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DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON  
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DEPUTY

CHARLES SALES and  
PATRICIA SALES, a married couple,

*Appellants,*

v.

WEYERHAEUSER COMPANY,  
a Washington Corporation,

*Respondent.*

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BRIEF OF RESPONDENT

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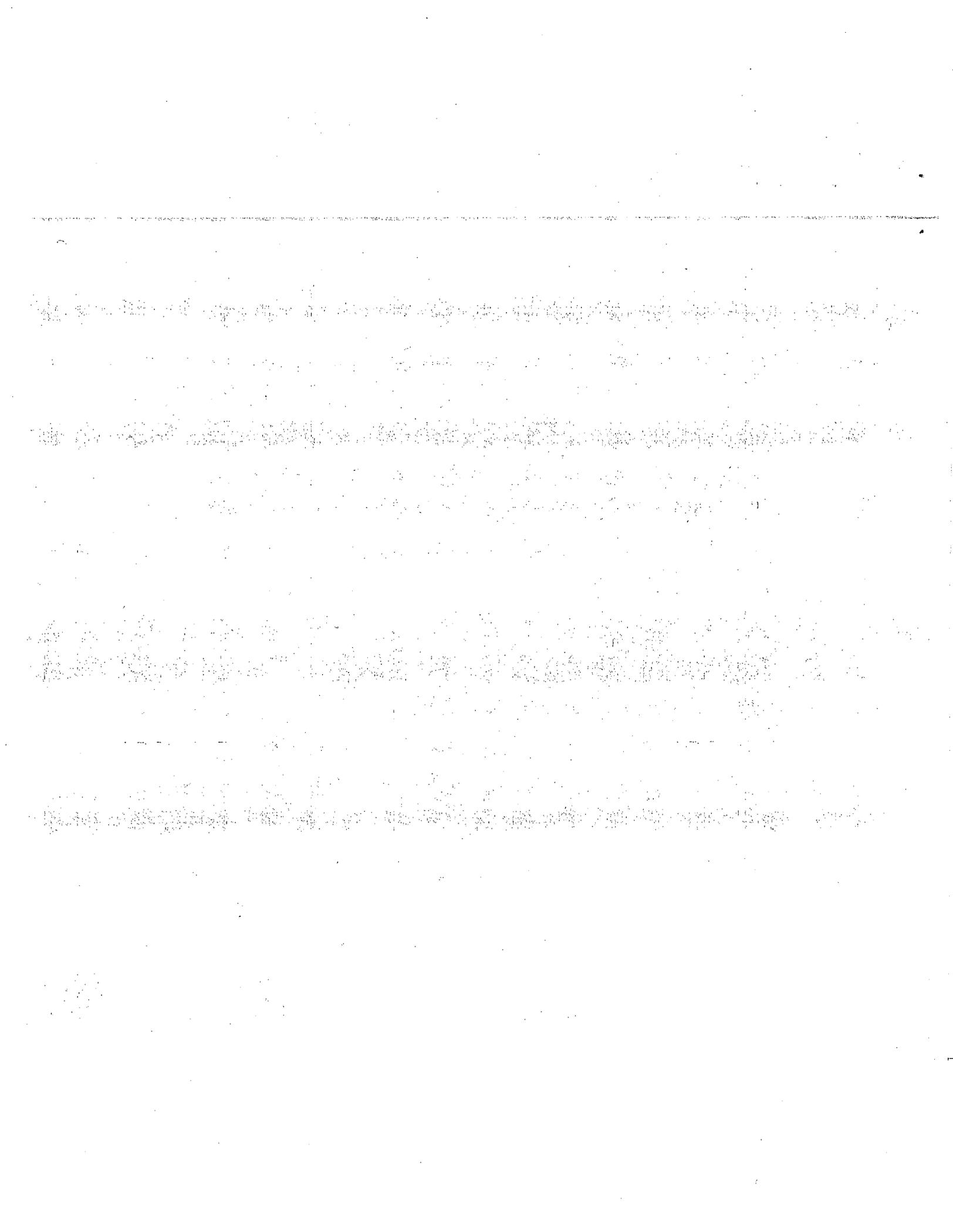


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## I. INTRODUCTION

The dispositive question on this appeal is whether the Superior Court for Pierce County, Washington abused its discretion by dismissing the Plaintiffs' Complaint based upon *forum non conveniens*. As is explained below, the Superior Court properly applied Washington law when it held the relevant public and private interest factors strongly favored Arkansas. Accordingly, Weyerhaeuser Company ("Weyerhaeuser") submits this Court should deny Plaintiffs' appeal and affirm the Superior Court's decisions granting Weyerhaeuser's Motion to Dismiss for *Forum Non Conveniens* and denying Plaintiffs' Motion for Reconsideration.

## II. STATEMENT OF THE CASE

### A. Statement of Facts

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. CP at 16–17. Plaintiffs specifically allege Weyerhaeuser used asbestos-containing materials at its "plywood and 2x4 production mill in Mountain Pine, Arkansas" and that Sales' father, Charles D. Sales, "was an employee at this mill" from 1984 to 1992. *Id.* at 16. Plaintiffs further

allege (1) Plaintiff Sales' father was "regularly exposed to asbestos-containing products and materials at the work place" between 1984 and 1992; (2) this exposure "resulted in the regular, systematic, continuous ... accumulation of dust on his clothing and his person;" and, (3) Plaintiff Sales' father unwittingly transported this dust to the home where he and Plaintiff Sales lived. Id. Plaintiffs further allege Plaintiff Sales was born on May 13, 1984 and "grew up in Mountain Pine, Arkansas." Id. at 16–17. Plaintiffs currently reside in Hot Springs, Arkansas. Id. at 15.

Plaintiffs do not allege: (1) that they ever resided in Washington; (2) that they ever worked in Washington; (3) that exposure to asbestos occurred in Washington; or, (4) that they sustained any injury in Washington. See id. at 14–20.

Thus far, Plaintiffs have sued only one defendant in their case – Weyerhaeuser. Plaintiffs did not sue any product manufacturers even though they alleged that Plaintiff Sales' father worked with and around various asbestos products and brought home asbestos fibers from these products.<sup>1</sup>

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<sup>1</sup> As explained further below, it is within Plaintiffs' control whether they sue Weyerhaeuser alone or add an Arkansas defendant when they refile their suit.

**B. Relevant Background on Weyerhaeuser**

Weyerhaeuser is a Washington corporation. Id. at 15. Weyerhaeuser's corporate headquarters has been located in Federal Way, Washington since 1971. Id. Before 1971, Weyerhaeuser's corporate headquarters was located in Tacoma, Washington. Id. at 15, 52.

**III. SUMMARY OF ARGUMENT**

As explained below, Plaintiffs must establish that the trial court abused its discretion in granting Weyerhaeuser's Motion to Dismiss. This standard of review dooms Plaintiffs' efforts to obtain a reversal of the trial court's decision. As to Plaintiffs' specific assignments of error, an analysis of each reveals that they do not support reversal of the trial court's decisions.

