IN THE SUPREME COURT OF THE UNITED STATES

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WEYERHAEUSER COMPANY, :

Petitioner :

v. : No. 05-381

ROSS-SIMMONS HARDWOOD :

LUMBER COMPANY, INC. :

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Washington, D.C.

Tuesday, November 28, 2006

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

ANDREW J. PINCUS, ESQ., Washington, D.C.; on behalf of Petitioner.

KANNON K. SHANMUGAM, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting Petitioner.

MICHAEL E. HAGLUND, ESQ., Portland, Ore.; on behalf of Respondent

C O N T E N T S

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 standards 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 the 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 a 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

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

JUSTICE STEVENS: Can I ask you a preliminary question before you get too far into your argument? Is it your understanding that the instructions to the jury were that finding that predatory price cutting was in itself sufficient to establish a Section 2 violation? I know the Court of Appeals opinion reads that way but is it, do you think the jury was so instructed?

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

JUSTICE STEVENS: You may consider it as an anticompetitive act, but it does not say you may regard it as a violation of Section 2.

MR. PINCUS: No.

JUSTICE STEVENS: And as I read the instructions, it did require there be three elements of the violation of Section 2 which, two of which were not discussed by the Court of Appeals.

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

JUSTICE STEVENS: Do you concede there is monopoly power?

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

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

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

JUSTICE STEVENS: But you do agree that the conduct in itself is not sufficient to establish a

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

MR. PINCUS: Yes. Because this is a claim under Section 2, there would have to be either monopoly power or a danger of probability to the monopoly power. It's single firm conduct so there would have to be --

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

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

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

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

JUSTICE STEVENS: Of course in the Brooke

case, it may not have even been a monopolist.

MR. PINCUS: Well, because Brooke involved a claim under the Patent Act. But this Court in the Trinko case has certainly interpreted the Brooke Standard as also applying to claims under Section 2. And in fact the Court explicitly said that in Brooke Group.

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

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

MR. PINCUS: Your Honor, we don't, we don't think that that difference is a distinction that warrants a different test, for several reasons. First of all, we are dealing here with single firm pricing conduct and it's recognized that that's key to the

proper functioning of the markets. As the court said in Professional Engineers, fixed pricing is the central nervous system of the economy. It allocates goods and ensures that, that they are allocated to the most efficient use.

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

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

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

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

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

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

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

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

MR. PINCUS: No, Your Honor. The claim is that the supply was relatively inelastic, not that it's perfectly inelastic, and as long as the supply market is not perfectly inelastic, an increase in price may lead

to more supplies, maybe not as much as if there were higher elasticity, but more. But there's another benefit to consumers here, which is that if one would expect that a buyer bidding more can make a more efficient use of the product and therefore generate more output, and that output expansion which doesn't depend on supply expansion is also beneficial to consumers because that means there will be more output in the downstream market and a corresponding decrease in price.

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

JUSTICE SCALIA: I presume it could lead to lower consumer prices too. If you have a firm that has developed a new, a new technique for processing the logs, and it can process them cheaper and faster, and sell them for a lower price but in greater volume, and thereby make even more profit, that firm would be willing to pay more for those logs, even though it would sell them for less than competitors might sell them.

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

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

MR. PINCUS: Well, our view, Justice Kennedy, there really wasn't, because the district judge had made clear his view in the pretrial motions that there wasn't a need to prove prices, and that --

JUSTICE KENNEDY: But that was the end of it

at the trial court.

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

JUSTICE GINSBURG: Mr. Pincus, how do you determine the price of the logs? Because we, the charges that some logs were purchased at an excessive price, and if we were dealing with only those logs to determine cost, that's one thing. But we are, also in this picture is that some of the logs came from Weyerhaeuser's own land and some came from long-term contracts that it had, and those, the price was not inflated on those. So if you take those into account you may get one figure, but if you take only the high bid logs you might get a different picture. So how, what is it? How do you determine costs? Do you look at all the logs that were purchased or only the ones that

were allegedly bid out?

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

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

MR. PINCUS: And it might be --

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

MR. PINCUS: And Your Honor, as the Court

observed in Brooke Group, there really wasn't a need there to get into how the test works and we think there isn't here. We think the issue is symmetrical and it might be that the focus is on the incremental costs that are associated with the alleged predatory volume, and therefore that might focus on those incremental costs. But in this case there's no dispute that, whatever the measure of costs, there has been no challenge to the position that Weyerhaeuser's prices were above those costs.

