

5

No. A07-2199

STATE OF MINNESOTA  
IN SUPREME COURT

---

Ambrose Harry Rajamannan, et al.,

Appellants,

vs.

Paulownia Plantations  
de Panama Corporation,

Respondent.

---

---

APPELLANTS' BRIEF AND ADDENDUM

---

Gary Hansen, MN ID 40617  
Aaron Mills Scott, MN ID 33943X  
**OPPENHEIMER WOLFF & DONNELLY LLP**  
45 South Seventh Street  
Suite 3300  
Minneapolis, MN 55402-1609  
612.607.7000

**Attorneys for Appellants**  
**Ambrose Harry Rajamannan,**  
**Concie Rajamannan, Agro-K Corporation,**  
**Perla Verde Service Corporation, and Perla Verde**  
**SA**

William F. Mohrman, MN ID 168816  
**MOHRMAN & KAARDAL, P.A.**  
33 South 6<sup>th</sup> Street  
Suite 4100  
Minneapolis, MN 55402  
612.341.1074

**Attorney for Respondent**  
**Paulownia Plantations de Panama**  
**Corporation**

**TABLE OF CONTENTS**

TABLE OF CONTENTS .....i

TABLE OF AUTHORITIES ..... ii

ISSUES PRESENTED .....1

STATEMENT OF CASE.....2

STATEMENT OF FACTS .....3

    I. ARGUMENT .....6

        A. Standard of Review .....6

        B. The District Court Correctly Determined this Case Belongs in Panama.....7

            1. Private Interest Factors .....8

            2. Public Interest Factors .....11

        C. Panama is “Available and Adequate” Despite Article 1421-J.....13

            1. Precedent Both Before and After Article 1421-J Invariably Finds  
                Panama Available and Adequate .....17

            2. The Language of Law No. 38 and Article 1421-J Support the  
                Conclusion that this Case is Unaffected by the Statute .....20

            3. Consent to Jurisdiction Ensures Availability.....23

            4. Application of Article 1421-J in this Case Would Directly Contradict  
                the Purpose of Blocking Statutes.....25

            5. Blocking Statutes are Unconstitutional .....26

        D. Public Policy Supports Dismissal Regardless of Article 1421-J .....27

        E. The District Court’s Order was not an Abuse of Discretion and Should be  
                Affirmed.....31

CONCLUSION .....33

CERTIFICATE OF COMPLIANCE WITH MINN. R. APP. P. 132.01, SUBD. 3 .....35

APPELLANTS’ ADDENDUM.....v

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>CASES</b>	
<u>Aguinda v. Texaco, Inc.</u> , 142 F. Supp. 2d 534 (S.D.N.Y. 2001) .....	passim
<u>Alpine View Co., Ltd. v. Atlas Copco AB</u> , 205 F.3d 208 (5th Cir. 2000) .....	15
<u>Behm v. Nuveen &amp; Co, Inc.</u> , 555 N.W.2d 301 (Minn. Ct. App. 1996) .....	6
<u>Bergquist v. Medtronic, Inc.</u> , 379 N.W.2d 508 (Minn. 1986) .....	passim
<u>Bongards' Creameries v. Alfa-Laval, Inc.</u> , 339 N.W.2d 561 (Minn. 1983) .....	8, 12
<u>Bonzel v. Pfizer, Inc.</u> , No. C9-03-47, 2003 WL 21743768 (Minn. Ct. App. July 29, 2003).....	12
<u>Chandler v. Multidata Sys. Int'l Corp.</u> , 163 S.W.3d 537 (Mo. Ct. App. 2005) .....	1, 19
<u>Del Rio v. Ballenger Corp.</u> , 391 F. Supp. 1002 (D.S.C. 1975) .....	19
<u>El-Fadl v. Central Bank of Jordan</u> , 75 F.3d 668 (D.C. Cir. 1996).....	32
<u>Ford v. Brown</u> , 319 F.3d 1302 (11th Cir. 2003) .....	1, 24, 32
<u>Fourth Northwestern Nat'l Bank v. Hilson Indus., Inc.</u> , 117 N.W.2d 732 (Minn. 1962) .....	9
<u>Fullerton-Krueger Lumber Co. v. N. Ry. Co.</u> , 206 U.S. 435 (1925) .....	22
<u>Gschwind v. Cessna Aircraft Co.</u> , 161 F.3d 602 (10th Cir. 1998) .....	24
<u>Gulf Oil Corp. v. Gilbert</u> , 330 U.S. 501 (1947) .....	6, 7, 11

<u>Hague v. Allstate Ins. Co.</u> , 289 N.W.2d 43 (Minn. 1979) .....	6, 7
<u>Home Ins. Co. v. Dick</u> , 281 U.S. 397 (1930) .....	12
<u>In re Lando’s Estate</u> , 127 N.W. 1125 (Minn. 1910) .....	6
<u>Islamic Republic of Iran v. Pahlavi</u> , 467 N.E.2d 245 (N.Y. 1984) .....	15
<u>Leon v. Millon Air, Inc.</u> , 251 F.3d 1305 (11th Cir. 2001) .....	1, 31
<u>Lisa, S.A. v. Gutierrez Mayorga</u> , 441 F. Supp. 2d 1233 (S.D. Fla. 2006).....	23
<u>Morales v. Ford Motor Co.</u> , 313 F. Supp. 2d 672 (S.D. Tex. 2004).....	23
<u>Nessi v. Sudovest Group, Inc.</u> , Nos. A04-1461, A04-1465, 2005 WL 832199 (Minn. Ct. App. April 12, 2005) .....	6
<u>O’Neil v. Allstate Ins. Co.</u> , No. C4-98-1980, 1999 WL 230943 (Minn. Ct. App. April 20, 1999) .....	9
<u>Phillips Petroleum Co. v. Shutts</u> , 472 U.S. 797 (1985) .....	12
<u>Piper Aircraft Co. v. Reyno</u> , 454 U.S. 235 (1981) .....	16
<u>Polanco v. H.B. Fuller Co.</u> , 941 F. Supp. 1512 (D. Minn. 1996) .....	1, 31
<u>Schertenleib v. Traum</u> , 589 F.2d 1156 (2d Cir. 1978) .....	1, 32
<u>Scotts Co. v. Hacienda Loma Linda</u> , -- So. 2d --, 2008 WL 5352221 (Fla. Dist. Ct. App. Dec. 24, 2008).....	passim
<u>Scotts Co. v. Hacienda Loma Linda</u> , 942 So.2d 900 (Fla. Dist. Ct. App. 2006).....	passim

