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No. 05-381

In the Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

ROSS-SIMMONS HARDWOOD LUMBER CO., INC.,

Respondent.

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

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondent's choice of emphasis is revealing. It spends comparatively little space addressing whether the *Brooke Group* test applies to allegations of buy-side predation, the issue actually before this Court. Instead, it devotes much of its brief to a fanciful description of its factual contentions below. See Resp. Br. 3-21. This account is inaccurate and misleading in almost every particular. That is not surprising, because respondent for the most part relies on (and distorts), not the record of this case, but extra-record material that is not properly before the Court at all.[1] So as not to leave the Court with a factual misimpression, we address below some of respondent's most outlandish assertions.

The more important point for present purposes, however, is this: respondent acknowledges that its factual discussion is simply irrelevant to the question presented by expressly recognizing that the Ninth Circuit's judgment cannot survive if the *Brooke Group* test applies to buy-side conduct. See Resp. Br. 49 ("If *Brooke Group* applies, * * * then the decision of

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[1] To offer just one example, respondent claims (at 21) that alder logs are 83% come-along, citing *Westwood Exh.* 2740, though that evidence is not in the record here and is contradicted both by the evidence in this case (see J.A. 750a (69% of alder is come-along)) and by other evidence in the *Westwood* case (see *Westwood Exh.* 2685 (70% of alder is come-along)). Parties often rely on scholarly and similar published materials in addressing matters such as national or international economic conditions; we did so in our opening brief. See Pet. Br. 43. But it is quite another matter to use extra-record materials to describe *the specific facts of the case being litigated*, as respondent does throughout its brief. "In the normal situation, attempts to rely on nonrecord facts in appellate courts are 'unprofessional conduct.' * * * Such an effort [to rely on evidence that is not part of the certified record], as well as any argument based thereon in the brief or petition, has consistently been condemned by the Court." R. Stern et al., SUPREME COURT PRACTICE 650 (8th ed. 2002).

the Ninth Circuit should be reversed."). Because the half-hearted contentions that respondent does offer challenging the vitality and applicability of *Brooke Group* are wholly lacking in merit, the judgment below should be reversed. Indeed, because the "monopoly broth" of non-price claims offered by respondent quite clearly cannot support a judgment in its favor, outright dismissal of the case is warranted.

A. *Brooke Group* Applies To Allegations Of Buy-Side Predation.

As we argued in our opening brief, application of the *Brooke Group* standard in this case follows directly from the analysis articulated in the Court's recent Section 2 decisions. It is now a cardinal principle of antitrust law that "[m]istaken inferences [of anticompetitive behavior] and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'" *Verizon Communications, Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) (citation omitted). Because it is easy for juries to confuse competitive pricing with predatory conduct, objective standards are necessary in this context to prevent "false positives." See Pet. Br. 9-10.

That understanding applies with full force to claims of buy-side predation because competition by buyers that increases the price paid to sellers "is almost certainly moving price in the 'right' direction." *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983) (Breyer, J.). As the Solicitor General explains, "aggressive bidding by a buyer in an upstream market is often (and indeed usually) procompetitive." U.S. Br. 16. At the same time, abandonment of *Brooke Group*'s objective test on the buy side would produce a subjective standard that is not manageable by courts, is incomprehensible to juries, provides no intelligible guidance to businesses, and thus inevitably "discourage[s] the competitive enthusiasm that the antitrust laws seek to

promote." *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 775 (1984).

This case illustrates the wisdom of the Court's approach: a less efficient competitor is seeking to hold Weyerhaeuser liable for taking advantage of the efficiencies and plant improvements it achieved through more than $80 million in investments. See Pet. Br. 7. If adopted, respondent's approach would make it costly for the most productive firms to innovate, discourage competition and investment by putting companies at risk of being haled into court (where they will be judged under a murky and unpredictable standard) whenever they take advantage of their increased productivity, and ultimately cause harm to consumers.

***1. Respondent May Not Benefit from an Elasticity Exception to* Brooke Group.** Respondent recognizes that competitive bidding may have desirable effects (at 29), but it insists that no such effects are possible in this case because the alder market is inelastic. Resp. Br. 18-21, 29; see also State Am. Br. 19. This argument, which was not presented to the district court or jury, is wrong both as a matter of economic theory and as a matter of fact.

