term 'restraint of trade' a chronologically schizoid statute, in which a 'rule of reason' evolves with new circumstances and new wisdom, but a line of *per se* illegality remains forever fixed where it was.

522 U.S. at 21 (quoting *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 731-32 (1988)).

The Court in *State Oil v. Khan*, in justifying its decision to retreat from the preexisting *per se* rule, also stated that:

> [V]ertical maximum price fixing, *like the majority of commercial arrangements subject to the antitrust laws*, should be evaluated under the rule of reason.

Id. at 22 (emphasis added). That statement by the Court, interpreting and applying the antitrust laws to a claim of anticompetitive conduct, makes clear just how unsupportable petitioner's position is here. Weyerhaeuser seeks the exact reverse of *State Oil*, *viz*., imposition of a set of fixed and absolute requirements, based on nothing express in the text of the statute and contrary to its general terms, that would extend the reach of *Brooke Group* to a vast range of other "commercial arrangements" (witness the scope of transactions engaged in by Weyerhaeuser's business amici who are so eager for the safe harbor) that currently are subject to the rule of reason. The proper exercise of judicial restraint would reject Weyerhaeuser's position.

D. The Price-Revenue Test Is Unworkable.

Although there are several accepted methodologies to analyze the cost of a product in an ordinary sale transaction, *e.g.*, average variable cost and marginal cost, there is no comparable, symmetrical cost test to apply in an input market. It is notable that Weyerhaeuser and its amici presume the existence of a test but do not fix on a specific test and explain how the test actually would be applied. The Solicitor General breezily assumes that the existing tests from predatory pricing could serve in monopsony cases, without providing an analysis that does more than scratch the surface. Thus, this

Court has no basis to conclude that a generally-accepted, reliable, workable cost test actually exists.

1. There is no test for multiple input products. In the most common circumstance, a product that a buyer manufactures and sells is comprised of more than one constituent part (*e.g.*, computers, trucks, beverages produced by the members of Weyerhaeuser's amici curiae the Business Roundtable and the National Association of Manufacturers). In a predatory pricing case, the parties are able to prove both the cost of producing and marketing the finished product by one of a number of well-accepted cost methodologies and the price at which the finished product then was sold, compare the cost and the price, and thereby determine whether the seller sold the finished product at a loss.

On the buy-side, the plaintiff ordinarily can prove the price at which the defendant's finished product was sold, and the plaintiff *may* be able to establish an objective cost for manufacturing and marketing the product (including the purchase cost of various inputs). But unlike in a predatory pricing case where the predatory act of selling is a unitary event with an ascertainable sale price for the transaction, on the buy-side the predatory act of purchasing an input is only one of the many constituent input purchases and other costs – including labor, marketing, and overhead costs that cannot feasibly or reliably be allocated among the various component input parts – that typically go into the overall cost of manufacturing a finished product.

Thus, unlike in a predatory pricing case, one *cannot* compare the purchase price of the targeted component input with the sale price of the finished product in any meaningful manner to determine whether there has been a "loss" on the purchase of the input that can subject the buyer to antitrust liability. If monopsony were merely the mirror image of monopoly, then why the fundamental, critical disconnect? And if *Brooke Group* nonetheless were imposed on buy-side transactions despite the obvious *lack* of symmetry, then the asymmetric result should not be a surprise: a dominant buyer

could readily monopsonize the market for an input component and still sell the end product for a profit, without ever having to face antitrust liability for its anticompetitive conduct in the targeted input market.

2. There is no workable test for this market. In the forest products industry, large vertically integrated companies own raw materials (fee timber) and converting facilities (sawmills). Some of this fee timber, acquired decades ago, may be an unusually cheap source of supply. For example, much of Weyerhaeuser's large timber holdings in Washington was purchased over a century ago for $6 per acre.[39] In this case, Weyerhaeuser's alder sawmill in Longview, Washington was the single largest beneficiary of defendant's fee alder, accounting for one-third to over one-half of that mill's annual log supply in 1997-2001. J.A. 831a. On average, these fee logs were supplied at a 32% discount to the average cost of logs purchased from third parties. *Id.*

