

No: 80472-9

SUPREME COURT
OF THE STATE OF WASHINGTON

CHARLES SALES and
PATRICIA SALES, a married couple,

Respondents,

v.

WEYERHAEUSER COMPANY,
a Washington Corporation,

Appellant.

PETITIONER'S
APPELLANT'S SUPPLEMENTAL BRIEF

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I. IDENTITY OF APPELLANT

Appellant, Weyerhaeuser Company (“Weyerhaeuser”), by and through its counsel of record, hereby submits this Supplemental Brief in support of its previously filed Petition for Review.

II. ASSIGNMENTS OF ERROR

1. Does the Washington Court of Appeals’ published decision – *Sales v. Weyerhaeuser Co.*, 138 Wn. App. 222, 156 P.3d 303 (2007) – conditioning dismissal on Weyerhaeuser’s waiver of its federal right to diversity jurisdiction violate the U.S. Constitution’s Supremacy Clause and the U.S. Supreme Court’s “unconstitutional conditions” doctrine?

2. Did the Court of Appeals err when it held the Superior Court of Pierce County, Washington abused its discretion by failing to condition dismissal of the case on Weyerhaeuser’s stipulation to try the case in Arkansas state court where there is no precedent for such a condition and where the decision conflicts with settled Washington law?

3. Does the Court of Appeals’ published decision substantially and improperly abridge the rights of Washington-based corporations defending lawsuits that ought to be brought elsewhere?

III. STATEMENT OF THE CASE

Plaintiff Charles Sales (“Plaintiff Sales”) and his wife, Patricia Sales, filed this lawsuit alleging Plaintiff Sales developed mesothelioma as a result of exposure to asbestos fibers brought home from Weyerhaeuser’s Mountain Pine, Arkansas facility on his father’s work clothes between

1984 and 1992.¹ Specifically, Plaintiffs allege Weyerhaeuser used asbestos-containing materials at its “plywood and 2x4 production mill in Mountain Pine, Arkansas” and that Plaintiff Sales’ father, Charles D. Sales, “was an employee at this mill” from 1984 to 1992.²

Plaintiffs further allege Plaintiff Sales “grew up in Mountain Pine, Arkansas” and that they now live in Hot Springs, Arkansas.³ Medical records submitted by Plaintiffs on June 7, 2006, in support of their motion for priority trial setting show Plaintiff Sales has also received medical treatment in Arkansas.⁴ Significantly, Plaintiffs do not allege: (1) that they ever resided in Washington; (2) that they ever worked in Washington; (3) that Plaintiff Sales was exposed to asbestos in Washington; (4) that they sustained any injury in Washington; or (5) that Plaintiff Sales received any medical treatment in Washington.⁵ Similarly, Weyerhaeuser argued that many of the fact witnesses critical to Weyerhaeuser’s defense of the case reside in and around Mountain Pine, Arkansas and not Washington.⁶ Weyerhaeuser specifically noted the former Environmental Manager and Engineering Maintenance Manager for Weyerhaeuser’s Mountain Pine, Arkansas mill reside in Arkansas and have personal knowledge of facts relevant to this case.⁷ Weyerhaeuser also advised the Superior Court that Charles D. Sales’ former supervisor resides in

¹ See CP at 16–17.

² *Id.* at 16.

³ See *id.* at 15–17.

⁴ See *id.* at 25–37.

⁵ See *id.* at 14–20.

⁶ See *id.* at 50, 138.

⁷ *Id.*

Mountain Pine, Arkansas rather than Washington.⁸ Based on these facts, the Superior Court found, and the Court of Appeals affirmed, that the public and private interest factors list in *Myers v. Boeing Co.*, 115 Wn. 2d 123, 128, 794 P.2d 1275, 1276 (1990) favored trial in Arkansas.⁹

IV. ARGUMENT

A. The Court of Appeals' Decision Unconstitutionally Violates Weyerhaeuser's Right to Assert Federal Diversity Jurisdiction.

1. Constitutional Right to Federal Diversity Jurisdiction and the Supremacy Clause to the U.S. Constitution.

The Supremacy Clause to the U.S. Constitution provides the Constitution *and* the Laws of the United States are paramount and must be followed by “the Judges in every State.” U.S. Const. art. VI, cl. 2. Contrary to Plaintiffs’ assertions, it does not matter if Weyerhaeuser’s right to federal diversity jurisdiction is constitutional or statutory. Weyerhaeuser’s right to diversity jurisdiction is a *federal* right and, under the plain language of the Supremacy Clause and the cases interpreting it, Washington’s courts cannot infringe upon this right for any reason. *Howlett v. Rose*, 496 U.S. 356, 371, 110 S. Ct. 2430, 2440, 110 L. Ed. 2d 332, 350 (1990) (“the Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a

⁸ *Id.* at 138.

⁹ *See id.* at 161 (stating “it would be in the interests of justice to have this case tried in the county and location where the incident occurred, where the majority of the factual witnesses are located, and where the Plaintiff resides”); *see Op.* at 7 (stating “record supports the trial court’s findings and its legal conclusion that Arkansas is a more appropriate forum for Sales’ lawsuit”).

refusal to recognize the superior authority of its source”).¹⁰ Simply put, the Court of Appeals’ decision directly violates the Supremacy Clause by conditioning the dismissal of Plaintiffs’ case on Weyerhaeuser’s waiver of its federal right to diversity jurisdiction.

Plaintiffs’ citation of *The Bremen*, 407 U.S. 1, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972) – a case involving a contractual forum selection clause stipulating to trial in London, England – is neither relevant nor persuasive.¹¹ As an initial matter, *The Bremen* is factually distinguishable as the parties therein agreed to forego federal court jurisdiction *before* their dispute arose. Moreover, the Court’s holding in *The Bremen* relates to the validity of the parties’ forum selection clause – not a defendant’s motion to dismiss for *forum non conveniens*. In the case at bar, the parties did not have a contract and the Court of Appeals’ ruling would force Weyerhaeuser to waive its right to federal diversity jurisdiction *after* the negligence-based cause of action arose.

