

No. A07-2199

STATE OF MINNESOTA

IN COURT OF APPEALS

Paulownia Plantations de Panama Corporation,

Appellant,

vs.

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

Respondents.

APPELLANT'S BRIEF

APPELLANT'S COUNSEL:

MOHRMAN & KAARDAL, P.A.
William F. Mohrman
Atty. Reg. No.: 168816
33 South 6th St.
Suite 4100
Minneapolis, Minnesota 55402
(612) 341-1074

RESPONDENTS' COUNSEL:

OPPENHEIMER WOLFF & DONNELLY, LLP
Gary R. Hansen
Atty. Reg. No.: 40617
45 South Seventh Street
Suite 3300
Minneapolis, MN 55402-1609
(612) 607-7000

TABLE OF CONTENTS

TABLE OF AUTHORITIES	v
STATEMENT OF THE ISSUES PRESENTED	1
STATEMENT OF THE CASE.....	1
STATEMENT OF FACTS	4
1. Appellant Paulownia Plantations de Panama Corp.....	5
2. Respondent Ambrose Harry Rajamannan.....	5
3. Respondent Agro-K, Inc.	6
4. Respondent Perla Verde Services Corp.	7
5. Verde Tech, S.A.....	7
B. Paulownia Trees	8
C. Respondent Rajamannan’s Solicitation of Appellant to Invest in Respondent Rajamannan’s Paulownia Tree Farm in Panama.	8
D. Respondent Rajamannan Demands Appellant Send Its Investment Monies Through Respondent Agro – K’s TCF Bank Account in Minnesota.	10
E. Appellant Enters Into A Contract With Respondent PVSC To Invest In The Paulownia Tree Farm But Respondents Fail to Use The Investment Monies For The Paulownia Tree Farm.....	10
F. During Discovery, Appellant Obtains Unequivocal Evidence of Respondent’s Fraud.	11
G. Respondents’ Records Reveal That At Least Two Transfers Appellant’s Made For The Paulownia Tree Farm Project Went To Pay For Respondent Rajamannan’s Purchase Of A Palatial Pacific Oceanfront Estate.	14
H. Minnesota Litigation.....	16
ARGUMENT	17

A. Standard of Review.....	17
B. Legal Standard For Determining A Motion To Dismiss Based On <i>Forum Non Conveniens</i>	18
1. In Determining <i>Forum Non Conveniens</i> Motions, Courts Must <i>First</i> Determine That An “ <i>Available and Adequate Alternative Forum</i> ” Exists and Then Evaluate the Public and Private Interest Factors.....	18
2. Respondents Bear The Burden Of Persuasion – And a Heavy Burden - As To All Elements Of The <i>Forum Non Conveniens</i> Analysis.	20
3. The Interpretation and Application Of Foreign Law, Such As Panamanian Law, Is A Question Of Fact On Which Respondents Must Present Admissible Evidence – Not The Unsubstantiated Arguments of its Minnesota Counsel.....	21
C. Respondents Failed To Present Any Evidence That Panamanian Courts Would Exercise Subject Matter Jurisdiction Over This Matter After Dismissal Based On <i>Forum Non Conveniens</i>	22
1. Appellant’s Expert Explicitly Testified That Panamanian Courts Cannot Exercise Subject Matter Jurisdiction Over This Case After A Dismissal Based On <i>Forum Non Conveniens</i>	22
a. Panama, Like Most Latin American Countries, Has Adopted The Old Roman Doctrine Of “Preemptive Jurisdiction” Which Prohibits Panamanian Courts From Exercising Subject Matter Jurisdiction Over Any Action Which Was Previously Dismissed by Another Court.	23
b. Mr. Dahl Also Testifies That In 2006 Panama Enacted A Law Which Specifically and Unequivocally Prohibits Panamanian Courts From Exercising Jurisdiction Over Cases Previously Dismissed Based On <i>Forum Non-Conveniens</i>	26
2. Respondents Submitted Absolutely No Evidence Addressing Panama’s Doctrine of Preemptive Jurisdiction or Article 1421-J.	27
a. Respondents’ Failed To Disclose Their Expert Witness In Discovery.	27
b. Respondents’ Expert Failed To Provide Any Opinion Regarding Whether Panamanian Courts Can Exercise Subject Matter Jurisdiction Over This Case After A <i>Forum Non Conveniens</i> Dismissal.	28

3. Mr. Dahl’s Opinion is Fully Supported By The U.S. District Court for the Southern District of Texas Decision in <i>Johnston v. Multi-Data Systems International Corp.</i>	30
4. The District Court Abused Its Discretion By Misconstruing <i>Piper</i> , Disregarding Mr. Dahl’s Opinion And Relying On The Inadmissible Speculations Of Respondent’s Attorney.....	31
a. Footnote 22 From <i>Piper</i> Specifically States That It is “Not Appropriate” for a Court To Dismiss A Case Based On <i>Forum Non Conveniens</i> if the Court is “Unclear” Whether the Foreign Court Has Subject Matter Jurisdiction Over The Case.....	31
b. The District Court’s Reliance On Respondents’ Attorney’s Speculation That Panama May Not Enforce Article 1421-J in Cases Involving Non-Citizens of Panama Is Improper.....	34
c. The District Court’s Citations to <i>Del Rio</i> and <i>Chandler</i> Are Inapposite – In Fact, <i>Chandler</i> Actually Supports Appellant’s Arguments Regarding the Evidentiary Nature of <i>Forum Non Conveniens</i> Motions.....	36
D. Panamanian Courts Are Not Adequate To Adjudicate This Matter Because (i) They Suffer From Significant Corruption and (ii) Panamanian Procedural Rules Will Not Allow Appellant To Adequately Present Its Case.....	40
E. Respondents Failed To Timely Bring Its <i>Forum Non Conveniens</i> Motion.....	42
F. The District Court Abused Its Discretion In Finding That The Private And Public Interests Weighed In Favor Of Dismissal.....	43
1. Respondents Failed To Rebut The Presumption In Favor Of Plaintiff’s Choice Of Forum.....	44
2. The District Court Erred Dismissing Appellant’s Complaint Because Respondents Failed to Show That The Balance of Private Factors Weigh In Favor Of Dismissal.....	47
a. Respondents Failed To Detail By Name and Description of Testimony The Witnesses From Panama It Allegedly Needs.....	47
b. Enforceability of Judgment.....	50

c. Appellant Did Not File In Minnesota In Order To Vex, Harass or Oppress. 51

d. Language Barrier. 51

3. The District Court Erred Dismissing Appellant’s Complaint Because Respondent Failed to Show That The Balance of Public Factors Weigh In Favor Of Dismissal. 51

CONCLUSION.....54

CERTIFICATE OF COMPLIANCE WITH MINN. R. APP. P. 132.01, Subd. 355

CERTIFICATE OF SERVICE56

TABLE OF AUTHORITIES

Cases

<i>Baris v. Sulpicio Lines, Inc.</i> , 932 F.2d 1540, 1550 n. 14 (5 th Cir. 1991)	20
<i>Bergquist v. Medtronic, Inc.</i> , 379 N.W.2d 508 (Minn. 1986)	passim
<i>Bridgeman v. Gateway Ford Truck Sales</i> , 269 F.Supp. 233, 238 (D.Ark.1969).....	1, 21
<i>Cable News Network L.P., L.L.L.P. v. CNNNews.com</i> , 177 F.Supp.2d 506 (E.D. Va. 2001)	43
<i>Canales Martinez v. Dow Chemical Corp.</i> , 219 F.Supp.2d 719, 728 (E.D.La. 2002)	25
<i>Chandler v. Multidata Systems Intern. Corp., Inc.</i> , 163 S.W.3d 537 (Mo. App. 2005)..	36, 37, 38, 39
<i>Cobb v. Contract Transp., Inc.</i> , 452 F.3d 543, 548-549 (6 th Cir.2006)).....	33
<i>Creamer v. Creamer</i> , 482 A.2d 346, 352 (D.C. App. 1984)	42
<i>Del Rio v. Ballenger Corp.</i> , 391 F.Supp. 1002 (D.S.C. 1975).....	36, 37
<i>Douglas v. E.G. Baldwin & Assoc. Inc.</i> , 150 F.3d 604, 606 (6 th Cir.1998)	33
<i>El Fadl v. Central Bank of Jordan</i> , 75 F.3d 668, 677 (D.D.C. 1996)	1, 18, 20
<i>Escalante Romero et al. v. Multidata Systems International et al.</i>	25, 26
<i>Friends for All Children, Inc. v. Lockheed Aircraft Corp.</i> , 717 F.2d 602, 607 (D.C. Cir. 1983)(emphasis supplied)	19
<i>Gulf Oil Corp. v. Gilbert</i> , 330 U.S. 501 (1947)	18, 20, 51, 54
<i>In re Air Crash Disaster Near New Orleans, Louisiana on July 9, 1982 v. Pan American Airways, Inc.</i> , 821 F.2d 1147, 1163 (5 th Cir. 1987)	54
<i>In Re Crash New Orleans</i> , 821 F.2d 1147, 1164 (5 th Cir. 1987)	2, 42
<i>In re Ford Motor Co. v. Bridgestone/Firestone North American Tire</i> , 344 F.3d 648, 652 (7 th Cir. 2003)	20
<i>In re Gyfteas' Estate</i> , 300 N.Y. S. 2d 913, 916 (N.Y. Sup. 1968).....	21
<i>Iragorri v. United Technologies Corp.</i> , 274 F.3d 65, 71-72 (2d Cir.2001).....	44

<i>Johnston v. Multi-Data Systems International Corp.</i> , No. G-06-CV-313, U.S. Dist. 2007 Westlaw 1296204, at 21, (S.D. Tex. April 29, 2004) (emphasis supplied) ..	passim
<i>Koster [v. Am. Lumbermens Mut. Cas. Co.</i> , 330 U.S. 518, 524, 67 S.Ct. 828, 831, 91 L.Ed. 1067 (1947)].....	54
<i>Lacey v. Cessna Aircraft Co.</i> , 862 F.2d 38, 45 (3 rd Cir. 1989)	19, 45
<i>Pain v. United Technologies Corp.</i> , 637 F. 2d 775, 784-785 (D.C. Cir. 1980).....	20
<i>Phoenix Canada Oil Co. Ltd. v. Texaco, Inc.</i> , 78 F.R.D. 445 (Del.1978).....	33
<i>Piper Aircraft Corp. v. Reyno</i> , 454 U.S. 235 (1981)	passim
<i>Pollux Holding, Ltd. v. Chase Manhattan Bank</i> , 329 F.3d 64, 70 (2d Cir. 2003)	18
<i>Robertson v. Stead</i> , 36 S.W. 610, 612 (Mo. 1896)	21
<i>Werlél v. Zivnostenska Banka</i> , 287 N.Y. 91, 38 N.E.2d 382(1941)	21
Statutes	
<i>Am.Jur.2d Expert and Opinion Evidence</i> §124.....	21
<i>Federal Practice & Procedure: Jurisdiction</i> §3828, at 291 (2d ed. 1986)	42
<i>Federal Practice & Procedure: Jurisdiction</i> §3851 (2d ed. 1986)	48
The Restatement of the Law – Conflict of Laws - §84.....	19