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

And finally, a test that provides no guidance threatens false positives that will deter the very competition that our economy requires and that

helps our economy reach its most efficient state. As Justice Breyer put it for the First Circuit in Town of Comfort, antitrust rules must be clear enough for lawyers to explain them to their clients, especially in a sensitive area like pricing. And certainly the rule that the Ninth Circuit adopted here has none of that clarity and we think that the Court's Brooke Group decision and that test does.

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

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

JUSTICE STEVENS: No. The anticompetitive -- the plan is to drive the company out of business. And the only anticompetitive conduct other than proving the whole objective is that you pick on this one competitor and outbid him every time you can. Could that possibly give rise to a damage claim?

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

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

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

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

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

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

MR. PINCUS: Well, because there won't be a given premise in every case, Your Honor, and the problem is the Court has to write rules that will, that will govern conduct, primary conduct of business people in the market, and a rule that says if you can prove intent then you don't have to worry about prices and costs is a rule that opens the door to second-guess, judicial second-guessing of prices --

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

MR. PINCUS: You do, Your Honor.

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

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

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

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

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

JUSTICE SCALIA: What do we do in the correlative situation where there is an allegation of predatory selling rather than predatory buying if you had the same situation posed by Justice Stevens? Namely

evidence that you're trying to drive the competitor out of business, wouldn't that establish a violation?

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

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

MR. PINCUS: But it involved the test for predatory pricing, Your Honor, under Robinson-Patman. But the Court said its test was perfectly applicable to section 2. And the lower courts have certainly applied that test in just that way in section 2 cases. And if the rule would be that even in the predatory selling situation intent can override the price-cost and the recoupment requirements, then you're in a situation where there's no ability for business people to know in advance when low prices are justified. All we think is that there should be symmetry.

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

CHIEF JUSTICE ROBERTS: Thank you, Mr. Pincus.

Mr. Shanmugam.

ORAL ARGUMENT OF KANNON K. SHANMUGAM

ON BEHALF OF UNITED STATES,

AS AMICUS CURIAE, SUPPORTING PETITIONER

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

Aggressive bidding by the buyer of an input, no less than aggressive pricecutting by the seller of a finished product, is usually procompetitive. Because a claim of predatory bidding is simply the flip side of a claim of predatory pricing, the Brooke Group standard for predatory pricing claims should apply to predatory bidding claims as well. And in our view the court of appeals erred in this case by sanctioning a broader and more subjective standard of liability. In Brooke Group, this Court adopted its now familiar two-pronged standard for predatory pricing claims despite recognizing that each prong of that standard might permit some anticompetitive pricecutting. The court was willing to tolerate that modest degree of underinclusion because, in the Court's own words, "The mechanism by which a firm engages in predatory pricing is the same mechanism by which a firm stimulates competition, namely by lowering

its prices. And the Court explained that a broader or a less precise standard of liability would run the risk of prohibiting or chilling some procompetitive price cutting. In our view the same analysis can apply to a claim of predatory bidding. Because aggressive bidding is usually procompetitive, application of the Brooke Group standard is warranted in order to avoid prohibiting or chilling procompetitive conduct with regard to price in that context as well.

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

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

MR. SHANMUGAM: Well, Mr. Chief Justice, I understood Justice Stevens' hypothetical, and he can correct me if I'm wrong, to posit a case in which there was dynamite evidence that the defendant had a monopolistic or exclusionary intent. But in our view that is insufficient to state a section 2 claim. One

has to have exclusionary conduct as well.

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. SHANMUGAM: That would be evidence, and

it may be powerful evidence, of a monopolistic intent, though courts have noted that even with regard to that requirement it's famously difficult to distinguish between a legitimate competitive attempt on the one hand and an illegitimate monopolistic intent.

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

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

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

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

JUSTICE STEVENS: You prove monopoly power plus an intent to maintain or acquire it.

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

JUSTICE STEVENS: That's insufficient to

prove a violation of Section 2?

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

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

MR. SHANMUGAM: Justice Scalia --

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

MR. SHANMUGAM: You could have an incompetent monopolist more generally or an incompetent predator in this specific context. And I think that the only other thing I would say with regard to this

colloquy is that the Court really did confront this issue in Brooke Group. There was fairly strong evidence of monopolistic intent and the majority opinion --

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

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

JUSTICE ALITO: Would your answer be the same if you added to Justice Stevens' hypothetical very high barriers of entry that would prevent other competitors from entering the market after the target was driven out?