¹⁰ See also *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 479–80, 94 S. Ct. 1879, 1885, 40 L. Ed. 2d 315, 324 (1974) (citation omitted) (stating “when state law touches upon the area of federal statutes enacted pursuant to constitutional authority, ‘it is ‘familiar doctrine’ that the federal policy ‘may not be set at naught, or its benefits denied’ by the state law”); *Goldey v. Morning News*, 156 U.S. 518, 523, 15 S. Ct. 559, 561, 39 L. Ed. 517, 519 (1895) (stating “[t]he judiciary of a State can neither defeat the right given by a constitutional act of Congress to remove a case from a court of the State into the Circuit Court of the United States, nor limit the effect of such removal”); *Home Ins. v. Morse*, 87 U.S. 445, 22 L. Ed. 365 (1874) (stating the U.S. Constitution “secures to citizens of another state than that in which suit is brought an absolute right to remove their cases into the Federal court, upon compliance with the terms of the removal statute”); *Kansas Pub. Employees Ret. Sys. v. Reimer & Koger Assocs.*, 4 F.3d 614, 619 (8th Cir. 1993) (stating “states cannot indirectly prevent, defeat, or limit the free exercise of the right to remove”); *Int’l Ins. Co. v. Duryee*, 96 F.3d 837 (6th Cir. 1996) (noting the Supremacy Clause makes state statutes unconstitutional if they conflict with federal law).

¹¹ See Resp’ts’ Ans. to *Amici Curiae* Br. of Coalition for Litigation Justice, Inc., et al. Re Weyerhaeuser’s Pet. for Review at 9.

The Bremen is also legally distinguishable and does not, in any way, support Plaintiffs' position that a trial court can condition a dismissal for *forum non conveniens* on a defendant's waiver of its right to federal diversity jurisdiction. Rather, *The Bremen* stands for the proposition that forum-selection clauses are *prima facie* valid. The fact that parties can contractually stipulate to jurisdiction in England does not validate the Court of Appeals' decision conditioning the dismissal of this case on Weyerhaeuser's waiver of its right to federal diversity jurisdiction.¹²

Plaintiffs' citation of *Wieser v. Missouri Pacific R.R. Co.*, 98 Ill. 2d 359, 456 N.E.2d 98 (1983) – a case where the appellate court conditioned dismissal of the case on the defendant's waiver of the FELA's statute of limitations – is also inapposite. As a threshold matter, state courts have concurrent jurisdiction with federal courts in enforcement of FELA actions and are required to apply federal substantive law when adjudicating FELA cases.¹³ Thus, in the context of a FELA action, it is not troubling that the Supreme Court of Illinois conditioned the dismissal on the defendant's waiver of the FELA's statute of limitations. The *Wieser* court did not violate the Supremacy Clause by conditioning the dismissal of the complaint because the court was *applying* federal law rather than limiting it. Unlike the Washington Court of Appeals, the

¹² To the extent *The Bremen* is relevant to this case, it supports Weyerhaeuser's position that a foreign forum, i.e., London or Arkansas, can be an adequate alternative forum under a *forum non conveniens* analysis.

¹³ See, e.g., 45 U.S.C. § 56 (2007); *Horn v. Atchison, Topeka & Santa Fe Ry. Co.*, 519 S.W.2d 894, 896 (Tex. Civ. App. 1975) (stating the substantive rights of parties in a FELA action are governed by federal law and the decisions of the U.S. Supreme Court must control).

Wieser court did not force the defendant to waive a federal right and merely took steps to ensure the plaintiff retained some remedy under the FELA. The *Wieser* court upheld federal law rather than subrogating it in favor of state law.

Another distinguishing factor of *Wieser* is that FELA cases are not removable.¹⁴ As Plaintiffs have made the possibility that Weyerhaeuser will remove this case to the *In Re: Asbestos Products Liability Action*, Multi-District Litigation No. 875, (“MDL”) a focal point of their opposition, *Wieser* has no applicability or precedential value to this case. If *Wieser* has any precedential value to this case, it supports the Superior Court, the Washington Court of Appeals and Weyerhaeuser’s position that Arkansas is the proper forum for this case. Like the Washington courts involved in this case, the *Wieser* court found the public and private interest factors strongly favored trial of the case in Oklahoma forum proffered by defendants rather than the Illinois forum chosen by plaintiff.¹⁵ The *Wieser* court, like the Superior Court and Court of Appeals, found plaintiff’s case simply had no connection to plaintiff’s chosen forum.¹⁶

Similarly, it is not unusual for courts to condition a *forum non conveniens* dismissal on a defendant’s waiver of a statute of limitations defense that may exist in the defendant’s proffered forum.¹⁷ The waiver of a statute of limitations defense is designed to ensure the plaintiff’s

¹⁴ See 28 U.S.C. § 1445 (2007).

¹⁵ Compare CP at 157–62 & Op. at 7 with *Wieser*, 98 Ill. 2d at 367–73, 456 N.E.2d at 102–05.

¹⁶ Compare CP at 161–62 & Op. at 7 with *Wieser*, 98 Ill. 2d at 371, 456 N.E.2d at 104.

¹⁷ See, e.g., *Wolf v. Boeing Co.*, 61 Wn. App. 316, 910 P.2d 943 (1991).

claims are not time barred in the proposed forum and that the plaintiff has *some* remedy.¹⁸ In the present case, the Court of Appeals did not need to condition dismissal of the case on Weyerhaeuser's waiver of its federal right to remove the case to ensure Plaintiffs have a remedy in Arkansas. Whether the case is tried in an Arkansas state court or an Arkansas federal court applying Arkansas state law – Plaintiffs have a remedy under Arkansas law.

