

No. A07-2199

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STATE OF MINNESOTA

IN COURT OF APPEALS

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Paulownia Plantations de Panama Corporation,

Appellant,

vs.

Ambrose Harry Rajamannan, Concie Rajamannan, Agro-K  
Corporation, Perla Verde Service Corporation, and Perla Verde  
SA,

Respondents.

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RESPONDENTS' BRIEF

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## INTRODUCTION

The order of the Hon. Barry A. Sullivan conditionally dismissing this case under the doctrine of *forum non conveniens* correctly and fairly resolved this litigation. The court's decision arose from the inescapable recognition that this case has everything to do with Panama and virtually nothing to do with Minnesota. This is, at its core, a Panamanian dispute arising from contracts and leases executed in Panama that relate to land, trees, and pepper plants located in Panama. The district court correctly decided that both the private interests of the litigants and concerns for the public's best interests heavily favor litigation of this case in Panama.

The court also considered Appellant's argument that *forum non conveniens* dismissal was inappropriate because of the Panamanian legal doctrine of "pre-emptive jurisdiction." The court's decision fairly balanced the parties' arguments and interests, following the example of several reported American cases and dismissed the case conditionally, with the option for Appellant to re-file in Minnesota if pre-emptive jurisdiction ultimately bars litigation in Panama. This decision was correct, demonstrates no abuse of discretion, and therefore should be affirmed in all respects by this Court.

## STATEMENT OF FACTS

### **Appellant's Statement**

Because the district court declined to rule on the parties' cross-motions for summary judgment in light of its decision to conditionally dismiss this case for *forum non conveniens*, only a limited number of facts are actually relevant to the issues presented in this appeal. Minn. R. Civ. App. P. 128.02(c) requires that "[t]he facts must be stated

fairly, with complete candor, and as concisely as possible.” Despite that rule, Appellant devotes 17 pages of its appeal brief to a statement of facts that are both highly contested and unsupported by the record. This is similar to Appellant’s approach in the district court, where its motion papers contained so many inaccurate factual assertions and misrepresentations of the contents of documents that Respondents were compelled to file a document entitled “Defendants’ Statement of Disputed Material Facts” setting forth 96 inaccurate factual assertions along with Respondents’ response to those assertions, supported by citations to the specific documents, deposition testimony, or other source demonstrating that Appellant’s assertions are wrong or, at best, hotly disputed by the parties. (Second Affidavit of A. Harry Rajamannan, filed June 25, 2007 (“Second Raj. Aff.”), Exhibit A.)

Appellant’s version of the “facts” includes a list of five factual assertions it claims Respondent Agro-K Corporation “admits.” (Appellant’s Brief (“App. Brief”) at 14.) Aside from the first item on the list, Appellant’s representation is incorrect. If the voluminous briefing in the trial court proved nothing else, it proved that Respondents vehemently dispute Appellant’s incorrect version of the facts. The inaccuracy of the “facts” presented by Appellant necessitates that Respondents include a somewhat longer Statement of Facts than they would prefer. Respondents will nevertheless focus only on the key facts and avoid a fact-by-fact refutation of all the misstatements in Appellant’s brief. In so doing, Respondents only urge that the Court not assume that Appellant’s factual allegations are true. Should the Court be interested in examining the real factual

record underlying any of Appellant's claims, Defendants' Statement of Disputed Material Facts will likely resolve any questions the Court may have.

### **Paulownia in Panama**

Dr. Ambrose Harry Rajamannan ("Rajamannan") is a businessman residing in Minnesota. (Affidavit of A. Harry Rajamannan filed May 31, 2007 ("First Raj. Aff.") ¶ 1.) His principal current business activity involves running Agro-K Corporation ("Agro-K"), a Minnesota corporation Rajamannan formed in 1976 and which today primarily markets foliar fertilizer products around the world. (First Raj. Aff. ¶¶ 1-2.) As part of marketing Agro-K products globally, Rajamannan traveled to Panama and formed a corporation there to distribute Agro-K products. (First Raj. Aff. ¶ 4.)

During the late 1990s, Rajamannan became interested in the commercial possibilities of growing paulownia trees. (First Raj. Aff. ¶¶ 6-7.) Rajamannan pursued this interest on his own time, with his own resources. (First Raj. Aff. ¶ 7.) He had observed the commercial success of paulownia in China, Southeast Asia, and Australia, where paulownia's fast-growing properties made it successful. (First Raj. Aff. ¶ 6.) Intrigued by the possibility of growing paulownia in the warm Panamanian climate, Rajamannan entered into business agreements and secured land rights to allow the successful growth of thousands of paulownia tree seedlings in a nursery in Panama. (First Raj. Aff. ¶ 9.) In late 1997 and early 1998, Rajamannan formed two Panamanian corporations as vehicles to further pursue his interest in growing paulownia commercially in Panama. (First Raj. Aff. ¶ 9.) These corporations are Respondents Perla Verde Service Corporation ("PVSC"), and Perla Verde S.A. (First Raj. Aff. ¶ 9.)

In October 1997 Robert Shepherd, who ultimately became the principal organizer and fund raiser of Appellant Paulownia Plantations de Panama Corporation (“Appellant” or “PPP”), met Rajamannan in Adelaide, Australia. (Complaint ¶ 8; Deposition of Robert Shepherd (“Shepherd Dep.”) 21:15-20; 9:24-11:5.)<sup>1</sup> Rajamannan had traveled to Australia to do Agro-K business with Jeff Rohrlach, who was also a client of Shepherd’s. (Shepherd Dep. 22:9-10). During the course of a trip to Queensland, Australia, Rohrlach told Shepherd about the commercial prospects of fast-growing paulownia trees and suggested that Shepherd speak with Rajamannan about Rajamannan’s interest in growing paulownia trees in Panama. (Shepherd Dep. 23:2-12.) On that same trip Shepherd and Rajamannan discussed the attributes of paulownia trees and the prospects for growing them commercially in Panama. (Shepherd Dep. 27:18-28:4.) Shepherd understood that paulownia was very new to Panama and had not been established as an industry there. (Shepherd Dep. 70:11-14.) Shepherd and Rajamannan agreed to further discuss the possibility of a project. (Shepherd Dep. 28:6-7.)

### **Robert Shepherd’s Visit to Panama**

In October 1998, Shepherd traveled to Panama and met with Rajamannan to discuss a contemplated project in which paulownia trees and pepper plants would be grown in Panama. (Shepherd Dep. 68:10-12.) They met at Rajamannan’s office in David, Panama. (Shepherd Dep. 68:24-69:3.) Shepherd met Roberto Barnett, a principal manager of PVSC. (Shepherd Dep. 28:6-7) The three of them then drove from David to

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<sup>1</sup> Deposition transcripts from the depositions of Robert Shepherd and Dr. A.H. Rajamannan were filed as Exhibits 1 and 2, respectively, to the Affidavit of William F. Mohrman filed on May 31, 2007.

a paulownia growing operation managed by Rajamannan. (Shepherd Dep. 70:24-71:5; 74:1-4.) Shepherd observed and was impressed by one-year-old paulownia trees that were already 20 to 25 feet tall and three inches around. (Shepherd Dep. 71:2-72:9.) There were approximately 1,000 such trees, planted close together awaiting transplantation. (Shepherd Dep. 72:24-73:1.)