As to Plaintiffs' First and Second Assignments of Error, the trial court properly applied the public and private interest factors in Myers v. Boeing Co., 115 Wn. 2d 123, 794 P.2d 1275 (1990) when it dismissed Plaintiffs' Complaint. The trial court properly exercised its discretion in granting Weyerhaeuser's Motion to Dismiss and denying Plaintiffs' Motion to Reconsider. Weyerhaeuser met its burden of persuasion that Arkansas is an adequate alternative forum for the trial of Plaintiffs' case. The trial court did not err in refusing to require Weyerhaeuser to submit to jurisdiction in Arkansas as a condition to granting the motion. The trial

court also properly concluded that the possibility that a defendant may assert its right to remove a case to federal court is not a proper reason to deny a motion to dismiss for *forum non conveniens*. The trial court properly concluded that the *possibility* that Weyerhaeuser might have the right to remove the case to federal court was not “adequate grounds to otherwise deny ... [Weyerhaeuser’s] motion for *forum non conveniens* when there ... [was] little or no connection between the complaining party and the facts of this case.” CP at 161.

With regard to Plaintiffs’ Third Assignment of Error, the trial court did not abuse its discretion in determining whether the ends of justice would be better served by trying the case in Arkansas rather than Washington, because it carefully analyzed the elements of the test in Myers. In fact, the trial court stated “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.” Id.

Finally, Plaintiffs’ Fourth Assignment of Error simply misstates the trial court’s decision. Contrary to Plaintiffs’ assertions, the trial court did not state that the balance of factors enumerated in Myers gave Arkansas a “slight edge” over Washington. Rather, the trial court stated “[t]here is *no question* that many of the factors, both private and public,

are either neutral or in favor of holding this trial in Arkansas since that is the state in which the alleged injuries took place and where Plaintiff resides and is being treated.” Id. at 160 (emphasis added). A plain reading of the trial court’s analysis reveals the trial court held the factors in Myers “strongly favored” Arkansas. Indeed, the trial court found that none of the factors from Myers favored Washington.

#### IV. ARGUMENT

##### A. Standard of Review

This Court reviews the trial court’s decisions to grant Weyerhaeuser’s Motion to Dismiss for *Forum Non Conveniens* and deny Plaintiffs’ Motion for Reconsideration under an abuse of discretion standard. Myers, 115 Wn. 2d at 128, 794 P.2d at 1275 (1990) (stating “[t]he standard of review applicable to a decision to dismiss on forum non conveniens grounds is abuse of discretion.”); Wilcox v. Lexington Eye Institute, 130 Wn. App. 234, 241, 122 P.3d 729, 732 (2005) (stating “[m]otions for reconsideration are addressed to the sound discretion of the trial court and a reviewing court will not reverse a trial court’s ruling absent a showing of manifest abuse of discretion.”).

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.” Id. (quoting

General Tel. Co. v. Utilities & Transp. Comm'n, 104 Wn. 2d 460, 474, 706 P.2d 625, 634 (1985)). The proper test for abuse of discretion is not whether another court might have or even would have ruled the same way. The test is whether the trial court based its decision on tenable grounds and reasons. See Coggle v. Snow, 56 Wn. App. 499, 506, 784 P.2d 554, 559 (1990) (stating “[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”). As explained by the Court of Appeals in Coggle:

The precise meaning of discretion is affected by the reasons and the purposes for which the decisionmaker is to exercise his or her discretion. Discretion may mean that the decisionmaker is not bound by standards; on the other hand, it may mean simply that the decisionmaker must exercise judgment in applying certain standards or that he or she has final authority in the matter, without review by other authority. ... Another scholarly commentator has stated that the central idea of discretion is *choice*: the court has discretion in the sense that there are no “officially wrong” answers to the questions posed.

Coggle, at 56 Wn. App. at 50, 784 P.2d at 558. Reversal is not appropriate unless “no reasonable judge would have reached the same

conclusion.” Sofie v. Fiberboard Corp., 112 Wn. 2d 636, 667, 771 P.2d 711, 727 (1989).<sup>2</sup>

**B. The Trial Court Did Not Abuse Its Discretion When It Granted Weyerhaeuser’s Motion to Dismiss and Denied Plaintiffs’ Motion for Reconsideration.**

The trial court properly applied the *forum non conveniens* test prescribed in Myers and did not, in any way, abuse its discretion by granting Weyerhaeuser’s Motion to Dismiss or by denying Plaintiffs’ Motion for Reconsideration. Under the doctrine of *forum non conveniens*, courts have discretion to decline “jurisdiction where, in the court’s view, the difficulties of litigation militate for the dismissal of the action subject to a stipulation that the defendant submit to jurisdiction in a more convenient forum.” Werner v. Werner, 84 Wn. 2d 360, 370, 526 P.2d 370, 377–78 (1974). According to the Supreme Court of Washington, a trial court deciding whether to decline jurisdiction under the doctrine of *forum non conveniens* must weigh and balance several private and public interest factors. Myers, 115 Wn. 2d at 128, 794 P.2d at 1272. The private interest factors are:

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<sup>2</sup> Weyerhaeuser believes that the trial court’s ruling is correct in all respects. However, it is well established that appellate courts in Washington can affirm a lower court’s judgment “on any ground within the pleadings and proof” even if the lower court abused its discretion by basing its dismissal on “inappropriate grounds.” See Washington v. Michielli, 132 Wn. 2d 229, 242–43, 937 P.2d 587, 594 (1997); Hoflin v. City of Ocean Shores, 121 Wn. 2d 113, 134, 847 P.2d 428, 439 (1993) (affirming trial court’s decision that reached the correct result, even though the trial court arrived at that result for the wrong reasons).

- (1) the relative ease of access to sources of proof;
- (2) the availability of compulsory process for attendance of unwilling witnesses;
- (3) cost of obtaining attendance of willing witnesses;
- (4) possibility of view of premises, if view would be appropriate to the action; and,
- (5) all other practical problems that make trial of a case easy, expeditious and inexpensive.

Id. at 128, 794 P.2d 1276; see also Lynch v. Pack, 68 Wn. App. 626, 629–34, 846 P.2d 542, 544–45 (1993).

The public interest factors are:

- (1) the administrative difficulties in congested courts not at the origin of the litigation;
- (2) burden of jury duty on a community that has no relation to the litigation;
- (3) proximity of trial to persons affected by and interest in the case;
- (4) interest in having local controversies decided locally; and,
- (5) having the case tried in the jurisdiction where law is applicable under conflict of law principles.

Myers, 115 Wn. 2d at 129, 794 P.2d at 1276; Lynch, 68 Wn. App. at 629–34, 846 P.2d at 544–45 (1993). Significantly, Washington’s courts have recognized the balancing that trial courts must undertake when deciding a motion to dismiss on *forum non conveniens* “is not subject to the same mathematical certainty as an accountant’s financial statement.” Lynch v. Pack, 68 Wn. App. 626, 635, 846 P.2d 542, 546 (1993). Rather, “[t]he court must consider the evidence presented and make what is necessarily a subjective judgment.” Id.