MR. SHANMUGAM: High barriers to entry,

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

I want to say just one thing in response to Justice Ginsburg and Justice Kennedy's questions to my friend Mr. Pincus about the question of the appropriate measure of cost if Brooke Group were to apply to predatory bidding claims. As in Brooke Group itself, we believe that it is unnecessary for this Court to specify the exact method of calculating costs in this case. But the position of the United States more generally both in the predatory pricing context and in the predatory bidding context is that a Court should look to a defendant's incremental costs, and in this context that

would mean looking to the amount of the input that was the subject of the alleged predation. So in this case the amount of logs that petitioner allegedly predatorily purchased on the open market. And such an incremental approach to be sure is not within its difficulties in application and for that reason a number of lower courts in the predatory pricing context have instead looked to average variable costs or other measures as a proxy for incremental costs. But we believe that in a case such as this one, looking to incremental costs may be useful because it effectively excludes from the analysis any potential cross-subsidization, whether by virtue of the fact that in this case, for example, petitioner may have harvested logs from its own lands. There are claims in this case that petitioner entered into various exclusive dealing arrangements as well, obtained logs at a lower price on that basis. And an incremental approach has the virtue of focusing only on that portion of the market that is the subject of the alleged predation claims.

JUSTICE SOUTER: You also, I take it, have to have an equally limited approach on the recoupment analysis, then. I mean, your recoupment analysis would have to be symmetrical with your cost analysis.

MR. SHANMUGAM: Yes. That's absolutely

true, Justice Souter, and again this is an issue that the lower courts have been grappling with in the predatory pricing context, and I by no means want to suggest that it is always an easy analysis in the predatory pricing context. Professor Arita's treatise has hundreds of pages on the appropriate calculation of cost, but I think that the important thing to remember with regard to the below cost pricing prong of the Brooke Group analysis is that it does provide an objective yardstick by which a defendant's loss can be measured.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Shanmugam.

Mr. Haglund.

ORAL ARGUMENT OF MICHAEL E. HAGLUND

ON BEHALF OF RESPONDENT

MR. HAGLUND: Mr. Chief Justice, and may it please The Court.

In this Court's antitrust jurisprudence over the last 25 years, market realities have consistently trumped per se rules. The same approach should apply here. Brooke Group's per se rule which carved out a special exception to the standard rule of reason balancing test in Section 2 cases should not be extended

to the buy side. No safe harbor per se rule is justified here because raising input prices, unlike cutting output prices, is moving prices in the wrong direction for consumers.

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

MR. HAGLUND: Justice Breyer --

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

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

JUSTICE BREYER: No, no, Congress has actually passed special legislation that the Mandeville Farms is consistent with the Farmers Cooperative and so -- you want me to write the proposition that the antitrust laws are not concerned --

MR. HAGLUND: Oh, absolutely --

JUSTICE BREYER: -- with the monopoly buyer who would in fact exploit a group of small suppliers,

farmers?

MR. HAGLUND: Absolutely not.

JUSTICE BREYER: Okay.

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

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

MR. HAGLUND: Drive prices down.

JUSTICE BREYER: Right. Drive prices way down, below what the woodsmen could get for them. And if that's going to have any effect aside from an income effect, it will leave some of them to go to the bread line or go to other places where they have other jobs at lesser revenue than they would get by staying in the woods business and selling at a reasonable price. That would be an antitrust concern.

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

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

MR. HAGLUND: But you're not --

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

Now I would have thought for 40 years that was a traditional idea. If you're trying to decide whether people are hogging goods unnecessarily for bad purposes, or rather storing up nuts for winter for good purposes, then a very good key to that is do these people expect in the long run to make money out of this

without driving those victims out? If the answer is yes; they can make money on the market, they are storing up nuts for winter. It's good. And if the answer is no it's bad. That's called the recoupment test. I don't think that's new. I think it's old. And I'm not sure what your view of it is.

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

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

JUSTICE BREYER: -- I agree with you. But I don't still think you can defend this retail versus maximum price restraint. That's a whole another kettle of fish. And what I'm interested -- I guess my question particularly is, I propose one test not two, but it might be that my test encompasses the dollar test and incremental costs and so forth. What do you think of my one test?

