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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first in case 05-381 Weyerhaeuser Company versus Ross-Simmons Hardwood Lumber Company.

Mr. Pincus.

ORAL ARGUMENT OF ANDREW J. PINCUS

ON BEHALF OF THE PETITIONER

MR. PINCUS: Thank you, Mr. Chief Justice, and may it please the Court:

The question in this case is whether the standard that this Court adopted in Brooke Group to determine whether a seller's prices violate the antitrust laws because they are too low also should apply in assessing the claim that a buyer's purchase prices are illegally high. We submit that the Brooke Group test applies because the four key underpinnings of the Court's ruling apply fully here.

First, there's a high risk of mistaking aggressive competition for anticompetitive behavior. Increasing the prices that are paid for inputs like lowering sales prices is the mechanism by which a firm competes. It's the result that we would expect from a buyer's ordinary competitive instincts. So the conduct targeted here is on its face identical to core

1 procompetitive conduct. It's also very hard to
2 distinguish losses suffered by a more inefficient
3 competitor from hard -- to anticompetitive behavior, but
4 the antitrust laws --

5 JUSTICE STEVENS: Can I ask you a
6 preliminary question before you get too far into your
7 argument? Is it your understanding that the
8 instructions to the jury were that finding that
9 predatory price cutting was in itself sufficient to
10 establish a section 2 violation? I know the court of
11 appeals opinion reads that way but is it, do you think
12 the jury was so instructed?

13 MR. PINCUS: Yes. Our position is that that
14 is what the jury was instructed, because the predatory
15 pricing instruction said one of plaintiff's contentions
16 is that defendant purchased more logs than needed or
17 paid a higher price for logs than necessary in order to
18 prevent the plaintiffs from obtaining the logs they
19 needed at a fair price. I'm reading from page 14a of
20 the appendix to the petition. And then it concluded, if
21 you find this to be true, you may regard it as an
22 anticompetitive act.

23 JUSTICE STEVENS: You may regard it as an
24 anticompetitive act, but it does not say you may regard
25 it as a violation of section 2.

1 MR. PINCUS: No.

2 JUSTICE STEVENS: And as I read the
3 instructions, it did require there be three elements of
4 the violation of section 2 which, two of which were not
5 discussed by the court of appeals.

6 MR. PINCUS: Well, Your Honor, there is no,
7 there is no contention here about monopoly power. The
8 focus here is on the conduct element of section 2.

9 JUSTICE STEVENS: Do you concede there was
10 monopoly power?

11 MR. PINCUS: We are not disputing it before
12 this Court.

13 JUSTICE STEVENS: But is that relevant to
14 the question whether, if there is monopoly power plus an
15 attempt to preserve that power or require that power,
16 plus an anticompetitive act, is that a violation of
17 section 2?

18 MR. PINCUS: Well, Your Honor, our view is
19 what the Court has said in cases like Trinko, is that
20 the test is monopoly power and anticompetitive conduct.
21 Those are the two elements. We are not contesting the
22 monopoly power element. We are looking at whether there
23 was anticompetitive conduct here.

24 JUSTICE STEVENS: But you do agree that the
25 conduct was not itself sufficient to establish a

1 violation, the question of whether the conduct plus the
2 monopoly power --

3 MR. PINCUS: Yes. Because this is a claim
4 under section 2, there would have to be either monopoly
5 power or a dangerous probability of achieving monopoly
6 power. It's single firm conduct so there would have to
7 be --

8 JUSTICE STEVENS: And so you're arguing not
9 only that the pricing conduct was not itself sufficient
10 to prove a violation, but it also was not even an
11 anticompetitive act which may give rise to damages?

12 MR. PINCUS: Yes, Your Honor. We are
13 arguing both things. I think, I'm not sure that there
14 is much space between the two, but to the extent there
15 is, we are arguing both.

16 JUSTICE STEVENS: Obviously, if there's just
17 an anticompetitive act without a violation of the
18 statute, then there would be no basis for damages.

19 MR. PINCUS: I think that's right, but I
20 guess I think the way the Court has approached
21 determining an anticompetitive act, anticompetitive
22 conduct, is it's the kind of conduct that when engaged
23 in by a monopolist or an entity that has a dangerous
24 probability of achieving it, it is a violation of this
25 statute.

1 JUSTICE STEVENS: But of course in the
2 Brooke case, it wouldn't have even had to have been a
3 monopolist if engaged in the conduct in that case.

4 MR. PINCUS: Well, because Brooke involved a
5 claim under the Robinson-Patman Act.

6 JUSTICE STEVENS: Correct.

7 MR. PINCUS: But lower courts and this Court
8 in the Trinko case have certainly interpreted the Brooke
9 Standard as also applying to claims under section 2.
10 And in fact the Court explicitly said that in Brooke
11 Group.

12 As I said, the first critical underpinning
13 is the risk of mistaking aggressive competition for
14 anticompetitive behavior. Second, this case involves --

15 CHIEF JUSTICE ROBERTS: Well, it's a little
16 different here in that in the Brooke Group cases, of
17 course, the alleged anticompetitive conduct was pricing
18 too low, which has at least a direct benefit to
19 consumers either in the short term, certainly in the
20 short term, and arguably in the long-term as well, while
21 here that is not the form in which the anticompetitive
22 conduct, that's not the form the anticompetitive conduct
23 takes. So isn't that a reason not to think that we
24 should apply the Brooke Group test to this situation?

25 MR. PINCUS: Your Honor, we don't, we don't

1 think that that difference is a distinction that
2 warrants a different test, for several reasons. First
3 of all, we are dealing here with single-firm pricing
4 conduct and it's recognized that that's key to the
5 proper functioning of the markets. As the Court said in
6 Professional Engineers, pricing is the central nervous
7 system of the economy. It allocates goods and ensures
8 that, that they are allocated to their most efficient
9 use.

10 Here, although there's no immediate benefit
11 to consumers, there is an immediate benefit to the
12 sellers of the logs, who certainly benefit when
13 competition drives up the prices that they achieve. And
14 we think that the Sherman Act protects them and gives
15 them the benefit of full competition just as much as it
16 does consumers. Over the course --

17 CHIEF JUSTICE ROBERTS: Have we ever
18 identified that as a benefit that the antitrust laws try
19 to achieve, people get higher prices for what they sell?

20 MR. PINCUS: Yes. In Mandeville Farms,
21 which was a section 1 case, the Court did talk about the
22 fact that the antitrust laws protect sellers as well as
23 buyers, and that was a case in which there was allegedly
24 a section 1 conspiracy to price too low, and the Court
25 said that's per se unlawful.

1 CHIEF JUSTICE ROBERTS: So in Brooke Group,
2 we said it's a benefit when prices are low to consumers,
3 and in this other case we said it's a benefit when
4 prices are high to suppliers.

5 MR. PINCUS: Because the benefit I think
6 that the Court is looking at in both cases is not the
7 particular price levels, but in achieving and ensuring
8 free price competition because of the central role that
9 price plays in the economy. That's what the Court is
10 trying to protect in Professional Real Estate -- in
11 Professional Engineers --

12 JUSTICE SCALIA: I assume it's a benefit to
13 consumers if the supply of the needed goods is increased
14 because of higher prices being paid for those needed
15 goods, and I assume when a higher price is paid, more of
16 those goods will be forthcoming, which will benefit
17 consumers who want those goods.