Significantly, the Court of Appeals' decision does not find support in any case cited by Plaintiffs or the Court of Appeals. Weyerhaeuser's research does not reveal a single asbestos case in which a state court declined to grant an otherwise persuasive *forum non conveniens* motion unless the moving party involuntarily relinquished its right to remove under federal law. This Court should not sanction the Court of Appeals' unconstitutional and unprecedented infringement upon Weyerhaeuser's right to federal diversity jurisdiction.

2. **The “Unconstitutional Conditions Doctrine.”**

Contrary to Plaintiffs' assertions, the Court of Appeals' order conditioning the dismissal of Plaintiffs' complaint on Weyerhaeuser's waiver of its right to federal diversity jurisdiction is an “unconstitutional condition.” Weyerhaeuser has repeatedly cited to numerous cases which

¹⁸ See *Klotz v. Dehkhoda*, 134 Wn. App. 261, 265, 141 P.3d 67, 68 (2006) (stating “an alternative forum is adequate so long as some relief, regardless how small, is available should the plaintiff prevail”).

hold a state's attempt to prevent a litigant from asserting the litigant's right to federal diversity jurisdiction is an "unconstitutional condition."¹⁹

In their Answer to Weyerhaeuser's Petition for Review, Plaintiffs also make much ado about *Kline v. Burke Construction Co.*, 260 U.S. 226, 43 S. Ct. 79, 67 L. Ed. 226 (1922), and claim this case conclusively establishes there is no constitutional right of access to the federal courts.²⁰ However, the U.S. Supreme Court's holding in *Kline* has no bearing on this case and its language putatively refuting the constitutional origin of a litigant's right to federal diversity jurisdiction is mere *dictum* and not binding.²¹ Furthermore, *Kline* did not overturn *Terral* as Plaintiffs allege. *Terral* still stands for the proposition that defendants have a Constitutional right to resort to federal courts.²²

¹⁹ See, e.g., *Home Ins.*, 87 U.S. at 453, 22 L. Ed. at 369 (invalidating a Wisconsin statute, the Court held "State legislation cannot confer jurisdiction upon the Federal courts, nor can it limit or restrict the authority given by Congress in pursuance of the Constitution"); *Barron v. Burnside*, 121 U.S. 186, 200, 7 S. Ct. 931, 936 30 L. Ed. 915, 920 (1887) (invalidating an Iowa statute which required foreign corporations to waive their right of removal and stating "[a]s the Iowa statute makes the right to a permit dependent upon the surrender by the foreign corporation of a privilege secured to it by the Constitution and laws of the United States, the statute requiring the permit must be held to be void"); *Harrison v. St. Louis & San Francisco R.R.*, 232 U.S. 318, 327-34, 34 S. Ct. 333, 335-37, 58 L. Ed. 621, 624-27 (1914) (invalidating an Oklahoma statute that attempted to limit a foreign corporations' ability to remove cases to federal court under diversity jurisdiction by prohibiting the foreign corporation from asserting a citizenship other than Oklahoma); *Terral v. Burke Constr. Co.*, 257 U.S. 529, 532, 42 S. Ct. 188, 189, 66 L. Ed. 352, 354 (1922).

²⁰ See Resp'ts' Ans. to Pet. for Review at 11-14.

²¹ See, e.g., *Farrell v. Waterman S.S. Co.*, 291 F. 604, 604-05 (S.D. Ala. 1923) (stating the *Kline* Court's comments regarding the origin of the right to federal diversity jurisdiction was "unnecessary to the decision and entirely too broad").

²² See *Garrity v. New Jersey*, 385 U.S. 493, 87 S. Ct. 616, 17 L. Ed. 2d. 562 (1967) (citing *Terral* and stating that "[r]esort to the federal courts in diversity of citizenship cases" is an example of "rights of constitutional stature whose exercise a State may not condition by the exaction of a price"); see also *Landworks Creations, LLC v. United States Fid. & Guar. Co.*, No. 05-40072-FDS, 2005 U.S. Dist. LEXIS 40287, at *10-11 (Mass. Nov. 15, 2005) (citing *Terral* for the proposition that "a state may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the state, exact from it a waiver of the exercise of its constitutional right to resort to the

Kline is also easily distinguishable and does not stand for the proposition that a defendant must waive its right to federal diversity jurisdiction in conjunction with a motion to dismiss for *forum non conveniens*. In *Kline*, Burke Construction Company (“Burke”) filed a breach of contract suit in federal court against Kline. Federal court jurisdiction was based upon federal diversity jurisdiction. Shortly thereafter, Kline brought a suit in equity against Burke in state court over the same contract. Burke moved the federal court to enjoin prosecution of the state court action. The district court denied Burke’s motion. Burke appealed to the Court of Appeals and the Court of Appeals reversed. On appeal to the U.S. Supreme Court, the critical question was whether the federal courts had exclusive jurisdiction over a controversy between citizens of different states when the suit was first filed in federal court. The propriety of that jurisdiction was beyond doubt and the Supreme Court did not question that the district court had jurisdiction over the case. Rather, the Court merely held the federal court did not have exclusive jurisdiction. Unlike the Washington Court of Appeals, the U.S. Supreme Court held Burke “had *the undoubted right under statute to invoke the jurisdiction of the federal court.*”²³ This remains the law of the land.

federal courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not”).

²³ *Kline*, 260 U.S. at 234, 43 S. Ct. at 83, 67 L. Ed. at 232 (emphasis added).

B. The Court of Appeals' Decision Conflicts with Established Washington Precedent.

1. The Court of Appeals Improperly Applied a *De Novo* Standard of Review When It Should Have Applied an Abuse of Discretion Standard of Review.

