

No: 35247-8-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

CHARLES SALES and
PATRICIA SALES, a married couple,

Appellants,

v.

WEYERHAEUSER COMPANY,
a Washington corporation,

Respondents.

FILED
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DIVISION II
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STATE OF WASHINGTON
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I. INTRODUCTION

Weyerhaeuser ignores the gaping hole in its argument and makes a charade of *forum non conveniens* analysis. The very purpose of a *forum non conveniens* dismissal is to ensure that the suit *will actually* go forward in a more convenient forum. Yet Weyerhaeuser refuses to stipulate that this case *will* go forward in its proposed alternative forum. Weyerhaeuser now concedes (Opp. at 7) that a trial court may “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*” (quoting *Werner v. Werner*, 84 Wn.2d 360, 370, 526 P.2d 370 (1974) (emphasis added)), but it claims that Washington law does not require it to so stipulate here. And the trial judge erroneously believed that it could not require Weyerhaeuser to submit to the alternative forum it proposed.

Weyerhaeuser’s argument is wrong, and the trial court’s conclusion that it lacked authority to require Weyerhaeuser to submit to the alternative forum of Arkansas was reversible error. Washington courts must have and do have such authority to ensure that the *forum non conveniens* doctrine is not used as a tactical tool to prevent a dying plaintiff from testifying at trial. Weyerhaeuser says it has the right to remove this case to federal court if it is re-filed in Arkansas and it has

reserved the right to do so. The uncontradicted record shows that if this case is re-filed there, Weyerhaeuser will exercise that right and cast this case on the MDL pile to languish unresolved until long after appellant Charles Sales has died and his case could have been tried to conclusion in Weyerhaeuser's home state.

The trial court's power and discretion to prevent this manifestly unjust and unfair result—and its legal errors and abuse of discretion in failing to do so—are the heart of this appeal, one that is important for justice to one family and to ensuring that the principles of *forum non conveniens* serve their real and intended purpose.

II. ARGUMENT

A. Standard of Review.

The parties agree that the standard of review is abuse of discretion. Weyerhaeuser does not dispute that a trial court “necessarily abuses its discretion if its ruling is based on an erroneous view of the law or on a clearly erroneous assessment of the evidence.” *See* Opening Brief at 16 (citing *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 530, 20 P.3d 447 (2001)). Nor does it dispute that a plaintiff's choice of forum “should rarely be disturbed” and “must [be] respect[ed] . . . unless doing so constitutes a manifest injustice to the defendant.” *Id.* at 16-17 (citing

Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508, 67 S.Ct. 839 (1947) and *Myers v. Boeing Co.*, 115 Wn.2d 123, 128, 794 P.2d 1272 (1990)).

The trial court committed legal error—and thus abused its discretion—by failing to require Weyerhaeuser to meet its burden of proving that the proposed alternative forum was an adequate alternative forum and by wrongly concluding that it could not require Weyerhaeuser to stipulate to its proposed alternative forum of Arkansas to ensure that the forum would be adequate. In the absence of such a stipulation, the trial court should have honored appellants' presumptively favored forum choice of Washington, the only forum where Mr. Sales was likely to be able to attend trial before his imminent death.

B. The Trial Court Abused its Discretion by Failing to Require Weyerhaeuser to Meet Its Threshold Burden of Proving that Arkansas Was an Adequate Alternative Forum.

Weyerhaeuser had a threshold burden to establish that its proposed alternative forum of Arkansas was an adequate alternative forum before the trial court reached the *forum non conveniens* factors and balanced them against the presumption favoring the plaintiffs' forum choice. Yet the trial court did not even consider this threshold burden or require Weyerhaeuser to meet it. Proof of an adequate alternative forum is a threshold test that the defendant must meet before the *forum non conveniens* balancing factors may be considered. As the Court of

Appeals stated in *Hill v. Jawanda Transport*, “[a] defendant bears the burden of proving an adequate alternative forum exists.” *Hill v. Jawanda Transport Ltd.*, 96 Wn. App. 537, 541, 983 P.2d 666 (1999) (citing *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 677 (D.C. Cir. 1996)); *id.* at 543 (“Once a defendant proves that another forum is adequate, the trial court must analyze and balance private and public interests”) (emphasis added).

Only after a defendant meets this threshold burden of proof may the trial court weigh the convenience factors against the presumption favoring plaintiff’s chosen forum. *Klotz v. Dehkhoda*, 134 Wn. App. 261, 265, 141 P.3d 67 (2006) (“In deciding whether to dismiss for *forum non conveniens*, the trial court *must* first determine whether an adequate alternative forum exists”) (emphasis added); *see also El-Fadl*, 75 F.3d at 676-77 (“In deciding a *forum non conveniens* motion, the district court *must* first establish that there is an adequate alternative forum Only if there is an adequate alternative forum must the court then weigh the relative conveniences to the parties”) (emphasis added).

Weyerhaeuser does not dispute that the trial court failed to conduct this required threshold analysis. *See Opp.* at 18-38. The trial court expressly revealed its erroneous view of the legal standard at the outset of its written decision, stating “the court must *first* do a balancing test with

regard to the public and private interest factors that would affect each of the litigants.” See Opening Brief at 19 (citing Clerk’s Papers (“CP”) at 157) (emphasis added). The trial court never required Weyerhaeuser to meet its threshold burden of proving that Arkansas was a real and adequate alternative forum. See CP 157-62 (trial court’s written decision dismissing on *forum non conveniens* grounds without conducting the required threshold analysis); see also Verbatim Report of Proceedings on July 28, 2006 (“RP”) 15-16 (trial court’s oral ruling denying reconsideration and stating that all the “traditional factors that the Court weighs have been evaluated in my written decision, and there’s nothing that the plaintiff has indicated at this point in time, other than to submit, I believe in good faith and with a sense of urgency[,] that this case potentially going to the federal system would have dire consequences to this plaintiff,” but concluding that “I simply do not see that as a legal basis for me to retain jurisdiction under the case law”).

Thus, the trial court’s decision was based on an erroneous view of the law. The error was explicit and the trial judge clearly, if unwittingly, documented it. As such, the *forum non conveniens* dismissal was an abuse of discretion and should be reversed based on the trial court’s failure to consider or to require Weyerhaeuser to meet its threshold burden of proof. See *El-Fadl*, 75 F.3d at 677 (*forum non conveniens*

dismissal is an abuse of discretion if trial court “fails to consider a material factor . . . [or] does not hold defendants to their burden of persuasion on all elements of the forum non conveniens analysis”); *Demelash*, 105 Wn. App. at 530 (trial court “necessarily abuses its discretion if its ruling is based on an erroneous view of the law”).

