Weyerhaeuser's aftermath: increased vulnerability of resource-based input markets to monopsony

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I. INTRODUCTION

In its 2007 decision in *Weyerhaeuser v. Ross-Simmons Hardwood Lumber Company, Inc.*,[1] the Supreme Court extended its *Brooke Group*[2] price-cost test from the sell-side to the buy-side, holding that the analytical similarity between predatory pricing in output markets and predatory bidding in input markets warranted application of the same bright line rule. Justice Thomas's 13-page opinion for a unanimous Court is remarkable for its heavy reliance on symmetry and its willingness to ignore the economic facts of the case.

Over the last 25 years, except for *Brooke Group* and now *Weyerhaeuser*, market realities have consistently trumped per se rules

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[1] Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 127 S. Ct. 1069 (2007).

[2] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

in the Supreme Court's antitrust jurisprudence. Throughout this period, one of the hallmarks of the Supreme Court's analytical approach to antitrust has been careful consideration of economics. As the Court has emphasized, "[a]ntitrust analysis must be attuned to the particular structure and circumstances of the industry at issue."[3] Surprisingly, the *Weyerhaeuser* opinion ignored the detailed economic rationale in the Ninth Circuit opinion below, in which a unanimous panel with noteworthy antitrust expertise[4] systematically examined the reasoning underlying *Brooke Group* and concluded that its heightened standard of liability "does not apply here because this case involved predatory bidding in a relatively inelastic market, not predatory pricing."[5] Nonetheless, the Supreme Court failed to mention, let alone consider, the distinctions between inelastic input markets and the output market at issue in *Brooke Group*. The result is a dramatic departure from the unmistakable trend of the last two decades in which careful, fact-based economic analysis has been a core consideration in the Supreme Court's antitrust opinions.

Three cases exemplify this trend. The Supreme Court embraced symmetry in equating maximum and minimum vertical resale price constraints as per se illegal in *Albrecht v. Herald Co.*[6] in 1968, but relied on market realities in overruling *Albrecht*'s prohibition against maximum resale price constraints nearly 30 years later in *State Oil Co. v. Kahn*[7] in 1997. The other half of that rule, a precedent for nearly a century, was jettisoned in the Court's decision last term in *Leegin*

3 Verizon Commc'ns, Inc. v. Trinko, 540 U.S. 398, 411 (2004).

4 Circuit Judge Thomas G. Nelson, who wrote the *Ross-Simmons* opinion, has authored multiple antitrust cases during his tenure on the Ninth Circuit. Senior District Judge William W. Schwarzer is well known for significant writing in the antitrust field, both opinions and scholarship. *See, e.g.*, William W. Schwarzer, MANAGING ANTITRUST AND OTHER COMPLEX LITIGATION: A HANDBOOK FOR LAWYERS AND JUDGES (1982).

5 Confederated Tribes of Siletz Indians of Or. v. Weyerhaeuser Co., 411 F.3d 1030 (9th Cir. 2005).

6 390 U.S. 145 (1968).

7 522 U.S. 3 (1997).

Creative Leather Products, Inc., v. PSKS, Inc.[8] In another recent case, the Court in *Illinois Tool Works Inc. v. Independent Ink, Inc.*,[9] abandoned the presumption that a patent equals market power in a tying case.

Particularly in the last quarter century, antitrust law has been no slave to symmetry. As Justice Holmes has written, in what has been characterized as "the most famous sentence in American legal scholarship:"[10] "The life of the law has not been logic: it has been experience."[11] While symmetry's gain was economics' loss in *Weyerhaeuser*, the case was also a triumph for big business and its call for antitrust rules that are sufficiently clear and objective to eliminate the risk of chilling procompetitive conduct.

In equating predatory pricing with predatory bidding, the Supreme Court extended a bright line per se rule, but did so at the expense of the nation's input markets, which are now at increased risk of monopsony. By failing to explore the differences between output and input markets, the Court passed on the opportunity to develop a rule of reason standard tailored to the predatory pricing context at issue in *Weyerhaeuser*—inelastic regionally constrained resource markets. This article first explores the factual record in the series of alder antitrust cases against Weyerhaeuser, a record compressed into little more than two pages in the Supreme Court's opinion, and the record in the only other antitrust case involving a regional log market, the Ninth Circuit's 1983 decision in *Reid Bros. Logging Co. v. Ketchikan Pulp Co.*[12] These records reveal that neither case was a false positive and that both involved potent combinations of price and nonprice conduct.

This article also examines the state of the alder sawlog market since the now reversed $79 million judgment against Weyerhaeuser was entered in the spring of 2003. Data from the follow-on cases and

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8 127 S. Ct. 2705 (2007).

9 547 U.S. 28 (2006).

10 Richard A. Posner, The Federal Courts 304–05 (1996).

11 Oliver Wendell Holmes, Jr., The Common Law 1 (1881).

12 699 F.2d 1292 (9th Cir. 1983).

other industry sources indicate that Weyerhaeuser has abandoned the anticompetitive practices challenged by Ross-Simmons at trial and that the competitive health of the alder sawlog market has improved significantly as a result. Within a period of just over three years following the *Ross-Simmons* verdict, Weyerhaeuser's market share declined from over 75% to less than 50% while the production and profitability of its smaller rivals grew substantially. These changes in the relevant market brought on by Ross-Simmons and 13 other plaintiffs in five antitrust cases against Weyerhaeuser speak loudly to the merits of that litigation and to the procompetitive force of private civil enforcement of the Sherman Act.

Finally, this article shows how the new price-revenue test is unworkable as a practical matter and projects that monopsonists will develop strategies to maximize the *Weyerhaeuser* safe harbor for input pricing. In the absence of countervailing regulatory constraints, the long term effect will be increased concentration over time in regional resource and agricultural markets to the detriment of competition in those markets, input sellers generally, and ultimately consumers. A number of suggestions are offered to resource market regulators to improve market transparency and to ameliorate the considerable impact of the immunity afforded large-buyer pricing behavior in these markets.

II. THE ALDER ANTITRUST RECORD AGAINST WEYERHAEUSER

The complete alder antitrust record against Weyerhaeuser encompasses five cases that were pending between the end of 2000 and the fall of 2007 and all of which have now been fully resolved. The *Ross-Simmons* case was filed in December, 2000, tried in April, 2003, affirmed by the Ninth Circuit in May, 2004, reversed and remanded by the Supreme Court in February, 2007 and settled for $17 million in August, 2007. Three cases were filed shortly after the *Ross-Simmons* verdict in 2003.[13] Two of these cases settled in 2004 for a total

[13] Westwood Lumber Co. v. Weyerhaeuser Co., Civil No. 03-0551-PA (D. Or.); Coast Mountain Hardwoods v. Weyerhaeuser Co., Civil No. 03-0552-PA (D. Or.); Washington Alder v. Weyerhaeuser Co., Civil No. 03-073-PA (D. Or.).

of $48.5 million.[14] The third case was tried in 2004 and produced a jury verdict of $5.2 million, which was trebled to $15.6 million. Because that case benefited from significant issue preclusion arising from the *Ross-Simmons* case, its fate on appeal was tied to the outcome in *Ross-Simmons*, which led to its reversal by the Ninth Circuit after the Supreme Court handed down its decision. That case was settled in September, 2007 for $4.2 million. A fifth case filed in 2004 on behalf of five plaintiffs was settled in 2005 for $13.1 million. All told, Weyerhaeuser paid $82.8 million to 13 plaintiffs in the 5 cases. This article relies upon the extensive record in all five cases as well as follow-up interviews with and confidential data provided by knowledgeable sources. The most extensive public record of the five cases is contained in the *Ross-Simmons* case, which is referred to herein as either *Ross-Simmons* or *Weyerhaeuser*.[15]

In 1980, Weyerhaeuser entered the alder lumber business with the purchase of two sawmills in Washington. By 1995, with a market share of approximately 50%, Weyerhaeuser's alder division managers devised a multipronged plan to consolidate the industry in Weyerhaeuser's hands and to amass an 85% market share. The plan's primary components were competitor acquisitions, exclusive supply agreements, and exclusionary bidding practices.

By 1998, Weyerhaeuser controlled approximately 65% of the alder sawlog market in Oregon and Washington, a position achieved primarily through nonprice tactics including the acquisition of three competitor mills. In Oregon, for example, a 1997 Weyerhaeuser supply projection showed it controlling over 60% of the supply through a variety of oral and written exclusive arrangements and that only 33% of supply was subject to competitive bid.[16] In this

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[14] *Westwood Lumber,* involving four alder sawmill plaintiffs, was settled for $34.5 million, and *Coast Mountain Hardwoods* was settled for $14 million.

[15] Citations to the *Ross-Simmons* record are to the joint appendix [hereinafter J.A.] in the Supreme Court or to specific pleadings, the transcript or exhibits, all of which are available at http://www.alderantitrust.com. Citations to records in the other four cases reference the individual case name, and each record citation is also available at http://www.alderantitrust.com.

[16] J.A. 901a.

constrained "open market," Weyerhaeuser used manipulative bidding practices to push log prices up for the purpose of either depriving competitors of needed raw materials or saddling them with high input costs.

The *Ross-Simmons* antitrust case arose at a point when Weyerhaeuser, having just acquired control over alder sawlogs in British Columbia, was forging ahead with plans to eliminate most of its remaining competition in Oregon and Washington and then to reduce raw material prices across the region. One of Weyerhaeuser's primary targets was Ross-Simmons Hardwood Lumber Company, Inc. (Ross-Simmons), an alder industry pioneer in the 1960s that grew to become the industry's number two producer before succumbing to Weyerhaeuser's massive consolidation and closing its doors in 2001. In 1985, after Ross-Simmons rejected its purchase offer, Weyerhaeuser converted a softwood mill to manufacture alder on a site immediately adjacent to Ross-Simmons in Longview, Washington.