APPENDIX INDEX

	Page
1. District Court Order.	AA-1
2. <i>Johnston v. v. Multi-Data Systems International Corp.</i> , No. G-06-CV-313, U.S. Dist. 2007 Westlaw 1296204, at 21, (S.D. Tex. April 29, 2004).	AA-23
3. Respondents' Table of Appellant's Payments to Agro – K.	AA-49
4. Affidavit of Henry Dahl.	AA-50
5. Affidavit of Humberto Iglesias.	AA-74
6. First Superior Court of the First Judicial District of Panama decision in <i>Escalante Romero et al. v. Multidata Systems International, et al.</i>	AA-77
7. Dahl Law Review Article on <i>forum non conveniens</i>	AA-79
8. Defendant Rajamannan's Supplemental and Amended Responses to Interrogatories, Interrogatory No. 7 and 8.	AA-85
9. Complaint	AA-86
10. Management Contract	AA-103

STATEMENT OF THE ISSUES PRESENTED

- I. Did the District Court abuse its discretion when it found that Panama was an available alternative forum with subject matter jurisdiction to hear Appellant's case after a *forum non conveniens* dismissal even though Respondents offered no evidence that Panama was an available forum?

District Court Held: That Panama is an available forum with subject matter jurisdiction.

Cases: *Johnston v. Multi-Data Systems International Corp.*, No. G-06-CV-313, U.S. Dist. 2007 Westlaw 1296204 (S.D. Tex. April 29, 2004);

El Fadl v. Central Bank of Jordan, 75 F.3d 668 (D.D.C. 1996).

- II. Did the District Court abuse its discretion by relying on Respondents' attorney's speculations regarding foreign Panamanian law as opposed to admissible evidence regarding foreign Panamanian law?

District Court Held: The District Court relied on Respondents' attorney's speculations regarding foreign Panamanian law as opposed to admissible evidence regarding foreign Panamanian law.

Cases: *Bridgeman v. Gateway Ford Truck Sales*, 269 F.Supp. 233 (D.Ark.1969).

III. Did the District Court abuse its discretion in granting Respondents' *forum non conveniens* motion after Respondent failed to bring its motion for over 28 months?

District Court held: Respondents did not waive their right to bring a *forum non conveniens* motion by waiting over 28 months to bring the motion.

Cases: *In Re Crash New Orleans*, 821 F.2d 1147 (5th Cir. 1987).

IV. Did the District Court err when it held that the private interest factors and public interest factors weigh heavily in favor of dismissal on Respondents' *forum non conveniens* motion?

District Court Held: The private interest factors and the public interest factors weigh heavily in favor of dismissal.

Cases: *Bergquist v. Medtronic, Inc.*, 379 N.W.2d 508 (Minn. 1986).

STATEMENT OF THE CASE

This is an appeal pursuant to Rule 103.03(a) of the Minnesota Rules of Civil Procedure from the Judgment of the District Court, Tenth Judicial District, Anoka County, the Honorable Barry Sullivan presiding, dismissing Appellant Paulownia Plantation De Panama Corporation's Complaint under the doctrine of *forum non conveniens*. The Court found that Panama was an available and adequate alternative forum to adjudicate Appellant's claims.

This action involves a classic investment scam by Respondent Harry Rajamannan and his corporation, Respondent Agro-K, which is in the business of selling fertilizer products for trees throughout the world including Panama. In addition, Respondent Harry Rajamannan also had a number of personal investments in Panama.

In 1998, Respondent Harry Rajamannan convinced Australian investors to invest in an (alleged) paulownia tree farm in Panama through Appellant Paulownia Plantation De Panama Corporation, a Republic of Vanuatu corporation the Australian investors formed to invest in the Panamanian paulownia tree farms ("Appellant"). Although Respondent Harry Rajamannan's wholly owned corporation Respondent Perla Verde Service Corporation ("PVSC") allegedly operated the paulownia tree farm, Respondent Harry Rajamannan told Appellant to wire transfer its investment monies through Respondent Agro-K's TCF bank account in Anoka County representing to Appellant that Agro-K would transfer the investment funds to Respondent PVSC in Panama for use on the paulownia tree farm. In reliance on Respondent Harry Rajamannan's representation,

Appellant wire transferred to Respondent Agro-K's TCF bank account in Anoka County \$898,831.26 from 1998 through 2001. In 2001, Respondent Harry Rajamannan claimed the paulownia tree farm failed never selling one tree.

Appellant commenced this action on December 29, 2004 asserting claims for fraud, unjust enrichment, conversion and breach of contract. Respondents' Answered on January 18, 2005 asserting counterclaims and an affirmative defense of *forum non conveniens* claiming that this action should be tried in Panama. In discovery, despite the fact that Respondent Agro-K received \$898,831.26 in wire transfers from Appellant from 1998 through 2001, and the fact that Agro-K is an American corporation subject to American accounting and tax law documentation requirements, Respondents failed to produce any documentary evidence or testimony that Agro-K ever sent Appellant's monies to Respondent PVSC for use on the paulownia tree farm. Moreover, what accounting records Respondents did produce unequivocally demonstrated that Respondent Harry Rajamannan used at least \$450,000 of Appellant's investment monies sent to Respondent Agro-K's TCF bank account to pay for a Pacific oceanfront estate Respondent Harry Rajamannan was purchasing in Panama.

Despite the fact that (i) Respondents' *forum non conveniens* affirmative defense required expert testimony from an expert in Panamanian law and (ii) Respondents are required to *timely* bring a motion to dismiss based on *forum non conveniens*, Respondents failed to disclose in discovery the expert opinions supporting their *forum non conveniens*

affirmative defense and failed to bring their motion to dismiss based on *forum non conveniens* until 28 months after serving their Answer – May 10, 2007.

On May 10, 2007, Appellant filed a motion for summary judgment and Respondents filed a motion for summary judgment and a motion to dismiss based on *forum non conveniens*. Respondents' motion to dismiss relied on the expert affidavit of Humberto Iglesias, a Panamanian attorney, whose sole opinion was Appellant's action "could have [originally] been brought in Panama". However, that is not the issue in this case. The issue is whether Panamanian courts will exercise subject matter jurisdiction over the case after a court dismisses the case based on *forum non conveniens*. Panamanian statutes unequivocally prohibit Panamanian courts from exercising subject matter jurisdiction over any case where a court previously dismissed the case based on *forum non conveniens* - as Appellant's expert specifically testified and as the U.S. District Court for the Southern District of Texas specifically found in an almost identical case in April, 2007:

In 2006, the Panamanian National Assembly passed a statute that deprives Panamanian courts of jurisdiction over cases filed in foreign countries that have been dismissed under the doctrine of *forum non conveniens*. See Pls.' Resp. to Canadian Defs.' Mot. to Dismiss for Forum non Conveniens at 8 (setting forth Panamanian National Assembly Law No. 32, Chapter IV, Section 1, Article 1421-J). The new law requires Panamanian courts to " 'reject[] ex officio by reason of incompetence' " any "[l]awsuits that are brought in the country as a result of a foreign judgment of *forum non conveniens*." " *Id.*

See, Johnston v. v. Multi-Data Systems International Corp., No. G-06-CV-313, U.S. Dist. 2007 Westlaw 1296204, at 21, (S.D. Tex. April 29, 2004) (emphasis supplied).

Appellant's Appendix ("AA") at AA-47.

The District Court granted the Respondents' Motion to Dismiss and dismissed Appellant's Complaint without prejudice without reaching the merits of Appellant's or Respondents' motions for summary judgment.

The District Court undeniably abused its discretion in finding that Panama was an available and adequate alternative forum because Respondents provided the Court with literally no evidence contradicting Appellant's expert's opinion and the result reached in *Johnston* that Panama is not an available jurisdiction to adjudicate this case. This Court should reverse that decision and remand to the District Court to reinstate the action for further proceedings.

STATEMENT OF FACTS

In order to understand this action and the merits of Appellant's claims, this Statement of Facts will detail the facts involved in the underlying action.

A. Parties

1. Appellant Paulownia Plantations de Panama Corp.

Appellant is a Vanuatu¹ corporation organized to invest in Respondent PVSC's (alleged) paulownia tree farm operation in Panama. Mr. Robert Shepherd, a citizen of Australia and an investor and accountant ("Shepherd"), is Appellant's principal. *See, Shepherd Depo. T at p. 10, l. 10- p.13, l. 3.* The Shepherd Deposition Transcript is attached to the May 31, 2007 William F Mohrman Affidavit (hereinafter "First Mohrman Affidavit") as Exhibit 1.

2. Respondent Ambrose Harry Rajamannan.

Respondent Ambrose Harry Rajamannan was born in Sri Lanka and currently resides in Anoka County, Minnesota. *See, Rajamannan Depo. T at p. 7, l. 3-22* (First Mohrman Affidavit, Ex. 2.) Respondent Rajamannan is the owner and principal of Respondents Agro-K, Inc., PVSC and Perla Verde, SA. *See, Rajamannan Depo T at p. 7, l. 3-p. 8, l. 7* (First Mohrman Affidavit, Ex. 2). Respondent Rajamannan has spent most of his business career in the plant fertilizer business. *See Rajamannan Depo. T. at p. 17, l. 11 - p.21, l. 3.* (First Mohrman Affidavit, Ex. 2). A large part of Respondent Agro-K's business, a corporation Respondent Rajamannan began in 1976, has been in the development of tree fertilizers. *See, Rajamannan Depo. T. at p. 22, l. 10-p.27, l. 15*

¹ The Republic of Vanuatu is an island nation located approximately 1,090 miles east of Australia.

(First Mohrman Affidavit, Ex. 2). Respondent Rajamannan is an expert in the cultivation of commercial trees. *See, Rajamannan Depo. T. at p. 23, l. 25-p. 30, l. 6; p 306, l —p 307, l. 10* (First Mohrman Affidavit, Ex. 2). In the 1990's, Respondent Rajamannan began developing a business interest in the plantation and harvesting of paulownia trees. *See, Rajamannan Depo. T at p. 5, l. 4- l. 22* (First Mohrman Affidavit, Ex 2).