18 MR. PINCUS: That is our second argument,
19 Justice Scalia.

20 JUSTICE SOUTER: Well, you don't have that
21 in this case, do you, because I thought the, I thought
22 one of the arguments on the other side was the
23 inelasticity of the supplies, so that no matter what
24 they were paying, basically the same amount of wood was
25 ultimately going to get processed; is that correct?

1 MR. PINCUS: Your Honor, the claim is that
2 the supply was relatively inelastic, not that it was
3 perfectly inelastic, and as long as the supply market is
4 not perfectly inelastic, an increase in price will lead
5 to more supplied, maybe not as much as if there were
6 higher elasticity, but more. But there's another
7 benefit to consumers here, which is that if one would
8 expect that a buyer bidding more can make a more
9 efficient use of the product and therefore generate more
10 output, and that output expansion which doesn't depend
11 on supply expansion is also beneficial to consumers
12 because that means there will be more output in the
13 downstream market and a corresponding decrease in price.

14 So we have those two benefits to consumers
15 and we also have the fact that as the Court has said in
16 Professional Engineers, the Sherman Act reflects a
17 judgment that price competition generally, a free and
18 open price competition will produce lower prices and
19 better goods and services, and the Court has not
20 required that that be traced to consumer welfare in
21 every particular case.

22 JUSTICE SCALIA: I presume it could lead to
23 lower consumer prices too. If you have a firm that has
24 developed a new, a new technique for processing the
25 logs, and it can process them cheaper and faster, and

1 sell them for a lower price but in greater volume, and
2 thereby make even more profit, that firm would be
3 willing to pay more for those logs, even though it would
4 sell them for less than competitors might sell them.

5 MR. PINCUS: That's exactly right, Justice
6 Scalia, and that's what the record reflects here, that
7 Weyerhaeuser invested in its lumber mills and created a
8 process that got more value out of a log. The record
9 reflects that plaintiffs, for example, did not do that.
10 And there is testimony that plaintiff's mill was quite,
11 relatively inefficient compared to Weyerhaeuser.
12 Weyerhaeuser invested new processes that had less waste,
13 produced more output as Justice Scalia suggested, and
14 therefore it was able to sell, sell that output at a
15 lower price and still make a profit, because it was
16 getting more output per log and could therefore pay more
17 for the log.

18 JUSTICE KENNEDY: Was there any argument in
19 the trial court or in the briefs of the court of appeals
20 as to how to calculate cost? You basically have two
21 markets. You don't usually think of cost when you buy
22 something. But was there any argument as to how to
23 determine whether or not this was below cost in the
24 Brooke Group sense?

25 MR. PINCUS: Well, our view, Justice

1 Kennedy, there really wasn't, because the district judge
2 had made clear his view in the pretrial motions that
3 there wasn't a need to prove prices, and that --

4 JUSTICE KENNEDY: But that was the end of it
5 at the trial court.

6 MR. PINCUS: But our position is, and there
7 has certainly been some writing on this in the
8 literature, is that what one does is take the cost of
9 producing the output which includes the allegedly
10 predatory price of the log, and here logs are 75 percent
11 of the cost so it's a very big cost. Compare those
12 costs to the revenues that are received in the
13 downstream market and if those revenues exceed costs,
14 then you're in a position where the defendant is
15 behaving perfectly economically rationally. If they're
16 less, then you go on to recoup it.

17 JUSTICE GINSBURG: Mr. Pincus, how do you
18 determine the price of the logs? Because we -- the
19 charges that some logs were purchased at an excessive
20 price, and if we were dealing with only those logs to
21 determine cost, that's one thing. But we are, also in
22 this picture is that some of the logs came from
23 Weyerhaeuser's own land and some came from long-term
24 contracts that it had, and those, the price was not
25 inflated on those. So if you take those into account

1 you may get one figure, but if you take only the high
2 bid logs you might get a different picture. So how,
3 what is it? How do you determine cost? Do you look at
4 all the logs that were purchased or only the ones that
5 were allegedly bid up?

6 MR. PINCUS: No. You would look, you would
7 look, Your Honor, at all of the, at all of the logs,
8 just as in the downstream market if you have a sell side
9 case, you look at, you look at prices of all sales.
10 Here it's interesting that the record reflects that
11 plaintiff received more than, between 30 and 50 percent
12 of its logs from the same kind of long-term sources that
13 it argues that Weyerhaeuser received them from. So in
14 this case there really isn't the kind of disparity, but
15 our position would be that you add all of those up and
16 compare them to revenues.

17 JUSTICE KENNEDY: It's not clear to me that
18 we have to get into this but if we do, I'm not sure
19 about your answer to Justice Ginsburg's question. If
20 you have your own logs that you own already and if you
21 have logs on a long-term contract, the only relevant
22 logs are the logs that both people are competing for.
23 That's the only relevant market that we are talking
24 about insofar as the purchaser is concerned.

25 MR. PINCUS: And it might be --

1 JUSTICE KENNEDY: And if Weyerhaeuser wanted
2 to drive somebody out of the market, then they go after
3 the logs which are open to both parties.

4 MR. PINCUS: And Your Honor, as the Court
5 observed in Brooke Group, there really wasn't a need
6 there to get into how the test works and we think there
7 isn't here. We think the issue is symmetrical and it
8 might be that the focus is on the incremental costs that
9 are associated with the alleged predatory volume, and
10 therefore that might focus on those incremental costs.
11 But in this case there's no dispute that, whatever the
12 measure of costs, there has been no challenge to the
13 position that Weyerhaeuser's prices were above those
14 costs.

15 Let me just turn back to, to the other two
16 reasons why we think Brooke Group applies because I
17 think they're important. The third is it's much more
18 likely that the high bids here were going to, were a
19 result of legitimate competition than of anticompetitive
20 effort. As this Court has observed both in Brooke Group
21 and Matsushita, predatory conduct is self-deterring. To
22 engage in it, the defendant has to be willing to incur a
23 near-term loss against the hope of higher returns later.
24 And as the Court explained in those cases, the loss is
25 definite but the gain depends on a number of

1 imponderables. So there is some self-deterring.

2 And finally, a test that provides no
3 guidance threatens false positives that will deter the
4 very competition that our economy requires and that
5 helps our economy reach its most efficient state. As
6 Justice Breyer put it for the First Circuit in *Town of*
7 *Concord*, antitrust rules must be clear enough for
8 lawyers to explain them to their clients, especially in
9 a sensitive area like pricing. And certainly the rule
10 that the Ninth Circuit adopted here has none of that
11 clarity and we think that the Court's *Brooke Group*
12 decision and that test does.

13 JUSTICE STEVENS: May I ask this question?
14 Supposing the evidence was perfectly clear that the
15 company did engage in a plan to get a total monopoly and
16 there were minutes of the board of directors says that
17 in order to do this we've got to drive company X out of
18 business and so you, we want you to compete in every
19 transaction with company X that you can and buy the logs
20 at a higher price. Would that be an anticompetitive act
21 even if it did not result in loss to the defendant?

22 MR. PINCUS: And the only anticompetitive
23 conduct alleged was pricing conduct, Your Honor?

24 JUSTICE STEVENS: No. The
25 anticompetitive -- the plan is to drive the company out

1 of business. And the only anticompetitive conduct other
2 than proving the whole objective is that you pick on
3 this one competitor and outbid him every time you can.
4 Could that possibly give rise to a damage claim?