The Court of Appeals applied an incorrect, *de novo*, standard of review when it reviewed the Superior Court's decision. Rather than applying the correct, *abuse of discretion*, standard of review, the Court of Appeals conducted its own review of the facts and improperly substituted its judgment for the Superior Court's.²⁴

The Supreme Court of Washington has long held a court abuses its discretion in granting a motion to dismiss on *forum non conveniens* and denying a motion to reconsider **only if** its decision is “manifestly unfair, unreasonable or untenable.”²⁵ The proper test for abuse of discretion is *not* whether another court might have ruled the same way. The test is whether the trial court based its decision on tenable grounds and reasons.²⁶ Reversal is not appropriate unless “***no reasonable judge would have reached the same conclusion.***”²⁷

In the case at bar, the Superior Court did not abuse its discretion when it declined to condition the dismissal of Plaintiffs' complaint on Weyerhaeuser's waiver of its federal right to diversity jurisdiction.

²⁴ See *Myers*, 115 Wn. 2d at 128, 794 P.2d at 1275 (1990) (stating the standard of review for a decision to dismiss on *forum non conveniens* grounds is abuse of discretion).

²⁵ *Id.* (citation omitted).

²⁶ *Coggle v. Snow*, 56 Wn. App. 499, 506, 784 P.2d 554, 559 (1990) (“[t]he proper standard is whether discretion is exercised on untenable grounds or for untenable reasons, considering the purposes of the trial court's discretion”).

²⁷ *Sofie v. Fiberboard Corp.*, 112 Wn. 2d 636, 667, 771 P.2d 711, 727 (1989) (emphasis added).

Though the Court of Appeals may disagree with the Superior Court's decision, the Court of Appeals cannot reasonably contend the Superior Court's decision was manifestly unfair, unreasonable or untenable. Rather, the Superior Court based its decision on a careful review of the applicable law and facts. Specifically, Judge Hickman:

- (1) Heard oral arguments from both parties on Weyerhaeuser's motion to dismiss – including, but not limited to, Plaintiffs' arguments regarding the MDL;²⁸
- (2) Heard oral arguments from both parties on Plaintiffs' motion to reconsider – including, but not limited to, Plaintiffs' arguments regarding the MDL;²⁹
- (3) Stated on the record that he carefully read the parties' briefs and cases cited therein;³⁰
- (4) Recognized he had authority to attach reasonable conditions to the dismissal and cited *Myers* and *Johnson v. Spider Staging Corp.*, 87 Wn. 2d 577, 579, 555 P.2d 997, 999 (1976) – two cases where trial courts imposed conditions on *forum non conveniens* dismissals;³¹ and,
- (5) Issued a well-reasoned and straightforward seven page opinion explaining his decision to grant Weyerhaeuser's motion to dismiss and why he concluded that six of the ten factors from *Myers* strongly favored Arkansas and *none* of the factors favored Washington.

The Court of Appeals agreed with the Superior Court's analysis and stated "Arkansas is a more appropriate forum for Sales' lawsuit."³²

Significantly, the Superior Court also recognized the possibility of removal was *speculative* and not dispositive to its *forum non conveniens*

²⁸ See RP at 20:1–22:9 (Tr. from Hr'g on Weyerhaeuser's Mot. to Dismiss, 6/23/06).

²⁹ See RP at 4:12–6:11 (Tr. from Hr'g on Pls.' Mot. to Recons., 7/28/06).

³⁰ See CP at 161 (Superior Court stating it "review[ed] cases cited by counsel); RP at 14:10–12 (Tr. from Hr'g on Pls.' Mot. to Recons., 7/28/06) (Superior Court stating it "exhaustively" reviewed the case law).

³¹ See CP at 157.

³² Op. at 7.

analysis.³³ The Superior Court specifically stated it did not believe that speculation on what might happen if Weyerhaeuser removed the case to the MDL was a proper basis on which to deny Weyerhaeuser's motion:

The Court cannot find that the county, which otherwise has little or no connection to the case other than the fact that the corporate headquarters is located in this state and there is the possibility that this matter may be removed to a Federal court system, is adequate grounds to otherwise deny a motion for *forum non conveniens* where there is little or no connection between the complaining party and the facts of the case.³⁴

The Superior Court granted Weyerhaeuser's Motion to Dismiss because the court rightly concluded the possibility of federal removal was not "a legitimate factor" it could consider when deciding the motion:

I came to realize, obviously, that the only reason that this case is in Washington State is potentially to avoid this diversity of jurisdiction so that the federal government or the federal court system would not be involved in it, and I believe that was a strong motivation in filing it here in Washington State. ... *But, the problem is that I don't believe that this Court has read any cases that would allow me under that fact pattern to use that as a sole reason for keeping jurisdiction over a case which otherwise the State of Washington has only what I consider to be a very thin connection.*³⁵

The Superior Court thoroughly analyzed the relevant facts and law in this case and did not abuse its discretion by dismissing Plaintiffs' complaint.

³³ See CP at 160-62.

³⁴ See *id.* at 161-62; RP at 15:9-14 (Tr. from Hr'g on Pls.' Mot. to Recons., 7/28/06).

³⁵ RP at 14:13-15:2 (Tr. from Hr'g on Pls.' Mot. to Recons., 7/28/06) (emphasis added); see also *id.* at 15:15-23.

2. **The Court of Appeals Misapplied Washington Law on What Constitutes an Adequate Alternative Forum.**

In applying Washington's law on *forum non conveniens*, the Court of Appeals made two critical errors. First, it analyzed the wrong forum. It should have based its ruling on the adequacy of Weyerhaeuser's proposed forum – Arkansas's state courts – and not of the federal MDL – a forum to which the court *assumed* the case would be transferred. Second, it applied the wrong legal standard. It concluded the MDL was an inadequate forum based solely upon perceived delays and congestion in that court. Neither of these actions have any support in Washington's jurisprudence.