3. Respondent Agro-K, Inc.

Respondent Agro-K is a Minnesota corporation engaged in the business of selling fertilizers throughout the world including Panama. *See, Rajamannan Depo. T. at p. 14, l. 8 - p. 25, l. 22* (First Mohrman Affidavit, Ex. 2). Respondent Harry Rajamannan is the President and primary shareholder of Respondent Agro-K. *See, Defendant Concie Rajamannan Depo. T. at p. 11, l. 8-20.* (First Mohrman Affidavit, Ex. 3). Respondent Rajamannan has convinced investors around the world to invest in Respondent Agro-K's operations. *See, Rajamannan Depo. T. at p. 14, l. 11 — p. 17, l.3* (First Mohrman Affidavit, Ex. 2). Incredibly, while Respondent Rajamannan testified as to Respondent Agro-K's business accomplishments, Respondent Rajamannan also admitted that despite earning millions in annual revenues, Respondent Agro-K has failed to turn an annual profit in over 25 years of business and has not made any distributions to its shareholders. *See, Rajamannan Depo. T. at p. 74, l. 10—p. 76, l. 8* (First Mohrman Affidavit, Ex. 2). Nonetheless, Respondent Rajamannan testified he is now working "harder" than ever "hoping" that Respondent Agro-K will hit a "home run" in order to make a return for his investors or actually the grandchildren of those investors because, as Rajamannan

admitted, “most of the investors are dead.” *See, Rajamannan Depo. T at p. 16, l. 7-23, p. 76, l. 17—p. 77, l. 2; p. 79, l. 8-24* (First Mohrman Affidavit, Ex. 25).

4. Respondent Perla Verde Services Corp.

Respondent Perla Verde Service Corporation (“PVSC”) is a Panamanian corporation. Respondent Rajamannan is the president of Respondent Perla Verde Service Corporation. Incredibly, Respondent Rajamannan testified that Respondent PVSC has not issued any shares of stock. *See, Rajamannan Amended Responses to Appellant’s Interrogatory No. 11.* (First Mohrman Affidavit, Ex. 4). Respondent PVSC is the corporation with whom Appellant contracted to plant, maintain and harvest the Paulownia trees in Panama. *See, March 12, 1999 Planting and Service Contract attached to the Complaint as Exhibit B.* However, as more fully discussed below, Respondent PVSC never owned or leased any of the land on which it had contracted with Appellant to plant, maintain and harvest the paulownia trees in Panama *See, Rajamannan Depo. T. at p. 354, l. 17-25* (First Mohrman Affidavit, Ex. 2). Moreover, Respondents failed to produce any bank records from Respondent PVSC evidencing its receipt of the investment monies Respondent Agro-K allegedly sent PVSC for use on the paulownia tree farm. *See, First Mohrman Affidavit.*

5. Verde Tech, S.A.

Verde Tech, S A. is a Panamanian corporation Defendant Rajamannan wholly owns. Rajamannan set up Verde Tech to operate as Respondent Agro-K’s distributor in

Panama. *See, Rajamannan Depo. T. at p. 71, l. 8—p. 72, l. 7* (First Mohrman Affidavit, Ex. 2).

B. Paulownia Trees

This action involves the business of planting, maintaining and harvesting paulownia trees. Paulownia trees have traditionally been grown in Asia. *See, Rajamannan Depo. T. at p. 104, l. 17—p. 106, l. 5* (First Mohrman Affidavit, Ex. 2). The paulownia tree has several commercial advantages over other trees because paulownia trees grow very fast, they can be harvested and dried quickly and paulownia lumber is highly regarded for commercial uses in burgeoning Asian markets such as China. *See, Rajamannan Depo. T. at p. 98, l. 20—p. 104, l. 1* (First Mohrman Affidavit, Ex. 2). It was Respondent Rajamannan's view in the late 1990's that there was a tremendous commercial potential for developing paulownia. *See, Rajamannan Amended Responses to Appellant's First Request for Admissions, Request No. 2* (First Mohrman Affidavit, Ex. 5 and 6).

C. Respondent Rajamannan's Solicitation of Appellant to Invest in Respondent Rajamannan's Paulownia Tree Farm in Panama.

In 1997, Respondent Harry Rajamannan met and solicited Mr. Shepherd to invest in Rajamannan's Paulownia tree farms in Panama. *See, Shepherd Depo. T. at p. 21, l. 13-1.5- - p. 28, l. 5* (First Mohrman Affidavit, Ex. 1) and *Rajamannan Depo. T. at p. 305, l. 9 - p. 307, l. 2* (First Mohrman Affidavit, Ex. 2). Respondent Rajamannan represented to Shepherd that paulownia trees grew quite rapidly and would fetch

substantial profits after ten years of growth. *See, Rajamannan Amended Responses to Requests for Admission, Request No. 7* (First Mohrman Affidavit, Ex. 5 and 6)).

It is at this point that Respondent Harry Rajamannan began his fraud. Rajamannan provided Shepherd with a budget for the paulownia plantation project in November, 1998. *See, Rajamannan Depo. T. at p. 336, 1.25—p. 339, 1. 6* (Mohrman Affidavit, Ex. 2). Respondent Rajamannan admitted in his responses to Requests for Admissions that he told Shepherd “that the estimated gross revenues on the paulownia plantation project over the first ten years would total \$61,115 per acre and that the estimated net yields would total \$40,749 per acre over the first ten years.” *See, Rajamannan Responses to Requests for Admission, Request No. 16* (First Mohrman Affidavit, Ex. 5 and 6).

Respondent Rajamannan further admitted (i) that he knew Shepherd would take Rajamannan’s financial representations and incorporate them into an offering memorandum for Appellant’s Australian investors and (ii) that the offering memorandum in fact contained the financial representations Rajamannan made to Shepherd. *See, Rajamannan Depo. T. at p. 586, 1. 6- p.590, 1.2* (First Mohrman Affidavit, Ex. 2) and *the Offering Memorandum at page PPP 0725* (First Mohrman Affidavit, Ex. 11). However, Respondent Rajamannan admitted in discovery his financial representations were false:

[Rajamannan] admits that these estimates as stated in Request No 16 were made as blue sky figures and thus not reliable.”

See, Rajamannan Responses to Requests for Admission, Request No. 16 (First Mohrman Affidavit, Ex. 5 and 6).

Based on Respondent Rajamannan's false financial representations, Appellant decided to invest in Defendant Rajamannan's paulownia tree plantation in Panama. *See, Shepherd Depo. T. p. 97, l. 7-21* (First Mohrman Affidavit, Ex. 1).

D. Respondent Rajamannan Demands Appellant Send Its Investment Monies Through Respondent Agro – K's TCF Bank Account in Minnesota.

Respondents admitted they demanded that Appellant make its investment payments through Respondent Agro – K's TCF Bank account in Minnesota rather than directly through Respondent PVSC. *See, Rajamannan Responses to Requests for Admission, Request No. 39* (Mohrman Affidavit, Ex. 5 and 6). Respondents represented that the payments to Agro – K would then be transferred to PVSC in Panama. *See, Rajamannan Responses to Requests for Admission, Request No. 39* (Mohrman Affidavit, Ex. 5 and 6). However, Respondents admitted that they did not transfer any of Appellant's investment monies to Defendant PVSC's bank account in Panama. *See, Rajamannan Responses to Requests for Admission, Request No. 39* (Mohrman Affidavit, Ex. 5 and 6).

E. Appellant Enters Into A Contract With Respondent PVSC To Invest In The Paulownia Tree Farm But Respondents Fail to Use The Investment Monies For The Paulownia Tree Farm.

Based on the false projections provided by Respondent Rajamannan, on March 12, 1999, Appellant entered a "Management Contract" with Respondent PVSC. *See, Rajamannan Depo. T. at p. 564, l. 2 — p. 565, l. 3* (First Mohrman Affidavit, Ex. 2); *see also, March 12, 1999 Management Contract – AA – pp. 103-108*. Under the

Management Contract, Appellant agreed to pay Respondent PVSC over the course of three years \$4,000 per acre of land planted. *See, paragraphs 1, 2 and 3 of the Management Contract – AA – p. 103.* Because Respondent PVSC represented to Appellant that it had leased 336 acres of land, Appellant was obligated to transfer to Respondent PVSC \$1,344,000 for the investment.

F. During Discovery, Appellant Obtains Unequivocal Evidence of Respondent's Fraud.

During discovery, Appellant fully learned of Respondents' fraud. First, Respondent Rajamannan fully admitted in his deposition that Respondent PVSC. *See, Rajamannan Depo. T. at p. 509, l. 17—p. 510, l. 22* (First Mohrman Affidavit, Ex. 2).

Second, Respondent Harry Rajamannan fully admitted that he has no idea whether the \$898,831.26 Respondent Rajamannan admits Respondent Agro-K received from Appellant ever went to Respondent PVSC's paulownia tree farm operation. During Respondent Rajamannan's deposition, Respondent Rajamannan was presented with a list of the wire transfers Respondent Agro-K made to Panama – a list Respondent Rajamannan prepared himself – which list was marked as Exhibit 23 to Respondent Rajamannan's Interrogatory Responses. *See, Rajamannan Depo. T. at p. 135, l. 1-p. 137, l. 16* (First Mohrman Affidavit, Ex. 2) *and Respondent Rajamannan's Amended Response to Appellant's Interrogatories, Interrogatory No. 23* (First Mohrman Affidavit, Exhibit 4). Respondent Rajamannan admitted that he could not testify whether

Appellant's investment monies listed on Exhibit 23 were ever used on the paulownia tree farm:

Q. You don't know which of any of these transfers starting on the page that's marked Exhibit 23, going to the next two, three, four, five, six pages, up through, but not including the document that's marked Exhibit A, you can't tell me which of these specific transfers were used on the PPP project?

A. That's right. Correct.

See, Rajamannan Depo. T. at p. 147, l. 22 — p. 148, l. 4 (First Mohrman Affidavit, Ex. 2).

Third, Respondents failed to produce any documentary evidence substantiating or corroborating what Respondents did with the \$898,831.26 of investment monies Appellant sent Respondent Agro - K. Respondent Harry Rajamannan developed a document in discovery setting forth all of the payments *Respondents'* claim Appellant sent to Respondent Agro - K for the paulownia investment. AA – p. 49. ² As set forth above, Respondents Rajamannan and Agro-K admitted that they have *no evidence - either in documentation or testimony-* that the \$898,831.26 Appellant sent to Respondent Agro-K, at Respondent Rajamannan's direction, ever went to Respondent PVSC or the paulownia tree farm. Rather, Respondent Rajamannan testified that Appellant's money went to Verde Tech or persons Respondent Rajamannan claimed to control but all creditors of Respondent Agro-K to whom Agro-K owed money. The fact that Respondent

² Appellant actually sent Respondent Agro-K and Verde Tech \$1,319,823.00 from 1998 through 2001 for Respondent PVSC. Nonetheless, Respondents admit that Appellant sent Respondent Agro-K \$898,831.26.

