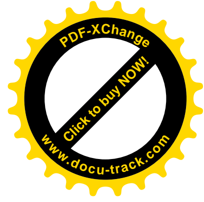


Stephen F. Crew, OSB No. 78171, stevec@rccb.com
O'DONNELL, CLARK & CREW LLP
Fremont Place, Suite 302
1650 NW Naito Parkway
Portland, Oregon 97209
Telephone: (503) 306-0224
Telecopy: (503) 306-0257
Web: lawyers.com/odonnell&clark

R. Stephen Berry, D.C. Bar No. 234815, sberry@berry-leftwich.com
BERRY & LEFTWICH
1717 Pennsylvania Ave. NW, Suite 450
Washington, DC 20006-1809
Telephone: (202) 296-3020
Telecopy: (202) 296-3038
(Other Counsel Listed on Signature Page)
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

MORELOCK ENTERPRISES,

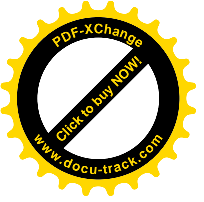
Plaintiff,

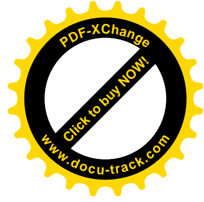
WEYERHAEUSER CO.

Defendant.

Civil No. 3:04-cv-00583-PA

PLAINTIFF'S TRIAL BRIEF (CORRECTED)





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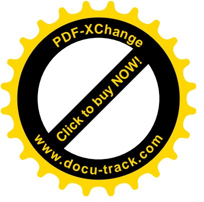

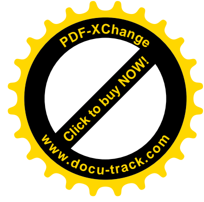

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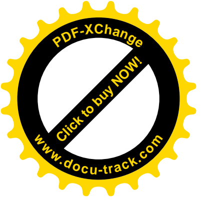

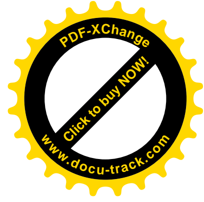

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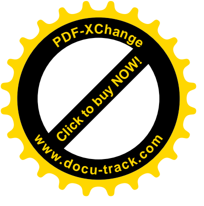
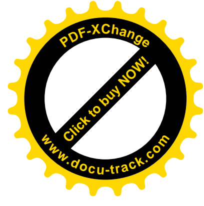

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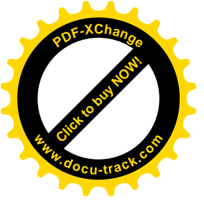
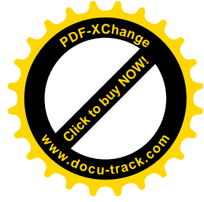

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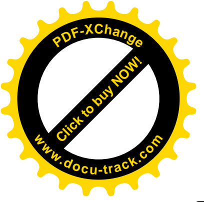
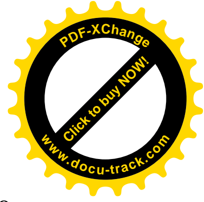

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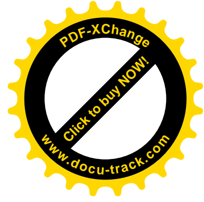
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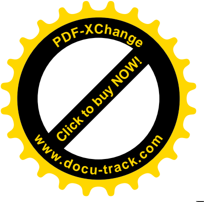
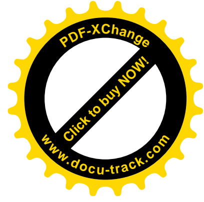

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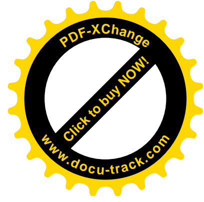

I. INTRODUCTION

Class Plaintiffs are businesses which purchased finished alder lumber directly from Weyerhaeuser at any time from April 28, 2000 through December 31, 2006. Evidence at trial will demonstrate that these businesses were victims of Weyerhaeuser's exclusionary conduct, creating and maintaining a monopoly over the relevant market for finished alder lumber, in violation of Section 2 of the Sherman Act. Weyerhaeuser's illegal conduct resulted in these Class Plaintiffs paying monopoly overcharges for finished alder lumber in an amount totaling approximately $37.3 million during the damage period.

Defendant Weyerhaeuser Company is a multinational corporation and one of the largest wood products companies in the world. Weyerhaeuser entered the alder industry in 1980, and by year-end 1995, it had acquired at least 65 percent of the finished alder lumber relevant market. With such monopoly power came responsibilities imposed by the Sherman Act. Weyerhaeuser was required to foreswear conduct where the preservation of its dominance:

- "was a necessary direct consequence of its conduct or business arrangements."
- "unnecessarily or unreasonably impede[d] the efforts of other firms to compete for raw materials or customers, or if the anticipated benefit of the conduct flow[ed] primarily from its tendency to hinder or eliminate competition."
- "[was] for the purpose of preventing competitors from obtaining the logs that they require."

Jury Instructions in *Washington Alder et al. v. Weyerhaeuser*, (Tr. 5/19/04 at 18). Weyerhaeuser treated these legal responsibilities with disdain.

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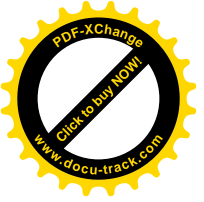

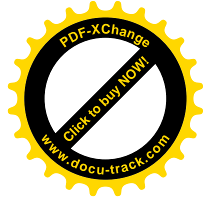

Plaintiffs' evidence at trial will show that Weyerhaeuser, by careful design, used multiple anti-competitive tactics to consolidate the alder industry in its hands, and to keep raw materials away from its sawmill competitors in sufficient quantities and quality so that, at best, they could pose only weak competition to Weyerhaeuser's dominance. Numerous witnesses – including two former senior executives of Weyerhaeuser's Northwest Hardwoods Division – will confirm Defendant's obsessive and sustained drive to exclude competition over the last two decades.

Weyerhaeuser's objective of eliminating competition has been pervasive through the years, and it has used several different means to achieve and maintain its monopoly. Plaintiffs will present testimony providing specific details concerning Weyerhaeuser's various exclusionary and anti-competitive acts. Moreover, Weyerhaeuser's internal documents will confirm that the company's exclusionary conduct was known to disadvantage and suppress its competitors with the goal of dominating the alder lumber market through any means available.

II. SUMMARY OF MONOPOLY STRATEGIES

Weyerhaeuser's monopolistic plan over at least two decades included:

- Seven years of elimination of competition by acquisition;
- The cutting off of its actual and potential competitors' alder sawlog supply – the only viable basis for hardwood mills in the Pacific Northwest;
- Acts subverting its competitors' alder lumber distribution in competition with that of Weyerhaeuser; and
- A pattern of suppressing entry by new competitors and targeting existing competitors for elimination.

The background of Weyerhaeuser's monopolistic plan is the increasing shortage of alder sawlogs – the only viable resource for hardwood mills in the Pacific Northwest – that Weyerhaeuser

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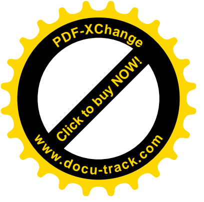

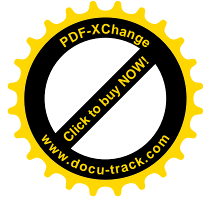

expected would be an increasing problem throughout the first two decades of this century. Weyerhaeuser determined that it would lock up as much alder as possible, keeping it away from competitors and preventing new entry into the alder lumber market.

A. Sawmill Acquisition And Expansion In The Pacific Northwest To Gain And Maintain A Dominant Share Of The Alder Lumber Market.

Plaintiff Class will demonstrate that, from the late 1980s and continuing into the damage period here, Weyerhaeuser has implemented a strategy of limiting competitors' access to alder sawlogs, in part through targeted acquisitions, in an attempt to target certain alder sawmill and lumber market competitors for suppression and exclusion.

1. The Goodyear-Nelson And Diamond Wood Products Acquisitions

In 1995, Weyerhaeuser acquired two important and substantial competitors, Goodyear-Nelson (which owned one sawmill at Sedro Woolley in Washington) and Diamond Wood Products (which owned two sawmills in Eugene and Garibaldi, Oregon), pushing its overall alder lumber market share up to approximately 65 percent. Both of these companies at the time of their acquisitions were concerned that Weyerhaeuser's control over alder sawlog supplies would threaten their independent existence and that concern encouraged them to sell out to Weyerhaeuser. The Diamond Wood Products acquisition was also facilitated by threats from Weyerhaeuser to build an alder sawmill in the same sourcing area on Weyerhaeuser owned land.

2. Acquisition Of Coast Mountain Hardwoods, After Weakening It Through Abuse Of Sales Agency Arrangement

Next, in September 2000, Weyerhaeuser acquired Coast Mountain Hardwoods, the only major alder lumber manufacturing facility in British Columbia, and a major emerging competitor in

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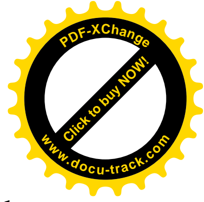
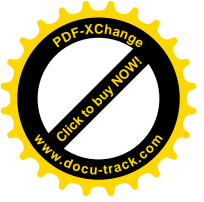
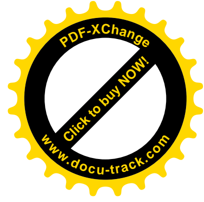


the Pacific Northwest, after thwarting bids for Coast Mountain by both Ross-Simmons and Washington Alder. This acquisition was the end game of a long strategy conducted by Weyerhaeuser throughout the 1990s to weaken Coast Mountain through a fraudulent scheme that, in effect, stole just under $2 million from Coast Mountain's potential revenues over several years.

Plaintiffs will present testimony from Wayne Kidd, the former CEO of Coast Mountain, that, although he viewed Weyerhaeuser as Coast Mountain's prime competitor for the sale of alder lumber, Mr. Kidd sought to strengthen Coast Mountain financially by entering into an agency sales agreement with Arnold Curtis, the president of Northwest Hardwoods, and Weyerhaeuser in 1993. Ultimately, multiple up-front payments of $200,00 or more were made over several years to Coast Mountain for undelivered alder lumber. This was the bait that enabled Weyerhaeuser to carry out its deceptive transactions as the relationship developed.