<u>State v. Armstrong,</u> 1860 WL 2856, 4 Minn. 335 (Minn. 1860).....	22
<u>Tandy Computer Leasing, a Div. of Tandy Electronics, Inc. v. Lysford,</u> No. CO-88-551, 1988 WL 70254 (Minn. Ct. App. July 12, 1988).....	12
<u>Vargas v. Gen. Elec. Co.,</u> No. C-2003-89374, 2004 WL 5273053 (Maryland Cir. Ct. Nov. 22, 2004) .....	24
<b>STATUTES AND OTHER AUTHORITIES</b>	
Minn. R. Civ. P. 45.02(b).....	9
Minn. R. Civ. P. 52.01 .....	6
Henry St. Dahl, <u>Forum Non Conveniens, Latin America and Blocking Statutes</u> , 35 U. Miami Inter-Am. L. Rev. 21, 35 (2003) .....	25, 26
Michael Wallace Gordon, <u>Forum Non Conveniens Misconstrued: A Response to Henry St. Dahl</u> , 38 U. Miami Inter-Am. L. Rev. 141, 148 (2006).....	14, 24, 27, 28
Peter N. Thompson & David F. Herr, <u>Minnesota Practice</u> (2007 ed.).....	9
Panamanian Judicial Code Article 1421-J .....	passim
Panamanian National Assembly Law No. 19 .....	20
Panamanian National Assembly Law No. 38 .....	20, 22

## ISSUES PRESENTED

### **1. Is Panama an “available and adequate” alternative forum for this case?**

The trial court found that Panama is “available and adequate.” The Court of Appeals disregarded the trial court’s findings and reversed.

Scotts Co. v. Hacienda Loma Linda, 942 So.2d 900 (Fla. Dist. Ct. App. 2006); Scotts Co. v. Hacienda Loma Linda, -- So. 2d --, 2008 WL 5352221 (Fla. Dist. Ct. App. Dec. 24, 2008); Chandler v. Multidata Sys. Int’l Corp., 163 S.W.3d 537 (Mo. Ct. App. 2005); Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534 (S.D.N.Y. 2001).

### **2. Are Minnesota courts required to give effect to foreign “blocking” statutes, passed for the purpose of forcing American courts to resolve claims they would otherwise dismiss?**

The trial court considered and gave effect to Panama’s Article 1421-J, but found that the statute did not prevent Panama from being an “available and adequate” alternative forum for this case. The Court of Appeals disagreed, applied the statute, and reversed.

Scotts Co. v. Hacienda Loma Linda, 942 So.2d 900 (Fla. Dist. Ct. App. 2006); Scotts Co. v. Hacienda Loma Linda, -- So. 2d --, 2008 WL 5352221 (Fla. Dist. Ct. App. Dec. 24, 2008); Bergquist v. Medtronic, Inc., 379 N.W.2d 508 (Minn. 1986).

### **3. Where the public and private interest factors weigh heavily in favor of dismissal for *forum non conveniens* to a foreign country, the case indisputably could have been brought in that foreign country, and the moving party consents to jurisdiction in the foreign country, is it an abuse of discretion for a trial court to conditionally dismiss the case despite the fact that the foreign country has adopted a blocking statute intended to limit the discretion of American judges to dismiss cases for *forum non conveniens*?**

The trial court conditionally dismissed the case in favor of litigation in Panama. The Court of Appeals did not analyze the public and private interest factors and reversed.

Polanco v. H.B. Fuller Co., 941 F. Supp. 1512 (D. Minn. 1996); Ford v. Brown, 319 F.3d 1302 (11th Cir. 2003); Schertenleib v. Traum, 589 F.2d 1156 (2d Cir. 1978); Leon v. Millon Air, Inc., 251 F.3d 1305 (11th Cir. 2001).

## STATEMENT OF CASE

- A. **Trial Court:** Anoka County District Court
- B. **Trial Judge:** Hon. Barry A. Sullivan
- C. **Nature of Case and Disposition:**

Appellants<sup>1</sup> jointly moved the trial court for dismissal under the doctrine of *forum non conveniens* in favor of litigation in Panama. The district court found that Panama was an “available and adequate” alternative forum, that the relevant private and public interest factors weighed “heavily” in favor of litigation in Panama, and that it is more appropriate and equitable that this action proceeds in Panama. (AD.20.)<sup>2</sup> The district court dismissed the case, conditioned upon four requirements: (1) that Appellants consent to the jurisdiction of the courts of Panama; (2) that the courts of Panama accept jurisdiction; (3) that Appellants waive any defenses based on statutes of limitation that did not exist at the time the Minnesota action was commenced; and (4) that Appellants agree to satisfy any judgment from the courts of Panama. (AD.1-2.) Appellants agreed to each condition of dismissal.

Respondent Paulownia Plantations de Panama Corporation (“PPP”) appealed the district court’s order. (SA.1-2.)<sup>3</sup> The Minnesota Court of Appeals reversed the district

---

<sup>1</sup> Throughout this brief, Defendants Dr. Ambrose Harry Rajamannan, Concie Rajamannan, Agro-K Corporation, Perla Verde Service Corporation, and Perla Verde, S.A. will be referred to collectively as “Appellants.”

<sup>2</sup> Citations to “(AD)” refer by page number to documents in Appellants’ Addendum filed under the same cover as this brief.

<sup>3</sup> Citations to “(SA)” refer by page number to documents in Appellants’ Appendix filed herewith under separate cover.

court. (AD.35-41.) Appellants petitioned for further review and this Court granted review on February 17, 2009. (SA.3-10.)

### **STATEMENT OF FACTS**

The facts relevant to this appeal may be drawn almost entirely from the opinion of the Court of Appeals.

Dr. Ambrose Harry Rajamannan (“Rajamannan”) was born in Sri Lanka and presently resides in Minnesota. (Affidavit of A. Harry Rajamannan filed May 31, 2007 (“First Raj. Aff.”) ¶ 1.) In 1976, Rajamannan started Agro-K Corporation (“Agro-K”), a corporation that 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, where he became interested in the commercial possibilities of growing paulownia trees. (First Raj. Aff. ¶ 4, 6-9.) Paulownia is a very fast growing tree species that can be harvested and dried quickly and is prized for commercial uses, especially in Asian markets. In an effort to pursue his interest in paulownia trees, Rajamannan formed two Panamanian corporations, Perla Verde Service Corporation (“PVSC”) and Perla Verde S.A. (“Perla Verde”). (First Raj. Aff. ¶ 9.)