Agro-K made these transfers to persons or entities under Respondent Rajamannan's control is critical because it means that Respondent Rajamannan had the ability to obtain the banking and accounting documentation proving that these entities transferred Appellant's funds to Respondent PVSC. However, Respondents produced no such documentation.

This fact is even more troubling because Respondents did produce documentation of Verde Tech's transactions during the 1998- 1999 time frame when Appellant made the bulk of its transfers to Respondent Agro-K. *See, Verde Tech's computer accounting transaction report* (First Mohrman Affidavit, Ex. 16.) However, Verde Tech's transaction report fails to identify who paid Verde Tech or who Verde Tech paid and, while there are handwritten notes purporting to reference the purpose of the transactions, there is not one reference to Respondent PVSC or the paulownia tree farm project. *See, Verde Tech's computer accounting transaction report* (First Mohrman Affidavit, Ex. 16).

Moreover, Respondent Agro-K is an American business subject to American accounting and tax laws. Respondent Agro-K is obligated under *American law* to fully and accurately account for the purpose of every dollar passing through its hands. Such an accounting should be in the form of receipts from Respondent PVSC along with a computer accounting program report reconciling Agro-K's bank statements. Certainly, Respondent Agro-K would have to perform such an accounting for U.S. tax authorities. Despite this, Respondent Agro-K failed to produce in discovery any business documentation showing that the *documented* wire transfers Respondent Agro - K

allegedly made on behalf of Respondent PVSC for the paulownia tree farm were in fact used on the paulownia tree farm in which Appellant invested. *See, First Mohrman Affidavit.*

Simply put, Respondent Agro-K admits the following:

1. That it received \$898,831.26 from Appellant;
2. That Respondent Agro-K was to send Appellant's investment money to Respondent PVSC for the paulownia tree farm;
3. That Respondent Agro-K did not send Appellant's investment money to Respondent PVSC but rather to Verde Tech or persons Respondent Rajamannan claimed to control but all of whom were creditors of Agro-K;
4. That while Respondent Agro-K *alleges* that Appellant's money was expended on Respondent PVSC's tree farm, Respondent Agro-K has absolutely no documentation evidencing such expenses and, most importantly;
5. Respondent Harry Rajamannan testified that he has no idea where Appellant's investment money went.

G. Respondents' Records Reveal That At Least Two Transfers Appellant's Made For The Paulownia Tree Farm Project Went To Pay For Respondent Rajamannan's Purchase Of A Palatial Pacific Oceanfront Estate.

While Respondent Agro-K is unable to provide any evidence that the monies it received from Appellant were actually used on the paulownia tree farm project, the records Respondents did produce demonstrate that Respondents' used at least \$450,000 of Appellant's money to pay for Rajamannan's palatial Pacific oceanfront estate in Panama.

First, Respondents admit that Appellant wire transferred to Respondent Agro-K two deposits totaling \$205,655.64 on December 29, 1998. On December 30, 1998, Respondent Agro-K's made a \$150,000 "foreign wire transfer," the purpose of which Respondents cannot identify. *See, Respondent Agro - K's TCF Bank statements* (First Mohrman Affidavit, Ex. 17). However, Respondent Rajamannan produced in discovery a payment register of Respondent Rajamannan's mortgage payments for the Pacific Oceanfront estate he was purchasing in Panama from a person named "Andre Rigaux." *See, Defendant Rajamannan's Register of Mortgage Payments* (First Mohrman Affidavit, Exhibit 19). Respondent Harry Rajamannan's mortgage register reflects a January 2, 1999 "transfer" for \$150,000 from "Harry" - exactly the amount of Agro-K's December 30, 1998 "foreign wire transfer."

Second, on June 11, 1999, Respondents directed Appellant to transfer \$335,152.48 directly to Verde Tech's account instead of to Respondent Agro-K's account in Minneapolis. *See, Respondent Rajamannan's Amended and Supplemental Responses to Appellant's Interrogatories, Exhibit A attached to the Responses, at p. 4* (First Mohrman Affidavit, Ex. 4). On June 15 and June 22, 1999, Verde Tech made two transfers of \$200,000 and \$100,000 to pay the mortgage. *See, Defendant Rajamannan's Register of Mortgage Payments* (First Mohrman Affidavit, Exhibit 19).

Third, one last document obtained in discovery confirms Defendant Rajamannan's fraud. Steven Silos was a former manager of Respondent PVSC and a current resident of Surinam. Silos apparently quit Respondent Rajamannan's operations in 2000 and

Rajamannan refused to pay Silos. Silos commenced an action against Rajamannan in Panama to collect the amounts owed to Silos. Silos sent Rajamannan a letter detailing Rajamannan's fraud including Silos' claims that Rajamannan would not let employees talk to the investors who came to Panama to view the paulownia tree farm and that the Respondents' operation of the paulownia tree farm was "chaotic." See, *Rajamannan Depo. T. at p. 760, 1. 15—p. 762, 1.2* (First Mohrman Affidavit, Ex. 2) and *Steve Silos Letter* (First Mohrman Affidavit, Ex. 7). Finally, in May, 2002, Respondent Rajamannan fired all of the workers on the second paulownia tree farm and completely abandoned the paulownia tree farm project. See, *Shepherd Depo. T. p. 331, 1. 22 —p. 332, 1.18* (First Mohrman Affidavit, Ex. 1) and *Harold Tomblin Depo. T. at p. 123, 1. 6-11.* (First Mohrman Affidavit, Ex. 18).

H. Minnesota Litigation.

Appellant commenced this action on December 29, 2004. Respondents answered the Complaint on January 18, 2005, asserting *forum non conveniens* as an affirmative defense. See, "*Third Defense*" contained in each of Respondents' Answers. However, Respondents did not file their *forum non conveniens* motion until May 10, 2007 – 28 months after the case was commenced and after discovery had been completed and depositions taken. Appellant also filed a cross motion for summary judgment. The District Court heard the motions on June 28, 2007. On September 25, 2007, the District Court issued an order dismissing Appellant's Complaint under the doctrine of *forum non*

conveniens holding that Panama was an available and adequate forum to adjudicate the claims. The Court never reached the merits of Appellant’s summary judgment motion.

Despite the fact that Appellant’s expert unequivocally opined that Panama had enacted specific legislation forbidding its courts from exercising subject matter jurisdiction over the claims previously dismissed by a foreign court based on *forum non conveniens*, and Respondents’ expert failed to contradict this opinion, the District Court nonetheless found that the Panamanian courts were still “available” to adjudicate this case. The District Court also found the Panamanian courts adequate even though Appellant presented un rebutted testimony regarding the corruption of the Panamanian courts. The District Court abused its discretion in failing to rely on any evidence presented to dismiss this case. The District Court Order and Judgment should be reversed.

ARGUMENT

A. Standard of Review.

The standard of appellate review from a judgment dismissing a complaint based on *forum non conveniens* is whether the district court abused its discretion in applying the *forum non conveniens* analysis. *Bergquist v. Medtronic, Inc.*, 379 N.W.2d 508 (Minn. 1986). “Discretion is abused in the context of *forum non conveniens* when a decision (1) rests either on an error of law or on a clearly erroneous finding of fact, or (2) cannot be located within the range of permissible decisions, or (3) fails to consider all the relevant

factors or unreasonably balances those factors.” *Pollux Holding, Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 70 (2d Cir. 2003). Most importantly to this appeal, “[b]ecause the defendant has the burden of establishing that an adequate alternative forum exists, this court will reverse when ‘the affidavit through which [the defendant] attempted to meet its burden contains substantial gaps.’” *El Fadl v. Central Bank of Jordan*, 75 F.3d 668, 677 (D.D.C. 1996).

B. Legal Standard For Determining A Motion To Dismiss Based On *Forum Non Conveniens*.

The standards and factors Minnesota courts utilize in deciding motions to dismiss based on *forum non conveniens* are straightforward and follow the factors set forth under federal law in *Piper Aircraft Corp. v. Reyno*, 454 U.S. 235 (1981) and *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). *Bergquist v. Medtronic, Inc.*, 379 N.W.2d 508, 511 (Minn. 1986).

1. In Determining *Forum Non Conveniens* Motions, Courts Must First Determine That An “Available and Adequate Alternative Forum” Exists and Then Evaluate the Public and Private Interest Factors.

In evaluating *forum non conveniens* motions, the Court must first determine whether an *available* and *adequate* alternative forum exists to adjudicate the case:

“[i]n all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums”

Gulf Oil, 330 U.S. at 506-507 (emphasis supplied).

Thus, Respondents must first demonstrate that an *available and adequate alternative forum* exists in order to dismiss this case based on *forum non conveniens*:

“[The District Court was required to first] determine that the alternative forum is ***available and adequate*** before it weighs the private and public interest factors relevant to the forum non conveniens inquiry.”

Lacey v. Cessna Aircraft Co., 862 F.2d 38, 45 (3rd Cir. 1989); *Johnston v. Multi-Data Systems International Corp.*, No. G-06-CV-313, U.S. Dist. 2007 West law 1296204, at 28 (S.D. Tex. April 29, 2004).

“Availability of adequate alternative fora is a threshold test...in the sense that a forum non conveniens motion cannot be granted unless the test is fulfilled.”

Friends for All Children, Inc. v. Lockheed Aircraft Corp., 717 F.2d 602, 607 (D.C. Cir. 1983)(emphasis supplied).

In fact, “availability” of an alternative forum is such a general requirement that it is specifically set forth as a requirement under The Restatement of the Law – Conflict of Laws - §84: “A state will not exercise jurisdiction if it is a seriously inconvenient forum for the trial of the action ***provided that a more appropriate forum is available to the plaintiff.***”

Only after the court determines that an available and adequate alternative forum exists may the court then balance the private and public interest factors. The non-exclusive private interest factors are: “(1) relative ease of access to sources of proof, (2) availability of compulsory process and costs for attendance of witnesses; (3) possibility of view of premises, if appropriate; and (4) other practical issues, including ease of enforcement of any ultimate judgment.” *See, Bergquist v. Medtronic, Inc.*, 379 N.W.2d 508, 511, footnote 4 (Minn. 1986). The non-exclusive public interest factors are (1)

congestion of the courts handling a case originating elsewhere, (2) imposition of a jury burden on people with no relation to the litigation, (3) the interest in having local controversies decided locally and (4) the interest in choice of law. *See, Bergquist v. Medtronic, Inc.*, 379 N.W.2d 508, 511, footnote 4 (Minn. 1986).