MR. HAGLUND: Well --

JUSTICE BREYER: One test is if they are not

going to make money legitimately out of this in the long run, it's bad, unless they can explain it away. But if they are, it's okay.

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

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

MR. HAGLUND: Well not, that's not quite correct, because the signals that the higher input prices show, yes, they do generally incent more

production in a, in a typical market. Here, however, where you have a product that takes 30 to 50 years time and production, the price, higher price signals when they are sent by a monopsonist, like Weyerhaeuser in this case, actually send a very powerful message to tree farmers not to replant alder, despite those high prices. And there was evidence in the follow-on cases that reference that.

It was alleged in our complaint in this case but not actually backed up by any testimony at trial, that tree farmers in Oregon and Washington were actually electing not to replant alder and as Professor Noel notes in his law review article in the issue of the Antitrust Law Journal, which by the way is the only area -- half of this issue is devoted to this subject. It's the sum total of literature devoted to predatory overbidding in this area. And what Professor Noel notes is that where you have localized monopsony, the result is when the monopsony is in full flower a misallocation of resources between regions. The highly productive forest lands of the Pacific Northwest won't have as much alder in the future because of the significant signals sent by a monopsonist, even when they are engaged in that scheme.

The seller is happy if he has mature alder

to sell at that time to get the good price, but he is not going to replant, because he sees that 30 years down the road he will not have a competitive marketplace within which to sell his timber, and that was the reality in this case.

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

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

Most small woodland owners, however, who may only be in the market once every five years because that's the nature of their rotation, of the age classes of the timber that they have got, are not in that kind of sophisticated position because they are in the market

so infrequently to make that kind of a judgment. It's been --

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

MR. HAGLUND: No, it's not.

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

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

JUSTICE ALITO: But you think it was sufficient.

MR. HAGLUND: Pardon me?

JUSTICE ALITO: You think it was sufficient enough.

MR. HAGLUND: In this case it was legally sufficient and I point out that this Court very recently has issued a decision in the first case of the term, Ayers vs. Belmontes, where you looked at the question of the catch-all mitigation factor in California in the

penalty phase of a capital murder case. And you looked at the instruction and interpreted it in terms of the closing arguments, the evidence and the other instructions as a whole.

JUSTICE GINSBURG: Who proposed the instruction in this case?

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

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

MR. HAGLUND: That's -- as to the issue of predatory pricing, plaintiffs, as we make clear in our brief, actually submitted a predatory pricing instruction three weeks before the trial. You tend to be overinclusive pretrial. Defendant on the other hand surprisingly submitted no such instruction on predatory pricing. The judge submitted a paragraph that had something more than what the current, or the ultimate paragraph contained. There was a debate over whether it needed to be, whether it was consistent with Brooke Group. I agreed with the other side that it did not have both components of the Brooke Group test. Judge

Panner and I had a colloquy where ultimately he was going to turn one paragraph into two, include a Brooke Group test. We then withdrew our request for that instruction, Weyerhaeuser objected to the, the thinned down version of the ultimate paragraph.

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

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

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

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

a jury know that?

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

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

MR. HAGLUND: Well, I don't think so if you look at the evidence. The evidence that we presented included a forest economist who presented three different scenarios where he identified how much Weyerhaeuser had artificially increased log prices above where they would have been but for their anticompetitive behavior. We in no way went to the jury in closing, saying award what you think is fair. We relied completely on that evidence, and in fact the jury, which included a Ph.D. in physics in a high-tech industry, an accountant, the head of a chain store, and a banker and a retired farmer, they looked at the evidence and they actually to the dollar picked one of those market -based scenarios for how much was the market elevated.

JUSTICE SOUTER: Okay. Let's assume I

accept your sort of Delmonte's analysis here. If we were to approve of that instruction in effect, as you want us to do, and we also believe that on its face something more has got to be said than merely the word fair, what proposition would we say must be included in that instruction to make the so-called fairness instruction a sensible one that can be consistently applied?

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

JUSTICE SOUTER: No, I realize that.

MR. HAGLUND: Okay.

