No. 92-466

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

LIGGETT GROUP INC.,
Petitioner,
v.

BROWN & WILLIAMSON TOBACCO CORPORATION,
Respondent.

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

---

RESPONDENT'S BRIEF ON THE MERITS

ROBERT H. BORK
1150 17th Street, N.W.
Washington, D.C. 20036
(202) 862-5851

FREDERICK M. ROWE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-5200

GRIFFIN B. BELL
Counsel of Record
KING & SPALDING
191 Peachtree Street
Atlanta, GA 30303
(404) 572-4600
Counsel for Respondent

(Additional Counsel Listed on Inside Cover)

February 3, 1993

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

ABBOTT B. LIPSKY, JR.
VERONICA G. KAYNE
KING & SPALDING
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 737-0500
Counsel for Respondent

Of Counsel:
NORWOOD ROBINSON
MICHAEL L. ROBINSON
ROBINSON MAREADY LAWING
& COMERFORD
380 Knollwood Street
Suite 300
Winston-Salem, NC 27103
(919) 631-8500

QUESTION PRESENTED

Respondent Brown & Williamson Tobacco Corp. respectfully submits that the "Questions Presented" identified by petitioner Liggett Group Inc. are not genuinely presented. The only question appropriate for resolution by this Court is:

> Whether the Fourth Circuit correctly affirmed the district court's determination that Liggett failed to demonstrate factually the elements of its oligopoly recoupment theory of competitive injury.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—Continued

PERIODICALS AND PUBLICATIONS Page

OTHER AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-466

LIGGETT GROUP INC.,
Petitioner,
v.
BROWN & WILLIAMSON TOBACCO CORPORATION,
Respondent.

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

---

RESPONDENT'S BRIEF ON THE MERITS

COUNTERSTATEMENT OF THE CASE

Introduction

This case arose from an outbreak of price competition triggered by respondent Brown & Williamson Tobacco Corporation's ("B&W")[1] entry into an emerging product segment of the cigarette industry. This competitive challenge was countered by an immediate lawsuit by petitioner Liggett Group Inc. ("Liggett") to preserve its 97% control of the new market segment. The complaint was filed two weeks after B&W announced its plans to enter and before B&W had sold a single cigarette. The result of B&W's entry, and that of other cigarette manufactur-

---

[1] Pursuant to Rule 29.1, B&W states that it is an indirect wholly-owned subsidiary of B.A.T. Industries, p.l.c. Between B.A.T. Industries, p.l.c. and B&W are South Western Nominees Ltd. (U.K.), BATUS Holdings, Inc. and BATUS Tobacco Services, Inc. B&W has only wholly-owned subsidiaries.

ers, has been vigorous price competition in the entire cigarette market, a proliferation of discount brands and varieties of cigarettes, and consumer savings of hundreds of millions of dollars.

The version of the facts and issues given by Liggett is so misleading that B&W is compelled to restate the case from beginning to end.

This is a predatory pricing case brought under the Robinson-Patman Act by one competitor in the cigarette market against another competitor. Based on seriously defective instructions, the jury found for Liggett. J.A. 27-28.[2] The district court granted B&W j.n.o.v., Pet. App. 19a, 52a; J.A. 34-35, and a unanimous panel of the Fourth Circuit affirmed on the ground that Liggett had shown no reasonable possibility of injury to competition. Pet.App. 2a. On the sole issue before this Court, potential competitive injury due to oligopolistic predation, both courts below rested their decisions upon the evidence of record. *Id.* at 12a-13a, 32a-38a.

The dispute before this Court is also factual. The outcome of this case does not depend on the answers given to Liggett's "Questions Presented," which are not posed by the decisions below, but on whether the two courts below or Liggett correctly described what happened in the market.

Liggett claims that B&W engaged in predatory, below-cost pricing in order to discipline Liggett and force it to raise its prices. Pet.Br. 1-2. B&W, according to Liggett, planned to and did recoup its losses on below-cost prices and thus injured consumers, as it had also planned. Pet. Br. Questions Presented. Liggett states that B&W, despite its small 12% market share, was able to accomplish

---

[2] In this brief, Liggett's Petition for a Writ of Certiorari is cited as Pet. ——; its Brief on the Merits is cited as Pet.Br. ——. The Joint Appendix is cited as J.A. ——. Exhibits admitted into evidence at trial are cited as PX or DX ——; the official transcript from the district court is cited as Tr. volume:page. The opinions of the district court and court of appeals are cited as Pet.App. ——.

this because it signaled other, much larger cigarette manufacturers not to interfere. *Id.* at 18. Liggett asserts that the other firms, acting not by agreement but as rational oligopolists, joined B&W in "managing prices upward." *Id.* at 2-3, 18-19.

Liggett's proof consists primarily of statements culled from B&W planning documents. Liggett claims that these documents show B&W's "intent" to "discipline" Liggett. B&W will show that Liggett's portrayal of an alleged B&W "plan" is an illusion created by distortions of the record, misleading quotations and misattributions, as well as by "splicing" of documentary fragments from different times and different organizational levels of B&W. Even Liggett's so-called "intent" documents do not support Liggett's case.

Apart from Liggett's abuse of the "intent" documents, however, the uncontested objective market facts are completely inconsistent with Liggett's assertion that B&W planned, attempted, or succeded in any oligopolistic "signaling" scheme to stifle price competition. Thus, Liggett's heavy reliance on intent documents is beside the point, since such documents could at most show B&W's early hopes and plans, not its actual conduct and not the real-world effect of generic discounting on the explosion in cigarette market competition. As the district court found after comparing Liggett's version of B&W's "analysis" with the undisputed market realities, even "[a]n avowed predator with no prospect of controlling prices is a paper tiger unable to harm consumer welfare." Pet.App. 33a.

This counterstatement of the facts will demonstrate that (1) the jury did not "find" key "facts" asserted in Liggett's brief; (2) B&W neither intended to nor did price below cost; (3) B&W planned no recoupment and received none; (4) B&W gave no "signal" to rival cigarette manufacturers; (5) those rivals, far from showing oligopolistic restraint, competed vigorously, just as B&W expected; and (6) competition, far from being injured, intensified to the benefit of consumers.

A. Liggett's Reliance On Jury "Findings" Is Specious.

Given the trial court's defective instructions,[3] it is improper to claim, as Liggett does, that the jury found either sales below cost or a likelihood of recoupment. The jury returned a general verdict on the issue of injury to competition (Issue 1). J.A. 27. There were no special interrogatories as to sales below cost, prospective recoupment, or any other element of the proof of injury to competition. *Id.*

Nor is it true to say, as Liggett does, that the jury's general verdict necessarily contained findings on these critical issues. The jury was instructed that, provided B&W had power in a submarket, the jury could base liability solely on documents indicating B&W's bad intent. Instr. 16, 18, 29, J.A. 831-35, 843. The instructions permitted, and the judge's subsequent explanation encouraged, the jury to find liability without finding any of the elements of competitive injury that Liggett claims were found. Tr. 123:27-30. Because the jury's factual findings are unknown and unknowable, the courts below did not substitute their view of the facts for any facts "found" by the jury. Indeed, since Liggett concedes that a competitive injury verdict based on predatory "motive" alone is untenable, Pet. 7 n.11, the jury verdict here fails for that reason alone. *See Spectrum Sports, Inc. v. McQuillan*, No. 91-10, slip op. at 12 (U.S. Jan. 25, 1993) (defective jury instructions vitiate antitrust verdict; predatory intent alone cannot support verdict of attempted monopolization).

1. *The Jury Was Not Required to Find That B&W Priced Below Cost.*

Liggett repeatedly asserts that the jury made the crucial factual finding that B&W priced below cost. Thus,

---

[3] The errors in the trial court's instructions were the subject of B&W's conditional cross-appeal, seeking a new trial, in the Fourth Circuit. That court did not reach those issues. The instructions are discussed here only to show that what the jury might have found cannot be determined from its verdict.

Liggett states: "B&W priced its black-and-whites below their average variable cost." Pet.Br. 13. Liggett asserts that B&W was "proven" to have engaged in "*actual* below-cost pricing." *Id.* at 33 (emphasis Liggett's). Liggett states as fact that "B&W sold black-and-whites well below their average variable cost for 18 months." *Id.* at 39.

These statements are baseless. Liggett tried to prove sales below cost and B&W tried to disprove such sales. Nobody knows what the jury thought on these issues. The jury gave a general verdict on the issue of injury to competition. J.A. 27. It did not answer special interrogatories. Nor can Liggett properly argue that these crucial factual findings were "necessarily" implicit in the verdict. The jury instructions destroyed that possibility.

Thus, according to Instruction 16, J.A. 832, "*Alternative Methods of Proving*" competitive injury, Liggett could establish such injury "in either one of two ways," (1) through "market analysis" showing actual injury, or (2) by a showing of "predatory intent" from which competitive injury could be inferred. J.A. 833. In turn, under Instruction 18, J.A. 834, such predatory intent could be inferred "in either one of two ways," (1) from below-cost pricing *or* (2) from "direct" evidence of B&W's bad statements, documents, or conduct.[4] In short, below-cost pricing was one of at least three alternative ways to show potential injury to competition.

Hence, not only was the jury not told that it must necessarily find such below-cost pricing, it was plainly told that it need not do so. Indeed, the trial court ne-

[4] Such purportedly "conventional" double-inference instructions are repudiated by Liggett itself, Pet.Br. 43 n.55, and have been called "unnecessarily cumbersome and even misleading." Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 720'c, at 730 (Supp. 1992) ("*Antitrust Law* (Supp. 1992)"). Liggett grades them "satisfactory" here because they were ostensibly "supplemented" by requirements of below-cost sales and recoupment. Pet.Br. 43 n.55. But the instructions imposed no such requirements. *See infra* pp. 2-3.

glected to give any instruction requiring proof that B&W priced its generics to lose money, even though B&W had specifically requested such an instruction and the judge had agreed to it. Tr. 111:79; B&W Proposed Jury Instruction 19, J.A. 25. Therefore, Liggett's repeated assertions that B&W priced below cost are untenable.

2. *The Jury Was Told That It Could Find Predatory Intent Solely From Bad "Statements" in B&W "Documents."*

That the jury did not address the issue of below-cost pricing is all the more likely because of the court's detailed instructions on intent. The jury was instructed that it could find B&W had a predatory intent solely on the basis of statements of aggressive language in some B&W documents. Instr. 18 and 29, J.A. 835, 843. Thus, Instruction 18, J.A. 834-35, plainly informed the jury that it could find a "reasonable possibility of injury to competition" from "predatory intent," and that predatory intent "may be found through direct evidence of B&W's statements, documents or conduct." The only example of "conduct" the court offered was the knowing copying of Liggett's package design. Instr. 29, J.A. 843. This example allowed the jury to find predatory intent from unspecified varieties of bad "conduct" unrelated to below-cost pricing or recoupment.

Accordingly, it was entirely possible for the jury to think that B&W's bad intent documents or unspecified bad conduct *alone* established injury to competition inferred from predatory intent.