On the same trip, Shepherd visited a nursery in which young paulownia trees were being grown under a quarter-acre shade cloth. (Shepherd Dep. 74:8-15.) The plants were growing, in his opinion, "very well." (Shepherd Dep. at 75:1-2.) He also visited a pepper growing operation in Puerto Armuelles, Panama. (Shepherd Dep. 80:12-19.) Shepherd observed three-year-old pepper vines growing around the trunks of bala trees that were "prolific in their production." (Shepherd Dep. 80:12-19.)

Recalling his October 1998 visit, Shepherd stated that "the itinerary was such that I was shown enough information to make my investment in paulownia and pepper viable in my mind. . ." (Shepherd Dep. 82:24-83:1.) Shepherd further recalled telling Rajamannan at the end of his October 1998 visit "that I'm satisfied what I've seen with the growth of the paulownia and I've seen also that the pepper has grown, I would be interested in looking at the possibility of introducing some of my friends and some of my clients into the possibility of investing in your project which will be managed by you." (Shepherd Dep. 100:22-101:2.)

#### **Creation of PPP and Execution of the Contracts**

In November 1998, PPP was formed as an investment vehicle for Australian investors recruited by Shepherd. (Complaint ¶ 11.) PPP was incorporated in the

Republic of Vanuatu to allow Shepherd and the other investors to exploit favorable Australian tax laws. (Shepherd Dep. at 12:6-11.) Neither Rajamannan nor any entity in which he had an interest was a PPP investor. (First Raj. Aff. ¶ 11.)

On December 30, 1998, Perla Verde S.A. one of the Panamanian companies formed to advance Rajamannan's paulownia interests, entered into multiple twenty (20) year lease agreements (collectively the "Prime Lease") with landowner Felipe Rodriguez for the lease of land in the David district of Panama ("Farm 1"). (Complaint ¶ 16.) On March 12, 1999 PPP entered into two contracts with PVSC. The first was a License to Occupy Land (Farm 1). (Complaint ¶ 18.) The second was the Paulownia and Black Pepper Management Contract (the "Management Contract"), the contract at issue in this litigation. (Complaint ¶ 18.) The Management Contract required PPP to make periodic payments to PVSC and required PVSC to:

- A. Obtain a lease on land on which to grow paulownia;
- B. Clear up to 500 acres for planting (the number of acres depending on how many people Shepherd secured as investors in PPP);
- C. Purchase and plant 200 paulownia trees and 200 pepper plants per acre; and
- D. Care for and fertilize the paulownia, control insects, and control weeds for ten years.

(AA-103-106.)<sup>2</sup> To state the obvious, all of these actions were to take place in Panama. PVSC did, in fact, clear Farm 1 and plant paulownia trees and pepper plants. (First Raj. Aff. ¶ 12.) PVSC obtained young paulownia trees from the nursery Rajamannan had developed before forming PVSC. (First Raj. Aff. ¶ 13.)

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<sup>2</sup> Citations to "(AA)" refer by page number to documents in Appellant's Appendix.

The Management Contract did not require PVSC to use funds received from PPP for any particular purpose. (AA-103-106; First Raj. Aff. ¶ 13.) Thus, once PPP made a management fee payment required by the Management Contract, those funds became the property of PVSC. (First Raj. Aff. ¶ 13.) They were not earmarked to be used for specific payments or purchases related to the paulownia project and could be used by PVSC in any manner PVSC wanted to use them, whether that use benefited PPP or not. (First Raj. Aff. ¶ 13.) The Management Contract required PVSC to obtain access to land, clear the land, supply paulownia and pepper plants, and plant and care for those plants, but PVSC was not required to use the money it obtained from PPP to meet its responsibilities and certainly was not required to spend all of the funds in that manner. (First Raj. Aff. ¶ 13.)

In July 1999 Shepherd traveled to Panama again to meet with Rajamannan and to observe the paulownia and pepper project managed by PVSC. (Shepherd Dep. 48:19-20.) Shepherd made subsequent similar trips to Panama in June 2000, March 2001, January 2002, and May-June 2002. (Shepherd Dep. 48:19-20.) Harold Tomblin, another PPP investor, traveled to Panama in July 1999, early 2001, January 2002, and May-June of 2002 (Tomblin Dep. 16:17-18; 38:6-10; 42:6-7; 67:2-13.)<sup>3</sup> Appellant's Complaint refers in detail to observations Shepherd and Tomblin claim to have made and statements they say Rajamannan made during these visits to Panama, as well as to statements Rajamannan allegedly made in Australia. Significantly, neither Shepherd nor any other

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<sup>3</sup> All relevant portions of the Harold Tomblin deposition are reproduced in Exhibit B to the Affidavit of Aaron Mills Scott filed on May 31, 2007 ("First Scott Aff.").

representative of PPP claims to have ever traveled to Minnesota prior to the initiation of this action.

### **Problems with Plant Growth**

In late 1999, it was apparent that climatic conditions on Farm 1 affected the growth of the pepper vines on the trunks of paulownia trees at that location. (Complaint ¶ 24.) It turned out that the dry season prevailing in that part of Panama (the Pacific side) was too intense for young pepper vines without irrigated water. (Complaint ¶ 24.) Rajamannan suggested that PPP consider using a second property, this one on Panama's Atlantic coast, to grow pepper on posts. (Complaint ¶ 24.) PPP agreed and formed a wholly owned Panamanian entity called Panaust S.A. to carry out that plan. (Complaint ¶ 25.)

By July 2001 the paulownia trees on Farm 1 were not growing as well as PPP and PVSC had hoped. (Complaint ¶ 30.)<sup>4</sup> Rajamannan noted that paulownia trees on an adjoining 360 acres of land ("Farm 2") that PVSC was managing for itself and for Shepherd outside of PPP were growing better and had less damage from sunburn than the trees on Farm 1. (H. Rajamannan Dep. 574:15-575:10.) Rajamannan observed that one noticeable difference between the properties was that PVSC had not cleared the grass between the trees on Farm 2, while grass had been cleared from between the trees on Farm 1. (H. Rajamannan Dep. 574:15-575:10.) Rajamannan felt that sunlight reflecting off bare soil and sand caused sunburn on the trunks of paulownia trees, but that allowing

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<sup>4</sup> The Complaint erroneously alleges July 2000 rather than July 2001. The distinction is not material to this matter.

the grass between the trees to stay in place and painting the lower trunks with white paint reduced sunburn damage. (H. Rajamannan Dep. 814:8-14.)

Rajamannan traveled to Australia for an October 31, 2001 meeting of the PPP shareholders, bringing photographs of the trees on Farm 1 and Farm 2. (H. Rajamannan Dep. 575:11-17.) He offered to have PVSC substitute the trees on Farm 2 for those on Farm 1 at no cost to PPP, allowing PPP to take control of the healthier paulownias on Farm 2 under the same terms as were in place for Farm 1. (H. Rajamannan Dep. 575:20-576:2.) Shepherd's Report to Shareholders of PPP for the October 31, 2001 meeting recited the problems with the less healthy trees on Farm 1 and recorded PPP's acceptance of PVSC's offer:

Dr Rajamannan reported at our meeting that there have been losses over the summer as a result of sunburn damage to the trunk of the tree. The fact that the grass cover between the trees was cut right back over that period to reduce the risk of fire and consequent damage has contributed to the sunburn of the tree trunk. The heat from the sun has radiated from the bare soil onto the tree trunk. . .