As detailed above (pages 13-14, *supra*), Weyerhaeuser claimed to utilize a transfer pricing mechanism to set "market" prices on sawlogs delivered from its timberlands division to its alder division, as determined quarterly from transaction evidence. Whereas arbitrarily low transfer prices will inflate division profits and impede efficiency, a market-based approach is designed to stimulate the most efficient allocation of resources. In a leading text on the subject, Professor Eccles describes the economic theory underlying transfer pricing as follows:

> In economic theory, the role of prices is to allocate resources in the market. Similarly, the role of transfer prices is to allocate resources within the firm, under the assumption that managers are motivated to maximize the profits of their division because at least some of their rewards are tied to divisional financial performance. The

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[39] Weyerhaeuser purchased 900,000 acres of Washington forest land in 1900, at the time the largest private land transaction in U.S. history. Joni Sensel, *Traditions Through The Trees, Weyerhaeuser's First 100 Years* 16 (1999).

> objective is to find the price that will lead both the selling and buying divisions to choose output levels that maximize the total profits of the firm.[40]

In this case, Weyerhaeuser was proven to have deviated from its market-based transfer pricing on deliveries to the Longview mill as part of its drive to eliminate competitor Ross-Simmons. At trial, Weyerhaeuser had no explanation for setting transfer prices on logs delivered to the Longview mill at levels significantly below the prices for identically graded logs delivered to defendant's five other mills in Oregon and Washington. If this below-market subsidy is eliminated, the Longview mill experienced periods of loss in 1998-2001. J.A. 831a. However, if this case is remanded for a new trial with direction that Ross-Simmons must meet a new buy side price-revenue test, Weyerhaeuser can be expected to contend that the proper inquiry is into the profitability of its alder division not just its mill that competed head-to-head with Ross-Simmons, and that transfer pricing is not *cost*-based and is therefore irrelevant. Defendant also will no doubt present evidence that the actual cost of the fee timber delivered to Longview from alder trees acquired for pennies decades ago was substantially below even the subsidized below-market rates actually utilized.

The economic rent associated with low-cost, long-held timber, which may be a function of luck rather than superior foresight or skill,[41] should not be readily available to fund "above revenue" bidding in a resource market. Were it otherwise, the antitrust law would greatly under-deter predatory bidding behavior while impeding the most efficient allocation of scarce resources.

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[40] Robert G. Eccles, *The Transfer Pricing Problem* 21 (1985).

[41] This is particularly so in the case of alder, which was considered a weed species in Pacific Northwest forests until the 1960s when Ross-Simmons pioneered its emergence as a source of high quality milled lumber. Like everyone else in the first half of the 20th century, Weyerhaeuser purchased forest land in Oregon and Washington for its softwood value and likely assigned no portion of the purchase price to the alder inventory.

A second administrability problem with Weyerhaeuser's proposed objective safe harbor is the confusion that would result, in a multi-tactic antitrust case, when a jury must be told that bidding behavior is judged by a cost-revenue test while closely associated conduct is measured by a balancing test. Here, Weyerhaeuser's region-wide presence through competitor acquisitions and its market foreclosure through varied exclusive agreements, along with other anticompetitive conduct, were major contributors to the creation of market conditions that both set up and enhanced the effectiveness of defendant's bidding behavior in the "open" fraction of the market. How can a judge or jury sort out the liability issues in a multi-conduct case if the bidding conduct is immunized with a price-revenue test, while related conduct, which facilitated the effectiveness of that bidding behavior, is measured by a rule of reason analysis?

Brooke Group involved only a pricing claim and presented no such problem. One need only look back to *Reid Bros.* to understand the potency of the combination of pricing and non-pricing conduct and to recognize the wisdom of the Ninth Circuit's conclusion, as a matter of statutory interpretation, that to segregate the overbidding allegation and make it subject to a strict numerical test "would only frustrate the intent of the Sherman Act." Pet. App. 12a (*quoting Reid Bros.*, 699 F.2d at 1298 n.5). *See also* Brief of Amicus Curiae American Antitrust Institute 17-23 (discussing why cost-based tests are particularly inappropriate for claims involving closely-connected combinations of price and non-price conduct).

A third administrability problem is associated with the fact that the relevant inputs (alder sawlogs) are used to produce many products. The three main product categories are chips, pallet lumber and kiln-dried, finished lumber, but Weyerhaeuser's finished lumber product mix included 25-50 lumber grades annually and 117 different products between 1990 and 2000. Ex. 94 at 2. Each sawlog produces some of all three major product categories, but larger diameter logs yield a higher percentage of the highest value item, finished lumber.