To begin with, as we argued in our opening brief (at 32-34) and as the Solicitor General emphasizes (U.S. Br. 24-26), the elasticity of the market ultimately is completely beside the point in a predatory buying case. Even in the unlikely event that no additional alder were logged or planted as prices went up, consumers would benefit if the most efficient producers obtained scarce inputs. In arguing to the contrary, respondent reads the Solicitor General to acknowledge that predatory bidding "is more readily accomplished in a natural resource market with limited supply." Resp. Br. 34. But respondent omits the rest of the Solicitor General's analysis: because "increased purchasing by a large buyer, which is usually a manifestation of procompetitive expansion, will cause an increase in the bid price (and thereby generate alle-

gations of predatory bidding)," "an inelastic market is precisely where the need to distinguish between procompetitive and anticompetitive bidding is *most* acute." U.S. Br. 24-25 (emphasis added).

Moreover, the alder log supply *is* responsive to price. As we showed in our opening brief (at 33), the record demonstrates that almost one-third of alder is not harvested on a come-along basis; there is no reason to doubt that the availability of those logs is directly related to price. Even as to come-along timber, trial testimony by respondent's former manager confirmed that, as prices fall, "you have people who just don't log. Every time you have a drop in prices, the marginal supplier says, I'm not willing to sell at that price. Availability drops off." J.A. 631a. Evidence also showed sometimes sharp variation in alder production from year to year. J.A. 923a. Despite respondent's argument to the contrary, the publicly available data (including articles cited by respondent at 19-20 nn. 25, 27, 29) also confirms that owners of timber generally respond to changes in price.[2] Respondent certainly has not proven that the alder supply is inelastic.

2. The Ninth Circuit's Decision in* Reid Brothers *Offers No Reason To Distinguish Between Buy- and Sell-Side Predation. Respondent and its amici attempt to draw support from the Ninth Circuit's decision in *Reid Brothers Logging Co.* v. *Ketchikan Pulp Co.*, 699 F.2d 1292 (9th Cir. 1983). That decision, they say, involved a claim "almost identical"

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[2] See, *e.g.*, J. Prestemon & D. Wear, *Inventory Effects on Aggregate Timber Supply*, Proceedings of the 1998 S. Forest Econ. Workshop 26, 28 (1999) ("The elasticity of supply for a temporary price change * * * is universally positive and significant for both industry and [non-industry] ownerships."); D. Newman & D. Wear, *Production Economics of Private Forestry: A Comparison of Industrial and Nonindustrial Forest Owners*, 75 AM. J. AGR. ECON. 674, 683 (1993) ("We reject the hypothesis that [non-industrial] landowners do not respond to price signals.").

to this one, and therefore goes to show that the outcome here "did not produce a false positive." Resp. Br. 30; see also Forest Industry Am. Br. 24-27. That contention is wrong.

Reid Brothers was hardly identical to this case. The allegations there principally concerned, and the Ninth Circuit's discussion was directed almost entirely at, a claim of "broad conspiracy by the defendants" under *§ 1* of the Sherman Act. 699 F.2d at 1295; see also *id*. at 1295-99. Because concerted action is inherently more suspicious than the unilateral pricing conduct at issue here (see, *e.g.*, *Copperweld*, 467 U.S. at 768-69), *Reid Brothers* says nothing about the plausibility of respondent's allegations in this case.

Respondent also goes astray in relying on the legal analysis of *Reid Brothers*. The Ninth Circuit there held that claims of buy- and sell-side predation are judged under *the same* standard. To be sure, *Reid Brothers* rejected an "objective test" for predation. 600 F.2d at 1298 n.5. But in doing so, it relied exclusively on the then-applicable Ninth Circuit predatory selling standard, which held that *above-cost* pricing could constitute actionable *sell-side* predation. *Ibid*. (citing *William Inglis & Sons Baking Co.* v. *ITT Cont'l Baking Co.*, 668 F.2d 1014, 1034 (9th Cir. 1981)). This holding, which predated *Brooke Group* and *Matsushita*, is no longer good law. In light of *Reid Brothers*' different facts, its recognition that buy- and sell-side conduct should be treated alike, and its erroneous rejection of an objective price-cost test for predation, the decision provides no support for the view that application of *Brooke Group* is unnecessary to avoid chilling procompetitive conduct. See Pet. Cert. Reply. Br. 6-7 n.7.

3. A "Monopoly Broth" Theory May Not Displace the* Brooke Group *Analysis. Respondent tries to avoid *Brooke Group* by asserting that above-cost, but supposedly predatory, prices may be used to establish a Sherman Act § 2 violation when it is advanced as part of a so-called "monopoly broth" – that is, when the plaintiff makes out its case by serv-

ing up a gumbo of assertedly anticompetitive acts, no one of which individually would give rise to liability. Resp. Br. 33; see also AAI Br. 18. But even if the monopoly broth theory ever has validity (a point we address below), it cannot help respondent here.