C. On this Record, Weyerhaeuser Could Not Meet Its Burden of Proving that the Proposed Alternative Forum Was Adequate.

Weyerhaeuser contends that if the trial court *had* considered this threshold issue, it could have concluded that Arkansas was an adequate forum based solely on the fact that Weyerhaeuser is “amenable to process” in Arkansas, regardless of Weyerhaeuser’s failure to stipulate to proceeding in the Arkansas forum and regardless of its failure to show that the case would in fact go forward in Arkansas if it were re-filed there. *See* Opp. at 19-20. Again, Weyerhaeuser misstates the governing legal standard.

Weyerhaeuser admits that it was required to “provid[e] enough information to enable the trial court to evaluate Arkansas as an alternative forum.” Opp. at 19. Weyerhaeuser grossly understates the information required to meet this requirement, however, and suggests that it was enough for Weyerhaeuser to show that it would be “amenable to process” in the other jurisdiction. *Id.* at 18-19. In fact, Weyerhaeuser was required to provide enough information to carry its burden of proving that its

proposed alternative forum would be adequate and *real* in light of the circumstances presented to the trial court. These circumstances included the uncontradicted evidence submitted by appellants (*see* page 11, *infra*) indicating that if this case were dismissed and then re-filed in state court in Arkansas, Weyerhaeuser would almost certainly remove it to federal court and transfer it to the federal MDL where it would languish indefinitely.

Where, as here, the plaintiff raises significant doubts about the adequacy of the alternative forum, the amount of information that the defendant must provide to establish the adequacy of the proposed alternative forum is correspondingly greater as well. As the Ninth Circuit stated in *El-Fadl*:

To show the existence of an alternative forum, the defendant must provide enough information to enable the District Court to evaluate the alternative forum Because the defendant has the burden of establishing that an adequate alternative forum exists, this court will reverse when the affidavit through which [the defendant] attempted to meet its burden contains substantial gaps *The amount of information that the defendant must provide, in supporting affidavits or other evidence, depends on the facts of the individual case Accordingly, the defendant must provide more detailed information if the plaintiff provides evidence that controverts the defendant's evidence* If the record before the court is so fragmentary that it is impossible to make a sound determination of whether an adequate alternative forum exists, the court will remand for further determination of the facts.

El-Fadl, 75 F.3d at 677 (cited and relied upon in *Hill v. Jawanda Transport*, 96 Wn. App. at 541) (emphasis added; internal quotation marks and citations omitted).

Appellants submitted detailed information to the trial court showing the substantial likelihood, if not certainty, that if this case is dismissed and re-filed in state court in Arkansas, Weyerhaeuser will remove it to federal court and transfer it to the asbestos MDL where it will languish. *See, e.g.*, CP 192-94 & 289-304 (Declaration of Brian F. Ladenburg discussing and documenting the procedural morass of the MDL through the concrete example of appellants' counsel's client Leo Sweeney, whose mesothelioma case was removed from state court to federal court in the fall of 2005 and transferred to the MDL, and has had no activity since then); CP 173 (motion for reconsideration discussing three of appellants' counsel's other mesothelioma cases which were transferred to the MDL in the year prior to Weyerhaeuser's motion and have made no progress towards trial since then); CP 342 (Rand Institute for Civil Justice study discussing the exceedingly small percentage of MDL cases that have been returned to their originating districts for trial); *Madden v. Able Supply Co.*, 205 F. Supp. 2d 695, 702 (S.D. Tex. 2002) (“[T]here are thousands of asbestos cases pending in [the MDL] and, if history be any indicator, Plaintiff's claims . . . will not be heard for many years”).

Weyerhaeuser could have removed this uncertainty by stipulating that if the case were dismissed based on *forum non conveniens*, as

Weyerhaeuser had requested, it would submit to the Arkansas forum and would not remove the case to federal court and transfer it to the MDL. *See, e.g.*, RP 7 & 13 (statements by appellants' counsel at reconsideration hearing noting that "Weyerhaeuser repeatedly could have stipulated that they will allow the case to proceed to trial in Arkansas and they haven't done so again and again and again" and "All they have to do is stipulate that they won't remove the case and they haven't done that").

But instead of stipulating to submit to its own proposed forum, and despite appellants' repeated requests that it do so, Weyerhaeuser refused to agree to go forward in Arkansas if the case were re-filed there. *See* Verbatim Transcript of Proceedings on June 23, 2006 ("TP") 26 (statement by Weyerhaeuser's counsel at the hearing that "[w]hether it [removal to federal court by Weyerhaeuser] would be asserted or not, I don't know the answer to that"); RP 10 (statement by Weyerhaeuser's counsel at subsequent hearing on reconsideration that "it continues to be speculative what would happen in this case [if it were re-filed in state court in Arkansas], and it's inappropriate for [appellants'] counsel to argue about something that may or may not occur"). Weyerhaeuser could have put to rest any speculation whether it would remove this case to federal court and transfer it to the MDL by simply stipulating to submit to its proposed alternative forum, but it refused to do so.

Weyerhaeuser disingenuously continues to treat *forum non conveniens* as a game on appeal. It states in its opposition, for example, that “the record is devoid of any evidence of a *present* intention by Weyerhaeuser to remove any case Plaintiffs *might* re-file in Arkansas to a local federal court in Arkansas for *possible* transfer to the MDL.” Opp. at 30 (emphasis added). Similarly, Weyerhaeuser states that “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.” *Id.* at 31 (emphasis added).

Weyerhaeuser’s record of removing asbestos cases from state to federal court and then transferring them to the MDL is well-documented in the public record. *See, e.g., McCandless v. Weyerhaeuser Corp. et al.*, U.S. District Court for Eastern District of North Carolina, Case No. 4:02-CV-124-H(4), Response to Weyerhaeuser Corp.’s Notice of Removal, dated July 22, 2002, at 1-2 (“All claims are based upon claims of injury due to exposure to asbestos dust and fibers . . . brought home by employee-spouses . . . *Weyerhaeuser Corporation filed a Notice of Removal to Federal Court and also attempted to have the case transferred to the Eastern District of Pennsylvania . . . pursuant to [the] MDL Transfer Order*”) (emphasis added) (Appendix 1-10); *McCandless v. Weyerhaeuser Corp. et al.*, U.S. District Court for Eastern District of

North Carolina, Case No. 4:02-CV-124-H(4), Order dated August 8, 2002, at 4-5 (remand order in the same case rejecting Weyerhaeuser's attempts to remove the case and transfer it to the MDL) (Appendix 11-15); *Abel v. A.O. Smith Electrical Products Co., et al.*, U.S. District Court for Northern District of Alabama, Case No. CV-05-RRA-1483-S, Notice by Weyerhaeuser Company of Tag-Along Action, at 1 ("The undersigned [Weyerhaeuser] notifies the Court that this case is a potential 'tag-along action' which may be subject to transfer to the [MDL in] Eastern District of Pennsylvania") (Appendix 16-20).¹

Because Weyerhaeuser bore the burden of proof in showing that its proposed alternative forum was truly available for appellants, its evasiveness cannot be tolerated here. The trial court erred in granting the *forum non conveniens* dismissal in the face of these evasions and the lack of any assurance that the Arkansas forum would really be available to a dying plaintiff.