Accurate cost allocations and revenue projections in this complicated input/output environment are extremely difficult. There is no comparable corollary to the commonly utilized average variable cost or marginal cost formulations used in sell-side predatory pricing cases.

In sum, especially in resource market cases where purchasing conduct is part of a multi-tactic integrated scheme, the cost-revenue test is not only unworkable, but is inconsistent with sound economic policy. Indeed, no rule of law, including *Brooke Group*, reasonably would permit a region-wide, multi-plant division to eliminate its single mill competition with a predatory march through submarkets and be insulated from any liability because the company as a whole or the relevant operating division was making money.

E. The Jury Instructions, Read as a Whole, Provided Adequate Guidance to the Jury on the Facts in this Case.

For each of the reasons detailed above, the *Brooke Group* test should not be imposed on monopsony bidding cases.[42] That conclusion should be the end of the adjudication regarding the proper rule for assessing anticompetitive conduct in this case.

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[42] Recoupment, properly, has received very little separate attention in the parties' analyses. Weyerhaeuser objected to and never sought a separate recoupment instruction as an alternative to its request for a *Brooke Group* instruction, and thus the Ninth Circuit did not consider such an instruction. Moreover, there was ample evidence, including the direct testimony of former Weyerhaeuser senior staff, that Weyerhaeuser drove prices for alder sawlogs up in the short term with the full expectation and plan that they would recoup any profits sacrificed manyfold once they could firmly control the market and aggressively drive the price of sawlogs back down. In addition, the general instructions to the jury on anticompetitive conduct and the Ninth Circuit's recognition that there was substantial evidence to support a conclusion that the jury could have found the existence of barriers to entry, Pet. App. 14a n.30, 23a-24a, all make clear that a separate recoupment instruction would not have been required or warranted. *See, e.g.*, Brief of Appellant 31-32 (Weyerhaeuser recognizes that entry barriers and recoupment are part and parcel of the same inquiry and contends accordingly that it is entitled to JMOL because entry barriers were so low that recoupment was not possible).

In the event, however, that the Court nonetheless decides to discuss the propriety of the jury instructions on anticompetitive conduct in this case, then it is respondent's position that the Ninth Circuit correctly stated, in dictum, that "the instructions as a whole provided sufficient guidance regarding how to determine whether conduct was anticompetitive," "consistent with Supreme Court precedent." Pet. App. 13a-14a.

The pertinent jury instructions on anticompetitive conduct and predatory overbidding are set forth in full at Pet. App. 14a n.30. The most concern that the United States can muster regarding the jury instructions is the government's unsupported belief that the instructions "will tend to discourage at least some firms from increasing their output (especially in markets with relatively inelastic supply)." U.S. Br. in Support of Certiorari 20. That carefully-phrased statement is so shot full of qualifiers as to be essentially meaningless. The government's carefully-constructed statement of the universe of potentially affected businesses also makes clear how readily distinguishable the market facts and the conduct are in this case from the vast range of other buy-side transactions that would be granted immunity by the imposition of a *Brooke Group* rule. Put differently, no significant percentage of Weyerhaeuser's amici would be covered by the terms of the Ninth Circuit's decision, yet all of Weyerhaeuser's amici would be granted safe harbor immunity by the adoption of the *Brooke Group* rule that they seek.

The principal authority that Weyerhaeuser cites for the proposition that clear objective rules are important for the administration of the antitrust laws are opinions that were crafted by Justice Breyer when he was writing as a judge of the First Circuit. On close examination, however, the opinions engage in a careful balancing of operative principles to reach a reasoned decision that is far from the "symmetrical" application of a bright-line, absolute test such as the one proposed by Weyerhaeuser here. That is not surprising, since Justice Breyer subsequently stated his general views on this

matter in a lecture entitled "Economic Reasoning and Judicial Review," delivered to the American Enterprise Institute-Brookings Joint Center for Regulatory Studies, as the Joint Center's 2003 Distinguished Lecture:

> In general, I tend to disfavor absolute legal lines. Life is normally too complex for absolute rules. Moreover, a more open, less definite approach to interpretation is likely to prove more compatible with the law's incorporation of knowledge drawn from other disciplines, particularly disciplines that themselves reason by way of "a little more, a little less," such as economics.