3. *The Jury Instructions Did Not Require a Finding That B&W Had a Reasonable Prospect of Recoupment.*

According to Liggett, "predatory intent was carefully defined. The jury was told that the *only* intent relevant to this case would be a B&W plan 'to discipline and exclude . . . rivals . . . so that it can earn higher than competitive profits. . . .'" Pet.Br. 20 (citing Instr. 19, J.A. 835) (emphasis added).

However, Instruction 29—*never mentioned by Liggett*—clearly states that a "second way" to "establish predatory intent" is from "direct evidence" of "oral or written statements by Brown & Williamson personnel." J.A. 843. This critical instruction on "*Direct Evidence of Predatory Intent*" does not mention below-cost pricing or recoupment, and it does not point the jury toward *any* objective evidence bearing on "recoupment." Instead, after explaining that "predatory intent" (and therefore competitive injury) could be found directly from bad documents or "conduct," the sole example of conduct given was the alleged copying of Liggett's packaging. Neither the instruction nor this example had anything whatever to do with recoupment. Thus, the jury was allowed to consider vague and undefined bad "conduct" as a basis for a predatory intent finding.

To overcome this fatal flaw in its assertion, Liggett maintains that "[t]he jury was warned not to infer injury to competition from predatory intent if its common sense indicated that there was no such possibility of recoupment." Pet.Br. 20 (citing and relying on Instr. 12 and 20, J.A. 829, 835). But No. 12 defines injury to competition generally, including a reference to recoupment, without mentioning predatory intent. And No. 20 is a boilerplate cautionary instruction defining "inferences" and urging "common sense," which does not mention recoupment. Liggett stitches these two instructions together to falsely claim that there was a specific warning on recoupment. There clearly was no such warning.

Hence, Liggett is incorrect to suggest that the jury must have found prospective recoupment by B&W. Instruction 29 plainly allowed a verdict for Liggett without (in Liggett's words) proof of "a recoupment potential" or finding recoupment "a genuine prospect here." Pet.Br. 41.

4. *The Court Instructed the Jury on a Submarket That Was Not Even in the Case, Allowing the Jury to Find B&W Liable on the Basis of Power in a Nonexistent Submarket.*

Finally, the trial court *sua sponte* injected the concept of submarkets into this case after the evidence was closed and over the objections of counsel for *both* parties. These instructions, too, make it impossible to know what the jury found. The very first instructions on competitive injury repeatedly stressed the "importance" of the separate concepts of markets and submarkets. Instr. 6, 7, 8, 9, J.A. 824-28. The jury was then told it could find injury to competition in the market as a whole if B&W had bad documents and power in a "well-defined submarket of generic cigarettes." Instr. 13, 14, 19, 29, J.A. 830-32, 835, 843.

The jury was so instructed despite the parties' stipulation that the relevant market comprised all cigarette sales, branded and generic, Pet.App. 25a, and Liggett's counsel's protest that he had not tried the case on any submarket theory, Tr. 112:85-86. The district court itself recognized in granting j.n.o.v. that the instruction had been improper:

> The parties have stipulated that the relevant market is the entire cigarette market in the United States. Upon close examination, this court believes that there is no substantial economic evidence that generic cigarettes are sufficiently distinct from branded cigarettes to justify applying the average variable cost test to generic cigarettes alone.

Pet.App. 25a (footnote omitted). Though it thus decided in its j.n.o.v. opinion that there was no valid submarket in this case, the district court had emphasized the submarket in ten separate instructions (Instr. 6, 7, 8, 9, 13, 14, 19, 21, 22, 24, J.A. 824-40) on the very issue now before this Court—injury to competition.

Nor were the instructions harmless. The district court itself stated that the submarket issue was indispensable to Liggett's case. When even *Liggett's* counsel protested the proposed instructions, the court said: "Mr. Hogeland, you wouldn't even be here if it wasn't in this case. You wouldn't have gotten past summary judgment if it wasn't in the case." Tr. 112:85.

Later, of course, the j.n.o.v. opinion removed the submarket issue from the case, but that cured nothing because the issue *was* in the case when the jury deliberated.

5. *The Court's Subsequent Explanation to the Jury Stressed the Intent and Submarket Issues.*

The prejudicial impact of these instructions was magnified by the trial judge's confusing response to the jury's request for "help" on day 8 of its 10-day deliberations. Tr. 123:7, 27-30. Although having the lengthy written instructions before them, J.A. 813-51; Tr. 115:11, 141-42; Tr. 123:25, the jury's note to the judge said that "some of the instructions" were "sort of unclear to us at this time," Tr. 123:8. The judge stated that the competitive injury instructions "may be confusing" on the relationship of market power and intent. Tr. 123:10-11.

The court's explanation to the reconvened jury invited a verdict based on B&W's "bad intent" alone. Tr. 123:27-30. Thus, in explaining two "alternative methods of proving reasonable possibility of injuring competition," the judge elaborated on finding competitive injury based on bad intent, but mentioned neither below-cost sales nor recoupment. Tr. 123:29-30. Indeed, the judge's explanation reiterated the "importance of market power," including the "very important" determination as to "whether price value cigarettes are a well-defined submarket of the cigarette market." [5] Tr. 123:28-29.

* * * * *

[5] Such simultaneous market/submarket instructions have been called "submarket confusions" that "have confused the legal issue by assuming that a 'market' and a 'submarket' could simultaneously be relevant to the appraisal of a particular transaction . . . ." Phillip

The upshot is that, under the trial court's instructions, the jury may have found B&W liable (1) without finding any below-cost pricing, (2) on the basis of bad "intent" shown by statements alone, (3) without finding prospective recoupment, and (4) in reliance on a nonexistent generic cigarette "submarket." *Absolutely nothing about the elements of proof of competitive injury can be inferred from the jury's general verdict on that issue.* Thus, this case must be decided on the facts of record. Four federal judges have concluded that the facts relating to competitive injury do not support Liggett's claim. B&W will show that the judges were correct.

B. The Facts Demonstrate Legitimate, Aggressive Market-wide Competition That Benefited Consumers.

The facts demonstrate that B&W's entry into the generic segment of the cigarette market was part of a competitive process that brought all cigarette manufacturers into generics, increased price competition in both branded and generic cigarettes, and saved consumers hundreds of millions of dollars. The generic segment of the market not only grew during all relevant time periods, it is still growing today, with many generics priced much further below branded cigarettes than was the case when Liggett and B&W first engaged in head-to-head generic price competition.

1. *The Parties and the Market.*

Liggett and B&W, along with all other companies in the market, manufacture and sell cigarettes, both branded and generic.[6] Pet.App. 20a, 22a. The parties stipulated

---

Areeda, *Monopolization, Mergers, and Markets: A Century Past and the Future,* 75 Cal. L. Rev. 959, 979-80 (1987).

[6] This brief defines "generic cigarettes" as (1) black-and-white cigarettes—sold in nondistinctive packaging at a low price; (2) private-label generics—sold at generic prices with the name and trade dress specified by the purchaser (usually a retail chain); (3) branded generics—cigarettes with name-brand identity (*e.g.,* "Doral"), but sold at discount prices; and (4) "Value-25s"—sold in packages of 25 cigarettes at the regular price of 20-cigarette packs.

that the relevant market consists of all cigarettes sold by the domestic industry. *Id.* at 25a. There are four other competitors in the industry: Phillip Morris ("PM"), R. J. Reynolds ("RJR"), Lorillard, and American. *Id.* at 2a-3a, 20a n.7. PM and RJR are the industry leaders, with 41.9% and 28.5% market shares, respectively, at the time of trial. J.A. 352. B&W was a distant third and its market share never exceeded 12% at any relevant time. Pet.App. 3a, 33a. Both Liggett and B&W have at all times been profitable full-line competitors. *Id.* at 48a. During the relevant time period, both companies were backed by multibillion dollar British parents. J.A. 212; Tr. 8:137-38; Tr. 27:91-92; Tr. 62:19.

Far from being the "stable oligopoly" portrayed by Liggett, Pet.Br. 6, the industry has experienced profound changes. PM rose from last place to oust RJR from first place in 1984. DX 3502R; Tr. 100:164. Liggett, once "a major factor in the cigarette industry" with market share over 20%, slid "precipitously for many years" down to last place since 1980. Pet.App. 21a. B&W fell from 17% in 1975 to 10.9% by 1988. DX 3502R. Even as those dramatic changes occurred, slumping overall demand created industry-wide excess capacity. J.A. 84. These are the classic conditions that make price competition inevitable.

Price competition increased in importance well before the introduction of generics. The very B&W planning documents cited by Liggett recognize that the entire cigarette market had grown increasingly price-competitive. List prices[7] were losing significance because manufacturers had begun offering discounts directly to consumers through coupons, stickers (manufacturers' coupons placed on cartons displayed on retailer premises) and promotions (free product to purchasers of branded cigarettes). PX 4 at 12; Tr. 2:198-99. But price competition was about to escalate into a price war.

[7] All references to list prices mean announced prices to wholesalers, retailers and other market intermediaries. Cigarettes are never sold by manufacturers to consumers (smokers).

2. *The Evolution of Discounting and the Explosion of Industry-Wide Price Competition.*

a. *The origin of generics.*

At the request of a grocery store purchasing group for its own private-label cigarette, Liggett began to produce generics in 1980. Pet.App. 21a. Eventually, Liggett offered its own black-and-white cigarettes with volume rebates, displacing two companies that had pioneered black-and-white generic cigarettes.[8] *Id.* at 21a & n.10.

RJR was the first to respond, in July 1983, with a generic Value-25 brand, "Century." *Id.* at 3a. In addition to offering a brand, 25s sold at a considerable discount from full-price brands. B&W followed shortly thereafter with its own 25, "Richland." *Id.* There were thus three sellers of generic cigarettes in the market by the end of 1983. By 1984 generics constituted 4% of the market and Liggett sold 97% of generics. *Id.* at 21a.

Because its own branded sales were eroding as generics grew, B&W began planning new discount entries. *Id.* at 3a-5a. It investigated the possibility of manufacturing three varieties of generics—branded, private label, and black-and-white—in late 1983. *Id.* The written record of that process shows an entirely different reality from Liggett's version.

B&W foresaw that the generic segment would continue to grow. PX 4 at 21. "The future growth of generics will be driven by consumer demand—not by the number of manufacturers who supply those products." J.A. 102. B&W anticipated that its competitors would enter the generic segment. J.A. 75-77, 103. "A competitive response appears to be inevitable and we strongly feel B&W will be better off being second rather than third or fourth." J.A. 103.