**1. Trial Court’s Analysis of Factors from *Myers*.**

In the present case, the trial court thoroughly analyzed each of the private and public interest factors based upon evidence provided by both parties and properly concluded Arkansas was the best forum for the trial of this case. CP at 156–62. Moreover, the trial court considered the Myers’ factors not once, but twice, since the trial court held full hearings on both Weyerhaeuser’s Motion to Dismiss for *Forum Non Conveniens* and Plaintiffs’ Motion for Reconsideration and the record reflects the trial court carefully and deliberately considered each motion and the evidence proffered during oral argument. See CP at 156–62, 464.

**a. Private Interest Factors.**

With regard to the private interest factors, the trial court concluded that four of the five factors favored Arkansas and one of the factors was

neutral. Id. at 157–59. Significantly, *none* of the five private interest factors were found to favor Plaintiffs’ chosen forum of Pierce County, Washington. See id.

Specifically, the trial court found “the relative ease of access to sources of proof would be easier for the parties in Arkansas.” Id. at 158. The trial court properly stated “[t]here is little, if any, nexus between the agreed parties and Washington State, all of the factual occurrences having occurred in Arkansas.” Id.

The trial court stated “the availability of compulsory process for attendance of unwilling witnesses” prong favored Arkansas as well. Id. The trial court appropriately stated that “most, if not all, of the factual witnesses would be located in Arkansas” and reasoned “it would be much more difficult to get fact witnesses from the state of Arkansas to Washington to testify.” Id.

The trial court also concluded the “possibility of view of the premises” favored Arkansas. Id. While stating that “[i]t would be unlikely the jury would want to view the corporate headquarters of Weyerhaeuser,” the trial court held “[m]ore likely than not, the view would be necessary for the plant in Arkansas.” Id.

The trial court held that “all other practical problems that make trial of a case easy, expeditious and inexpensive” also made Arkansas the

best forum for the trial. Id. at 159. With regard to this prong of the test, the trial court stated Arkansas was the proper forum because (1) “most, if not all, of the activity complained of occurred in the state of Arkansas;” (2) the physical plant is located in Arkansas; (3) the treating physicians are located in Arkansas; (4) Plaintiffs reside in Arkansas; and, (5) the Arkansas “court system and trial date availability ... [was] equal to, or comparable to, Pierce County.” Id.

The trial court held that the final private interest factor – “the cost of obtaining attendance of willing witnesses” – was neutral. Id. at 158. The trial court reasoned “[t]he cost would be equally shared by both parties in that no matter what jurisdiction this case is tried, there will be out-of-state witnesses that will need to be testifying since many of the experts involved in these cases are on a nationally-known basis.” Id. The record on appeal finds no evidentiary support for Plaintiffs’ untenable argument that Washington was inconvenient simply because Weyerhaeuser “might have to take a few depositions in Arkansas.” See Brief of Appellants at 32.<sup>3</sup>

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<sup>3</sup> After the trial court dismissed Plaintiffs’ action in Washington, it was widely reported in the public press that Weyerhaeuser is closing its mill in Mountain Pine, Arkansas and has laid off its workforce there. Thus, contrary to Plaintiffs’ assertions, Weyerhaeuser has no “control” over its now former employees at this mill, which makes the availability of service of process to compel witness testimony in Arkansas more important than ever.

b. **Public Interest Factors.**

As to the public interest factors, the trial court concluded that two of the five factors favored Arkansas, one factor did not favor Washington and two factors were neutral. Id. at 159–60. Like the private interest factors, *none* of the public interest factors were found to favor Washington. See id. With regard to “the proximity of trial to persons affected by an interest in the case,” the trial court stated “there would be more individuals inconvenienced by travel to Washington than if this matter was held in Arkansas where the injuries occurred.” Id. at 160. The trial court further stated Washington

would not be a convenient forum for the Plaintiff in the sense that he is not a resident of Pierce County, Washington, and if he is in fact in the late stages of cancer treatment, it would be a terrible inconvenience for this person to travel to Washington State in his medical condition, as well as family and friends who may be interested in supporting him during trial or be fact witnesses as to damages and/or liability.

Id.

The trial court also stated that the “interest in having local controversies decided locally” favored Arkansas as the proper forum. Id. The trial court stated: “Certainly this [case] would have more of an interested impact in Arkansas where this mill is located and more of the

local residents were affected by the alleged exposure to asbestos fibers and would not have such a local interest in Pierce County, Washington.” Id.

With regard to “the administrative difficulties in congested courts not at the origin of the litigation,” the trial court concluded “[t]his factor weighs equally for both parties in the sense that Pierce County’s congested courts are no worse, or no better than, what appears to be the situation in Arkansas in the county in which this incident occurred.” Id. at 159. The trial court further stated “[t]here would be no advantage to holding this matter in Pierce County versus an Arkansas State court in terms of congested courts.” Id.

The trial court further held the public interest of having the case tried in the jurisdiction where law is applicable under conflict of law principles was neutral in this case. Id. at 160. The trial court reasoned “[i]ssues of conflict of law principles do not appear to be an issue; neither party is indicating that there is a disparity in the local laws that would affect this particular case.” Id.

As to the fifth public interest factor – “the burden of jury duty on a community that has no relation to the litigation” – the trial court stated trial of this case “would not necessarily present Pierce County any more of a burden in terms of jury duty than the county in which this incident occurred.” Id. at 159.

c. The Trial Court Did Not Abuse Its Discretion When It Analyzed the Factors from *Myers*.

After analyzing each of the private and public interest factors, the trial court held “[t]here is no question that many of the factors, both private and public, are either neutral or in favor of holding this trial in Arkansas since that is the state in which the alleged injuries took place and where the Plaintiff resides and is being treated.” *Id.* at 160. The trial court correctly, concluded “[t]here is no real causal connection for this case to Washington State other than the fact that Weyerhaeuser’s corporate headquarters is located here.” *Id.*

In light of the trial court’s foregoing analysis, Plaintiffs cannot reasonably be heard to argue that the trial court abused its discretion in granting Weyerhaeuser’s Motion to Dismiss for *Forum Non Conveniens*. The trial court’s decision was not manifestly unfair, unreasonable or untenable. To the contrary, the trial court based its opinion on tenable grounds and reasons, carefully weighed the evidence proffered by each party, thoroughly analyzed each of the factors in *Myers* and issued a well-reasoned and straightforward seven page opinion. Indeed, the trial court found that six of the ten factors from *Myers* strongly favored Arkansas while *none* of the factors favored Washington.

Additionally, the trial court's balancing of the factors enumerated in Myers finds overwhelming support in the factual evidence provided by the parties on brief and during oral argument. Plaintiffs are not currently residents of Washington and do not allege that they have ever resided in Washington. Id. at 15. Rather, Plaintiffs admit they are residents of Hot Springs, Arkansas and that Plaintiff Sales "grew up" in Mountain Pine, Arkansas. See id. at 17. Similarly, Plaintiffs do not allege that Plaintiff Sales ever worked in Washington; was exposed to asbestos in Washington; or, sustained any injury in Washington. See id. at 15–17. To the contrary, Plaintiffs admit Plaintiff Sales' father worked at Weyerhaeuser's plywood mill in Mountain Pine, Arkansas and that Plaintiff Sales' alleged asbestos exposure occurred at his family home in Arkansas. See id. at 16–17. Plaintiffs further allege that Weyerhaeuser used asbestos-containing products at its Mountain Pine, Arkansas plywood mill, that Plaintiff Sales' father was regularly exposed to asbestos during his employment at Weyerhaeuser's Mountain Pine, Arkansas mill; and, that Weyerhaeuser failed to warn Plaintiff Sales' father of the dangers of asbestos or provide him with safety equipment. See id. at 16. Plaintiffs' entire claim is premised on the allegation that Plaintiff Sales was exposed to asbestos allegedly brought to his Arkansas home from Weyerhaeuser's Mountain Pine, Arkansas plywood mill on his father's work clothes

between 1984 and 1992. See id. Plaintiffs' suit revolves around what allegedly happened in Arkansas between 1984 and 1992 and not decisions made in Washington.