Finally, the moving party must show that the plaintiff can reinstate their suit in the foreign forum without undue inconvenience or prejudice. *Piper Aircraft*, 454 U.S. 235; *Gulf Oil*, 330 U.S. 501; *Pain v. United Technologies Corp.*, 637 F. 2d 775, 784-785 (D.C. Cir. 1980).

2. Respondents Bear The Burden Of Persuasion – And a Heavy Burden - As To All Elements Of The *Forum Non Conveniens* Analysis.

With respect to evaluating the factors set forth above, the burden of persuasion rests on Respondents to establish all elements of the *forum non conveniens* analysis. *Gulf Oil*, 330 U.S. at 508-509. In order to meet that burden, the Respondents must provide “unequivocal, substantiated evidence” for their position. *Baris v. Sulpicio Lines, Inc.*, 932 F.2d. 1540, 1550 n. 14 (5th Cir. 1991). *See also, In re Ford Motor Co. v. Bridgestone/Firestone North American Tire*, 344 F.3d 648, 652 (7th Cir. 2003). Finally, the courts have made it abundantly clear that the burden upon the defendant with respect to proving that the foreign alternative forum is “available” and “adequate” is, like the burden with respect to the other elements in a *forum non conveniens* determination, a “heavy one.” *El Fadl*, 75 F.3d at 677-78. “[U]nless the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed.” *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

3. The Interpretation and Application Of Foreign Law, Such As Panamanian Law, Is A Question Of Fact On Which Respondents Must Present Admissible Evidence – Not The Unsubstantiated Arguments of its Minnesota Counsel.

The central issue on this appeal is whether or not Panama is an “available” forum to adjudicate Appellant’s claims. The core to this central issue is whether Panamanian law prohibits its courts from exercising subject matter jurisdiction over this case after dismissal by the District Court. However, unlike an analysis of American law in which both the attorneys and the Court are presumed to be experts on American law, the meaning of the law of Panama is a fact question. “The determination of the law of a foreign jurisdiction is generally classed as a question of fact rather than of law.” 31 *Am.Jur.2d Expert and Opinion Evidence* §124. “What the laws of foreign countries are, when made an issue in a case, must be proved as other facts.” *Robertson v. Stead*, 36 S.W. 610, 612 (Mo. 1896). See also, *In re Gyfteas’ Estate*, 300 N.Y. S. 2d 913, 916 (N.Y. Sup. 1968) (“It is elementary that foreign law is a question of *fact*”); *Werlél v. Zivnostenska Banka*, 38 N.E.2d 382 (N.Y. 1941) (“Foreign law is a question of fact which must be proved”); *Bridgeman v. Gateway Ford Truck Sales*, 269 F.Supp. 233, 238 (D.Ark.1969) (“A question of foreign law has been considered historically as being a question of fact”).

The fact that Panamanian law may be contrary to an American court’s expectations of what the law ought to be is neither relevant nor surprising. Neither the District Court nor Respondents’ attorney can speculate as to how the Panamanian courts will apply the Panamanian laws at issue in this case. This court may not, as the District

Court chose to do, superimpose its own view of what the law of Panama ought to be over the testimony of experts on Panamanian law and on what the law of Panama in fact *says*.

C. Respondents Failed To Present Any Evidence That Panamanian Courts Would Exercise Subject Matter Jurisdiction Over This Matter After Dismissal Based On *Forum Non Conveniens*.

The central issue on this appeal is whether Panamanian law allows its courts to exercise subject matter jurisdiction over this case after the District Court dismissed the case based on *forum non conveniens*. More importantly, the determination of this issue required an analysis of Panamanian law which, as set forth above, is a factual issue to be determined based on the testimony and opinions of experts on Panamanian law. As more fully set forth below, Respondents not only failed to present any expert testimony or other evidence demonstrating that Panamanian Courts could exercise subject matter jurisdiction over Appellant's case after the District Court dismissed the case based on *forum non conveniens*, but Appellants presented un rebutted evidence in the form of Panamanian Civil Code citations and U.S. District Court decisions specifically holding that Panamanian courts would not have subject matter jurisdiction over Appellants claims.

1. Appellant's Expert Explicitly Testified That Panamanian Courts Cannot Exercise Subject Matter Jurisdiction Over This Case After A Dismissal Based On *Forum Non Conveniens*.

Because Respondents failed to present any evidence on the issue of whether a Panamanian Court would exercise subject matter jurisdiction over this case after a

dismissal based on *forum non conveniens*, Appellant will first describe the evidence Appellant presented unequivocally demonstrating that Panamanian Courts will not exercise subject matter jurisdiction.

In its response to Respondents' motion to dismiss, Appellant submitted the Affidavit of Mr. Henry Dahl, an expert on Latin American procedural law generally and Panamanian procedural law specifically. *See, Dahl Affidavit AA* at p. 50-73. As Mr. Dahl specifically testifies and opines, and as a U.S. District Court has found in identical circumstances, Panamanian law prohibits Panamanian courts from exercising jurisdiction over Appellant's claims.

- a. **Panama, Like Most Latin American Countries, Has Adopted The Old Roman Doctrine Of "Preemptive Jurisdiction" Which Prohibits Panamanian Courts From Exercising Subject Matter Jurisdiction Over Any Action Which Was Previously Dismissed by Another Court.**

First, Mr. Dahl explained in his Affidavit the Latin American doctrine of "preemptive jurisdiction." Preemptive jurisdiction (*competencia preventiva*) is a well-defined concept in the Panamanian system. The doctrine is grounded on the Roman concepts of "*forum praeventionis*" and "*perpetuatio jurisdictionis*" meaning that once jurisdiction accrues it cannot be altered. *See, Dahl, H. S., Forum Non Conveniens, Latin America and Blocking Statutes*, 35 (2003 - 2004) *Inter-American Law Review* at p. 28. AA – p. 80: In other words, "[i]n a situation in which more than one court claims the power to adjudicate concurrently, the plaintiff's choice, *once exercised*, cannot be disturbed or twisted by a court of law." *See, Prof. Garro, Forum Non Conveniens:*

“Availability” and “Adequacy” in Latin American from a Comparative Perspective

attached to the Dahl Affidavit as Exhibit 8 – AA – p. 57. The Inter-American Juridical Committee explains how preemptive jurisdiction applies in Latin America mentioning Panama specifically:

Jurisdiction is terminated. Even when there is concurrent jurisdiction, the claim filed before one court extinguishes the jurisdiction of the other court. (Footnote 3).

Footnote 3. Once jurisdiction attaches, it cannot be altered. For instance, Codes of Civil Procedure of [...] Panama, art. 253 [...] The term of art for this is “prevención”, or “competencia preventiva”. From “prevenire”, a Latin term meaning to arrive (venire) earlier (pre) and consequently preventing or blocking the way for others. (Report of March, 2000, at pp. 2 and 3.

See, Proposal for an Inter-American Convention on the Effects and Treatment of the Forum Non Conveniens Theory, 1999 and 2000 Reports, attached to the Dahl Affidavit as Exhibit 3. AA – p. 58.

As Mr. Dahl testifies in his Affidavit, the U.S. District Court for the Eastern District of Louisiana recognized that Costa Rica’s application of preemptive jurisdiction prevented a dismissal based on *forum non conveniens*:³

Finally, the Court considers article 31 of the Costa Rican Code of Civil Procedure, which states that “if there were two or more courts with jurisdiction for one case, it will be tried by the one who heard it first at plaintiff’s request”. Under this rule, in cases in which there

³ As Mr. Dahl testifies and opines, Costa Rica’s preemptive jurisdiction rule (Article 31 of the Code of Civil Procedure) is similar to Panama’s (Article 238, Judicial Code).

might initially have been concurrent jurisdiction in two or more fora, once a plaintiff has chosen a particular forum, all other possible fora are divested of jurisdiction. Thus, when plaintiffs filed suit against defendants in this Court, by operation of CCP 31, as of that filing, the Costa Rican courts --if they ever had jurisdiction -- were divested of jurisdiction in favor of this Court. Because the courts of Costa Rica may no longer assert jurisdiction over plaintiffs' claims, they must be considered unavailable."

Canales Martinez v. Dow Chemical Corp., 219 F.Supp.2d 719, 728 (E.D.La. 2002) *See*, Dahl Affidavit, Ex. 4 and AA – p. 58.

Mr. Dahl further testifies and opines that Panama has codified the doctrine of preemptive jurisdiction in Articles 238, 255, 256 and 259 of the Panamanian Judicial Code. *See*, Dahl Affidavit at ¶¶ 21-25 – AA – pp. 57-60. Mr. Dahl testifies and opines that the First Superior Court of the First Judicial District of Panama, in *Escalante Romero et al. v. Multidata Systems International, et al.*, explicitly dismissed a re-filed Panamanian lawsuit based on preemptive jurisdiction after a U.S. court had previously dismissed plaintiff's case under the doctrine of *forum non conveniens*:

Now, we have concluded that the Judge of the defendant's domicile, as well as the Judge of the place where the harm was caused have jurisdiction, but in a pre-emptive way. [Emphasis in original].

And, according to the provision of article 238 of the Judicial Code, "Pre-emptive jurisdiction is the one that belongs to two or more courts, so that the one that hears the case first, pre-empts or prevents the others from hearing the same." [...]

The Panamanian court in *Escalante Romero* applied the doctrine of preemptive jurisdiction in agreement with Panamanian law and dismissed the action. *See, Escalante Romero et al. v. Multidata Systems International et al.* decision attached to the Dahl Affidavit as Exhibit 10 and AA – pp. 58-59.

Based on the doctrine of preemptive jurisdiction, Mr. Dahl unequivocally testifies and opines that the Panamanian doctrine of preemptive jurisdiction doctrine will prevent Panamanian courts from exercising subject matter jurisdiction over Appellant’s claims if this Court affirms the dismissal of this action under the doctrine of *forum non conveniens*.

Mr. Dahl Also Testifies That In 2006 Panama Enacted A Law Which Specifically and Unequivocally Prohibits Panamanian Courts From Exercising Jurisdiction Over Cases Previously Dismissed Based On *Forum Non-Conveniens*.

In 2006, the Panamanian National Assembly passed Law 32 including Section 1421-J:

1421-J. Lawsuits filed in the country as a consequence of a *forum non convenience judgment* from a foreign court, do not generate national jurisdiction. Accordingly they must be rejected *sua sponte* for lack of jurisdiction because of constitutional reasons or due to the rules of preemptive jurisdiction.

See, Dahl Affidavit at ¶17 – AA – pp. 56-57.