---

[8] Generic cigarettes were first introduced by G.A. Georgopulo & Co. (a cigarette importer and small manufacturer) and U.S. Tobacco Co. (a maker of smokeless tobacco products and former cigarette producer). Pet.App. 21a n.10.

b. *RJR's repricing of Doral as a generic.*

On April 27, 1984, RJR, one of the two industry leaders, cut the list price of Doral, then a full-price brand, to the same list price as Liggett's black-and-whites, and offered volume rebates equal to or greater than those offered by Liggett. J.A. 110. RJR first cut Doral prices in the fourteen states where Liggett's black-and-whites were most successful. J.A. 209-10. On June 22, 1984, less than two months later, RJR extended the same prices and rebates on Doral nationwide. *Id.* The RJR executive responsible for repositioning Doral testified that volume incentives were "a very critical part of our plan, given the fact that Liggett had a similar type of program. We felt it was necessary to gain distribution and to create an incentive for volume purchases." Tr. 104:177.

c. *Doral radically changed the marketplace.*

RJR's repricing of Doral accelerated B&W's planning. After extensive analysis, B&W made its final recommendations to its then parent company, BATUS, on May 15, 1984 ("Final Proposal"). B&W's Final Proposal, relied upon by the Fourth Circuit, expressly stated that prior speculations were now obsolete:

> *The earlier concern of expanding the economy segment is no longer tenable, given RJR's recent action.* It is clear that the economy segment is significant and growing.
>
> Accordingly, recognizing the importance of minimizing increased cannibalization and concomitant share erosion. as well as maintaining trading profit targets, it is imperative that B&W enter this segment.

J.A. 141 (emphasis added).[9]

[9] B&W's Final Proposal was based on a series of *"Strategic Conclusions," e.g.*: "1. *The economy segment has established itself in the U.S. market and will be a major part of the market in the foreseeable future.*" and "2. *A declining total market in combination with growth in the economy segment makes a strong competitive response inevitable.*" J.A. 130-31.

The Final Proposal's prediction that the generic segment of the market was here to stay and would continue to grow was fundamental to B&W's planning. B&W believed that:

> branded generics will enhance the growth of the economy segment and will draw volume from popular priced brands. B&W believes that the black and white/private label generics will continue to be a large and viable subsegment of the total economy segment.

J.A. 130-31.

B&W's Final Proposal assumed that: "The economy segment grows to 10% of market by 1988. It was further assumed that two-thirds of this segment would be represented by black and white/private labels and one-third by branded generics." J.A. 133. The Final Proposal also projected that the percentage price difference between generic and full-price brands would remain at its then-current level (35%) throughout the balance of the five-year planning period. J.A. 153, 156.

B&W's Final Proposal attempted to anticipate the strategies of other cigarette manufacturers, but assumed (correctly) that such strategies would differ. Thus, "RJR has clearly stated its willingness to live with lower margins on volume *it otherwise would not have enjoyed.*" J.A. 136. B&W thus recognized that RJR would accept low Doral prices indefinitely. B&W speculated that PM would probably launch a branded generic if Doral succeeded, J.A. 136, that "Lorillard will be the next company to enter this segment," (it was actually the last), and that "American is not expected to respond given its history of being the last in the industry to recognize new consumer trends." J.A. 136. Contrary to Liggett's picture of an oligopoly in which each company knew what the others would do, B&W was unsure of its competitors' reactions.

B&W's Final Proposal therefore recommended the introduction of black-and-white generics and a branded generic to be known as "Hallmark." BATUS vetoed

Hallmark, however, because it would have taken too long to become profitable. J.A. 694. BATUS approved B&W's proposal to sell black-and-white cigarettes. J.A. 442. BATUS insisted that B&W's black-and-white cigarettes be priced to make a profit from the outset. J.A. 442; Tr. 33:102-12. B&W proceeded in accordance with these directions. J.A. 176.

B&W announced its intention to sell black-and-whites as well as its prices and volume rebates on May 31, 1984. Liggett concedes that these volume rebates, similar to its own, resulted in B&W prices above cost. J.A. 622, 704. Liggett, however, immediately increased its volume rebates. J.A. 201-06, 212; Tr. 69:116. Between late May and July 19, 1984—before B&W had sold any black-and-whites—Liggett and B&W engaged in five rounds of increased rebates. Pet.App. 22a. Every one of these rebate increases was initiated by Liggett. J.A. 201-06.

The evidence is clear that before every volume rebate increase, Tony Bacon, B&W's controller, calculated that B&W would make money on generics. J.A. 194-95, 694-706; Tr. 93:139-47. He also testified that during the planning period, he never did a financial projection with a branded/generic price spread less than 30%, Tr. 92:118, and that neither he nor anyone else in his department (finance) was asked to make any projections on the assumption that the growth of the generic segment would slow. Tr. 92:119.

d. ***Cigarette discounting and competition have grown explosively since B&W's entry.***

Cigarette discounts have proliferated and increased since B&W's announcement. By time of trial, five of the six manufacturers offered discounts of at least 50% off full-price cigarette brands (two of these firms offered their black-and-whites at these low prices). J.A. 681-86; Tr. 107:147. Meanwhile, the economy segment has grown from 4% of the market in 1984 to 15% at time of trial and *over 31%* of the market today. *Maxwell Consumer*

Report, Third Quarter 1992 Sales Estimates for the Cigarette Industry, at 4 (Oct. 30, 1992) ("*Maxwell Consumer Report*").[10] Black-and-whites *alone* accounted for *over 17%* of the entire market at the time of the last authoritative industry report. *Id.*

Total industry sales of generics went from 2.8 billion cigarettes in 1981 to 61.6 billion in 1988 and then to nearly 80 billion at the time of trial—more than a twenty-eight-fold increase. Pet.App. 6a, 12a. RJR executive Winebrenner agreed that competition among Liggett, RJR and B&W brought lower net prices to distributors, retailers and consumers. Tr. 105:18. Indeed, "[t]he growth of generic cigarettes has encouraged additional competition, primarily in the form of couponing and stickering, on branded cigarettes."[11] Pet.App. 22a-23a (footnote omitted). Even Liggett's economics witness agreed that generic cigarettes exercised a "downward influence or drag on the prices of branded cigarettes." Tr. 52:23, 24; Tr. 51:115, 180. Liggett's director of national sales confirmed that consumer savings attributable to discounting had risen nearly ten-fold after B&W's introduction of its black-and-whites, from $375 million in 1980-84 to almost $3.5 billion from 1984-89. Tr. 44:116-18.

C. Undisputed Market Facts Refute Liggett's Story.

Contrary to Liggett's imaginings, the record shows that B&W did not plan to injure competition and did not do so. Liggett has constructed a superficially powerful story for this Court by pasting together statements from B&W

---

[10] Although Liggett protests the use of the *Maxwell Consumer Report* as "post judgment non-record evidence," Reply Br. in Support of Petition at 9, Liggett does not and cannot contest the accuracy of any of the data therein. Maxwell Consumer Reports have long been relied upon as the standard source of U.S. cigarette industry market statistics. They were consistently relied upon at trial by both parties for this precise purpose.

[11] Liggett protests that generics "obviously did not provide an effective brake" on market prices. Pet.Br. 18. However, *every* sale of a discounted cigarette puts a "brake" on market prices by reducing demand for full-price brands.

documents generated at different times and in different levels of the company. When these statements are put into context and in their proper temporal sequence, they tell a very different story than the one Liggett has made up. Instead, both the documents and, more importantly, the undisputed objective market facts show a vigorous competitive response to Liggett that increased competition and benefited consumers.[12]

1. *Liggett Makes Its Case by Presenting Pre-Doral Conjectures as Post-Doral Policies.*

Thus, for example, Liggett seizes on two phrases in a rough, handwritten note by a Ms. Tharaldson, J.A. 61, a seventh-tier (two from the bottom of the sales hierarchy) manager, PX 27; Tr. 2:198-99, that B&W could "signal" to competition that it would not expand the generic segment and wished to "put a lid on" Liggett. Ms. Tharaldson's note, of a meeting to develop options for management, is transformed by Liggett into "B&W memoranda" concerning corporate policies. Pet.Br. 2, 10, 16, 17, 18, 28, 31. It is even more egregious that Liggett takes this single, handwritten note made in early 1984, *before* RJR's repricing of Doral mooted all of B&W's prior specula-

[12] Like any firm in the midst of intense competition, Liggett's own documents are replete with dramatic characterizations of its competitive intentions regarding generic cigarettes. Liggett's plans indicated an intent to "lock[] out our competition" (DX 34R at 4; Tr. 69:191), "bury" competitive efforts (Tr. 12:182, 189), "wipe out" (Tr. 5:75-76) and "eliminate" competitors (Tr. 5:81-84; Tr. 12:86-88), "drown out demand" for their products (Tr. 6:48, 55), "limit competitive entries" (DX 320 at 25; Tr. 68:32-33), "thwart introduction of generic cigarettes" by B&W (DX 419 at 2; Tr. 68:32-33), "neutralize competitive entries" (PX 3692 at 3; Tr. 44:180-81), "blunt all effort of competitive entries," "hold competition at bay," and "lock out competition" (DX 2009 at 4, 5, 14, 16; Tr. 68:32-33). Liggett's documents reveal plans to "kill all B&W generic sales" (DX 2622 at 1; Tr. 85:55), "make every special effort to see that [customers] drop [B&W generics]" (DX 768 at 1; Tr. 84:106), "combat B&W's entry" (Tr. 100:40), "stop direct accounts from accepting . . . B&W generics" (DX 472 at 1; Tr. 68:32-33), and "conquer [B&W]" (DX 3544 at 4; Tr. 84:165).

tions, and converts it into a high-level corporate decision made *after* the repricing of Doral.[13] *Id.* at 18, 31.

Liggett states that "B&W's goal was *first,* in its own words, to 'prevent[] an increase in the [generic/branded price spread]' *and then* to 'gradually reduce[]' that spread. J.A. 70-72, 280." Pet.Br. 11 (emphasis Liggett's). This is Liggett's effort to show that B&W entered generics while planning to reduce the "spread." But the quotation in the first half of the sentence is from a February 1984 *pre-Doral* document, while the second phrase is from an August 1985 *post-Doral* document, after B&W had been selling generics for over a year, when the spread had increased to almost 40%. J.A. 325. Moreover, the post-Doral document is not a statement of "B&W" corporate policy, but footnotes to an attachment to an internal solicitation for input to an impending five-year business plan. Such documents are hardly a "high level" or "sophisticated" corporate "analysis." Pet.Br. Questions Presented, 17, 43 n.56. B&W's corporate policy was reflected in its Final Proposal to BATUS, which projected that the branded/generic price "spread" would remain at 35% for the entire five-year planning period. J.A. 153, 156.

These documents do not set out any strategy of predation followed by recoupment from branded sales but an entirely normal thinking-through of the consequences of entering or not entering generics. There is no mention of selling below cost, discipline, or any other element of Liggett's "oligopolistic disciplinary pricing" scenario. There is no support in any B&W document for any plan of the sort Liggett describes.