Weyerhaeuser now concedes (*see* Opp. at 7, citing *Werner*, 84 Wn.2d at 370) that the trial court could have required Weyerhaeuser to

¹ Appellants respectfully request that the Court take judicial notice of these court pleadings in the attached Appendix which were printed from the federal Public Access to Court Electronic Records ("PACER") system and are a matter of public record. *See* ER 201 (undisputed facts in public record may be judicially noticed at any stage of the proceeding); RAP 9.11 (such facts may be judicially noticed on appeal when necessary, equitable, and appropriate to resolve issues on review).

stipulate to submit to the Arkansas forum as a condition of the *forum non conveniens* dismissal order, but Weyerhaeuser made no such concessions to the trial court, allowing it to fall into the legal mistake of believing that because it was not *certain* that Weyerhaeuser would remove the case to federal court and transfer it to the MDL, the trial court lacked the authority to prevent that “speculative” possibility by conditioning its order on the requirement that Weyerhaeuser submit to the Arkansas forum. *See* CP 161 (trial court’s written decision stating that “[t]his Court cannot speculate on whether or not this case would be removed to Federal court by the Defendant or what the status is of cases relating to this subject matter in the Federal system” and failing to condition dismissal on Weyerhaeuser’s stipulation to submit to Arkansas forum); RP 15 (trial court’s oral ruling denying reconsideration in which it acknowledged “the fact that [the case] may end up in [the MDL] in Pennsylvania” but again failed to consider Weyerhaeuser’s threshold burden to prove the adequacy of the proposed alternative forum in Arkansas, and failed to require Weyerhaeuser to stipulate to submit to the proposed forum).

In finding that it was “speculative” whether Weyerhaeuser would remove the case to federal court and then transfer to the MDL, the trial effectively negated Weyerhaeuser’s burden of proof. Without such a stipulation it was “speculative” whether the proposed alternative forum

was genuine (and available to appellants) or artificial (and a mere pretext for Weyerhaeuser to engineer its way to the MDL in Pennsylvania). Thus, Weyerhaeuser failed to meet its burden. The trial court simply misunderstood its legal authority to condition dismissal on Weyerhaeuser's stipulation to submit to the alternative forum, a legal authority that Weyerhaeuser now concedes exists.

In *Werner*, the Court held that the trial court on remand could condition its *forum non conveniens* dismissal on defendant's stipulation to "submit to jurisdiction in California and not plead as a defense any statute of limitations which *may* have lapsed since this action was commenced in Washington." *Werner*, 84 Wn.2d at 378 (emphasis added). Although it was thus similarly "speculative" there whether the defendant would raise a statute of limitations defense, the Court held that it would be appropriate for the trial court to assure the adequacy of the alternative forum by conditioning its dismissal on defendant's agreement not to assert the statute of limitations defense.

Here, likewise, the trial court could have conditioned its dismissal on Weyerhaeuser's stipulation to submit to the state court in Arkansas, even though the prospect of removal was not certain and thus "speculative." Removal was speculative only because Weyerhaeuser refused to say what it would do—*i.e.*, Weyerhaeuser created and refused

to end the speculation—and the only speculation was whether Arkansas would truly be available to appellants. As such, Weyerhaeuser failed to meet its burden.²

Finally, Weyerhaeuser takes issue with the numerous cases cited by appellants holding that a proposed alternative forum is not adequate unless it is a *real* alternative, in the sense that the case could realistically and meaningfully proceed in the alternative forum if it were re-filed there. *See* Opening Brief at 18-20 (citing cases); *compare* Opp. at 21-27. Although their circumstances vary, all of these cases hold that in order to be a true alternative forum, the forum must be *real*.

Whether the issue is the existence of subject matter jurisdiction (as in *El-Fadl*³), the availability of adequate relief (as in *Hill v. Jawanda*

² The declaration of the Philadelphia attorney, G. Daniel Bruch Jr., on which Weyerhaeuser seeks to rely (*see* Opp. at 29-30), is not helpful to Weyerhaeuser. Mr. Bruch states that there is a theoretical procedure by which a plaintiff's counsel could obtain an affidavit stating that a plaintiff is "in imminent danger of death" and have that case transferred from the MDL back to the originating federal court for an expedited trial. *Id.* Mr. Bruch does not deny, however, that such transfers are extremely rare, if not almost purely theoretical, and he does not contradict the overwhelming statistics, direct evidence, and published court decisions all establishing that the MDL is a procedural "black hole" where cases languish indefinitely and from which they are unlikely to emerge. The reality is that the theoretical exception for dying mesothelioma victims does not work, as shown by the un rebutted example of appellants' counsel's dying client, Mr. Sweeney. *See* Opening Brief at 5-9; *see also* page 11, *supra*.

³ *See El-Fadl*, 75 F.3d at 677-79.

*Transport, Ceramic Corp. and Mercier*⁴), the amenability of the defendant to suit (as in *Ravelo Monegro*⁵), the possibility that the defendant might plead a statute of limitations that lapsed after the case was originally filed (as in *Werner*⁶), or the substantial likelihood if not certainty of significant delay in the resolution of plaintiff's claims (as in *Sablic*⁷ — **and this case**), the fundamental inquiry for the trial judge remains the same: If I dismiss, can I be confident that the plaintiff will be able to try the case in the alternative forum that the defendant proposes?⁸

The trial court in this case never asked that question because it did not believe it had the right to do so. Yet the question lies at the heart of the *forum non conveniens* doctrine. Put simply, the trial court committed

⁴ See *Hill v. Jawanda Transport*, 96 Wn. App. at 542-43; *Ceramic Corp. of America v. Inka Maritime Corp.*, 1 F.3d 947, 949-50 (9th Cir. 1993), *Mercier v. Sheraton International, Inc.*, 935 F.2d 419, 424-26 (9th Cir. 1991).

⁵ See *Ravelo Monegro v. Rosa*, 211 F.3d 509, 514 (9th Cir. 2000).

⁶ See *Werner*, 84 Wn.2d at 378.

⁷ See *Sablic v. Armada Shipping APS*, 973 F. Supp. 745, 748 (S.D. Tex. 1997) (“[T]he Court finds that Croatia, while it may be an available forum, is not an adequate forum in which Plaintiff may present his case . . . While it is possible for Plaintiff’s case to be heard in the Croatian courts, there is likely a backlog of cases that could present a significant delay in the resolution of Plaintiff’s case”).