Mr. Kidd's testimony will be that, under the agreement with Mr. Curtis, Weyerhaeuser was to receive a five percent commission on the revenues from the sale of a vast majority of Coast Mountain's lumber. This commission was to be its only compensation for such agency sales. Coast Mountain was sent quarterly price lists from Northwest Hardwoods that set out the prices for finished alder lumber. Throughout the marketing period, Mr. Kidd believed, and in fact was told by senior Weyerhaeuser officers (including Vice President David Weyerhaeuser and President Rob Taylor), that this pricing was representative of actual market prices at which Coast Mountain's alder lumber was being sold by Weyerhaeuser (less a small freight differential on shipments to the United States); and that the same pricing was used by Northwest Hardwoods to sell its own alder lumber.

Mr. Kidd was never advised by Northwest Hardwoods that the company would purchase his finished alder lumber products for one price, and then turn around and sell those same products for an increased amount, while computing the commission upon the lower price, and pocketing the difference in the sales prices. At least one former employee of Northwest Hardwoods, who was assigned to Coast Mountain in the mid-1990s to train their personnel in Northwest Hardwoods' alder lumber grading system, will testify that he was instructed by Weyerhaeuser management to conceal from Coast Mountain employees the actual lumber prices at which Coast Mountain's alder lumber was being sold.

By misrepresenting the actual prices it received for Coast Mountain lumber, Weyerhaeuser greatly reduced Coast Mountain's revenues and increased Weyerhaeuser's own profits on the sale of Coast Mountain lumber. Witnesses will also testify that Weyerhaeuser did not market Coast Mountain lumber as aggressively as it did its own lumber, a fact which Coast Mountain learned only after switching its lumber sales relationship to Washington Alder in 1999, which sold Coast Mountain's lumber more rapidly. All of these Weyerhaeuser actions weakened Coast Mountain's viability as an independent competitor and made it easier for Weyerhaeuser to purchase the company.

Weyerhaeuser was aware that the venture fund that owned a majority interest in Coast Mountain needed to sell Coast Mountain by the end of the 1990's, due in part to Weyerhaeuser's conduct. During the time that Weyerhaeuser controlled Coast Mountain's finished lumber sales, Mr. Kidd was present when Weyerhaeuser made two low offers to purchase the company: with an offer of $15 million in 1997 and another offer of approximately $15 million in the spring of 1999. Northwest Hardwoods President Rob Taylor stated on numerous occasions in 1997-99 that

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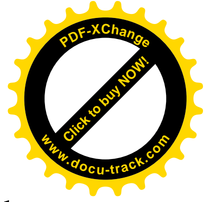

"Weyerhaeuser would never offer a dollar more than $15 million." Neither offer would have resulted in any return to Coast Mountain's majority owner and both offers were rejected.

As described above, in 1999 Weyerhaeuser bought MacMillan Bloedel and its access to large alder timberlands. At the time, Coast Mountain was relying on a substantial supply of alder logs from MacMillan and was worried that Weyerhaeuser was attempting to eliminate an important source of Coast Mountain alder supply.

In negotiations to purchase Coast Mountain, Weyerhaeuser had access to Coast Mountain's confidential financial information, and initially sought "exclusivity" as the only potential purchaser. It also planned, in the event that it was unable to purchase Coast Mountain, to build a facility next to Coast Mountain to make Coast Mountain's business even more untenable. After Coast Mountain engaged in acquisition discussions with Washington Alder and Ross-Simmons (and after Weyerhaeuser sued in the Canadian courts to suppress the sale of Coast Mountain to Washington Alder) Weyerhaeuser purchased Coast Mountain in 2000 for $26 million, raising its "final" offer by nearly 75 percent. This represented several million dollars more than Washington Alder had offered. It was clear then that Weyerhaeuser's conduct toward Coast Mountain was designed to weaken it and drive down the price at which it could be acquired, but the more important objective of keeping those alder resources and the Coast Mountain alder mill out of the hands of Weyerhaeuser's competitors took precedence.

Weyerhaeuser's own documents make clear that a major reason for the acquisition was to harm competitors, noting that Washington Alder was under financial pressure and the Coast Mountain acquisition "would weaken them." Indeed, Weyerhaeuser's internal documents predicted

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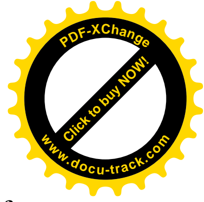

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that if it bought Coast Mountain, "Wash[ington] Alder would most likely go away," whereas if Washington Alder purchased Coast Mountain, it would result in that competitor's ability to expand its market position. By the time it was acquired by Weyerhaeuser in 2000, Coast Mountain's alder lumber production represented over 80 percent of the total alder lumber production in the province of British Columbia.

B. Weyerhaeuser's Strategy To Exclude Competition By Timberland And License Acquisitions, By Exclusive And/Or Long-Term Alder Log Supply Agreements, And By Obtaining "First Look" and "Last Refusal" Options

Another important part of Weyerhaeuser's acquisition scheme was to make it a top management priority to "lock up more wood" from suppliers to make it more difficult for competitors to obtain sawlogs. This took several forms, all of which worked together to harm competition.

1. Acquisition Of MacMillan Bloedel's Vast Timberlands, Including Alder Stands, In British Columbia

In 1999-2000, Weyerhaeuser acquired MacMillan Bloedel, which owned millions of acres of timberland, including substantial alder timber, and had licenses to tens of millions of acres. To carry out this acquisition, Weyerhaeuser agreed to a stock transaction valued at more than US$2 billion. This acquisition was part of Weyerhaeuser's strategy to control its alder lumber competitors' alder sawlog supplies, and prevent access to largely untapped British Columbia alder sawlog supply.

2. Acquisition Of Coast Mountain's Alder Timber Licenses From Canadian Provincial Lands And The Rights To Block Alder Exports To The United States

When it acquired Coast Mountain's Delta, British Columbia mill, Weyerhaeuser also obtained Coast Mountain's five alder specific forest licenses entitling it to the entire alder-specific annual harvest allowable on provincial timberlands in the lower mainland of British Columbia. Without those

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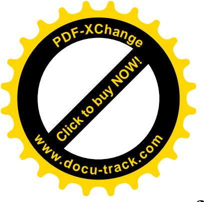
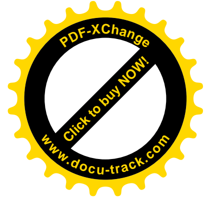




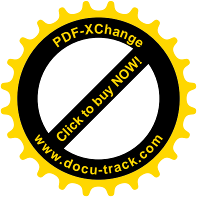
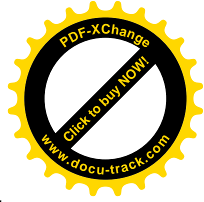
forest licenses, it is Mr. Kidd's judgment that it would be very difficult for any company to develop an alder sawmill of a size comparable to Coast Mountain's in British Columbia to compete with Weyerhaeuser.

As a further condition of purchasing Coast Mountain, Weyerhaeuser insisted that it retain the power directly to block alder exports, or selectively allow them if export to Weyerhaeuser mills in the United States would be of greater benefit. As a result, Weyerhaeuser has been able to prevent its competitors from gaining access to British Columbia alder sawlogs.

3. Weyerhaeuser's Hostile Takeover Of Willamette Industries

In 2002, Weyerhaeuser engaged in a hostile acquisition of Willamette Industries, a substantial holder of alder timberlands, and thus ensured that competitors would have no access to sawlogs from those timberlands. Weyerhaeuser's purchase of timberlands, especially when coupled with its blocking of alder sawlog exports from British Columbia and exclusive arrangements with other timberland owners, put it in a very favorable position compared to its competitors (which for the most part do not own timberlands or public licenses like those obtained by Weyerhaeuser in the Coast Mountain and Willamette acquisitions). Weyerhaeuser was assured of access to a substantial supply of sawlogs to facilitate its expanded alder lumber capacity and could then compete aggressively for the remaining sawlogs sold on the spot or bid portion of the alder sawlog market to service its dominant lumber market share.

4. Weyerhaeuser's Long-term And Exclusive, Or Near-Exclusive Alder Log Purchasing Agreements

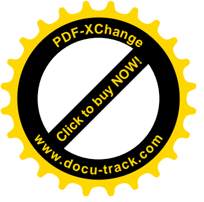
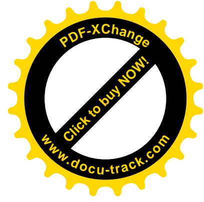
Weyerhaeuser entered into long-term and exclusive (or virtually exclusive) contracts with major timber owners and sawlog suppliers. As a result of Weyerhaeuser's acquisition of timberlands and exclusive contracts with suppliers, Weyerhaeuser has denied its lumber competitors the opportunity even to bid on 40 percent of alder sawlogs during the damage period. This foreclosure number, however, actually understates the effect on Weyerhaeuser's competitors, because Weyerhaeuser has also engaged in significant other conduct to harm competition. Even where there were no formal exclusive arrangements, Weyerhaeuser used its leverage as the dominant purchaser of sawlogs to obtain "first refusal" and "last look" rights that would allow it to keep alder sawlogs away from competitors.

5. Use Of Softwood Dominance To Lock Up Alder Supplies

Weyerhaeuser used its status as the largest softwood purchaser for export as leverage against timber owners by threatening to withhold softwood purchases unless they guaranteed all of their alder harvest on specific plots to Northwest Hardwoods. Weyerhaeuser also threatened to cut off sales of its Douglas fir logs to industrial landowners who also operate softwood sawmills unless they would commit to sell the alder logs from their lands to Weyerhaeuser. Weyerhaeuser also put restrictive covenants in timber deeds to prevent the sale of alder sawlogs to competitors.

In yet another example of its use of its dominant position to further lock up alder resources, Weyerhaeuser proposed to close its Coos Bay, Oregon facility in return for Roseburg Forest providing sawlogs to Weyerhaeuser's Eugene mill on a long-term basis. Its stated goal in making that proposal was to "frustrate new competition".

6. Using Misrepresentations To Oregon State Authorities To Obtain Alder Log Supplies That Would Otherwise Be Available To Competitors

Another aspect of Weyerhaeuser's scheme was to obtain sawlogs from Oregon public lands by making misrepresentations to Oregon state authorities about its dependence on such sawlogs. Weyerhaeuser recognized that, if it did not obtain the sawlogs from Oregon public lands, the additional sawlog availability would "encourage more competition".

Plaintiffs will produce evidence that in 1989-1990 in Washington and again in 1998-1999 in Oregon, Weyerhaeuser (directly and through its in-house lobbyist) provided false and misleading information to the legislative bodies and/or government agencies in those states. Weyerhaeuser's prepared testimony and correspondence to state officials grossly misrepresented the extent to which its alder mills were dependent upon alder harvested from public forests in Oregon, or land managed by the Department of Natural Resources in Washington. Weyerhaeuser's misrepresentations to these state officials were made in an effort (which proved successful in both cases) to obtain an exemption which would allow a company that exports softwood logs to still purchase alder from state forests. Defendant was the sole beneficiary of these exemptions, and the misrepresentations proved successful, resulting in Weyerhaeuser being unfairly allowed to compete for public alder.