5 MR. PINCUS: No, it wouldn't, Your Honor.

6 JUSTICE STEVENS: Even if the whole purpose
7 was to drive it out of business?

8 MR. PINCUS: Even if that was the whole
9 purpose.

10 JUSTICE STEVENS: Pursuant to a plan to
11 acquire a monopoly.

12 MR. PINCUS: And the reason for that,
13 Justice Stevens, is that it's very hard to distinguish,
14 especially for the judicial system to distinguish,
15 between hard-fought competition and anticompetitive
16 intent if all we're looking at is what's in people's
17 mind set. As Judge Easterbrook wrote in his AA Poultry
18 decision --

19 JUSTICE KENNEDY: Why is it so hard if you
20 take Justice Stevens' premise that there's an agreement
21 and we take that as a given, as a given premise?

22 MR. PINCUS: Well, because there won't be a
23 given premise in every case, Your Honor, and the problem
24 is the Court has to write rules that will, that will
25 govern conduct, primary conduct of business people in

1 the market, and a rule that says if you can prove intent
2 then you don't have to worry about prices and costs is a
3 rule that opens the door to second-guess, judicial
4 second-guessing of prices --

5 JUSTICE STEVENS: No, but only intent plus
6 monopoly power. You have to be able to prove monopoly
7 power, too.

8 MR. PINCUS: You do, Your Honor.

9 JUSTICE STEVENS: There aren't too many
10 cases that fit this.

11 MR. PINCUS: As the Court has recognized in
12 the section 2 context, the problem of deterring
13 procompetitive conduct is even more serious because you
14 don't have the threshold requirement of proof of a
15 conspiracy, as one does in section 1. We're dealing
16 with unilateral conduct, and so --

17 JUSTICE STEVENS: No, but unilateral conduct
18 where you have monopoly power. There aren't too many of
19 these cases, as you know.

20 MR. PINCUS: Well, Your Honor, market
21 definition is a complicated issue and it may be hard for
22 businesses --

23 JUSTICE STEVENS: It was an issue that was
24 resolved by the jury in this case and I don't understand
25 you to be disputing the resolution of that issue.

1 JUSTICE SCALIA: What do we do in the
2 correlative situation where there is an allegation of
3 predatory selling rather than predatory buying if you
4 had the same situation posed by Justice Stevens? Namely
5 evidence that you're trying to drive the competitor out
6 of business, wouldn't that establish a violation?

7 MR. PINCUS: It would not establish a
8 violation, Your Honor. In fact, the Brooke Group Court
9 dealt with that very case because the dissent in Brooke
10 Group pointed out that the district court in that case
11 had held that the intent evidence was amongst the most
12 powerful that had ever been, been presented in any case,
13 and it still said, even though there was a clear
14 evidence of intent --

15 JUSTICE STEVENS: But that did not involve a
16 monopoly. That did not involve monopoly power.

17 MR. PINCUS: But it involved the test for
18 predatory pricing, Your Honor, under Robinson-Patman.
19 But the Court said its test was perfectly applicable to
20 section 2. And the lower courts have certainly applied
21 that test in just that way in section 2 cases. And if
22 the rule would be that even in the predatory selling
23 situation intent can override the price-cost and the
24 recoupment requirements, then you're in a situation
25 where there's no ability for business people to know in

1 advance when low prices are justified, and all we think
2 is that there should be symmetry.

3 If the Court has no further questions I'll
4 reserve the balance of my time.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 Mr. Pincus.

7 Mr. Shanmugam.

8 ORAL ARGUMENT OF KANNON K. SHANMUGAM

9 ON BEHALF OF UNITED STATES,

10 AS AMICUS CURIAE, SUPPORTING PETITIONER

11 MR. SHANMUGAM: Thank you, Mr. Chief
12 Justice, and may it please the Court.

13 Aggressive bidding by the buyer of an input,
14 no less than aggressive pricecutting by the seller of a
15 finished product, is usually procompetitive. Because a
16 claim of predatory bidding is simply the flip side of a
17 claim of predatory pricing, the Brooke Group standard
18 for predatory pricing claims should apply to predatory
19 bidding claims as well. And in our view the court of
20 appeals erred in this case by sanctioning a broader and
21 more subjective standard of liability. In Brooke Group,
22 this Court adopted its now familiar two-pronged standard
23 for predatory pricing claims despite recognizing that
24 each prong of that standard might permit some
25 anticompetitive pricecutting. The Court was willing to

1 tolerate that modest degree of underinclusion because,
2 in the Court's own words, "The mechanism by which a firm
3 engages in predatory pricing is the same mechanism by
4 which a firm stimulates competition, namely by lowering
5 its prices. And the Court explained that a broader or a
6 less precise standard of liability would run the risk of
7 prohibiting or chilling some procompetitive price
8 cutting. In our view the same analysis can apply to a
9 claim of predatory bidding. Because aggressive bidding
10 is usually procompetitive, application of the Brooke
11 Group standard is warranted in order to avoid
12 prohibiting or chilling procompetitive conduct with
13 regard to price in that context as well.

14 The court of appeals in this case held that
15 Brooke Group was inapplicable to Respondent's claim of
16 predatory bidding by --

17 CHIEF JUSTICE ROBERTS: Would you describe
18 the hypothetical Justice Stevens posed to your, your
19 brother, would you describe that as just aggressive
20 bidding? Aggressive is, you know, it's kind of a good
21 term when you're talking about competition. But what if
22 it's purposely bidding higher than you know your rival
23 can afford?

24 MR. SHANMUGAM: Well, Mr. Chief Justice, I
25 understood Justice Stevens' hypothetical, and he can

1 correct me if I'm wrong, to posit a case in which there
2 was dynamite evidence that the defendant had a
3 monopolistic or exclusionary intent. But in our view
4 that is insufficient to state a section 2 claim. One
5 has to have exclusionary conduct as well.

6 JUSTICE STEVENS: No, you have to have the
7 monopoly power as well.

8 MR. SHANMUGAM: Well, that is also true, and
9 with regard to a claim of attempted --

10 JUSTICE STEVENS: In your view, if as the
11 jury was instructed in this case there was proof of
12 monopoly power and intent to maintain or preserve that
13 power, plus anticompetitive acts, does the
14 anticompetitive act have to be in and of itself a
15 violation of the Sherman Act?

16 MR. SHANMUGAM: Well, I think you need to
17 have all three of those elements in order to state a
18 claim of attempted monopolization --

19 JUSTICE STEVENS: And if you do have all
20 three, is that enough to prove a violation?

21 MR. SHANMUGAM: That would be enough to
22 state a claim for attempted monopolization under this
23 Court's decision in *Separate Forks*.

24 JUSTICE STEVENS: And isn't that how the
25 jury was instructed in this case?

1 MR. SHANMUGAM: In our view the jury was
2 instructed that it would be sufficient to establish an
3 anticompetitive act to find that Petitioner priced its
4 logs --

5 JUSTICE STEVENS: Yes, but if it was not
6 instructed it would be sufficient to find a violation of
7 section 2 by those, by that accounting, is that not
8 correct?