⁸ Notably, Weyerhaeuser has not cited any cases, state or federal, where a court has sanctioned the type of strategy that Weyerhaeuser seeks to implement here. The dearth of supporting authority further indicates that its attempt to use the *forum non conveniens* doctrine as a back-door route to federal court for defendants sued in their home states is inappropriate.

legal error because it never required Weyerhaeuser to show that its proposed alternative forum would be real.

On this record, there are no facts from which the trial court could have concluded that Weyerhaeuser met its burden of proving that its proposed alternative forum was adequate, and it would have been an abuse of discretion for the trial court to so conclude on this record without a binding stipulation by Weyerhaeuser that it would allow that case to go forward in Arkansas. The trial court's *forum non conveniens* dismissal should therefore be reversed on this ground as well.

D. The Trial Court Also Abused Its Discretion and Failed to Serve the Ends of Justice by Dismissing this Action Based on the *Forum Non Conveniens* Balancing Analysis.

Finally, in addition to the trial court's legal errors and abuse of discretion in failing to require Weyerhaeuser to meet its threshold burden of proof, the trial court also abused its discretion in concluding that Weyerhaeuser overcame the strong presumption favoring appellants' forum choice and that Arkansas is a better and more appropriate forum based on the balancing of convenience factors.

The balancing test articulated in *Myers v. Boeing Co.* contemplates a judge weighing two forums—plaintiff's presumptively favored chosen forum and defendant's proposed alternative—not three. Yet three forums are at issue here because of Weyerhaeuser's procedural gamesmanship—

Washington, Arkansas, and the MDL in Philadelphia. Weighing the private and public *forum non conveniens* factors means nothing if at the end of the day the trial court has no idea whether the case will be litigated in the proposed alternative forum. As the trial court stated in its written decision, it did not know “whether or not this case would be removed to Federal Court by the Defendant or what the status is of cases relating to this subject matter in the Federal system.” CP 157 (trial court’s written decision). Thus, although the trial court stated that it believed 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 asbestos exposure occurred” (*see* Opp. at 34, citing CP 161), the trial court had no idea whether Weyerhaeuser would allow this case to go forward there or would instead send it to the MDL quagmire in Philadelphia.

In response to this unrebutted record, Weyerhaeuser suggests that appellants could prevent removal by suing non-diverse defendants in the Arkansas state court. *See* Opp. at 27-28.⁹ In other words, Weyerhaeuser says that appellants should do what it is doing—file a pleading for an ulterior purpose. Weyerhaeuser has sought dismissal on *forum non*

⁹ Weyerhaeuser’s *ad hominem* argument that appellants’ counsel delayed for eighteen months before filing this action is utterly baseless. *See* Opp. at 32. Although Mr. Sales was diagnosed with mesothelioma in January 2005, he did not engage appellants’ counsel until April 2006 and appellants promptly filed this action in May 2006.

conveniens grounds when what it really wants is to remove this case to federal court, transfer it to the MDL, and deny Mr. Sales his day in court. Weyerhaeuser argues that appellants could defeat removal by joining a non-diverse defendant even though it has offered no factual basis for doing so, and even though Weyerhaeuser has sought to remove other similar cases on the purported grounds that the non-diverse, in-state defendant was “fraudulently joined” by the plaintiff.¹⁰

Perhaps the most revealing statement in Weyerhaeuser’s opposition brief is its statement that “the record is devoid of any evidence of a *present* intention by Weyerhaeuser to remove any case Plaintiffs *might* re-file in Arkansas to a local federal court in Arkansas for *possible* transfer to the MDL.” Opp. at 30 (emphasis added). This statement by Weyerhaeuser captures the pure artifice of its argument before the trial court and on appeal. Based on Weyerhaeuser’s refusal to agree to submit

¹⁰ See *McCandless v. Weyerhaeuser Corp. et al.*, U.S. District Court for Eastern District of North Carolina, Case No. 4:02-CV-124-H(4), Response to Weyerhaeuser Corp.’s Notice of Removal, dated July 22, 2002, at 2 (Appendix 1-10) (in a case similarly involving claims of injury due to a family member’s exposure to asbestos dust and fibers brought home by an employee-spouse, Weyerhaeuser filed a notice of removal alleging that the plaintiff had fraudulently joined the non-diverse in-state defendant); *id.*, Order dated August 8, 2002, at 4-5 (remand order in the same case rejecting Weyerhaeuser’s attempts to remove the case and transfer it to the MDL) (Appendix 11-15); see also footnote 1, *supra* (requesting that the Court take judicial notice of these public court documents which were printed from the federal PACER system and are a matter of public record).

to Arkansas, the trial court could presume, and this Court may presume on appeal, that Weyerhaeuser intends to remove the case if it is re-filed in state court in Arkansas and then transfer it to the MDL. *See State v. Neslund*, 50 Wn. App. 531, 551, 749 P.2d 725 (1988) (a party may manifest adoption of a statement by silence where the circumstances are such that it is reasonable to conclude that the party would have responded had there been no intention to acquiesce) (citing 5A K. Tegland, *Washington Practice: Evidence* § 348 (2d ed. 1982)).

Under these circumstances, where a defendant has refused to stipulate to submit to its own proposed alternative forum and there is no evidence that the case will actually go forward there if the plaintiff's claims are dismissed and re-filed in the alternative forum, it is impossible for the trial court to determine whether the "ends of justice" will be served by the requested *forum non conveniens* dismissal. *See Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 579, 555 P.2d 997 (1976) (ultimate question in *forum non conveniens* analysis is whether "the *ends of justice* would be better served if the action were brought and tried in another forum") (emphasis added); *see also Sablic*, 973 F. Supp. at 748 ("While it is possible for Plaintiff's case to be heard in the Croatian courts, there is likely a backlog of cases that could present a significant delay . . . The Court finds that the possibility of a lengthy delay may be considered in

this analysis because justice delayed is often justice denied. Therefore, the Court finds that Croatia is not an adequate alternative forum”); *Johnson v. Cash Store*, 116 Wn. App. 833, 841, 68 P.3d 1099 (2003) (“Justice is not done . . . if continuing delays are permitted”).

Accordingly, the trial court’s balancing of *forum non conveniens* factors failed ultimately to answer whether the ends of justice would be better served if this action were re-filed in Arkansas, and its dismissal was an abuse of discretion that should be reversed on that ground as well.

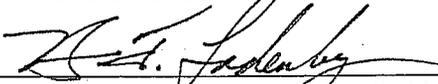
III. CONCLUSION

For all of these reasons, the trial court’s order dismissing this action on grounds of *forum non conveniens* was legal error and an abuse of discretion and should be reversed.

DATED this 21 day of February, 2007.