7. In Seeking To "Lock Up" Alder Sawlogs, Weyerhaeuser's Intent Was To Cut Off Its Competitors' Supplies

Plaintiffs do not contend that Weyerhaeuser's conduct in buying up alder sawlogs was unlawful. However, evidence of statements by Weyerhaeuser executives directing subordinates to buy up alder sawlogs specifically to deny them to competitors are highly relevant to showing that Weyerhaeuser's acquisitions, long-term contracts, and other related conduct was intended to cut off alder supplies to competitors. Beginning in the early 1990s, Weyerhaeuser's president, Arnold Curtis, specifically directed management to buy up alder sawlogs in quantities that would drive competing

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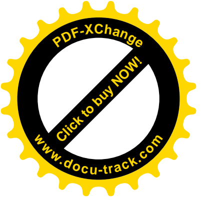
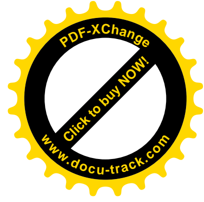

alder mills from the market or weaken them for acquisition. Mr. Chulos will testify that the frequent direction by Mr. Curtis to senior management in the early 1990s was to put pressure on Weyerhaeuser's alder competitors by "buying up all the logs."

Mr. Chulos will testify that Mr. Curtis told Mr. Hohendorf in 1991 to seek to deprive the Ross-Simmons mill in Longview of alder sawlogs. He remembers a number of occasions when Weyerhaeuser's Longview mill, which was adjacent to Ross-Simmons' mill, accumulated after these instructions much greater log inventory than the mill required to manufacture alder lumber. This caused significant stain problems that then resulted in substantial inventories of stained lumber that had to be sold at a discount. Other witnesses will corroborate this testimony from their direct experience. A similar illogical stockpiling of alder sawlogs happened in Northwest Hardwoods' Centralia mill in 1998. In Mr. Chulos' experience, there was no valid business reason for these inventory build-ups except to deprive Ross-Simmons (and other competitors purchasing in those areas) of the sawlogs they needed to compete with Northwest Hardwoods. The stained lumber generated at the Longview mill caused Northwest Hardwoods to develop a special grade for stained lumber in order to effectively move the product at the lowest discount possible.

As part of this strategy of depriving its competitors of adequate log supplies, Northwest Hardwoods monitored competitors' log yards continuously to assess their capacity to obtain alder log supply. Without permission. senior management would drive four wheel drive vehicles through competitors' log yards.

C. Weyerhaeuser's Efforts To Subvert Its Competitors' Distribution Of Alder Lumber

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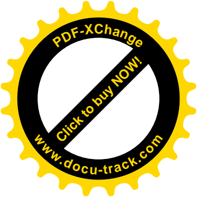
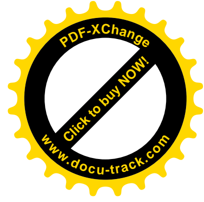

Yet another part of Weyerhaeuser's scheme was its use of various tactics to subvert the distribution of alder lumber by its competitors. For example, prior to entering into a lumber marketing agreement with Weyerhaeuser in the early 1990s, Coast Mountain marketed much of its alder lumber through the start-up lumber broker North American Wood Products (which was run by Mr. Cliff Chulos in Portland, Oregon). Mr. Chulos had previously been the head of Weyerhaeuser's alder lumber sales operation for a number of years. Arnold Curtis, the president of Northwest Hardwoods at the time, was attempting to enter into the agency sales relationship to market Coast Mountain's lumber, as described above, and to thwart the distribution relationship with North American Wood Products, Mr. Curtis engaged in a disparagement campaign against North American, leaving the impression that North American was financially unstable and could go out of business.

1. Anticompetitive Use Of Alder Lumber Allocation And Grading Schemes

Weyerhaeuser also used its alder lumber allocation system for anticompetitive purposes, requiring customers to purchase their entire allocation of Weyerhaeuser lumber in each quarter or else lose their allocation for the next quarter; requiring customers to buy grades they did not need if they wanted to be able to buy grades they did need; and cutting off distributors from supply to reduce customers' access to alternative sources. Moreover, Weyerhaeuser's market power was such that it felt free to cut off a customer that purchased more than one million dollars in lumber a year.

In addition, Weyerhaeuser used its proprietary grading system as a barrier to entry or expansion by its relatively small competitors. Mr. Chulos participated in the creation of Weyerhaeuser's marketing plan for alder lumber that included the development of more than 40 speciality grades of alder lumber, contrasted to the approximately 3 to 6 grades used for other

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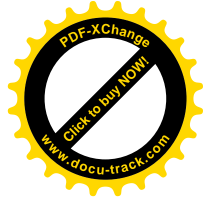

hardwoods. Cascade witnesses will testify that Weyerhaeuser manipulated this scheme over time to gain a sales advantage over Cascade and smaller competitors.

The grading system also gave Weyerhaeuser and its size an advantage over smaller mills because the manufacture of so many grades required access to a variety of sizes of alder sawlogs and relatively large sawmill scale to produce the full range of lumber grades. Weyerhaeuser grades quickly became the alder industry standard competitors needed to match in order to compete since Northwest Hardwoods was the largest producer by a significant amount since at least the mid 1990s.

Also, Weyerhaeuser has developed its own alder log scaling methods which are used selectively (instead of using the industry standard scaling methods) to disadvantage competition by discriminating in the prices paid to log sellers. There is no valid business reason for developing a unique scaling standard, and its aim is to thwart competitors.

D. Weyerhaeuser's Efforts To Discourage New Competitors And Target Existing Competitors For Suppression Or Elimination

When Weyerhaeuser was negotiating to acquire the Diamond Wood Lumber Company in 1995, it threatened to place an alder mill in Oregon within Diamond's sourcing area if it did not agree to sell the two mills it owned to Weyerhaeuser. As noted above, in 1999 and 2000, Weyerhaeuser threatened to open a mill next to Coast Mountain in British Columbia if Coast Mountain did not agree to its acquisition offer. In 1997, Weyerhaeuser threatened to cut off lumber supplies to Westwood Lumber unless Westwood agreed not to build a competing alder sawmill.

Plaintiffs will also present evidence to demonstrate that, in late 1998, Weyerhaeuser specifically targeted Washington Alder even before construction of its plant site had been completed

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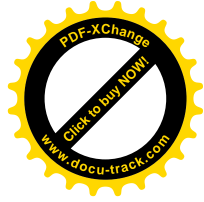

by assigning one of Northwest Hardwood's mill managers to interfere with bonding that Washington Alder was attempting to obtain from the Port for construction of the plant.

Weyerhaeuser also engaged in a targeted campaign of disparagement against smaller lumber competitors, telling their customers and timber sellers not to do business with them because they would not be in business very long. After opening its doors for business, Weyerhaeuser told log sellers and truckers not to do business with Washington Alder because it would be soon "going out of business," or that Weyerhaeuser would no longer do business with that seller or trucker if it did business with Washington Alder. Of course, coming from the dominant lumber market competitor, such disparagement also carried a threat that Weyerhaeuser could drive them out of business.

III. The Effects of Weyerhaeuser's Anticompetitive Conduct

Over the course of Weyerhaeuser's anticompetitive scheme, Weyerhaeuser increased and solidified its share of the alder lumber market. According to the testimony of expert economist Morton Kamien, its alder lumber market share – previously at monopoly levels – actually increased and was more than 75 percent throughout 2003-2006. Indeed, even Weyerhaeuser's own expert's estimates of hardwood lumber market shares, when adjusted to make them alder-only, give Weyerhaeuser 62 percent share as of 2004-2005. Weyerhaeuser's internal documents state that its alder lumber share as of 2000 was 75 percent, and a Weyerhaeuser witness testified that estimate remained the same for 2001.

During this relentless march to dominant market share, numerous alder mills left the business. Ross-Simmons, which had been Weyerhaeuser's leading competitor, ceased operations in 2001. Other competitors leaving the market included Pacific Hardwoods (2001), H. R. Jones Veneer

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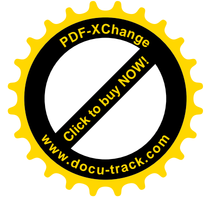
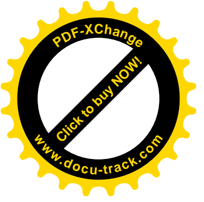
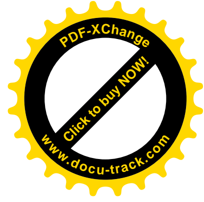


(2001), and Morton Alder (2003). All together, 18 sawmills went out of business in the Pacific Northwest from 1990-2001.

Notwithstanding the housing boom of the mid-2000s, the only new mill to enter the market throughout the damage period is Port Angeles Hardwoods, and that only occurred in the seventh year. However, that mill, which only entered the market in 2006, represents not new entry but expansion by the consolidation of existing competitors, since Port Angeles is controlled by the same owners and management as Cascade and Washington Alder. Even the Port Angeles expansion might not have been possible had Cascade not obtained a multi-million dollar antitrust settlement from Weyerhaeuser in early 2004 (and Washington Alder a jury verdict that ultimately resulted in a substantial settlement). Weyerhaeuser's own expert has testified that the combination of Cascade, Washington Alder, and Port Angeles has increased concentration in the industry, and that it is more difficult for smaller mills to compete than in the past.

The only other "new entrants" Weyerhaeuser's experts have identified for the period after 1999 are Willapa Bay/Seaport in 2002 and Diamond West in 2002. However, the evidence will show that neither of these is a new entrant either. Willapa Bay is the successor to Pacific Hardwoods, which had shut down in 2001. Diamond West's mill, meanwhile, is another former Pacific Hardwoods mill (although Weyerhaeuser contended at the summary judgment hearing that Diamond West's mill had previously been a softwood mill, Weyerhaeuser repeatedly stipulated in prior cases that it had actually been both a hardwood mill and a softwood mill). Thus, Weyerhaeuser's own expert's testimony reflects that there has been no true new entry of significance throughout the damage period. And, there is evidence that Port Angeles' entry is not entirely new production, but

rather may in part be a replacement of alder lumber produced from logs obtained from the same sourcing area previously by Washington Alder.

Weyerhaeuser's own expert's data also reveals that competitors' alder sawlog consumption as of 2006 is considerably lower than in the early 1990s, and has declined since 2001. Only in the seventh year of the damage period, 2006, did a new mill actually enter the market (Port Angeles), but even that was built by an existing competitor and was not enough to bring the total new capacity entering over the 2000-2006 period up to the amount of capacity that had left the market.