In view of the problem that has been experienced, Dr Rajamannan has agreed to underwrite the Project with trees growing on land adjacent to the company's holding and which are owned by the manager of the Project, Pearla Verde Service Corporation.

(First Scott Aff. Ex. A; Shepherd Dep. Ex. 26.)

The substitution of Farm 2 trees for Farm 1 trees was documented in a February 10, 2002, agreement between PPP and PVSC (the "Second License"). (Complaint ¶¶ 32-33.) PVSC agreed to maintain Farm 2 in the same manner as Farm 1; that is, PVSC promised to maintain the paulownia trees in exchange for a management fee and PPP was to receive the proceeds from the sale of pepper and timber. (Complaint ¶ 34.)

### **The April 2002 Fire**

In April 2002 a fire that started outside the paulownia property swept through Farm 1 and Farm 2. (Complaint ¶ 36.) In response to the fire, PVSC coppiced the surviving trees – meaning the trunks of the trees were cut down to approximately 1 foot from the ground to enable the roots to push out a new sucker. (Complaint ¶ 37.) Coppicing young paulownia trees is recognized as a common and productive practice due to the rapid, straight growth that emerges after the tree has been coppiced. (H. Rajamannan Dep. 619:8-11.)

When Shepherd traveled to Panama a short time after the fire, in late May and early June 2002, he observed that most or all of the paulownia trees on Farm 2 had been coppiced. (Shepherd Dep. 334:7-9.) Tomblin accompanied Shepherd on this trip and testified that “[w]hen I went back in late May, June 2002 I could see the trees were shooting and growing again.” (Tomblin Dep. 75:16-17.) He said the trees were “3 or 4 feet high.” (Tomblin Dep. 75:20-22.) A letter sent by Shepherd to all PPP shareholders dated June 7, 2002 stated that “[t]he resultant coppicing of the trees has resulted in a new tree to grow in its place and I was very surprised at the recovery rate (over 95%) and growth of the new trees.” (First Scott Aff. Ex. E, at PPP 0768.) The minutes of a June 20, 2002 PPP shareholder meeting record that “[d]espite the fire all of the Paulownia trees had reshot and, after coppicing, had shown excellent growth characteristics. This is as a result of having a two-year root system in place and the onset of the wet season which will last until December.” (First Scott Aff. Ex. E, at PPP 0763.) By July 1, 2002 a PPP representative observed that “[t]he paulownia farm looks very good with very good

growth with trees already ... more than 8 feet tall.” (First Scott Aff. Ex. B; Tomblin Dep. Ex. 16.)

Despite the recovery of the paulownia trees after the fire, Shepherd and Tomblin had come to Panama in late May 2002 to, in Shepherd’s words, “confront” Rajamannan with complaints about the way PVSC was managing the paulownia and pepper projects. (Shepherd Dep. 280:6-10.) Over several days, Shepherd, Tomblin, and a Panamanian lawyer met to discuss their strategy. (Shepherd Dep. 313:10-20.) A May 22, 2002 memo from Robert Shepherd reveals that PPP’s “preferred result in all of this is as follows: Dr. Rajamannan. . . agrees that Pearla Verde Service Corporation gives up immediately the management of all the projects.” (First Scott Aff. Ex. A; Shepherd Dep. Ex. 25, at pp. 103-04.) Though no formal agreement was reached, Shepherd’s actions forced Rajamannan, and thereby PVSC, to stop managing the PPP project at the end of May 2002. (Tomblin Dep. 124:10-18.) PPP then retained Barnett, Rajamannan’s key assistant, to replace PVSC as manager of the projects. (First Scott Aff. Ex. B; Tomblin Dep. Ex. 16.) Ultimately, however, PPP abandoned the paulownia project. (Shepherd Dep. 358:3-359:10.)

### **The Supposed Minnesota Connection**

Disappointed that their venture to grow paulownia and pepper in Panama was not successful, Appellant brought this action in Minnesota. Appellant attempted to justify its decision to bring this case in Minnesota by arguing that because a Minnesota bank account was used as a pass-through for money paid by PPP under the Management Contract, Minnesota was a proper forum. Use of the Minnesota bank account arose out

of a December 1998 agreement between Rajamannan and Shepherd, motivated by concerns about the security and accessibility of funds, that wire transfers from PPP would be sent to Agro-K's account at TCF Bank and then transferred to Panama as needed, rather than leaving large amounts of cash in accounts in Panama. (Complaint ¶¶ 43-44.) Rajamannan and Shepherd have different recollections of whether this was Shepherd's idea or Rajamannan's idea, but it is undisputed that beginning on December 29, 1998 most PPP management fee payments to PVSC were wired to Agro-K's bank account. (First Raj. Aff. ¶ 15.) Between December 1998 and April 2002, Agro-K received 24 such wire transfers from PPP, totaling \$898,831.45. (Affidavit of Eugene Logan filed May 31, 2007 ("Logan Aff.") ¶ 5, Ex. 1.) In turn, Agro-K made 153 wire transfers from its bank account to persons or entities in Panama between January 5, 1998 and May 17, 2002. (Logan Aff. ¶ 7, Ex. 2.) These transfers totaled \$2,426,164.00. (Logan Aff. ¶ 7.) Both Agro-K accountant Eugene Logan and Agro-K office manager Concie Rajamannan, who reviewed and were familiar with the wire transfer and bank records of Agro-K, state in unequivocal terms that all funds received from PPP were transferred to Panama. (Logan Aff. ¶ 24; Affidavit of Concie Rajamannan filed May 31, 2007 ¶ 18.) Robert Shepherd was aware that Agro-K was to receive wire transfers of management fees sent pursuant to the Management Contract and had no objection to this arrangement. (Shepherd Dep. 238:5-24.)

When it chose Minnesota as the forum to bring its lawsuit, Appellant decided that it no longer viewed its payments made under the Management Contract as "management fees" (as they are called in the contract, AA-103). Rather, Appellant has decided that this

money was an “investment” and that PVSC (and not any of the related Panamanian companies) was required to document that every penny of these management fees was received in a PVSC bank account and then spent on the paulownia project. Indeed, Appellant now takes the position that it does not actually matter whether any paulownia trees or pepper were grown at all: “The issue is the amount of money Respondents allegedly spent on the paulownia farm – not the work performed.” (App. Brief at 49.) This reading of the Management Contract is completely inconsistent with its plain language. (AA-103-106.)

Litigation and discovery proceeded subsequent to case filing in Anoka County, Minnesota. (Notice of Case Filing dated August 9, 2005.) Respondents brought a motion for summary judgment and to dismiss for *forum non conveniens* on May 31, 2007. On September 25, 2007 the district court issued an opinion conditionally dismissing this case under the doctrine of *forum non conveniens*. Appellant’s appeal is from that decision.

## **I. ARGUMENT**

### **A. Standard of Review**

“Minnesota courts in their discretion may decline jurisdiction over transitory causes of action brought by nonresident citizens or noncitizens of this state when it fairly appears that it would be more equitable to have the case tried in another available court of competent jurisdiction.” Hague v. Allstate Ins. Co., 289 N.W.2d 43, 45 (Minn. 1979). “Minnesota forum non conveniens law is patterned after the doctrine set forth by the United State Supreme Court in Gulf Oil [Corp. v. Gilbert], 330 U.S. 501, 67 S.Ct. 839

(1947)]. We explicitly followed Gulf Oil in Hague, 289 N.W.2d 43.” Bergquist v. Medtronic, Inc., 379 N.W.2d 508, 511 (Minn. 1986).