In its complaint, Ross-Simmons alleged that Weyerhaeuser deployed an array of exclusionary tactics designed to foreclose much of the log supply from competitors and then manipulated prices in the remaining "open market" to drive up log prices to levels that forced its competition to lose money and ultimately to go out of business. Ross-Simmons alleged 15 different specifications of predatory conduct, only two of which pertained to price-related conduct. The other allegations fell into four general categories: (1) aggressively acquiring competitors; (2) entering restrictive or exclusive contracts with sawlog suppliers; (3) overbuying; and (4) making misrepresentations to state officials to obtain sawlogs from state forests.[17]

The predatory bidding and overbuying conduct was submitted to the jury with a general definition of anticompetitive conduct under the Sherman Act and the following specific paragraph regarding overbidding and overbuying:

> One of Plaintiffs' contentions in this case is that the Defendant purchased more logs than it needed or paid a higher price for logs than necessary, in order to prevent the Plaintiffs from obtaining the logs they needed at a

[17] J.A. 134a–136a.

> fair price. If you find this to be true, you may regard it as an anti-competitive act.[18]

After a nine-day trial, the jury returned a verdict for Ross-Simmons of $26,256,406, which was trebled to $78,769,218, and judgment was entered.[19] The *Ross-Simmons* verdict generated four other antitrust cases (involving 11 plaintiffs), which revealed a mass of relevant materials withheld by Weyerhaeuser in the *Ross-Simmons* case that were subsequently unsealed over Weyerhaeuser's vigorous objections. In finding that the public interest strongly outweighed Weyerhaeuser's confidentiality claims, the district judge declared:

> To the extent these exhibits furnish a "window" that lets the public peer inside Weyerhaeuser's alder business and observe years of conduct that a jury has pronounced illicit, that result is consistent with the intent of the antitrust laws notwithstanding that Weyerhaeuser might prefer to keep that window shuttered.[20]

Most of the evidence that Weyerhaeuser withheld in the *Ross-Simmons* case, but disgorged in later cases, is cited here where appropriate to fill out the factual history of Weyerhaeuser's deliberate multi-tactic scheme to monopolize the alder industry.[21] These same materials were made available on a website for consideration by the Supreme Court on the theory that Weyerhaeuser's strategic plans, resource studies and associated communications stand on no different footing than the hundreds of empirical data sources cited in the original Brandeis brief.[22] These materials are germane, particularly in an antitrust context where the courts need a complete understanding

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[18] J.A. 978a.

[19] Petition for a Writ of Certiorari, Appendix at 47a, *Weyerhaeuser*, 127 S. Ct. 1069 (No. 05-381) [hereinafter Pet. App.].

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

[21] All documents cited herein which are outside the *Ross-Simmons* record, including unpublished opinions in the follow-on cases, are available at www.alderantitrust.com.

[22] Citation to extra-record facts in briefs before the U.S. Supreme Court has been common dating back to the first so-called "Brandeis brief" in 1907. Muller v. Oregon, 208 U.S. 412 (1908).

of the relevant marketplace before deciding a case addressing the rules of competitive engagement in a particular sector of the U.S. economy. Further, this information helps demonstrate that the inferences drawn and the conclusions reached by the *Ross-Simmons* jury were in fact reasonable. As the factual record described below reveals, the *Ross-Simmons* case is no false positive.

A. Industry structure and relevant markets

In the western United States, where softwoods predominate, the only concentration of hardwood trees sufficient to support a hardwood lumber industry is in the Pacific Northwest. This region is often referred to as the alder region because approximately 95% of the hardwood manufactured in western Oregon, Washington, and British Columbia is alder. This is in considerable contrast to the hardwood lumber regions east of the Mississippi where the forests contain a highly varied mix of commercial hardwoods.

The significance of alder to the hardwood industry in the Pacific Northwest was undisputed at trial. Multiple Weyerhaeuser executives conceded that the region's hardwood industry would disappear if alder were suddenly declared off-limits and unavailable for harvest.[23] The parties stipulated that there was virtually no movement of hardwood logs into or out of the Pacific Northwest.[24] That is a function of two factors: the substantial transportation costs, and the fact that alder suffers significant degradation in the form of discoloration within several weeks after harvest, depending upon weather conditions.[25] Alder therefore cannot be shipped long distances without a significant decline in sawlog value, and the parties stipulated that alder sawlogs typically are processed within 100 miles of harvest.[26]

The overall market structures of the U.S. hardwood regions also vary dramatically when comparing the alder region in the Pacific

[23] J.A. 584a; Transcript 5B at 109.

[24] J.A. 153a.

[25] J.A. 184a.

[26] J.A. 153a.

Northwest to the hardwood lumber regions east of the Mississippi. As a result of acquisitions by Weyerhaeuser and the closure of dozens of alder sawmills since 1970, the existing number of market participants in Oregon and Washington dropped by 75% from more than 60 in 1970 to 15 by 2001 (all single mill operations plus six mills owned by Weyerhaeuser).[27] In contrast, the hardwood lumber industry in the East was characterized by scores of sawmills of widely varying capacities in every state with a substantial hardwood inventory.

Weyerhaeuser understood these structural differences. A 2001 Weyerhaeuser strategic planning document noted that the outlook for its eastern hardwood lumber operations was "for consistent margins due to a rational market."[28] In support of this conclusion, the document notes that the relationship between "raw material and product realizations" was consistent "due to [the] large number of landowners, brokers, manufacturers and low entry costs."[29] The market dynamics for alder in the Pacific Northwest were considerably different, a condition Weyerhaeuser sought to exploit. According to its own studies, over 80% of the alder log supply was inelastic, which meant that this harvest volume would flow into the market if the price was above the costs of logging and transportation.[30] In the alder region, Weyerhaeuser considered barriers to entry to be high[31] and the opportunity for further consolidation to be considerable.[32]

As a matter of corporate policy, the company sought to participate only in those wood products markets where Weyerhaeuser was one of the top three players, and CEO Steve Rogel and his lieutenants promoted the benefits of industry consolidation in multiple speeches.[33] Alder competitors were not the only acquisition target. From 1999 through 2002, Weyerhaeuser bought up British Columbia's

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27 J.A. 741a, 744a.

28 *Westwood* Ex. 2640 at 36.

29 *Id.*

30 J.A. 750a; *Westwood* Ex. 2740 at 1.

31 *Westwood* Ex. 2685 at 1.

32 J.A. 744a–745a.

33 *See generally Ross-Simmons* Exs. 466, 469–475, 477.

largest forest products company, the largest U.S. producer of trusses and I-joists, and successfully executed a hostile takeover of Willamette Industries, a company with sizeable alder holdings in the Pacific Northwest.[34]

The market structure that Weyerhaeuser pursued through its ongoing consolidation efforts was not a free and competitive market. Rather, Weyerhaeuser coveted oligopoly through consolidation, a point made abundantly clear by CEO Rogel in a speech in 2001 in which he criticized the pace of paper industry consolidation in Europe and noted the unfortunate continued existence of "small or medium-sized family firms," whom he characterized as "marginal producers" who made it hard "to avoid price wars when demand for paper has fallen."[35] Clearly, Weyerhaeuser craved the supra-competitive profits that come with oligopoly, which Mr. Rogel also considered the key to superior returns in U.S. equity markets.[36]

1. ALDER SAWLOG MARKET Weyerhaeuser disputed at trial but conceded on appeal that alder sawlogs are a relevant product market geographically confined to the Pacific Northwest, specifically the western thirds of Oregon, Washington and British Columbia. Even within the Pacific Northwest, the alder sawlog market is distinct from other log markets. Alder sawlogs are segregated from other species during harvesting in the woods and trucked to specialized production facilities that utilize technology different from that of the softwood industry.[37] While most of the softwood lumber generated from Pacific Northwest forests goes into structural applications like two-by-four studs, alder is an appearance wood resawn by remanufacturers into a host of different products. Common uses include furniture parts (for cabinets, tables and chairs), electric guitar blanks, paint brush handles and hangers.[38] Alder is generally referred to as "come-along volume" because it is almost always harvested as

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34 *Ross-Simmons* Ex. 477 at 5.

35 J.A. 823a.

36 *Id.*

37 J.A. 152a.

38 *Id.*

a by-product of the region's much more dominant softwood harvest.[39]

Weyerhaeuser forest inventory experts used satellite technology, harvest records and other data to inventory the standing alder throughout the Pacific Northwest by owner and location, classifying alder log suppliers into four categories: Weyerhaeuser fee lands; large private or industrial landowners; small private landowners; and public timber sales.[40] As explained below, Weyerhaeuser used a variety of tactics to lock up most of the supply from large industrial landowners and the supplies from public lands. With control of the harvest from its own lands and most industrial landowners at rational prices, Weyerhaeuser then concentrated its overbidding strategies in that fraction of the market where it faced competition from its rivals, sourced primarily from small nonindustrial log suppliers.