In the late 1990s, Robert Shepherd, a resident and citizen of Australia, began discussing with Rajamannan the attributes of paulownia trees and the prospects for growing them commercially in Panama. (Shepherd Dep. 27-28.)<sup>4</sup> In October 1998, Shepherd met with Rajamannan in Panama, where Shepherd visited two operations

---

<sup>4</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.

pertaining to the growth of the paulownia tree. (Shepherd Dep. 68-83.) Shortly thereafter, Shepherd recruited a group of Australian investors who formed PPP. (Complaint ¶ 11.) PPP was incorporated in the Republic of Vanuatu and was created for the purpose of investing in Rajamannan's paulownia tree lumber operations in Panama. (Shepherd Dep. 12.)

On March 12, 1999, PPP entered into two contracts with PVSC: a license to occupy land and a paulownia and black pepper planting and management contract (the "Management Contract"). (Complaint ¶ 18.) Under the terms of the Management Contract, PPP was required to pay fees to PVSC, generally calculated on a per-acre basis. (SA.42-45.) The Management Contract also required PVSC to (1) obtain a lease on land in Panama on which to grow the paulownia trees; (2) clear up to 500 acres for planting; (3) purchase and plant 200 paulownia trees and pepper plants per acre; and (4) care for and fertilize the paulownia trees, control insects, and control weeds for ten years. (SA.42-45.) In light of safety concerns regarding the security and accessibility of funds, the parties agreed that wire transfers from PPP would be sent to Agro-K's bank account at TCF Bank in Minneapolis, rather than leaving large amounts of cash in accounts in Panama. (Complaint ¶¶ 43-44; First Raj. Aff. ¶ 15.)

By 2002 the investment operation had allegedly failed and operations pertaining to the growth of the paulownia were eventually abandoned. (Shepherd Dep. 358-359.) PPP subsequently brought this action, asserting claims for, among other things, fraud, unjust enrichment, conversion, and breach of contract. (Complaint.) PPP claimed that the funds transferred from PPP to Agro-K were never used for their intended purposes, but were

diverted by Rajamannan and used for purposes unrelated to the paulownia lumber operations.

Appellants answered, asserting various counterclaims and the defense of *forum non conveniens*, claiming that the action should be tried in Panama. (Answers.)<sup>5</sup> Appellants observed that the contract between PPP and PVSC was not an investment vehicle, but a management contract that does not specify the disposition of funds paid by PPP. (SA.42-45; First Raj. Aff. ¶ 13.) Appellants further claimed that any funds wired to Agro-K by PPP were transferred to the Panamanian companies handling funds for PVSC in Panama. (First Raj. Aff. ¶ 13.)

In May 2007, Appellants moved to dismiss PPP's complaint in its entirety under the doctrine of *forum non conveniens*. The district court granted the motion to dismiss, holding that "[P]anama is both 'available' and 'adequate' as an alternative forum within the meaning of the law" and that "under the circumstances of this case, it is more appropriate and equitable for [PPP] to bring this action in Panama." (AD.22.) The district court also conditioned the dismissal upon "[t]he courts of Panama ... accept[ing] jurisdiction" over the matter. (AD.1.) PPP appealed dismissal to the Court of Appeals, which reversed. Appellants petitioned for further review from this Court, which was granted on February 17, 2009.

---

<sup>5</sup> Each Appellant separately filed Answers on October 14, 2005 raising *forum non conveniens* as a defense.

## 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 States Supreme Court in Gulf Oil [Corp. v. Gilbert], 330 U.S. 501 (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.”) The effect of foreign law is a question of fact. In re Lando’s Estate, 127 N.W. 1125, 1127 (Minn. 1910). “Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” Minn. R. Civ. P. 52.01. See also Nessi v. Sudovest Group, Inc., Nos. A04-1461, A04-1465, 2005 WL 832199, at \*4 (Minn. Ct. App. April 12, 2005) rev. denied June 28, 2005 (applying “clearly erroneous”

standard to appellate review of trial court's determination of the content and effect of Italian law).

**B. The District Court Correctly Determined this Case Belongs in Panama**

This case arises out of contracts and leases executed in Panama, requiring performance in Panama, related to management of paulownia tree and pepper growing operations in Panama. (AD.20.) The district court recognized that this case belongs where all of the critical events occurred, not in Minnesota.

Beginning with this Court's decision in Hague, Minnesota courts have employed the private and public interest factors articulated in Gulf Oil in deciding whether cases should be dismissed under the doctrine of *forum non conveniens*. Hague, 289 N.W.2d at 46 (citing Gulf Oil, 330 U.S. at 508); Bergquist, 379 N.W.2d at 512, n.4. 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 PPP's choice of forum, finding that the private interest factors "weigh heavily in favor of dismissal" and that the public interest factors similarly "weigh heavily in favor of dismissal." (AD.19-20.) The district court concluded, in ordering dismissal:

“In short, this case has little to do with Minnesota and everything to do with Panama.”

(AD.21.)

### 1. Private Interest Factors

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 weigh heavily in favor of dismissal. (AD.19-20.) The court also noted that since PPP’s principal, Robert Shepherd, resides in Australia and will be traveling overseas for trial regardless, there is not a meaningful difference to PPP between traveling to Minnesota or Panama. (AD.20.)

Each portion of the court’s decision is correct; trial in Minnesota would be profoundly and prejudicially inconvenient for Appellants. 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 evidence and witness located in 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). Just as in these cases, Minnesota law provides Appellants no instrument they could use to compel the attendance of critical witnesses from Panama at trial. See Minn. R. Civ. P. 45.02(b); 11A Peter N. Thompson & David F. Herr, Minnesota Practice, Chapter 7 (2007 ed.) (“Subpoenas may only be served within the state.”)

Distilled to its fundamentals, this case arises from the allegation by PPP that it paid money pursuant to its Management Contract with PVSC, a Panamanian company,

for the management of trees and peppers in Panama, but PVSC failed to adequately provide the contracted services. PVSC contends that it did, in fact, perform under the contract. However, without the availability of compulsory process to compel witnesses to appear from Panama to testify about the work they performed for PVSC, Appellants' defense will be severely prejudiced. Even witnesses who strongly desire to testify regarding the great effort of PVSC to make the project successful face substantial obstacles in the expense of traveling to Minnesota and the difficulty in obtaining a visa to enter the United States from Panama.

Appellants have specifically identified several Panamanian witnesses with important knowledge of PVSC's performance under the contract who would be called to testify at trial. (First Scott Aff. ¶ 2.)<sup>6</sup> These witnesses include Felipe Rodriguez (the owner of the land on which the paulownia trees were grown), project forestry engineer Celedonio Morales, and former PVSC office manager Carola Santos. (First Scott Aff. ¶ 3.) Appellants 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.)