Weyerhaeuser also offered evidence regarding the realistic timeline for the trial of Plaintiffs' case in Arkansas. See id. at 140. Specifically, Weyerhaeuser stated "an Arkansas state court likely could accommodate Plaintiffs' desire for an expedited trial" and estimated a suit filed in Garland County, Arkansas could be tried within six to ten months depending upon the expected length of trial. Id.

Weyerhaeuser further proffered that many of the fact witnesses critical to Weyerhaeuser's defense of the case reside in and around Mountain Pine, Arkansas and not Washington. Id. at 50, 138. Weyerhaeuser specifically noted that the former Environmental Manager and Engineering Maintenance Manager for Weyerhaeuser's Mountain Pine, Arkansas plywood mill reside in Arkansas and have personal knowledge of facts relevant to this case. Id. Weyerhaeuser also advised the trial court that Charles D. Sales' former supervisor resides in Mountain Pine, Arkansas rather than Washington. Id. at 138. These will be the critical fact witnesses on the question of whether Plaintiff Sales' father worked with or was exposed to asbestos-containing products at the mill.

Similarly, Plaintiff Sales' diagnosing pathologist is an Arkansas physician, Dr. Jorge Jimenez. Id. at 50.

Significantly, Plaintiffs' attempt to transform this premises liability case into a "corporate misconduct" action is an unavailing "straw man" argument. See Brief of Appellants at 3–4, 21–33. Plaintiffs cannot reasonably hope to base venue on the fact that Weyerhaeuser's corporate headquarters was located in Tacoma, Washington until 1971 – approximately thirteen years before Plaintiff Sales was born and twenty-five years before Plaintiffs filed suit. Moreover, even if the location of Weyerhaeuser's corporate headquarters was a decisive factor under Washington law, Plaintiffs should have filed suit in King County rather than Pierce County since Weyerhaeuser's headquarters is in King County, Washington.

Similarly, Plaintiffs cannot credibly assert that Pierce County is a convenient forum through the proffer of documents which show a corporate policy regarding asbestos that was administered in part through Joseph D. Wendlick when he worked at the Weyerhaeuser headquarters at Federal Way in King County, Washington. See id. at 3–5. Should such policy be relevant, it only becomes so based on evidence of how asbestos hazards were controlled *at the Mountain Pine, Arkansas mill* where Plaintiffs allege exposure. Contrary to Plaintiffs' assertions, this issue

necessarily requires testimony from Arkansas witnesses. Stated simply, Plaintiffs' claim has no rational connection to Washington, much less Pierce County, Washington and the trial court did not err, in any way, when it granted Weyerhaeuser's Motion to Dismiss for *Forum Non Conveniens* and denied Plaintiffs' Motion for Reconsideration.

**C. Weyerhaeuser Met Its Required Burden Under the Doctrine of *Forum Non Conveniens* and Was Not Required to Stipulate to Jurisdiction in Arkansas.**

Contrary to Plaintiffs' assertions, Washington law does not require Weyerhaeuser to establish that the case would be litigated in Arkansas if Plaintiffs filed suit in Arkansas. See id. at 1, 17–19. Plaintiffs grossly misstate Washington's law on this point. Weyerhaeuser need not submit to jurisdiction in Arkansas to prove Arkansas is an adequate alternative forum for the trial of this case. Stated simply, Washington law does not require Weyerhaeuser to waive any legal right, including its federal right of removal, before a trial court can properly grant its motion to dismiss for *forum non conveniens*. Plaintiffs' brief is devoid of any legal authority to support this argument.

Washington's law on *forum non conveniens*, only required that Weyerhaeuser prove the existence of an *adequate alternative forum*. See Hill v. Jawanda Transport, 96 Wn. App. 537, 541, 983 P.2d 666, 669 (1999). Weyerhaeuser met this burden by being amenable to process in

Arkansas and by providing enough information to enable the trial court to evaluate Arkansas as an alternative forum. See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 n.22, 70 L.Ed. 2d 419 n.22, 435, 102 S. Ct. 252, 265 n.22 (1981) (stating the requirement of an adequate alternative forum is “[o]rdinarily ... satisfied when the defendant is ‘amenable to process’ in the other jurisdiction”); see also El-Fadl v. Cent. Bank of Jordan, 75 F.3d 668, 677 (D.C. Cir. 1996).

1. **Authority Cited by Plaintiffs Is Easily Distinguishable and Does Not Support Reversal.**

As is explained below, Plaintiffs’ “authority” is factually and legally distinguishable from the case at bar and does not support imposing waiver of federal diversity jurisdiction as a condition of an otherwise meritorious *forum non conveniens* motion. There is no legal authority in Washington that required the trial court to condition dismissal on Weyerhaeuser’s agreement to waive any legal rights, including a hypothetical right of removal.

As an initial matter, Plaintiffs’ reliance in Hill v. Jawanda Transport is misplaced because the court did not condition the dismissal of plaintiff’s complaint on defendants’ stipulation to jurisdiction in their proposed alternate forum. Rather, the defendants in Hill *voluntarily* offered to admit liability and submit to jurisdiction in their proposed

alternative forum *before* the court ruled on their *forum non conveniens* motion. In Hill, a car and tractor trailer collided on I-5 in Whatcom County, Washington. Hill, 96 Wn. App. at 538, 983 P.2d at 668. The drivers were both Canadian citizens who lived in British Columbia. Id. The passenger in the car was killed. Id. Her husband filed a wrongful death and survival action in Washington. Id. Defendants “moved to dismiss on *forum non conveniens* grounds, saying that if they prevailed, they would admit to British Columbia jurisdiction as well as total liability for the accident.” Id. at 540, 983 P.2d at 668. Plaintiffs appealed. Id. at 540, 983 P.2d at 669.

