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Attorneys for Defendant Weyerhaeuser Company

**UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON**

**WESTWOOD LUMBER COMPANY,  
INC., CASCADE HARDWOODS, INC.,  
MORTON ALDER MILL, and  
ALEXANDER LUMBER MILL INC.,**

**No. CV03-0551-PA**

Plaintiff,

**MEMORANDUM OF LAW IN SUPPORT  
OF MOTION FOR RECONSIDERATION**

v.

**WEYERHAEUSER COMPANY,**

Defendant.

Defendant Weyerhaeuser Company (“Weyerhaeuser”) respectfully submits this memorandum of law in support of its motion for reconsideration of the Court’s October 29, 2003 oral ruling that certain financial information that Plaintiffs have refused to produce is not admissible and therefore not available to Weyerhaeuser in discovery.

### PRELIMINARY STATEMENT

At the November 6, 2003 discovery conference (the “Discovery Conference”), the Court invited Weyerhaeuser to brief whether information concerning the financial condition of Plaintiff sawmills for the time period after 2002 (“2003 Financial Information”) in the *Westwood*, *Washington Alder*, and *Coast Mountain* proceedings is discoverable. As set forth below, the 2003 Financial Information is relevant to both Plaintiffs’ claims and Weyerhaeuser’s defenses in this litigation and discovery of this information is reasonably calculated to lead to admissible evidence. Weyerhaeuser will be substantially prejudiced if it is denied this discovery and therefore Weyerhaeuser respectfully requests that the Court order its production.

### ARGUMENT

#### **I. LEGAL STANDARD FOR DISCOVERY**

Discovery may be sought “regarding any matter, not privileged, that is relevant to the claim or defense of any party ... if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” Fed. R. Civ. P. 26(b)(1); *Upchurch v. USTNET, Inc.*, 158 F.R.D. 157 (D. Or. 1994). The Ninth Circuit has instructed courts in this District to liberally apply Rule 26(b)(1). *See Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir.1993). Parties, in antitrust cases in particular, have been given broad access to potentially admissible information. *See Riedel Int’l, Inc. v. St. Helens Invs., Inc.*, 633 F. Supp. 117, 119 (D. Or. 1985); *Columbia Steel*

*Casting Co., Inc. v. Portland General Electric Company*, 1992 WL 55753, \*1 (D. Or. 1992). Indeed, it is reversible error when denial of access to relevant information that is reasonably calculated to lead to admissible evidence results in substantial prejudice to the party seeking discovery. See *Laub v. US Department of the Interior*, 342 F.3d 1080, 1093 (9th Cir. 2003) (reversing district court's decision not to permit discovery which caused actual and substantial prejudice to the litigant).

## **II. PLAINTIFFS SHOULD BE ORDERED TO PRODUCE THE 2003 FINANCIAL INFORMATION**

At the Discovery Conference, Plaintiffs' counsel argued that the 2003 Financial Information was not discoverable because Plaintiffs are "not seeking damages beyond the third quarter of '02" and Plaintiffs' counsel failed "to understand" how such information would be relevant in this litigation. As stated below, the 2003 Financial Information is discoverable because it is directly relevant to Plaintiffs' liability and damage claims and therefore likely to lead to admissible evidence.

### **A. Information Is Not Inadmissible Simply Because It Is From A Time Period Following The Period For Which Damages Are Sought**

Plaintiffs argue that Weyerhaeuser is not entitled to discovery of the 2003 Financial Information because they are not seeking damages beyond the third quarter of 2002. Applicable law, however, provides that an antitrust defendant is entitled to discovery from the period after which damages are sought where, as here, such information is relevant to whether a antitrust violation occurred and, if so, the damage, if any, suffered by the plaintiff. See *In Re Shopping Carts Antitrust Litigation*, 95 F.R.D. 299, 308-309 (S.D.N.Y. 1982) (ordering discovery from post-damages period because such information was potentially relevant to antitrust claim).

**B. The 2003 Financial Information Is Relevant To Plaintiffs' Claim That Weyerhaeuser Attempted To Drive Its Rivals From The Market**

The Court recently observed that: "Plaintiffs appear to be arguing (but have not clearly alleged) that Weyerhaeuser intends to put them out of business, or otherwise ensure there won't be any viable competitors remaining." *See* November 7 *Westwood* Order at n.1; November 7 *Washington Alder* Order at n.1.<sup>1</sup> More specifically, Plaintiffs are alleging that Weyerhaeuser paid unprofitably high prices for alder logs in an effort to drive its competitors (including Plaintiffs) out of business. It is well settled, however, that this predation theory of antitrust liability requires, *inter alia*, proof of a period where such loss-generating purchases could be recouped because competition was eliminated. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993). The 2003 Financial Information is therefore relevant because it is likely to contain admissible evidence such as whether Plaintiffs are on the verge of being driven from the market, or continue to enjoy profits and compete after years of alleged predation.