2. *The Evidence Contradicts Oligopolistic Behavior in Generic Cigarettes.*

Liggett's own economic theory witness, William Burnett, conceded that the alleged oligopoly scheme could not

[13] Contrary to Liggett's attribution of these notes to Ms. Olges, B&W's Director of Strategic Planning, Table of Contents to Joint Appendix, J.A. ii, the testimony is clear, and Liggett knows, that these are Ms. Tharaldson's notes. Tr. 23:106.

succeed if B&W's competitors were motivated to expand generics. Tr. 54:111. Yet, Burnett destroyed Liggett's case when he testified that, while there was tacit collusion on branded cigarettes, there was no tacit collusion in the generic segment during the alleged period of predation. Pet.App. 36a; Tr. 54:107. But Liggett's theory requires such collusion. Without tacit collusion, B&W could not, as alleged, discipline Liggett in the generic segment with confidence that the other companies would refrain from entering and expanding the segment themselves. Moreover, Burnett testified that RJR's repricing of Doral was independent of B&W and caused the expansion of the generic segment. Tr. 55:15-16; Tr. 51:128. But B&W could not succeed with its alleged plan without the tacit cooperation of RJR. Liggett's expert destroyed Liggett's theory.

Liggett's senior executives also demolished Liggett's theory. Liggett's president specifically denied that the industry is a "collusive oligopoly," J.A. 623, and testified: "The public has not been denied the benefits of free and open competition in the cigarette industry." J.A. 394. Liggett's senior vice president for sales and marketing also denied that the firms engage in "tacit collusion." Tr. 11:170-74. A former Liggett director disclaimed "tacit collusion," Tr. 64:53-54, and affirmed that cigarette prices are "competitive prices" determined by the market.[14] Tr. 64:52.

Tacit collusion in the branded segment is also essential to Liggett's theory of predation in generics. If, as the executives entitled to speak for Liggett swore, there is no tacit collusion in branded cigarettes, there are also no supracompetitive profits that Liggett's theory of re-

---

[14] Liggett's current attempt to walk away from the fatal admissions of its senior executives, Pet.Br. 7 n.11, is the last in a long series. B&W respectfully refers this Court to the district court's thorough and accurate analysis of Liggett's evasive positions. Pet.App. 34a-35a.

coupment requires.[15] Again, Liggett put witnesses on the stand that destroyed Liggett's theory.

It is also noteworthy, in this supposedly tight oligopoly whose members can allegedly read each other's minds, that there are no documents, or any other evidence, showing that any of the other four cigarette manufacturers understood B&W to be disciplining Liggett or trying to contain the generic segment. Liggett took extensive depositions of PM and RJR executives and obtained their relevant business documents by subpoenas. If Liggett's scenario bore any relationship to reality, there would be evidence of that fact in the testimony or documents of those companies.

The most Liggett can do is its baseless claim that a "Reynolds executive testified that, by 1987, the industry was managing generic prices and profitability upward." Pet.Br. 18 (citing J.A. 758-59). But this RJR testimony says nothing about "generic prices." Instead, the RJR witness agreed with an independent industry analyst that "the industry is carefully watching and controlling its profit margins and making significant strides and [sic] improving the profitability of the lower-priced segment as it becomes a more important contributor to sales." J.A. 758-59.

---

[15] Although cigarette industry profitability (including Liggett's) remained high in the 1980's, it was inflated by accounting conventions that excluded the value of brands from the asset base. Tr. 100:217-21 (testimony of Dr. Kenneth Elzinga). Also, those profits reflected the risk factor of an industry with rising regulation and litigation. Tr. 100:208-12. Specific firms may enjoy high accounting profits due to the success of individual brands, but this has no connection to oligopoly. Lacy Thomas, *Advertising in Consumer Goods Industries: Durability, Economies of Scale, and Heterogeneity*, 32 J.L. & Econ. 163, 188-89 (1989). Indeed, scholars observe that the cigarette industry has "at least a moderately high level of competition. . . ." Daniel Sullivan, *Testing Hypotheses About Firm Behavior in the Cigarette Industry*, 93 J. Pol. Econ. 586, 586 (1985).

3. *B&W's Volume Rebates, Used by Every Company Then Offering Generics (Including Liggett), Did Not "Signal" That B&W Was Constraining Generics.*

B&W's volume rebates are said to have been a signal that B&W was going to discipline Liggett but not expand the generic segment. But Liggett used volume discounts even when it was the only firm selling generic cigarettes.[16] Pet.App. 21a. RJR repriced Doral with volume rebates to meet Liggett's volume rebates before B&W even announced that it would sell black-and-whites. Tr. 104: 177. Why would competitors read B&W's rebates as a "signal" when both Liggett and RJR had already used volume rebates on their own generics?

The signal B&W actually sent—that it intended to compete and thereby expand the segment—was conveyed by B&W's offer to sell generics to one thousand wholesale customers who had never previously purchased generics. Tr. 87:191; Tr. 88:143, 146-47, 230, 233; PX 4079; Tr. 40:8-9. B&W reinforced that signal by investing $10 million in stickering on its generics during the alleged period of predation. Tr. 70:246. *See also infra* p. 27.

4. *B&W Did Not Intend to Price Below Cost.*

The evidence about pricing is far different from Liggett's misrepresentation of it. Though it is clear that B&W did not actually suffer losses on its generics, Liggett concedes that the controlling question is whether B&W set its prices while reasonably anticipating that it would do so. Pet.Br. 20. The evidence is similarly clear that every B&W pricing decision was made with the expectation of a profit on its generics. *See supra* p. 15.

Liggett makes much of the fact that B&W planning documents indicate a willingness to price as low as "full variable margin." Pet.Br. 14. Liggett makes the un-

---

[16] Liggett purports to find evidence of predatory intent in B&W's statement that volume discounts would "[p]ut the money where the volume is." Pet.Br. 26. Volume rebates always put the money where the volume is.

qualified assertion that "B&W's controller admitted that if B&W sacrificed full variable margin, it necessarily would have a negative trading profit." *Id.* Mr. Bacon actually testified that the terms "full variable margin" and "net variable margin" are *not* terms used by B&W's finance department, that they are used inconsistently in various B&W documents, and that he could interpret them only if they were tied to a financial schedule. Tr. 98:56; Tr. 92:121-22. The statement quoted by Liggett responded to a hypothetical posed by Liggett's counsel. Tr. 98:86-99. When questioned by the court in connection with the use of the term in B&W's Final Proposal, Mr. Bacon explained that "full margin," as used in the text of that document, "would suggest break even at trading profit, because that's what the financial schedule says." [17] Tr. 98:64-65.

This "financial schedule," attached to B&W's Final Proposal, showed zeroes at the "Trading Profit" level. J.A. 153. This demonstrates that the Final Proposal's reference to the possibility of spending full margin means breaking even, not selling below cost.[18] Tr. 98:64-65, 151;

---

[17] Liggett purports to extract a concession from a B&W economic expert that B&W "priced" below cost. Pet.Br. 13-14. At most, the quoted excerpt says that for a time period artificially selected by Liggett, *ignoring* substantial tax savings that were actually *considered* by B&W in planning its introduction of black-and-whites, B&W's actual generic revenues would have been below its costs. In short, Liggett converts an answer to a leading question about a hypothetical *ex post* calculation into a concession of fact about B&W's pre-entry planning.

[18] That B&W's sales planners routinely used variable margin to mean profits is established by other planning documents. Thus, a March 9, 1984 document, J.A. 81, suggests that Liggett may meet competitive entry in generics by "spend[ing] down to full variable margin (*i.e.*, zero profit)." J.A. 91. "If L&M goes below full variable margin, Brown & Williamson would not plan to match their offer. We would not expect L&M to be able to maintain a loss position for any extended period of time." J.A. 92. This was a plan by B&W *not* to sell below cost even if Liggett did.

That the intention of the Final Proposal was *not* to lose money on generics is further established by the statement that if B&W

Tr. 30:74. Liggett, which had the Joint Appendix printed, has converted the financial schedule's zeroes to asterisks, stating that the figures are illegible. J.A. 153. This financial schedule was a subject of Bacon's testimony at trial, and it was clear to Liggett's counsel then,[19] as it should be to Liggett's counsel now, that the bottom line figures are zeroes.

5. ***B&W Did Not in Fact Sell Below Cost.***

The after-the-fact calculation of Liggett's economist, Burnett, that B&W sold below cost ignores an important source of cost savings that B&W realized because of tax reductions due to additional sales volume and its LIFO accounting system. B&W took these into account in its Final Proposal. J.A. 147-49. Under LIFO, which is a widely used and legitimate accounting system, B&W made cigarettes with older tobacco that had been bought at lower prices but deducted from revenues the cost of the most recent, higher-priced tobacco. This resulted in higher profits because of the tax savings. There was a dispute at trial whether higher returns due to tax savings should be used in an antitrust case to show that a product line was profitable. Whatever antitrust law ultimately says on that point, it is indisputable that B&W at the time thought this was a proper calculation and, therefore, that it would not be losing money on generics.

If the higher return from generic sales due to tax savings is counted, as it should be, B&W clearly did make

---

gets the business with the suggested price, "competitors will not be able to make their proposals meaningfully more attractive without selling below cost. Competitive response of this nature would be considered unlawful conduct." J.A. 145.

[19] "Q. [By Mr. Topman, Liggett's counsel]: So in May in '84, Mr. McCarty gets the May proposal and it shows trading profit on the last line of the schedule as zero, right, sir?

A. [By Mr. Bacon]: The last line on the schedule shows zero." Tr. 98:151. *Accord* Tr. 98:148-50.

In addition, when questioned by another Liggett attorney, B&W's president, Tommy Sandefur, testified: "Those zeroes mean break even." Tr. 30:124. *Accord* Tr. 30:74.

very substantial profits on its generics. Liggett's economic witness, Burnett, conceded that if tax savings were counted, B&W's generic sales were profitable. Tr. 57:130-36. Ignoring tax savings, B&W's generic revenues for the 18-month period arbitrarily selected by Liggett fell $1.2 million short on sales of over $190 million—less than 1% short of break even. Tr. 92:95-96; Tr. 93:181. Contrary to Liggett's contention, there was also no 18-month period of continuous below-cost pricing. Even if the tax savings are ignored, B&W made profits on black-and-whites in seven scattered months of that period and its black-and-whites were profitable when viewed over the 24-month period following their introduction. Tr. 92:95-96; Tr. 93:181; DX 1469; Tr. 93:185, 198; DX 3510; Tr. 93:167. However the tax question may be resolved, one thing is abundantly clear: B&W did not anticipate that its generic prices would be below cost and did not anticipate losses on generics. That is the dispositive fact.

6. *B&W Had No Plan to Recoup Any Losses on Generic Sales.*

Liggett concedes that the courts below were correct in holding that Liggett had to show that B&W had a reasonable expectation of recoupment. Pet.Br. 23-24, 41. Liggett's expert witness testified that predation made no sense without the expectation of recoupment. J.A. 480-81. Liggett's counsel has written that predatory pricing would make little economic sense without "a very substantial prospect that the losses [the predator] incurs in the predatory campaign will be exceeded by the profits to be earned after his rivals have been destroyed." 3 Phillip Areeda & Donald Turner, *Antitrust Law* ¶ 711b, at 151 (1978) ("*Antitrust Law* (1978)").

Liggett relentlessly repeats the charge that B&W offered black-and-whites pursuant to an express plan to "recoup" its losses from alleged predatory pricing.[20]

[20] *See* Pet.Br. Questions Presented; Pet.Br. 1, 5, 9, 17, 28-29, 33, 37, 41, 42, 43, 44, 45.