9 MR. SHANMUGAM: That is correct, Justice
10 Stevens, and the jury was also instructed and in our
11 view the jury was properly instructed with regard to the
12 other two elements, namely a dangerous probability of
13 monopolization and a specific intent to monopolize. The
14 sole question before this Court is what constitutes
15 exclusionary conduct for purposes of section 2, what
16 constitutes it regardless of whether it's a claim of
17 attempted monopolization or actual monopolization.

18 JUSTICE STEVENS: Go back to my
19 hypothetical. Supposing you have the first two elements
20 and you say in order to drive this company out of
21 business we want you to compete with them and get the
22 logs at whatever cost it takes. Would that be an
23 anticompetitive act?

24 MR. SHANMUGAM: No, Justice Stevens. That
25 would solely be --

1 JUSTICE STEVENS: Even if it was for the
2 sole purpose of driving the company out of business in
3 order to accomplish the goal of getting a monopoly?

4 MR. SHANMUGAM: That would be evidence, and
5 it may be powerful evidence, of a monopolistic intent,
6 though courts have noted that even with regard to that
7 requirement it is famously difficult to distinguish
8 between a legitimate competitive intent on the one hand
9 and an illegitimate monopolistic intent.

10 JUSTICE STEVENS: No, no. I'm assuming this
11 is not offered as evidence of intent. There's
12 independent evidence of both intent and monopoly power.
13 With those two elements established, would this, the
14 kind of evidence I described, be evidence of an injury
15 to the plaintiff that could be actual in damages?

16 MR. SHANMUGAM: No, Justice Stevens. You
17 would need to have objective evidence that the defendant
18 met both of the prongs of the Brooke Group requirement.

19 JUSTICE STEVENS: Will you need to meet the
20 prongs of the Booker test even if you otherwise prove a
21 violation of section 2?

22 MR. SHANMUGAM: Well, I'm not quite sure
23 what it means to say that you otherwise prove a
24 violation in that example.

25 JUSTICE STEVENS: You prove monopoly power

1 plus an intent to maintain or acquire it.

2 MR. SHANMUGAM: That is insufficient. You
3 have to have some action --

4 JUSTICE STEVENS: That's insufficient to
5 prove a violation of section 2?

6 MR. SHANMUGAM: It is insufficient to prove
7 a violation of section 2 because you have to have some
8 conduct that is classed as exclusionary, and in our view
9 that is the content that the Brooke Group standard
10 supplies. It specifies the conduct that you need to
11 have and that conduct is the defendant suffering a loss
12 in the short term and having a dangerous probability of
13 recouping that loss in the long term.

14 JUSTICE SCALIA: I assume you could have a
15 company that has dynamite evidence of seeking to
16 monopolize and the means that they choose is just
17 idiotic. For example, they say, we're going to try to
18 get a monopoly by buying these logs at a lower price as,
19 at as low a price as possible. You would have the two
20 elements, monopoly power, intent to monopolize, but you
21 wouldn't have an act that constitutes anticompetitive
22 conduct.

23 MR. SHANMUGAM: Justice Scalia --

24 JUSTICE SCALIA: And that's what you're
25 asserting is the case here.

1 MR. SHANMUGAM: You could have an
2 incompetent monopolist more generally or an incompetent
3 predator in this specific context. And I think that the
4 only other thing I would say with regard to this
5 colloquy is that the Court really did confront this
6 issue in Brooke Group. There was fairly strong evidence
7 of monopolistic intent and the majority opinion --

8 JUSTICE STEVENS: But there is no evidence
9 of monopoly power and it wasn't even remotely at issue
10 in that case.

11 MR. SHANMUGAM: That's right, and it wasn't
12 an issue simply because it was a Robinson-Patman Act
13 case and all that is required under the Robinson-Patman
14 Act is the possibility of harm to competition and there
15 was some disagreement about whether a showing had been
16 made of that requisite possibility between the majority
17 opinion and your dissenting opinion. But I don't think
18 that there was any disagreement in Brooke Group with
19 regard to the relevant standard for exclusionary
20 conduct. Even the dissenting opinion recognized that
21 recoupment would be necessary in order to state a
22 predatory pricing claim in the Robinson-Patman Act
23 context.

24 JUSTICE ALITO: Would your answer be the
25 same if you added to Justice Stevens' hypothetical very

1 high barriers of entry that would prevent other
2 competitors from entering the market after the target
3 was driven out?

4 MR. SHANMUGAM: High barriers to entry,
5 Justice Alito, would be very relevant to the inquiry
6 under the second prong of the Brooke Group standard,
7 namely whether the defendant had a dangerous probability
8 of recoupment in the long term. And indeed in many
9 predation cases, many predatory pricing cases in the 13
10 years since Brooke Group, barriers to entry have been
11 absolutely vital in resolving predatory pricing claims
12 at the summary judgment stage, because typically
13 defendants will make the argument that the absence of
14 barriers to entry make the possibility of recoupment
15 unlikely. But that is a consideration that is built
16 into the Brooke Group standard and it certainly would be
17 part of the Brooke Group analysis in the predatory
18 bidding context as well.

19 I want to say just one thing in response to
20 Justice Ginsburg and Justice Kennedy's questions to my
21 friend Mr. Pincus about the question of the appropriate
22 measure of cost if Brooke Group were to apply to
23 predatory bidding claims. As in Brooke Group itself, we
24 believe that it is unnecessary for this Court to specify
25 the exact method of calculating cost in this case. But

1 the position of the United States more generally both in
2 the predatory pricing context and in the predatory
3 bidding context is that a court should look to a
4 defendant's incremental cost, and in this context that
5 would mean looking to the amount of the input that was
6 the subject of the alleged predation. So in this case
7 the amount of logs that Petitioner allegedly predatorily
8 purchased on the open market. And such an incremental
9 approach to be sure is not without its difficulties in
10 application and for that reason a number of lower courts
11 in the predatory pricing context have instead looked to
12 average variable cost or other measures as a proxy for
13 incremental cost. But we believe that in a case such as
14 this one, looking to incremental cost may be useful
15 because it effectively excludes from the analysis any
16 potential cross-subsidization, whether by virtue of the
17 fact that in this case, for example, Petitioner may have
18 harvested logs from its own lands. There are claims in
19 this case that Petitioner entered into various exclusive
20 dealing arrangements as well, obtained logs at a lower
21 price on that basis. And an incremental approach has
22 the virtue of focusing only on that portion of the
23 market that is the subject of the alleged predation
24 claims.

25 JUSTICE SOUTER: You also, I take it, have

1 to have an equally limited approach on the recoupment
2 analysis, then. I mean, your recoupment analysis would
3 have to be symmetrical with your cost analysis.

4 MR. SHANMUGAM: Yes. That's absolutely
5 true, Justice Souter, and again this is an issue that
6 the lower courts have been grappling with in the
7 predatory pricing context, and I by no means want to
8 suggest that it is always an easy analysis in the
9 predatory pricing context. Professor Arita's treatise
10 has hundreds of pages on the appropriate calculation of
11 cost, but I think that the important thing to remember
12 with regard to the below cost pricing prong of the
13 Brooke Group analysis is that it does provide an
14 objective yardstick by which a defendant's loss can be
15 measured.

16 Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 Mr. Shanmugam.