Under Washington law, the focus of inquiry is on the proposed alternative forum's adequacy, not speculation about what might happen to the re-filed case. The Court of Appeals simply brushed aside the forum proposed by Weyerhaeuser and focused on the MDL's adequacy. There is simply no precedent for basing a *forum non conveniens* ruling on a court's speculation as to what "might" happen to a case after it is re-filed and Plaintiffs have not identified any precedent supporting this action.

Aside from focusing on the wrong forum, the Court of Appeals applied the wrong legal standard in concluding the MDL was inadequate on the sole basis of perceived delays and congestion. The proper test for determining the adequacy of an alternative forum under Washington law is whether any recovery is available there to remedy the plaintiff's

damage.³⁶ Moreover, “the fact of a difference in the law between the original and proposed alternative forum is not given substantial weight in the analysis.”³⁷ “So long as the plaintiff can litigate the essential subject matter of the case in the alternate forum, the fact that recovery would be smaller—even considerably smaller—does not render the forum inadequate.”³⁸ An alternative forum is adequate even if “a particular claim cannot be asserted in the foreign forum.”³⁹ “Even the fact that a suit would no longer be economically viable due to the limited damages available does not render an alternative forum inadequate for forum non conveniens purposes.”⁴⁰

In finding the MDL inadequate, the Court of Appeals failed to apply the proper test – i.e., is *any* recovery available to remedy Plaintiffs’ damage in the alternative forum – and instead fixated solely on how quickly Plaintiffs’ case was likely to proceed to trial. This approach has no support in Washington case law. Indeed, Washington courts traditionally have not given great weight to expediency and efficiency when evaluating the adequacy of an alternative forum.⁴¹ As efficiency and expediency in the alternative forum are not dispositive, or even relevant,

³⁶ *Klotz*, 134 Wn. App. at 265, 141 P.3d at 68 (holding an alternative forum is “adequate so long as some relief, regardless how small, is available should the plaintiff prevail”).

³⁷ *Id.*

³⁸ *Id.*; *Hill v. Jawanda Transp.*, 96 Wn. App. 537, 542, 983 P.2d 666, 670 (1999) (holding British Columbia was an adequate alternative forum as plaintiffs could “clearly litigate the essential subject matter of their dispute and recover damages for their losses”).

³⁹ *Hill*, 96 Wn. App. at 543, 983 P.2 at 670.

⁴⁰ *Klotz*, 134 Wn. App. at 266, 141 P.3d at 69.

⁴¹ *See Hatley v. Saberhagen Holdings, Inc.*, 118 Wn. App. 485, 489–90, 746 P.3d 255, 258 (2003) (holding neither the “perceived expertise of a given court,” nor considerations of “expediency and efficiency,” were a proper basis for transferring venue); *Wolf*, 61 Wn. App. at 328, 910 P.2d at 951 (stating court congestion, “[l]ike other factors, ... is entitled to some, but not decisive, weight in transfer motions”).

to the forum's adequacy, it is troubling that the Court of Appeals based its decision on this one factor and other intangibles such as the possibility of removal (particularly when Plaintiffs, not Weyerhaeuser, control whether any re-filed case is removable). Had the Court of Appeals applied the proper test, it easily should have concluded Plaintiffs would have more than ample opportunity to obtain a recovery in any action re-filed in Arkansas even if the case was removed to federal court and subsequently transferred to the MDL for pretrial proceedings. Moreover, there is simply no appellate precedent for a state court to find a U.S. federal court inadequate as a matter of law.⁴² Thus, assuming *arguendo* (a) it was proper for the Court of Appeals to analyze the MDL and (b) the court's conclusions regarding delays in the MDL were correct – both points which Weyerhaeuser contests – the court still should have found the MDL was an adequate alternative forum.

If allowed to stand, the Court of Appeal's revised standard will force Washington trial courts, at the pleadings stage, to engage in mini trials to determine (a) what might happen to a case after it is re-filed in the alternative forum and (b) whether the new forum (be it the one proposed by defendant or the one where plaintiff argues the case will eventually land) is too congested to afford plaintiff a "proper" remedy. This revised

⁴² In the one case in which delay in a non-U.S., foreign court was considered a dispositive factor, *Bhatnagar v. Surreda Overseas Ltd.*, 820 F. Supp. 958 (E.D. Pa. 1993), *aff'd*, 52 F.3d 1220 (3d Cir. 1995), the delay was 18-26 years – far greater than anything alleged in this case. Subsequent decisions have held delays up to 10 years did not render an alternative forum inadequate. *See, e.g., Ramakrishna v. Besser Co.*, 172 F. Supp. 2d 926, 931 (E.D. Mich. 2001); *Shin-Etsu Chem. Co., Ltd. v. 3033 ICICI Bank Ltd.*, 777 N.Y.S.2d 69, 9 A.D. 3d 171 (N.Y. App. Div. 2004).

standard is impractical, unduly burdens Washington's courts and conflicts with established precedent.

Similarly, if the Court of Appeals applied the proper test to the proper forum, it undoubtedly would have found that Arkansas' state courts constitute an adequate alternative forum. Indeed, in its decision, the Court of Appeals conceded that point insofar as it found that "Arkansas state courts recognize a tort action for damages caused by asbestos exposure", that "Arkansas's state court system and trial date availability is 'equal to, or comparable to, Pierce County'" and that Plaintiffs' counsel had "conceded that the Arkansas state courts could provide an adequate forum."⁴³ Given the overwhelming evidence that Arkansas was an adequate forum and the lack of any precedent for focusing on any forum other than the one suggested by defendant, the Court of Appeals clearly erred in not upholding the Superior Court's decision dismissing the case.

3. **Court of Appeals' Factual Assumptions about the MDL Are Incorrect.**

Assuming *arguendo* it was proper for the Court of Appeals to look beyond the adequacy of Arkansas as an alternative forum and evaluate the adequacy of the MDL, the Court of Appeals' assumptions about the MDL's operation and efficacy are factually inaccurate. The MDL is an adequate alternative forum and Plaintiffs would have a remedy if Weyerhaeuser removed this case to federal court.