Thus, in addition to the instances cited in the footnote, Liggett baldly claims that "B&W calculated that it alone would benefit enougb—up to $350 million by 1988—to make its investment in disciplining Liggett pay off handsomely." Pet.Br. 28-29.

On the contrary, the $350 million is a pre-Doral estimate of the profit B&W would lose if it did not go into generics. J.A. 81, 83. For that reason, the document recommended entering the generic segment:

> Generics represent B&W's most immediate opportunity to increase volume. This volume can be achieved within current manufacturing capacity, without incremental manpower and *without negatively impacting trading profit*. No other option offers similar potential to recover lost volume/share with such minimal investment risk.

J.A. 88 (emphasis added).

B&W's Final Proposal to BATUS also makes clear that B&W planned to recover profits lost on branded sales with the profits it expected to make on black-and-white sales from 1984 to 1988. J.A. 146. That conclusively rebuts Liggett's claim that B&W intended to lose money on black-and-whites in order to recoup on branded sales.

a. ***Liggett did not "surrender" by raising its prices and closing the "spread" between branded and generic prices.***

Liggett's story about "surrendering" and narrowing the "spread" between the list prices of its branded and black-and-white cigarettes is equally baseless. Liggett did not "surrender" and the "spread" between branded and generic prices did not narrow but widened.

Liggett did not "surrender" to B&W. In March 1984, before RJR's Doral announcement and before B&W's black-and-white announcement, Liggett on its own increased black-and-white list prices, closing its spread from

40.82% to 35.68%. J.A. 325. Liggett surrendered before it had anybody to surrender to.

In June 1985, when Liggett claims it surrendered by raising its black-and-white prices, it simultaneously boosted its rebates to many of its largest customers.[21] Thus, the alleged June 1985 "surrender" was largely a function of Liggett's bookkeeping. Indeed, following this unilateral generic price increase, Liggett persuaded distributors to raise the prices of *B&W's* black-and-whites and *RJR's* branded generic, Doral. J.A. 264-65.

The district court correctly held that B&W's *only* attempt to initiate a generic price increase, in December 1985, had to be retracted promptly because Liggett and other producers did not follow. Pet.App. 38a n.36. Liggett's assertion that it "followed" B&W increases in 1986, 1987 and 1988, Pet.Br. 16, is simply made up in contradiction of the record. If Liggett easily "resisted" B&W's attempted increase at the very end of the alleged "period of predation," *id.*, why would it "follow" B&W increases thereafter? Indeed, Liggett later introduced "Pyramid" at a 50% discount.[22] *Id.* at 18 n.20.

In short, the one time Liggett initiated a price increase, B&W was not yet selling black-and-whites. The one time B&W initiated a generic price increase, Liggett did not follow.

Liggett's contentions about the gap shrinking from 40% in 1985 to 26.8% in 1989, Pet.Br. 18, are equally fanciful. Liggett's gap calculations are based on the differences in list prices between its own branded and generic cigarettes. Even on these terms, the calculation is spurious, because it ignores the array of discounts, rebates, and promotions that made list prices meaningless. As

[21] DX 1416; Tr. 85:196-97; DX 1417; Tr. 85:177; DX 2428; Tr. 85:185; DX 2429; Tr. 85:202; DX 8732; Tr. 104:21-22; Tr. 85:179.

[22] Liggett asserts that B&W allowed it to sell at a 50% discount because B&W was intimidated by the lawsuit. Pet.Br. 18 n.20. But this lawsuit was pending during the entire period of alleged predation.

B&W's economic expert, Dr. Elzinga, testified, cigarette list prices do not reflect a wide variety of other forms of price competition, including coupons, stickering, rebates and other promotional programs. Tr. 100:227-29. Coupons alone account for "hundreds of millions of dollars" annually. Tr. 33:206-09. Again, taking the calculation on its own terms, as early as 1982, Liggett itself had projected that it would decrease its gap to 24.2% by August 1985, and indeed, raised its price in March 1984, reducing the gap by 5%. DX 36R; Tr. 68:162-63; J.A. 325.

But Liggett's gap calculations cannot be taken on their own terms. Liggett myopically focuses on its own black-and-whites, ignoring not only others' branded generics, but also ignoring its own branded generic, Pyramid, that widened the gap to over 50% in 1988. Indeed, by the time of trial, five manufacturers offered cigarettes at a discount of at least 50%. J.A. 681-86; Tr. 107:147. Two of these were black-and-whites. *Id.*

b. *B&W never "took credit for slowing the growth" of generics.*

Not only did B&W not take "credit for slowing the growth of disruptive generics," Pet.Br. 3, there was nothing to take credit for. As demonstrated *supra* pp. 15-16, the growth of generics was explosive.

Liggett points to a B&W document, J.A. 257, which does not say that "the growth" of generics has slowed but that the "growth *rate*" of black-and-whites has slowed. Pet.Br. 3. As the growth of black-and-whites continued, the rate of growth necessarily slowed because of the larger base against which growth was measured. Liggett points out that the document also states that B&W's presence in black-and-whites reduced Liggett's advertising. *Id.* at 12. Of course that was true. Nobody would spend to advertise black-and-whites when much of the benefit would go to a competitor's virtually indistinguishable black-and-whites.

Refuting Liggett's story, Liggett's own planning analysis concluded that "Doral Introduction Accelerated Timing" of B&W's entry into black-and-whites, and that "Brown & Williamson Strategies" assumed that the "Category will Continue to Grow." DX 2009 at 90853-54. By the time of trial, moreover, generics accounted for one-third of all B&W cigarette sales, were deemed critical to B&W's future success, and were projected to account for up to one-half of B&W's future cigarette sales. Tr. 31:67; Tr. 71:146. In the third quarter of 1992 that projection proved correct. *Maxwell Consumer Report, supra.*

D. Proceedings Below.

Both lower courts held that Liggett failed to establish the requisite "reasonable possibility" of lessening competition because Liggett could not substantiate its novel "oligopoly recoupment" theory with record facts. Both courts also summarized the evidence which, contrary to Liggett, demonstrated more rather than less competition due to the entry of B&W and others into the generic segment previously dominated by Liggett.

The District Court Proceedings.

This case originated as a trademark infringement and unfair competition claim by Liggett which it lost before the jury and did not appeal. *Liggett Group Inc. v. Brown & Williamson Tobacco Corp.*, 1989-1 Trade Cas. (CCH) ¶ 68,583, at 62,098 (M.D.N.C. 1988); J.A. 30-33. The lawsuit was part of a strategy to "thwart" B&W's attempt to market black-and-white cigarettes. J.A. 184; DX 2038; Tr. 68:32-34.[23] Subsequently, Liggett added a

[23] Liggett gave wide publicity to its lawsuit and threatened customers with possible involvement in the suit, thereby exploiting customers' fears that they would be left with unsaleable and non-returnable inventory of B&W generics. This deterred many distributors from purchasing B&W's black-and-whites and caused others to cancel orders. DX 473; Tr. 68:32-33; DX 537; Tr. 68:32-33; Tr. 8:74; Tr. 69:179; Tr. 88:139; DX 444; Tr. 68:32-33; DX 491; Tr. 70:48-49; DX 493; Tr. 70:48-49; DX 2367; Tr. 70:13-14; DX

Robinson-Patman Act claim, dismissed on summary judgment and not appealed, which claimed illegal price discrimination between B&W's full-priced branded and its low-priced generic cigarettes. 1989-1 Trade Cas. (CCH) ¶ 68,583, at 61,099. Liggett further amended its Complaint, claiming that B&W's volume rebates in the sale of generics violated the Robinson-Patman Act. *Id.*

After a 115-day trial and 10 days of deliberation, the jury returned a verdict for Liggett. J.A. 27. As explained *supra* pp. 4-10, the instructions on competitive injury were fatally defective.

Almost six months thereafter, the district court entered j.n.o.v., now having a "complete record" enabling "the court to have a thorough understanding of the issues and facts in controversy" and of the "complex economic and legal issues." Pet.App. 18a n.4. The court's j.n.o.v. opinion rested on three separate grounds as to which, even as viewed most favorably, "Liggett's evidence falls short," *id.* at 24a: (1) lack of prospective competitive injury; (2) lack of causation, *i.e.*, Liggett's claimed injury rested on B&W's *low prices*, not on B&W's price differentials;[24] and (3) lack of antitrust injury to Liggett.

As to competitive injury (the sole issue on review here), the district court ruled that Liggett's proof was

---

2492; Tr. 70:48-49; Tr. 69:178; DX 788; Tr. 104:218; PX 29 ¶ 26; Tr. 11:141; DX 526; Tr. 68:32-33; DX 2091; Tr. 70:13-14; Tr. 8:84; Tr. 69:115-16; Tr. 69:162.

[24] The district court correctly held that "if there was any reasonable possibility of injury to competition from B&W's conduct it came from the low prices that B&W offered to its customers and not from the fact that these low prices varied depending on volume." Pet.App. 40a. Liggett argued that, even so, the price differences "facilitated" the low prices by making them cheaper for B&W than one low price. Pet.Br. 27. But as the district court understood, the price differences also made Liggett's resistance to the supposed predation cheaper, and by the same amount. As the district court recognized, moreover, the Act requires that competitive injury must be "the effect of" the unlawful discrimination, not of predation "facilitated" by such discrimination. Pet.App. 38a, 41a.

unsubstantiated and refuted by the record. The court noted that if "any of the other major cigarette manufacturers were interested in promoting the sale of generic cigarettes, even Burnett [Liggett's economic theory witness] admitted that successful predation by B&W would *be impossible.*" *Id.* at 36a (emphasis added). The record established that "[e]ven before B & W began selling black and white cigarettes, RJR had entered the generic segment by repositioning Doral at generic prices." *Id.* Furthermore, there was "no evidence that any of the other major cigarette companies had an interest in slowing the growth of generic cigarettes." *Id.* The record demonstrated "steady growth" in the generic segment. *Id.* at 38a n.36.

The district court also stressed that Liggett's own economic expert's oligopoly recoupment theory "was contradicted by witnesses from the Liggett boardroom." *Id.* at 34a. The "unequivocal" trial testimony "from the senior executives at Liggett who made the pricing decisions" flatly contradicted its expert's forensic theory about "tacit collusion," "collusive oligopoly," and "excessive profits."[25] *Id.* at 34a-35a.

The Court of Appeals' Affirmance.

The unanimous Fourth Circuit panel affirmed because Liggett had failed to prove a prospective lessening of competition. The court distinguished this Court's decision in *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967), involving below-cost discriminatory geographic price cutting in one location by three multi-market competitors, aimed at injuring a small local seller, which they "subsidized" with their "economic muscle" from sales elsewhere. Pet.App. 8a. The court nowhere "ruled that the standard monopoly model is the only circumstance"

---

[25] The court emphasized that it had "allowed the case to go to trial" in view of affidavits stating that those executives were "confused" by B&W's lawyers, and "did not mean to contradict" Liggett's economic expert. At trial, however, "despite having consulted extensively with Burnett," the "Liggett executives again contradicted Burnett's theory." Pet.App. 35a.

supporting prospective recoupment, Pet.Br. 4, nor that "an oligopolist's unjustified, below-cost and discriminatory price never has a 'reasonable possibility of injuring competition,'" *id.* at 5.