Looking only to the proceedings in this case, respondent's "broth" theory cannot save the verdict because the instruction here allowed the jury to base liability *exclusively* on a finding that Weyerhaeuser engaged in above-cost predation. The jury was told that anticompetitive acts are illegal and then was instructed that, if it found Weyerhaeuser to have "paid a higher price for logs than necessary," "you may regard it as an anti-competitive act." Pet. App. 14a n.30. Given the trial's heavy focus on Weyerhaeuser's pricing practices (see p. 13 & n.7, *infra*), there is every likelihood that the jury premised liability on just such a finding. The presence of other allegations does not ameliorate that danger.

More fundamentally, respondent is wrong on the law. The holding of *Brooke Group* would be wholly vitiated if plaintiffs could circumvent its objective standards through the simple expedient of combining their assertion of predatory pricing with allegations of other sorts of anticompetitive conduct. In such a situation, just as in *Brooke Group* itself, there would be a significant danger that the jury would impose liability because it confused desirable competition with predation, an outcome that would "'chill the very conduct the antitrust laws are designed to protect.'" *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Co.*, 509 U.S. 209, 226 (1993) (citation omitted). That is why, both before and after *Brooke Group*, courts consistently have rejected predatory pricing claims in the absence of below-cost pricing, even when the plaintiffs also alleged a host of other exclusionary practices. See, *e.g.*, *Taylor Publ'g Co.* v. *Jostens, Inc.*, 216 F.3d 465, 477-79 (5th Cir. 2000); *Stearns Airport Equip. Co. Inc.* v. *FMC Corp.*, 170 F.3d 518, 527-34 (5th Cir. 1999); *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 483-86

(1st Cir. 1988) (Breyer, J.); *Directory Sales Mgmt. Corp.* v. *Ohio Bell Tel. Co.*, 833 F.2d 606, 613-14 (6th Cir. 1987); *Barry Wright*, 724 F.2d at 230-36.

4.* Brooke Group*'s Analysis Remains Sound. Little need be said about respondent's curious argument that *Brooke Group* should be reconsidered. See Resp. Br. 35-37. Although respondent and its *amici* assert that "more recent scholarship" has undermined *Brooke Group*'s rationale (AAI Br. 11-12; Resp. Br. 35-37), seven of the ten articles cited in support of this proposition by respondent's *amicus* AAI actually predate the *Brooke Group* decision. AAI Br. 12-13. In reality, most current scholarship fully supports *Brooke Group*'s holding. See, *e.g.*, III P. Areeda & H. Hovenkamp, ANTITRUST LAW, ¶¶ 723, 725, 735, 739 (2d ed. 2002); E. Elhauge, *Why Above Cost Price Cuts to Drive Out Entrants Are Not Predatory – and the Implications for Defining Costs and Market Power*, 112 YALE L.J. 681, 754-821 (2003).[3] Even more tellingly, this Court also has continued to cite and apply *Brooke Group* without reservation. See, *e.g.*, *Volvo Trucks N. Am., Inc.* v. *Reeder-Simco GMC, Inc.*, 126 S. Ct. 860, 870, 873 (2006); *Trinko*, 540 U.S. at 414.

5. There Is Nothing Unmanageable About Applying* Brooke Group *to the Buy Side. Respondent also is incorrect in contending that there is no practical way to apply the below-cost pricing prong of *Brooke Group* to predatory buying claims. Resp. Br. 41; see also Forest Industry Am. Br. 14.

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[3] Even the scholarship cited by respondent does not endorse its position here. See, *e.g.*, P. Bolton, J. Brodley, & M. Riordan, *Predatory Pricing: Strategic Theory and Legal Policy*, 88 GEO. L.J. 2239, 2249 (2000) ("price [must] be below some measure of cost" for a predatory pricing claim to succeed). Professor Kahn expressly recognized that his opinions are "contrary to respectable economic opinion and Supreme Court dicta." A. Kahn, *Telecommunications, The Transition from Regulation to Antitrust*, 5 J. TELECOMM. & HIGH TECH. L. 159, 171-72 (2006).

Respondent bases its argument on the assertion that the price-cost inquiry on the sell side is easy because it involves looking at a simple "unitary event with an ascertainable sale price for the transaction," while on the buy side "the predatory act of purchasing an input is only one of many constituent input purchases and other costs." Resp. Br. 41.

But this is a false dichotomy. Sell-side claims require proof of the cost of producing the product at issue. And determining the cost against which the allegedly predatory sales price must be compared is not always an easy matter, as when many products are produced in a common facility and/or have multiple inputs. *Brooke Group* nevertheless applies in that situation. See III Areeda & Hovenkamp, *supra*, ¶ 742a, at 457 ("Measurement of appropriate price/cost ratios when a firm produces multiple products and earns different returns is terribly complicated"); *id.* ¶ 742c, at 460. The issue on the buy side is identical – comparing the sales price of goods with the cost of producing the goods.