---

<sup>6</sup> All references to "First Scott Aff." herein refer to the Affidavit of Aaron Mills Scott filed on May 31, 2007.

Sources of proof critical to Appellants' ability to defend themselves in this matter exist only in Panama. The district court's determination that the private interest factors "weigh heavily in favor of dismissal" accurately analyzes the relevant facts.

## 2. Public Interest Factors

This case threatens to impose an enormous burden on the Minnesota judiciary, forcing an Anoka County court to apply Panamanian law to a complex dispute involving numerous claims, parties, and events that occurred almost entirely in Panama and Australia. It will also require that numerous critical documents executed in Panama in Spanish be translated into English. Jurors in this case would be forced to confront complicated, foreign facts far outside their probable life experiences, spending many days or weeks resolving an undeniably foreign dispute.

Relevant "public interest factors" for trial courts to consider in deciding whether to grant dismissal for *forum non conveniens* have been identified by the Supreme Court:

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 case arises from a decision by Australians, operating through a Vanuatu corporation, to enter into a Management Contract with a Panamanian company to grow paulownia trees and pepper plants in Panama. It is not a Minnesota dispute and the Minnesota judiciary and taxpayers should not be burdened with the time and expense of what would undoubtedly be a lengthy and complicated trial. As the district court correctly noted: “The contracts and leases were executed in Panama. Performance was required in Panama.” (AD.20.) In its decision in Bergquist, this Court recognized the powerful public interest in resolving foreign disputes where they arose rather than imposing them on Minnesota’s court system:

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 enormous financial pressure currently faced by the Minnesota judiciary makes this factor even more compelling than it was at the time this Court decided Bergquist. Our courts should not be forced to resolve complex foreign disputes that properly belong in the countries in which they arose.

Panamanian law must be applied to this dispute, just as the trial court determined. “It seems clear that Panamanian law will predominate.” (AD.20.) Under Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 822 (1985) and Home Ins. Co. v. Dick, 281 U.S. 397, 407-08 (1930), neither Minnesota nor any other United States jurisdiction has a sufficient contact or aggregation of contacts to this dispute to permit American law to apply. Although Minnesota courts are capable of conducting trials using foreign law,

numerous cases recognize that such a requirement is a public interest factor favoring *forum non conveniens* dismissal. Bonzel v. Pfizer, Inc., No. C9-03-47, 2003 WL 21743768, at \*5 (Minn. Ct. App. July 29, 2003) (“German law is best interpreted by German courts.”); Bongards’ Creameries, 339 N.W.2d at 563 (need to apply New York law cited among 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.

While the Minnesota court system would be strained by the task of resolving this case, a perhaps equally difficult burden would be borne by jurors at a trial. Jurors would be forced to attempt to decide a complicated and entirely foreign dispute. As the trial court observed: “[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.” (AD.20.)

Each of these considerations demonstrates the correctness of the district court’s determination that this case should be in Panama rather than Minnesota. This is an immutably Panamanian dispute, appropriate for resolution by the courts of Panama. As the trial court determined, private and public interest factors weigh “heavily” in favor of dismissal.

**C. Panama is “Available and Adequate” Despite Article 1421-J**

The evidence is overwhelming that this case belongs in Panama, rather than in Minnesota, thousands of miles from where the relevant events occurred. Appellants have

provided uncontradicted testimony that this case could have been brought against these defendants in the courts of Panama. (SA.11-13.)

In an effort to prevent dismissal, PPP argues that Panama is not an “available and adequate” alternative forum because PPP chose to travel thousands of miles north to file its case. According to PPP, Panamanian statute Article 1421-J and a pre-existing Panamanian concept of “pre-emptive jurisdiction” would prevent Panamanian courts from accepting jurisdiction over this case if it was re-filed in Panama after *forum non conveniens* dismissal, even though the case could indisputably have been filed in Panama in the first instance. The Court of Appeals accepted this argument, relying on Article 1421-J as its basis for reversing the district court. The text of Article 1421-J, effective June 26, 2008<sup>7</sup>, reads:

In those processes that are being dealt with in this Chapter, national judges are not competent if the claim or the action attempted to be brought in the country has been previously rejected or denied by a foreign judge who applies the *forum non conveniens*. In these cases, national judges shall reject or inhibit themselves from hearing the claim or action for reasons of constitutional order or preventive competence.

(AD.33.) Article 1421-J is similar to statutes passed in several other Latin American countries in an effort to compel American courts to retain cases they would otherwise dismiss for *forum non conveniens*. These laws, referred to as “blocking” statutes (or, less sympathetically but more accurately, as “forum shopping support” statutes) were created by Latin American legislatures in an effort to increase access for Latin American citizens

---

<sup>7</sup> As is discussed below, this statute does not affect this case because it was not effective until June 26, 2008, years after this case began and months after dismissal in the district court.

to favorable aspects of the American judicial system in lawsuits against American companies; i.e. tort recoveries greater than those available to plaintiffs in many Latin American countries. Michael Wallace Gordon, Forum Non Conveniens Misconstrued: A Response to Henry St. Dahl, 38 U. Miami Inter-Am. L. Rev. 141, 148 (2006). Ironically, in this case a non-Panamanian corporate plaintiff seeks to use Panama's blocking statute to force Minnesota courts to retain the case here over the objections of the defendants, including two Panamanian corporations: PVSC (the only company with which PPP contracted) and Perla Verde.

Panama's acceptance of jurisdiction after dismissal is relevant if Minnesota requires that an alternative forum be "available and adequate" in order for *forum non conveniens* dismissal to be ordered. As the Court of Appeals noted: "There are no Minnesota cases expressly adopting the 'available and adequate' test as part of the forum non conveniens analysis." (AD.4.) At least one court has concluded that availability and adequacy of an alternative forum is merely a pertinent factor to consider, not a precondition for dismissal.<sup>8</sup> Whether that is correct or not, both the district court and the Court of Appeals treated "availability and adequacy" as threshold requirements. That standard is well-articulated in Alpine View Co., Ltd. v. Atlas Copco AB, 205 F.3d 208, 221 (5th Cir. 2000), as quoted in the district court's opinion:

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.

---

<sup>8</sup> Islamic Republic of Iran v. Pahlavi, 467 N.E.2d 245, 249 (N.Y. 1984)

(AD.10)

In the briefing before the Court of Appeals, PPP raised several arguments suggesting that Panamanian legal procedures are less favorable than those in the United States. However, the precedent of this Court provides that: “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 Aircraft Co. v. Reyno, 454 U.S. 235, 254 (1981)) (emphasis added). The only real question, then, is whether Panama remains “available and adequate” in light of the existence of Article 1421-J.