Instead, the court focused on the facts that disproved competitive injury: the "actual experience" in the market—the "furious rebate war," the entry of RJR's Doral at black-and-white prices, the entry of all manufacturers into generics by the time of trial, the "dramatic" growth of generic sales from 2.8 billion sticks in 1981 to nearly 80 billion at time of trial, and the increase of generics' market share from 4% in 1984 to 15% at time of trial. Pet.App. 6a, 11a, 12a.

SUMMARY OF ARGUMENT

This case requires resolution of none of the questions Liggett presents for this Court's consideration. The disputes between the parties are entirely factual. B&W does not maintain, nor did the Court of Appeals for the Fourth Circuit hold, (1) that in a primary-line case the Robinson-Patman Act merely duplicates the Sherman Act by requiring a monopoly or a conspiracy, (2) that theory can override facts, or (3) that Robinson-Patman requires actual injury to competition rather than a reasonable possibility of such injury. Thus, there is no legal dispute for this Court to resolve.

Liggett would expand the reach of the Robinson-Patman Act through theories of oligopoly and predation that are unsupported by anything in case law or even in academic theorizing.

While some oligopoly theories, which B&W does not dispute, hold that firms may be able to achieve prices above the competitive level without collusion, no oligopoly theory holds that firms can, without communication, play the complicated game of oligopolistic predation that Liggett proposes. There are so many variables in the dynamic and unprecedented situation that confronted the industry after Liggett's success with black-and-white cigarettes and RJR's repricing of Doral that it would be impossible for B&W to plan and carry out the campaign Liggett alleges. Thus, theory accords with the facts the district court and court of appeals rested upon.

Any firm contemplating a campaign of below-cost predatory pricing must, as Liggett admits, see a good prospect of recouping its losses with supracompetitive profits afterwards. That may occur when the would-be predator has reasonable hopes of achieving a monopoly, but not even Liggett supposes that B&W entertained any such wild dream. Instead, Liggett's theory is that B&W engaged in predation when it knew it would bear 100% of the losses and could, under the most favorable circumstances, enjoy only 12% of the uncertain future profits. No theory of predation supports that scenario and no one has ever shown predation of that impossible nature.

Liggett asks this Court to go far beyond *Utah Pie*, the leading case on primary-line injury to competition. Consistent with the expressed legislative concern over geographic price discrimination underlying this aspect of Robinson-Patman, *Utah Pie* held three multi-market firms liable for discriminatory price cutting in the single market of the victimized firm. Where all companies sell in the same market, it is inconsistent with the rationale of the primary-line application of Robinson-Patman and of *Utah Pie* to allow one small competitor to recover from another small competitor for lowering prices in one segment of the larger market. Should that become the law, every national marketer would be subject to treble damages for cutting prices anywhere.

The danger to hard competition is not averted by Liggett's argument that the cigarette market is "concentrated." Fully half of the manufacturing, distributing, retailing, and service industries in this country—national, regional, and local—are concentrated. If concentration is enough to put a 12% firm in danger for price cutting, price competition will be extremely hazardous in many industries and markets.

The Robinson-Patman Act goes beyond the Sherman Act, but this Court has recognized the need to accommodate the later statute to the basic antitrust policies of the earlier, wherever possible, in order to preserve competition. To hold B&W liable on the facts here would send a signal to many industries, including the smaller firms in those industries, that tough price competition brings treble damage retaliation.

To avoid an affirmance because competition intensified in the cigarette market, Liggett misstates what the Fourth Circuit held and offers a new, anticompetitive rule of its own.

Both courts below expressly employed a "possible injury" standard and stressed the facts that showed not only that there was no possible injury but that competition had in fact intensified after RJR and B&W entered the generic segment of the market to compete with Liggett.

Courts regularly hold that the fact of increased competition overwhelms any fleeting theoretical suspicion of a possible lessening of competition. No sensible jurisprudence could hold otherwise. Liggett's proposal to "educate[] would-be predators" by imposing treble damage liability even where competition increases merely means that theoretical conjecturings about what might have happened will trump the facts of what did happen. That is a prescription for the suppression of competition. The vigorous competitor, now renamed the "would-be predator," will in truth be educated that it is dangerous to compete.

ARGUMENT

Introduction

Liggett's case seeks to crossbreed the Sherman Act with the Robinson-Patman Act to produce a hybrid antitrust law. The object of that exercise is to win a judgment that Liggett cannot obtain under either of the statutes as written. A suit laid under § 2 of the Sherman Act for attempted monopolization by predatory pricing would be laughed out of court because here the alleged "predator" has only 12% of the market. A suit for price discrimination fails because B&W's volume rebates caused Liggett no injury. Liggett complains that B&W's prices were below its own at every volume. Thus, Liggett's objection is to low prices (a Sherman Act claim), not to different prices. There are very good reasons why Liggett should not be allowed to succeed with this statutory legerdemain.

I. THE DECISION OF THE COURT OF APPEALS WAS CORRECT.

A. Liggett's "Questions Presented" Are Not Presented By The Facts Of This Case.

The sole issue before this Court is entirely fact-bound. Although Liggett denied this in petitioning for certiorari, its brief is almost entirely factual argument. There is no alternative but for this Court to decide on the record whether the district court and the court of appeals correctly assessed the facts or whether Liggett has done so.

For that reason, this case does not require resolution of any of Liggett's "Questions Presented." These are purely hypothetical questions, not presented by the facts and not decided by either of the courts below. B&W is prepared to answer each of Liggett's questions as Liggett wants:

1. B&W agrees that the Robinson-Patman Act retains "independent force" and does not "address only a monopoly or conspiracy already covered by the Sherman Act." The Fourth Circuit never said otherwise; it merely found

Liggett's Rube Goldberg version of oligopoly theory doubtful and contradicted by the facts. *Utah Pie* remains precedent, even with the modifications that Liggett suggests to this Court. Pet.Br. 37, 39-41. Thus, the Robinson-Patman Act retains independent force. The companies found to have violated the Act in *Utah Pie* were neither monopolists nor conspirators.

2. B&W agrees that a court's "theoretical speculation" may not "vitiate a jury verdict based on the calculations, conduct, and success of the actual respondent." That proposition is established by *Eastman Kodak Co. v. Image Technical Services, Inc.*, —— U.S. ——, 112 S. Ct. 2072, 2082, 2085 (1992), a case that Liggett circulated to all the judges on the Fourth Circuit Court of Appeals without eliciting a single vote for rehearing *en banc*.

The question Liggett proposes for debate in this Court is not presented by this case for two reasons. First, the court of appeals found, as did the district court, that it was Liggett's "theoretical speculation" that was not borne out by the facts. Second, as B&W has shown, *supra* pp. 4-10, the jury's general verdict, especially given the court's instructions, is perfectly opaque. It cannot be said that the jury found anything more than aggressive remarks in B&W's pre-Doral documents and related those remarks to a non-existent generic submarket.

3. B&W agrees that the Act requires a reasonable threat of injury to competition and consumers rather than actual damage. But that question has no relevance to a case where the evidence clearly shows an intensification of competition to the benefit of consumers.

B&W has shown that the court of appeals and the district court were correct in their view of the facts. B&W will next demonstrate that Liggett's case is also fatally defective both theoretically and legally.

B. The District Court And The Court Of Appeals Were Correct In Remarking That Liggett's Novel Oligopoly Theory Is "Dubious" And "Suspicio[us]."

Liggett urges upon this Court an economic theory of oligopoly behavior that not only has never been accepted by any court but that has not been espoused in even the most speculative academic literature. Liggett asks this Court to announce as law an abstract economic theory that is not merely *avant garde* but bizarre.

Some oligopoly theories (there are many) hold that manufacturers may develop the habit of going along with each other's price increases because each understands that is the most profitable course. Such tacit collusion, where it exists, requires a single variable, usually price, as well as long experience so that reactions to that variable are predictable. Liggett continually cites such standard theories to support its case here, but this case requires Liggett to advance a much more complicated theory, one that has no support in the literature or the case law. It is not enough for Liggett to point to uniform list price increases on branded cigarettes (which, as shown, *supra* p. 27, are meaningless because they are not the actual transaction prices). Liggett must advance a tenable theory about B&W's ability to engage in predatory pricing of generic cigarettes with assurance that no other cigarette seller will enter, expand, or maintain low prices in the generic segment. But here Liggett runs into theoretical difficulties, as well as the factual difficulties already described.

No oligopoly theory supposes that manufacturers, without communicating, can fly in tight formation when the situation they face is wholly unprecedented,[26] there is no

[26] As Liggett told its customers, the summer of 1984 was "a period of unprecedented competitive entry programs. . . ." DX 540; Tr. 68:32-33. Liggett's "history of anticompetitive conduct," Pet.Br. 6 & n.10, omits that the long-time "Big Three" of the pre-war industry—the defendants in the government antitrust prosecution—were RJR, American, and Liggett, but *not* B&W. F.M. Scherer &

guidance from past practice, there are many variables, and it is entirely unclear which course of action *is* the most profitable.[27]

Predicting the actions and reactions of oligopolistic rivals is the subject of game theory, and it is quite clear that game theory refutes Liggett's suppositions. Professor Robert Dorfman, analyzing the strategies of duopolists attempting to advance their own positions "without igniting an uncontrollable sequence of challenges and retaliations," demonstrated that "any constant sum game with two players is solvable—*i.e.*, has readily discoverable best choices for both players. More complicated games rarely are." Robert Dorfman, *The Price System* 99-100 & n.10 (1964).[28]

The game Liggett supposes is extremely complicated. There were not two players but six. Of the five that were contemplating their individual responses to Liggett's generic sales, each had a number of possible responses—stay out of the generic segment, introduce black-and-whites, introduce branded generics, introduce private labels, introduce "Value-25s," or some combination of these tactics. Moreover, as to each type of product, there was a wide range of marketing strategies available —cutting prices across the board, volume discounts, stickering, couponing, free products with each purchase, and,

---

David Ross, *Industrial Market Structure and Economic Performance* 250-51 (3d ed. 1990) ("*Scherer & Ross*").

[27] *See Antitrust Law* ¶ 404b2, at 276 (1978) (even "effective price coordination among oligopolist . . . will not be possible when any significant firm chooses, for any reason, to 'go it alone.' "); *id.*, ¶ 404b3, at 277 (oligopoly stability "will quickly evaporate if rivals misread a price change or make disparate responses, as they are likely to do").

[28] *See also Scherer & Ross* at 279 ("when products are heterogeneously differentiated, the terms of rivalry become multidimensional, and the coordination problem grows in complexity by leaps and bounds").

where the generic is branded, advertising.[29] And each of these tactics could be applied to branded cigarettes, generics, or both.