IV. GOVERNING LAW

A. Elements Of Monopolization

The offense of monopolization under Section 2 of the Sherman Act has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power. . . ." *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 481 (1992). Such willful acquisition or maintenance of monopoly occurs when a firm with monopoly power "engages in exclusionary conduct as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966). Thus, to prevail on their monopolization claim under Section 2 of the Sherman Act, plaintiffs must prove by a preponderance of the evidence that: (1) Weyerhaeuser possessed monopoly power in the relevant market (here, the market for finished alder lumber); (2) Weyerhaeuser willfully acquired or maintained that power through exclusionary conduct; (3) Weyerhaeuser's activities occurred in or affected interstate commerce; and (4) that plaintiffs were

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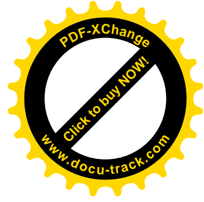
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injured by defendant's exclusionary conduct. *United States v. Grinnell Corp.*, 384 U.S. at 570-71; *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 597 (1985).

B. Relevant Markets.

The beginning point for establishing whether a defendant has monopoly power is "by ascertaining the relevant market." *Les Shockley Racing, Inc. v. National Hot Rod Ass'n*, 884 F.2d 504, 507 (9th Cir. 1989). A relevant market for antitrust analysis has a product component, and a geographic component. *Id.*

1. The Relevant Product Market

Plaintiffs will demonstrate the existence of a single relevant product market in this case: (1) the finished alder lumber market in the domestic United States, which is defined to include kiln-dried and surfaced alder lumber. Only the alder lumber market is alleged to have been monopolized resulting in damages for overcharges on alder lumber paid by Class Plaintiffs. Third Amended Complaint ¶¶ 1, 3, 6, 7.

Plaintiffs Do Not Need To Prove A Sawlog Market. When a plaintiff contends that a defendant has used its control over an input to monopolize the market for a product, the cases make clear that the plaintiff only needs to prove the market for the product, and does not need to prove an additional market for the input. For example, in *Kodak*, the defendant allegedly used its control over parts both to tie them to service and to monopolize a relevant service market. 504 U.S. at 461-467, 480-87. After explaining the elements of a Section 1 tying claim (including proof of separate markets for the tying product, parts, and the tied product, service), the Supreme Court set forth the elements of monopolization separately, making clear that under Section 2 it is necessary to prove a market and

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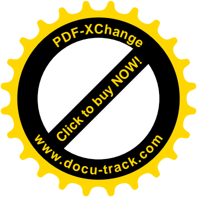

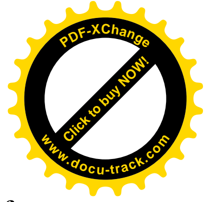

market power *only* in the relevant market alleged to have been monopolized, and manipulation of inputs excluding competition only in *that* market. *Kodak*, 504 U.S. at 482.[1] Thus, all the Plaintiffs have to prove here is that Weyerhaeuser willfully acquired or maintained monopoly power in the relevant alder lumber market through exclusionary conduct, all of which will be shown at trial. The exclusionary conduct, as described above, involves much more than just control over alder sawlog supplies.

Moreover, even if Plaintiffs were required to offer proof of an alder sawlog market, there is ample evidence substantiating it. First, Defendant's experts have admitted that, if Plaintiffs are correct, as described below, in stating that alder lumber is in a relevant market separate from other hardwoods, then alder sawlogs are in a separate market from other hardwood sawlogs as well. Further, if such proof were required, it would be unreasonable to contend that Weyerhaeuser must have a *monopoly* of alder sawlogs. Rather, the most that could be asked is that Weyerhaeuser have *market* power over sawlogs that would be sufficient to justify, for example, an attempted monopolization claim. Weyerhaeuser counsel has admitted that a finding of 30 percent market share is sufficient to support a finding of market power. January 22, 2008 Transcript of the Testimony of Motion for Summary Judgment at pp. 7-8. *See also* *Rebel Oil Co. v. Atl. Richfield Co.,* 51 F.3d 1421, 1438 (9th Cir.1995) (44 percent market share sufficient to find market power).

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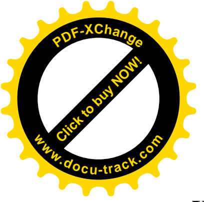
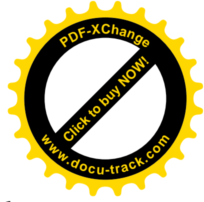
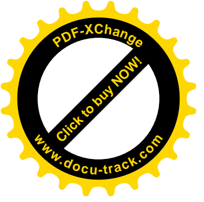
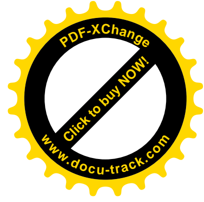
[1] *See also United States v. Microsoft Corp*., 253 F.3d 34 (D.C. Cir. 2001) (en banc) (where Microsoft had sought to gain market share over Internet browsers to bolster its monopoly over operating systems, the Government was *not* required to offer proof of a separate "browser" market or monopoly share of that market); *T. Harris Young & Associates, Inc. v. Marquette Electronics, Inc*., 931 F.2d 816, 822, 823-25 (11th Cir. 1991); *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056, 1065 (3d Cir. 1978).

Weyerhaeuser's own expert has testified that Weyerhaeuser's alder sawlog share during 2001-2006 ranged between 47% and 54%, with 52% as recently as 2005. Moreover, Weyerhaeuser has acknowledged that, without alder sawlogs, there would be no hardwood lumber industry in the Pacific Northwest, and mills have sourcing areas that are limited to approximately 100 miles from the mill, so there is no way that other hardwood sawlogs could meaningfully compete with alder sawlogs. Thus, Weyerhaeuser's own evidence will show at trial that it has market power over alder sawlogs.

<u>Plaintiffs Will Offer Sufficient Proof To Establish The Elements Of The Relevant Product Market For Finished Alder Lumber</u>. A relevant product market includes the pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity of demand. *Syufy Enterprises v. American Multicinema, Inc.*, 793 F.2d 990, 995 (9th Cir. 1986). "Definition of the relevant market cannot be performed with mathematical accuracy; it is simply the recognition of a field in which meaningful competition is said to exist." *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1476 (9th Cir.) (citing, *United States v. Continental Can Co.*, 378 U.S. 441, 449 (1964)), *cert. denied*, 522 U.S. 996 (1997). "The definition of the relevant market is a factual inquiry for the jury, and the court may not weigh evidence or judge witness credibility." *Forsyth*, 114 F.3d at 1476, (quoting *Rebel Oil Co.,* 51 F.3d at 1434); *accord*, *Thurman Industries,* 875 F.2d at 1374.

"Determining the relevant market for antitrust purposes involves identification of a group . . . of sellers or producers who have actual or potential ability to deprive each other of significant levels of business. *Forsyth.*, 114 F.3d at 1467; *Thurman Industries*, 875 F. 2d at 1374. Calculating the cross-elasticity of demand is often the first step in defining a market. *See, e.g., Lucas Automotive Engineering, Inc. v. Bridgestone*, 275 F.3d 762, 767 (9th Cir.2001). Cross-elasticity of demand

measures the substitutability of two products by determining whether consumers will shift from one product to another in response to changes in the relative prices of the two products. *Bridgestone*, 275 F.3d at 767.

The fact that there is *some* substitution or cross-elasticity among products is not sufficient to show that all those products are in the same relevant market. *See United States v. Aluminum Co. of America*, 377 U.S. 271, 275 (1964) (although there is competition between aluminum conductor wire and copper conductor wire, aluminum conductor wire is in separate submarket). "Accordingly, for goods or services to be in the same market as the defendant['s], substitutability in the eyes of consumers must be sufficiently great that the defendant['s] charging of supra-competitive prices for its product would drive away not just some consumers but a large enough number to make such pricing unprofitable (and hence induce the defendant to restore the competitive price)." *United States v. Visa U.S.A. Inc.*, 163 F. Supp. 2d 322, 335 (S.D.N.Y. 2001) (citing *du Pont*, 351 U.S. at 394-95); *see also Thurman Indus.,* 875 F. 2d at 1374; *Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210, 218 (D.C. Cir. 1986).

Courts consider a wide range of evidentiary sources in evaluating substitutability and estimating cross-elasticity of demand. In *Brown Shoe Co. v. United States*, the Supreme Court held that courts could determine the boundaries of an antitrust market "by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." 370 U.S. 294, 325 (1962). Although *Brown Shoe* involved the definition of submarkets, the Ninth Circuit has held that the *Brown Shoe* factors

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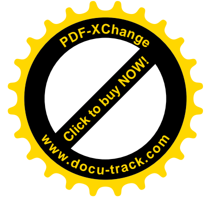

"are relevant even in determining the primary market to be analyzed for antitrust purposes." *Olin Corp. v. F.T.C.*, 986 F.2d 1295,1299 (9th Cir.1993).

Using well-established economic and statistical analyses, as well as testimony from customers, industry analysts, and Weyerhaeuser's own witnesses and documents, Plaintiffs will demonstrate that customers do not view finished alder lumber as being a close substitute for other hardwood lumber, and that Weyerhaeuser has, indeed, profitably monopolized the relevant market for alder lumber.

a. "First Difference Correlations" Show That Alder Is Not In The Same Market As Other Hardwoods

Plaintiffs will present statistical analyses of alder compared with other hardwoods in the form of correlations in monthly *quantity* first differences between alder lumber and other species of hardwood lumber between January 1997 and December 2006, and in correlations of monthly *price* first differences between alder and other species of hardwood lumber for the same period.

To illustrate the importance of monthly quantity correlations, if some other hardwood lumber, say product X, were claimed to be a substitute for alder, then an increase in the quantity of its monthly sales should result in a comparable decline in alder monthly sales. In other words if product X and alder lumber were substitutes then the monthly first differences in the quantities of their sales should be negatively correlated.

Plaintiffs' expert witness on relevant market issues, Dr. Morton Kamien, and his staff, analyzed first difference correlations for both price and quantity between alder and numerous other hardwoods, including ash, basswood, birch, cherry, cottonwood, hard maple, hickory, poplar, red oak, and soft maple. They performed calculations for all grades and also for a subset consisting of premium grades only. The first difference quantity correlations were positive – indicating a complete

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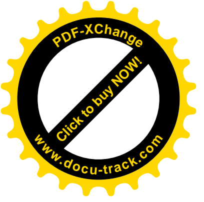
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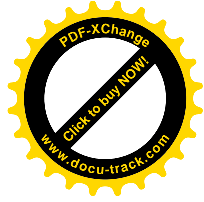
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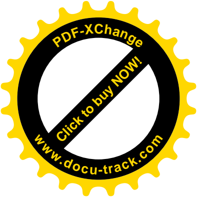
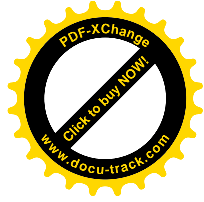
absence of substitutability – between alder and almost all other species tested. Dr. Kamien will present his expert opinion that, where the first difference correlations between alder and another species were negative they were very low, indicating very weak correlations between alder and those other species, which further indicates alder is not in the same market as any other hardwood species.