The district court found that Panama is “available and adequate.” (AD.22.) The district court supported its finding in several ways: (1) it cited several cases finding Panama an available and adequate forum; (2) it found that Article 1421-J did not apply because the statute was passed long after this case began; (3) it found that Appellants’ consent to jurisdiction would effectively ensure availability of the Panamanian forum; (4) it found that application of Article 1421-J in this case would be contradictory to the statute’s purpose; and (5) it noted challenges to the constitutionality of the statute. As a determination of the content and effect of foreign law, the district court’s finding that Panama is an “available and adequate” alternative forum should not be disturbed by this Court unless clearly erroneous. (See p. 6, supra.) The district court’s decision to dismiss the case should not be disturbed unless it is found to be an abuse of discretion. (See p. 6, supra.) Far from being clearly erroneous, the district court was precisely correct and the Court of Appeals had no basis on which to find either clear error or abuse of discretion.

**1. Precedent Both Before and After Article 1421-J Invariably Finds Panama Available and Adequate**

Several 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. In each case, the court has found Panama available and adequate.

In recent decisions in a case with many similarities to the present matter, the Florida District Court of Appeal has twice found that Panama is an “available and adequate” forum. Scotts Co. v. Hacienda Loma Linda, 942 So.2d 900, 902-03 (Fla. Dist. Ct. App. 2006); Scotts Co. v. Hacienda Loma Linda, -- So. 2d --, 2008 WL 5352221 (Fla. Dist. Ct. App. Dec. 24, 2008). The Hacienda litigation arises out of the failure of an orchid growing operation located in Panama. 942 So. 2d at 901. The plaintiff, a Panamanian corporation, brought suit in Florida alleging that a plant product marketed by Scotts Company caused damage to orchids growing in Panama. Id. The court considered the relevant interest factors, concluding that the vast majority of witnesses, relevant events, and the alleged failure of the plants all occurred in Panama and that Florida has no interest in adjudicating a dispute brought by a Panamanian corporation whose property was injured in Panama. Id. at 902. The court therefore found that private and public interest factors favored dismissal. Id. at 902-03. The plaintiff resisted, arguing that, after dismissal, its lawsuit would not be entertained in Panama’s courts because it was filed first in the United States and the pre-emptive jurisdiction doctrine would bar a subsequent suit in Panama. Id. at 902. The court rejected this argument, finding that: “[U]nder the

circumstances of this case, there is no pre-emption and Panama will be an adequate alternative forum available to resolve this dispute.” Id. The court also took an additional step, ordering: “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.

The Hacienda litigation returned to Florida in 2008, when the plaintiff claimed that the Panamanian courts had blocked its re-filed case from proceeding and that Panama was not an available forum, citing Article 1421-J. -- So. 2d --, 2008 WL 5352221, at \*1. The District Court of Appeal once again rejected this argument and reiterated its earlier holding that Panama was an available alternative forum. Id. at \*2. The court found that the plaintiffs had deliberately manipulated the Panamanian courts into blocking the case from proceeding, by refusing to stipulate to jurisdiction in Panama and by inviting dismissal based on pre-emption and the blocking statute. Id. at \*3. The court found that the plaintiffs “led with their chin” in the Panamanian litigation, and that: “The record indicates that, but for the actions taken by Hacienda and the invocation of preemption and the blocking statute, the Panamanian court would have retained jurisdiction.” Id. at \*2-\*3. The District Court of Appeal therefore remanded the case to the trial court for dismissal. Id. at \*4. The two Hacienda decisions demonstrate the availability and adequacy of Panama as a forum for cases, like this one, that plainly belong in Panama.

Cases prior to the passage of Article 1421-J similarly concluded that Panama is “available and adequate.” These cases are relevant because PPP has argued – in ways at

times inconsistent with its other arguments – that Article 1421-J did not actually change Panamanian law at all, instead only documenting the state of the law as it has always existed. (Plaintiff’s Memorandum of Law in Opposition to Defendants’ Motion to Dismiss at 7.) In fact, PPP’s expert takes the position that Article 1421-J merely codified the pre-existing law of pre-emptive jurisdiction. (SA.21, ¶ 20.) Even if that is so, American courts have uniformly concluded that Panama is an available and adequate alternative forum, both in Scotts expressly considering Article 1421-J and in previous decisions rejecting the argument that Panama is unavailable based on pre-emptive jurisdiction principles. In Chandler v. Multidata Sys. Int’l 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*, finding that: “the trial court did not abuse its discretion in finding that Panama is an available forum.” Id. at 548. The court considered the plaintiffs’ arguments that jurisdiction in Panama would be rejected because the plaintiffs chose to bring their claim first in the United States, but rejected that argument. Id. The court crafted its dismissal to protect the plaintiff’s rights in the event that a jurisdictional block existed: “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.” 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 for *forum non conveniens* in favor of litigation in Panama. The court considered the question of jurisdiction over the case by the courts of Panama, but ordered the case dismissed conditionally while protecting the plaintiff’s rights: “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.

The chain of cases finding Panama available and dismissing cases for *forum non conveniens* in favor of litigation there is unbroken. PPP can cite to no American decision accepting the arguments it urges. This Court should decline the opportunity to become the first. The district court did not make a “clearly erroneous” determination that Panama is an “available and adequate” alternative jurisdiction and did not abuse its discretion in ordering conditional dismissal.

## **2. The Language of Law No. 38 and Article 1421-J Support the Conclusion that this Case is Unaffected by the Statute**

The timing of Article 1421-J’s passage and repeal and the language of the law reinstating it demonstrate that this case should be unaffected by Article 1421-J. This case was filed in Anoka County on August 9, 2005. (Notice of Case Filing.) The first version of Article 1421-J was enacted almost a year later, on August 1, 2006. (SA.20, 39-41.) The district court ordered this case dismissed for *forum non conveniens* on September 25, 2007. (AD.1.) Article 1421-J was then repealed when, on February 18, 2009, the Panamanian National Assembly passed Law No. 19, which “abrogate[d] article 1421-J of the Judicial Code.” (AD.24-25.) Months later, on June 26, 2008, the Panamanian National Assembly issued Law No. 38, which enacted a revised Article 1421-J. (AD.33-34.) Law No. 38 states that it “shall start in force and effect as of its promulgation.” (AD.33.)

The plain language of Law No. 38 stating that it “shall start in force and effect as of its promulgation” in June 2008 – months after dismissal of this case in Anoka County – indicates that it does not affect this case. Further, Law No. 38 states that its effect is to “reinstate” Article 1421-J as of June 2008, but even if it was reinstated from its original passage Article 1421-J did not exist in any version until more than 11 months after this case began. Even when it was passed the first time, the law passing Article 1421-J stated that it “shall become effective from its promulgation.” (SA.41.)