⁴³ Op. at 5.

The Court of Appeals' assumption that MDL cases are tried in Pennsylvania is simply incorrect.⁴⁴ The MDL controls *pretrial* proceedings alone. Cases that remain unresolved after the conclusion of the parties' settlement conference must be transferred back to their local federal court, i.e., the U.S. District Court for the Western District of Arkansas, for trial.⁴⁵ In fact, the U.S. Supreme Court has specifically held that MDL panels *must* remand cases to the local, transferor, federal court for trial after the conclusion of pretrial proceedings.⁴⁶ Regardless of whether the case proceeds in Arkansas state or federal court, the case will be tried in Arkansas, not Pennsylvania.

Similarly, the Court of Appeals misunderstood the operation of the MDL and improperly assumed Plaintiffs' case would be lost in a "black hole" and never actually go to trial.⁴⁷ The MDL has a well-known and long followed process for moving *extremis* cases towards final disposition.⁴⁸ As put before the Superior Court, the MDL's Pretrial Order No. 2 provides a process for prompt action in living cancer cases such as this one.⁴⁹ Paragraph 5 of the Order provides that, in cases in which a mesothelioma or asbestos-related lung cancer is alleged, the plaintiff is assured that a settlement conference "shall be held with the Court's designee," within thirty (30) days after the defendant receives from

⁴⁴ See Op. at 7, 9–11.

⁴⁵ See MDL 875 Pretrial Order No. 2; see also CP at 458–59.

⁴⁶ See *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 140 L. Ed. 2d 62, 118 S. Ct. 956 (1998).

⁴⁷ See Op. at 7, 9–11.

⁴⁸ See MDL 875 Pretrial Order No. 2, attached in Appendix.

⁴⁹ See *id.* ¶ 5.

plaintiff's counsel certain designated information including an affidavit from a qualified physician that the Plaintiff is in imminent danger of death, and "sufficient information for settlement evaluation."⁵⁰ Paragraph 5(c) of the Order provides that "if the case is not resolved, it shall be subject to remand" to its local federal court for trial.⁵¹

The Court of Appeals also improperly *assumed* Plaintiffs would re-file a case in Arkansas that was, in fact, removable to federal court. The parties are still in the *pleadings* stage of this litigation and have conducted very little discovery. It was improper for the Court of Appeals to simply assume Plaintiffs would be unable to add a non-diverse defendant to block any theoretical removal.⁵² Plaintiffs are the "masters" of their complaint and decide who to sue, when to sue and where to sue. It is error to force Weyerhaeuser to waive its federal rights simply because the Court of Appeals assumes Plaintiffs' re-filed suit would be removable.

In finding that the MDL was an inadequate forum, the Court of Appeals disregarded the evidence presented by Weyerhaeuser and instead relied upon case law *dicta* and anecdotal evidence presented by Plaintiffs'

⁵⁰ *Id.*

⁵¹ See CP at 458–59.

⁵² Most asbestos plaintiffs name multiple defendants and it would be highly unusual if Plaintiffs did not prevent removal of this case by adding a non-diverse defendant to any re-filed case. See CP at 354 (Rand Report noting the number of defendants named by typical claimant is increasing; plaintiffs in the 1980s typically sued about 20 defendants, plaintiffs in the mid-1990s typically sued 60 to 70 defendants.) Plaintiffs could potentially sue local contractors who allegedly installed asbestos-containing products at the mill; the manufacturers, sellers and/or distributors of the asbestos-containing products allegedly used at the mill; the owner of the schools Plaintiff Sales attended; and/or, the employer of Plaintiff Sales' stepfather who may have worked with or around asbestos-containing products. Significantly, Weyerhaeuser is not suggesting improper joinder. See Resp'ts' Ans. to Pet. for Review at 7, n. 2. Weyerhaeuser is merely attempting to show the legitimacy of other potential defendants in this case.

counsel regarding his experience in one case. A close review of the evidence presented reveals that Plaintiffs' case would not be lost if it is ultimately referred to the MDL. If, pursuant to the MDL's procedures, Plaintiffs can show Plaintiff Sales is in imminent danger of death, Plaintiffs' case would be eligible for expeditious handling and remand to Arkansas federal court for trial.

C. Court of Appeals' Decision Adversely Affects All Washington Corporations.

As evidenced by the *amicus curiae* briefs filed in this case, the Court of Appeals' published decision adversely impacts *all Washington corporations* – not just Weyerhaeuser. Plaintiffs admit they forum-shopped in this case.⁵³ Unless reversed on appeal, the Court of Appeals' decision will embolden future plaintiffs to forum shop. Similarly, unless reversed, the *mere possibility* of removal will become the dispositive factor in Washington's *forum non conveniens* analysis – trumping both the balancing test and public and private interest factors outlined in *Myers*.

Finally, Weyerhaeuser's prediction that future plaintiffs will cite *Sales* in support of a position that the defendant's proposed adequate alternative forum is inadequate unless the defendant agrees to waive its constitutional right to diversity jurisdiction and try the case in state court already has come to fruition.⁵⁴ On September 21, 2007, the Superior Court for King County, Washington conditioned a dismissal for *forum non conveniens* on the defendants' stipulation that they would submit to

⁵³ See, e.g., Resp'ts' Ans. to Pet. for Review at 3.

⁵⁴ See Weyerhaeuser's Pet. for Review at 20.

jurisdiction in Oregon state courts and would “not seek to remove the case to federal court for any reason.”⁵⁵ The plaintiff therein specifically cited the Court of Appeals’ published decision in *Sales* in support of her request that the trial court condition the dismissal of the case on the defendants’ stipulation that they would not seek to remove the case to federal court.