Dr. Kamien also analyzed the correlations of first differences of monthly *prices* between superior grade alder and comparable other species, and between such other species and each other. Here, perfect substitutability would be reflected by a correlation of 1 because, if product A's price increased and consumers switched to Product B, the latter's price would increase too. A low positive correlation between the first differences in Product A's prices and Product B's prices would indicate weak substitutability. Negative or zero correlation of the first differences in prices of Products A and B indicate that their price movements are independent and the products are not substitutes (or are in fact complements).

Dr. Kamien's analysis reveals that the first difference price correlations between alder and other hardwoods are either not significantly different from zero, negative, or extremely low. These results also indicate that alder is not in the same market as any other hardwood species tested. All sides acknowledge that Weyerhaeuser generally does not control other, non-alder species. That means that, *if* alder and other species are substitutable such that they are in the same relevant market, there is no way that Weyerhaeuser could manage to prevent them from being substituted. Thus, a first difference analysis of alder versus other species is a valid way of measuring whether alder and those other species are in the same market, because such results by their nature cannot be tainted by Weyerhaeuser's market power.

Moreover, it will also be apparent that Weyerhaeuser's own conduct is not economically rational unless alder lumber is in a separate product market. Weyerhaeuser's documents presented at trial will describe expected shortages of alder sawlogs, the need to obtain alder sawlogs to satisfy customer demand for alder lumber, and the desirability of denying alder sawlogs to lumber competitors. This strongly suggests that Weyerhaeuser itself believed that alder lumber was in a separate market. For, if other species were readily substitutable for alder lumber, then it would not matter if there were an expected shortage of alder sawlogs, because any price increase or supply shortage of alder would simply lead purchasers to switch to other species.

Further, Weyerhaeuser has repeatedly referred to its alder lumber operations as a separate business and, until it was sued by its sawmill competitors in 2001, it calculated its share of the alder lumber market (at dominant levels of approximately 75 percent). These business decisions would not have been rational if Weyerhaeuser did not consider alder lumber to be in a separate product market from all other hardwoods.

The class members in this case typically purchase alder lumber directly from Weyerhaeuser for use in manufacturing products such as kitchen cabinets, doors, mouldings, furniture components, or other products. Other class members are direct purchasers of alder lumber from Weyerhaeuser for resale as independent brokers to such component manufacturers. The class member witnesses' testimony make clear that their customers do not "shop" among different woods; rather, they come in with requests for a specific hardwood, which the class member then fills. It is rare for a class member to propose using a different hardwood, and the customer usually responds by demanding the hardwood it originally requested. Indeed, many customers are locked into long-term contracts that

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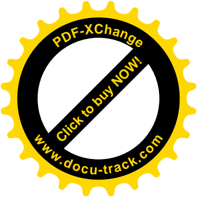
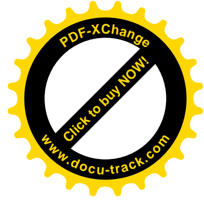
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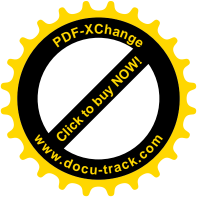
specify the type of wood to be used, are limited by their interior designer's or architect's specifications, or are ordering cabinets, doors, or other items that need to match other furniture.

Testimony from these class member witnesses will also demonstrate that their customers are generally not price sensitive when it comes to the alder products they buy from these class members. Several of these class members testified that, if they notified their customers that they were switching from alder to another hardwood, where alder has been consistently used in the customer's product, they would lose that customer's business.

Switching from alder lumber to another species of hardwood lumber can also cause problems in the manufacturing process. Indeed, the testimony presented will show that, when alder prices go up, the shift is not towards other hardwoods but towards emphasizing other grades of alder.

b. The 5 Percent Test: When Alder Prices Rise, Customers Do Not Switch To Other Species Enough To Force Weyerhaeuser To Drop Prices

One test sometimes used by the Department of Justice and the Federal Trade Commission is the "5 Percent Test": could an alleged monopolist raise the price of the product 5 percent for the foreseeable future without losing customers? 1992 *Department of Justice and Federal Trade Commission Horizontal Merger Guidelines* (" Merger Guidelines"), § 1.11. *Olin Corporation v. F.T.C.*, 986 F.2d 1295, 1299-1300 (9th Cir. 1993) (explaining this test). The class member witnesses – nearly all of them hand-picked by Weyerhaeuser – were uniform in attesting that a 5 percent price rise in alder would not (and, indeed, did not) cause them to purchase other hardwoods. In fact, much larger price increases for alder lumber were imposed by Weyerhaeuser and it customers did not switch to other species to any appreciable extent.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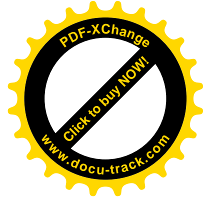
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c. Customers View Alder As Having Unique Characteristics

Customers also view alder as having "unique characteristics" setting it apart from other hardwoods. These characteristics include superior machinability, stainability, uniformity of color and grain consistency. Witnesses will testify that Weyerhaeuser has spent decades promoting the combination of these characteristics as unique in order to further isolate alder in a separate market that can be profitably monopolized. It was only after Weyerhaeuser began to see the antitrust liability potential of its alder dominance that it began to refer to alder in public statements as merely part of an "all hardwoods" market. Its actions, however, and the marketplace realities belie such protestations.

d. Weyerhaeuser's Alder Margins Are Further Evidence That It Is In A Separate Relevant Market

Finally, Weyerhaeuser's monopoly margins on alder lumber cannot be reconciled with the broader relevant market. Dr. Netz will testify that Weyerhaeuser makes much lower margins in its Eastern mills on its non-alder hardwood lumber. These large differentials simply would not occur if alder were sold in the "all hardwood lumber" relevant market claimed by Weyerhaeuser. If other hardwood lumber products were substantial price substitutes for alder, these woods would bid down the price of alder and alder margins until they approximated the margins earned on other species. This manifestly has not occurred.

Indeed, Weyerhaeuser has made returns on its alder lumber that represent several multiples of what its own management considers strong returns in other areas of its business. This is not consistent with a wider, all hardwoods market.

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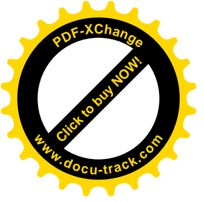
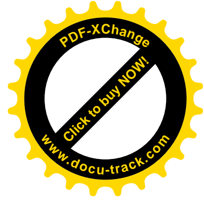

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e. The Relevant Product Market Includes All Grades Of Alder Lumber

Finally, the fact that Weyerhaeuser sells a wide range of different grades of alder lumber raises the question of whether or not these different grades are in separate markets from each other. Plaintiffs will present expert testimony (including testimony from Weyerhaeuser's own experts) and other evidence that shows the different grades of alder are not in separate markets, and that it is reasonable to consider finished alder lumber as being in a single relevant product market. This is because the grades range across a spectrum that makes relatively fine distinctions between different pieces of alder lumber. The proprietary grading program can be viewed as in effect a lumber sorting service rather than an inherent difference across products. If a seller only had control over certain grades and tried to raise prices above competitive levels, purchasers could switch to the next grades down on the scale. Thus, it is likely that a seller would need control over all grades in order to profitably monopolize alder lumber. Indeed, Plaintiffs will present testimony that if some grades (such as premium grades) are priced too high, customers increase their use of other grades.

2. The Geographic Market

The geographic market for antitrust purposes is the market area in which the seller and its competitors operate. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 357 (1963). The geographic market extends to "the area of effective competition where buyers can turn for alternate sources of supply." *Tanaka v. University of Southern California*, 252 F.3d 1059, 1063 (9th Cir. 2001). To define a geographic market, the jury may analyze, *inter alia*, "'[p]rice data and' such corroborative factors as transportation costs, delivery limitations, customer convenience and preference, and the location and facilities of other producers and distributors."

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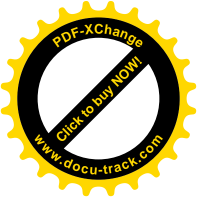
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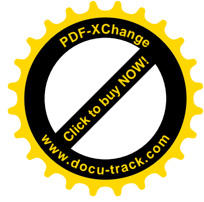
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The geographic market for alder sawlogs is confined to the Pacific Northwest. This is due to the unique geography of where alder grows, and the practical limitations requiring alder sawlogs to be processed quickly and in close proximity to where they are cut to avoid stain. Moreover, this is not a mere accident based on a company's decision to place its headquarters in a particular location. Rather, it is inherent in the fact that alder trees, from which the sawlogs derive, grow only in the Pacific Northwest and that they stain if left after harvesting too long before they are processed into lumber. Due to these practical limitations, including that it takes decades for alder trees to mature, confining the product market geographically to the Pacific Northwest makes abundant sense. No credible scenario has even been suggested that alder sawlogs can be processed in a commercially reasonable manner anywhere outside the Pacific Northwest.

Plaintiffs will also show that the geographic market for finished alder lumber is an area comprising the Pacific Northwest. Suppliers in the Pacific Northwest provide finished alder lumber to purchasers throughout the United States and, indeed, in other countries. Thus, all supply is from the Pacific Northwest, and that is "the area of effective competition where buyers can turn for alternate sources of supply." *Tanaka*, 252 F.3d at 1063.

In some cases, the definition of the relevant geographic market is significant. However, in this case it has no effect on whether Weyerhaeuser can monopolize the relevant product market, or whether it has market power in that market. For lumber purchasers in the United States, the only potential source of finished alder lumber is the Pacific Northwest. Thus, whether one defines the geographic market as regional, national, or international, control of alder lumber in the Pacific Northwest gives Weyerhaeuser control of alder lumber throughout the market.