Recognizing this problem, the district court noted in its opinion finding Panama “available and adequate” that it is not “at all clear that Panamanian courts will give [Article 1421-J] retroactive application and bar actions occurring and forum selections exercised prior to its adoption.” (AD.15.) The Court of Appeals’ decision did not address the district court’s finding or consider the timing of Article 1421-J or the text of Law No. 38.

Precedent strongly suggests that Article 1421-J does not reach back to apply to this case. In Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 546-47 (S.D.N.Y. 2001), the court granted a motion to dismiss for *forum non conveniens* and found Ecuador to be an available alternate forum despite the existence of Ecuadorian blocking statute Law 55, with the same purpose and purported effect as Article 1421-J (“Should the lawsuit be filed outside Ecuadorian territory, this will definitely terminate national competency as well as any jurisdiction of Ecuadorian judges over the matter.”) Id. at 546. In finding Ecuador an “available and adequate” forum despite Law 55, the court found it a

“doubtful assumption. . . that Law 55 is retroactive and applies to lawsuits, like these, that were filed prior to the enactment of Law 55 in 1998.” Id. The court continued:

This seems dubious on its face since it posits that such plaintiffs would be conclusively held to a choice of forum made before they had any reason to believe either that such a choice would be conclusive or that it would forever deprive them of even the possibility of an alternative forum.

Id. at 546-47. The logic of the Southern District of New York applies with equal force to Panama’s similar statute and this case where, as in Aguinda, the statute was passed long after the case began.<sup>9</sup> In fact, the passage of Article 1421-J occurred months after Appellants answered PPP’s complaint and asserted their *forum non conveniens* defense. (Answers.) Application of Article 1421-J to this case would deprive Appellants of the opportunity to defend themselves in the only convenient, logical forum for this case based on a statute passed long after the case began and long after Appellants asserted the *forum non conveniens* defense.

“It is a rule of construction, that all statutes are to be considered prospective, unless the language is express to the contrary, or there is a necessary implication to that effect.” Fullerton-Krueger Lumber Co. v. N. Pac. Ry. Co., 206 U.S. 435, 437 (1925). Many years ago, this Court found that statutes passed outside Minnesota presumptively do not apply retroactively. “The production of Statutes of another State may raise the presumption that the law has continued to be the same as at the date of their passage, until

---

<sup>9</sup> The Aguinda court ordered the same result as the district court ordered in this case, providing “as a safeguard” that the dismissal was qualified such that “in the event the court of last review in Ecuador finally affirms the dismissal for lack of jurisdiction pursuant to Law 55 of any action raising the claims here at issue pursued in good faith in Ecuador by any of the plaintiffs here, this Court, upon motion made within 60 days, will resume jurisdiction over that action. Id. at 547.

an amendment or appeal is shown, but it cannot run retrospectively.” State v. Armstrong, 1860 WL 2856, at \*8, 4 Minn. 335 (Minn. 1860).

Because neither the text of Law No. 38 nor the history of Article 1421-J support application of the statute to this case and precedent supports a presumption that this statute does not apply, the district court’s determination that Panama is an “available and adequate” forum was not clearly erroneous and its conditional dismissal was not an abuse of discretion.

### **3. Consent to Jurisdiction Ensures Availability**

As a condition of dismissal, the district court ordered that Appellants “shall consent to the jurisdiction of the courts of Panama.” (AD.1.) The district court found that: “Panamanian law permits jurisdiction by consent which, to the Court, means that jurisdictional defects can be waived.” (AD.15.) Numerous courts have examined this issue and, like the district court, found that consent to jurisdiction makes dismissal an appropriate result.

The Florida District Court of Appeal reached this conclusion with respect to Panama in Hacienda, -- So. 2d --, 2008 WL 5352221, at \*3, n.6, finding that the Panamanian court would have retained jurisdiction of the case re-filed there after dismissal had the plaintiffs “ask[ed] the court in Panama to accept the case and stipulate[d] to its admissibility” instead of manipulating its rejection. Courts examining other Latin American blocking statutes have reached the same result, finding that consent by the parties to jurisdiction makes the forum “available.” Lisa, S.A. v. Gutierrez Mayorga, 441 F. Supp. 2d 1233, 1237 (S.D. Fla. 2006) (finding that Guatemala is an

available forum despite plaintiff's argument to the contrary because defendants consented to jurisdiction there); Aguinda, 142 F. Supp. at 554 (granting motion to dismiss despite arguments based on Ecuadorian blocking statute in part because defendants consented to jurisdiction in Ecuador); Morales v. Ford Motor Co., 313 F. Supp. 2d 672, 689 (S.D. Tex. 2004) (granting motion to dismiss in favor of litigation in Venezuela based in part on determination that required condition of consent to jurisdiction would allow litigation in Venezuela to proceed); Vargas v. Gen. Elec. Co., No. C-2003-89374, 2004 WL 5273053 (Maryland Cir. Ct. Nov. 22, 2004) (finding Costa Rica available despite blocking statute in dismissal order conditioned in part on defendants submitting to jurisdiction there).

Federal courts recognize the sufficiency of consent to jurisdiction to make an alternative forum "available" for *forum non conveniens* dismissal even beyond the context of blocking statutes. Gschwind v. Cessna Aircraft Co., 161 F.3d 602, 606 (10th Cir. 1998) (citing Piper, 454 U.S. at 254, n.22) ("In this case, Defendants agreed to be subject to suit in France. That concession is generally enough to make the alternative forum available."); Ford v. Brown, 319 F.3d 1302, 1310-11 (11th Cir. 2003) (reversing district court and directing that dismissal be ordered where defendant consented to jurisdiction in Hong Kong and dismissal was conditional). The precedent finding that consent to jurisdiction is effective to make an alternative forum available confirms that the district court's decision was neither clearly erroneous nor an abuse of discretion.

#### 4. Application of Article 1421-J in this Case Would Directly Contradict the Purpose of Blocking Statutes

There can be no doubt blocking statutes in general, and Article 1421-J in particular, are intended to allow Latin American plaintiffs to sue American companies in the United States without being dismissed for *forum non conveniens*. Gordon, supra, at 148; Hacienda, -- So. 2d --, 2008 WL 5352221, at \*3. In this case a plaintiff from Vanuatu sued two Panamanian defendants.