Within six years of its 1980 entry, Weyerhaeuser's share of the Pacific Northwest alder sawlog market was 50%.[41] By 1996, this share was 65% and by 2001, it had reached 75%.[42] At trial, two former top executives for defendant's hardwood division acknowledged that Weyerhaeuser had substantial market power in the alder sawlog market.[43] A single firm market share of 75% was unprecedented in the forest industry; no other wood products company had amassed more than 50% market share in any other U.S. wood products market.[44]

2. FINISHED ALDER LUMBER MARKET In their briefing before the Supreme Court, Weyerhaeuser and its amici treated Ross-Simmons' failure to carry its burden of proof on the question of whether there

39 J.A. 145a, 750a; *Westwood* Ex. 2740 at 1.

40 J.A. 747a.

41 J.A. 260a.

42 J.A. 921a.

43 J.A. 259a, 341a.

44 J.A. 663a–664a. An expert at trial testified that Louisiana-Pacific's 50% market share of the oriented strand board market was the next highest level of market concentration in any U.S. wood products market.

was a relevant market for finished alder lumber in the United States as *establishing* that Weyerhaeuser had no power in the output market. In fact, the jury made no such finding, and the record evidence shows that this was a very close issue. Weyerhaeuser in 2000 listed its alder lumber market share at 75% and that of all other species at less than 1%.[45] Even the district judge noted, "The jury ultimately didn't find for the Plaintiffs on the finished lumber claim, but there was evidence from which it could have."[46] In April, 2008, a jury found alder lumber to be a relevant market in a class action monopolization case resulting in an $83 million judgment against Weyerhaeuser.[47]

B. *Purchasing conduct was only part of a complex monopolization scheme*

1. ACQUISITIONS Weyerhaeuser used strategic acquisitions from 1996 to 2000 to increase its then 50% alder sawlog market share to over 75%, eliminating three major competitors and extending Weyerhaeuser's reach to every corner of the relevant geography for standing alder. Its acquisition in 2000 of British Columbia's "dominant" and only significant alder producer exemplifies the anticompetitive character of these acquisitions.[48] The target, Coast Mountain Hardwoods, purchased 90% of the alder log supply in the province.[49] Much of this volume was generated by the company's five exclusive alder-specific forest licenses with terms of 15 to 20 years.[50] Provincial regulations also allowed Coast Mountain to block the export of alder sawlogs harvested under forest licenses held by other companies.[51] In British Columbia, where over 95% of the timber supply is on public lands, the power to block export to

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[45] J.A. 753a.

[46] *Coast Mountain*, Opinion and Order Denying Motion to Dismiss at 17, *available at* www.alderantitrust.com. This was also the opinion of four experts whose conclusions were substantiated by a price correlation analysis. J.A. 384a–392a.

[47] Morelock Enterprises, Inc. v. Weyerhaeuser Co., Civil No. 04-583-PA (D.Or.).

[48] J.A. 422a.

[49] *Westwood* Ex. 2538 at 1.

[50] J.A. 158a-159a.

[51] J.A. 429a.

interested buyers in Washington could be a potent anticompetitive weapon. The 90% control enjoyed by Coast Mountain resulted in dramatically different and much lower market prices for alder sawlogs in British Columbia compared to northern Washington.[52]

In an effort to gain access to that low cost resource, Ross-Simmons made a bid for Coast Mountain in early 2000 but needed a number of months to raise the capital.[53] Weyerhaeuser immediately proposed an all cash deal and a quick closing, which is what occurred.[54] As it proceeded toward that closing, Weyerhaeuser sought to maintain the combination of exclusive long-term supply agreements *and* the power to block alder log exports out of the province. Weyerhaeuser requested[55] and received a clarification of existing regulations that it would be able to block alder log exports despite its status as a softwood log exporter.[56]

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52 *Compare* J.A. 845a ($299 per 1,000 board feet in B.C.) *with* J.A. 865a, 895a ($504–$524 per 1,000 board feet in Washington).

53 Stipulation Certifying Supp. Record, Ex. B at 24 (G. Boyd testimony), *available at* http:www.alderantitrust.com..

54 With the benefit of discovery in the *Ross-Simmons* case, Coast Mountain filed its own lawsuit in 2003 alleging that Weyerhaeuser deliberately cheated the British Columbia company during six years as its exclusive sales agent, extracting millions of dollars above an agreed fixed commission, and that Weyerhaeuser's purpose was to perpetuate weak financial performance by Coast Mountain to set it up for a below market acquisition. After paying $26 million to purchase Coast Mountain in 2000, Weyerhaeuser eventually paid another $14 million to settle Coast Mountain's fraud, breach of fiduciary duty, and antitrust claims. Ross-Simmons sought to introduce evidence of this anticompetitive episode below, but plaintiffs' effort to add this issue to a proposed fourth amended complaint was denied three months before trial. However, this entire affair made its way into the complaint and the evidentiary filings in the follow-on cases based upon the district court's subsequent ruling that plaintiffs were entitled to present evidence of a "deliberate scheme to reduce Coast's value so it could be acquired by Weyerhaeuser as part of a broader plot to achieve and perpetuate a monopoly in the American alder lumber markets." *Coast Mountain*, Opinion and Order Denying Motion to Dismiss at 19.

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

56 Letter from Jim Doyle, Minister, British Columbia Ministry of Forests to Paul Perkins, V.P., Forestlands & Strategic Planning, Weyerhaeuser Co. (Sept. 28, 2000), *available at* http://www.alderantitrust.com.

The net result is Weyerhaeuser's powerful control over the alder sawlog resource in British Columbia. In 2002, for example, Weyerhaeuser enjoyed log costs in British Columbia that were only 60% of its average log costs in Oregon and Washington.[57]

In early 2001, Weyerhaeuser projected that its growing monopsony power would enable it to reduce log costs in Oregon/Washington, and that every $10 per 1,000 board foot drop in log costs would add $2 million in profits to the alder division's bottom line.[58] Had that scheme not been disrupted by the *Ross-Simmons* litigation, there is every reason to believe that Weyerhaeuser would have succeeded in pushing alder sawlog prices in Oregon and Washington down to the levels prevailing in British Columbia. Based upon the 2001 data, this increase in profits was close to $40 million annually.[59]

2. EXCLUSIVE CONTRACTS (WRITTEN AND ORAL) Weyerhaeuser locked up most of the alder sawlog market through a variety of exclusive arrangements: 15 to 20-year exclusive forest licenses in British Columbia; exclusive log supply contracts; quasi-tying arrangements; and oral agreements. A 1997 action plan following a meeting of the division's log buyers lists "lock up more wood" as the objective and identifies long-term arrangements as a primary means using "money, log trades, chip for logs or any combination."[60] This memo also lists 12 of the largest industrial landowners in the region, including five of Weyerhaeuser's amici,[61] for this approach. Weyerhaeuser eventually attracted many of the region's largest timberland owners into exclusive agreements of one kind or another

[57] J.A. 832a–896a.

[58] J.A. 903a.

[59] J.A. 832a-896a, 903a.

[60] *Westwood* Ex. 2657 at 2.

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

or oral arrangements where the parties agreed to sit down each quarter and negotiate a price for that quarter's volume. Evidence in the follow-on cases ultimately established conclusively that Weyerhaeuser generally paid less to these industrial sellers than it paid in that smallest segment of the market where Weyerhaeuser competed for and/or manipulated prices to higher levels.[62]

For forest landowners in western Oregon or Washington, the highest value and volume on any stand of timber is softwood. In this region, Weyerhaeuser was the "dominant" exporter of the high grade Douglas fir that qualifies for the Asian markets.[63] During its drive to monopolize the alder industry, log buyers in Weyerhaeuser's timberlands division, which purchased export grade softwood logs as part of its export business, were told to assist the alder division by tying their willingness to buy a logger's export grade softwood logs to that logger's commitment to deliver alder sawlogs from the stand being harvested to Weyerhaeuser's alder division on an exclusive basis.[64] Weyerhaeuser denied this quasi-tying tactic, but obviously lost the credibility contest at trial.

3. BIDDING PRACTICES According to Weyerhaeuser's trial testimony, it was nothing more than an innocent (but large) buyer of alder sawlogs, competing vigorously for its share of a limited supply of inputs. The impression advanced by Weyerhaeuser was that prices were established in a transparent market by competitive bid. In fact, the market was anything but transparent. Weyerhaeuser engaged in manipulative buying procedures calculated either to push prices up or hold them at high levels while minimizing the volume of high-priced logs it actually bought.

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

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62 *Smith St.* Exs. 15951–54.

63 J.A. 332a.

64 J.A. 330a–331a.

Its competition, however, was forced to fill most of its needs from this so-called "open" share of the market.

Bear in mind that this log market, like most in the United States, lacks transparency, depends largely on oral communications, and is therefore highly susceptible to manipulation. As the dominant buyer throughout the region, Weyerhaeuser had the power to set log prices through its bidding. Multiple witnesses testified at trial that alder sawlog prices were set at whatever level Weyerhaeuser was paying in the market.[65] But in this high-priced segment, Weyerhaeuser sought to minimize its purchasing while maximizing the harm inflicted on its competitors. It employed two tactics: "last look" oral bidding and market-making sealed bids.

In 1999, Weyerhaeuser further undermined market transparency by adopting a proprietary log grading system adding high, medium, and low classifications to each diameter class and different pricing for each.[66] This classification system was very subjective, enabling Weyerhaeuser, which graded its customers' logs delivered to its mills, to mitigate high costs quoted to suppliers by manipulating the subjectivity in its grading system.[67]

The geographic market proved in *Ross-Simmons* was the Pacific Northwest, specifically the temperate marine zone west of the Cascade Mountains in Oregon, Washington, and British Columbia. Log market competition, however, was focused in smaller "sourcing areas," consistent with the location of mills and their 100-mile radius supply zones.[68] By 1998, there were five or fewer bidders in each of these areas,[69] and each bidder participated in the market through a log buyer whose job was to talk to potential suppliers, primarily landowners and loggers, about the price the mill was willing to pay for delivered logs. The pricing was generally by diameter and quoted on a per thousand board foot basis. The larger the diameter of the

[65] J.A. 231a–233a, 343a, 661a.