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

MR. HAGLUND: It's quite simple. If you look at that paragraph, there are two pieces of it. One of them, one portion says that you can regard it as an anticompetitive act if defendant purchased more logs than it needed. We don't think that needs to be improved because that's easy to figure out, and here we had evidence that they continued --

JUSTICE GINSBURG: Why? Why is it easy to

figure out? As Justice Breyer brought up the stockpiling, how do you know whether they are storing it, or a time when the supply is short, or they are just letting it go to rack and moon in order to put this company out of business?

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

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

MR. HAGLUND: We did.

JUSTICE BREYER: Fine. Then why do you need all these other instructions about pricing? I suppose the only reason you'd need them is if there's a dispute as to whether it was in their economic interest in the absence of any intent to monopolize these people to buy all these logs or not. And so it would be very

interesting if you have a way of proving that they did not need these for any legitimate purpose, a matter which is likely to be disputed. So, I think the hard thing in these cases is to prove that. And if you can tell me how you prove that without giving the jury an instruction something like, look to see whether they can sell them reasonably at a profit. Or, look to see even if they can't sell them at a profit, whether they could recoup whatever they are losing later. Or, or, and you fill in some blanks, and now I'll have some candidates for testing.

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

JUSTICE BREYER: Oh. But of course, I want to injure competition always when I in fact sell at a lower price that I very much hope my competitor can't possibly meet, indeed would go out of business. I cheer. I would love to get a monopoly. I would love to make a better product, lower prices, et cetera. Do you see the problem? And so what you've told the jury there

on that instruction --

MR. HAGLUND: But here --

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

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

JUSTICE BREYER: What if it were the highest cost producer? Suppose still, they think that by buying these logs we later can make a profit when we resell them on the competitive market. You see, the reason they're coming up with this test is they don't think you can give, the reasoning of it is that they don't think that you can produce a better one. So I'm listening.

MR. HAGLUND: Well, one of the reasons that one can't go in this direction here, Brooke Group was a pricing only case. As the briefs make clear and the decision made clear, if that had been a standard monopolization case it would have been out the door on

summary judgment because the defendant was a 12 percent player. They had no prospect of, of attempted or monopolization, a viable monopolization claim. Here we have a situation where Weyerhaeuser's pricing conduct, deliberately and artificially pushing the market up through a variety of mechanisms, was also interconnected and linked to complementary other conduct that we think set the table for the effectiveness of their strategy in elevating the log market that our client was participating in.

Bear in mind that, that at JA 901 we have a Weyerhaeuser document showing that very significant foreclosure from their exclusive contracts in the, in Oregon for example, this is a document that shows that 62 percent of the market was covered through either exclusive purchase arrangements between Weyerhaeuser and large landowners, or non-efficiency-based trades were the, were linked to the exchange of the alder sawlogs from that landowner. Only 33 percent according to JA 901 show, in Oregon, was projected to be open market bidding. Weyerhaeuser acquired, when it was then at a 65 percent market share, acquired the dominant seller, a built-in monopsony in British Columbia and it's five, 15 to 20-year exclusive forest licenses. That kind of foreclosure, linked with the anticompetitive behavior

they engaged in that was a variety of bidding practices, some of it was overbuying, some of it was manipulating bidding back and forth, and then putting the last bid in terms of that cost on the other side.

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

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

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

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

MR. HAGLUND: We do not agree as to the

evidence in this case. We have evidence in this case that we cited to in our brief that when you adjust, as against the Longview mill which our client was literally right next door to, when you adjust for the fact that Weyerhaeuser supplied half of the raw material needs of the Longview mill at way below market transfer prices, when you adjust those to the average price they paid other third parties for logs, the Longview mill ran at a loss for a significant part of the, of the predation period. We do have the evidence in this case to contend --

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

MR. HAGLUND: If Brooke Group is applied --

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

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

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

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

MR. HAGLUND: If the Court concludes the Brooke Group applies to this case, then the instruction

was incomplete, it was not correct, and we would be entitled to a remand and a chance to retry the case.

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

MR. HAGLUND: Well, the recoupment is not in the output end of things. The recoupment is the opportunity to drive log costs down to recoup the extra costs you pay during the predatory period. And we had evidence in the record that a former executive from Weyerhaeuser testified that they had used this strategy multiple times, that when it was questioned by some in top management that the head of a division would always say once we either acquire or get rid of a competitor, we will recoup those costs many fold. That's at JA 260, Cliff Chulos. We also had at JA 903 a planning document in 2001 where Weyerhaeuser was showing in that PowerPoint chart the expectation that log prices would be going down in '01, '02, '03, and for every 2 percent change downward it was an extra $2 million in profits to the bottom line. There was no plan to pass on the benefits of those lower input prices to consumers. Obvious consumer lack of benefit in that situation.