19 Mr. Haglund.

20 ORAL ARGUMENT OF MICHAEL E. HAGLUND

21 ON BEHALF OF RESPONDENT

22 MR. HAGLUND: Mr. Chief Justice, and may it
23 please the Court.

24 In this Court's antitrust jurisprudence over
25 the last 25 years, market realities have consistently

1 trumped per se rules. The same approach should apply
2 here. Brooke Group's per se rule which carved out a
3 special exception to the standard rule of reason
4 balancing test in section 2 cases should not be extended
5 to the buy side. No safe harbor per se rule is
6 justified here because raising input prices, unlike
7 cutting output prices, is moving prices in the wrong
8 direction for consumers.

9 JUSTICE BREYER: But it does hurt the
10 supplier and the antitrust laws are just as, I don't
11 know just as, but they are just as concerned about a
12 group of small farmers or a group of small growers or a
13 group of small fishermen faced with a monopsony buyer as
14 they are with a group of consumers having to fight off a
15 monopoly seller.

16 MR. HAGLUND: Justice Breyer --

17 JUSTICE BREYER: I mean that's pretty well
18 established, isn't it?

19 MR. HAGLUND: Well I'd like to point out
20 that the Mandeville Farms case that Mr. Pincus cited
21 does not stand for the same --

22 JUSTICE BREYER: No, no, Congress has
23 actually passed special legislation that the Mandeville
24 Farms is consistent with the Farmers Cooperative and so
25 -- you want me to write the proposition that the

1 antitrust laws are not concerned --

2 MR. HAGLUND: Oh, absolutely --

3 JUSTICE BREYER: -- with the monopoly buyer
4 who would in fact exploit a group of small suppliers,
5 farmers?

6 MR. HAGLUND: Absolutely not.

7 JUSTICE BREYER: Okay.

8 MR. HAGLUND: But in this particular context
9 which the Ninth Circuit repeatedly emphasized, in an
10 inelastic market like this one raising input prices is
11 not going to increase supply and --

12 JUSTICE BREYER: That can't possibly be
13 right, can it? I mean if in fact the object here is to
14 strike, is -- suppose their object is what you say.
15 Their object is in fact to try to get a monopoly on the
16 buying side over a group of small woodsmen. Now they
17 might do that if they drove out all the buying
18 competitors, and now what are they going to try to do?
19 What they will try to do if they get that terrible
20 monopoly, which would be bad --

21 MR. HAGLUND: Drive prices down.

22 JUSTICE BREYER: Right. Drive prices way
23 down, below what the woodsmen could get for them. And
24 if that's going to have any effect aside from an income
25 effect, it will leave some of them to go to the bread

1 line or go to other places where they have other jobs at
2 lesser revenue than they would get by staying in the
3 woods business and selling at a reasonable price. That
4 would be an antitrust concern.

5 MR. HAGLUND: Absolutely, and that is
6 exactly what Weyerhaeuser's plan was here, as shown by
7 their own materials, that their plan was and in fact
8 they did foresee and project that log prices would go
9 down in 2001 --

10 JUSTICE BREYER: So where we are is at the
11 problem. The problem is the same as at the buying side.
12 What we have is possibly a very bad motive and very bad
13 effects. On the other hand, low prices are good for the
14 consumer.

15 MR. HAGLUND: But you're not --

16 JUSTICE BREYER: Here we have bad effects,
17 bad possibilities. On the other hand, higher prices are
18 good for the woodsmen. So we need rules to separate the
19 sheep from the goats. And the other side is proposing a
20 rule, and the rule simply is don't count this as bad
21 conduct, unless the person who pays the money for the
22 goods is in fact buying so many goods that later on when
23 he tries to sell them he will incur a loss.

24 Now I would have thought for 40 years that
25 was a traditional idea. If you're trying to decide

1 whether people are hogging goods unnecessarily for bad
2 purposes, or rather storing up nuts for winter for good
3 purposes, then a very good key to that is do these
4 people expect in the long run to make money out of this
5 without driving those victims out? If the answer is
6 yes, they can make money on the market, they are storing
7 up nuts for winter. It's good. And if the answer is no
8 it's bad. That's called the recoupment test. I don't
9 think that's new. I think it's old. And I'm not sure
10 what your view of it is.

11 MR. HAGLUND: Well, as to Brooke Group and
12 what the Court's being asked to do here, Justice Breyer,
13 is to go down the same path that it did in Albrecht
14 versus Harold Company in '68 when it agreed to treat
15 completely symmetrically minimum and maximum vertical
16 resale price restraints.

17 Later on, in State Oil Company vs. Kahn the
18 Court abandoned and accepted Justice Harlan's dissent
19 that it was wrong to equate those two.

20 JUSTICE BREYER: -- I agree with you. But I
21 just don't think this is the same as retail versus
22 maximum price restraints. That's a whole other kettle
23 of fish. And what I'm interested -- I guess my
24 question particularly is, I propose one test not two,
25 but it might be that my test encompasses the dollar test

1 and incremental cost and so forth. What do you think of
2 my one test?

3 MR. HAGLUND: Well --

4 JUSTICE BREYER: One test is if they are not
5 going to make money legitimately out of this in the long
6 run, it's bad, unless they can explain it away. But if
7 they are, it's okay.

8 MR. HAGLUND: The problem with granting a
9 safe harbor for above cost input purchases is that it
10 does not work well in this context, especially in an
11 inelastic market. The suggestion that you can simply
12 use incremental cost is not a workable approach here if
13 you look at the facts in this case.

14 CHIEF JUSTICE ROBERTS: What about the fact
15 that the woodsmen in Justice Breyer's story are rational
16 actors as well, and they don't have to be geniuses to
17 realize that they are in a better shape having two
18 buyers rather than just one. So maybe they forego the
19 extra 50 cents a log, or whatever -- tree, it is in the
20 short term and sell enough to keep the other company in
21 business? I mean they can make that decision
22 themselves. Or they can make the decision as rational
23 actors that they are better off having more money that
24 they can then use to buy more alder saplings that they
25 can plant for the future. And either way it benefits

1 the consumer.

2 MR. HAGLUND: Well not, that's not quite
3 correct, because the signals that the higher input
4 prices show, yes, they do generally incent more
5 production in a, in a typical market. Here, however,
6 where you have a product that takes 30 to 50 years time
7 and production, the price, higher price signals when
8 they are sent by a monopsonist, like Weyerhaeuser in
9 this case, actually send a very powerful message to tree
10 farmers not to replant alder, despite those high prices.
11 And there was evidence in the follow-on cases that
12 reference that.

13 It was alleged in our complaint in this case
14 but not actually backed up by any testimony at trial,
15 that tree farmers in Oregon and Washington were actually
16 electing not to replant alder and as Professor Noel
17 notes in his law review article in the issue of the
18 Antitrust Law Journal, which by the way is the only area
19 -- half of this issue is devoted to this subject. It's
20 the sum total of literature devoted to predatory
21 overbidding in this area. And what Professor Noel notes
22 is that where you have localized monopsonies, the result
23 is when the monopsony is in full flower a misallocation
24 of resources between regions. The highly productive
25 forest lands of the Pacific Northwest won't have as much

1 alder in the future because of the significant signals
2 sent by a monopsonist, even when they are engaged in
3 that scheme.

4 The seller is happy if he has mature alder
5 to sell at that time to get the good price, but he is
6 not going to replant, because he sees that 30 years down
7 the road he will not have a competitive marketplace
8 within which to sell his timber, and that was the
9 reality in this case.