On appeal, plaintiffs argued the trial court abused its discretion when it granted defendants motion to dismiss on *forum non conveniens*. Id. The court of appeals disagreed and affirmed the trial court’s dismissal of plaintiff’s complaint. Id. at 544–47, 983 P.2d at 671–72. The Court of Appeals noted defendants presented evidence showing plaintiffs could litigate the essential subject matter of their dispute and recover damages in the defendants’ proposed alternate forum. Id. at 542, 983 P.2d at 670. The court of appeals further noted the majority of the damages witnesses resided in British Columbia and that British Columbia law provided a means of compelling the attendance of unwilling witnesses – something Washington courts would have been unable to accomplish because the

witnesses resided outside of Washington. Id. at 544–47, 983 P.2d at 671–72. Significantly, the court of appeals concluded that British Columbia was an adequate alternative forum even though British Columbia did not allow recovery for pain and suffering, or for lost and future earnings – two claims sued for by plaintiffs. Id. at 542–43, 983 P.2d at 670 (stating “the fact that a particular claim cannot be raised in a foreign forum does not establish that it is inadequate”). Hill does not, in any way, stand for the proposition that a defendant moving to dismiss for *forum non conveniens* must submit to jurisdiction in the defendant’s proposed forum.

Similarly, in El-Fadl v. Cent. Bank of Jordan, the United States Court of Appeals for the District of Columbia reversed the district court’s dismissal on *forum non conveniens* “because defendants failed to show that Plaintiff’s claims could be filed in the Jordanian courts” – not because defendants failed to submit to jurisdiction in Jordan. El-Fadl, 75 F.3d at 670. Therein, Hassan El-Fadl filed suit in the Superior Court of the District of Columbia seeking to recover damages against Petra International Banking Corporation for wrongful termination of employment as well as for various tort claims against several Jordanian institutions and officials, including The Central Bank of Jordan. Id. at 669–70. The Central Bank of Jordan removed the case to federal district court pursuant to the Federal Sovereign Immunities Act. Id. at 670.

Thereafter, the Jordanian defendants filed a motion to dismiss and, in the alternative, for summary judgment. Id. The district court dismissed the complaint as to all defendants ruling, *inter alia*, that El-Fadl had an available forum in the Jordanian courts. Id. The court denied El-Fadl's motion for reconsideration and El-Fadl appealed. Id.

The circuit court reversed on appeal. Id. at 676–79. The circuit court reversed because defendants failed to prove the Jordanian courts would grant plaintiff access to its judicial system on the claims in plaintiff's complaint. Id. at 678–79. The circuit court did not reverse because defendants failed to stipulate to jurisdiction in Jordan. In its analysis, the circuit court noted:

At the outset of any forum non conveniens inquiry, the court must determine whether there exists an alternative forum.

***Ordinarily, this requirement will be satisfied when the defendant is "amenable to process" in the other jurisdiction.*** ... In rare circumstances, however, where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirement may not be satisfied. Thus, for example, dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute.

Id. at 676–77 (quoting Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 n.22, 70 L.Ed. 2d 419, 435, 102 S. Ct. 252, 265 (1981) (emphasis added)).

The court reversed after finding the affidavit proffered by defendants was inadequate to prove plaintiff could prosecute his claims in Jordan. Id. at 678–79. The court also reversed because the trial court placed the burden of proving the inadequacy of the Jordanian courts on El-Fadl rather than properly requiring the defendants to prove the adequacy of the Jordanian courts. Id.

Plaintiffs' reliance upon the United States Court of Appeals' opinion in Mercier v. Sheraton Int'l, Inc., 935 F.2d 419 (1st Cir. 1991) is also curious. Therein, the court of appeals reversed because the affidavit relied upon by defendants to prove their proposed forum was adequate contained substantial gaps. See id. at 424–25. The court of appeals did not reverse because defendants refused to submit to jurisdiction in their proposed alternate. Therein, plaintiffs – an American citizen and her father – formed a partnership with a Turkish national to operate a cruise ship casino in defendant Sheraton International, Inc.'s Turkish hotel. Id. at 421–23. The partnership later collapsed, and another company provided a casino for defendant. Id. Plaintiffs filed an action against the defendants in the United States District Court and alleged breach of contract and intentional interference with contractual relations in connection with an alleged agreement between the parties. Id. Defendants filed a motion to dismiss on the ground of *forum non conveniens*, arguing Turkey was an

adequate alternative forum. Id. The district court granted defendants motion. Id. Plaintiffs appealed and the court of appeal reversed. Id.

The court of appeals reversed because “the affidavit through which defendants “attempted to meet its burden contain[ed] substantial gaps.” Id. at 425. Though the court of appeals recognized that “[a] finding that there is a suitable alternative forum is usually justified as long as the defendant is amenable to process in the other forum;” the court concluded defendants failed to show the Turkish courts would permit plaintiffs to litigate the subject matter of the dispute. Id. at 424. The court of appeals stated that “[a]mong the affidavit’s most notable defects ... [was] its failure to state expressly that Turkish law recognizes claims for breach of contract and tortious interference with contract – or some analogous action.” Id. at 425. Stated simply, the court of appeals reversed because defendants failed to prove plaintiffs could prosecute their claims in Turkey – not because defendants failed to stipulate to trial in Turkey. See id.

The United States Court of Appeals’ decision in Ceramic Corp. of Am. v. Inka Maritime Corp., 1 F.3d 947 (9th Cir. 1993) is also easily distinguishable. In this maritime action, the M/V Bremen Senator collided with a pier in Japanese waters, thus interrupting the vessel’s trip to the United States. Id. at 948. Thereafter, the vessel’s owner, defendant Inka Maritime Corporation, a Liberian corporation with its principal place of

business in Germany, declared general average in Japan and appointed an average adjuster in Hamburg, Germany. Id. Plaintiff Ceramic Corporation – one of the owners and insurers of cargo carried aboard the M/V Bremen Sentator – filed an admiralty action in the United States District Court for the Central District of California. Id. Defendants filed a motion to dismiss for *forum non conveniens*, arguing Japan was a more convenient forum to litigate the case. Id. The trial court granted defendants motion to dismiss. Id. Plaintiffs appealed and the court of appeals reversed. Id. at 949.

Contrary to Plaintiffs’ assertions, the court of appeals did not reverse “[b]ecause the defendants failed to establish that the case would in fact proceed in Japan, even though that was its proposed alternative forum.” See Brief of Appellants at 22. Rather, the court of appeals reversed because the defendants failed to show that the Japanese courts would permit litigation of the subject matter of the dispute. Ceramic Corp. of Am., 1 F.3d at 949–50. Specifically, the court of appeals explained

it is uncontroverted that a Japanese court would dismiss Ceramic's action on its own motion. As a result, Ceramic will not be able to pursue any of its claims in Japan or obtain any relief in that forum. Because Japan will “not permit litigation of the subject matter of the dispute,” we are confronted with one of those rare instances

where the remedy provided by the alternative forum is “clearly unsatisfactory.”

Id. at 949. While noting “[a] court may dismiss on forum non conveniens grounds even though the foreign forum does not provide the same range of remedies as are available in the home forum,” the court of appeals stated “*the alternative forum* must provide some potential avenue for redress.” Id. (emphasis added).

Significantly, the court of appeals focused on what the Japanese courts would do and whether the Japanese courts would allow plaintiffs to prosecute their claim in Japan. Id. at 949–50. The court of appeals did not consider what the parties might do or how the parties’ actions might impact the trial in defendants proposed forum. See id. The court of appeals concluded Japan was not an adequate alternative forum because the Japanese court – on its own motion – would transfer the case to Germany. Id.