In its opinion finding Panama “available and adequate,” the district court found: “This Court believes it is clear that Panama’s policy behind its preemptive jurisdiction law is to protect its own citizens from being deprived of their chosen forum. In the instant case, Plaintiff is not Panamanian, but is a corporation based on Vanuatu comprised of Australian citizens.” (AD.14.) The district court specifically referred to the University of Miami Inter-American Law Review article written by PPP’s expert witness, Henry St. Dahl, which quoted the Attorney General of Ecuador stating, “My country considers that **our citizens** are treated in a discriminatory way due to the application of the *forum non conveniens*.” (AD.13.) (emphasis in original.) The district court found that: “According to Plaintiff’s own assertions, Panama’s preemptive jurisdiction law was not designed to protect Plaintiff.” (AD.14.)

PPP’s expert’s own words make equally clear that because this case was brought against Latin American defendants, no “illegal effects” would be caused by *forum non conveniens* dismissal. In the same law review article quoted by the district court, Mr. St. Dahl wrote:

Normally when the defendant is Latin American, the effect of FNC would probably not violate the law of the Latin American country concerned. This party may effectively raise FNC when sued in the US because it would be in conformity with the principle of action sequitur forum rei. In other words, FNC would transfer the case to the defendant's domiciliary courts, which is what the Latin American systems dictate.

Henry St. Dahl, Forum Non Conveniens, Latin America and Blocking Statutes, 35 U. Miami Inter-Am. L. Rev. 21, 35 (2003).

The district court correctly analyzed the available evidence, including the evidence presented by PPP's expert. There is no basis for applying Article 1421-J in this case; neither the plaintiff's nor the defendants' nationality makes application of pre-emptive jurisdiction appropriate. The district court's determination that Panama is "available and adequate" in this case despite Article 1421-J should be affirmed.

##### **5. Blocking Statutes are Unconstitutional**

Latin American blocking statutes have repeatedly been struck down as unconstitutional by the judicial systems of the countries that adopted them. Ecuador's Law 55 was declared unconstitutional, as was at least a portion of Guatemala's blocking statute. St. Dahl, supra, at 48. Panama's Article 1421-J faces similar challenges to its constitutionality. As noted in Hacienda, -- So. 2d --, 2008 WL 5352221, at \*1, proceedings challenging the constitutionality of Article 1421-J were brought in the Supreme Court of Panama and the Attorney General of Panama opined that the statute was unconstitutional. The statute was then repealed in February 2008, only to be enacted anew in June 2008. Id. The constitutionality of Article 1421-J has once again been challenged in the Supreme Court of Panama and Appellants expect it is likely that before

this case is resolved they will file with this Court new Panamanian authority again repealing Article 1421-J.

Because the district court's finding that Panama is "available and adequate" was not clearly erroneous and its decision to conditionally dismiss the case was not an abuse of discretion, the district court's opinion should be affirmed.

**D. Public Policy Supports Dismissal Regardless of Article 1421-J**

While Appellants urge that the district court's order should be affirmed, it may be noted that the district court's order was actually more accommodating to PPP than it needed to be. This case provides an opportunity for this Court to consider for the first time how Minnesota district courts should regard foreign blocking statutes in the "available and adequate" analysis. This Court can and should determine that Minnesota courts may disregard these statutes, just as a Florida appellate court did in December 2008.

The passage of blocking statutes has developed as a trend in a few countries in Latin America. Guatemala, Costa Rica, and Ecuador have all adopted statutes similar to Article 1421-J. Gordon, supra at 144-45. These statutes have a single purpose: permitting Latin American plaintiffs to sue in the United States without having their cases dismissed for *forum non conveniens*. Gordon, supra at 144-46; Scotts, -- So. 2d --, 2008 WL 5352221, at \*3.

As one commentator noted:

Rather than refer to the new Latin American statutes designed to nullify *forum non conveniens* as blocking statutes, which would give them a credibility they have not earned, they are more accurately described as

foreign forum shopping support statutes. The intention of these statutes is understandable; they assist their nationals in gaining access to U.S. courts that offer several benefits absent to plaintiffs in their own nations. . .

Gordon, supra at 148. The facts of this case threaten an absurd blocking statute result, blocking Panamanian defendants from defending themselves in their home jurisdiction solely because of the forum choice of a Vanuatu corporation, in spite of the fact that every other consideration strongly supports the conclusion that this case belongs in Panama. Even without regard to the facts of this particular case, Minnesota courts should decline to recognize blocking statutes as a matter of policy in all cases.

From a review of his writings, it is clear PPP's expert, Henry St. Dahl, is less an antiseptic expert of the construction of Latin American statutes and more a crusading advocate working to convince American courts to retain cases they would otherwise dismiss for *forum non conveniens* to further the interests of Latin American plaintiffs. Other commentators disagree with both St. Dahl's objective and his analysis. Professor Michael Wallace Gordon offers a point-by-point refutation of the law review article written by St. Dahl and considered by the district court in its order. Gordon, supra at 151-174. Gordon identifies sixteen separate bases advanced by St. Dahl for concluding that the *forum non conveniens* doctrine causes "highly illegal effects" in Latin America, analyzes each, and concludes that "not one of the sixteen is persuasive." Gordon, supra at 151. The conclusion that Latin American blocking statutes actually bar *forum non conveniens* dismissal is, at best, hotly disputed. Equally subject to question is whether such statutes *should* bar dismissal, even if they may be found in some cases to prevent post-dismissal filing in the Latin American jurisdiction.

The most prominent modern Minnesota *forum non conveniens* decision is Bergquist v. Medtronic, Inc. In that case this Court pointedly questioned why Minnesota courts and taxpayers should be forced to expend resources providing a forum for foreign plaintiffs who have a cause of action in foreign countries and where the defendants consent to being sued in the foreign country. 379 N.W.2d at 512. This Court may now ask and answer this same question with respect to a new subject: Latin American blocking statutes. Must Minnesota courts expend precious time and resources resolving foreign disputes with only the flimsiest connection to Minnesota simply because policymakers in countries like Panama and Guatemala wish it so?

Both the Florida District Court of Appeal and the district court in this case rejected that notion. In Scotts, the court held that foreign plaintiffs “may not assume that a foreign country’s preemption or blocking laws will be recognized here.” -- So. 2d --, 2008 WL 5352221, at \*4. Motivated by the belief that Florida need not serve as “a courthouse for the entire world,” the court reasoned that if the foreign plaintiff’s own country refused to accept jurisdiction over a lawsuit for damages allegedly suffered in that very country, Florida’s courts should not be forced to devote resources to the case. Id. at \*3-\*4. “[O]ur courts cannot be compelled by other countries’ courts and lawmakers to resolve cases that should be determined in those countries.” Id. at \*3. The Scotts court therefore ordered dismissal without “return” jurisdiction, ordering that the plaintiff was no longer permitted to continue litigation in Florida unless conditions of dismissal were violated. Id. at \*4.