As on the sell side, so long as the sales price of a product exceeds its cost (taking into account the allegedly excessive amount paid for one of its inputs), there is no reason to doubt that the amount paid for the input was dictated by tough competition rather than predation. See generally *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 594 (1986). The fact that other inputs also go into the product is wholly immaterial to this calculus. The Solicitor General thus is correct in observing that "[t]he *Brooke Group* standard can easily be applied to a claim of predatory bidding," with the plaintiff required to show "that the defendant suffered (or expected to suffer) a short-term loss as a result of its allegedly higher bidding." U.S. Br. 21. That would be so "even if the cost of the relevant input constituted only a small percentage of the cost of the finished product." U.S. Br. 22. Of course, in this case, where the relevant input (alder sawlogs) constituted as much as 75 percent of the total cost of the finished product (J.A. 169a), the connection between a predato-

rily high price paid for the input and any loss suffered by the defendant would be readily apparent.

Respondent also makes the related argument that there "is no workable [price-cost] test for this market" because Weyerhaeuser has large timber holdings and (assertedly) provided some of this timber to its Longview mill "at levels significantly below the prices for identically graded logs delivered to defendant's five other mills." Resp. Br. 41, 42; see also *id.* at 13-14. On the record here, this contention is immaterial to the claim before the Court; because the jury found the relevant geographic market to be the Pacific Northwest as a whole (J.A. 967a), cost data regarding a single facility can have no legal significance.[4]

Respondent's argument also lacks any logical foundation. Respondent appears to be contending that the Sherman Act precludes a vertically integrated competitor from taking advantage of structural efficiencies such as access to low-cost raw materials – or, presumably, innovative manufacturing processes that similarly hold down costs – when deciding whether it is profitable (and permissible) to bid aggressively for necessary inputs. We are not aware of any support for this far-fetched proposition, and respondent provides none. As for respondent's argument that juries would be confused when asked to apply the *Brooke Group* test in "a multi-tactic antitrust case" (at 43), that assertion is belied by the many deci-

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[4] In any event, internal purchases at Longview were not priced differently than purchases from third parties. Regression analysis confirmed that "[o]nce you controlled for the sort quality of the logs, there was no difference [in prices paid internally versus to third-parties]." J.A. 705a; see also J.A. 707a. Moreover, the purchases and sales at Longview were hardly exceptional in quantity relative to other mills. See J.A. 764a-769a (providing financial information for each mill). Thus, even assuming *arguendo* that there was a subsidy at Longview, there is no reason to believe that it had the potential to produce an anticompetitive effect.

sions, cited above (at 6-7), in which courts imposed just that requirement. Certainly, *Brooke Group* is more intelligible than respondent's "monopoly broth."

In addition, it bears emphasis that respondent says nothing at all about application of the *Brooke Group* recoupment requirement. As we showed in our opening brief, that requirement has received special emphasis from courts and the Department of Justice as an essential and easily administered identifier of a predatory scheme. See Pet. Br. 17, 25; see also U.S. Br. 23. After all, predation is not "rational" absent a realistic prospect of recoupment (*Matsushita*, 475 U.S. at 588) because, in such circumstances, the predator is simply throwing money away. That point is just as true of predatory buying as of predatory selling. Accordingly, absent proof that the alleged predator "would likely" recoup its losses, "the plaintiff's case has failed." *Brooke Group*, 509 U.S. at 226. Respondent makes absolutely no attempt to show that this requirement is inapplicable to, or unadministrable when applied to, a case alleging buy-side predation.[5]

B. The Instruction In This Case Gave No Meaningful Guidance To The Jury.

In addition, as we showed in our opening brief (at 37-44), the vague language of the "marshmallow" instruction in this case was flawed for reasons other than its departure from *Brooke Group*. Respondent is wrong in contending (at 2, 22,

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[5] Respondent's argument that "Weyerhaeuser objected to and never sought a separate recoupment instruction" (at 45 n.42) is extremely misleading. As we detail in our opening brief, Weyerhaeuser consistently took the position that the jury should be instructed on both elements of the *Brooke Group* test. See Pet. Br. 8. When the district court proposed to instruct the jury only on recoupment, Weyerhaeuser objected on the ground that such an instruction would be incomplete. The district court responded by dropping recoupment from the jury charge; Weyerhaeuser objected again. See *ibid*.