2. **Contrary to Plaintiffs’ Contentions, Arkansas is a “Real” and Adequate Alternative Forum for the Trial of this Case.**

Arkansas is an adequate alternative forum for the trial of Plaintiffs’ case against Weyerhaeuser. Weyerhaeuser is amenable to process in Arkansas. As was demonstrated above, Weyerhaeuser provided the trial court with more than sufficient evidence to allow the trial court to

determine whether Arkansas was an adequate alternative. Stated simply, Arkansas will “permit litigation of the subject matter of the dispute” and provide an avenue for Plaintiffs’ redress. Contrary to Plaintiffs’ assertions, Weyerhaeuser proved Arkansas is a “real” and viable alternative forum for the trial of this case. See Brief of Appellants at 21. Whether Plaintiffs create a scenario allowing Weyerhaeuser to even consider asserting a right to remove the case to a local federal court in Arkansas does not change, in any way, the fact that Arkansas is an adequate alternative forum for this case.

**D. Plaintiffs’ Multidistrict Litigation Argument Is Unpersuasive.**

Plaintiffs’ MDL “straw man” argument amounts to an untenable effort to persuade the Court that Pierce County, Washington is the only forum that will ensure Plaintiffs their day in court. See Brief of Appellants at 5–9, 19–21. Contrary to Plaintiffs’ lengthy argument on the matter, the removal and transfer of Plaintiffs’ case to a local federal court in Arkansas is not “inevitable.” See id. at 19–21. While inaccurately forecasting doom and gloom, Plaintiffs appear to forget that *they*, not Weyerhaeuser, ultimately control whether the case is even eligible for a potential removal to a local federal district court in Arkansas. Of course, cases are never removed from a state court to a multi-district litigation. Moreover, when cases are transferred to a multi-district litigation is a

matter of local federal procedure and whatever process may have been established for the specific multi-district litigation.

Plaintiffs, rather than Weyerhaeuser, are the “masters” of their Complaint and determine who to sue, when to sue and where to sue. Weyerhaeuser is left to react to Plaintiffs’ actions and, like here, to evaluate whether to raise an objection that one forum is more convenient than the other. Stated simply, Plaintiffs alone will decide whether their re-filed case is subject to potential federal jurisdiction in Arkansas, or elsewhere, by deciding whether to sue one or more non-diverse defendants in the lawsuit. Indeed, as the Rand Report noted, most asbestos claimants file claims against multiple defendants:

[T]he number of defendants named by the typical claimant is increasing. In the early 1980s, claimants typically named about 20 different defendants. The data we have now suggests that by the mid-1990s, the typical claimant named 60 to 70 defendants.

CP at 354.

Moreover, Plaintiffs’ bleak picture of the MDL is wholly inaccurate. See Brief of Appellants at 5–9, 19–21. For example, Plaintiffs’ “statistical evidence” is grossly overbroad because, among other reasons, it does not account for the percentage of exigent cases involving plaintiffs diagnosed with mesothelioma that were remanded, and also ignores the Rand Report’s report finding that 73,000 of the 95,994

asbestos suits transferred to the MDL *have been closed*. See id.; see also CP at 342.

Plaintiffs' arguments related to the MDL also omit the fact that there is a well-known and long followed process for moving such cases towards final disposition. G. Daniel Bruch, Jr., a lawyer practicing in Philadelphia, Pennsylvania has been involved with the MDL since its inception over fifteen years ago. CP at 444–45, 457–59. According to Mr. Bruch, Pretrial Order No. 2 entered on September 18, 1991 provides a process for prompt action in living cancer cases. Id. at 458.<sup>4</sup> Paragraph 5 of the Order, provides that in cases in which the Plaintiff alleges mesothelioma or asbestos-related lung cancer, they are assured that a settlement conference “shall be held with the Court’s designee,” within thirty (30) days after the defendant receives from 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.” Id. at 444–45, 457–59. Paragraph 5(c) of the Order specifically provides that “if the case is not resolved, it shall be subject to remand.” Id. Mr. Bruch has further confirmed that

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<sup>4</sup> It appears that the Declaration of Mr. Bruch was transmitted to this Court without Pretrial Order No. 2 attached. A complete copy of the Bruch Declaration with all attachments as filed in the trial court is included as an appendix to this brief for the Court’s reference.

cases that do not get settled through this process are routinely remanded to the *local federal court* from which they were transferred to the MDL for trial. *Id.* at 458–59. Thus, Plaintiffs’ implication that the case would not and could not be tried in Arkansas, even if it was removed to a local federal court, is simply incorrect. Stated simply, Plaintiffs’ contention that this case will be tried in the MDL if Plaintiffs re-file in Arkansas would require the MDL court to ignore its own order.

Plaintiffs’ assertion that “central to the adequacy determination is knowledge that the Arkansas state forum would be where the case would actually be litigated” is also simply wrong. *See* Brief of Appellants at 20. To show the existence of an adequate alternative forum, Weyerhaeuser was not, in any way, required to show the case would be tried in Arkansas as opposed to a local federal court in Arkansas. Without regard to whether Plaintiffs would create the possibility of removal, Weyerhaeuser was required to show *Arkansas* was an adequate alternative forum. Weyerhaeuser met this burden and the trial court properly granted Weyerhaeuser’s motion to dismiss. Also, the record is devoid of any evidence of a present intention by Weyerhaeuser to remove any case Plaintiffs might refile in Arkansas to a local federal court in Arkansas for possible transfer to the MDL.

The record also unequivocally demonstrates that the trial court analyzed the possibility that Weyerhaeuser might remove the case to a local federal court in Arkansas, and exercised his discretion in rejecting this as a determinative factor. CP at 160–62. The trial court properly concluded that the possibility of removal was *speculative* and not dispositive of the trial court’s *forum non conveniens* analysis. Id. Washington’s case law supports the trial court’s decision on this matter.

In Wolf v. Boeing Co., 61 Wn. App. 316, 328, 910 P.2d 943, 951 (1991), the court of appeals stated that court congestion, “[l]ike other factors, ... is entitled to some, but not decisive, weight in transfer motions.” In fact, “[n]o specific set of facts mandates forum non conveniens dismissal in every case.” Hill, 96 Wn. App. at 543, 983 P.2d at 670. Stated simply, the possibility of court congestion is not decisive as Plaintiffs apparently contend. Moreover, Plaintiffs do not allege the state court system in Arkansas is a congested forum. Rather, Plaintiffs argue the MDL – a theoretical forum – is a congested forum. See Brief of Appellants at 5–9. Thus, assuming *arguendo* the possibility of removal to a local federal court in Arkansas is not speculative, the fact of congestion is not dispositive in any event. Even if a local federal court in Arkansas were Weyerhaeuser’s proposed alternative adequate forum, the trial court was not obligated to deny Weyerhaeuser’s motion based solely upon

Plaintiffs' assertions that the MDL is congested. This is particularly true in light of Mr. Bruch's sworn testimony to the contrary. See CP at 457–59.