B&W itself recognized this in a March 22, 1984 planning document that was pre-Doral: "Innovation can come on many fronts—product, packaging, pricing, marketing, etc." [30] J.A. 100. In short, the game Liggett proposes was not "solvable" by the cigarette companies. There was not even a theoretical possibility that B&W could plan a predatory campaign on the basis of confidence about the reactions of others. Thus, there was very good reason for the district court to note that "[t]acit collusion among the major cigarette manufacturers is a dubious theory of market power," Pet.App. 33a, and to buttress its own doubts with the doubts of Liggett's counsel:

---

[29] Liggett itself had not only volume rebates but multiple programs involving secret rebates, special promotional payments, and other sales inducements that had significant effects on net prices. Holman Brown, the witness Liggett designated under Rule 30(b)(6) as knowledgeable concerning Liggett's sales activities, said that to find the net price to a customer would be like "a blind man feeling his way around the office and find out who does what." Tr. 104:24, 56.

[30] Thus, the competitive actualities at the time of Doral's and B&W's entry into generics in 1984 included: (1) more than 200 cigarette varieties (filter and non-filter), (2) marketed by six manufacturers, (3) through different distribution channels (*i.e.*, wholesalers, national chains, etc.), (4) under various designations (branded, generic, private label), (5) at multiple price points (list prices for branded, black-and-white generics, branded generics, private label), and (6) offset by an array of rebates, discounts, promotional deals, shelf payments, stickering, coupons, allowances, etc. These conditions defy any conceivable oligopolistic coordination of the complexity Liggett imagines.

Such diversity "magnifies the complexity of the interactions manyfold." *Scherer & Ross* at 214. Thus, *Scherer & Ross* concludes that the cigarette industry in recent years "has failed to achieve a high degree of market-sharing coordination." *Id.* at 251 n.50. *See also* Daniel Sullivan, *Testing Hypotheses About Firm Behavior in the Cigarette Industry*, 93 J. Pol. Econ. 586, 587 (1985) (results "point to at least a moderately high level of competition").

> [A] leading antitrust authority has noted that the scenario for predatory pricing by a firm possessing a small share of the market is "highly speculative" and "presses the potential for tacit price coordination very far." P. Areeda & H. Hovenkamp, *Antitrust Law* 711.2c, at 538-39 (Supp. 1989).

Id. at 34a.

Liggett's "oligopoly recoupment" theory further supposes that one firm can "discipline" price-cutters without unravelling tacit arrangements that support monopolistic prices. Oligopoly cohesion presupposes similar attitudes and reactions among all oligopolists; but Liggett's theory is that B&W chose to go it alone as the industry "hit-man." If Liggett is permitted to assume a divergent strategy by B&W, why must B&W be assumed to predict *uniform* reactions by all four other firms?

The lone-wolf "disciplinary" plan attributed to B&W by Liggett is irrational without communication and agreement. Even the far-fetched theories of tacit collusion described in economics literature do not allow for *divergent* responses to an oligopoly "defector."[31] Disciplinary measures recognized in contemporary theory always involve participation by *every* rival. *See, e.g.*, C. Shapiro, *Theories of Oligopoly, in* Handbook of Industrial Organization 329, 363ff., 370ff. (R. Schmalensee & R. Willig eds., 1989). Not even Liggett alleges that this was the case here.

Though Liggett's economic theory is impossible and contradicted by its own economic expert, neither the district court nor the court of appeals decided the propriety

---

[31] The closest approach is the 1989 Supplement to *Antitrust Law*, but even that work states that oligopolistic predation cannot succeed unless companies which in the aggregate dominate the market attack in unison. *Antitrust Law* ¶ 711.2c, at 538-39 (Supp. 1989). *But see Antitrust Law* ¶ 711.2c, at 647 (Supp. 1992). Liggett has never alleged that even one of the other four cigarette companies, which collectively have 85% of the market, has engaged in predation.

of j.n.o.v. on these grounds. To the contrary, the district court went out of its way to emphasize that in rejecting the theory on the facts here, the court did "not rule that this theory is insufficient as a matter of law." Pet.App. 34a. And the court of appeals rested throughout on the record evidence and said that its "suspicions" were confirmed by the facts. *Id.* at 12a-13a. Both courts were right about Liggett's dubious and suspicious economic theorizing, but both backed up their doubts with facts.

C. Liggett's Theory Of Predation Is Impossible.

As this Court recognized in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), even in cases of "predatory pricing by a *single firm* seeking monopoly power," *id.* at 590, "the success of [predatory pricing schemes] is inherently uncertain; the short-run loss is definite, but the long-run gain depends on successfully neutralizing the competition. . . ." *Id.* at 589. Liggett itself recognizes that the "predator's calculus" is far more speculative for a *single* oligopolist than even for a "single firm" predator:

> [I]f predation is successful, the monopolist alone reaps its fruits, while an oligopolist must share the fruits with surviving oligopolists, and the smaller oligopolist may benefit less . . . than the larger ones.

Pet.Br. 28. Indeed, "[t]he uncertain future gains must *greatly exceed* the present actual losses to overcome the *uncertainty* that rivals will be destroyed or disciplined and that monopoly profits can be reaped in the face of future entry." Areeda, *Monopolization, Mergers and Markets,* 75 Cal. L. Rev. at 965 (emphasis added).

Particularly apt here is the conclusion that "[i]f rivals survive or entry occurs, not only will predation be unsuccessful, but that very prospect reduces the likelihood that a challenged low price is in fact predatory. Whenever the market circumstances make such predation unlikely, it is probably absent." *Id.* Here B&W had less than 12% of the market. By Liggett's own admission, therefore, B&W would have received less than 12¢ for every dollar "recouped" by the industry—including Liggett. Moreover, as Liggett again recognizes:

> [A] predator anticipating entry-resistant monopoly hopes that it alone will set the post-predation price, while an oligopolist such as B&W knows that future prices *depend upon the choices of fellow oligopolists.*

Pet.Br. 29 (emphasis added).

Thus, B&W not only reaps a tiny fraction of the "recoupment" it allegedly generates, but also must count on continued oligopoly stability, lest the source of recoupment vanish in a flurry of competitive moves and countermoves. In short, Liggett's "oligopoly predation" theory presupposes a calculation by B&W that would have gone well beyond the speculative into the realm of the irrational.

II. BOTH ANTITRUST LAW AND POLICY SUPPORT THE JUDGMENTS BELOW.

Liggett's case is defective in law because it goes far beyond any decided case and urges this Court to adopt a rule of law that would effectively stifle price competition in many, if not most, markets.

A. The Robinson-Patman Act Does Not Impose Liability On B&W.

The Fourth Circuit recognized that the Robinson-Patman Act's proscription of predatory price discrimination extends beyond cases involving monopolies and conspiracies, which are already covered by the Sherman Act. The court held only that Robinson-Patman does not punish B&W's competition.

There is no doubt, for example, that the court recognized that *Utah Pie* remains a precedent. There similarly can be no quibble that *Utah Pie* demonstrates that the Robinson-Patman Act reaches cases that the Sherman Act does not reach. It is palpably untrue, therefore, that the Fourth Circuit made the Robinson-Patman Act redundant in primary-line cases. The relevant question is what *Utah Pie*, in particular, and antitrust law and policy, more generally, require in the present case.

Liggett asks this Court to go far beyond *Utah Pie*. That case involved, as this case does not, geographic price discrimination. Geographic price discrimination was the concern of the 1914 Clayton Act provision, retained in the 1936 Robinson-Patman amendments, invoked by Liggett:

> In the past it has been a most common practice of great and powerful combinations . . . to lower prices of their commodities, oftentimes below the cost of production . . . with the intent to destroy and make unprofitable the business of their competitors, and with the ultimate purpose in view of thereby *acquiring a monopoly in the particular locality* or section in which the discriminating price is made. Every concern that engages in this evil practice must of necessity *recoup* its losses . . . by raising the price of this same class of commodities above their fair market value in other sections or communities. . . . [T]he present antitrust laws ought to be supplemented by making *this particular form* of discrimination a specific offense under the law. . . .

H.R. Rep. No. 627, 63d Cong., 2d Sess., pt. 1, at 8-9 (1914) (emphasis added); *Goodyear Tire & Rubber Co. v. Federal Trade Commission*, 101 F.2d 620, 623 (6th Cir.), *cert. denied*, 308 U.S. 557 (1939).

It may be a proper extension of that concern, and of *Utah Pie*, to apply the Act to non-geographic cases where the predator operates in many product markets and the victim in but one. The rationale is the same. The predator can afford its losses in the victim's market because of profits made in other markets. That rationale has no application here. The parties stipulated, and the district court agreed, that Liggett and B&W sell in the same market.

So long as the rationale of *Utah Pie* is adhered to, § 2(a) guards against predation while posing little threat to vigorous price competition. But Liggett seeks a vast expansion of *Utah Pie* by applying it to price competition in one corner of a single market. It is as though one national seller of pies sued another national seller for reducing prices in Salt Lake City. If such a suit were successful—and that is Liggett's suit—every national marketer would be afraid to cut prices anywhere.[32]

B. Holding B&W Liable For Vigorous Competition Would Seriously Impair Legitimate Price Competition In Many Markets.

The danger to hard competition is not averted by Liggett's insistence that the cigarette market is "concentrated." [33] Liggett has not faced up to what that contention means. Fully half of the markets in this country can be classified as concentrated. Tr. 100:201. If price cutting in part of a single "concentrated" product or geographic market is sufficient to support an inference that a firm with as little as 12% of the general market is a predator, price competition will become extremely hazardous throughout most of American industry and

[32] Liggett attempts to avoid this point by arguing that it was weak in branded cigarettes, so presumably its branded sales can be disregarded and it can be viewed as a single-market victim just as was the plaintiff in *Utah Pie*. That argument, if accepted, would thrust courts into making judgments about how well or poorly a firm has to be doing in the market segments where price cutting is not taking place in order for *Utah Pie's* rationale to apply. Quite aside from the legal quagmire Liggett thus urges this Court to enter, the argument has no place here because Liggett itself announced in 1989 that its branded cigarettes were its "lifeblood," J.A. 315, and Liggett was profitable throughout the period of alleged predation. Pet.App. 48a.

[33] The radical novelty of Liggett's new theory of the Robinson-Patman Act is not mitigated by references to Clayton Act § 7 anti-merger enforcement. Pet.Br. 5, 29, 30 & n.35. Unlike the primary-line anti-price discrimination provisions that aim at geographic price cutting by large national firms injuring small local rivals, Clayton Act § 7 sought to stem a "rising tide of economic concentration." *E.g., United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 362-63 (1963). Hence Liggett gains no legal leverage from anti-merger law enforcement to distort Robinson-Patman into an anti-oligopoly measure—a conversion unsupported by the Act's uniquely detailed text or by its legislative purpose, and unprecedented in over half a century of the Act's application.

commerce. For this reason, antitrust courts have been very careful about permitting inferences of predatory pricing. *E.g.*, *Spectrum Sports, Inc. v. McQuillan*, No. 91-10, slip op. at 11 (U.S. Jan. 25, 1993).