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

But I would like to point out that they never preserved the issue of whether or not the standard that the Ninth Circuit in dictum stated was as a whole sufficient to guide the jury as to a definition of anticompetitive conduct. At page 43 of their brief after quoting this paragraph they so criticize, they note, although that statement of the law -- this is 43 of the Ninth Circuit brief, not the blue brief that you have -- although that statement of the law may have been acceptable when Reed Brothers was decided, it is not in the wake of Brooke Group for reasons explained above. The point here is that they never made any charge in the

Ninth Circuit that the instruction was flawed independent of Brooke Group. Now we concede, if Brooke Group applies, the instruction was -- was -- is wrong, and the case should be reversed and remanded. But the second point that they try to make in their briefing is not properly preserved. And in fact, I'd like to point out that they contributed to the linguistic framework of this instruction in a very significant way. First --

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

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

JUSTICE SCALIA: Regardless of Brooke Group.

JUSTICE SOUTER: But isn't that something that we've got to consider because if, if we disagree with them on Brooke Group, we've got to do it in the course of making a choice between a Brooke Group instruction and something else, and the only something else we've got right now is what we have in this case and we ought to, we ought to decide whether in fact that is good enough.

MR. HAGLUND: I agree with that.

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

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

JUSTICE SOUTER: I'll stipulate to that.

MR. HAGLUND: Right.

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

MR. HAGLUND: That's correct. And I suggest that you look to the type of formulation I gave a little earlier where you're looking at how much did the defendant push the market to levels that are above where it otherwise would have been. It's not too far from the test that is proposed by the State at page 29 of their

brief where they suggest it's, that the conduct be measured by whether it raised the price that the buyer's rivals had to pay for the input beyond a level that could be justified or explained by other market or exogenous factors and substantially affected the ability of the buyer's rivals to compete for the input. The eight States, all of which have concerns both as sellers into these vulnerable resource markets and for citizens and companies in their own resource State, laden States, whether it's mineral, whether it's agriculture, they have that concern and they've offered that test that's not too far from what I posited as a way to improve the instruction that Weyerhaeuser invited.

I'd like to make one further point on that subject and that is, if you look at the opening statement of their counsel, the closing, he used that very language. They were going to put on witnesses who would all state that they never bought more than they needed, they never paid more than necessary. That same litany was put to 13 different witnesses.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Haglund.

Mr. Pincus, you have two minutes remaining.

REBUTTAL ARGUMENT OF ANDREW J. PINCUS

ON BEHALF OF PETITIONER

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

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

It's true that we did not request a Brooke Group instruction because the district court had ruled that Brooke Group didn't apply at the summary judgment phase. We did object to the instruction proposed by the district judge on the grounds that it did not conform with Brooke Group in order to preserve our argument here and we believe that that objection gives the Court the power to adopt an intermediate rule, but it isn't exactly what we requested and there are decisions in the court of appeals of to that effect.

With respect to the question about purchasing more logs than they needed, as we say in our briefs we think that that claim can't really be separated from the predatory pricing claim here because

the argument is that by purchasing more logs the price was driven up and it's the increased price, that's the impact that respondent complains of. So creating a separate overbuying claim that relies on price for impact would be the same thing as saying on the sell side you can have an overselling claim regardless of whether you flunk the Brooke Group standard with respect to prices, and that's just going to undercut the certainty that this Court has prescribed.

With respect to the document that Mr. Haglund cited, 901A about the inputs, that document is described in testimony in the joint appendix at 571A to 573A, and that's a hypothetical look at what the market might would look like if current, past purchasing patterns had continued. It's not a document that in any way says that the various sources of log supply were locked up and it doesn't indicate that, and in fact there's nothing in the record to indicate what the percentage of logs were that were available to Weyerhaeuser by long-term contract, in contrast, as I said, to the testimony in the record that indicates that respondent got between 30 and 50 percent of its logs through those long-term sources.

With respect to the proper disposition of the case, in the Boyle case this Court made clear that

where there's no, not sufficient evidence in the record -- I'm sorry, my time is up.

CHIEF JUSTICE ROBERTS: You can finish your sentence.

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

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

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