Finally, it is truly odd that Plaintiffs persist with their argument that the trial of their claim would be delayed in federal court in light of their own actions to date and the pace at which they have moved forward with their claims. Plaintiff Sales was diagnosed with mesothelioma in December 2004. CP at 141. Plaintiffs did not file this action until eighteen months later in May 2006. Id. at 14, 89. Stated simply, by filing their suit in Washington, Plaintiffs knowingly accepted the risk that a Washington trial court might decline jurisdiction over a case arising from asbestos exposure in Arkansas – the state where the exposure occurred and Plaintiffs reside. In sum, Plaintiffs, not Weyerhaeuser, chose when to file suit, where to file, and who to name as a defendant in their suit.

The trial court correctly concluded that the possibility of removal to a local federal court in Arkansas should not sway the balance of the overwhelming factors favoring Arkansas as the proper forum for the trial of this case. The case law cited by Plaintiffs is devoid of any case that holds, or even suggests, that a trial court should use the possibility of removal to a local federal court as the “sole reason for keeping jurisdiction

over a case which otherwise the State of Washington has only ... a very thin connection.” See RP dated 7/28/06, at 14:22–15:2.

**E. Courts Have Discretion to Condition Dismissal for *Forum Non Conveniens* and the Trial Court Did Not Abuse Its Discretion When It Decided Not to Do So.**

The trial court did not abuse its discretion when it decided against conditioning dismissal of Plaintiffs’ Complaint on Weyerhaeuser’s stipulation that it would waive its federal right of removal and try the case in Arkansas. See Brief of Appellants at 21–24. A trial court has discretion to condition dismissal on a defendant’s stipulation that it will submit to jurisdiction in the defendant’s proposed adequate alternative forum. See Wolf, 61 Wn. App. at 329, 810 P.2d at 952 (stating “[c]onditions imposed by the order of dismissal are within the sound discretion of the trial court”). However, a trial court is not, in any event, *required* to condition dismissal on this basis. Plaintiffs have not proffered any evidence showing the trial court acted manifestly unfair, unreasonable or untenable by not conditioning its dismissal. To the contrary, the trial court’s written opinion reveals the trial court thoroughly analyzed the issue and decided against conditioning dismissal on Weyerhaeuser stipulation to jurisdiction in Arkansas:

The Court cannot find that the county, which otherwise has little or no connection to the case other than the fact that the corporate

headquarter is located in this state and *there is a possibility that this matter may be removed to a Federal court system*, is adequate grounds to otherwise deny a motion for *forum non conveniens* when there is little or no connection between the complaining party and the facts of the case.

CP at 161–62 (emphasis added).

**F. The Trial Court Considered Whether the Dismissal Would Further the “Ends of Justice” and Did Not Err When It Granted Weyerhaeuser’s Motion to Dismiss.**

Plaintiffs Third Assignment of Error lacks any legal or factual basis. See Brief of Appellants at 24–28. Plaintiffs can disagree with the trial court’s decision, but cannot credibly argue the trial court abused its discretion by dismissing the action without considering whether the ends of justice would be better served by allowing Plaintiffs to try their case in Washington. As was discussed above, the trial court carefully and meticulously analyzed all of the factors prescribed in Myers and concluded Arkansas was the proper forum for the trial. As to the “ends of justice,” the trial court specifically stated: “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.” CP at 161.

The trial court also considered the time frame within which Plaintiffs could obtain trial in Arkansas. Id. at 159. Specifically, the trial

court concluded “Pierce County’s congested courts are no worse, or no better than, what appears to be the situation in Arkansas in the county in which this incident occurred.” Id. The trial court concluded “[t]here would be no advantage to holding this matter in Pierce County versus an Arkansas State court in terms of congested courts.” Id. In addition, Weyerhaeuser proffered evidence showing Arkansas’ courts likely could accommodate Plaintiffs’ desire for an expedited trial and estimated trial could commence in Garland County, Arkansas – the county in which Plaintiffs reside – within six to ten months depending upon the expected length of trial. Id. at 140. Significantly, had Plaintiffs filed suit in Arkansas immediately after the trial court dismissed their Complaint on June 28, 2006, Plaintiffs could likely have set their case for trial between December 2006 and May 2007.

**G. The Trial Court Concluded that the Factors from Myers “Strongly Favored” and “Weighed Heavily” in Favor of Arkansas.**

Plaintiffs’ Fourth Assignment of Error amounts to nothing more than “splitting hairs.” See Brief of Appellants at 28–33. Plaintiffs would have this Court reverse the trial court’s decision simply because the trial court did not use the specific “buzz words” advocated by Plaintiffs. See id. at 2. Plaintiffs’ request is truly odd given the overall tone and conclusion of the trial court’s decision.

The trial court concluded the factors from Myers strongly favored Arkansas. See CP at 157–60. The trial court found that six of the ten private and public interest factors favored Arkansas and four were neutral. See id. The trial court concluded that *none* of the private and public interest factors favored Washington. See id. One can draw but one conclusion given this glaring disparity – the trial court concluded the factors from Myers weighed heavily in favor of Arkansas. Indeed, the court specifically stated “[t]here is *no question* that many of the factors, both private and public, are either neutral or in favor of holding this trial in Arkansas since that is the state in which the alleged injuries took place and where Plaintiff resides and is being treated.” Id. at 160 (emphasis added). How can Plaintiffs reasonably assert that the use of the words “no question” could somehow suggest that the trial court really meant that the Myers factors “slightly favored” Arkansas?

Moreover, the trial court further correctly noted “[t]here is no real causal connection for this case to Washington State other than the fact that Weyerhaeuser’s corporate headquarters is located here.” Id. The trial court also stated “[t]here is relatively little, if any, nexus between the agreed parties and Washington State, all of the factual occurrences having occurred in Arkansas.” Id. at 158. Significantly, the trial court was also aware of the applicable standard and specifically stated courts “may

conduct a balancing test in order to determine whether or nor there are relevant factors that would weigh strongly in favor of the Defendant in supporting a motion to dismiss for *forum non conveniens*.” Id. at 157. In light of the forgoing, it is beyond question that the trial court properly applied the test prescribed in Myers and concluded Arkansas was the proper forum for this case. Stated simply, the trial court correctly concluded the factors from Myers “strongly favored” Arkansas.

Finally, Plaintiffs’ assertion that the trial court found Arkansas had only a “slight edge” over Washington is mere subterfuge and takes the trial court’s statement out of context. See Brief of Appellants at 29–33. The statement relied upon by Plaintiffs in their Fourth Assignment of Error was taken from the trial court’s discussion of the fifth private interest factor – “all other practical problems that make trial of a case easy, expeditious and inexpensive.” See CP at 159. Contrary to Plaintiffs’ misinterpretation, the trial court did not state its balancing of the Myers factors gave Arkansas only a slight advantage over Washington with regard to which was the best forum. Rather, the trial court’s statement was limited to a specific private interest factor. Id. The trial court concluded Arkansas had a “slight edge” over Washington because “all other practical problems that make trial of a case easy, expeditious and inexpensive” made Arkansas the best forum for this case. Id. Arkansas

had a “slight edge” over Washington with regard to *this prong* (one of ten) from the Myers’ test – not the overall balancing test from Myers. See id.

Specifically, the trial court stated:

Based on the fact that most, if not all, of the activity complained of occurred in the state of Arkansas where the physical plant is located, where the treating physicians are located, where the Plaintiff himself resides, there would be a *slight edge* in the advantage of having this case in Arkansas.