As Mr. Dahl further testifies, the Panamanian National Assembly in passing Section 1421-J specifically stated that Section 1421-J was intended to clarify the codified doctrine of “preemptive jurisdiction” in the context of cases previously dismissed in a foreign jurisdiction based on *forum non-conveniens* and ensure that such cases are

“dismissed sua sponte.” See, *Statement of National Assembly* attached as Exhibit 2 to the Dahl Affidavit and AA – p. 56-57.

2. **Respondents Submitted Absolutely No Evidence Addressing Panama’s Doctrine of Preemptive Jurisdiction or Article 1421-J.**

Respondents bore the burden of establishing that Panama was an available jurisdiction under *forum non conveniens*, and, if Respondents were relying on Panamanian law in support of their motion, Respondents were required to present admissible evidence in the form of expert testimony to support their argument that Panama was available. However, Respondents failed to present any evidence on the issue of whether Panamanian law prohibits its Courts from exercising subject matter jurisdiction over a case previously dismissed based on *forum non conveniens*.

a. **Respondents’ Failed To Disclose Their Expert Witness In Discovery.**

Before reviewing the merits of Respondents’ expert’s opinion, Appellant moved to strike Respondents’ expert’s Affidavit because Respondents never disclosed the expert in discovery. See, *Appellant’s June 19, 2007 Motion to Strike*. Appellant served its First Set of Interrogatories on December 29, 2004. Interrogatory No. 7 and 8 requested Respondents identify any expert witness and expert opinions. However, Respondents never identified any expert witnesses or opinions. See, *Defendant Rajamannan’s Supplemental and Amended Responses to Interrogatories, Interrogatory No. 7 and 8*. AA – p. 85. As a result, Appellant moved to strike Respondent’s expert opinion.

Appellant relied on the fact that Respondents failed to disclose any expert testimony which Respondents unequivocally needed to support their motion to dismiss. Obviously, Appellant was prejudiced by its inability to cross examine Respondents' expert based on Mr. Dahl's testimony related to Panama's doctrine of preemptive jurisdiction and Panama's passage of Section 1421-J. Respondents' expert's responses, if truthful, would have defeated Respondents' Motion.

The Court should have struck Respondents' expert's affidavit.

b. Respondents' Expert Failed To Provide Any Opinion Regarding Whether Panamanian Courts Can Exercise Subject Matter Jurisdiction Over This Case After A *Forum Non Conveniens* Dismissal.

Even if the Court could properly accept Respondents' expert's affidavit into evidence, Respondents' expert failed to provide any opinions with respect to whether Panamanian Courts could exercise subject matter jurisdiction over this case after a dismissal based on *forum non conveniens*.

First, Respondents' expert's affidavit is only three pages long and contains only one relevant opinion at ¶9:

After reviewing the allegations in the Complaint and exhibits, I have concluded that this case could have been brought in Panama by [Appellant] against all of the [Respondents] in this action, including the Respondents who are citizens of the United States.

See, Igelisias Affidavit at ¶9 – AA at p. 75.

Second, Mr. Igelisias' expert opinion with respect to the availability of Panamanian courts are borderline disingenuous to the Court. Despite being a Panamanian attorney, Respondents' expert fails to address either the Panamanian doctrine of preemptive jurisdiction or Section 1421-J as set forth in the Dahl Affidavit. Moreover, Respondents' expert's failure to address these issues of fundamental Panamanian law is surely not because he did not know about them. Similarly to all of Respondents' arguments in this matter, the language of Respondents' expert affidavit is important. Respondents' expert does not testify that Panamanian courts will be "available" to hear this matter if dismissed under the doctrine of *forum non conveniens*. Rather, Respondents' expert testifies in the past tense that "[Appellant's] case could have been brought in Panama." In addition, Respondents' Memorandum submitted in support of their Motion to Dismiss reveals that Respondents fully knew of their difficulty with the availability issue because Respondents' Memorandum likewise fails to even discuss Panama's availability to hear this case even though "availability" of the foreign jurisdiction is the first factor this Court must address in evaluating a *forum non conveniens* motion. See, *Respondents' Memorandum of Law in Support of Their Motion at pages 28-29*.

Finally, unlike Mr. Dahl's Affidavit and testimony, Respondents' expert's affidavit is wholly devoid of any statutory or case citations. Respondents' expert fails to provide any analysis including Panamanian Code Citations as to why Appellant could have brought its claims in Panama even against the U.S. defendants.

It is extremely difficult to believe that a lawyer with the credentials of the Respondents' expert did not know of the foundational concept of preemptive jurisdiction or was unaware of the statute enacted last year - Section 1421-J - that strips Panamanian courts of subject matter jurisdiction over this case. Further, it is strange to think that American lawyers of some obvious expertise would so misunderstand the *forum non conveniens* test as to think that Panama's availability as an *initial forum* was what was at issue, rather than Panama's availability and adequacy *as an alternative forum* to hear this case after dismissal for *forum non conveniens*. Simply put, Appellant believes that Respondents failed to disclose their expert opinion in discovery and carefully couched the opinion to state that Appellant's case "could have been brought in Panama" in the first instance in the hopes that Appellant would not learn of the Panamanian doctrine of preemptive jurisdiction and Section 1421-J of the Panamanian statutes.

3. **Mr. Dahl's Opinion is Fully Supported By The U.S. District Court for the Southern District of Texas Decision in *Johnston v. Multi-Data Systems International Corp.***

On April 29, 2007, less than two weeks prior to Respondents filing their Motion to Dismiss, the U.S. District Court for the Southern District of Texas in *Johnston* denied a defendant's motion to dismiss based on the doctrine of *forum non-conveniens* based on Section 1421-J:

In 2006, the Panamanian National Assembly passed a statute that deprives Panamanian courts of jurisdiction over cases filed in foreign countries that have been dismissed under the doctrine of *forum non conveniens*. See Pls.' Resp. to Canadian Defs.' Mot. to Dismiss for Forum non Conveniens at 8 (setting

forth Panamanian National Assembly Law No. 32, Chapter IV, Section 1, Article 1421-J). The new law requires Panamanian courts to “ ‘reject[] ex officio by reason of incompetence’ “ any “ ‘[l]awsuits that are brought in the country as a result of a foreign judgment of *forum non conveniens*.’ ” *Id.* (quoting the law).

See, AA – p. 42 (emphasis supplied). The *Johnston* court’s opinion fully supports the opinion of Mr. Dahl.

4. **The District Court Abused Its Discretion By Misconstruing *Piper*, Disregarding Mr. Dahl’s Opinion And Relying On The Inadmissible Speculations Of Respondent’s Attorney.**

In its Memorandum and Order granting Respondents’ Motion, the District Court fully understood and analyzed the issue of whether Panama was available as a forum if this matter were dismissed based on *forum non conveniens*. The District Court simply muddled its analysis by failing to take into account the complete footnote 22 from *Piper*, disregarding Mr. Dahl’s Affidavit and relying on the inadmissible speculations of Respondents’ attorney.

a. **Footnote 22 From *Piper* Specifically States That It is “Not Appropriate” for a Court To Dismiss A Case Based On *Forum Non Conveniens* if the Court is “Unclear” Whether the Foreign Court Has Subject Matter Jurisdiction Over The Case.**

At page 6 of its Memorandum, the District Court fully and properly acknowledged that Respondents must establish that Panama is an available forum; otherwise the Court would be required to deny the *forum non conveniens* motion. However, on page 8 of the District Court opinion, the District Court only quotes *part* of footnote 22 from *Piper* in dismissing Appellant’s case based on *forum non conveniens*:

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.*** *Gilbert*, 330 U.S., at 506-507, 67 S.Ct., at 842. 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....

See, District Court Order (emphasis supplied) – AA – p. 10.

Relying on *Piper’s* quote regarding “amenability to process”, the District Court at page 9 ignored Mr. Dahl’s opinion that Panama would have jurisdiction over the case after a dismissal based on *forum non conveniens*:

There is no dispute that [Respondents] are “amenable to process” in Panama. The entire case and all the parties come within the jurisdiction of the Panamanian courts. The question is whether this case presents one of those “rare circumstances” where the alternative forum offers absolutely no remedy.

AA – p. 11.

There are numerous problems with the District Court’s analysis. First, the reason the *Piper* Court addressed “amenability to process” is because often times the alternative forum a defendant proposes will not have ***personal jurisdiction*** over the defendant. Thus, when courts dismiss cases based on *forum non conveniens* they will often condition the dismissal on defendants agreeing to be “amenable to process” in the alternative forum. This is generally not a problem because, similarly to American procedural law, the defense of lack of personal jurisdiction can be waived. However, subject matter jurisdiction can never be waived. For instance, U.S. federal courts can never waive subject matter jurisdiction:

Parties cannot create subject matter jurisdiction by contract where none exists, nor can they waive a court's lack of subject matter jurisdiction because, quite simply, subject matter jurisdiction cannot be created where none exists.

Douglas v. E.G. Baldwin & Assoc. Inc., 150 F.3d 604, 606 (6th Cir.1998), *overruled on other grounds by Cobb v. Contract Transp., Inc.*, 452 F.3d 543, 548-549 (6th Cir.2006).

More importantly, the District Court quotation from footnote 22 of *Piper* is incomplete as reflected in the ellipsis at the end of the quote. The remainder of *Piper* footnote 22 directly states that it would not be appropriate to dismiss a case based on *forum non conveniens* even if it was only “unclear” whether the alternative forum would have subject matter jurisdiction over the dispute:

Thus, for example, dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute. Cf. Phoenix Canada Oil Co. Ltd. v. Texaco, Inc., 78 F.R.D. 445 (Del.1978) (court refuses to dismiss, where alternative forum is Ecuador, *it is unclear* whether Ecuadorean tribunal will hear the case, and there is no generally codified Ecuadorean legal remedy for the unjust enrichment and tort claims asserted).

Piper Aircraft Corp. v. Reyno, 454 U.S. 235, footnote 22 (1981) (emphasis supplied).

Thus, based on footnote 22 from *Piper*, a Court should never dismiss a case on *forum non conveniens* where it is “unclear” whether the foreign court has subject matter jurisdiction over the case.

b. **The District Court's Reliance On Respondents' Attorney's Speculation That Panama May Not Enforce Article 1421-J in Cases Involving Non-Citizens of Panama Is Improper.**

At pages 9-11 of its Opinion, the District Court fully addresses Mr. Dahl's opinion that Panamanian courts will not exercise subject matter jurisdiction over this case after a dismissal based on *forum non conveniens*. At page 11, the District Court analyzes Respondents' "arguments" which consist of bare assertions unsupported by admissible evidence:

The [Respondents] counter that Panamanian law allows parties to consent to jurisdiction, that the purpose of the preemptive jurisdiction is to prevent resident plaintiffs of Panama from being deprived of their chosen forum, and that the Attorney General of Panama has opined that Section 1421 – J is unconstitutional. Finally, Panama has subject matter jurisdiction, i.e., this action could have been initiated in Panama.