[66] J.A. 789a–790a.

[67] J.A. 135a, Tr. 6A at 105.

[68] J.A. 153a, 677a.

[69] J.A. 740a, 741a; Exs. 16, 17.

sawlog, the higher the price.[70] Within this market segment, some larger landowners who had not been enticed into written or oral exclusive agreements with Weyerhaeuser put up their volume for sale quarterly by sealed written bid. But most of the selling in this "open" market segment was oral, through bids over the phone, with the seller ultimately asking the high bidder to issue a purchase order that was valid for deliveries over 30 to 60 days.[71]

Weyerhaeuser used a carefully calculated "last look" buying practice to minimize its own purchases and impose high prices on its competition, which was relatively easy. Once having received a commitment from a supplier to give it the opportunity to bid last, it was Weyerhaeuser's choice following multiple rounds of upward bidding to stop and let the competitor have the volume at the elevated price.[72] Log sellers profited in the short term from a process that appeared to generate higher pricing compared to securing just one set of independent bids from each log buyer.

Sealed written bidding in this market was also subject to manipulation. Because of the largely oral nature of market information and the easy access to the prices being quoted by competitors, Weyerhaeuser was in a position to submit sealed bids just below what it expected its competitors to bid, knowing that the losing (but high) bid would continue to signal a high-priced market to sellers while shifting that volume to Weyerhaeuser's competitors. Weyerhaeuser carefully monitored its competitors' alder log inventories with regular drivebys and aerial reconnaissance and surreptitiously gained access to Ross-Simmons' planned bids through an employee.[73] This facilitated more precise "market-forcing" but losing bids on quarterly volume sold by sealed bid.

The above behavior is far different from predatory output pricing by sellers in a highly competitive market with many buyers. In *Brooke*

[70] *See, e.g.*, J.A. 781a.

[71] Transcript 6A at 112.

[72] *See* Transcript 1B at 120–27 (explaining the process, with a historical example).

[73] Transcript 2A at 61–65.

Group, Brown & Williamson had no ability to drop its price for generic cigarettes and avoid the cost of this strategy in terms of lower revenue. Here, in contrast, Weyerhaeuser manipulated input prices upward and then, rather than pay the full consequences of that manipulation in that fraction of the market where it faced competition, avoided a significant share of those costs.

4. OVERBUYING Weyerhaeuser's overbuying, which the jury instructions referred to as "purchas[ing] more logs than it needed . . . in order to prevent plaintiffs from obtaining the logs they needed at a fair price," was accomplished in two ways. First, Weyerhaeuser attempted on several occasions to force shutdowns or curtailments of Ross-Simmons by stockpiling huge volumes of sawlogs which then rotted in the log yard, suffering enormous devaluation from sawlog to pulp log. Major episodes of this tactic occurred in 1993 and 1989, causing Ross-Simmons to suffer curtailment or to shift its purchasing into lower grade logs that were not the focus of Weyerhaeuser's overbuying.[74]

The second type of overbuying occurred from 1997 to 2000, a time of declining lumber prices brought on by the Asian economic crisis, which greatly reduced demand for hardwood lumber in Asia. The result was an excess of supply in the United States and lower prices. Weyerhaeuser's CEO pointed out the financial impact of the declining Asian market on the company's overall results in its 1998 annual report and noted that defendant had taken "downtime to balance inventory levels with market conditions."[75] But not Weyerhaeuser's alder division. It continued to run at capacity and built up staggering all-time high lumber inventories, which exerted downward pressure on the market for finished alder lumber.[76]

5. TRANSFER PRICING Late stage discovery in the *Ross-Simmons* case revealed that Weyerhaeuser, contrary to company policy and repeated representations at depositions, was transferring up to half of the raw material needs of its Longview alder sawmill from company

[74] Transcript 2A at 32, 38-44.

[75] Ex. 458 at 4.

[76] J.A. 547a, 922a.

lands at below market prices. At trial, one Weyerhaeuser witness after another testified that they had no explanation for records showing that the prices for identical grades of sawlogs from defendant's Longview free farm delivered to its Longview mill were substantially below identically graded logs delivered to other mills from other Weyerhaeuser tree farms.[77] If the average price of this volume is adjusted to the average price paid for sawlogs from all third party suppliers, the financial impact was a multimillion dollar subsidy to the Longview plant from 1997 to 2001.[78] For part of this period, after eliminating a subsidy not enjoyed by any of Weyerhaeuser's other alder plants, the Longview mill (located right next door to Ross-Simmons) ran at a loss.

In disposing of Weyerhaeuser's post-trial motions in *Ross-Simmons*, the district court noted:

> Among other things, the jury could have found that Defendant was internally transferring [logs] to its Longview mill, at below cost, to conceal or compensate for the fact that Defendant's Longview log buyers were paying excessive prices for logs purchased on the open market in order to keep Ross-Simmons from obtaining those logs. This might also support an inference that Defendant was deliberately trying to evade the antitrust laws and to conceal possible antitrust violations, *i.e.*, that there was willful misconduct, and that Defendant's course of conduct described at trial was designed to be anti-competitive and to further its dominance in the relevant market and went far beyond ordinary means of competition.[79]

6. FALSE REPRESENTATIONS TO STATE GOVERNMENTS The new interpretation of British Columbia forestry regulations in 2000 that empowered Weyerhaeuser to block alder log exports out of the province was not the first time that the company had secured regulatory change that enhanced its market power over alder sawlogs. Weyerhaeuser is the largest private forest landowner in Oregon and Washington and the largest U.S. exporter of softwood logs to Asia. Weyerhaeuser's status as a log exporter disqualifies it from purchasing public timber from U.S. National Forests and, until it

[77] J.A. 897a–900a; Transcript 6B at 142, 7A at 81–82, 7B at 19.

[78] J.A. 831a ($14.7 million in total).

[79] Pet. App. 33a.

secured special exemptions from state regulators, disqualified Weyerhaeuser from purchasing logs (softwood or hardwood) generated from the sizable state forests in Oregon and Washington.

In both states, however, Weyerhaeuser successfully leveraged false representations to state officials into special exemptions allowing it to purchase alder sawlogs from state forests, provided it did not export hardwood (as opposed to softwood) logs from its own lands. The Oregon example is the most egregious. In public testimony before Oregon's state forester, Weyerhaeuser grossly exaggerated the levels of its Eugene and Garibaldi mills' dependence on alder sawlogs from Oregon's state forests. Weyerhaeuser witnesses weakly contended at trial that a major upward change in the relevant figures between draft and final versions of public testimony was an inadvertent error.[80] In its post-trial ruling, the district judge said the following on this issue:

> The Plaintiffs pled, and presented evidence, that Defendant knowingly made false statements to the Oregon Department of Forestry to obtain an exemption from log export regulations that allowed Defendant to obtain alder from state lands and, by design, also had the effect of denying those same logs to the Plaintiff mills. There was evidence from which the jury could readily conclude that the misstatements were deliberate, the deviation from the truth was substantial, and the misstatements were intended to and did influence the outcome of that proceeding. The jury could also have found that these actions were not undertaken for legitimate business reasons but rather as part of a pattern of deliberate anti-competitive conduct.[81]

C. *Weyerhaeuser clearly sought monopsony power in a vulnerable market*

The fact that Weyerhaeuser lost the credibility contest before a highly educated jury[82] should be no surprise. The timber giant's own planning documents exposed its strategy: acquire competitors and

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

[81] Pet. App. 42a.

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

expand plants to become the dominant buyer in every part of the region; control most of the raw materials supply through exclusive arrangements; and manipulate the balance of the so-called "open" market to levels that eliminated competition. Each element of the strategy was deployed through multiple complementary means, all the while focused on the opportunity to restructure a largely inelastic, regionally constrained raw material market into a dominant Weyerhaeuser monopsony.

In its acquisitions, Weyerhaeuser sought market control. In aggressively fending off its competitors to acquire British Columbia's 90% consumer of alder sawlogs, Weyerhaeuser knew that future market entry in British Columbia was unlikely[83] and that denying its Washington competitors access to the low-cost provincial resource likely would cause one of those competitors (not Ross-Simmons) to go out of business.[84] Defendant's hostile takeover of industry giant Willamette Industries, an effort that began in 2001 and closed in 2002, was parallel in tactic to its entry into the alder business in Oregon in late 1995. When its friendly negotiations to acquire privately-owned Diamond Wood Products and its major presence in Oregon stalled, Weyerhaeuser's alder division chief Arnold Curtis threatened to use available Weyerhaeuser land in close proximity to Diamond's Oregon plants to construct competing mills if the deal was not finalized soon. The deal promptly closed.[85]

In its exclusive supply arrangements, Weyerhaeuser sought market power. The company developed a massive database of standing alder by owner classification and then focused its exclusive contracting efforts on the most promising of those classes—large industrial owners who could be attracted into exclusive oral or written arrangements with special cash advances, trades of other species, or other incentives. Weyerhaeuser's clear objective was, in its own words, to be "the consolidator" in the Pacific Northwest, the only hardwood region west of the Mississippi.[86] Significantly, Weyerhaeuser had no such plans for

[83] *Smith St.* Ex. 15406 at 3.

[84] *Westwood* Ex. 2426 at 1.

[85] J.A. 747a, 750a, *Westwood* Exs. 2657 at 2, 2682 at 20.

[86] J.A. 745a.

the eastern United States because the rationality of that marketplace with its large number of competitors of varied size at every market level made such a strategy impractical.