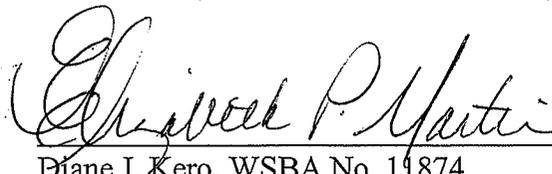
V. CONCLUSION

For the foregoing reasons, Weyerhaeuser asks this Court to reverse that portion of *Sales v. Weyerhaeuser Co.*, 138 Wn. App. 222, 156 P.3d 303 (2007), requiring the Superior Court of Pierce County, Washington to condition the dismissal of Plaintiffs’ complaint on Weyerhaeuser’s stipulation to try this case in Arkansas state court and to affirm the Superior Court of Pierce County, Washington’s decision in this case.

DATED this 1st day of November, 2007.

Respectfully Submitted,

GORDON, THOMAS, HONEYWELL,
MALANCA, PETERSON & DAHEIM, LLP



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V4815385.3

⁵⁵ See Order Granting Def.’s Mot. to Dismiss for Inconvenient Forum, *Baker v. Saberhagen Holdings, Inc.*, No. 07-2-22675-3 SEA, attached in Appendix.

95 F
SEP 23 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FILED

SEP 18 1991

IN RE: ASBESTOS PRODUCTS LIABILITY LITIGATION
By MICHAEL E. KUNZ, Clerk MDL #875
Dep. Clerk

PRETRIAL ORDER NO. 2

IT IS HEREBY ORDERED:

1. All personal injury asbestos cases that were set for trial as of July 29, 1991 with trial to commence after August 1, 1991 and prior to September 30, 1991 where the alleged injury is a malignant disease process are to be set for a settlement conference with the Court's designee prior to September 30, 1991. Plaintiffs' counsel shall provide the necessary information for settlement evaluation to defendants' designated counsel either local or national immediately and shall file attachment "A" with the Court and liaison counsel for the plaintiff and defendant prior to September 30, 1991. Any case not resolved as of October 15, 1991 shall be subject to remand.

2. All personal injury asbestos cases that were set for trial as of July 29, 1991 with trial to commence between October 1, 1991 and November 30, 1991 where the alleged injury is a malignant disease process are to be set for a settlement conference with the Court's designee prior to October 30, 1991. Plaintiffs' counsel

ENTERED: 9/18/91

CLERK OF COURT

shall provide the necessary information for settlement evaluation to defendants' designated counsel either local or national prior to October 10, 1991 and shall file attachment "A" with the Court and liaison counsel for the plaintiff and defendant by October 10, 1991. Any case not resolved as of November 15, 1991 shall be subject to remand.

3. All personal injury asbestos cases that were set for trial as of July 29, 1991 with trial to commence between December 1, 1991 and December 31, 1991 where the alleged injury is a malignant disease process are to be set for a settlement conference with the Court's designee prior to November 30, 1991. Plaintiffs' counsel shall provide the necessary information for settlement evaluation to defendants' designated counsel either local or national prior to November 10, 1991 and shall file attachment "A" with the Court and liaison counsel for the plaintiff and defendant by October 15, 1991. Any case not resolved as of December 15, 1991 shall be subject to remand.

4. The court will address all cases that were on the trial list as of July 29, 1991 with trial to commence prior to December 31, 1991 where the alleged injury is asbestosis and all other cases. Any and all parties can file with the court any relevant motions with regard to the above cases as of December 1, 1991. Plaintiffs are urged to submit settlement information necessary for evaluation of the above cases to defendants' counsel.

5. Any asbestos personal injury case whether or not set for trial in which plaintiff alleges mesothelioma or asbestos

related lung cancer and files an affidavit by a qualified physician that such person is in imminent danger of death shall be treated as follows:

(a) Plaintiffs shall provide to defendants' liaison counsel and defendant designated counsel sufficient information for settlement evaluation.

(b) Fifteen days after receipt of the information from plaintiffs' counsel defendants' counsel shall notify plaintiffs' counsel in writing what additional information is needed for settlement evaluation.

(c) Thirty days after receipt from plaintiffs' counsel of the additional information a settlement conference shall be held with the Court's designee and if the case is not resolved it shall be subject to remand.

6. Nothing in this order shall preclude any party from raising any appropriate issue.

7. Plaintiffs shall promptly file with defendants' liaison counsel and the Court the claimant information form for all federal cases and are requested to provide such information for all state cases (Attachment "A").

8. Plaintiffs' counsel are encouraged to submit the necessary information for settlement evaluation of state court cases and defendants are encouraged to process in accordance with the above schedule in this Order.

Dated: 9/17/91



CHARLES R. WEINER, J.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ASBESTOS PRODUCTS LIABILITY LITIGATION (NO. VI) MDL NO. 875

CLAIMANT INFORMATION FORM

1. Name: _____
2. Social security no.: _____ Date of birth: _____
3. Court(s) and Docket No(s) of Pending Action(s): 1. _____
2. _____ 3. _____
4. If the claimant listed above is a different person than the person whose alleged asbestos-related injury gives rise to this claim, give that injured person's:
Name: _____
Social security no.: _____ Relationship to claimant: _____
Date of death: _____ Cause of death: _____
5. Specify below each occupation in which injurious exposure to asbestos is claimed, including as to each the inclusive dates (month/date to month/date) of exposure:

Shipyard _____	Construction _____
Maritime _____	Steelworker _____
Insulator _____	Refractory _____
Refinery/Powerplant _____	Tireworker _____
Asbestos Plantworker _____	Railroad _____
Mfg. Plantworker _____	Other(specify) _____
6. Do you allege a malignant asbestos-related condition? Yes ___ No ___ If so, specify: Mesothelioma ___ Lung Cancer ___ Other (specify) _____
7. Do you allege a non-malignant asbestos-related condition? Yes ___ No ___
8. Have you obtained any x-rays and had B-readings done by a qualified physician? If so,
 - a. provide the dates of your most recent x-rays and readings: _____
 - b. provide the ILO profusion reading for parenchymal change: _____
 - c. provide the gradings for (i) pleural plaques: _____
(ii) diffuse pleural thickening: _____
9. Have you obtained pulmonary function test results? If so,
 - a. provide the date of your most recent tests: _____
 - b. provide your percentages of predicted scores for:
 Forced Vital Capacity (FVC) _____
 Vital Capacity (VC) _____
 Total Lung Capacity (TLC) _____
 Diffusing Capacity (DLCO) _____
 - c. provide your actual ratio score for:
 Ratio of Forced Expiratory Volume in one second to Forced Vital Capacity (FEV-1/FVC): _____
10. Name, address and telephone number of claimant's counsel:

Certification: I hereby certify that I am counsel for the above-named claimant, that the information set forth to support the claim described herein is true and correct, and that there is (are) no other asbestos-related personal injury claim(s) or proceeding(s) pending in any jurisdiction on behalf of this claimant or injured person except as described herein.

Dated: _____
Signature of Claimant's Counsel

Koro

CW
RJK

Counsel for Plaintiff
shall promptly mail copies of this
order to all other counsel/parties

THE HONORABLE JUDGE SHARON ARMSTRONG
Date of Hearing: Friday, September 21, 2007
Without Oral Argument

RECEIVED

SEP 26 2007

SEP 28 2007

BERGMAN & FROCKT

GORDON, THOMAS, HONEYWELL
MALANCA, PETERSON & DAHEIM LLP

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

BARBARA M. BAKER, Individually and as
Personal Representative of the Estate of
WILLARD R. BAKER, SR.,

NO. 07-2-22675-3 SEA

Plaintiff,

ORDER GRANTING DEFENDANT
ZURN INDUSTRIES' MOTION TO
DISMISS FOR INCONVENIENT
FORUM

v.

SABERHAGEN HOLDINGS, INC.,

CLERK'S ACTION REQUIRED

(No envelopes provided)

THIS MATTER comes before the Court on Defendant Zurn Industries' ("Zurn's")
Motion to Dismiss for Inconvenient Forum. In adjudicating these Motions, the Court has
considered the following pleadings submitted by the parties:

- (1) Defendant Zurn's Motion to Dismiss for Inconvenient Forum;
- (2) Plaintiff's Response to Zurn's Motion to Dismiss for Inconvenient Forum;
- (3) No Reply received
- (4) _____

PROPOSED ORDER - 1

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FNC_Proposed Order.doc

ORIGINAL

BERGMAN & FROCKT
614 FIRST AVENUE, 4TH FLOOR
SEATTLE, WA 98104
TELEPHONE: 206.957.9510
FACSIMILE: 206.957.9549

1 IT IS THEREFORE ORDERED that Defendant Zurn's Motion to Dismiss on
2 Inconvenient Forum is GRANTED, subject to the following conditions:

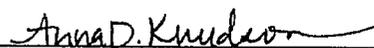
- 3 (1) Defendant Zurn and all other defendants currently in this case stipulate to
4 personal jurisdiction in Oregon state courts;
- 5 (2) Defendant Zurn and all other defendants currently in this case stipulate that they
6 will not seek to remove the case to federal court for any reason;
- 7 (3) Defendant Zurn and all other defendants will not raise any new statute of
8 limitations defenses as long as Plaintiff refiles her complaint in Oregon state court
9 within 90 days of the date of this order.
- 10 (4) _____

11 DONE IN OPEN COURT this 21st day of September, 2007.

12 
13 JUDGE SHARON ARMSTRONG

14 Presented by:

15 BERGMAN & FROCKT

16 
17 Anna D. Knudson, WSBA #37959
18 Brian F. Ladenburg, WSBA #29531
19 Counsel for Plaintiffs

20 Approved as to Form and Content and
21 Notice of Presentation Waived:

22 _____
23 Jason H. Daywitt, WSBA # 31959
Counsel for Defendant Zurn

PROPOSED ORDER - 2

S:\Clients\Clients_B\BAKER, Willard\BakerW_Pleadings\BakerW_PLD_Response to Zurn Motion to Dismiss
FNC_Proposed Order.doc

BERGMAN & FROCKT
614 FIRST AVENUE, 4TH FLOOR
SEATTLE, WA 98104
TELEPHONE: 206.957.9510
FACSIMILE: 206.957.9549

SUPREME COURT
OF THE STATE OF WASHINGTON

CHARLES SALES and PATRICIA
SALES, a married couple,

NO. 80472-9

Respondents,

CERTIFICATE OF SERVICE

Vs.

WEYERHAEUSER COMPANY,

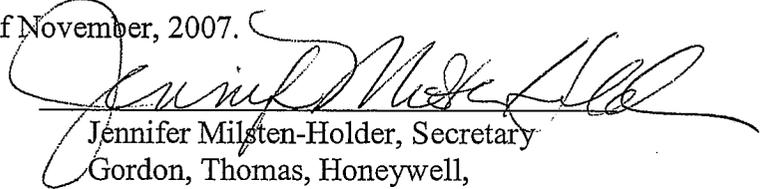
Appellant.

I hereby certify that on the 1st of November, 2007, I filed the original and one copy of Appellant's Supplemental Brief in the above entitled matter with the Washington State Supreme Court and caused to be delivered via legal messenger also on the 1st of November a copy of Appellant's Supplemental Brief to the following:

Matthew P. Bergman
Bergman & Frockt
614 First Ave., 4th Floor
Seattle, WA 98104

John W. Phillips
Phillips Law Group
315 Fifth Ave. S.
Seattle, WA 98104

Dated this 1st day of November, 2007.


Jennifer Milsten-Holder, Secretary
Gordon, Thomas, Honeywell,
Malanca, Peterson & Daheim
1201 Pacific Ave., Suite 2100
P.O. Box 1157
Tacoma, WA 98401-1157