Id. (emphasis added). The trial court further noted the Arkansas “court system and trial date availability ... [was] equal to, or comparable to, Pierce County.” Id. Accordingly, the trial court did not err when it granted Weyerhaeuser’s Motion to Dismiss for *Forum Non Conveniens* and Plaintiffs’ Motion for Reconsideration.

## V. CONCLUSION

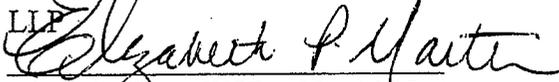
Weyerhaeuser met its burden of showing Arkansas is an adequate alternative forum for the trial of this case. The Superior Court for Pierce County, Washington did not, in any way, abuse its discretion when it granted Weyerhaeuser’s Motion to Dismiss for *Forum Non Conveniens* or when it denied Plaintiffs’ Motion for Reconsideration. The Superior Court for Pierce County, Washington’s decisions were not manifestly unfair, unreasonable or untenable. Rather, the Superior Court for Pierce County, Washington based its decisions on tenable grounds and reasons.

Plaintiffs have not met the extraordinarily high standard required to obtain reversal of a trial court's discretionary ruling on *forum non conveniens*. Accordingly, the judgment of the trial court below should be affirmed.

DATED this 22nd day of January, 2007.

Respectfully Submitted,

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**APPENDIX**



06-2-07815-8 25887585 DCLR 07-31-06



IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

CHARLES SALES,

Plaintiff(s) ,

vs.

WEYERHAEUSER COMPANY,

Defendant(s) .

Cause No. 06-2-07815-8

DECLARATION OF G. DANIEL BRUSH, JR.

DECLARATION OF G. DANIEL BRUCH, JR.

This day comes, G. Daniel Bruch, Jr., Esquire, who states as follows:

1. I am over the age of twenty-one (21) years and am competent to make this Declaration.
2. I have personal knowledge of the facts set forth in this Declaration.
3. I am an attorney licensed to practice law in the State of Pennsylvania and have been a member of the Bar since 1976. I am partner in a Philadelphia law firm of Swartz Campbell, LLC.
4. As a regular part of my practice, I defend asbestos and other toxic tort litigation. I have been involved in the asbestos litigation in Pennsylvania and elsewhere since 1979. At no time have I ever served as counsel for Weyerhaeuser Company.
5. In my role as regional counsel for several companies sued in thousands of asbestos cases, I have been intimately familiar with the procedures of MDL 875, a multi-district litigation established for the processing of asbestos claims throughout the federal court system in Philadelphia, Pennsylvania since MDL 875 was established in 1991.
6. In preparation for the development of this Declaration, I have reviewed a Motion for Reconsideration filed on behalf of Charles and Patricia Sales in the Superior Court of Pierce County, Washington. I also have reviewed the Declaration attached in the Motion to Reconsider signed by Brian F. Landerburg, Esquire, dated July 17, 2006. The impression that I had upon reviewing this information is that living cancer cases in the federal court system are transferred to MDL 875 and are treated the same as thousands of other asbestos claims involving non-life threatening medical conditions such as pleural asbestosis, pleural thickening, and pleural

plaques. To the contrary, there is a well-established and regularly utilized procedure for handling living cancer claims that are transferred to MDL 875 in Philadelphia, Pennsylvania.

7. Specifically, the late Honorable Charles R. Weiner entered an Order on September 18, 1991, which is attached to this Declaration as Exhibit 1, establishing a procedure for handling the claims filed by plaintiffs involving mesothelioma or asbestos-related lung cancer. Specifically, plaintiff's counsel files an affidavit prepared by a qualified physician that the plaintiff is in imminent danger of death. Upon the filing of such an affidavit, the Order provides for the following procedure. Plaintiff's counsel provides to defense counsel "sufficient information for settlement evaluation." Fifteen (15) days after receiving this information, defense counsel are required to notify Plaintiff's counsel in writing of any additional information that may be needed in order to evaluate the claim for settlement. The Order next provides that within thirty (30) days after receipt of the additional information from Plaintiff's counsel, a "settlement conference shall be held with the Court's designee and if the case is not resolved it shall be subject to remand."

8. I have participated in a number of settlement conferences that have involved living plaintiffs who are dying of cancer whose claims have been processed in accordance with Pretrial Order No. 2. It has been my experience that when Plaintiff's counsel have living cancer cases that are pending in MDL 875, they have an opportunity to move that case promptly through the MDL system by submitting the required affidavit, providing information for settlement evaluation and requesting through the presiding Judge's designee a settlement conference. It also has been my experience that such conferences are scheduled in order to determine quickly whether such cases can be settled, or should be remanded for trial. It has further been my experience that when cases are not settled through the settlement conference

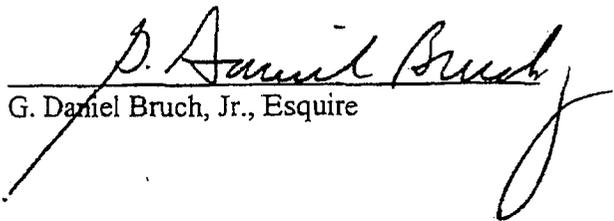
process provided by Pretrial Order No. 2, that upon request, the cases are timely remanded to the local federal court from which they were transferred to MDL 875, for further pretrial proceedings and trial.

9. I noticed in reviewing the Motion to Reconsider and Mr. Landenburg's Declaration, that no one has represented to the Pierce County Court that Mr. Sweeney's counsel ever attempted to comply with Pretrial Order No. 2 by providing the required affidavit, sufficient information for settlement evaluation and requesting that the Court's designee schedule a settlement conference, and if the case was not then resolved, to remand to the transferor court.

10. MDL 875 has been in effect for over fifteen (15) years. During this time frame cases involving plaintiffs who are dying of cancer have, in my experience, been given prompt attention by the Court and its designee, and through the process provided in Pretrial Order No. 2, are often remanded to local federal courts from which they were transferred for further disposition and trial.

11. I declare under penalty of perjury that the foregoing is true and correct.

12. Executed this 26<sup>th</sup> day of July, 2006 at Philadelphia, Pennsylvania.

  
G. Daniel Bruch, Jr., Esquire

CITY OF PHILADELPHIA  
STATE OF PENNSYLVANIA

Subscribed and sworn to be me on  
This 26<sup>th</sup> day of July, 2006.

  
Notary Public

My Commission Expires Feb. 8, 2007

Notarial Seal Eileen McGovern, Notary Public Philadelphia, Pennsylvania My Commission Expires Feb. 8, 2007
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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.

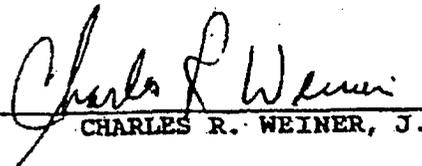
(c) Thirty days after receipt from plaintiffs' counsel of the additional information a settlement conference shall be held with the Court's designee and if the case is not resolved it shall be subject to remand.

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:  
  

Shipyards _____	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 percentage 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):	_____
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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