In its bidding behavior, Weyerhaeuser sought market power. In that smallest segment of the market not controlled by Weyerhaeuser through fee ownership or exclusive contracts, its bidding behavior was primarily designed to manipulate log prices upward to eliminate competition rather than to compete on fair terms for a share of a limited resource. There is no other explanation for Weyerhaeuser's tracking of every competitor's profit margin and the directive in its planning documents that log prices be such "that the highest cost competitors drop from the market."[87]

At trial, two former Weyerhaeuser executives admitted that manipulating log prices upward was part of Weyerhaeuser's consolidation strategy. Weyerhaeuser could not execute this strategy in the "open" market segment without buying some of that volume, which eroded the division's profit margins. When a Weyerhaeuser senior business analyst, who prepared a financial model showing the "disconnect" between rising log prices and declining lumber prices, questioned the division's finance director about this market development, she twice stated, "that was the business strategy, to price logs up to deal with competition."[88] In early 2001, this same analyst participated in a series of high level meetings in which alder division head Robert Taylor candidly admitted that Weyerhaeuser "had given up about $20 million in potential log cost opportunity within the last year."[89] Another former Weyerhaeuser executive testified that the wisdom of incurring higher log costs had been questioned in senior management meetings, but division chief Arnold Curtis repeatedly brushed them aside with the statement that Weyerhaeuser would "recoup the costs manyfold" once competition was eliminated.[90]

87 *Westwood* Ex. 2725 at 21.

88 J.A. 357a.

89 J.A. 354a.

90 J.A. 260a.

Notably, as the dramatic difference between 2001 log price levels in British Columbia compared to Oregon and Washington shows, Weyerhaeuser had its eyes on log prices that would reduce its costs by nearly $40 million annually. Any doubt about Weyerhaeuser's perceived ability to drive log costs down is belied by a planning exhibit, and an e-mail issued when the closure of Ross-Simmons was imminent. In that 2001 e-mail,[91] division head Robert Taylor directed his management team that the time had come in the year's "strategic plan" to push log prices down. His specific language was: "We are in position to accelerate lower log prices AGGRESSIVELY."[92] This was obviously to be accomplished by Weyerhaeuser reversing its previous pattern of manipulative bidding and exercising its market power to drive prices downward.

D. *Developments in the alder sawlog market post-*Weyerhaeuser

When the $79 million *Ross-Simmons* judgment was entered against Weyerhaeuser following a two-week trial in April, 2003, it was the largest antitrust judgment in the history of the Pacific Northwest. It generated significant press throughout Oregon and Washington, which was followed by another round of comprehensive coverage two weeks later when two new cases for five plaintiffs were filed in district court in Oregon.[93] Most of Weyerhaeuser's alder competitors also joined in filing an administrative challenge to Weyerhaeuser's special exemption from Oregon's log export regulations, which allowed Weyerhaeuser to purchase hardwood logs harvested from Oregon's State Forests through third parties despite its status as a log exporter from its own lands.[94]

The historic size of the alder antitrust result against Weyerhaeuser and the continuing comprehensive press reports about the

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[91] J.A. 903a.

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

[93] Westwood Lumber Co. v. Weyerhaeuser Co., Civil No. 03-0551-PA (D. Or.); Coast Mountain Hardwoods v. Weyerhaeuser Co., Civil No. 03-0552-PA (D. Or.).

[94] *In re Weyerhaeuser's Exemption from Oregon Law Export Substitution Regulations*, Joint Rulemaking before Oregon Division of State Lands and Oregon Department of Forestry (2003).

subsequent cases and the Oregon administrative proceeding produced an environment in which the monopsonistic tactics challenged by Weyerhaeuser's smaller competition became well known throughout the region's forest industry, including log sellers. Discovery in the two follow-on district court cases and testimony in the administrative proceeding revealed both that Weyerhaeuser had abandoned the challenged tactics and that large forest landowners were uniformly putting their alder sawlog volume out for competitive bid, rather than dealing exclusively with Weyerhaeuser.

The impact of the alder antitrust litigation on the structure of the log market occurred in two stages. In the first stage, which occurred during the course of the *Ross-Simmons* case, Weyerhaeuser abandoned the challenged anticompetitive acts and largely denied their existence at trial. By the third quarter of 2002, some 21 months after the filing of the original case, plaintiffs in the follow-on cases testified that the log market had returned to a semblance of normalcy and plaintiffs sought no damages beyond that period.[95] During this time frame, Weyerhaeuser did not attempt to buy any of its competitors, signed no additional exclusive contracts, avoided oral exclusive dealing arrangements with log sellers, cleaned up its bidding practices, and discontinued below-cost log transfer pricing.

The second stage was post-verdict, beyond the second quarter of 2003. In this period, log sellers became aware of the controversy and the alleged illegality of exclusive supply agreements with Weyerhaeuser. The result was a significant opening up of the alder log market in Oregon and Washington. There was no change in British Columbia as Weyerhaeuser continued to hold exclusive long term supply agreements with the provincial government for nearly half of the provincial alder supply and maintained its 90% control in that fully monopsonized market. In Oregon and Washington, however, Weyerhaeuser's competitors, who were previously excluded from bidding on a significant share of the alder volume, were now allowed to bid and began to purchase a portion of that volume.

[95] *Westwood* transcript of proceedings dated October 29, 2003 at 8-9; *accord* Weyerhaeuser's Memorandum of Law in Support of Motion for Reconsideration at 5; both available at http://www.alderantitrust.com.

From a market structure standpoint, the change between conditions at the end of 2001, the year in which Ross-Simmons and three other competitors closed permanently, and the end of 2006—a period of just five years—was quite dramatic. The production of Weyerhaeuser's small and medium competitors surged from 143 to 227 million board feet, an increase of 58%.[96] In terms of market share in Oregon and Washington, the 75% share enjoyed by Weyerhaeuser in 2001 had fallen to below 50% by the end of 2006.[97] This remarkable transformation in market structure is a function of three factors: a more competitive and transparent log market freed of exclusive dealing arrangements; Weyerhaeuser's closing of one of its seven alder sawmills and reducing production at other plants; and significant increases in the production of Weyerhaeuser's competitor mills, including a sizable new entrant in Port Angeles, Washington. Interviews in late 2007 and early 2008 with each of Weyerhaeuser's competitors confirm that the alder industry now views Weyerhaeuser as a "former monopsonist" that apparently has not returned to any of the contracting or bidding practices challenged in the five antitrust cases, even after Weyerhaeuser's victory in the Supreme Court in early 2007.

This substantial change in market structure, which began during the course of the *Ross-Simmons* case and has persisted to the present, is strong evidence of the procompetitive effects of the alder antitrust litigation against Weyerhaeuser. Both sellers and buyers in the alder sawlog market have benefited from the improved competitive health of the market. In the years 2003 through 2006, the region's alder sawmills enjoyed solid profits from the sale of alder lumber products while log sellers enjoyed higher revenues as they watched alder sawlog prices reach new highs in each of those four years.

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[96] These statistics are based upon confidential lumber production records provided to the author from each of Weyerhaeuser's competitors with the understanding that the figures would be aggregated and no individual sawmill's lumber production would be disclosed in this article.

[97] While Weyerhaeuser competitor information was provided directly to the author, Weyerhaeuser data was not. The above approximation is based upon trial testimony from a Weyerhaeuser expert in April, 2008, in Morelock Enterprises, Inc. v. Weyerhaeuser Co., Civil No. 04-583-PA (D.Or.) (alder lumber class action case).

It should be noted that the data referred to here is through calendar year 2006, which precedes by two months Weyerhaeuser's win in the Supreme Court. With a market share that remains in excess of 50%, it is unlikely that Weyerhaeuser will forget the expensive lesson of the alder antitrust litigation, at least with respect to its anticompetitive nonprice behavior. However, now that above-cost pricing behavior is immunized by *Weyerhaeuser*'s price-revenue test, one might ask whether Weyerhaeuser is likely to return to its prior tactic of running up alder log prices. Bearing in mind that Weyerhaeuser did accomplish a major restructuring of the alder industry between its initial entry in 1980 and the initiation of antitrust litigation in 2000, which converted a highly competitive market into a highly concentrated one, it is not rational to run up log costs if the net result is lower margins and significantly lower overall profitability. In an era with fewer alder sawmill competitors in each log sourcing area or subset of the Pacific Northwest, there is significant risk that the larger players will watch each other carefully and gradually produce a price differential between sawlog inputs and lumber outputs that generates excellent oligopolistic profits for all.

III. THE *REID BROS*. RECORD

In its *Weyerhaeuser* opinion, the Supreme Court emphasized the risk of chilling procompetitive behavior "with too lax a liability standard,"[98] noting that the risk was as serious in the predatory bidding context as it was in *Brooke Group*. The Court failed to consider the Ninth Circuit's discussion of and reliance on its 1983 precedent in *Reid Bros.*,[99] the only other monopsony case involving a log market in American jurisprudence. In fact, there are striking similarities between the records in *Reid Bros.* and *Weyerhaeuser*, as both cases involved almost identical combinations of price and nonprice conduct that enabled dominant buyers to monopsonize a regional log market. The defendants in *Reid Bros.* used a Weyerhaeuser-like strategy

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[98] Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 127 S. Ct. 1069, 1078 (2007).

[99] Reid Bros. Logging Co. v. Ketchikan Pulp Co., 699 F.2d 1292 (9th Cir. 1983).

involving exclusive long-term raw material supply agreements, aggressive use of acquisitions and expansions, and exclusionary bidding practices designed either to deprive competitors of access to raw material or to inflict irrationally high input costs on that competition.