10 CHIEF JUSTICE ROBERTS: Well if he is, if he
11 is that rational and foresighted, why isn't he rational
12 and foresighted enough to know that he ought to be
13 selling some to the other, the other processor even if
14 that processor is not bidding as much?

15 MR. HAGLUND: Well we did actually have some
16 record evidence in this case that at least a few people
17 were doing that. One of the major suppliers of the
18 Respondent here, Ross-Simmons, was a company called
19 Longview Fiber which made it -- a very sophisticated
20 publicly held company -- made it a practice to sell most
21 of its volume to Ross-Simmons on a market basis because
22 it did not want the eventuality of not having
23 Ross-Simmons in that competitive circle with
24 Weyerhaeuser.

25 Most small woodland owners, however, who may

1 only be in the market once every five years because
2 that's the nature of their rotation, of the age classes
3 of the timber that they have got, are not in that kind
4 of sophisticated position because they are in the market
5 so infrequently to make that kind of a judgment. It's
6 been --

7 JUSTICE ALITO: If we don't take the Brooke
8 Group approach, is the alternative to ask the jury to do
9 what the instructions in this case ask them to do.

10 MR. HAGLUND: No, it's not.

11 JUSTICE ALITO: To decide whether
12 Weyerhaeuser bought more logs than it needed in order to
13 prevent its rivals from obtaining the logs that they
14 needed at a fair price? How is a jury to, a lay jury,
15 to decide whether a company like Weyerhaeuser bought
16 more logs than it needed, or what is the fair price?

17 MR. HAGLUND: We don't contend that the
18 instruction was perfect here, but if one looks at the
19 instruction as a whole and --

20 JUSTICE ALITO: But you think it was
21 sufficient.

22 MR. HAGLUND: Pardon me?

23 JUSTICE ALITO: You think it was sufficient
24 enough.

25 MR. HAGLUND: In this case it was legally

1 sufficient and I point out that this Court very recently
2 has issued a decision in the first case of the term,
3 Ayers vs. Belmontes, where you looked at the question of
4 the catchall mitigation factor in California in the
5 penalty phase of a capital murder case. And you looked
6 at the instruction and interpreted it in terms of the
7 closing arguments, the evidence and the other
8 instructions as a whole.

9 JUSTICE GINSBURG: Who proposed the
10 instruction in this case?

11 MR. HAGLUND: The instruction, the paragraph
12 that is subject to the great criticism on the other
13 side, was a paragraph that was drafted by the district
14 judge and handed out near the end of the trial and then
15 commented on by the lawyers in, prior to --

16 JUSTICE GINSBURG: There was no requested
17 charge on this point by the plaintiff?

18 MR. HAGLUND: That's -- as to the issue of
19 predatory pricing, plaintiff, as we make clear in our
20 brief, actually submitted a predatory pricing
21 instruction three weeks before the trial. You tend to
22 be overinclusive pretrial. Defendant on the other hand
23 surprisingly submitted no such instruction on predatory
24 pricing. The judge submitted a paragraph that had
25 something more than what the current, or the ultimate

1 paragraph contained. There was a debate over whether it
2 needed to be, whether it was consistent with Brooke
3 Group. I agreed with the other side that it did not
4 have both components of the Brooke Group test. Judge
5 Panner and I had a colloquy where ultimately he was
6 going to turn one paragraph into two, include a Brooke
7 Group test. We then withdrew our request for that
8 instruction, Weyerhaeuser objected to the, the thinned
9 down version of the ultimate paragraph.

10 But the interesting thing about
11 Weyerhaeuser's relationship to this instruction is that
12 they really invited the linguistic framework of this,
13 "bought more than they needed" or --

14 JUSTICE ALITO: What does that mean? What
15 does a fair price in this, in this context mean? Does
16 it mean the price that's necessary in order to keep an
17 inefficient competitor in business?

18 MR. HAGLUND: Well, what it meant in this
19 case, Justice Alito, is that it meant what, how much did
20 Weyerhaeuser artificially increase the log market above
21 where it otherwise would have been? We had several
22 experts and a number of both industry and forest
23 economists testify that for 20-plus years log prices had
24 been following lumber. There was an equilibrium in the
25 market. Then you get to --

1 JUSTICE SOUTER: Why is that the standard of
2 fairness? I mean that, you know, that may be fine. But
3 how does, how does a jury, A, what's the authority for
4 saying that is the standard of fairness and B, how does
5 a jury know that?

6 MR. HAGLUND: The -- if you look at the
7 Ninth Circuit opinion, the Ninth Circuit made it clear
8 that the instructions as a whole provided sufficient
9 guidance. Nowhere in the case as we tried it did we
10 attempt to exploit the instruction in the way that
11 Weyerhaeuser suggests happened.

12 JUSTICE SOUTER: Maybe you didn't, but that
13 basically left the jury on a, on a free float, didn't
14 it?

15 MR. HAGLUND: Well, I don't think so if you
16 look at the evidence. The evidence that we presented
17 included a forest economist who presented three
18 different scenarios where he identified how much
19 Weyerhaeuser had artificially increased log prices above
20 where they would have been but for their anticompetitive
21 behavior. We in no way went to the jury in closing,
22 saying award what you think is fair. We relied
23 completely on that evidence, and in fact the jury, which
24 included a Ph.D. in physics in a high-tech industry, an
25 accountant, the head of a chain store, and a banker and

1 a retired farmer, they looked at the evidence and they
2 actually to the dollar picked one of those market-based
3 scenarios for how much was the market elevated.

4 JUSTICE SOUTER: Okay. Let's assume I
5 accept your sort of Belmontes' analysis here. If we
6 were to approve of that instruction in effect, as you
7 want us to do, and we also believe that on its face
8 something more has got to be said than merely the word
9 fair, what proposition would we say must be included in
10 that instruction to make the so-called fairness
11 instruction a sensible one that can be consistently
12 applied?

13 MR. HAGLUND: And we don't contend that it
14 was a perfect instruction. We think it would be
15 perfectly appropriate if --

16 JUSTICE SOUTER: No, I realize that.

17 MR. HAGLUND: Okay.

18 JUSTICE SOUTER: And I'm saying if we follow
19 your lead, we're going to try to take that and make it a
20 closer to perfect instruction, and what should we say
21 must be added to it?

22 MR. HAGLUND: It's quite simple. If you
23 look at that paragraph, there are two pieces of it. One
24 of them, one portion says that you can regard it as an
25 anticompetitive act if defendant purchased more logs

1 than it needed. We don't think that needs to be
2 improved because that's easy to figure out, and here we
3 had evidence that they continued --

4 JUSTICE GINSBURG: Why? Why is it easy to
5 figure out? Justice Breyer brought up the stockpiling.
6 How do you know whether they are storing it for a time
7 when the supply is short, or they are just letting it go
8 to rack and moon in order to put this company out of
9 business?

10 MR. HAGLUND: Justice Ginsburg, you will
11 know because of the evidence in the case. If the
12 plaintiff, the defendant is able to show that they were
13 storing up this extra input against a prospect of a
14 price hike in the future or because they were out trying
15 to get enough volume for some promotion for a customer
16 that was going to significantly increase their
17 purchases, then you'd have a different kind of case. We
18 have a situation where they warehoused large,
19 unprecedentedly high volumes of lumber because they --

20 JUSTICE BREYER: Why did they say they
21 needed it? I mean, why do you need all this Ph.D. guy
22 up there? Why don't you just prove what you just said?

