No. 05-381

IN THE

Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

ROSS-SIMMONS HARDWOOD LUMBER COMPANY, INC.,

Respondent.

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

SECOND SUPPLEMENTAL BRIEF FOR RESPONDENT

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SECOND SUPPLEMENTAL BRIEF FOR RESPONDENT

Respondent files this second supplemental brief pursuant to Rule 15.8 to respond to incorrect assertions in Petitioner's Supplemental Brief regarding the record below. Petitioner attempts to distort the record below regarding the single sentence in the jury instructions that has become the focus of petitioner and amici in this Court. To put the record on this sentence into its proper perspective, three points are appropriate.

First, despite its clever weaving of record excerpts, the fact remains that Weyerhaeuser *never* submitted a *Brooke Group* instruction, passing up the opportunity both in its 32-page pretrial submission and in a supplemental set of requested instructions filed during trial. Instead, Weyerhaeuser pursued an all-or-nothing strategy in which it unsuccessfully contended that *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) entitled it to judgment as a matter of law in summary judgment, trial and post trial motions.

Second, consistent with the foregoing, Weyerhaeuser made only a generalized, blanket "*Brooke Group* should apply" objection to a predecessor of the disputed instruction formulated by the district court, which at that point totaled 108 words. TR 8B at 6 (ER 419). In a colloquy that consumes over seven transcript pages, the district judge first proposed a major expansion of the instruction, dropped that proposal when respondent withdrew one of its requested instructions and then substantially reworded the original draft instruction down to 58 words. TR 8B at 5-12 (ER 418-425) (corrected at ER 630). At this point, Weyerhaeuser's counsel, without citing any ground, stated only that defendant took exception to that instruction "as modified." *Id.* at 12 (ER 425). Weyerhaeuser also failed to make any specific objection to this instruction after it was read to the jury and before the jury retired to deliberate.

Given the major evolution of this instruction in a discussion largely between the district court and respondent's counsel, Weyerhaeuser's unspecified objection failed to meet the Rule 51 requirement that trial counsel specify the *grounds* for objection to a jury instruction. This Court has long held that "a general exception is not sufficient," and that, in fairness to the trial court and the parties, "objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error." *Palmer v. Hoffman*, 318 U.S. 109, 119 (1943).

To be sure, the procedural posture of any challenge to this now-disputed jury instruction is most peculiar. Weyerhaeuser submitted no instruction on the issue that is the primary basis for its petition in this Court and made no particularized objection to an instruction that underwent considerable evolution between the time of its inclusion in draft instructions submitted to the parties and its adoption in a far different form by the district court. On this record, Weyerhaeuser utterly failed to comply with the letter or spirit of Rule 51 which is designed to "bring possible errors to light while there is still time to correct them without entailing the cost, delay and expenditure of judicial resources occasioned by retrials." *See, e.g., Voorhies-Larson v. Cessna Aircraft Co.*, 241 F.3d 707, 713 (9th Cir. 2001) (quotation marks omitted); *id.* (noting with approval that the Ninth Circuit "has long enjoyed the 'reputation as the strictest enforcer of Rule 51,' as we have consistently declared that there is no 'plain error' exception in civil cases in this circuit") (citation omitted).

Finally, precisely because Weyerhaeuser raised no challenge to the specific terms of the overbidding instruction either at trial or in its direct appeal, the Ninth Circuit was clearly accurate and correct when it held:

> Our conclusion that *Brooke Group* does not apply here disposes of Weyerhaeuser's challenge regarding a new trial due to erroneous jury instructions in its entirety.

Pet. App. 5a.

Accordingly, Weyerhaeuser's challenge to the overbidding instruction on grounds other than that *Brooke Group* should apply is not properly before this Court. Indeed, neither Weyerhaeuser nor the government contests the point made by respondent in opposition to certiorari and again in the supplemental brief that the Ninth Circuit's short discussion of the jury instructions, which are addressed "as a whole," is mere dictum, rarely a basis for certiorari. Relatedly, neither Weyerhaeuser nor the government has refuted the fact that there have been material changes in the ABA's model jury instructions since the jury was instructed in this case, changes that make the recurrence of the instruction in this case highly unlikely, which is yet another reason why certiorari is inappropriate.

Respectfully submitted.

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