Following a lengthy bench trial, the district judge in *Reid Bros*. entered detailed findings that two large wood products companies conspired to restrain trade and to monopolize the softwood log market in southeast Alaska. That log market was geographically confined to the harvest from the Tongass National Forest, which contained 97% of all woodland in southeast Alaska, and was highly inelastic because the annual harvest was limited by statutory sustainability requirements.[100] As a result, timber sale offerings by the U.S. Forest Service were fixed annually; stumpage prices paid to the federal government in one year had no impact on the level of timber sales in the next.

The two defendants originally came to southeast Alaska in the 1950s after entering into long-term contracts with the Forest Service entitling each to harvest timber from designated allotment areas for 50 years. Outside these allotment areas, Tongass timber sales were sold periodically at public auction. At the time, there were numerous loggers and competing sawmills in southeast Alaska who bid on these timber sales. The Forest Service contemplated a genuinely competitive market for the openly bid timber sales, which were supposed to provide the transaction evidence needed for periodic reappraisals of the stumpage rates paid by the two defendants for timber delivered under the 50-year contracts.

The "two giants of the southeast Alaska lumber industry" divided the Tongass National Forest between them and agreed not to bid against each other in these "spheres of influence."[101] The two defendants also pursued "well-orchestrated and successful" efforts to "eliminate independent mills and prevent the establishment of new operations through control of the timber supply," including one "well-documented example" that is the equivalent of Weyerhaeuser's

[100] National Forest Management Act, 16 U.S.C. § 1611 (1976).

[101] 699 F.2d at 1296–97.

use of "last look" bidding.[102] Knowing that a competitor was "desperately in need of timber," one *Reid Bros*. defendant suggested to the other that it "run [the bidding] up on [the competitor] to the point it will really hurt," noting, however, to beware of "the danger of making one bid too many."[103] In little more than one year, the targeted competitor was "unable to acquire a timber supply" and eventually sold out to one of the defendants.[104] The Ninth Circuit also affirmed the district court's finding that defendants blocked entry of new mill competitors by bidding "preclusively" on federal timber sales.

In a direct parallel to the *Weyerhaeuser* facts, the *Reid Bros.* defendants combined captive long-term raw material supplies, aggressive use of acquisitions and expansions and exclusionary bidding practices. The bidding behavior was designed either to deprive competitors of access to raw materials or to inflict irrationally high input costs on that competition.

After eliminating its sawmill competition and combining to possess over a 90% market share, defendants conspired to pay artificially low prices for logs and logging services. In paying loggers on the basis of the loggers' cost rather than log value, defendants "created a network of 'captive' loggers heavily indebted to the defendants."[105] With such financial control, defendants systematically eliminated contract loggers: "with a drop of the executioner's sword, the defendants could cut off a logger's financing, force the logger out of business, and acquire the company or its assets."[106] By the time *Reid Bros*. reached trial, 23 loggers had been eliminated and plaintiff Reid Bros. was the "only remaining independent purchase logger in southeast Alaska."[107]

In their appeal, the *Reid Bros*. defendants raised the very issue presented in Weyerhaeuser by arguing that the district court erred in

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[102] *Id*. at 1297.

[103] *Id*.

[104] *Id*.

[105] 699 F.2d at 1298.

[106] *Id*.

[107] *Id*.

its finding of predatory bidding because there was no evidence that the high prices paid for standing timber would prevent the defendants from recovering their marginal costs on the ultimate sale of the processed lumber. The Ninth Circuit rejected the application of this "rigid objective test" with the following statement:

> Where, as here, there is direct evidence that the defendants aimed to exclude competition in order to enhance their long-term market position, the blind application of a numerical test would only frustrate the intent of the Sherman Act.[108]

Reid Bros. underscores the general importance of experience in antitrust law and, in particular, of focus upon a fact-specific, industry-sensitive approach to section 2 liability. Moreover, the Supreme Court has recognized that the combination of conduct—the "constituent elements of an unlawful scheme"—should entitle plaintiffs to receive "the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each."[109] *Reid Bros*. is a potent reminder that geographically constrained natural resource markets are especially susceptible to coordinated predatory schemes involving price and nonprice conduct.[110]

In fact, the federal government, which is a significant timber seller primarily from the national forests, has acted in the past out of a concern that large businesses with huge private timber holdings were bidding preclusively against small companies and moving the industry toward an oligopolistic structure. In 1958, Congress amended the Small Business Act to require a "fair proportion" of total sales of government property go to small business "to preserve free competitive enterprise."[111] When the Small Business Administration and the Forest Service adopted regulations in 1971 establishing

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108 *Id.* at 1298 n.5.

109 Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 707 (1962).

110 *See* American Tobacco Co. v. United States, 328 U.S. 781 (1946) (affirming section 2 liability for a combination of price and nonprice conduct in a tobacco market).

111 15 U.S.C. § 631(a) (2007).

defined standards for how and when to reserve sales for exclusive bidding by small business, big business filed suit. That legal challenge was rejected, based in part on testimony from a top Small Business Administration official showing that the previous program had been ineffective at preventing preclusive bidding by large companies and their "increasing quasi-monopoly."[112]

In the Solicitor General's brief in *Weyerhaeuser*, the government acknowledged that a predatory bidding scheme is more readily accomplished in a natural resource market with limited supply,[113] which translates into a far lower risk for false positives than the highly accentuated apparent risk that triggered the Court's concern in *Brooke Group*. Indeed, the Supreme Court recognized in *Mandeville Island Farms*, another monopsony case involving a natural resource market, that the plaintiff does not need to prove that the monopolist controls the entire industry so long as "control is exercised effectively in the area concerned," and that such control is "magnified" in a regionally constrained market.[114]

IV. PREDATORY BUYING CASES POST-*WEYERHAEUSER*

A. *Inelastic resource markets face increased risk of monopsony*

Unfortunately, the likely legacy of the Supreme Court's *Weyerhaeuser* decision will be greater concentration in U.S. resource markets, particularly input markets that are inelastic. By extending *Brooke Group* to the buy-side, the Supreme Court immunized pricing behavior from antitrust scrutiny and substantially increased the potential for a dominant buyer to exercise monopsony power to the detriment of its smaller competitors, input sellers generally, and ultimately consumers. These markets may be localized in that they are confined to a region of the United States and are often exemplified

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112 Duke City Lumber v. Butz, 382 F. Supp. 362, 367, 370 (D.D.C. 1974), *aff'd*, 539 F.2d 220 (D.C. Cir. 1976).

113 *See* U.S. Brief at 24.

114 Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 236 (1948).

by what Professor Grimes refers to as "small, atomistic sellers," who are more vulnerable to market power abuses than consumers.[118]

In the United States, there are multiple regional markets where a large and diverse number of small producers sell their commodity products to firms that process logs, fish, or an agricultural product into a host of other products. As Professor Noll has observed, local monopsony in conditions where market power is not present in a national or regional final product market "causes harm to consumers by misallocating production across localities."[116]

The antitrust issues associated with input markets have received very little attention until quite recently. In fact, a good share of the scholarship on the subject is found in a 2005 quarterly issue of the *Antitrust Law Journal*, which contained a symposium collection of nine articles, including those of Professors Grimes and Noll referred to above. Most recently, Gregory J. Werden, senior economic counsel for the Antitrust Division of the Justice Department, examined the implications of *Weyerhaeuser* within the context of the basic policies embodied in the Sherman Act and the role that consumer welfare plays in its application. Mr. Werden coins the terms "aggregate welfare" and "end-user welfare" to distinguish between the welfare of all people in the economy (aggregating sellers and buyers) from the welfare of people (usually consumers) at the end of the particular chain of distribution.[117] I agree with Mr. Werden's conclusion that the legislative history of the Sherman Act and the Supreme Court's decisions in *Mandeville Island Farms, American Tobacco Co.* and now *Weyerhaeuser* demonstrate that the Sherman Act is not limited to promoting consumer or end-user welfare. Rather, one of its major purposes is to protect the competitive process, which includes sellers victimized by cartels or monopsony, just as it protects consumers from monopoly.

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[115] Warren S. Grimes, *Buyer Power and Retail Gatekeeper Power: Protecting Competition and the Atomistic Seller,* 72 Antitrust L.J. 563 (2005).

[116] Roger G. Noll, *"Buyer Power" and Economic Policy,* 72 Antitrust L.J. 589, 624 (2005).

[117] Gregory J. Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light*, 74 Antitrust L.J. 707, 708 (2007).

If the Sherman Act applies with equal force to the buy-side and protects competitive pricing for input suppliers regardless of whether there is harm to consumers, the Supreme Court's *Weyerhaeuser* decision goes too far by extending a per se safe harbor rule to a new context when the rule of reason balancing test was more appropriate. This is particularly true in light of the greater vulnerability of inelastic input markets to monopsony compared to the risk of monopolization of consumer markets. By departing from its longstanding focus on the economic realities of the market at issue in a given antitrust case, the Supreme Court has created the opportunity for predatory well-counseled large businesses in regionally constrained input markets to achieve monopsony with impunity.

The pricing instruction in *Ross-Simmons*, which established anticompetitive conduct if the defendant purchased more inputs "than it needed or paid a higher price for those inputs than necessary" so as "to prevent the Plaintiffs from obtaining the [inputs] they needed at a fair price" was attacked, with some justification,[118] by Weyerhaeuser and its amici as a loose, standardless and subjective standard that exposed routine business purchasing decisions to the vagaries of a jury trial. But instead of giving due consideration to the Ninth Circuit's nuanced analysis concluding that *Brooke Group* should not be extended to the narrow category of cases that involve "predatory bidding in a relatively inelastic market,"[119] the Supreme Court extended *Brooke Group* in blanket fashion to the buy-side and ignored a formulation of the rule of reason standard advanced by eight States,[120] which submitted

[118] In fairness to the district court, it should be noted that this language was included within a longer instruction which defined anticompetitive conduct based upon language in Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 (1985) and model instructions drawn from AMERICAN BAR ASSOCIATION SAMPLE JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES (1999).