23 MR. HAGLUND: We did.

24 JUSTICE BREYER: Fine. Then why do you need
25 all these other instructions about pricing? I suppose

1 the only reason you'd need them is if there's maybe a
2 dispute as to whether it was in their economic interest
3 in the absence of any intent to monopolize these people
4 to buy all these logs or not. And so it would be very
5 interesting if you have a way of proving that they did
6 not need these for any legitimate purpose, a matter
7 which is likely to be disputed. So, I think the hard
8 thing in these cases is to prove that. And if you can
9 tell me how you prove that without giving the jury an
10 instruction something like, look to see whether they
11 could sell them reasonably at a profit. Or, look to see
12 even if they can't sell them at a profit, whether they
13 could recoup whatever they are losing later. Or, or,
14 and you fill in some blanks, and now I'll have some
15 candidates for testing.

16 MR. HAGLUND: Well, as to the paid a higher
17 price than necessary, the language we would suggest
18 could be used in another case and passed on by this
19 Court, is the following: Paid a higher price than
20 necessary to move the log market to higher levels than
21 otherwise would have prevailed in order to injure
22 competition.

23 JUSTICE BREYER: Oh. But of course, I want
24 to injure competition always when I in fact sell at a
25 lower price that I very much hope my competitor can't

1 possibly meet, indeed would go out of business. I
2 cheer. I would love to get a monopoly. I would love to
3 make a better product, lower prices, et cetera. Do you
4 see the problem? And so what you've told the jury there
5 on that instruction --

6 MR. HAGLUND: But here --

7 JUSTICE BREYER: -- is that they can find
8 this person guilty even if all he wants to do is so
9 second-guess that market that he gets the logs and will
10 sell them at a huge profit later on in a competitive
11 selling market.

12 MR. HAGLUND: We don't have a situation
13 here, Justice Breyer, where Weyerhaeuser presented
14 evidence that they were the most efficient and able to
15 pay higher prices. Weyerhaeuser presented no
16 quantitative evidence that it was the lowest cost
17 producer in terms of costs --

18 JUSTICE BREYER: Suppose they were the
19 highest cost producer. Suppose still, they think that
20 by buying these logs we later can make a profit when we
21 resell them on the competitive market. You see, the
22 reason they're coming up with this test is they don't
23 think you can give, the reasoning the SG is they don't
24 think that you can produce a better one. So I'm
25 listening.

1 MR. HAGLUND: Well, one of the reasons that
2 one can't go in this direction here, Brooke Group was a
3 pricing only case. As the briefs make clear and the
4 decision made clear, if that had been a standard
5 monopolization case it would have been out the door on
6 summary judgment because the defendant was a 12 percent
7 player. They had no prospect of, of attempted or
8 monopolization, a viable monopolization claim. Here we
9 have a situation where Weyerhaeuser's pricing conduct,
10 deliberately and artificially pushing the market up
11 through a variety of mechanisms, was also interconnected
12 and linked to complementary other conduct that we think
13 set the table for the effectiveness of their strategy in
14 elevating the log market that our client was
15 participating in.

16 Bear in mind that, that at JA 901 we have a
17 Weyerhaeuser document showing that very significant
18 foreclosure from their exclusive contracts in the, in
19 Oregon for example, this is a document that shows that
20 62 percent of the market was covered through either
21 exclusive purchase arrangements between Weyerhaeuser and
22 large landowners, or non-efficiency-based trades were
23 the, were linked to the exchange of the alder sawlogs
24 from that landowner. Only 33 percent according to JA
25 901 show, in Oregon, was projected to be open market

1 bidding. Weyerhaeuser acquired, when it was then at a
2 65 percent market share, acquired the dominant seller, a
3 built-in monopsony in British Columbia and it's five, 15
4 to 20-year exclusive forest licenses. That kind of
5 foreclosure, linked with the anticompetitive behavior
6 they engaged in that was a variety of bidding practices,
7 some of it was overbuying, some of it was manipulating
8 bidding back and forth, and then putting the last bid in
9 terms of that cost on the other side.

10 I think it's important, I'd like to shift to
11 the instruction again, and make the point that
12 Weyerhaeuser never gave either the plaintiff in this
13 case or the district judge the opportunity to consider a
14 different instruction than was given here. And the fact
15 that's demonstrably shown if one looks at page 43 of
16 their opening brief in the Ninth Circuit. In the Ninth
17 Circuit they only took the position in the bulk of their
18 brief that they were entitled to judgment as a matter of
19 law on the basis of Brooke Group. As to the ground or
20 the contention --

21 JUSTICE GINSBURG: Do you -- do you agree
22 that you couldn't have made it on Brooke Group because
23 they were selling these logs at a profit?

24 MR. HAGLUND: I didn't quite hear that,
25 Justice Ginsburg.

1 JUSTICE GINSBURG: Do you agree that you
2 could not have prevailed under the Brooke Group test
3 because Weyerhaeuser was, was making a profit on these
4 sales even though it had bid up the price of the logs?

5 MR. HAGLUND: We do not agree as to the
6 evidence in this case. We have evidence in this case
7 that we cited to in our brief that when you adjust, as
8 against the Longview mill which our client was literally
9 right next door to. When you adjust for the fact that
10 Weyerhaeuser supplied half of the raw material needs of
11 the Longview mill at way below market transfer prices,
12 when you adjust those to the average price they paid
13 other third parties for logs, the Longview mill ran at a
14 loss for a significant part of the, of the predation
15 period. We do have the evidence in this case to
16 contend --

17 JUSTICE SCALIA: It's ultimately a jury
18 question, I assume.

19 MR. HAGLUND: If Brooke Group is applied --

20 JUSTICE SCALIA: But that question was not
21 put to the jury, right?

22 MR. HAGLUND: That's correct. We withdrew
23 the request for a Brooke Group instruction.

24 But to finish my point about the fact that
25 this --

1 CHIEF JUSTICE ROBERTS: So then, would you
2 be entitled to a remand on that or not, given that you
3 withdrew that instruction?

4 MR. HAGLUND: If the Court concludes the
5 Brooke Group applies to this case, then the instruction
6 was incomplete, it was not correct, and we would be
7 entitled to a remand and a chance to retry the case.

8 JUSTICE ALITO: But what about the
9 recoupment prong, given that Weyerhaeuser doesn't have
10 market power in the selling market and that mills were
11 entering, new mills were coming on line during this
12 period. How would you satisfy the recoupment?

13 MR. HAGLUND: Well, the recoupment is not in
14 the output end of things. The recoupment is the
15 opportunity to drive log costs down to recoup the extra
16 cost you paid during the predatory period. And we had
17 evidence in the record that a former executive from
18 Weyerhaeuser testified that they had used this strategy
19 multiple times, that when it was questioned by some in
20 top management that the head of a division would always
21 say once we either acquire or get rid of a competitor,
22 we will recoup those costs many fold. That's at JA 260,
23 Cliff Chulos. We also had at JA 903 a planning document
24 in 2001 where Weyerhaeuser was showing in that
25 PowerPoint chart the expectation that log prices would

1 be going down in '01, '02, '03, and that for every 2
2 percent change downward it was an extra \$2 million in
3 profits to the bottom line. There was no plan to pass
4 on the benefits of those lower input prices to
5 consumers. Obvious consumer lack of benefit in that
6 situation.