Id. at 7.

The briefs of amici curiae American Antitrust Institute and Forest Industry Participants contain extensive analysis as to why the existing rule of reason analysis is valid generally and in this case. Ross-Simmons is in full accord with and adopts by reference the position they advocate. The instructions here recognize the "necessarily broad principles of the [Sherman] Act," *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 454 (1993), and the substantial body of case law spanning many decades whose principal defining characteristic is a rejection of *per se* rules and a concomitant recognition of the need for a fact-specific, industry-sensitive approach to antitrust liability.

In this instance, the general instructions to the jury on anticompetitive conduct were derived largely from the then-current American Bar Association's *Sample Jury Instructions in Civil Antitrust Cases* C-20 (1999). The ABA has recently revised its model antitrust instructions, and courts will look to those in the future. ABA, *Model Jury Instructions in Civil Antitrust Cases* C-26 to C-30 (2005).

The Ninth Circuit quoted from this Court's decisions in both *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 & n.32 (1985) and *Eastman Kodak*, 504 U.S. at 482-83, to define anticompetitive conduct. Pet. App. 14a-15a, 17a. Indeed, *Aspen's* definition of exclusionary conduct as conduct that "tends to impair the opportunities of rivals" and that "impaired competition in an *unnecessarily* restrictive way,"

Aspen, 472 U.S. at 605 & n.32 (quoting III Phillip E. Areeda & Donald F. Turner, *Antitrust Law* 78 (1978)), is echoed in the general instructions here on anticompetitive conduct, *e.g.*, "you should consider whether the conduct lacks a valid business purpose, or unreasonably or unnecessarily impedes the efforts of other firms to compete for raw materials." Pet. App. 14a n.30. And that formulation is then recaptured and developed through the more specific instruction on overbidding, which refers to paying "a higher price for logs than *necessary, in order to prevent Plaintiffs from obtaining the logs they needed* at a fair price." This instruction is not about abstract concepts like 'necessity' and 'fairness,' it is about Weyerhaeuser's intent and the anticompetitive consequences of its actions – paying more than necessary 'in order to prevent plaintiffs from obtaining the logs they needed to survive.'[43] That is entirely consonant with the recognition in *Aspen*, 472 U.S. at 605 n.32, 610-11, and *Trinko*, 540 U.S. at 409, that intent matters when ascertaining whether conduct should be deemed to be anticompetitive.

The only relevant contention that Weyerhaeuser raised and preserved in this case was that *Brooke Group* should apply. Weyerhaeuser sought judgment as a matter of law (JMOL) and objected to the jury instruction on overbidding on that ground. Accordingly, after concluding that *Brooke Group* did not apply, the Ninth Circuit held that this conclusion "disposes of Weyerhaeuser's challenge regarding a new trial due to erroneous jury instructions in its entirety." Pet. App. 5a.

Although Weyerhaeuser and its amici clamor now about the precise terms of the jury instruction on overbidding, their objections come three-and-one-half years too late. Weyerhaeuser never made any such objections to the trial court, thereby failing to comply with Fed. R. Civ. P. 51(c)

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[43] The 2005 ABA instructions no longer contain the term "fair" in the section on anticompetitive conduct, suggesting that the term, which formerly was used by the instructions as the complementary concept on the other side of "wrongly preventing or excluding competition" is unlikely to gain any more currency than it already has.

(requiring an objection to state "distinctly the matter objected to and the grounds of the objection").[44] Weyerhaeuser thus is precluded from raising that issue as a claim of error subsequently on appeal. Fed. R. Civ. P. 51(d). Accordingly, if this Court concludes that the two-prong test of *Brooke Group* does not apply, then it must affirm the decision of the circuit court. Even correction by this Court of the Ninth Circuit's *dictum* concerning the acceptability of the jury instructions would not be a basis for reversing its *holding*, which properly was limited to adjudicating Weyerhaeuser's contention that *Brooke Group* must apply.