The district court in this case was equally disturbed by the notion that foreign governments could effectively guarantee plaintiffs the right to forum shop in Minnesota courts:

What is troubling about Plaintiff's position, of course, is that the blanket application of preemptive jurisdiction would require American Courts to litigate cases regardless of the dubious nature of the claims or the tenuousness of any nexus to the selected forum and regardless of the prejudice to Defendants and the burdens imposed upon the chosen forum. The decision would nullify – render “virtually useless” – an important doctrine of long established jurisprudence and a valuable tool of judicial discretion and flexibility. [citation omitted] The Court is disinclined to do so.

(AD.15.)

This Court may now determine whether Minnesota is compelled to serve as a “courthouse for the entire world.” The cost to Minnesota's judiciary and its citizens, both in time and money expended resolving cases that plainly belong in foreign countries and could have been filed there had the plaintiff made that election, support a determination that blocking statutes will be rejected in Minnesota. Whether that policy takes the form of the moderate approach of the district court ordering conditional dismissal with the option to return to Minnesota if necessary or takes the form of a general rule like Florida's that blocking statutes will be disregarded, this Court should decline to allow Minnesota courts to be handcuffed by foreign countries to cases that belong in those countries and which could, and should, have been initiated in those countries.

**E. The District Court's Order was not an Abuse of Discretion and Should be Affirmed**

Even if this Court decides that blocking statutes are entitled to consideration, the tortured history of blocking statutes (notably including Panama's) and the inevitability of conflicting testimony before the district courts as to the application of blocking statutes to particular cases suggest that the decision to conditionally dismiss cases for *forum non conveniens* despite the existence of a blocking statute should be found to lie within the sound discretion of the trial court.

Courts in Minnesota and around the country agree that even where a party argues that jurisdictional issues will block re-filing in the alternative jurisdiction, conditional dismissal may still be ordered. In Polanco v. H.B. Fuller Co., 941 F. Supp. 1512, 1525 (D. Minn. 1996) the District of Minnesota dismissed a case in favor of litigation in Guatemala despite the plaintiff's argument that Guatemalan courts would refuse to hear the case if filed there because of the plaintiff's choice to first file in the United States. The court noted with approval a Southern District of Texas decision directing conditional dismissal with the option to return to the United States if the highest court of any foreign country affirmed dismissal of the re-filed case for lack of jurisdiction, calling it "a quick and decisive solution to this problem." Id.

In Leon v. Millon Air, Inc., 251 F.3d 1305, 1313 (11th Cir. 2001) the Eleventh Circuit affirmed the district court's order dismissing a case brought by Ecuadorian plaintiffs for *forum non conveniens*, despite the plaintiffs' arguments that Ecuadorian blocking statute Law 55 made the courts of Ecuador unavailable. The court refused to

disturb the trial court's finding that Ecuador was available and adequate despite Law 55, but pointed out that the statute did not limit the option of conditional dismissal: "Nor is the alleged uncertainty over Law No. 55 an obstacle to dismissal; the District Court would presumably reassert jurisdiction over the case in the event that jurisdiction in the Ecuadorian courts is declined." Id. See also Aguinda, 142 F. Supp. 2d at 547 (reaching same conclusion and conditionally dismissal in favor of litigation in Ecuador).

Other circuit courts echo the holding that conditional dismissal is the proper resolution where a party moves for *forum non conveniens* dismissal to a foreign forum and it would be complicated, expensive, or difficult for the American court to determine whether or not the case may proceed in the foreign forum. Schertenleib v. Traum, 589 F.2d 1156, 1163 (2d. Cir. 1978); El-Fadl v. Central Bank of Jordan, 75 F.3d 668, 679 (D.C. Cir. 1996). To avoid this, the Eleventh Circuit limits the evidentiary threshold required for moving parties:

We never indicated that a defendant must have an affidavit from a lawyer in the foreign jurisdiction predicting that the foreign tribunal will ultimately assert jurisdiction over the case and recognize any limitations waiver. Since the district court's dismissal is conditional, it may reassert jurisdiction in the event that the foreign court refuses to entertain the suit. There would be little point in approving of this device while simultaneously requiring proof that the foreign jurisdiction will reach the merits of the case.

Ford, 319 F.3d at 1310-11.

In light of this precedent and the nature of blocking statutes, this Court should, at a minimum, affirm the district court, holding that conditional dismissal despite the possible application of a blocking statute was not an abuse of discretion because the trial court

found the Panamanian forum “available and adequate.” To provide more specific guidance, the Court could order that where (1) the public and private interest factors weigh heavily in favor of dismissal to a foreign country; and (2) the case indisputably could have been brought in the foreign country at the time it was commenced; and (3) the moving party consents to jurisdiction in that country; but (4) the non-moving party objects to dismissal on the basis of a blocking statute; then (5) it is not an abuse of discretion for the trial court to order conditional dismissal with the option for the non-moving party to re-file the case in Minnesota if the court of final review in the foreign country determines that the courts of that country are barred from exercising jurisdiction. The Court could also conclude, as Appellants believe it should, that blocking statutes will not be considered in deciding *forum non conveniens* motions.

### CONCLUSION

Appellants ask this Court to reverse the decision of the Court of Appeals and affirm the decision of the trial court. The trial court was within its broad discretion in determining that Panama was “available and adequate” notwithstanding the enactment of Article 1421-J subsequent to the filing of this action. It is within the discretion of a trial court to conditionally dismiss a case when it determines that a foreign forum’s blocking statute will not prevent the action from proceeding in that forum. It would also be appropriate for this Court to determine that foreign blocking statutes should not be considered by Minnesota courts when determining whether a case should be dismissed in favor of litigation in a forum where the case could have been filed in the first instance

and where it could still be filed and proceed but for arguments based on a blocking statute.

Dated: March 19, 2009

OPPENHEIMER WOLFF & DONNELLY LLP

By:  \_\_\_\_\_

Gary Hansen (#40617)

Aaron Mills Scott (#33943X)

Plaza VII, Suite 3300

45 South Seventh Street

Minneapolis, Minnesota 55402-1609

Telephone: (612) 607-7000

Facsimile: (612) 607-7100

**Attorneys for Appellants Ambrose Harry  
Rajamannan, Concie Rajamannan, Agro-K  
Corporation, Perla Verde Service Corporation,  
and Perla Verde S.A.**

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

The undersigned certifies that the Brief submitted herein contains 9,299 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.



---

Aaron Mills Scott