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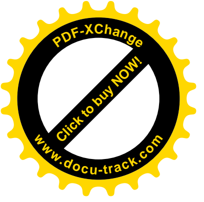

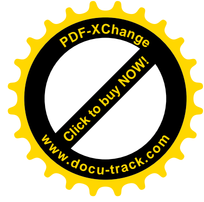

C. Monopoly Power

Monopoly power is "the power to control prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co.,* 351 U.S. 377, 391 (1956). In fact, the ability to exclude competition necessarily results in the ability to control prices, because, "[o]nce a monopolist achieves its goal by excluding potential competitors, it can then increase the price of its product to the point at which it will maximize its profit." *LePage's Inc. v. 3M*, 324 F.3d 141, 164 (3d Cir. 2003) (en banc). "The more competition a company faces, the less it can control prices because competitors will undercut its prices to secure market share. Conversely, a company that can exclude competition can sustain its ability to control prices." *Pepsico, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 107-08 (2d Cir.2002) (citations omitted).[2]

Monopoly power may be inferred from a firm's possession of a dominant share of a relevant market that is protected by entry barriers. *Microsoft II*, 253 F.3d at 51; *see also, e.g., Grinnell,* 384 U.S. at 571 ("The existence of [monopoly] power ordinarily may be inferred from the predominant share of the market."); *Rebel Oil,* 51 F.3d at 1434; *Broadway Delivery Corp. v. United Parcel Serv. of America, Inc.,* 651 F.2d 122, 129 (2d Cir.1981) ("[T]he higher a market share, the stronger is the inference of monopoly power.").

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2 *See also Barr Labs., Inc. v. Abbott Labs.*, 978 F.2d 98, 114 (3d Cir.1992) (competition "would have prevented [defendant] from raising prices for any lengthy period of time"); *Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc.,* 784 F.2d 1325, 1335 (7th Cir.1986) (defining market power as "the ability to cut back the market's total output and so raise price"); *United States v. Microsoft*, 253 F.3d 34, 51 (D.C. Cir. 2001) ("*Microsoft II*") ("A firm is a monopolist if it can profitably raise prices substantially above the competitive level").

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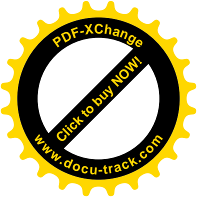

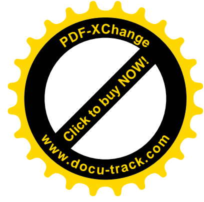

The question of whether a party possesses monopoly power is essentially one of fact. *Los Angeles Land Co. v. Brunswick Corp.* , 6 F. 3d. 1422, 1425 (9th Cir. 1993) , *cert. denied*, 510 U. S. 1197 (1994). Market power can be proven by either direct or circumstantial evidence. *Rebel*, 51 F.3d at 1434.

1. Circumstantial Evidence Of Monopoly Power

To demonstrate market power by circumstantial evidence, a plaintiff must: (1) define the relevant market, (2) show that the defendant owns a dominant share of that market, and (3) show that there are significant barriers to entry and expansion. *Rebel Oil,* 51 F.3d at 1434. Although market share standing alone does not automatically equate to monopoly power, *SmileCare Dental Group v. Delta Dental Plan of California, Inc.*, 88 F. 3d 780, 783 (9th Cir. 1996), it is a starting point for assessing market power. *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 925 (9" Cir.1980), *cert. denied*, 450 U.S. 921 (1981). Where the plaintiff presents evidence of defendant's high market share, along with other evidence of barriers to entry and the defendant's ability to control prices or exclude competitors, the jury may be instructed that such evidence would ordinarily raise an inference of monopoly power. *Oahu Gas Service, Inc. v. Pacific Resources Inc.*, 838 F.2d 360, 366 (9th Cir.), *cert. denied*, 488 U.S. 870 (1988).

Although there are no bright-line tests for what percentage market share is sufficient to support a finding of monopoly power, courts have generally found that 65% market share, where the record also contains other evidence of barriers to entry and the relative weakness of competition, is sufficient to establish a *prima facie* case of market power. *See e.g. American Tobacco Co. v. United States,* 328 U.S. 781, 797 (1946) (over two-thirds of the market is a monopoly); *Image Tech. Serv.*

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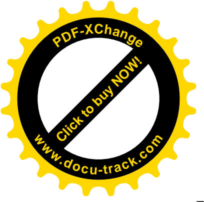

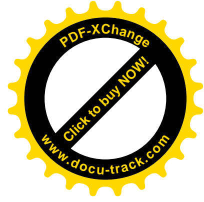

Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1206 (9th Cir. 1997) (65 percent share established *prima facie* case of monopoly); *Movie 1 & 2*, v. *United Artists Communications, Inc.*, 909 F.2d 1245, 1254 (9th Cir. 1990) (showing defendant possessed 69.9% of first-run art film exhibition revenues at least raised an issue of fact as to monopoly power, particularly in light of other evidence of the defendant's power to exclude competition); *Syufy Enterprises v. American Multicinema, Inc.*, 793 F.2d 990, 995 (9th Cir. 1986) (60% to 69% sufficient); *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 926 (9th Cir. 1980) (where market share had been increasing, 65% market share could justify inference of monopoly power); *Pacific Coast Agric. Export Ass'n. v. Sunkist Growers, Inc.,* 526 F.2d 1196, 1204 (9th Cir.1975) (market share as low as 45-70% may support a finding of monopoly power, if accompanied by other relevant factors).

2. Direct Evidence Of Monopoly Power

a. Power To Control Prices In The Relevant Market

Where evidence indicates that a firm has in fact profitably raised prices above competitive levels, the existence of monopoly power is clear. *Rebel Oil,* 51 F.3d at 1434; *see also FTC v. Indiana Fed'n of Dentists,* 476 U.S. 447, 460-61 (1986) (using direct proof to show market power in Sherman Act § 1 unreasonable restraint of trade action); *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1182 n.60 (1st Cir. 1994) (supra-competitive prices were evidence of monopoly power). Moreover, the ability of a firm to price discriminate and earn higher than normal profits are indicators of significant monopoly power. *Rebel Oil,* 51 F.3d at 1434.

b. Power To Restrain Supply In The Relevant Market

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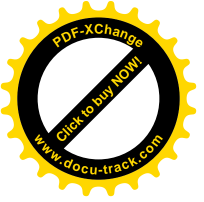
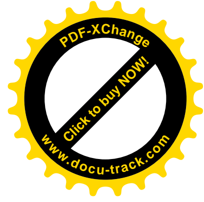

A firm's ability to restrain supply in the relevant market (either by itself or in conjunction with other firms) is also direct evidence of monopoly power, due to the fact that such supply restraints inevitably have the effect of increasing prices. *See Federal Trade Commission v. Superior Court Trial Lawyers Association*, 493 U.S. 411, 423 (1990) ("agreeing upon an output ... will increase the price offered"); *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Oklahoma*, 468 U.S. 411, 423 (1990). As both the Seventh and Third Circuits have held,

> [If] firms restrict output directly, price will ... rise in order to limit demand to the reduced supply. .... Reducing output, and dividing markets have the same anticompetitive effects.

In Re Linerboard Antitrust Litigation, 305 F.3d 145, 160 (3rd Cir. 2002), *quoting General Leaseways, Inc. v. National Truck Leasing Assn.*, 744 F.2d 588, 594-95 (7th Cir. 1984). *See also United States v. Andreas*, 216 F.3d 645, 667 (7th Cir. 2000).

3. Weyerhaeuser's Monopoly Power In The Relevant Lumber Market – Market Share Evidence

At trial, plaintiffs will establish that, by the fourth quarter of 1995, Weyerhaeuser controlled 65 percent or more of the finished alder lumber market. The evidence will also show that Weyerhaeuser's monopoly share of that market increased to approximately 75 percent in 2006. These increases in Weyerhaeuser's alder lumber market share coincided with its anticompetitive conduct and acquisitions during the same period. Where market share is increasing from already high levels, monopoly power may be inferred. *Hunt-Wesson Foods*, 627 F.2d at 926.

4. Weyerhaeuser's Ability To Control Prices And Achieve Supracompetitive Margins In The Relevant Market – Direct Evidence Of Monopoly Power

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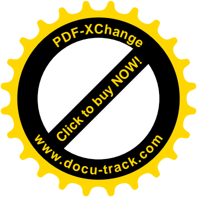

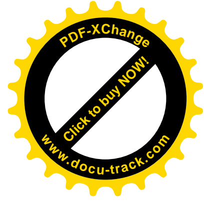

Similarly, Weyerhaeuser's profit margins have increased sharply over competitive levels, a classic hallmark of monopoly and the reward of its long scheme of monopolization. Dr. Janet Netz will present evidence that Weyerhaeuser's profit margins for alder lumber in the damage period were above competitive levels, using two benchmarks: (1) profit margins in alder lumber during a more competitive period, and (2) profit margins in Weyerhaeuser's Eastern hardwoods during this damage period. In both cases, Dr. Netz found that Weyerhaeuser's actual alder margins were significantly higher than the benchmarks would predict if the market were competitive.

Plaintiffs will introduce other evidence that Weyerhaeuser acts like a monopolist. For example, one customer witness testified that, even though his company buys approximately $4,000,000 in alder from Weyerhaeuser per year, Weyerhaeuser treats its prices as non-negotiable, creating the inference that Weyerhaeuser views itself as being immune from competition. Another sign that Weyerhaeuser viewed itself as immune from competition is its practice of "salting" deliveries of lumber by including inferior grades or less valuable pieces of alder lumber in packages labeled with a higher grade or value. In this way, Weyerhaeuser effected hidden price increases, by providing inferior lumber at higher prices.

5. Weyerhaeuser's Ability To Restrict Output In The Relevant Market Is Also Direct Evidence Of Monopoly Power

Plaintiffs will put on evidence from Weyerhaeuser's current and former customers that tell a classic tale of output restraint. For example, Bill Redman, who was the president of a former Weyerhaeuser customer, North Pacific Lumber Company ("North Pacific"), will testify that Weyerhaeuser told him that particular lumber was unavailable at the same time it was offering to sell

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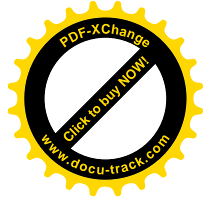

it to others. Subsequently, even though North Pacific purchased more than one million dollars in lumber from Weyerhaeuser each year, Weyerhaeuser suddenly cut it off in 2002, telling Mr. Redman that "We prioritize our customers on their importance to us, and we see no importance of dealing with North Pacific Lumber Company. Bottom line is we don't want to do business with you."

Still more revealing will be Mr. Redman's testimony that a Weyerhaeuser employee told him privately in 2002 (midway into the class damage period) that "there was going to be a huge shortage in the marketplace that nobody knew about." Plaintiffs will introduce evidence that the shortage predicted by Weyerhaeuser in fact occurred, even though Weyerhaeuser's facilities at the time seemed to have insufficient room to store their logs and lumber. Only an alder lumber monopolist would be able to dominate the market to such an extent, and predict and create such shortages – which put upward pressure on pricing of alder lumber.