A trial court’s decision on a motion to dismiss for *forum non conveniens* will not be reversed unless the appellate court finds that the trial court abused its discretion. Bergquist, 379 N.W.2d at 511-12. See also Behm v. Nuveen & Co, Inc., 555 N.W.2d 301, 308 (Minn. Ct. App. 1996) (“Dismissal on the basis of the doctrine of forum non conveniens is an equitable remedy, reviewed only for an abuse of discretion.”) Appellate courts have “even greater cause to recognize the discretion of the trial court in dismissing on forum non conveniens grounds a suit brought by a foreign plaintiff.” Bergquist, 379 N.W.2d at 512.

**B. The District Court’s Decision Correctly Determined that Panama is an Available and Adequate Forum.**

The district court determined that a threshold question in any *forum non conveniens* analysis is whether an available and adequate alternative forum exists, noting that this threshold question is implicit in the holdings of cases like Bergquist, 379 N.W.2d at 513, and Kennecott Holdings Corp. v. Liberty Mut. Ins. Co., 578 N.W.2d 358, 360 (Minn. 1998) (AA-8.) The court looked to Alpine View Co., Ltd. v. Atlas Copco AB, 205 F.3d 208, 221 (5th Cir. 2000) to define the elements of the “available and adequate” analysis:

A foreign forum is available when the entire case and all parties can come within the jurisdiction of that forum. A foreign forum is adequate when the parties will not be deprived of all remedies or treated unfairly, even though they may not enjoy the same benefits as they might receive in an American court.

## 1. Availability

As the district court noted: “There is no dispute that the Defendants are ‘amenable to process’ in Panama. The entire case and all the parties come within the jurisdiction of the Panamanian courts.” (AA-9.) This conforms with the instruction in Alpine that “availability” requires that “the entire case and all parties can come within the jurisdiction of” the alternative forum. 205 F.3d at 221. The Affidavit of Humberto Iglesias, presented by Respondents below, states unequivocally that Respondents are subject to the jurisdiction of Panamanian courts and that this entire case could have been brought against these same parties in Panama. (AA-75-76, ¶¶ 9-12.) In its appeal brief, Appellant does not dispute that this case or these Respondents are within the jurisdiction of the Panamanian courts, arguing instead that this fact is “irrelevant.” (App. Brief at 42.)

Since it is undisputed that Panama is an “available” alternative forum, the inquiry must turn to whether Panama offers an “adequate” forum.

## 2. Adequacy

At the outset of any *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum. Ordinarily, this requirement will be satisfied when the defendant is ‘amenable to process’ in the other jurisdiction. [citation omitted] In rare circumstances, however, where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirement may not be satisfied. . .

Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255, n.22, 102 S.Ct. 252 (1981).

Appellant urges that this case is one of those “rare circumstances” mentioned in Piper, where litigation in the alternative forum will be so “clearly unsatisfactory” that the

district court could not dismiss this case for *forum non conveniens*. Appellant advances two arguments to support this position, claiming that the procedures in Panamanian courts offer a less attractive alternative to litigation in Minnesota, and secondly asserting that Appellant's decision to bring this case in Minnesota extinguished the right of Minnesota courts to dismiss the case under the doctrine of pre-emptive jurisdiction.

**a. Appellant has a Remedy in the Panamanian Courts**

Appellant argues that Panama is an "inadequate" forum because the manner in which depositions may be used at trial, the number of witnesses that may be called, and other Panamanian procedural rules make litigation there less favorable. (App. Brief at 41-42.) While it may be that these considerations are what led Appellant to choose to bring its case thousands of miles from where this dispute originated, these claimed differences do not establish that Panama is "inadequate."

The Supreme Courts of both the United States and Minnesota have directly addressed the possibility that the law in the alternative forum may be less favorable to one of the litigants, rejecting precisely the argument Appellant makes.

In fact, if conclusive or substantial weight were given to the possibility of a change in law, the *forum non conveniens* doctrine would become virtually useless. Jurisdiction and venue requirements are often easily satisfied. As a result, many plaintiffs are able to choose from among several forums. Ordinarily, these plaintiffs will select that forum whose choice-of-law rules are most advantageous. Thus, if the possibility of an unfavorable change in substantive law is given substantial weight in the *forum non conveniens* inquiry, dismissal would rarely be proper. Except for the court below, every Federal Court of Appeals that has considered this question after Gilbert has held that dismissal on grounds of *forum non conveniens* may be granted even though the law applicable in the alternative forum is less favorable to the plaintiff's chance of recovery.

Piper, 454 U.S. at 250 (reversing decision of Third Circuit Court of Appeals, which had reversed district court order granting motion to dismiss for *forum non conveniens*). “Differences in the substantive law will enter into the court’s analysis only if there is *absolutely no effective remedy* in the alternative forum.” Bergquist, 379 N.W.2d at 512 (citing Piper, 454 U.S. at 254) (emphasis added).

Appellant’s complaints about litigation in Panama do not establish that there is “absolutely no effective remedy” in the Panamanian courts. Bergquist, 379 N.W.2d at 512. While Appellant clearly prefers American procedural rules, the standard that must be met to demonstrate that a forum is “inadequate” requires much more. Appellant also alleges, with scant substantiation, that Panamanian courts suffer from corruption. But Appellant has offered no evidence sufficient to establish that this is the “rare circumstance” where Appellant would have “absolutely no effective remedy.” Piper, 454 U.S. at 255, n.22; Bergquist, 379 N.W.2d at 512.

It should be noted that Appellant is a Vanuatu-based corporation formed for the purpose of investing in Panama and that Appellant consciously involved itself in a series of business transactions, including executing contracts for performance in Panama, which undeniably exposed Appellant to litigation in Panama. Furthermore, once the principals operating Appellant became dissatisfied with the growth of the paulownia trees, they manipulated the Panamanian courts to sequester the assets of Respondents in Panama. (First Scott Aff. Ex. A; Shepherd Dep. Ex. 25, at 103-04.) Appellant’s conscious choice to engage in business in Panama and its use of Panamanian judicial resources in the past (when it suited Appellant’s advantage) belies any notion that Panama is an “inadequate”

forum for this case. The district court properly concluded that Panama is an adequate forum and this determination does not demonstrate any abuse of discretion.

**b. The District Court Correctly Decided the Issue of Pre-Emptive Jurisdiction.**

In their arguments to the district court, the parties disputed whether the doctrine of pre-emptive jurisdiction would block litigation of this case in Panama. The court carefully addressed this issue and identified several reasons supporting a determination that litigation in Panama would not be barred. The district court's opinion nevertheless protected Appellant's rights through a conditional dismissal, providing that if this case is "dismissed by the courts of Panama for lack of jurisdiction, then Plaintiff is free to move the Court to re-open this file." (AA-2.) The court's decision is the correct result in this case, is fully within the court's discretion, and should be affirmed.