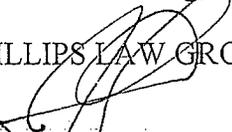
Respectfully submitted,

BERGMAN & FROCKT



Matthew P. Bergman, WSBA #20894
Brian F. Ladenburg, WSBA #29531

PHILLIPS LAW GROUP, PLLC



John W. Phillips, WSBA #12185
Matthew Geyman, WSBA #17544
Counsel for Plaintiffs/Appellants

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DISTRICT DIVISION
Civil Action No.: 4:02-CV-124-H (4)

FILED

JUL 29 2002

DAVID W DANIEL CLERK
US DISTRICT COURT
E DIST N CAROLINA

JANICE MCCANDLESS, and husband,)
MELVIN MCCANDLESS, FAYE TAYLOR)
MODLIN, and husband, JAMES DAVID)
MODLIN, DELORES ALEXANDER, and)
husband, VICTOR ALEXANDER, AGNES)
BEMBRIDGE and husband, JOHN BEMBRIDGE,)
MINNIE COMSTOCK and husband, HOWARD)
COMSTOCK,)
)
Plaintiffs,)
)
vs.)
)
WEYERHAEUSER CORPORATION, and)
EAST CAROLINA SUPPLY COMPANY, INC.)
)
Defendants.)

MEMORANDUM IN
SUPPORT OF
PLAINTIFFS' MOTION FOR
REMAND; RESPONSE IN
OPPOSITION TO DEFENDANT,
WEYERHAEUSER CORP.'S
NOTICE OF REMOVAL; AND
MOTION FOR COSTS AND
ATTORNEYS' FEES

COMES NOW, the Plaintiffs, Janice McCandless, et al, by and through their undersigned attorneys and file this Motion to Remand the above-referenced action and Response in Opposition to Defendant's Notice of Removal, and Motion for Costs and Attorney's Fees and as further grounds hereinafter states:

NATURE OF THE CASE

On or about June 24, 2002, the Plaintiffs herein, five in number and their spouses, filed a Complaint in Superior Court in the County of Martin, North Carolina. All claims are based upon claims of injury due to exposure to asbestos dust and fibers from asbestos products distributed by Defendant, East Carolina Supply, Inc., and brought home by employee-spouses to wives from a paper mill located in Plymouth, North Carolina owned and operated by the Defendant, Weyerhaeuser. On or about July 24, 2002 Defendant Weyerhaeuser Corporation filed a Notice of Removal to Federal Court and also attempted to have the case transferred to the Eastern District of Pennsylvania for coordinated or consolidated pretrial proceedings pursuant to 28 USC

Copy to Judge Howard

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Section 1407 ("MDL Transfer Order") claiming that the case is a "'potential" tag along action" which may be subject to transfer to the Eastern District of Pennsylvania. In their notice, Defendant Weyerhaeuser does not cite any case with which this case could be considered a "tag along action."

STATEMENT OF THE FACTS

The Complaint alleges several causes of action against both named Defendants with supporting allegations including actions against Defendant, East Carolina Supply Company, Inc. (hereinafter referred to as East Carolina Supply) for negligence and breach of implied warranty. (See Complaint: Exhibit 1, paragraphs 60-74). There is no dispute that East Carolina Supply Company, Inc. is a domestic company both organized under the corporate laws of North Carolina and currently active and doing business in the State. (See Exhibit 2, Articles of Incorporation and Annual Reports for Years 1997, 1998, 1999, 2000 and 2001 filed with the North Carolina Secretary of State). Corporate records filed with the Secretary of State also indicates that East Carolina Supply, Inc.'s corporate officers, directors, registered agent and corporate headquarters are located in Plymouth, North Carolina (See Exhibit 2), as well as the fact that the corporation is in the business of "wholesale/retail of industrial, electrical and hardware supplies" (Exhibit 2). This is the same location as the Weyerhaeuser plant which forms the basis of Plaintiffs' claim (See Exhibit 1).

While conceding the current domestic status of East Carolina Supply, the remaining Defendant, Weyerhaeuser Corporation (hereinafter referred to as Weyerhaeuser) has filed a Notice of Removal based on its own "investigation... that Plaintiffs fraudulently and improperly joined East Carolina Supply for the sole purpose of defeating diversity jurisdiction". (Exhibit 2, Defendant, Notice of Removal, page 11) It appears that the only information Weyerhaeuser has obtained from its investigation and the only basis for its claim of fraudulent joinder is that the current Secretary of State listing for Defendant, East Carolina Supply reveals that the company currently listed was incorporated in 1997 and thus could not have supplied offending asbestos materials to Weyerhaeuser over the last 50 years as alleged by Plaintiffs. Corporate records regarding East Carolina Supply dating back to 1953 copied from the corporate record books at the County Record Office (See Exhibit 9, Affidavit of Amanda L. Kims, Esq.)

ARGUMENT

A. REMOVAL ATTEMPTS ARE STRICTLY CONSTRUCTED AND REMOVING DEFENDANT HAS A HEAVY BURDEN IN CLAIMS OF FRAUDULENT JOINDER

Removal is purely a statutory right and one which divests the state court and the Plaintiffs' chosen forum with jurisdiction. In all federal districts, removal is strictly contained and allowed only where the grounds are valid and clear. Beritech v. Metropolitan Life Insurance Company, 881 F. Supp. 557, S. D. Ala. (1995). The above-referenced rule is particularly true in removal cases based upon diversity of citizenship where all doubts should be resolved in favor of remand and any ambiguity constructed against removal. Hess v. Great Atlantic and Pacific Tea Company, Inc., 520 F. Supp. 373, N. D. Ill. 1981; Rivers v. International Matex Tank Terreral, 864 F. Supp. 556, (E. D. LA. 1994). Most importantly, in the Fourth Circuit (as acknowledge by the Defendant herein seeking Removal) where the basis of removal is a claim of fraudulent and improper joining of a resident Defendant, "the removing party must establish either: '[t]hat there is no possibility that the plaintiff would be able to establish a cause of action against the in-state defendant in state court; or that there has been outright fraud in the Plaintiffs' pleadings of jurisdictional facts.'" Marshall v. Manville Sales Corp. 6, F.3d 229, 232 (4th Cir. 1993)(quoting B, Inc. v. Miller Brewing Co. 663 F.2d 545, 549 (5th Cir. 1981)).

In the case herein, Defendant is not making a claim of outright fraud, but claims Plaintiffs have "no possibility of establishing a cause of action against East Carolina Supply Company, Inc." In this regard, it must be noted that Defendant's Notice of Removal and charge of fraudulent joinder is made without any evidence or affidavit support concerning prior dissolutions and reformations of the corporation. This omission is important for two reasons. First, it ignores the controlling law of North Carolina concerning corporate legal liability and secondly, it ignores specific evidence which clearly indicates both a prior corporate existence and a role in the direct distribution of asbestos material by East Carolina Supply to Defendant, Weyerhaeuser's plant.

Simply stated, the only support for this assertion is the current dates of incorporation of said company and it completely ignores the prior history of East Carolina Supply Company.