This Court has frequently recognized, and Liggett concedes, the need to interpret the Robinson-Patman Act so as to accommodate the policies of the Sherman Act, whenever that is possible. To protect one producer from competitive entry and aggressive pricing by another, as here, would squarely set Robinson-Patman against "the broader antitrust policies" laid down by Congress. *E.g.*, *United States v. United States Gypsum Co.*, 438 U.S. 422, 458 (1978); *Automatic Canteen Co. v. Federal Trade Commission*, 346 U.S. 61, 74 (1953). Liggett has not come close to proving recoupment, the test that both sides agree distinguishes predatory pricing from vigorous competition.

III. DRAMATICALLY INCREASED COMPETITION DUE TO B&W'S ENTRY INTO THE SALE OF GENERICS CONSTITUTES AN INDEPENDENT GROUND FOR AFFIRMING THE JUDGMENT BELOW.

The dramatically increased competition sparked by RJR's and B&W's entries into the generic segment independently supports affirmance by this Court.

To avert such an affirmance, Liggett invents a Fourth Circuit "alternative holding that the absence of consummated injury" exonerates B&W of its "otherwise predatory conduct." Pet.Br. 44. But Liggett (1) misstates the lower court's holding as having erroneously required *actual* injury rather than the statutory possible injury to competition, and (2) wrongly maintains that even the *actuality* of *more* competition cannot rebut the *prospective lessening* of competition inferable from B&W's conduct—which must "be judged as of the time it occurs" because this "educates would-be predators as to their duties under the statute." *Id.* at 45.

A. The Holdings Below Expressly Turned On "Possible Injury," Not "Consummated Injury," To Competition.

Both courts below expressly applied the statutory "possible injury" standard, and the Fourth Circuit's decision nowhere suggests, let alone imposes, any "requirement of actual effects." *Id.* at 23. But no inference of a possible injury to competition can withstand the fact that competition actually intensified. To allow such a preposterous result would not only chill competition in the future but would be directly contrary to this Court's recent *Eastman Kodak* decision which stressed the priority of "actual events" over "economic theories." In measuring the competitive impact of business practices in order "to resolve antitrust claims on a case-by-case basis," courts must focus on actual record facts. *Eastman Kodak*, 112 S. Ct. at 2082.[34]

Rather than requiring "actual injury" to competition, both courts below summarized the uncontroverted evidence demonstrating more rather than less competition due to B&W's and others' entries into the sale of generics, a category which Liggett had dominated for several years. In particular, the Fourth Circuit opinion stressed:

—Liggett's 97% domination of generic sales prior to RJR's "repositioning" of Doral and B&W's entry into generics in mid-1984, Pet.App. 6a;

---

[34] Although addressed by Liggett, Pet.Br. 46 n.58, the issue of "antitrust injury," which was an independent legal basis for the district court's j.n.o.v. that was not reached by the Fourth Circuit, is *not* before this Court. In any event, Liggett's latest focus on "managing prices upward" and "higher prices" creating "actual injury to competition and consumers," Pet.Br. 44, vitiates any "antitrust injury" to Liggett. Liggett plainly lacks standing to challenge *higher* cigarette prices, which might theoretically inflict "antitrust injury" on consumers but *not* on a competitor who benefits from higher prices that *help* not *hurt* its own competitive opportunities. *E.g.*, *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990); *Cargill, Inc. v. Monfort, Inc.*, 479 U.S. 104, 116 (1986); *Matsushita*, 475 U.S. at 583; *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 485 (1st Cir. 1988), *cert. denied*, 488 U.S. 1007 (1989).

—B&W's third-ranking 12% market share, dwarfed by PM (41.9%) and RJR (28.5%), *id.* at 3a;

—the "furious rebate war," and explosion of diverse discount deals erupting after B&W's entry, *id.* at 5a-6a, 12a-13a;

—the confirmation by Liggett's own executives that the companies fought "tooth and nail," that the market "got very competitive," and that "competition had substantially increased in the total cigarette market," *id.* at 6a;

—the ensuing dramatic growth of the enonomy segment as all other cigarette manufacturers successively entered the fray with a variety of economy cigarettes including branded generics and black-and-whites, *id.* at 6a, 12a-13a;

—the intensified competition due to the several companies' "vigorously competing with differing devices and approaches," *id.* at 12a;

—the consequent expansion of economy cigarettes from 2.8 billion in 1981 to nearly 80 billion in 1989, mushrooming from .4% to 15% of the U.S. cigarette market as of 1990, *id.* at 12a-13a; and

—Liggett's tripling of its generic sales from 2.8 to 9 billion between 1981 and 1988, *id.* at 6a.

In sum, having nowhere required "proof of actual injury," the decisions below marshalled the uncontroverted record evidence, confirmed by Liggett's own executives, that competition dramatically increased due to B&W's entry into generics.[35]

---

[35] Liggett recognizes that acceptance of its theory would have a tremendous potential "chilling" effect on price competition, but proposes that the Court adopt "filters" to protect the unwary, and claims that this case has passed through each of its six filters. Pet.Br. 41-42. This is untrue. For example, the first filter was not satisfied because the trial court's instructions erroneously denied B&W its valid meeting competition defense. Moreover, the facts stated by both courts below and in this brief, *supra* pp. 10-31, demonstrate that this case has not passed through a single one of the other "filters."

B. Many Robinson-Patman Act Decisions Hold That Proof Of More Actual Competition Rebuts Any Inference Of Prospective Lessening Of Competition Due To Challenged Price Discrimination.

Contrary to Liggett's assertions that the competitive impact of challenged pricing must "be judged as of the time it occurs," which "educates would-be predators" as to their legal duties, Pet.Br. 45, price discrimination claims routinely fail whenever the actuality of *more* competition negates the prospect of *lessened* competition inferable from the challenged price discrimination. *E.g., Boise Cascade Corp. v. Federal Trade Commission,* 837 F.2d 1127, 1144 (D.C. Cir. 1988) (inference of competitive injury can be *"overcome by evidence showing an absence of competitive injury"*).[36] Nothing supports Liggett's speculative assertion of primary-line competitive injury because "the generic segment would have been even larger in the absence of B&W's predatory conduct." Pet. Br. 44; *e.g., O. Hommel Co. v. Ferro Corp.,* 659 F.2d 340, 347 (3d Cir. 1981), *cert. denied,* 455 U.S. 1017 (1982) (competitive injury cannot be based on "speculative possibility" of even more competition in the absence of price discrimination).

Furthermore, an assessment of the competitive actualities in the wake of B&W's alleged predatory pricing, which both lower courts undertook, was imperative here because of the highly speculative (at best) character of Liggett's oligopolistic recoupment theory. In sum, nothing supports Liggett's doctrine that ordains oligopoly theorizing about possible future reactions of rivals, but

[36] Many Robinson-Patman primary-line cases are in accord: *O. Hommel Co. v. Ferro Corp.,* 659 F.2d 340, 347 (3d Cir. 1981), *cert. denied,* 455 U.S. 1017 (1982); *Dean Milk Co. v. Federal Trade Commission,* 395 F.2d 696, 714 (7th Cir. 1968); *Anheuser-Busch, Inc. v. Federal Trade Commission,* 289 F.2d 835, 842 (7th Cir. 1961); *Minneapolis-Honeywell Regulator Co. v. Federal Trade Commission,* 191 F.2d 786, 790 (7th Cir. 1951) (volume discounts), *cert. dismissed,* 344 U.S. 206 (1952).

forbids looking at what actually happened in the marketplace.

C. Liggett's Theories Would Set The Robinson-Patman Act At Odds With "Broader Antitrust Policies Laid Down By Congress," Chill Price Competition, And Foment Treble Damage Litigation.

Liggett's freeze-frame interpretation of the statutory competitive injury requirement gravely magnifies the Robinson-Patman risks and treble damage exposures of business firms' daily pricing decisions. Primary-line injury claims would preclude defendants from showing the actual impact of their alleged discriminatory pricing "predation," and how they in fact, as here, intensified competition in the marketplace. Hence, Liggett's modest proposal for judging competitive injury in the dark "educates would-be predators," Pet.Br. 45, with a vengeance. Not the least, Liggett's draconian teaching tools bode large burdens on courts and business firms alike, to the detriment of U.S. firms' competitiveness and ultimately the American consumer.

Particularly in primary-line price discrimination cases, which are uniquely prone to abusive litigation to thwart hard price competition by business rivals, the Robinson-Patman Act should not be strained beyond its text and province.[37] Instead, the Act should be construed to avert a chilling effect on competitive pricing, "the central ner-

[37] "When a business rival brings suit, it is often safe to infer that the [challenged] arrangement is beneficial to consumers." Frank Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 18 (1984).

> Business rivals have an interest in higher prices, while consumers seek lower prices. Business rivals seek to raise the costs of production. . . . The books are full of suits by rivals for the purpose, or with the effect, of reducing competition and increasing price. . . . [The Department of Justice and the courts] should treat suits by horizontal competitors with the utmost suspicion.

Id. at 34-35.

vous system of the economy." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940). Realistic rather than expansive Robinson-Patman interpretations would treat price cutting as a *preferred* form of business behavior in free markets, akin to the free expression protected by the First Amendment. *E.g.*, *Spectrum Sports*, slip op. at 11; *Eastman Kodak*, 112 S. Ct. at 2088; *Atlantic Richfield*, 495 U.S. at 338; *Matsushita*, 475 U.S. at 594.

Not least, penalizing B&W's generic entry and competitive price cutting would twist antitrust policy into a confrontation with itself. At the core of this case is a vigorous competitive encounter between two profitable rivals, each backed by the "staying power" of a large parent, which met head-to-head in competition for the new and growing generics segment for cigarettes in which Liggett held 97% of the business prior to B&W's entry. The inevitable competitive responses by other firms set off a fierce "rebate war" and mushroomed the economy segment, bringing huge consumer savings.

Above all, as recently stressed by a unanimous Court, lest antitrust interpretations "chill competition, rather than foster it," the Sherman Act "directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest." *Spectrum Sports*, slip op. at 11. For the same reason, the Robinson-Patman Act must be read to foster competition, not to suppress it.

CONCLUSION

The decision of the Fourth Circuit should be AFFIRMED.

Respectfully submitted,

ROBERT H. BORK
1150 17th Street, N.W.
Washington, D.C. 20036
(202) 862-5851

FREDERICK M. ROWE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-5200

GRIFFIN B. BELL
Counsel of Record
KING & SPALDING
191 Peachtree Street
Atlanta, GA 30303
(404) 572-4600

ABBOTT B. LIPSKY, JR.
VERONICA G. KAYNE
KING & SPALDING
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 737-0500
Counsel for Respondent

Of Counsel:
NORWOOD ROBINSON
MICHAEL L. ROBINSON
ROBINSON MAREADY LAWING
& COMERFORD
380 Knollwood Street
Suite 300
Winston-Salem, NC 27103
(919) 631-8500

February 3, 1993