7 Also as to recoupment, if you look at JA 831
8 to 95, which are the year-end financials for the
9 Weyerhaeuser alder mills in Oregon, Washington and BC
10 during a roughly four-year period, you see a monu -- a
11 huge price differential between the prices in British
12 Columbia and those prevailing in Oregon and Washington.
13 We think there was every expectation on management's
14 part to drive the prices down to the levels that
15 prevailed in British Columbia, which works out to about
16 \$40 million a year, way way above the amount they were
17 spending in this predatory scheme predominantly in
18 Oregon and Washington, because there is no competition
19 in British Columbia.

20 But I would like to point out that they
21 never preserved the issue of whether or not the standard
22 that the Ninth Circuit in dictum stated was as a whole
23 sufficient to guide the jury as to a definition of
24 anticompetitive conduct. At page 43 of their brief
25 after quoting this paragraph they so criticize, they

1 note, although that statement of the law -- this is 43
2 of the Ninth Circuit brief, not the blue brief that you
3 have -- although that statement of the law may have been
4 acceptable when Reed Brothers was decided, it is not in
5 the wake of Brooke Group for reasons explained above.
6 The point here is that they never made any charge in the
7 Ninth Circuit that the instruction was flawed
8 independent of Brooke Group. Now we concede, if Brooke
9 Group applies, the instruction was -- was -- is wrong,
10 and the case should be reversed and remanded. But the
11 second point that they try to make in their briefing is
12 not properly preserved. And in fact, I'd like to point
13 out that they contributed to the linguistic framework of
14 this instruction in a very significant way. First --

15 JUSTICE SCALIA: I'm losing you. What's the
16 second point that they're trying to make besides the
17 fact that this didn't conform to Brooke Group?

18 MR. HAGLUND: Well, they have also asserted
19 in their briefing that as an independent ground for
20 reversal, the instruction was so standardless that the
21 verdict cannot stand.

22 JUSTICE SCALIA: Regardless of Brooke Group.

23 JUSTICE SOUTER: But isn't that something
24 that we've got to consider because if, if we disagree
25 with them on Brooke Group, we've got to do it in the

1 course of making a choice between a Brooke Group
2 instruction and something else, and the only something
3 else we've got right now is what we have in this case
4 and we ought to, we ought to decide whether in fact that
5 is good enough.

6 MR. HAGLUND: I agree with that.

7 JUSTICE SOUTER: And so I mean, I think,
8 they may not have made that an independent basis of
9 reversal but we've got to consider it.

10 MR. HAGLUND: I agree with that, but I would
11 like to point out these facts in terms of the way they
12 contributed to it. They submitted jury instructions
13 just like us based upon the ABA model instructions,
14 theirs are at JA 97 to 122, that used the words outside
15 of this paragraph that we are talking about, fair,
16 reasonable or necessary 18 times. They showed up 19
17 times in those instructions. In their opening and
18 closing --

19 JUSTICE SOUTER: I'll stipulate to that.

20 MR. HAGLUND: Right.

21 JUSTICE SOUTER: Assuming they don't have a
22 leg to stand on in complaint, we have still got to face
23 what the alternative to a Brooke Group kind of
24 instruction is. And -- and however they may have tried
25 their case, we've still got the same problem.

1 MR. HAGLUND: That's correct. And I suggest
2 that you look to the type of formulation I gave a little
3 earlier where you're looking at how much did the
4 defendant push the market to levels that are above where
5 it otherwise would have been. It's not too far from the
6 test that is proposed by the States at page 29 of their
7 brief where they suggest it's, that the conduct be
8 measured by whether it raised the price that the buyer's
9 rivals had to pay for the input beyond a level that
10 could be justified or explained by other market or
11 exogenous factors and substantially affected the ability
12 of the buyer's rivals to compete for the input. The
13 eight States, all of which have concerns both as sellers
14 into these vulnerable resource markets and for citizens
15 and companies in their own resource State, laden States,
16 whether it's minerals, whether it's timber, whether it's
17 agriculture, they have that concern and they've offered
18 that test that's not too far from what I posited as a
19 way to improve the instruction that Weyerhaeuser
20 invited.

21 I'd like to make one further point on
22 that subject and that is, if you look at the opening
23 statement of their counsel, the closing, he used that
24 very language. They were going to put on witnesses who
25 would all state that they never bought more than they

1 needed, they never paid more than necessary. That same
2 litany was put to 13 different witnesses.

3 Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 Mr. Haglund.

6 Mr. Pincus, you have two minutes remaining.

7 REBUTTAL ARGUMENT OF ANDREW J. PINCUS

8 ON BEHALF OF Petitioner

9 MR. PINCUS: Thank you, Mr. Chief Justice.
10 Just a couple of points.

11 With respect to the story of how this
12 instruction came to be, in fact it closely resembles
13 some language that was requested by Respondent that
14 appears on page 93a of the joint appendix which refers
15 to a test that paying a price for logs that's higher
16 than market value unnecessarily to drive out or injure
17 competition. So I do think this is an instruction that
18 comes from Respondent.

19 It's true that we did not request a Brooke
20 Group instruction because the district court had ruled
21 that Brooke Group didn't apply at the summary judgment
22 phase. We did object to the instruction proposed by the
23 district judge on the grounds that it did not conform
24 with Brooke Group in order to preserve our argument here
25 and we believe that that objection gives the Court the

1 power to adopt an intermediate rule, but it isn't
2 exactly what we requested and there are decisions in the
3 court of appeals to that effect.

4 With respect to the question about
5 purchasing more logs than they needed, as we say in our
6 briefs we think that that claim can't really be
7 separated from the predatory pricing claim here because
8 the argument is that by purchasing more logs the price
9 was driven up and it's the increased price, that's the
10 impact that Respondent complains of. So creating a
11 separate overbuying claim that relies on price for
12 impact would be the same thing as saying on the sell
13 side you can have an overselling claim regardless of
14 whether you flunk the Brooke Group standard with respect
15 to prices, and that's just going to undercut the
16 certainty that this Court has prescribed.

17 With respect to the document that
18 Mr. Haglund cited, 901a about inputs, that document is
19 described in testimony in the joint appendix at 571a to
20 573a, and that's a hypothetical look at what the market
21 might look like if current, past purchasing patterns had
22 continued. It's not a document that in any way says
23 that the various sources of log supply were locked up
24 and it doesn't indicate that, and in fact there's
25 nothing in the record to indicate what the percentage of

1 logs were that were available to Weyerhaeuser by
2 long-term contract, in contrast, as I said, to the
3 testimony in the record that indicates that Respondent
4 got between 30 and 50 percent of its logs through those
5 long-term sources.

6 With respect to the proper disposition of
7 the case, in the Boyle case this Court made clear that
8 where there's no, not sufficient evidence in the
9 record -- I'm sorry, my time is up.

10 CHIEF JUSTICE ROBERTS: You can finish your
11 sentence.

12 MR. PINCUS: Where there's not sufficient
13 evidence in the record to go to the jury under the
14 proper jury instruction, the proper outcome is for the
15 claim to be dropped from the case.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 Mr. Pincus. The case is submitted.

18 (Whereupon, at 11:03 a.m., the case in the
19 above-entitled matter was submitted.)

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