If *Brooke Group* applies, however, then the decision of the Ninth Circuit should be reversed, and the case should be remanded to the Ninth Circuit for further proceedings to consider the alternative bases for affirming the jury's general verdict, based on sufficient evidence of other actionable anticompetitive conduct. Notwithstanding its apparent recognition that a remand to the Ninth Circuit for further proceedings would be appropriate, Weyerhaeuser asserts in the alternative that the Court could reverse outright the jury's general verdict. Weyerhaeuser fails to apprise this Court that the Ninth Circuit already has ruled on this dispositional issue. The Ninth Circuit considered only the allegation of anticompetitive bidding and pertinently held:

> We need not analyze whether substantial evidence supports the other alleged anticompetitive acts because the evidence of predatory overbidding sufficiently supports the finding [by the jury in the general verdict] that Weyerhaeuser engaged in anticompetitive conduct.

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[44] This requirement insures that the opposing party has a fair opportunity to confront the objection and that the trial court has an adequate opportunity to rule. *See, e.g., Palmer v. Hoffman*, 318 U.S. 109, 119 (1943) (fairness to the trial court and to the parties requires an objection to a jury instruction to be "sufficiently *specific* to bring into focus the *precise nature* of the alleged error") (emphasis added).

Pet. App. 18a & n.42.[45] The question presented by Weyerhaeuser's petition for certiorari does not challenge that distinct dispositional holding on review, thus foreclosing review pursuant to Sup. Ct. Rule 14(1)(a).

Finally, it bears mention that Ross-Simmons' claim based on overbidding for sawlogs was distinct from its claim based on overbuying of sawlogs.[46] Pet. App. 18a n.42. The district court thus gave an instruction that covered, in the disjunctive, liability for overbidding *or* overbuying. Weyerhaeuser did not challenge at trial the sufficiency of evidence for overbuying[47]

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[45] The Ninth Circuit correctly applied the distinction (a distinction that Weyerhaeuser fails to note) between cases where there is (a) a general verdict based on multiple *factual specifications* of liability (here, various acts like overbidding and market foreclosure each of which is alleged to be anticompetitive under Section 2 of the Sherman Act) and (b) a general verdict based on different *legal theories* of liability (like conspiracy to restrain trade and monopolization under Sections 1 and 2 of the Sherman Act, as in *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962) and *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), the cases cited by Weyerhaeuser.) In the former category, if the defendant eschews its opportunity to seek a special verdict under Fed. R. Civ. P. 49(a), as was the case here (another material consideration that Weyerhaeuser neglects to mention), then the general verdict will be affirmed if any one of the factual specifications for liability is deemed to be supported by substantial evidence on appellate review. Pet. App. 18a & n.42 (citing *Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 736 (9th Cir. 1999)); *see also McCord v. Maguire*, 873 F.2d 1271, 1273-74 & n.3, *amended, rehearing denied*, 885 F.2d 650 (9th Cir. 1989), (discussing the importance of Rule 49(a) and distinguishing cases involving different factual specifications from cases involving separate legal theories).

[46] Overbuying need not depend on cost and is a well-recognized basis for a claim of anticompetitive conduct since the potential for waste and allocative inefficiency is obvious. *American Tobacco Co. v. U.S.*, 328 U.S. at 809; Roger D. Blair & Jeffrey L. Harrison, *Monopsony* 155-56 (1993).

[47] In its appeal to the Ninth Circuit from the jury's general verdict, Weyerhaeuser recognized that in order to prevail it needed to attack the factual sufficiency of the evidence on *all* of the specifications of anticompetitive conduct. *See* Pet. App. 18a & n.42 (any one viable specification of anticompetitive conduct will support the jury's general verdict on appeal); Brief of Appellant 2-3 (Weyerhaeuser is not entitled to JMOL unless "*none* of the . . . conduct challenged by Ross-Simmons was actionable under Section 2 of the Sherman Act." (Emphasis added.)).

or the jury instruction as it related specifically to overbuying, which could never be subject to a *Brooke Group* standard since overbuying is not a cost-based claim. Thus, reversal by this Court of the Ninth Circuit's decision on *Brooke Group* would result in remand to the Ninth Circuit to consider whether to affirm the jury's verdict based on the viability of other factual bases for liability, including overbuying.

CONCLUSION

Respondent respectfully submits that the judgment should be affirmed.

Weyerhaeuser's brief thus included challenges, *inter alia*, to the specifications of overbuying and anticompetitive acquisition of competitors. Weyerhaeuser, however, did not raise and preserve in the district court factual sufficiency challenges to those specifications, and the Ninth Circuit did not need to address the import of those failures.

Respectfully submitted.

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