[119] Confederated Tribes of Siletz Indians of Or. v. Weyerhaeuser Co., 411 F.3d 1030 (9th Cir. 2005).

[120] California, Oregon, Arizona, Iowa, Louisiana, Montana, West Virginia, and Wisconsin, filed an amicus brief in *Weyerhaeuser* urging the Supreme Court to affirm the Ninth Circuit decision and reject the application of *Brooke Group* to predatory bidding cases. These States noted that while the *Weyerhaeuser* case involved timber, the "amici States also provide inputs and

an amicus brief supporting Ross-Simmons, and Professor Jack Kirkwood.[121]

The States proposed a two-pronged rule of reason test for evaluating predatory bidding that found the behavior anticompetitive "if the conduct (a) 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 (b) substantially affected the ability of the buyer's rivals to compete for the input."[122] A predatory bidding plaintiff unable to marshal the evidence to meet this test would be subject to dismissal of the claim on summary judgment.

The *Weyerhaeuser* decision lays out a fairly simple three-step road map for achieving monopsony in an inelastic input market. First, during the course of achieving a market share that is below a threshold of significant antitrust concern (i.e., 30 to 40%), vertically integrate by acquiring a significant share of the input market and use competitor acquisitions to fuel much of the market share growth. Second, force equally efficient competitors out of business by raising input prices to levels that make operations just barely profitable. Having acquired access to a significant share of the needed raw materials at lower prices during the first phase, the rising monopsonist can survive a significant period of break-even operations while an equally efficient competitor without access to a significant increment of low-cost raw materials cannot. In the third stage, having achieved a market share of 70 to 85%, the monopsonist drives down the cost of the relevant input and recoups the cost of its strategy.

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access to natural resources through the competitive bidding process in a number of other markets such as mining and drilling leases, mineral and geothermal rights such as oil and gas, grazing rights, and use of materials such as gravel from submersible and submerged lands." States' Amicus Brief at 7. The State of Oregon noted that, as the owner and supplier of alder timber in Oregon, it was one of the "targets" of Weyerhaeuser's predatory bidding activities. *Id*. at 5.

121 John B. Kirkwood, *Buyer Power and Exclusionary Conduct: Should* Brooke Group *Set the Standards for Buyer-Induced Price Discrimination and Predatory Bidding,* 72 Antitrust L.J. 625, 661 (2005).

122 States' Amicus Brief at 29.

From an economics perspective, the captive raw material supply acquired by a dominant firm in step two of the *Weyerhaeuser* road map to monopsony is not "low-cost" if valued at its opportunity cost. However, if monopsony is the ultimate objective, exploiting the opportunity provided by a captive low-cost raw material supply—an opportunity not available to an equally efficient nonintegrated competitor—is an entirely rational approach to achieving monopsony power in an inelastic raw material market. *Reid Bros.* and *Weyerhaeuser* both show that a monopsonist will sacrifice these opportunity costs (while remaining profitable from an accounting perspective) for the express purpose of achieving much higher profits through the exercise of a monopsony power after its unprofitable, equally efficient but nonvertically integrated competitor closes its doors. While economists would recommend that the transfer price for low-cost logs be set at market,[123] which was in fact the policy Weyerhaeuser professed to have in effect at trial in *Ross-Simmons*, there is no legal requirement to do so. Indeed, there is a strong incentive on the part of the rising monopsonist to exploit a captive low-cost raw material supply with full knowledge that its average overall input costs will be below that of an equally efficient competitor without such supply. The bottom line in these conditions is that the *Weyerhaeuser* rule now allows the rising monopsonist to push input prices to levels where it remains profitable while its equally efficient competitor is losing money.

Given the clarity of the Supreme Court's road map as applied to an inelastic market, there is nothing to prevent Weyerhaeuser from returning to its prior status as a monopsonist in the alder sawlog market by aggressive pursuit of stage two bidding behavior, which is immunized from antitrust scrutiny by virtue of the Supreme Court's extension of *Brooke Group*. Interviews with Weyerhaeuser competitors in late 2007 and early 2008 revealed that each is concerned that Weyerhaeuser or any other large player in the market could replicate the monopsony power that Weyerhaeuser enjoyed in 2001 by following the guideposts now sanctioned by the Supreme Court. Consider as well, however, the following hypothetical involving another inelastic regional resource market.

123 *See* discussion *infra* text accompanying notes 133–38.

Suppose one of the major seafood processors in Alaska, currently holding a 25% market share, decides to achieve monopsony power with a carefully calibrated three-step plan to be implemented over five to ten years. In stage one, the company vertically integrates by acquiring sufficient fishboat capacity in the form of vessels and permits entitling the holder to catch a specified volume of a particular fish species. Most U.S. fish markets are classically inelastic because the total catch is fixed by state and federal regulators. Most of these markets are also regional, which is a function of the time and fuel cost of delivery to processors and the perishable character of the products. Also in stage one, this processor bent on monopsony increases its market share to 40% by acquiring a number of its larger and most efficient competitors.

In the second stage, this processor's antitrust counsel advises against any further acquisitions, which could expose his client to an attempted monopolization claim under the Sherman Act. However, he advises that the company is free to increase capacity at its multiple facilities and to pay higher prices to fish suppliers so long as the revenues produced from the products from a given fish stock exceed its costs. Because this processor can supply one-third of its needs from its own fishing fleet, it can afford to pay fish prices which go all the way to the edge of unprofitability. And if the company can average its input costs, thus taking advantage of the low cost supplies from its captive fleet, this vertically integrated processor can raise input prices to levels that would bankrupt an equally efficient competitor that is not vertically integrated.

Moreover, if this processor gains a reputation for aggressively punishing attempts to siphon off its market share by competitors or new entrants, the probability that a formerly bankrupt facility will reopen under new ownership is greatly reduced. In stage three, this processor uses its dominant 75% to 85% market share to control Alaskan fish prices at levels which are just above those necessary to cover expenses and earn a small profit for the typical fishboat owner. The few remaining processor competitors in Alaska recognize the oligopolistic condition of their market and simply follow the dominant player's lead. The net result is an obvious aggregate welfare loss in terms of the competitive health of fish markets in

Alaska. A predator has achieved monopsony power by following a fairly simple road map that is demonstrated to have worked in an inelastic input market. That predator has acquired or eliminated equally efficient competitors and, now benefiting from monopsony pricing, has little reason to innovate or maximize efficiency. The potential for new entrants is low, considering high capital costs and the legitimate fear of preclusive bidding by the monopsonist. The fishboat owners who catch and sell Alaskan fish stocks, just like the *Reid Bros.* loggers, decline in number and those survivors are victimized by low prices, which adversely impact their ongoing capital investment and productivity.

B. *The price-revenue test is unworkable*

The Supreme Court in *Weyerhaeuser* embraced without exception the notion of predatory bidding as the mirror image of predatory pricing. Throughout his opinion for the Court, Justice Thomas characterized these two types of pricing claims as analytically,[124] economically,[125] and theoretically[126] similar and, without any discussion of the contrary arguments, breezily concluded that the first prong of the *Brooke Group* test "requires little adaptation for the predatory-bidding context."[127] *Brooke Group*'s price-cost test requires a predatory pricing plaintiff to show that defendant has priced its outputs below cost as measured by the generally accepted methodologies of average variable cost or marginal cost. As to the price-revenue test now applicable to predatory bidding, the *Weyerhaeuser* opinion offers no guidance other than to state that the plaintiff must prove that the predatory bidding "lead to below-cost pricing of the predator's outputs."[128] Specifically, "the predator's bidding on the buy-side must have caused the cost of the relevant

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[124] Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 127 S. Ct. 1069, 1076 (2007).

[125] *Id*.

[126] *Id*. at 1078.

[127] *Id*.

[128] *Id*.

output to rise above the revenues generated in the sale of those outputs."[129] What the Supreme Court failed to acknowledge, however, is that there is no comparable, generally accepted, reliable or workable test for the buy side.

1. THERE IS NO WORKABLE TEST FOR INELASTIC RESOURCE MARKETS

In the forest products industry, large vertically integrated companies own raw materials (fee timber) and converting facilities (sawmills). Some of this fee timber, acquired decades ago, may be an unusually cheap source of supply. For example, much of Weyerhaeuser's large timber holdings in Washington were purchased over a century ago for $6 per acre.[130] In *Ross-Simmons*, Weyerhaeuser's alder sawmill in Longview, Washington was the single largest beneficiary of its fee alder, accounting for one-third to over one-half of that mill's annual log supply from 1997 to2001.[131] On average, these fee logs were supplied at a 32% discount to the average cost of logs purchased from third parties.[132]

As detailed above,[133] Weyerhaeuser claimed to utilize a transfer pricing mechanism to set "market" prices on sawlogs delivered from its timberlands division to its alder division, as determined quarterly from transaction evidence. Whereas arbitrarily low transfer prices will inflate division profits and impede efficiency, a market-based approach is designed to stimulate the most efficient allocation of resources. In a leading text on the subject, Professor Eccles describes the economic theory underlying transfer pricing as follows:

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

[129] *Id*.

[130] Weyerhaeuser purchased 900,000 acres of Washington forest land in 1900, at the time the largest private land transaction in U.S. history. JONI SENSEL, TRADITIONS THROUGH THE TREES, WEYERHAEUSER'S FIRST 100 YEARS 16 (1999).

[131] J.A. 831a.

[132] *Id*.