23, 48) that Weyerhaeuser did not properly preserve this objection to the instruction. Weyerhaeuser insisted at all times that the jury should be instructed according to *Brooke Group*, consistently objected to any proposed instruction premising liability on whether prices were "higher" than necessary, and objected to the instruction as actually given. See Pet. Br. 7-9. This course was more than sufficient to preserve Weyerhaeuser's objection to the instruction's "marshmallow" language. See IX MOORE'S FEDERAL PRACTICE, § 51.32[2], at 51-37 to 51-41 (3d ed. 2006). Moreover, as the Solicitor General shows (U.S. Br. 27-28), the balance of the instruction did not temper the objectionable language. Respondent says the instruction here was "derived" from ABA model antitrust instructions (at 47), but that is true only in the sense that chicken salad is derived from a chicken; neither the 1999 nor the 2005 model instructions include anything resembling the "more than needed/higher than necessary/fair price" language that was determinative in this case.[6]

Respondent makes no serious attempt to defend the language of the instruction as given. Instead, it complains that our opening brief relies heavily on "opinions that were crafted by Justice Breyer when he was writing as a judge of the First Circuit"; respondent finds that problematic because Justice Breyer has since stated that he tends to disfavor abso-

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[6] Respondent also asserts (at 47-48) that the language in the instruction can be traced to *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 & n.32 (1985). Its amici likewise rely on *Aspen Skiing* in seeking to uphold the verdict here. AAI Br. 6; State Am. Br. 26-29. But *Aspen Skiing*, a non-pricing case that involved a refusal to deal, presented a sort of "restraint" on trade that did not trigger the concern about chilling core competitive conduct that arises with respect to pricing decisions. Moreover, the language from *Aspen Skiing* quoted by respondent required a finding that the challenged conduct "impaired competition" (Resp. Br. 47 (quoting 472 U.S. at 605 & n.32)), which was not part of the instruction in this case.

lute legal rules. Resp. Br. 46. In fact, our opening brief (at 38) relied on repeated holdings by this Court rejecting a vague antitrust "reasonableness" standard. Respondent makes no attempt to reconcile its position with those decisions. As for Justice Breyer, his writings speak for themselves. We note, however, that the lecture cited by respondent emphasized "the law's need for administrable rules and related certainty," discussing antitrust law as an example. S. Breyer, Lecture at the AEI-Brookings Joint Center, *Economic Reasoning and Judicial Review*, at 4, 7 (Dec. 4, 2003).

Indeed, it is respondent that disregards the considerations that underlie not only *Brooke Group*, but the entire body of the Court's modern § 2 decisions. The Court has developed objective rules that separate the "harmful price-cutting goats from the more ordinary price-cutting sheep" (*Barry Wright*, 724 F.2d at 231-32), thus providing protection for the hard competition that the antitrust laws were intended to encourage. Those rules also offer clarity: they are "clear enough for lawyers to explain * * * to clients" (*Town of Concord* v. *Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, C.J.)) and therefore provide the sort of guidance that is essential to avoid chilling legitimate competition. Respondent's approach would fatally undermine that structure by fostering arbitrary verdicts, protecting inefficiency, and discouraging competition. It should be rejected.

C. Judgment Should Be Entered For Petitioner.

1. The Verdict Here Rests on an Improper Ground and Cannot Stand. If this Court holds that *Brooke Group* applies, the remaining issue concerns the proper disposition of the case. Respondent concedes that its predatory buying claim cannot succeed under the *Brooke Group* standard, but maintains that the case should be remanded so that the Ninth Circuit may "consider the alternative bases for affirming the jury's general verdict." Resp. Br. 49. Respondent reasons that there is a distinction between general verdicts based on mul-

tiple "*factual specifications*" and those based on multiple "*legal theories* of liability," and that a general verdict will be upheld "if any one of the factual specifications for liability is deemed to be supported by substantial evidence on appellate review." Resp. Br. 49 n.45 (emphasis in original). This theory, however, cannot save the verdict here.

In fact, the prevailing rule "in civil cases is that a new trial is usually warranted if evidence is insufficient with respect to *any one* of multiple claims covered by a general verdict." *Gillespie v. Sears, Roebuck & Co.*, 386 F.3d 21, 29 (1st Cir. 2004) (Boudin, J.) (internal quotation marks omitted; emphasis added). This "accord[s] with the Supreme Court precedents that require remand in civil cases when one of several claims or theories encompassed in a general verdict was flawed (*e.g.*, because of a mistaken jury instruction)." *Id.* at 30; see also *Hurley* v. *Atlantic City Police Dept.*, 174 F.3d 95, 121 (3d Cir. 1999); *Dillard & Sons Constr., Inc.* v. *Burnup & Sims Comtec, Inc.*, 51 F.3d 910, 915-17 (10th Cir. 1995); *Braun* v. *Flynt*, 731 F.2d 1205, 1206 (5th Cir. 1984) (per curiam, denying pet. for rehearing); *E.I. Du Pont de Nemours & Co.* v. *Berkley & Co., Inc.*, 620 F.2d 1247, 1258 (8th Cir. 1980).