It is reasonable to infer from Weyerhaeuser's output restraints that it charges prices that are higher than those that would prevail in a more competitive market. *LePage's*, 324 F.3d at 164. Substantial other evidence supports this conclusion. During the period between 1995 and 2002, it will be shown that Weyerhaeuser increased the number and capacity of its mills at the same time that the total number of alder-producing mills was sharply decreasing. Not surprisingly, Weyerhaeuser's alder lumber pricing has gone up disproportionately since it obtained a dominant share and monopoly power over the alder market.

D. Weyerhaeuser's Monopoly Power Is Protected By Substantial And Durable Barriers To Entry

Plaintiffs' expert witnesses, as well as former senior management personnel from Weyerhaeuser and competing sawmills, will testify to the barriers to entry in this case. Weyerhaeuser

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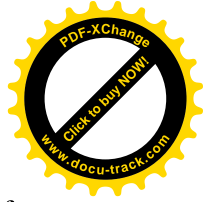

itself has recognized the significant barriers to entry, noting in an internal document: "[l]ow threat of new entrants due to raw material supply in the West." Plaintiffs will also present evidence that Weyerhaeuser, like its expert witnesses, also recognized that it had economies of scale that its competitors did not, that there would be increasing shortages of alder sawlogs, and that a shortage of raw materials can be a barrier to entry.

In *Image Technical Services*, 125 F.3d at 1208, the court held that "[c]ommon entry barriers include ... control of essential or superior resources, entrenched buyer preferences, high capital entry costs and economies of scale." Here, there is a limited and decreasing supply of alder sawlogs, much of that supply has been removed from commerce by Weyerhaeuser, and all of it is available only in the Pacific Northwest. Moreover, the lumber market involves substantial up-front investment as well as working capital.

In addition, the court in *United States v. Syufy Enterprises*, 903 F.2d 659 (9th Cir. 1990) said that "[e]ntry barriers pertain not to those already in the market, but to those who would enter but are prevented from doing so;" thus, "a market containing two firms, each having a 50% share could well be deemed monopolistic if entry barriers prevented other firms from gaining a foothold." *Id.* at 671 n.21. As discussed above, there was no net new entry in the first six years of the damage period; the only new mill to enter – which only occurred in the seventh year – was owned by existing competitors who found it necessary to merge their operations to compete against Weyerhaeuser. Diamond West was able to enter the market only by acquiring the assets of a failed mill that had not been in operation for several years, and it purchased the equipment at liquidation values. Moreover, as discussed above, such entry was insufficient to make up for the effect of mills that shut down. Since

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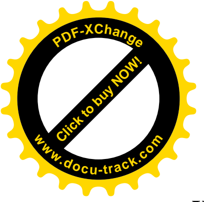
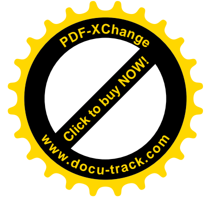

Weyerhaeuser already had monopoly share at the beginning of the damage period, the fact that the alleged new entry did not even make up for mills that left the market hardly shows the triumph of healthy competition.

Moreover, the mere fact of *some* entry is not sufficient to show lack of barriers to entry. "The fact that entry has occurred does not necessarily preclude the existence of 'significant' entry barriers ... Barriers may still be 'significant' if the market is unable to correct itself despite the entry of small rivals." *Rebel Oil*, 51 F.3d at 1440. As Dr. Kamien will testify, the existence of a "competitive fringe" of smaller competitors is not inconsistent with monopoly power and barriers to entry.

Rather, the issue is whether the entry is sufficient to discipline pricing: as the Ninth Circuit and the Department of Justice recognize, entry must be "timely, likely, and sufficient in magnitude, character and scope to deter or counteract the [anti]competitive effects of concern." *Rebel Oil*, 51 F.3d at 1440, quoting 1992 *Department of Justice and Federal Trade Commission Horizontal Merger Guidelines* ("DOJ/FTC Merger Guidelines"), § 3.0; *see also Image Technical Services,* 125 F.3d at 1208 (issue is whether there are "entry barriers sufficient to prevent [the defendant's] monopoly share from self-correcting"; barriers need only be sufficient to "be capable of constraining the normal operation of the market to the extent that the problem is unlikely to be self-correcting"). Here, Plaintiffs' experts have found that the number of competing sawmills in the market has declined, prices continued to rise, and Weyerhaeuser continued to overcharge Class members throughout the damage period.

Significantly, *Rebel Oil* also makes clear that "[w]e know of no authority that would require, as proof of market power, evidence of entry barriers throughout the period of predation." 51 F.3d

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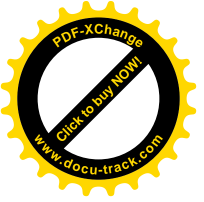
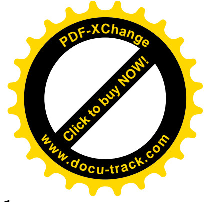

at 1440. In *Oahu Gas Serv., Inc. v. Pacific Resources, Inc.*, 838 F.2d 360, 367 (9th Cir. 1988), cited by *Rebel Oil*, "the entry of two rivals did not preclude the jury's finding that the defendant had actually monopolized the market." 51 F.3d at 1441.

E. Weyerhaeuser's Predatory Conduct Increased And Maintained Its Dominance Over The Alder Lumber Market

Anti-competitive conduct is that which uses monopoly power to foreclose competition, gain a competitive advantage, or destroy a competitor. *Kodak*, 504 U.S. at 482-83. The Supreme Court has endorsed a jury instruction defining "exclusionary conduct" as that which impairs "the efforts of others to compete for customers in an unnecessarily restrictive way." *Aspen Skiing Co. v. Aspen Highlands Skiing Corn.*, 472 U.S. 585, 605 (1985). The Ninth Circuit has defined "[t]he test of willful maintenance or acquisition of monopoly power [as] whether the acts complained of unreasonably restrict competition." *Drinkwine v. Federated Publication, Inc.,* 780 F.2d 735, 739 (9" Cir. 1985). Also relevant is whether there was any valid business reason for the conduct. *Id.*

Although it has been described in various ways, the term "exclusionary" or "anti-competitive" comprehends behavior that impairs the opportunities of rivals. *Aspen Skiing, supra*, 472 U.S. at 605 n.32 (quoting 3 P. Areeda & D. Turner, ANTITRUST LAW 7 (1978)). A distinction must be drawn "between practices which tend to exclude or restrict competition, and the success of a business which reflects only a superior product, a well-run business, or luck." *Aspen Skiing*, 470 U.S. at 604; *see also Image Technical Services,* 125 at 1211. In that context, intent is "relevant to the question [of] whether the challenged conduct is fairly characterized as 'exclusionary' or 'anticompetitive' ... . [or] 'predatory.'" *Aspen Skiing,* 470 U.S. at 602. Exclusion of rivals "on some basis other than efficiency" is "predatory." *Id.* at 602-03 n.1.

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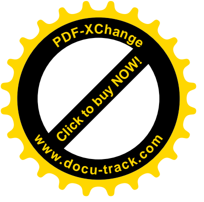

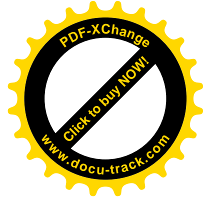

Moreover, conduct that would be innocent if engaged in by a non-monopolist can be considered exclusionary when undertaken by a company with monopoly power. "[A] monopolist must take care that otherwise lawful acts do not have anticompetitive effects because of its monopoly power." *Oahu Gas Service, Inc. v. Pacific Resources, Ltd.*, 838 F.2d 360, 368 (9th Cir. 1988). *See also Greyhound Computer Corp. v. IBM*, 559 F.2d 488, 498 (9" Cir. 1977) (monopolist "precluded from employing otherwise lawful practices that unnecessarily excluded competition").

1. Weyerhaeuser's Acquisitions Helped Create And Maintain Its Monopoly

Weyerhaeuser's decade long campaign to be "the consolidator" of the alder lumber industry, carried out with the clear intent to exclude competition, is evidence of its "willful acquisition of monopoly power" that is actionable under Sherman Act §2. *See e.g. U.S. v. Grinnell Corp.,* 384 U.S. at 576-77 (series of acquisitions achieved monopoly power by unlawful and exclusionary practices, including long term contracts with subscribers that created barriers to competition; pricing practices that contained competitors, and acquisitions of competitors to limit competition). In *Grinnell*, the Court noted: "By those acquisitions it perfected the monopoly power to exclude competitors and fix prices. . . . Since the record clearly shows that this monopoly power was consciously acquired, we have no reason to reach the further position that once monopoly power is shown to exist, the burden is on the defendants to show that their dominance is due to skill, acumen, and the like." *Id.* at 576 & n.7.

Here, Weyerhaeuser repeatedly utilized its size, gained through a relentless drive to not only acquire its competitors and the necessary resources for its own expansion, but also to deprive competitors of critical sawlog supplies, and allow it to exercise its dominance in the alder markets by

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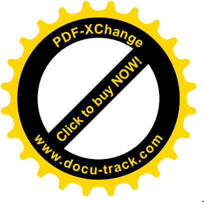
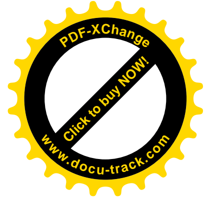
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threatening competitors and suppliers with the loss of business if they did not favor Weyerhaeuser in its demand for raw materials and acquisition of mill capacity. Moreover, this acquisition strategy must be viewed, not in sheer isolation, but in the context of all the other anticompetitive behavior alleged. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962).[3]

2. Weyerhaeuser's Long Term And Exclusive Dealing Arrangements Are Anticompetitive And Raise Barriers To Entry And Expansion

Plaintiffs will prove that Weyerhaeuser's long-term and exclusive, or near-exclusive, log purchasing agreements, exclusive log trading arrangements, and exclusive dealing contracts unlawfully perpetuated Weyerhaeuser's monopoly. When the question is whether a monopolist has unlawfully maintained its monopoly through exclusive contracts, courts require far less foreclosure of the relevant material than in the situation where lower tier competitors enter into such agreements. *United States v. Microsoft Corp.*, 253 F.3d 34, 70-73 (D.C. Cir. 2001) (Section 2 liability "even though the contracts foreclose less than the roughly 40% or 50% share usually required in order to establish a § 1 violation"); *United States v. Dentsply International*, 399 F.3d 181, 197 (3d Cir. 2005); *LePage's Inc. v. 3M*, 324 F.3d 141, 157 & n.10 , 159 (3d Cir. 2003) (en banc). The only test for monopolization is whether there is a relevant market, the defendant has the power to increase