Defendants argue that the fundamental purpose of the Panamanian preemptive jurisdiction law which [Appellant's] expert articulates in his affidavit, is not a concern in the present case. Defendants contend that "the bias in some Latin American countries against 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." ([Respondents' Reply Brief of June 25, 2007, p. 9). Defendants' contention coincides with Mr. Dahl's notation in his article in the University of Miami Inter – American Law Review, which quotes the Attorney General of Ecuador as stating, "my country considers that our citizens are treated and discriminatory way due to the application of the *forum non-conveniens*."

AA – p. 13.

Once again, the District Court's analysis is erroneous in several ways. To begin, in the first paragraph none of the District Court's statements regarding Panamanian law are supported anywhere much less in the testimony of Respondents' expert. There is

simply no evidence in the record that (i) “Panamanian law allows parties to consent to [subject matter] jurisdiction,” (ii) “that the purpose of the preemptive jurisdiction is to prevent resident plaintiffs of Panama from being deprived of their chosen forum,” or (iii) that the Attorney General of Panama has opined that Section 1421 – J is unconstitutional.⁴

Second, the District Court’s conclusion in the first paragraph that “Panama has subject matter jurisdiction, i.e., this action could have been initiated in Panama” is simply not relevant. The issue is not whether this case could have been filed initially in Panama. The issue is whether Panamanian courts can exercise subject matter jurisdiction over the case after this Court dismisses based on *forum non conveniens*. The answer to this issue based on the only evidence in the record – Dahl’s Affidavit – is **NO!**

Third, in the second paragraph quoted above, the District Court, *citing to Respondents’ Reply Memorandum*, states that “[Respondents] contend” that Panama

⁴ The reference to the opinion of the Attorney General of Panama is particularly troubling. In their Reply papers, Respondents’ attorney, Aaron Scott, attached as Exhibit C to his Second Affidavit what he testified was an opinion of the Attorney General of Panama that Article 1421-J is unconstitutional – **however, the attachment is in Spanish and Respondents never had it translated.** As such, it is inadmissible because no one knows if the Attorney General of Panama ever expressed this opinion. Moreover, even if admissible, Respondents again failed to provide any **admissible evidence** that the Attorney General’s opinion regarding the constitutionality of Panamanian statutes carries any weight under Panamanian law. In Minnesota, the Attorney General’s opinion regarding the constitutionality of a statute carries absolutely no weight in this court. *See, West St. Paul Federation of Teachers v. Independent School Dist. No. 197*, 713 N.W.2d 366, 373 (Minn. 2006), *citing Billigmeier v. Hennepin County*, 428 N.W.2d 79, 81-82 (Minn. 1988).

will not enforce Article 1421-J in favor of foreign citizens such as Appellant. Suffice it to say, Respondents' arguments in their Reply Memorandum are not evidence of Panamanian law.

Finally, the District Court quotes Ecuador's Attorney General stating that the purpose of Ecuador's preemptive jurisdiction statute is to protect its citizens. How is Ecuador's Attorney General's opinion possibly relevant? Would this Court consider Hawaii's Attorney General's opinion regarding an issue of Minnesota law relevant? In any event, neither Respondents nor the District Court quoted or cited to the alleged Ecuadorian statute at issue.

Panamanian law is clear based on the un rebutted evidence presented to the District Court – Panamanian courts will not have subject matter jurisdiction over this matter and therefore are not “available.”

c. **The District Court's Citations to *Del Rio* and *Chandler* Are Inapposite – In Fact, *Chandler* Actually Supports Appellant's Arguments Regarding the Evidentiary Nature of *Forum Non Conveniens* Motions.**

At pages 11-12, the District Court cites *Del Rio v. Ballenger Corp.*, 391 F.Supp. 1002 (D.S.C. 1975) and *Chandler v. Multidata Systems Intern. Corp., Inc.*, 163 S.W.3d 537 (Mo. App. 2005) as decisions affirming dismissal based on *forum non conveniens* where the alternative forum was Panama. However, *Del Rio* is simply not applicable because the *Del Rio* plaintiff never argued the Panamanian doctrine of preemptive jurisdiction and the *Del Rio* court never addressed the issue in its opinion. In addition,

Del Rio was decided in 1975. Thus, Section 1421-J, which was enacted in 2006, was not applicable.

The reason *Chandler* supports Appellant's argument is because the lower court in *Chandler* actually held an evidentiary hearing on the *forum non conveniens* motion taking testimony from both plaintiff's and defendants' experts on Panamanian law. In its appellate opinion, the *Chandler* court first reviewed the testimony of defendants' expert offered in support of the motion to dismiss and found that the opinion was fully supported by citations to "sections of Panama's Judicial Code and Civil Code." *Chandler*, 163 S.W.3d at 543-544 (emphasis supplied). However, the *Chandler* Court then reviewed the testimony of plaintiff's expert and specifically found that plaintiffs' expert did not provide any support for his legal opinions:

[Plaintiff's expert] testified that in his opinion, once Plaintiffs sued Multidata and the Canadian Defendants in the United States, they could not return to Panama and file the cause of action there. Although [plaintiff's expert] acknowledged that the Judicial Code allows a plaintiff to sue a defendant where the injury occurred, [plaintiff's expert] explained that once you choose one forum, you cannot choose the other. ***[Plaintiff's expert] did not cite to any Judicial Code or Civil Code articles, but he did argue that the Bustamante Code supported his conclusion.***

[Plaintiff's expert] also testified that he disagreed with [defendants' expert's] testimony that a defendant can consent to jurisdiction in this case. ***Again, [plaintiff's expert] did not cite to any Panamanian authority to support his statements.***

Chandler, 163 S.W.3d at 544-545 (emphasis supplied).

The *Chandler* court thus, not surprisingly, affirmed the lower court's decision that Panama was an "available" forum because the defendants presented "***ample evidence***"

that Panama would accept subject matter jurisdiction after the *forum non conveniens* dismissal:

As to Plaintiffs' argument that Panama is not an available forum, Plaintiffs merely recite favorable testimony from [Plaintiff's expert] and argue that "the trial court had a legal obligation to conclude that the Panamanian court system was not available to these Plaintiffs." As stated above, the trial court did not have a legal obligation to conclude that the Panamanian court system was unavailable. Moreover, [Defendants] presented ample evidence in the form of actual sections of Panama's Judicial and Civil Codes and expert testimony from [Defendants' experts], along with [Defendants' experts] affidavits, indicating that Panama can assume jurisdiction over the parties, provide a cause of action against [Defendants], provide due process and an effective discovery system to prepare for trial, and provide adequate remedies.

Chandler, 163 S.W.3d at 546-547 (emphasis supplied).

As set forth above, a trial court's determination of foreign law applicable to a *forum non conveniens* motion is a ***factual determination*** based on the ***factual evidence*** admitted in the trial court. Thus, if the *Chandler* plaintiff's attorneys did not properly prepare their expert to testify on the ***factual*** issue of whether Panamanian courts will have subject matter jurisdiction over the case after a *forum non conveniens* dismissal, and the *Chandler* defendants' attorneys conversely did properly prepare their expert to testify on this issue supported by Panamanian Judicial Code citations, then, just like any other ***factual determination*** a court makes based on the evidence, the defendants will win. More specifically, because of the *Chandler* plaintiff's expert's failure to testify regarding the Panamanian doctrine of preemptive jurisdiction under Articles 238, 255, 256 and 259 of the Panamanian Judicial Code, the *Chandler* plaintiff, not surprisingly, lost the *forum non conveniens* motion.

Two points deserves special emphasis. First, in contrast to the *Chandler* plaintiff's expert, Appellant's expert, Mr. Dahl, did present specific evidence of the Panamanian doctrine of preemptive jurisdiction under Articles 238, 255, 256 and 259 of the Panamanian Judicial Code accompanied with the further citation and opinion regarding Section 1421-J.⁵ Moreover, unlike the *Chandler* defendants, Respondents failed to present the District Court with any citations to the Panamanian Judicial or Civil Code and failed to rebut with admissible evidence Mr. Dahl's testimony.

Second, the *Chandler* decision demonstrates that it is not surprising that attorneys arguing *forum non conveniens* motions will often cite what appear to be conflicting prior appellate and federal district court decisions on whether a foreign jurisdiction is "available." However, these decisions are not "conflicting" in the sense of legal precedent because these prior courts are simply ruling on the "availability" issue ***based on the expert opinions and evidence on foreign law actually presented to the courts in those prior cases.*** Thus, it is not surprising that the court in *Chandler* ruled that Panama was an "available" jurisdiction and the *Johnston* court ruled that Panama was not available because the plaintiffs in *Johnston*, similarly to Appellant, presented actual evidence and opinions regarding the application of the Panamanian doctrine of preemptive jurisdiction coupled with Article 1421-J.

⁵ It is also important to note that in addition to the factual distinctions in *Chandler*, the *Chandler* plaintiff's expert also did not provide testimony regarding Section 1421-J because Section 1421-J was not passed until 2006.

D. Panamanian Courts Are Not Adequate To Adjudicate This Matter Because (i) They Suffer From Significant Corruption and (ii) Panamanian Procedural Rules Will Not Allow Appellant To Adequately Present Its Case.

The Panamanian judicial system is “inadequate” because it is corrupt and suffers from numerous procedural defects.

First, the U. S. Department of State has specifically investigated corruption in Panamanian courts and concluded that Panamanian courts suffer from significant corruption. The report specifically states:

The business community lacks confidence in the Panamanian judicial system as an objective, independent arbiter in legal or commercial disputes, especially when the case involves powerful local figures with political influence. When disputes with foreign investors arise, as they do from time to time, the investors often choose not to pursue remedies available to them via the court system. In a few cases the appearance of corruption has been so widely accepted as to constitute conventional wisdom. The decision by investors to avoid the court system understandable, given the massive case backlogs and the specter of corruption.

*See, U.S. Dept. of State, Doing Business in Panama. A Country Commercial Guide for U.S. Companies (2006), at p.53 (Third Mohrman Affidavit, Ex. 2).*⁶

In addition, Appellant’s evidence is fully supported by none other than Respondent Harry Rajamannan. Rajamannan testified that “you can buy” Panamanian courts and “the law does not exist in Panama.” *See, Rajamannan Depo, T. at p. 126, 1.9—11 and p. 127, 1. 7—1. 12 (First Mohrman Affidavit, Ex 2).* Respondent Rajamannan

⁶ U.S. Department of State reports are admissible on the issue of forum adequacy in *forum non conveniens* litigation. *Bridgeway Corp. v. Citibank*, 201 F.3d 134, 142 (2d. Cir. 2000).

also voluntarily complained about the severe case backlog in the Panamanian court system in reference to a lawsuit he filed in Panama. *See, Rajamannan Depo. T. at p. 124, l.3-p.125, l.6* (First Mohrman Affidavit, Ex. 2).