B. BOTH THE FACTS OF THE CASE HEREIN AND THE NORTH CAROLINA LAW CONCERNING CORPORATE LIABILITY REFUTE DEFENDANT'S FRAUDULENT JOINDER CLAIM.

In determining whether a Plaintiff states a cause of action against an in-state defendant in a diversity suit which a non-resident corporate defendant seeks to remove, the law of the state where the action is brought is determinative and governing. Chumley v. Great Atlantic and Pacific Tea Company, 191 F. Supp. 254, (M. D. N. C. 1961). Under North Carolina law, dissolution and/or reformation of a prior corporation does not effect or prevent commencement of a legal proceeding against the corporation in its corporate name, nor does it absolve the corporation for liabilities incurred prior to its dissolution. N.C. Gen. Stat. § 55-14-05 (b)(5).

That the allegations within Plaintiffs' Complaint stem from activities during a corporate existence prior to the corporation's current stated date of incorporation is immaterial to the corporation liability if, indeed, said corporation was in existence and engaged in the activities at the relevant time. N.C. Gen. Stat. § 55-14-05 (b)(5). In this regard, not only does North Carolina allow and provide for claims against now dissolved corporations, but it specifically provides injured asbestos victims with recoverable claims against said corporations by recognizing and adopting the "exposure theory" of insurance coverage held by them and any responsible defendant. Imperial Casualty and Indemnity Co. v. Radiation Specialty Co., 862 F. Supp. 1437 (E. D. N. C. 1994).

Under North Carolina law, the applicable insurance listing of any of the dissolved corporations as insured would cover against the injuries or loss suffered by the Plaintiffs herein which were caused by any negligent exposure to asbestos during the time the Defendant-employees performed the work. Id. at 1439. In doing so, North Carolina Courts have specifically rejected unfair attempts to limit exposed workers from recovery on narrow interpretations of insurance coverage and existing corporate status. (In Imperial Casualty, supra, the Court rejected the defense-sought "manifestation" and "injury in fact" coverage claims followed in other states).

In the case at bar, information available to the Plaintiffs, even at the early stage in the litigation process clearly indicates that East Carolina Supply was both in existence and a supplier of asbestos materials to the Weyerhaeuser plant at issue during all times relevant to Plaintiffs' claim of exposure to asbestos at the plant. The "supplier product search records" on the Weyerhaeuser in-house database computer system attached hereto as Exhibit 4, Affidavit of Warren Gurganus) specifically lists East Carolina Supply as a product supplier to the plant.

Of equal importance is the fact that the products supplied by East Carolina Supply are well-known asbestos containing products by well-known asbestos manufactures (See attached Exhibit 5). The manufacturers of products distributed by East Carolina Supply includes those who manufactured and sold asbestos gaskets, asbestos-containing insulation as well as asbestos refractory materials (See for example Exhibit 4 and 5) which lists Armstrong, Garlock and Raybestos products both as asbestos-containing and those supplied by East Carolina Supply.

In addition to supply records, supporting affidavits of workers who not only worked at the plant, but in the storeroom where supplies were stored and handled, at the plant identify East Carolina Supply as a supplier of materials to the plant over the course of many years and as far back as 1966. It is clear from these records and affidavits that East Carolina Supply was in existence and supplied asbestos materials for decades to the Weyerhaeuser plant. (See Exhibits 4: Affidavits of Warren Douglas Gurganus; Exhibit 6: Affidavit of Roy Franklin Moore; Exhibit 7: Affidavit of Jon Wayne Barnes; and Exhibit 8: Affidavit of Johnny Marvin Smith).

The first case relied upon by Defendant, Weyerhaeuser for removal of this action is totally inapplicable to the claim herein. In Wilson v. Republic Iron and Steel Co., 257 U.S. 92 (1921), the Plaintiff joined in a State personal injury action against his employer a resident co-employee. After removal on the basis of "fraudulent joinder" was made to the Federal District Court, the Plaintiff moved for remand claiming the removal was merely a delay tactic. Id. at 94. The Plaintiff, however, "did not by the motion or in any wise traverse or take issue with any of the allegations of the petition for removal." Id. at 94. By failing to do so, the Plaintiff "assented to their truth" and thus Plaintiffs' Motion for Remand was lacking in any "jurisdictional bearing". Id. at 96. It was on this basis, the failure of Plaintiffs to come forward with evidence to the contrary, that the Supreme Court affirmed the removal.

The second case relied upon by the Defendant is actually and completely in support of Plaintiffs' Motion for Remand. In Martin v. Norfolk and W. Ry. Co. et al., 43 F.2d 193, 296 (4th Cir. 1930), a claim was brought against the Defendant Norfolk and W. Ry. along with two train operators for the wrongful death of pedestrian who was struck by a train while on a bridge overpass. Norfolk and W. Ry. filed a notice of removal claiming the two workers were fraudulently named to destroy diversity jurisdiction. The Fourth Circuit disagreed with Defendant and remanded the case to State Court. In doing so, the Fourth Circuit made it clear that in face of a claim of "fraudulent joinder", the job of the District Court is not to engage in an assessment of liability, which is the job of the State Court, but purely to determine if under the facts stated in the notice of removal and motion to remand that there can be no liability on the part of the alleged sham-defendant. Id. at 295.

Additionally, Defendant, purely to attempt to defeat ^{state law} federal jurisdiction, alleges as required under federal law, that each Plaintiff and each Plaintiff's spouses consortium claim clearly exceeds the \$ 75,000.00 jurisdiction amount. (See Notice of Remand, paragraphs 15-18). The basis of Defendant's assertion is a demand letter sent by Plaintiffs' counsel in one claim (Agnes Bembridge) and a review of the North Carolina permitted elements of recovery in a consortium claim.

Removal jurisdiction does turn on the actual amount in controversy. Michigan Mfrs. Service Inc. v. Robershaw Controls Co., E. D. Mich. 1991, 134 F.R.D. 154. In this regard, a petition for removal must show with reasonable certainty that *each* State Court claim will exceed the jurisdictional amount. This is particularly difficult where Plaintiffs' Complaint fails to establish with any certainty the amount in controversy. Dane v. Southwestern Bell Tel. Co. W. D. Okla. (1972), 352 F. Supp. 257. A reading of Defendant's Notice of Removal indicates pure speculation particularly as to any consortium claim alleged, that said claim will exceed the \$75,000.00 amount and clearly is not stated with "reasonable certainty". As contested claims which involve occupational illness with different impairments and medical expenses incurred by each Plaintiff as well as different "losses" as to the Plaintiff spouses, the Defendant cannot maintain with the required certainty that each of these claims will exceed the requisite jurisdictional amount. If such a determination of required jurisdictional amount cannot be made by the Court remand is proper even if diversity is determined. Dane v. Southwest Bell Telephone, supra.