Under this approach, it is possible that a verdict may be "rescue[d] * * * where [the appellate court] could be reasonably sure that the jury in fact relied upon a theory with adequate evidentiary support." *Gillespie*, 386 F.3d at 30. But that is not this case. To the contrary, here the argument and presentation of evidence at trial focused substantially on the predatory buying claim,[7] and respondent's theory of damages turned solely on the inflated log costs that assertedly followed from that conduct. See Pet. Br. 49 n.25. Respondent

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[7] See, *e.g.*, J.A. 231a-232a, 243a-244a, 257a-263a, 298a-302a, 320a-324a, 333a, 336a, 349a-358a, 383a-384a, 407a-411a, 414a-415a, 502a-506a, 553a-554a, 563a, 592a, 617a, 636a, 641a, 660a-661a, 677a-678a, 731a, 736a.

cannot possibly establish a reasonable likelihood that the jury based its decision on some other theory. In these circumstances, so long as *Brooke Group* applies the law is clear that affirmance of the verdict is impermissible.

If the case is remanded for a new trial, respondent is not entitled to retry its predatory buying claim. As we argued in our opening brief (at 46-49), a retrial is not appropriate when the evidence presented at the first trial "would not suffice, as a matter of law, to support a jury verdict under the properly formulated" standard. *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 513 (1988). And as we also showed in our opening brief (at 6, 46-48), respondent made no attempt to introduce evidence satisfying either prong of the *Brooke Group* test. Respondent does not argue to the contrary now.[8] That precludes

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[8] "*Brooke* holds that no matter what the defendant's anticompetitive intent, likelihood of recoupment must be established by *objective evidence*." III Areeda & Hovenkamp, *supra*, ¶ 738a, at 404 (emphasis added); *id*, ¶ 729b, at 349 ("Proof of recoupment generally requires expert evidence concerning the magnitude of the recoupment price increase, the volume of recoupment sales, and the length of the recoupment period."). But respondent only cites testimony by former Weyerhaeuser employees that they thought the company would be able to make up any profits lost by paying too much for logs. Resp. Br. 45 n.42. That evidence does not come close to showing that Weyerhaeuser objectively had a "reasonable prospect" or "dangerous probability[] of recouping its investment in below-cost prices." *Brooke Group*, 509 U.S. at 224. Indeed, the opening of new competing sawmills *during the alleged predation period* is "'particularly damaging'" to respondent's case. See Pet. Br. 48 (quoting III Areeda & Hovenkamp, *supra*, ¶ 729c2, at 351). The record confirms that there were no significant barriers to entry by new mills, which also precludes a finding that recoupment was probable. 4/16/03 PM Tr. 60-64, 113-115. In this regard, we note that the Ninth Circuit (Pet. App. 23a n.57) erred in stating that 31 alder sawmills closed during the alleged predation period. See also U.S. Br. 2. Only nine mills closed during that period, while four new ones opened. The other 22 mills closed between 1980 and

any further proceedings with respect to respondent's price claim.[9]

For similar reasons, respondent is wrong in arguing that it would be entitled to a new trial on its "overbuying" claim if the Court reverses on *Brooke Group* grounds. See Resp. Br. 50. As we demonstrated in our opening brief, the claim that Weyerhaeuser purchased too many logs cannot meaningfully be separated from the allegation that the company paid too much for the logs, at least where (as here) there is no evidence that the purchases made it impossible for the plaintiff to obtain the input. Pet. Br. 35-37. On the one hand, the cost of "overbuying" logs will be fully factored into the *Brooke Group* cost-revenue comparison; on the other, allowing such a claim to proceed separately from the predatory pricing allegation would provide an easy route to evasion of the *Brooke Group* requirements in most cases. And even if that were not so, the record here demonstrates beyond dispute that Weyerhaeuser made productive use of all the logs it acquired. See Pet. Br. 36 & n.15. Respondent makes no response at all to this point.

2. Because Respondent's "Other Acts" Claims Are Wholly Without Merit, Dismissal of the Case Is Warranted. This Court's typical practice is to remand a case for disposition of remaining claims when, as here, the judgment must be set aside because a principal basis for liability is insupportable. In this case, however, respondent has chosen to describe

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1996, before the period of alleged predation, and a time when other new mills also opened. See J.A. 740a.