Similarly, to prevail on their monopolization claim, Plaintiffs must show that current competitors, including themselves, are foreclosed from expanding output. *Image Technical Services, Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1208. (9th Cir. 1997) ("... establishing monopoly power requires that there are significant barriers to entry and ... existing competitors lack the capacity to increase their output in the short run.") As this Court has observed: Plaintiffs have not alleged that Weyerhaeuser "has the power to control prices in, or to exclude competition from, the relevant market," *See* November 7 *Westwood* Order at 1; November 7 *Washington Alder* Order at 1, and Plaintiffs "haven't alleged inability to obtain logs, lost sales, or

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<sup>1</sup> Presumably, Plaintiffs will bring their next round of Complaints in line with this Court's opinion and clearly allege that they will be driven out of business.

other injuries resulting from anti-competitive conduct.” See November 7 *Westwood* Order at 1; November 7 *Washington Alder* Order at 1. Assuming that Plaintiffs properly fix their complaint, an investigation of Plaintiffs’ current capacity and their financial strength is relevant in assessing their ability to expand output and thereby offset any alleged attempt by Weyerhaeuser to charge (or pay) monopolistic (or monopsonistic) prices.

**C. The 2003 Financial Information Is Relevant To The Calculation Of Plaintiffs’ Alleged Damages**

Even if the 2003 Financial Information was not relevant to Plaintiffs’ liability claims, such information would still be discoverable because it is relevant to calculating what, if any, damages Plaintiffs have suffered. The 2003 Financial Information presumably reflects Plaintiffs’ financial performance during the alleged recoupment period. Therefore, a comparison of the 2003 Financial Information with Plaintiffs’ financial performance during the alleged predation period is relevant to determine what, if any, effect the alleged predation had on Plaintiffs. See *In Re Shopping Carts Antitrust Litigation*, 95 F.R.D. at 308-309 (S.D.N.Y. 1982) (ordering discovery after finding that financial information from time period after alleged antitrust conspiracy is relevant to damages because it provides a comparison between performance of the parties during and after the conspiracy). Indeed, Plaintiffs contend that currently, the market is in competitive equilibrium and that no competitor is reaping supracompetitive profits. If so, the current financial records are not only relevant but arguably indispensable to establish the “but-for” world that would have existed in the absence of Weyerhaeuser’s allegedly unlawful conduct. See *Blanton v. Mobil Oil Corp.*, 721 F.2d 1207, 1216 (9th Cir. 1983) (“before and after” evidence, comparing a plaintiff’s restrained business with a comparable business operating free of antitrust restraints, is competent evidence of antitrust damages). Weyerhaeuser should not be

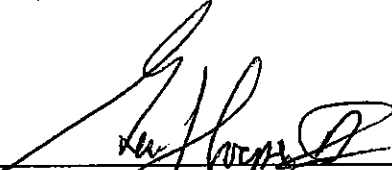
denied access to information that bears upon the accuracy and scope of Plaintiffs' alleged damage claims.

**CONCLUSION**

In short, the 2003 Financial Information is clearly relevant to both the liability and damage claims in this litigation and reasonably calculated to lead to the discovery of admissible evidence. Weyerhaeuser would be substantially prejudiced if it was denied access to the 2003 Financial Information at this stage of the litigation. For the foregoing reasons, Weyerhaeuser respectfully requests that the Court order Plaintiffs to produce the 2003 Financial Information.

Dated this 14<sup>th</sup> day of November, 2003.

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**CERTIFICATE OF SERVICE**

I hereby certify that the **MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR RECONSIDERATION** was served on:

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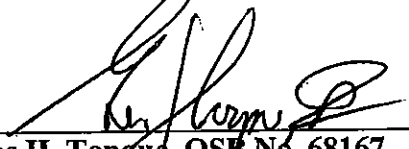
- By hand delivery
- By first-class mail
- By certified mail
- By overnight mail
- By facsimile transmission
- Fax #: 503-225-1257

Attorneys for Plaintiffs

With first-class postage prepaid and deposited in Portland, OR.

DATED this 14<sup>th</sup> day of November, 2003.

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