C. MOTION FOR COST AND ATTORNEY'S FEES

In addition to the foregoing, the Plaintiffs/Movants respectfully request an Order awarding the Plaintiffs associated costs, expenses and attorney's fees incurred with the preparation of the motion and any concomitant hearing held herein.

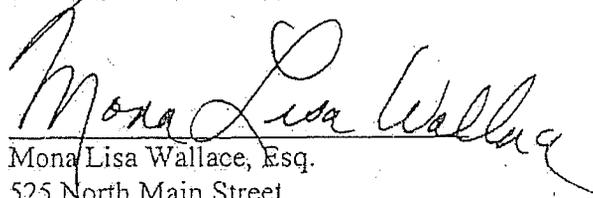
Said costs and fees are expressly allowable and appropriate should an Order of Remand be issued pursuant to federal statute 28 U.S.C. A. § 1447 (c) and may be included as part of the Order of Remand where appropriate. McGuire Oil Co. v. City of Houston, 143 F. 3d. 205, 20 (5th Cir. 1998).

In this regard, the Defendant's motive or a determination of "bad faith" removal by Defendant is unnecessary. Garbie v. DaimlerChrysler Corp., 211 F. 3d 407 (7th Cir. 2000). It is sufficient if removal was "erroneous" and "wrong as a matter of law". Balcorta v. Twentieth Century-Fox Film Corp., 208 F. 3d 1102, 1105-1106 (9th Cir. 2000).

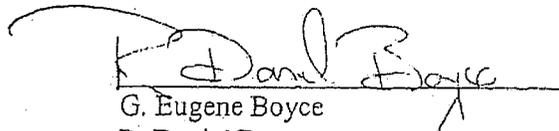
For all of the above stated reasons, along with the supporting legal authority and affidavits, it is clear that complete diversity does not exist in this action and the Motion to Remand to North Carolina Superior Court should be granted.

This the 22 day of July, 2002

WALLACE and GRAHAM. P.A.
Attorney for the Plaintiffs


Mona Lisa Wallace, Esq.
525 North Main Street
Salisbury, North Carolina 28144
704/633-5244

BOYCE & ISLEY, PLLC

A handwritten signature in black ink, appearing to read "R. Daniel Boyce", is written over a horizontal line. The signature is stylized with a large initial "R" and a long horizontal stroke extending to the left.

G. Eugene Boyce

R. Daniel Boyce

Post Office Box 1990

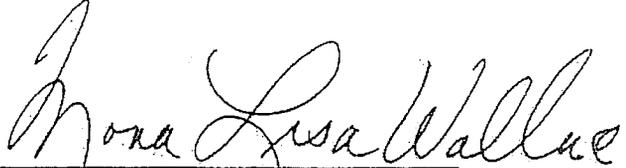
Raleigh, North Carolina 27602-1990

CERTIFICATE OF SERVICE

I, Mona Lisa Wallace, do hereby certify that I have served a copy of the foregoing document on the attorney listed below by hand delivery this 22 day of July 2002

Robert A. Mukenfuss, Esq.
McGuire Woods, LLP
100 North Tryon Street
Suite 2900
Charlotte, North Carolina 28202

H. Rane Singleton, Esq.
Carter Archie & Hassell
112 S. Respass Street
Washington, NC 27889



Mona Lisa Wallace

PARTIALLY SCANNED DOCUMENT

THIS IS A PARTIALLY SCANNED DOCUMENT.
PLEASE SEE THE CASE FILE FOR ANY
ATTACHMENTS OR OTHER MATERIALS WHICH
HAVE NOT BEEN SCANNED.

PARTIALLY SCANNED DOCUMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION

FILED

AUG 8 2002

DAVID W. DANIEL CLERK
US DISTRICT COURT
E DIST N CAROLINA

No. 4:02-CV-124-H-4

JANICE MCCANDLESS, and her)
husband, MELVIN MCCANDLESS,)
FAYE TAYLOR MODLIN, and her)
husband, JAMES DAVID MODLIN,)
DELORES ALEXANDER, and her)
husband, VICTOR ALEXANDER,)
AGNES BEMBRIDGE, and her)
husband, JOHN BEMBRIDGE,)
MINNIE COMSTOCK, and her)
husband, HOWARD COMSTOCK,)

Plaintiffs,)

ORDER

v.)

WEYERHAEUSER CORPORATION and)
EAST CAROLINA SUPPLY COMPANY,)
INC.,)

Defendants.)

This court on August 7, 2002, held a hearing in Raleigh, North Carolina, on plaintiffs' motion to remand this case to state court. At the hearing the court issued an oral ruling GRANTING plaintiffs' motion to remand.

Defendants primarily argued that East Carolina Supply Company, Inc., could not have done the acts alleged by plaintiffs because East Carolina Supply Company, Inc. did not become a legal entity until 1997. As to plaintiffs' claim that East Carolina Supply Company, Inc. was the successor to other corporations acting under the trade name "East Carolina Supply Company," defendants charged

8/8/02
Cy filed to Case Manager for review

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that plaintiffs should not be allowed to amend their complaint to defeat removal. As a secondary argument, defendants maintained that North Carolina's statute of repose barred plaintiffs' tort claims.¹

As to defendants' first argument, in cases alleging fraudulent joinder, the removing defendants have the heavy burden of establishing, after resolving all issues of fact and law in the plaintiffs' favor, that the non-diverse defendant has been joined fraudulently. Marshall v. Manville Sales Corp., 6 F.3d 229, 232 (4th Cir. 1993). Defendants must show that "[t]here is no possibility that the plaintiff[s] would be able to establish a cause of action against the in-state defendant in state court; or [t]hat there has been outright fraud in the plaintiff[s'] pleadings of jurisdiction facts." Id. (quotations and citations omitted). Moreover, all doubts about the propriety of removal should be resolved in favor of retained state court jurisdiction. Id. at 231.

After reviewing the briefs and documents submitted by the parties and after a full oral hearing, the court adopts the arguments advanced by plaintiffs. The defendants have failed to meet their burden of showing that defendant East Carolina Supply

¹ While defendants presented argument that the amount in controversy exceeded \$75,000, plaintiffs did not seriously contend otherwise. As such, the amount in controversy argument was not material to the court's decision.

Company, Inc. was fraudulently joined or that counsel for plaintiffs have committed outright fraud in plaintiffs' pleadings. Specifically, the court finds that plaintiffs have in good faith alleged that East Carolina Supply Company, Inc. is a proper in-state defendant. There is sufficient evidence, for the purposes of remand, to connect the named in-state defendant, East Carolina Supply Company, Inc., to its alleged predecessors--Gurkin Distributors, Inc. and East Carolina Supply Company as alleged suppliers of asbestos-containing products--to Weyerhaeuser. Defendants have failed to establish that there is no possibility that plaintiffs could establish a cause of action against East Carolina Supply Company, Inc.