[133] *See* discussion *supra* text accompanying notes 77–79.

> divisional financial performance. The objective is to find the price that will lead both the selling and buying divisions to choose output levels that maximize the total profits of the firm.[134]

In *Ross-Simmons*, Weyerhaeuser was proven to have deviated from its market-based transfer pricing on deliveries to the Longview mill as part of its drive to eliminate competitor Ross-Simmons. At trial, Weyerhaeuser had no explanation for setting transfer prices on logs delivered to the Longview mill at levels significantly below the prices for identically graded logs delivered to defendant's five other mills in Oregon and Washington. If this below-market subsidy is eliminated, the Longview mill experienced periods of loss in 1998–2001. However, following remand after the Supreme Court reversal, Weyerhaeuser argued that the proper inquiry was into the profitability of its entire alder division not just its mill that competed head-to-head with Ross-Simmons.[135]

The economic rent associated with low-cost, long-held timber, which may be a function of luck rather than superior foresight or skill,[136] should not be readily available to fund "above revenue" bidding in a resource market. The new antitrust safe harbor announced in *Weyerhaeuser*, however, immunizes this predatory strategy and thus underdeters predatory bidding behavior while impeding the most efficient allocation of scarce resources.

A second administrability problem with the *Weyerhaeuser* safe harbor for input pricing behavior is the confusion that will result, in a multitactic antitrust case, when a jury must be told that bidding

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

[135] Letter from Stephen V. Bomse, Heller Ehrman LLP, Counsel for Weyerhaeuser Co., to Ms. Cathy Catterson, Clerk, U.S. Court of Appeals for the Ninth Circuit at 2 (Mar. 12, 2007); Defendant's Memorandum of Law in Support of Motion for Judgment as a Matter of Law at 4 (May 4, 2007) (filed after remand from Ninth Circuit); both available at www.alderantitrust.com.

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

behavior is judged by a price-revenue test while closely associated conduct is measured by the rule of reason balancing test. In the alder sawlog market, Weyerhaeuser's region-wide presence through competitor acquisitions and its market foreclosure through varied exclusive agreements, along with other anticompetitive conduct, were major contributors to the creation of market conditions that both set up and enhanced the effectiveness of its bidding behavior in the "open" fraction of the market. How can a judge or jury sort out the liability issues in a multiconduct case if the bidding conduct is immunized with a price-revenue test, while related conduct, which facilitated the effectiveness of that bidding behavior, is measured by a rule of reason analysis?

Brooke Group involved only a pricing claim and presented no such problem. One need only look back to *Reid Bros.* to understand the potency of the combination of pricing and nonpricing conduct and to recognize the wisdom of the Ninth Circuit's conclusion, as a matter of statutory interpretation, that to segregate the overbidding allegation and make it subject to a strict numerical test "would only frustrate the intent of the Sherman Act."[137]

This "course of conduct" argument based on *Continental Ore* was advanced by the government in *Microsoft*,[138] where the government argued that, as a matter of antitrust policy, "a monopolist's unilateral 'campaign of [acts intended to exclude a rival] that in the aggregate has the requisite impact' warrants liability even if the acts viewed individually would be lawful for want of a significant effect upon competition."[139] The D.C. Circuit passed on the government's argument because the district court "did not point to any series of acts, each of which harms competition only slightly but the cumulative effect of which is significant enough to form an independent basis for liability."[140] Cumulative effects analysis is well-

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[137] Pet. App. 12a (quoting Reid Bros. Logging Co. v. Ketchikan Pulp Co., 699 F.2d 1292, 1298 n.5 (9th Cir. 1983).

[138] United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

[139] *Id*. at 78, citing Brief for Appellees United States and the State Plaintiffs, *Microsoft*, 253 F.2d 34 (Nos. 00-5212 and 00-5213).

[140] *Id*.

recognized in environmental law[141] and was recently recognized as a viable antitrust theory by the Sixth Circuit in *Spirit Airlines.*[142] In *Spirit*, the Sixth Circuit reversed the trial court's summary judgment in favor of defendant and remanded the case for trial on both predatory pricing and "course of conduct" theories. As to the latter claim, the court declared:

> In sum, even if the jury were to find that Northwest's prices exceeded an appropriate measure of average variable costs, the jury must also consider the market structure in this controversy to determine if Northwest's deep price discounts in response to Spirit's entry and the accompanying expansion of its capacity on these routes injured competition by causing Spirit's departure from this market and allowing Northwest to recoup its losses and to enjoy monopoly power as a result.[143]

The Supreme Court completely ignored the course of conduct argument advanced by Ross-Simmons and its amici in their briefs. The presence of this other conduct, however, was no doubt a significant contributor to Weyerhaeuser's ultimate decision to settle with Ross-Simmons for $17 million.

A third administrability problem is associated with the fact that the relevant inputs (alder sawlogs) are used to produce many products. The three main product categories are chips, pallet lumber and kiln-dried, finished lumber, but Weyerhaeuser's finished lumber product mix included 25–50 lumber grades annually and 117 different products between 1990 and 2000.[144] Each sawlog produces some of all three major product categories, but larger diameter logs yield a higher percentage of the highest value item, finished lumber. Accurate cost allocations and revenue projections in this complicated input/output environment are extremely difficult. There is no comparable corollary to the commonly utilized average variable cost or marginal cost formulations used in sell-side predatory pricing cases.

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141 *See, e.g.,* Kleppe v. Sierra Club, 427 U.S. 390, 413 (1976) ("Cumulative environmental impacts are, indeed, what require a comprehensive impact statement.").

142 Spirit Airlines, Inc. v. Northwest Airlines, Inc., 431 F.3d 917 (6th Cir. 2005).

143 Id. at 953.

144 Ex. 94 at 2.

In sum, especially in resource market cases where purchasing conduct is part of a multitactic integrated scheme, the price-revenue test is not only unworkable, but inconsistent with sound economic policy. Indeed, the *Brooke Group/Weyerhaeuser* safe harbors should not be interpreted or applied in a manner that would permit a region-wide, multiplant division to eliminate its single mill competition with a predatory march through subsets of the relevant market and be insulated from any liability because the company as a whole or the relevant operating division was making money. But this is precisely the argument advanced by Weyerhaeuser on remand in *Ross-Simmons*, no doubt foreshadowing the arguments of future predatory bidding defendants.

2. THERE IS NO TEST FOR MULTIPLE INPUT PRODUCTS In the most common circumstance, a product that a buyer manufactures and sells is comprised of more than one constituent part (e.g., computers, trucks, beverages). In a predatory pricing case, the parties are able to prove both the cost of producing and marketing the finished product by one of a number of well-accepted cost methodologies and the price at which the finished product then was sold, compare the cost and the price, and thereby determine whether the seller sold the finished product at a loss.

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

Thus, unlike in a predatory pricing case, one *cannot* compare the purchase price of the targeted component input with the sale price of the finished product in any meaningful manner to determine whether there has been a "loss" on the purchase of the input that can subject the buyer to antitrust liability. If monopsony were merely the mirror image of monopoly, then why the fundamental, critical disconnect? And now that *Brooke Group* nonetheless has been imposed on buy-side transactions despite the obvious lack of symmetry, the asymmetric result should not be a surprise: where a dominant buyer can now readily monopolize the market for an input component and still sell the end product for a profit, it will never have to face antitrust liability for its anticompetitive conduct in the targeted input market.

C. Suggestions for antitrust plaintiffs and state regulators

What is an antitrust plaintiff to do in the post-*Weyerhaeuser* era? With pricing conduct immunized from legal scrutiny, an antitrust input plaintiff must find evidence showing a predatory monopsonistic plan on the part of the defendant. This requires evidence of other anticompetitive behavior and expert testimony to show how the individual elements work in combination: acquisitions, increasing internal capacity; exclusive supply agreements; and manipulative bidding behavior that does not serve a legitimate business purpose. Admittedly, if the predator focuses entirely on pricing strategies and makes effective use of the "failing business" safe harbor in acquiring competitors who surrender to a sustained period of aggressive (but technically not predatory) bidding, there is little for the victims of this strategy to do on the antitrust front. On the business front, input buyers who fear a potential predator's use of this strategy should endeavor to educate suppliers about the potential risk of monopsony in their market and the need to maintain a diverse and competitive group of input processors in that particular market. This may be feasible in relatively transparent input markets where the suppliers participate on a regular basis and likely will recognize the irrationality of a rise in input prices driven by a monopsonist hopeful rather than legitimate market forces, but not so in markets without these attributes.

What can state regulators do? As shown by the records in the *Reid Bros.* and *Weyerhaeuser* cases, input markets that lack transparency are more susceptible to preclusive or manipulative bidding. Lack of transparency also fosters a market condition where it would be very difficult to know whether a monopsonist is using targeted illegal predatory bidding to achieve monopsony power by picking off competitors within subsets of the relevant geographic market. Transparency can be significantly enhanced by regulations that require accurate reporting of input prices. Where the state is a resource owner and participant in these markets, greater transparency will facilitate the bidding process, increase the number of bidders, and help secure the highest market price on a sale of public resources.

V. CONCLUSION

Inelastic natural resource markets are uniquely susceptible to monopsony or oligopoly. The Supreme Court's extension of *Brooke Group*'s per se rule from predatory selling to predatory buying is an unfortunate departure from the multidecade focus in its antitrust opinions on fact-based economic analysis of the particular market at issue. Unless inelastic resource markets become more transparent as a result of conditions in the particular market or regulatory intervention, increased concentration in these markets is the inevitable long term outcome. As evidence of this likely trend develops over time, the Supreme Court should reconsider its approach and replace the *Weyerhaeuser* per se rule with the rule of reason standard.