**(1) Judge Sullivan's Decision is Clearly Supported by Case Law.**

At least three *reported* cases considering *forum non conveniens* dismissal in favor of litigation in Panama have explicitly considered the possibility that litigation in Panama will not be allowed to proceed for jurisdictional reasons and have crafted precisely the same solution reached by Judge Sullivan – conditional dismissal with the option to re-file in the American forum in the unlikely event the case could not proceed in Panama. In Chandler v. Multidata Sys. Intern. Corp., 163 S.W.3d 537, 547-48 (Mo. Ct. App. 2005), the Missouri Court of Appeals refused to disturb the trial court's decision dismissing for *forum non conveniens* in favor of litigation in Panama. The court considered the plaintiffs' arguments that jurisdiction in Panama would be rejected because – just as

Appellant argues – the plaintiffs chose to bring their claim first in the United States. Id. at 548. The court rejected this argument, but crafted its dismissal to protect the plaintiff's rights in the event that a jurisdictional block existed. Id. (“Moreover, assuming that Panama does refuse to proceed, this action can be re-filed in Missouri as a dismissal for *forum non conveniens* is necessarily a dismissal without prejudice.”) The Missouri Court of Appeals held that the trial court did not abuse its discretion in crafting its conditional dismissal. Id.

Similarly, in Del Rio v. Ballenger Corp., 391 F. Supp. 1002, 1006 (D.S.C. 1975), the United States District Court for the District of South Carolina dismissed a case for *forum non conveniens* in favor of litigation in Panama, expressly preserving the plaintiff's rights by providing that, after dismissal: “Any resistance to the jurisdiction of that [Panamanian] court. . . will cause this court immediately to abandon the doctrine and proceed under the jurisdiction which this court unquestionably has.” Id. Finally, in Scotts Co. v. Hacienda Loma Linda, 942 So.2d 900, 903 (Fla. Dist. Ct. App. 2006), the Florida District Court of Appeal dismissed a case on *forum non conveniens* grounds in favor of litigation in Panama, but protected the plaintiffs' rights in the event their pre-emptive jurisdiction argument turned out to have merit. “As an additional safeguard, the parties must also stipulate as a condition of dismissal that the court retain jurisdiction in the event the Panama court does not entertain the case based on pre-emption.” Id.

Appellant cites no reported cases supporting its position that pre-emptive jurisdiction bars American courts from exercising their discretion to dismiss cases for *forum non conveniens* where the alternative forum is Panama. The sole case upon which

Appellant relies is Johnston v. Multidata Sys. Intern. Corp., No. G-06-CV-313, 2007 WL 1296204 (S.D. Tex. April 30, 2007). Appellant fails to inform the Court – despite the fact that the copy of the case reproduced in Appellant’s appendix bears a large red flag in the upper left corner (AA-23) – that in the months since the unpublished Johnston decision was issued, the Judge who wrote the opinion (the Hon. Samuel Kent) has been suspended from the bench and his cases have been reassigned to other judges. The Southern District of Texas has *sua sponte* vacated Judge Kent’s order denying a motion for interlocutory appeal and has certified the order denying *forum non conveniens* dismissal for immediate interlocutory appeal. Johnston, 2007 WL 3998804, at \*1 (Nov. 14, 2007). Shortly before his suspension, Judge Kent issued an order denying defendants’ motion for certification of interlocutory appeal of his previous order denying dismissal for *forum non conveniens*. Johnston, 2007 WL 2064817, at \*1 (July 13, 2007). The judge who assumed responsibility for Judge Kent’s docket *sua sponte* noted his “serious concerns” over Judge Kent’s decisions, vacated the July 13, 2007 order denying immediate interlocutory appeal, and certified the April 30, 2007 order upon which Appellant totally relies for its pre-emptive jurisdiction argument for immediate interlocutory appeal. Johnston, 2007 WL 3998804, at \*1 (Nov. 14, 2007). The Fifth Circuit accepted the appeal and it is proceeding. See Johnston, et al. v. Multidata Sys. Int’l Intern. Corp., No. 07-41232 (5th Cir.). It is apparent that the Johnston case – the central case in Appellant’s entire argument on appeal – has no precedential value.

In its appeal brief, Appellant attempts to distinguish the reported American cases cited by Respondents on the basis that they were decided before the passage of a

Panamanian law, Article 1421-J (which Appellant's expert refers to as "Law 32"). (App. Brief at 38, 39, n.5.) This argument completely contradicts the opinion of Appellant's own expert, who unambiguously opined: "It should be noticed [sic] that even without Law 32 the result would be the same. As the Statement of Legislative Intent says, Law 32 does not 'innovate,' preemptive jurisdiction causes the same effect." (AA-57, ¶ 20.)

Presumably because it recognized the problems inherent in relying on a statute passed *after* this litigation was initiated in Minnesota, Appellant forcefully argued below that Article 1421-J changed nothing and that other provisions of Panamanian law pre-existing Article 1421-J compelled the same result. (Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss at 7.) Appellant's expert relied on several Panamanian judicial decisions predating passage of Article 1421-J in his Affidavit. (AA-60-64.)

Appellant's position is plainly untenable; it cannot be the case that Respondents' pre-2006 decisions are distinguishable based on time but Appellant's are not. If Appellant's expert is correct in stating repeatedly and unequivocally that Panamanian pre-emptive jurisdiction law was unchanged by the passage of Article 1421-J, it is apparent from the holdings of three different reported American cases that conditional dismissal to Panama – with the possibility of returning to Minnesota if the case is not permitted to proceed in Panama – is the proper decision.

The weight of authority in American courts considering the very question posed in this case supports Judge Sullivan's decision. Conditional dismissal is the proper mechanism to resolve cases like this one. The sole, unpublished decision upon which

Appellant relies – and the dubious precedential value of which Appellant fails to acknowledge to this Court – fails to provide any support for an argument that the district court abused its discretion. The tried and true practice of conditional dismissal appropriately protects Appellant’s rights and is the proper resolution of this case in Minnesota.

(2) **The Doctrine of Pre-Emptive Jurisdiction Will Not Bar Litigation of this Case in Panama.**

The district court recognized that this Court can uphold the conditional dismissal of this case from Minnesota with a high level of confidence that the case will *not* return, because it does not appear that the doctrine of pre-emptive jurisdiction would bar the litigation of this case in Panama.

First, according to Appellant’s expert’s own article, the sensitivity in some Latin American countries about the *forum non conveniens* doctrine is motivated by concern that residents of those countries will be deprived of their chosen forum (frequently the United States) when they choose to sue foreign defendants. As Mr. Dahl’s own article states:

My country considers that our citizens are treated in a discriminatory way due to the application of the *form non conveniens*’ theory.” Legal Opinion by the Attorney General of Ecuador. (citation omitted) “The effects of the mentioned theory cause a procedural discrimination against our citizens abroad because, in practice, it is against the latter that foreign courts close their doors and not against the nationals of the foreign judge. Accordingly the *forum non conveniens* theory leads to xenophobic results.” Congress of Honduras, Resolution in the Defense of Legislative Sovereignty. (citation omitted)

(Henry Saint Dahl, Forum Non Conveniens, Latin America and Blocking Statutes at 28, n.35, Exhibit 7 to the Affidavit of Henry Saint Dahl (“Dahl Aff.”).) Consistent with this

policy purpose, each of the cases relied on by Appellant follows the pattern of Latin American plaintiffs whose attempt to litigate a case in the United States against United States defendants has been dismissed for *forum non conveniens*. Santos Abrego Morales (Dahl Aff. Ex. 12 at 1-2) (suit by Panamanian plaintiffs against United States defendant); Martinez v. Dow Chemical Co., 219 F. Supp. 2d 719, 721-22 (E.D. La. 2002); 2002 U.S. Dist. LEXIS 13481 (Dahl. Aff Ex. 4, suit by plaintiffs from Costa Rica, Honduras, and the Philippines against a United States defendant); Johnston, 2007 WL 1296204, at \*1 (April 30, 2007). Unlike the cases relied upon by Appellant, the present suit was brought not by a Panamanian resident, but by a corporation domiciled in Vanuatu. Also unlike the cases on which Appellant relies, two of the Defendants in this case, PVSC and Perla Verde S.A. actually *are* Panamanian residents. If Appellant's argument is accepted by this Court, these Panamanian defendants will have been deprived of the opportunity to defend themselves in their home forum simply because a Vanuatu corporation chose to forum shop and force them to defend themselves thousands of miles from home. That result is not contemplated in the cases or articles upon which Appellant relies.