[9] We note in our opening brief (at 47) that there is no evidence in this case that Weyerhaeuser's costs exceeded its price under *any* standard, a proposition that respondent does not deny. We therefore agree with the Solicitor General's observation that elaboration of the short-term loss requirement should be left to the lower courts to address in cases in which that issue is presented.

the basis of those claims in detail[10] – and it is apparent both from respondent's own account and from the undisputed facts that the remaining claims cannot support a judgment against Weyerhaeuser.

Respondent's brief is useful in that it provides this Court with a glimpse of what today is, unfortunately, standard operating procedure for plaintiffs asserting § 2 claims: mix together as many different assertions of "anticompetitive conduct" as possible and argue that the entire "monopoly broth" establishes a § 2 violation. The approach apparently is designed to discourage a close evaluation of the economic rationality of the various claims and instead to convince the fact-finder to rule for the plaintiff because of the sheer variety and number of factual allegations.

The Court should take the opportunity presented by respondent's argument to provide the lower courts with guidance regarding adjudication of § 2 claims, affirming that focused analysis of the plaintiff's various allegations is essential to avoid deterring manifestly procompetitive conduct. See *Brooke Group*, 509 U.S. at 230 (the Court will review sufficiency of the evidence "when the issue is properly before us and the benefits of providing guidance concerning the proper application of a legal standard and avoiding systemic costs associated with further proceedings justify the required expenditure of judicial resources"); *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 345 (1979) (noting courts "must be especially alert to identify frivolous claims"). With that goal in mind, we address each of respondent's arguments below.

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[10] In addition to the "overbuying" claim, which we already have addressed, the court of appeals described the non-price claims as "entering into exclusive agreements for sawlogs [] and making misrepresentations to state officials to obtain sawlogs from state forests." Pet. App. 18a n.42.

a. Respondent's argument that Weyerhaeuser made anticompetitive use of exclusive contracts (at 9) is legally and factually incorrect. Respondent has presented absolutely no evidence that Weyerhaeuser used exclusive contracts to foreclose a substantial percentage of the alder log market – a critical deficiency in a claim that such agreements were anticompetitive. See Pet. Br. 49; 4/16/03 PM Tr. 115:8-13 (93 to 95% of standing alder timber supply was "up for bids" by anyone).[11] To the contrary, it is undisputed that respondent, had it been willing to pay, was at all times able to procure logs. See Pet. Br. 37 n.16. And there is, of course, nothing inherently anticompetitive about exclusive supply contracts, which "can provide significant procompetitive benefits including supply assurance, protection against price increases and long-term planning." W. Kolasky, Jr., *Antitrust Enforcement Guidelines for Strategic Alliances*, 1063 PLI/Corp 499, 505 (1998) (citing *Standard Oil Co.* v. *United States*, 337 U.S. 293, 306-07 (1949); *Tampa Elec. Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 334 (1961)).

Respondent's related assertion that Weyerhaeuser engaged in anticompetitive acquisitions (at 7-8) is equally insubstantial. None of the acquisitions identified by respondent was ever challenged by any government agency – even though, in evaluating acquisitions, the government applies a much more restrictive standard than do courts under Section

[11] Moreover, respondent's claim (at 9) that Weyerhaeuser had exclusive supply contracts with "most of" the 12 largest landowners in this region is demonstrably false. Weyerhaeuser's only exclusive contract was with Crown Pacific (which suggested the exclusive arrangement). J.A. 686a. Weyerhaeuser also had contracts providing for 70 to 80 percent of Georgia-Pacific's annual alder harvest at one of its tree farms. J.A. 558a, 559a, 611a, 612a-614a. Under those contracts, prices were negotiated monthly or quarterly and, if no price could be agreed upon, Georgia Pacific could sell the logs on the open market or use the logs in its own pulp mills. J.A. 559a; 4/15/03 PM Tr. 108:21-111:6.

2 of the Sherman Act. See, *e.g.*, *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 318 & nn. 32-33 (1962).

b. Respondent's assertion of unfair bidding practices – which, despite its prominence in respondent's brief to this Court, was not an element of its claim before the jury – is made up out of whole cloth. Respondent complains about "last-look" bidding (at 11), but this is merely the mechanism by which Weyerhaeuser allegedly increased bid prices; as such, it is part and parcel of respondent's overbidding claim. In any event, a log buyer for respondent testified that such bidding "was a standard operating practice" in the industry (J.A. 407a) even though he, in fact, *never* saw Weyerhaeuser use it. J.A. 408a. ("I have never seen Weyerhaeuser – Weyerhaeuser was always pretty firm. If they say basically $60 a ton as price, they say $60. You couldn't get any more than $60 out of them. They were set.").