Furthermore, under the notice pleadings adopted by both federal and state rules of civil procedure, East Carolina Supply Company, Inc. has been given sufficient notice of the claims asserted against it and the grounds for imposing corporate liability to state a viable cause of action under state law. Any "amendments" which may occur should plaintiffs choose to proceed under successor liability would not change the essential elements of plaintiffs' complaint: The same plaintiffs would be suing the same in-state corporate defendant under the same causes of action based on the same underlying facts. As long as the pleadings frame the essential issues and facilitate fair notice of asserted claims to the defendant, the court will not allow technical niceties to

defeat a meritorious complaint, even in the area of remand. See Gordon v. Leeke, 574 F.2d 1147, 1151 (4th Cir. 1978); Suarez Corp. Indus. v. McGraw, 125 F.3d 222, 225 (4th Cir. 1997).

Neither have defendants shown that plaintiffs' pleadings were fraudulently submitted in bad faith. Accordingly, the court rejects defendants' argument that defendant East Carolina Supply Company, Inc. is a sham defendant fraudulently joined to defeat diversity jurisdiction.

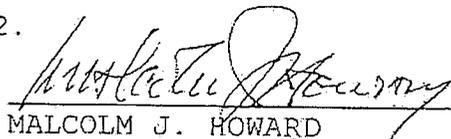
As to defendants' statute of repose argument, the Fourth Circuit has previously stated that North Carolina's statute of repose does not apply to asbestos-related disease claims under North Carolina General Statute § 1-50(a)(6). Burnette v. Nicolet, Inc., 818 F.2d 1098, 1101 (4th Cir. 1986); Hyer v. Pittsburgh Corning Corp., 790 F.2d 30 (4th Cir. 1986). As to defendants' argument that another subsection of the statute of repose legislation applies, namely § 1-50(a)(5), the court remains unconvinced. Moreover, as counsel's argument involves a question of law not sufficiently settled under North Carolina law to defendants' benefit, the court must resolve any doubt in favor of remand.

CONCLUSION

The court hereby GRANTS plaintiffs' motion to remand. This case is REMANDED to the Superior Court of Martin County, North Carolina for lack of subject matter jurisdiction. This clerk is

directed to close this case.

This 8th day of August, 2002.


MALCOLM J. HOWARD
United States District Judge

At Greenville, NC
#6

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

FRED ABEL, et al.,

*

Plaintiffs,

*

*

vs.

*

Civil Action No. CV-05-RRA-1483-S

*

A. O. SMITH ELECTRICAL PRODUCTS
COMPANY, a division of A. O. SMITH
CORPORATION, et al.,

*

*

*

*

Defendants.

*

NOTICE BY WEYERHAEUSER COMPANY
OF TAG-ALONG ACTION

PLEASE TAKE NOTICE THAT on July 29, 1991, the Judicial Panel on Multidistrict Litigation entered an order transferring all asbestos cases pending in the federal court to the United States District Court, Eastern District of Pennsylvania, for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407 ("MDL Transfer Order"). That order also applies to "tag-along actions", or actions involving common questions of fact filed after the January 17, 1991 filing of the Panel's Order to Show Cause. MDL Rule 7.5 provides:

Any party of counsel in actions previously transferred under Section 1407 or under consideration by the Panel for transfer under Section 1407 shall notify the Clerk of the Panel of any potential "tag-along actions" in which that party is also named or in which that counsel appears.

The undersigned hereby notifies the Court that this case is a potential "tag-along action" which may be subject to transfer to the Eastern District of Pennsylvania. The

Clerk of the Panel may either: (1) enter a conditional transfer order pursuant to MDL Rule 7.4 (a), or (2) file an order to show cause why the action should not be transferred, pursuant to MDL Rules 7.5(c) and 7.3.

Dated: August 5, 2005.



F. Grey Redditt, Jr. (ASB-5142-R64F)
Timothy A. Clarke (ASB-1440-R67T)

Attorneys for Defendant Weyerhaeuser
Company

Of Counsel:

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Regions Bank Building, 11th Floor
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Mobile, Alabama 36652-2568
Telephone: (251) 432-9772
Facsimile: (251) 432-9781

CERTIFICATE OF SERVICE

I hereby certify that the original of the Notice of Tag-Along Action and copy of the Complaint have been sent via overnight mail to:

Clerk of the Panel
Judicial Panel on Multidistrict Litigation
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Room G-255, North Lobby
Washington, D.C. 20002-8004

I further certify that a true and accurate copy of the foregoing Notice of Tag-Along Action and copy of the Complaint have been electronically filed with:

Mr. Perry D. Mathis, Clerk
United States District Court
Northern District of Alabama
1729 5th Avenue North
Birmingham, Alabama 35203
(Tel: 205-278-1800)

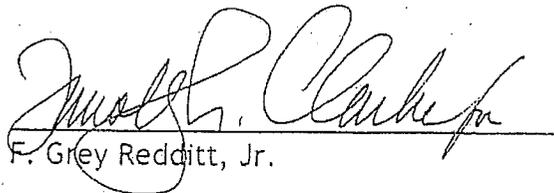
I further certify that a true and correct copy of the foregoing Notice of Tag-Along

Action was sent via U.S. Mail, First Class Postage Prepaid to:

G. Patterson Keahey, Jr., Esq.
Law Offices of G. Patterson Keahey
One Independence Plaza
Suite 612
Birmingham, Alabama 35209

All Defense Counsel as listed on attached Service List.

I certify on this the 5th day of August, 2005.


F. Grey Redditt, Jr.

Service List

*Abel, et al. v. A. O. Smith Corporation, et al.
In the United States District Court for the Northern District of Alabama,
Southern Division*

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The Lincoln Electric Company

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Exteco, Inc. f/k/a Thermo Electric Co., Inc.;
The Marley-Wylain Company d/b/a Weil-McLain
Company, Inc.

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DIVISION II

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No: 35247-8-II

STATE OF WASHINGTON
BY
DEPUTY

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

CHARLES SALES and
PATRICIA SALES, a married couple,

Appellants,

v.

WEYERHAEUSER COMPANY,
a Washington corporation,

Respondents.

CERTIFICATE OF SERVICE

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Seattle, WA 98104
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Fax (206) 382-6168

Counsel for Appellants

I hereby declare that on this day I caused to be served a true and correct copy of (1) Reply Brief of Appellants, and (2) Certificate of Service.

Said documents were caused to be served, as indicated, on the following:

Diane J. Kero
Elizabeth P. Martin
Gordon Thomas Honeywell, et al.
600 University Street, Suite 2100
One Union Square
Seattle, WA 98104
(Via Hand Delivery)

DATED this 21st day of February, 2007.



Carrie J. Krogh