Second, it appears that Article 1421-J does not even apply to this case. The text of Article 1421-J provides that pre-emptive jurisdiction dictates that a *forum non conveniens* "judgment" from a foreign court does not "generate national jurisdiction" in Panama. (AA-11.) As the district court accurately observed, a *forum non conveniens* dismissal in Minnesota is not a "judgment" and is not a decision on the merits. (AA-16-17.) Furthermore, there is no need for a *forum non conveniens* decision to "generate" national jurisdiction in this case – it is undisputed that the Panamanian courts had the power to

exercise jurisdiction over this case and all the Defendants when the case began. The district court properly noted that it is deeply questionable whether the statute applies where, as here, “foreign plaintiffs choose foreign forums against Panamanian businesses.” (AA-17.)

Third, the Panamanian Judicial Code, sections 244, 247, 248, and 249 allow Defendants to waive jurisdictional defenses. Johnston, 2007 WL 1296204, at \*26 (April 30, 2007) (AA-46.) Respondents have done so in this case, as was required by the district court’s conditional dismissal. (AA-1.) This consent would likely permit litigation to proceed in Panama even if the doctrine of pre-emptive jurisdiction actually applied.

Finally, even if Appellant’s expert is wrong and Article 1421-J adopted a new rule that never before existed in Panama, there is no reason to believe that the statute would retroactively apply to this case. As Appellant notes, the Complaint and Answer in this case had both been served by January 2005, well before the passage of Article 1421-J. (App. Brief at 43.) Appellant’s expert provides no opinion suggesting that Article 1421-J applies retroactively – presumably because his opinion is that Article 1421-J did not change Panamanian law. The district court’s decision properly ordered conditional dismissal in light of the highly doubtful possibility that Article 1421-J could reach back and affect the outcome of this case.

Appellant argues at length that foreign law is “generally classified as a question of fact” and that, in effect, the district court abused its discretion by doing anything other than exactly what Appellant’s expert urged. According to Appellant, it is improper for

the court to read the text of a Panamanian statute and decisions of courts addressing the doctrine upon which Appellants rely. Appellant further claims Respondents' expert's Affidavit should be either ignored<sup>5</sup> or dismissed as irrelevant. (App. Brief at 29-39.) But the district court properly exercised its discretion to consider the available factual and legal sources and to craft a remedy that protected Appellant's rights in the unlikely event there is a bar to litigation in Panama. Respondents' expert unequivocally opined that this case could have been brought in Panama against all Defendants. This not only demonstrates the existence of an alternative, "available" forum, it is consistent with Minnesota law of *forum non conveniens*. "In holding that *forum non conveniens* presupposes at least two forums in which the defendant is amenable to process, we understand that rule to imply that the plaintiff must have a present available right to secure involuntary process in more than one jurisdiction *at the time the suit is started.*" Hill v. Upper Mississippi Towing Corp., 89 N.W.2d 654, 660 (Minn. 1958). (emphasis added).

The trial court's decision crafted the most appropriate possible resolution of this case in the Minnesota courts. That decision is supported by decades of reported case

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<sup>5</sup> Appellant argues that the district court should not have considered the expert's affidavit because Respondents did not disclose the expert in response to Appellant's Interrogatory Nos. 7 and 8. (App. Brief at 27.) Interrogatory No. 7 asked Respondents to "State the name and address *for each person you intend to call as an expert witness at trial.*" (AA-85.) (emphasis added.) Interrogatory No. 8 asked for a list of information "[w]ith respect to each expert *whom you intend to call as a witness at trial.*" (AA 85.) (emphasis added). The expert in question was not retained as a trial expert and did not fall within Appellant's discovery requests. Moreover, it is readily apparent from Appellant's substantial submissions through its own expert's affidavit that it was in no way prejudiced by the fact or timing of the submission of Respondents' expert's affidavit.

precedent in American courts and strikes a just compromise between protecting the parties' competing interests. If the highest court of Panama ultimately affirms dismissal for lack of jurisdiction, Appellant may re-file in Minnesota with no prejudice to its substantive rights. (AA-16.) The district court's decision was fully within its discretion and should be affirmed.

**C. The District Court's Decision Correctly Weighed the Private and Public Interest Factors.**

Minnesota's *forum non conveniens* law is patterned after the doctrine set forth by the United State Supreme Court in Gulf Oil, 330 U.S. 501. Hague, 289 N.W.2d at 43; Bergquist, 379 N.W.2d at 51. Beginning with the Minnesota Supreme Court's decision in Hague, Minnesota courts have employed the private and public interest factors articulated in Gulf Oil in deciding *forum non conveniens* cases. Hague, 289 N.W.2d at 46 (citing Gulf Oil, 330 U.S. at 508); Bergquist, 379 N.W.2d at 512, n.4. Courts use the relevant private and public interest factors to determine whether *forum non conveniens* dismissal makes sense on the facts of each particular case.

Where a United States plaintiff brings a case within the United States, the traditional rule provides that "the plaintiff's choice of forum should rarely be disturbed." Hague, 289 N.W.2d at 46 (quoting Gulf Oil, 330 U.S. at 508). This case presents a different situation.

When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference. . . . The traditional

presumption that the plaintiff's choice of forum should not be disturbed will not be given full effect when the plaintiff is foreign. . .

Bergquist, 379 N.W.2d at 512-13. The district court's decision accorded proper, minimal deference to Appellant's choice of forum, finding that the relevant factors of convenience weighed heavily in favor of trial in Panama rather than Minnesota.

#### 1. Private Interest Factors

The district court did not abuse its discretion in holding that the private interest factors set forth in Gulf Oil "weigh heavily in favor of dismissal." (AA-19.) Rather, the court correctly perceived that this case has everything to do with Panama, virtually nothing to do with Minnesota, and it would be unfairly inconvenient and prejudicial to Respondents if they were forced to litigate this case in Minnesota.

The Supreme Court's decision in Gulf Oil set forth a detailed list of private interest factors for courts to consider:

Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. The court will weigh relative advantages and obstacles to a fair trial.

Gulf Oil, 330 U.S. at 508. See also Bergquist, 379 N.W.2d at 512, n.4. The district court correctly held that the difficulties and expense associated with getting willing witnesses out of Panama and into Minnesota for trial and the lack of any instrument for compulsory process to compel unwilling witnesses to travel from Panama to give testimony heavily favor dismissal. (AA-19-20.) The court also noted that since Appellant's principal,

Robert Shepherd, resides in Australia and will be traveling overseas for trial regardless, there is not a meaningful difference to Appellant between traveling to Minnesota or Panama. (AA-20.)