Similarly, respondent's claim (at 12 & n.18) that Weyerhaeuser bid up prices and then dropped out of the bidding at the last minute is ridiculous. This theory was not presented at trial and was first unveiled in respondent's brief to this Court. The "historical example" provided by respondent (at 12 n.18 (citing 4/8/03 PM Tr. 120-127)) shows *why* this allegation has not been a part of respondent's case: it was another company (Cascade Hardwoods) that bid the price up before dropping out, leaving *Weyerhaeuser* to pay the higher price.

c. Respondent alleges that Weyerhaeuser received permission to obtain logs from state forests by making intentionally false statements to state officials. Resp. Br. 15. Leaving aside the accuracy of respondent's assertion (which Weyerhaeuser vigorously contests), it is undisputed that Weyerhaeuser ended up on the same footing as its competitors in obtaining logs from state lands. Indeed, respondent has never shown how Weyerhaeuser's assertedly false statements could have caused it harm – and has not shown, for that matter, that respondent ever purchased logs from Oregon

state lands at all. The claim that Weyerhaeuser intentionally made false statements therefore adds nothing to respondent's case.

d. Finally, respondent's attack (at 11) on Weyerhaeuser's use of its own log grading system is laughable – and powerfully illustrates all that is wrong with respondent's "blow-smoke-before-the-jury" approach to establishing antitrust liability. The log-grading system greatly enhanced efficiency and productivity, allowing Weyerhaeuser to extract more value from its logs; it was useful both to the company and to its suppliers. Nothing, moreover, prevented Weyerhaeuser's competitors, including respondent, from making use of an identical system. It would seem obvious that there is something terribly wrong with a regime, like the one proposed by respondent, that makes such an efficiency-enhancing innovation a source of antitrust liability.

e. If the Court does not itself dispose of respondent's "other act" claims, we urge it to guide any remand by making clear that respondent may not prevail by aggregating myriad insubstantial allegations into one "monopoly broth." Respondent signals its intent to do so, invoking the statement in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962), that antitrust plaintiffs need not "tightly compartmentalize[]" their claims. Resp. Br. 33. But such a theory should not support liability.

As courts generally have recognized, "[i]n *Continental Ore*, the Court held that the 'factual components' of a case should be viewed together, not the pieces of legal theory. * * * Each legal theory must be examined for its sufficiency and applicability, on the entirety of the relevant facts * * *." *Intergraph Corp.* v. *Intel Corp.*, 195 F.3d 1346, 1366-67 (Fed. Cir. 1999); see also *United States v. Microsoft Corp.*, 253 F.3d 34, 78 (D.C. Cir. 2001) (en banc); *California Computer Prods., Inc.* v. *IBM Corp.*, 613 F.2d 727, 746 (9th Cir. 1979). Respondent would turn that approach on its head by

asserting that fatal deficiencies in different legal theories (notwithstanding consideration of the entire factual record) can be cured simply by agglomerating those theories in a single case.

As Judge Becker once famously put the point in rejecting an aggregation argument under *Continental Ore*, "[n]othing plus nothing times nothing still equals nothing." *Zenith Radio Corp.* v. *Matsushita Elec. Indus. Co., Ltd.*, 513 F. Supp. 1100, 1311 (E.D. Pa. 1981);[12] see II Areeda & Hovenkamp, *supra*, at ¶ 310c2, at 141 ("Claims are not subject to aggregation [under *Continental Ore*] when there is no cardinal unit in one that can be added to any unit in another to produce a meaningful sum."). That equation, we submit, sums up all that need be said about respondent's claim here.

CONCLUSION

For the foregoing reasons and those stated in the opening brief, the judgment of the court of appeals should be reversed and the case remanded with directions to enter judgment for petitioner.

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[12] Judge Becker also observed: "In *Continental Ore* itself, the Supreme Court engaged in a detailed analysis of the record with respect to three of the four ventures which the Court of Appeals had addressed on their facts, concluding with respect to each of the three considered separately that there was enough evidence of causation to preclude a directed verdict. If the warning against 'compartmentalizing' an antitrust conspiracy case were meant to prevent a court from breaking down a plaintiff's allegation of a 'unitary' conspiracy into its component parts for purposes of analysis, the Court would not have engaged in the 'forbidden' analysis in the very same opinion in which it issued the warning." *Zenith Radio Corp.*, 513 F. Supp. at 1167-68 (citation omitted).

Respectfully submitted.

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