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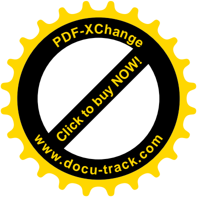
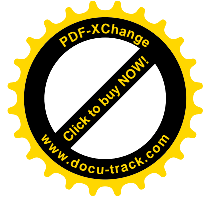
[3] Weyerhaeuser's threats to cut off lumber supplies to brokers and distributors are also support for a violation of §2 if there is no legitimate business reason for such refusals to deal by a company with monopoly power. *See e.g. Kodak,* 504 U.S. at 483 ("If Kodak adopted its parts and service policies [refusing to deal with competitors] as part of a scheme of willful acquisition or maintenance of monopoly power, it will have violated §2). Even disparagement toward competitors and their suppliers can provide support for a violation of §2, particularly where the statements are not factually true and are made by one with the power to exclude competition. *See e.g. United States Football League v. NFL,* 634 F. Supp. 1155, 1183 (S.D.N.Y. 1986) (disparagement by a firm with monopoly power may violate §2) *aff'd*, 842 F.2d 1335 (2d Cir. 1988).





prices or exclude competition in that market, and whether that power was willfully acquired or maintained. *Kodak*, 504 U.S. at 481. There is no need to show *any* particular level of foreclosure, and indeed no such level was shown in either *Microsoft* or *LePage's*.

a. Although Plaintiffs Will Prove That Exclusionary Conduct Continued Throughout The Damage Period, They Are Not Required To Do So

Plaintiffs will also present evidence that foreclosure and anticompetitive conduct continued throughout the damage period. There is, however, no requirement that Plaintiffs show that the foreclosure – or any particular level of it – took place throughout the damage period. *See Rebel Oil*, 51 F.3d at 1440 (no need to show entry barriers throughout anticompetitive period); *Berkey Photo,* 603 F.2d 263, 296 ("The taint of an impure origin does not dissipate after four years if a monopolist continues to extract excessive prices because of it"); *Program Engineering, Inc. v. Triangle Publications, Inc*., 634 F.2d 1188, 1193 n.6, 1194 (9th Cir. 1980) ("A plaintiff may recover for acts violating the antitrust laws that were committed before the limitation period, provided that the damages from such acts accrued and became ascertainable during the limitation period"); *In re Multidistrict Vehicle Air Pollution*, 591 F.2d 68, 73 (9th Cir. 1979) ("An accrual of damages can constitute the accrual of a cause of action even though all wrongful acts took place outside the limitations period"). Even if Weyerhaeuser had completely stopped all anticompetitive conduct in the early 2000s (or even earlier) – for example, in reaction to pending antitrust cases, judgments, or settlements – it would still be liable for overcharges resulting from the monopoly that it only had because it had previously maintained it unlawfully.

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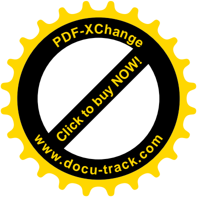

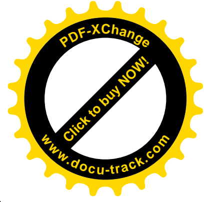

b. Illegal Monopoly Power, Gained or Maintained Through Exclusionary Conduct, Can Lead to Liability for Overcharges Even Long After the Conduct Ceases.

So long as a monopolist continues to use the power it has gained illicitly to overcharge its customers, it has no claim on the repose that a statute of limitations is intended to provide. Thus, as the Supreme Court stated in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971):

> Plainly, at the time a monopolist commits anticompetitive conduct it is entirely speculative how much damage that action will cause its purchasers in the future. Indeed, some of the buyers who will later feel the brunt of the violation may not even be in existence at the time. Cf. *Continental Ore Co., supra*, 370 U.S. at 709-10, 82 S. Ct. 1404. Not until the monopolist actually sets an inflated price and its customers determine the amount of their purchases can a reasonable estimate be made.

Zenith Radio Corp., *supra*, 401 U.S. at 340.

IV. DAMAGES SOUGHT

A. Governing Law

Section 4 of the Clayton Act provides that "any person ... injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore...." 15 U.S.C. § 15(a). Antitrust injury is defined not merely as injury caused by an antitrust violation, but more restrictively as "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

Antitrust injury is made up of four elements: "(1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type

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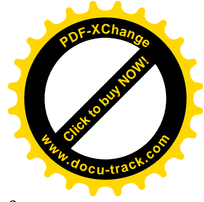
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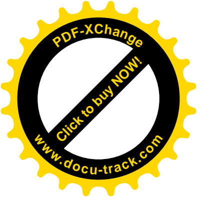
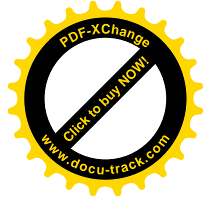
the antitrust laws were intended to prevent." *American Ad Management v. Gen. Tel. Co. of California*, 190 F.3d 1051, 1055 (9th Cir. 1999). In addition, the Ninth Circuit Court of Appeals imposes a fifth requirement, that "the injured party be a participant in the same market as the alleged malefactors.' " *Id.* at 1057 (quoting *Bhan v. NME Hospitals, Inc.*, 772 F.2d 1467, 1470 (9th Cir.1985)). As purchasers in the alder lumber market where trade is allegedly restrained, these class plaintiffs have clearly alleged antitrust injury.

As the Supreme Court stated in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968): "We think it sound to hold that when a buyer shows that the price paid by him for materials purchased for use in his business is illegally high and also shows the amount of the overcharge, he has made out a *prima facie* case of injury and damage within the meaning of § 4." *Id.* at 488. See, *Los Angeles Memorial Coliseum Com'n v. National Football League*, 791 F.2d 1356, 1365 (9th Cir. 1986). However, a plaintiff need not prove that the antitrust violation was the only cause of its injury in order to recover damages under 15 U.S.C. § 15; proof that the violation was a material cause is sufficient. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n. 9 (1969); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc.*, 668 F.2d 1014, 1051 (9th Cir. 1981).

In evaluating Plaintiffs' allegations of conduct resulting in harm to purchasers, the Supreme Court has also stated that "plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962); See also *Knutson v. Daily Review*, 548 F.2d 795, 811-12 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977).

A "defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible." *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 379 (1927); *Knutson*, 548 F.2d at 812. Once a plaintiff establishes the fact of damages with reasonable certainty, the jury will be permitted to "make a just and reasonable estimate of the damage based on relevant data." *Zenith*, *supra*, 395 U.S. at 123-24; *Knutson*, 548 F.2d at 812.

B. Methodology

Plaintiffs will present expert testimony from Prof. Janet Netz, Ph.D. to support the damages calculations presented at trial. Prof. Netz will testify that prices for alder lumber were higher than they would have been but-for Weyerhaeuser's illegal conduct. Weyerhaeuser's illegal conduct harmed class members by substantially reducing competition in the finished alder lumber market, thereby allowing Weyerhaeuser to charge customers supracompetitive prices for finished alder lumber.

Dr. Netz uses two benchmark methodologies, a comparison of Weyerhaeuser's alder mill margins during the damage period to its margins in a period before it acquired monopoly power ("before and after benchmark") and a comparison of Weyerhaeuser's alder mill margins to its Eastern mill margins during the damage period ("Eastern Mill benchmark") to find that Weyerhaeuser's behavior caused supracompetitive prices for alder lumber sold to class members. She then estimated what Weyerhaeuser's profit margins would have been but for its illegal conduct, and the effect this had on the amounts paid by class members. In her expert opinion, monetary damages to class

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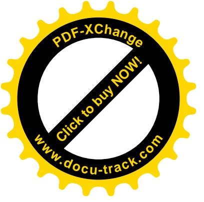
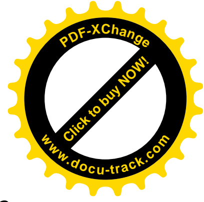
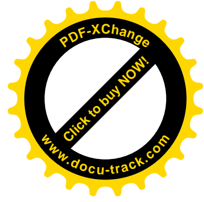



members, using an average of the two reasonable benchmarks, adjusted for inflation, are $37.3 million.

C. Injunctive Relief.

Should the Plaintiffs prevail at the trial in this matter, they intend to seek, in addition to their damages, effective injunctive relief in order to reduce the barriers to competition that continue to allow Weyerhaeuser to maintain its monopoly power in the relevant lumber market. However, as the Court directed in its Order granting class certification, *Morelock Enterprises, Inc. v. Weyerhaeuser Company*, 2004 WL 2997526 *4 (D. Or. Dec. 16, 2004), the terms of proposed injunctive relief will be fleshed out in detail, post-trial at the remedies phase.

Berry & Leftwich
1717 Pennsylvania Ave., NW, Suite 450
Washington, DC 20006



Dated: February 11, 2008

KARNOPP PETERSEN LLP

William F. Buchanan
OSB No.93222
Josh Newton
OSB No.98308
Riverpointe One
1201 NW Wall Street
Suite 300
Bend, Oregon 97701-1957
Telephone: (541) 382-3011
Telecopy: (541) 388-5401
Web: www. karnopp.com
Email: wfb@karnopp.com

BERRY & LEFTWICH

By: /s/ ______________________________

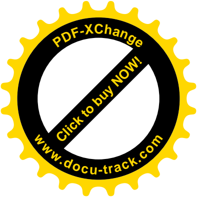
R. STEPHEN BERRY
D.C. Bar No. 234815
Telephone: (202) 296-3020

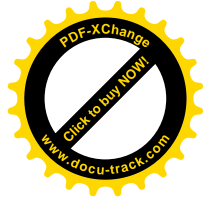
J. Daniel Leftwich
D.C. Bar No. 428134
Gregory Baruch
D.C. Bar No. 420137
1717 Penna. Ave., NW Suite 450
Washington, DC 20006-1809
Telecopy: (202) 296-3038
Web: berry-leftwich.com

O'DONNELL, CLARK & CREW LLP

Stephen F. Crew
OSB No. 78171
Mark P. O'Donnell
OSB No. 68119
Fremont Place, Suite 302
1650 NW Naito Parkway
Portland, Oregon 97209
Telephone: (503) 306-0224
Telecopy: (503) 306-0257
Web: lawyers.com/odonnell&clark
Email: stevec@oandc.com
marko@oandc.com

Attorneys for Plaintiff Class





CERTIFICATE OF SERVICE

R. Stephen Berry certifies that the foregoing was served via the Court's electronic filing system on counsel for the Defendant on February 11, 2008.

/s/______________________________
R. Stephen Berry

Berry & Leftwich
1717 Pennsylvania Ave., NW, Suite 450
Washington, DC 20006