The court's decision is correct; trial in Minnesota would be profoundly and prejudicially inconvenient for Respondents. Minnesota courts have consistently held that dismissal for *forum non conveniens* is appropriate where important witnesses are located in another jurisdiction from which the Minnesota court cannot compel attendance to give testimony. See Bergquist, 379 N.W.2d at 513 (reversing denial of motion to dismiss for *forum non conveniens* where court lacked power to compel attendance of witnesses from Sweden); Bongards' Creameries v. Alfa-Laval, Inc., 339 N.W.2d 561, 562 (Minn. 1983) (reversing trial court's denial of motion to dismiss for *forum non conveniens* because documentary evidence and likely witnesses were located outside Minnesota); Fourth Northwestern Nat'l Bank v. Hilson Indus., Inc., 117 N.W.2d 732, 737-38 (Minn. 1962) (holding state statute unconstitutional as applied given violation of *forum non conveniens* principles where physical evidence of what occurred was located in Ohio and Defendant expressed intent to call witnesses from Ohio); Tandy Computer Leasing, a Div. of Tandy Electronics, Inc. v. Lysford, No. CO-88-551, 1988 WL 70254, at \*1 (Minn. Ct. App. July 12, 1988) (affirming dismissal for *forum non conveniens* where contract was performed and negotiated in North Dakota, a number of potentially important witnesses were in North Dakota, and no witness other than the Defendant himself was located in Minnesota); O'Neil v. Allstate Ins. Co., No. C4-98-1980, 1999 WL 230943, at \*1 (Minn. Ct. App. April 20, 1999) (affirming dismissal for *forum non conveniens* because events

giving rise to claim occurred in Colorado and parties to litigation had extensive ties to Colorado).

The heart of Appellant's claim – despite the manner in which it has attempted to recast the issues to this Court – lies in the allegation that Respondents received money pursuant to the Management Contract between PPP and PVSC but failed to provide services. Respondent PVSC contends that it did, in fact, perform under the contract. But, because Minnesota courts provide no compulsory process to compel citizens and residents of Panama to appear to testify, Respondents' defense will be severely prejudiced. Even witnesses willing to appear to testify and support Respondents' case face substantial obstacles in the form of the expense of traveling to Minnesota and the difficulty inherent in obtaining a visa to enter the United States from Panama. Respondents have specifically identified several key witnesses residing in Panama who possess knowledge of PVSC's performance under the contract and that Respondents would call to testify at trial. (First Scott Aff. ¶ 2.) These witnesses include Felipe Rodriguez (the owner of the land on which Farm 1 and Farm 2 were located), project forestry engineer Celedonio Morales, and former PVSC office manager Carola Santos. (First Scott Aff. ¶ 3.) Respondents would also call laborers who performed work at the locations in Panama at which PVSC managed paulownia and pepper projects. These witnesses would all be expected to testify regarding the work performed by PVSC in Panama and the condition of the paulownia and pepper growing operations throughout the relevant time period. (First Scott Aff. ¶ 4.)

Appellant raises several arguments in an effort to demonstrate an abuse of discretion. First, Appellant argues that because Respondents have not presented affidavits from the witnesses they wish to call at trial, the Court should not consider the unavailability of those witnesses. (App. Brief at 48.) This argument is contrary to clear and controlling Supreme Court law.

[The party opposing dismissal] suggested that defendants seeking *forum non conveniens* dismissal must submit affidavits identifying the witnesses they would call and the testimony these witnesses would provide if the trial were held in the alternative forum. *Such detail is not necessary.* Piper and Hartzell have moved for dismissal precisely because many crucial witnesses are located beyond the reach of compulsory process, and thus are difficult to identify or interview. Requiring extensive investigation would defeat the purpose of their motion. Of course, defendants must provide enough information to enable the District Court to balance the parties' interests.

Piper, 454 U.S. at 258 (emphasis added). The Supreme Court specifically approved the level of detail provided in Piper, which included affidavits stating *by category* the witnesses that the defendants would call if given the opportunity. Id. at 259, n.27. Respondents have provided more than sufficient detail regarding the witnesses and testimony that are unavailable to them if trial were to be held in Minnesota.

Appellant also states, without citing any law, that the availability of compulsory process to compel testimony is meaningless because Respondents could take video depositions of all the Panamanian witnesses “under the Hague Convention” and present them at trial in Minnesota. (App. Brief at 50.) Even assuming, *arguendo*, that the Hague Convention on Taking of Evidence Abroad would allow Respondents to take such depositions, they are plainly an inadequate substitute for live testimony.

This procedure [depositions under the Hague Convention] poses difficulties in obtaining adequate deposition testimony. For example, this procedure is expensive and time-consuming. In addition, conducting a substantial portion of a trial on deposition testimony precludes the trier of fact from its most important role; evaluating the credibility of witnesses. All of these problems can be avoided by trial in [the foreign nation].

Torreblanca de Aguilar v. Boeing Co., 806 F. Supp. 139, 144 (E.D. Tex. 1992).

Appellant's suggestion that Respondents should be forced to conduct their trial through the use of video depositions taken through the Hague Convention is unpersuasive.

Finally, Appellant argues that a judgment in the Panamanian courts will not be enforceable against Respondents and thus this case should not be dismissed. (App. Brief at 50.) This argument ignores the express conditions under which the district court dismissed this case, which included a requirement that: "Defendants shall agree to satisfy any resulting judgment from the courts of Panama." (AA-2.) Respondents have unambiguously communicated their agreement to abide by all of the district court's conditions of dismissal to Appellant's counsel. Enforceability of a judgment from the courts of Panama is a non-issue.

The unavailability of sources of proof to Respondents in Minnesota supports dismissal of this case on the grounds of *forum non conveniens*. The district court was correct – and certainly did not abuse its discretion – in ruling that the private interest factors weigh strongly in favor of dismissal to Panama.

## **2. Public Interest Factors**

The district court was also well within its discretion in holding that the public interest factors "weigh heavily in favor of dismissal." (AA-20.) This case is clearly one

that will consume significant time and judicial resources wherever it is tried. In light of these facts it should be the courts of Panama, rather than those of Minnesota, burdened with resolving this case.

The Supreme Court has set forth a series of “public interest factors” to be considered by trial courts in deciding whether to grant motions to dismiss for *forum non conveniens*:

Factors of public interest also have a place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in a law foreign to itself.

Gulf Oil, 330 U.S. at 508-09; Bergquist, 379 N.W.2d at 512, n.4.

This dispute stems from the decision of Australians, operating through a Vanuatu corporation, to enter into a Management Contract relating to tree and pepper growing operations in Panama. It is not a Minnesota dispute and Minnesota’s courts should not be burdened with the time and expense of what would undoubtedly be a lengthy and complicated trial – one made even more difficult by the fact that many of the contracts and leases are written in Spanish. The court correctly noted: “The contracts and leases were executed in Panama. Performance was required in Panama. The fire occurred in Panama.” (AA-20.) A Minnesota court and a Minnesota jury should not be forced to

incur the time and expense of resolving a foreign dispute. As the Minnesota Supreme Court reasoned in Bergquist:

Why should the United States taxpayers, or the taxpayers of Minnesota in the present case, be presumed to pay for the costs of trial for a plaintiff who is a citizen of a foreign nation; who has a remedy in his own country; and whose defendant consents to being sued in the foreign country?

Bergquist, 379 N.W.2d at 512. The same public factors weigh against this case continuing in Minnesota. Appellant has a remedy in the courts of Panama and Respondents have consented to being sued and satisfying any judgment that might result in the courts there.

The trial court also noted the obvious: “It seems clear that Panamanian law will predominate.” (AA-20.) This finding is compelled by the Supreme Court’s decisions in Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 822, 105 S.Ct. 2965 (1985) and Home Ins. Co. v. Dick, 281 U.S. 397, 407-08, 50 S.Ct. 338 (1930), which hold that a state may not impose its law on a dispute unless the state has a significant contact or aggregation of contacts to the dispute and that a state cannot impose its law on a dispute regarding rights under a contract made and performed almost entirely outside the state’s borders. Although it is true that Minnesota courts are capable of conducting trials using non-Minnesota law, cases considering the application of foreign law recognize that this public interest factor weighs in favor of dismissing such a case. In affirming the trial court’s decision granting dismissal for *forum non conveniens* in Bonzel v. Pfizer, Inc., the Minnesota Court of Appeals held that because German law applied to the dispute, “[t]he people of Germany have a significant stake in seeing that their law is properly considered

and applied . . . German law is best interpreted by German courts.” No. C9-03-47, 2003 WL 21743768, at \*5 (Minn. Ct. App. July 29, 2003); Bongards’ Creameries, 339 N.W.2d at 563 (citing facts that courts in New York would have personal jurisdiction over the defendants, the defendants executed a contract in New York, and New York law applied to the dispute as reasons to reverse trial court denial of motion to dismiss for *forum non conveniens*); Tandy, 1988 WL 70254, at \*1 (citing the necessity of applying North Dakota law in Minnesota as a factor in affirming dismissal for *forum non conveniens*). See also Bergquist, 379 N.W.2d at 512.

The district court correctly observed that if trial were to proceed in Minnesota: “A Minnesota judge and jury would be required to understand and apply Panamanian law of contracts, licenses, real estate, and negligence. Clearly, a court in Panama would be better able to apply such law.” (AA-20.) The court also observed that if trial proceeded in Minnesota, “[A] jury would need to make factual findings out of social context. Their common sense and life experiences, so valuable to any deliberation, may be of little guidance in this case.” (AA-20.)

All of these issues weigh decisively in favor of trial in Panama, where a judicial system can bear the burden of resolving a large and complicated case locally, under the prevailing law of the land, and within the social context of the events underlying the litigation. The district court properly dismissed this case – and certainly did not abuse its discretion – in light of the public interest factors weighing heavily in favor of dismissal.

**D. The District Court did Not Abuse its Discretion in Finding Respondents' Motion Timely.**

Appellant argues that “Respondents waived their right to bring a motion for *forum non conveniens*” because of the passage of time from the start of this case until Respondents filed the motion to dismiss. (App. Brief at 43.) The district court correctly held that it “cannot find waiver” because the parties asserted *forum non conveniens* as a defense in their initial pleadings, discovery was necessary to lay the factual background for the motion, and it was inevitable that such a motion would be brought. (AA-21.) This case was filed in Anoka County Court in August 2005. Respondents moved to dismiss for *forum non conveniens* in May 2007.

The court’s holding is supported by Minnesota law and certainly was not an abuse of discretion. Two cases involving foreign plaintiffs who attempted to bring cases in Minnesota against Minnesota defendants demonstrate that cases in which substantial litigation and discovery have occurred can still be properly dismissed for *forum non conveniens*. In Bergquist, the trial court granted the defendant’s motion to dismiss almost exactly one year after the complaint was filed. 379 N.W.2d at 509. The parties took discovery in the case, but dismissal was still ordered. Id. at 510. The Minnesota Supreme Court ultimately upheld dismissal for *forum non conveniens*. Id. at 513-14. In Bonzel, 2003 WL 21743768, at \*2, the trial court ordered dismissal at least one year after the case was filed. The German plaintiff in that case brought a complaint against the defendants in July 2000. Id. On July 26, 2001 the parties attended a court-sponsored mediation and settled several of the claims (counts 10-14 in the amended complaint). Id.

Discovery was ongoing during this period, and following the mediation the defendants brought a motion to dismiss on several grounds including *forum non conveniens* based on facts learned during the depositions of two key witnesses. Id. The district court heard arguments, dismissed the case, and the Minnesota Court of Appeals upheld dismissal on *forum non conveniens* grounds. Id. at \*5-\*6.

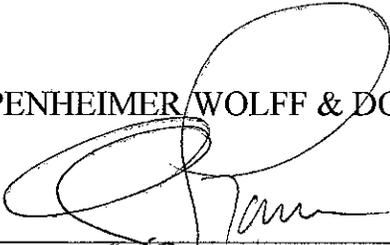
One only need read Appellant's brief to see how much it relies on the facts developed during discovery (incorrectly stated, in Respondents' opinion) to support its opposition to Respondents' motion. Conversely, Respondents had to develop the underlying facts in order to demonstrate to the district court that this case has everything to do with Panama and nothing to do with Minnesota. The district court properly understood that Respondents should not be penalized for pursuing the discovery required to disentangle themselves from the jurisdiction of a court that has no real interest in this dispute. That court properly rejected Appellant's suggestion that Respondents' motion was not timely and this Court should affirm that decision as properly within the district court's discretion.

### **CONCLUSION**

Based on the foregoing, the district court's decision conditionally dismissing this case for *forum non conveniens* should be affirmed in all respects.

Dated: February 11, 2008

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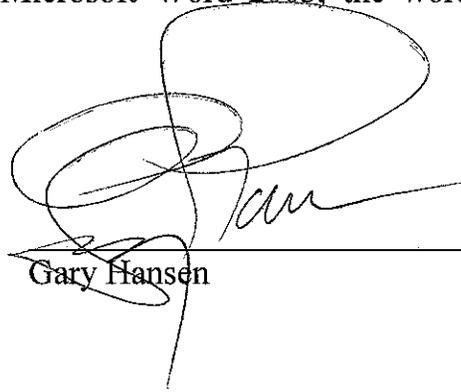
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**CERTIFICATE OF COMPLIANCE WITH MINN. R. APP. P. 132.01, SUBD. 3**

The undersigned certifies that the Brief submitted herein contains 10,128 words and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Brief was prepared using a proportional spaced font size of 13pt. The word count is stated in reliance on Microsoft Word 2003, the word processing system used to prepare the Brief.



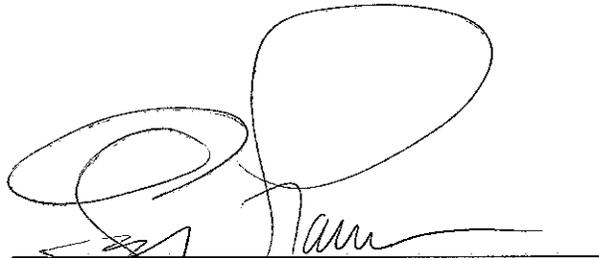
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**CERTIFICATE OF SERVICE**

I hereby certify that I served a copy of the Respondents' Brief on the following parties, by personal service, on February 11, 2008.

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