The evidence presented by Appellant regarding the corruption of the Panamanian court system was substantial and unrefuted and the District Court abused its discretion in finding that the Panamanian court was an adequate forum.

Second, as set forth in the testimony of Mr. Dahl, Appellant's expert witness, the Panamanian Court system is also not adequate to litigate cases involving international witnesses because, among other things, Panamanian procedural rules do not allow the introduction of deposition testimony.

To begin, while American courts allow the introduction at trial of deposition testimony of international witnesses, Panamanian rules do not. *See, Dahl Affidavit – AA – p. 66*. Thus, Appellant could not present the testimony of many witnesses including Respondents themselves and employees of Defendant Agro-K. For instance, Respondents' former employee, Roberto Barnett, resides in the Philippines. Appellant has located Mr. Barnett and is going to request that this Court issue a letter rogatory under the Hague Convention in order to compel Mr. Barnett's trial deposition in the Philippines. *See, Third Mohrman Affidavit*. In Panama, Appellant could not present Mr. Barnett's testimony.

Mr. Dahl also testified that evidence under the Panamanian legal system is much weaker and more difficult to obtain than under U.S. procedural laws. In Panamanian civil cases, like the above captioned action, there is no discovery and there are no depositions as under U.S. procedural rules like the Federal Rules of Civil Procedure. Testimony in open court is much more limited than in the United States. Lawyers do not examine witnesses. Rather, judges question witnesses based on written questions submitted to the Judge (Judicial Code, Articles 937 and 938). Witnesses are limited to four for each party. It is not possible to require the production of categories of documents from the opposing party, much less from third parties. The power to compel production of documents is quite weak because the right of privacy prevents forced disclosure. Mr. Dahl further testified that the mechanisms for compelling witnesses are extremely unreliable and weak. "In practice, a witness can easily flout a Panamanian court order, particularly if he lives abroad." Finally, if the case were transferred to Panama it would not be decided by a jury, only a bench trial being available. *See, Dahl Affidavit at ¶¶42-45 AA – pp. 66-67.*

E. Respondents Failed To Timely Bring Its *Forum Non Conveniens* Motion.

"[T]he moving defendant must submit its *forum non conveniens* motion in a timely manner." *In Re Crash New Orleans*, 821 F.2d 1147, 1164 (5th Cir. 1987); see also, Wright, Miller & Cooper, *Federal Practice & Procedure: Jurisdiction* §3828, at 291 (2d ed. 1986); *cf. Creamer v. Creamer*, 482 A.2d 346, 352 (D.C. App. 1984) (delay in making motions cuts in favor of denial). Delays as of little as eight months have resulted

in denial of a *forum non conveniens* motion. *Cable News Network L.P., L.L.L.P. v. CNNNews.com*, 177 F.Supp.2d 506 (E.D. Va. 2001)(*vacated on other grounds*).

Respondents waived their right to bring a motion for *forum non conveniens* based on their 28 month delay in filing their motion. Respondents answered the Complaint on January 18, 2005, asserting *forum non conveniens* as an affirmative defense. See, “*Third Defense*” contained in each of Respondents’ Answers on file with the Court. Thus, Respondents were aware of their *forum non conveniens* defense when the case began yet they failed to bring a motion to dismiss for 28 months. Respondents’ delay undeniably prejudiced Appellant. As a result of the delay, Appellant has taken and defended over 1400 pages of deposition testimony, all of which will be irrelevant if this matter is dismissed and the matter is sent to Panama because Panama does not admit deposition testimony. See, *Third William F. Mohrman Affidavit filed June 19, 2007*. Moreover, Appellant will have lost almost three years litigating this matter in Minnesota, only to be forced to start again in Panama where Mr. Dahl and Respondent Rajamannan have testified that cases can take years before they go to trial.

The District Court abused its discretion in dismissing Appellant’s case under the doctrine of *forum non conveniens* based on Respondents’ delay.

F. The District Court Abused Its Discretion In Finding That The Private And Public Interests Weighed In Favor Of Dismissal.

While it is Appellant’s position that the District Court erred in finding that an “available” and “adequate” forum exists and, as such, should not have even reached the

analysis of private and public factors, the Appellant maintains that the District Court's analysis of the public and private factors was an abuse of discretion because Respondents failed to meet their burden of showing that dismissal was warranted.

1. **Respondents Failed To Rebut The Presumption In Favor Of Plaintiff's Choice Of Forum.**

In *Bergquist*, the Minnesota Supreme Court cited the strong presumption in favor of the *plaintiff's choice of forum* and noted that "the trial court must balance a series of public and private interest factors in determining whether the defendant has successfully rebutted the presumption that the *plaintiff's choice of forum* will not be disturbed."

Bergquist, 379 N.W.2d at 511. "The more it appears that a domestic or foreign Appellant's choice of forum has been dictated by reasons that the law recognizes as valid, the greater the deference will be given to the Appellant's forum choice." *Iragorri v. United Technologies Corp.*, 274 F.3d 65, 71-72 (2d Cir.2001) (en banc). "One of the factors that necessarily affects an Appellant's choice of forum is the need to sue in a place where the defendant is amenable to suit." *Id.* at 72. In this case, Appellant had two choices of fora to sue — Minnesota and Panama. Appellant chose Minnesota for several reasons:

- Respondents are amenable to process in Minnesota;
- Both parties have ready access to efficient sources of proof including deposition testimony and the fact finder will be fluent in the language of the main witnesses — i.e. English;
- Most importantly, and as specifically cited as a factor in *Gilbert*, Appellant is also concerned with enforceability of its judgment;

Based on these factors, Appellant chose to sue Respondents in their home jurisdiction.

Despite the fact that Appellant made a strong showing of convenience, the District Court found that because the Appellant was “foreign,” the presumption in favor of Appellant’s choice forum should receive less deference. However, while it is true that a non-U.S. plaintiff’s choice of forum is entitled to less deference than that of a U.S. plaintiff, the District Court is nonetheless obligated to give weight to Appellant’s choice of forum. *Piper*, 454 U.S. 235, 255-256. “Less deference” does not mean “no deference.”⁷

In ruling on a *forum non conveniens* motion, the district court must indicate the amount of deference it is giving to plaintiff’s choice. Where a foreign plaintiff has made a strong showing of convenience, we hold that the district court must indicate how far that showing goes toward putting the foreign plaintiff on the same footing as a domestic plaintiff.

Lacey v. Cessna Aircraft Co., 932 F.2d 179, 179(3rd Cir. 1991).

In this case, Appellant sued Respondents in their home forum – Minnesota. The central fact of Appellant’s case is Respondents’ use of Agro – K’s Minnesota bank account to receive wire transfers from Appellant. The underlying acts of Harry and Concie Rajamannan consist of *faxed documents and phone calls from Minnesota* to

⁷ “Courts should be mindful that, just as plaintiffs sometimes choose a forum for forum-shopping reasons, defendants also may move for dismissal under the doctrine of forum non conveniens not because of genuine concern with convenience, but because of similar forum-shopping reasons. District courts should therefore arm themselves with an appropriate degree of skepticism in assessing whether the defendant has demonstrated genuine inconvenience and a clear preferability of the foreign forum.” *Irragorri v. United Tech. Corp.*, 274 F.3d 65, 71, 75 (2d Cir 2001) (en banc).

Appellant in Australia requesting that Appellant send its investment monies to Respondent Agro-K's *Minnesota bank account*. Respondents Harry and Concie Rajamannan then made representations *from Minnesota* that Respondent Agro-K would then transfer those funds *from Minnesota* either to Respondent PVSC or would ensure the use of those funds on the paulownia tree farm in which Appellant invested. As set forth above, Appellant's allege that Respondents never intended to transfer Appellant's funds from Minnesota to Panama and Appellant has presented significant proof that no such transfers occurred. Respondents' deceptive and fraudulent acts which give rise to their liability were: (i) Respondents solicitation of Appellant's funds made by Respondents *from Minnesota*, (ii) Respondents receipt of those funds *in Minnesota* and (iii) Respondents' failure to account for those funds. Finally, it is important to stress that even if Respondents transferred Appellant's investment monies out of Minnesota, Appellant has presented evidence demonstrating that those transfers were not for the purposes Respondents represented to Appellant — that Appellant's investment monies would be transferred to Panama for use on the paulownia tree farm in which Appellant invested.

The District Court erred in failing to give deference to Appellant's choice of forum and abused its discretion dismissing Appellant's claims in favor of Panama.

2. **The District Court Erred Dismissing Appellant's Complaint Because Respondents Failed to Show That The Balance of Private Factors Weigh In Favor Of Dismissal.**

The private interest factors evaluate the effect a grant or denial of a *forum non conveniens* motion would have on the parties. Respondents' arguments regarding these factors do not meet their "heavy burden" to justify dismissal.

a. **Respondents Failed To Detail By Name and Description of Testimony The Witnesses From Panama It Allegedly Needs.**

Because the factors involving access to proof and availability of witnesses are so intertwined in this case, Appellant will address them together.

First, the District Court held that Respondents may require many Panamanian witnesses, including some government officials, and that the cost and administrative hurdles associated with travel would be significant. However, in order to evaluate this factor properly, Respondents were required to (i) identify the witnesses, (ii) demonstrate that the witnesses still live in Panama and (iii) describe the witnesses' testimony so the Court could determine whether the testimony was material:

The party seeking the transfer must specify clearly, typically by affidavit, the key witnesses to be called and their location and must make a general statement of what their testimony will cover.... *If the moving party merely has made a general allegation that necessary witnesses are located in the transferee forum, without identifying them and providing sufficient information to permit the district court to determine what and how important their testimony will be, the application for transferring the case should be denied, as was true in the many cases cited in the note below.*

Wright, Miller & Cooper, *Federal Practice & Procedure: Jurisdiction* §3851 (2d ed. 1986)(transfer of venue) (emphasis supplied).

The District Court's determination that Panama was more convenient for the parties was an abuse of discretion because, as was the case with most of Respondents' arguments, Respondents have failed to provide the factual or legal predicate for establishing the necessity of the Panamanian employee's *live* testimony or the ability to get the testimony into court — i.e., do these witnesses currently reside in Panama, would they be willing to come to Minnesota, what is the cost of obtaining their testimony in Minnesota, what is their anticipated testimony, etc?

As set forth above, Respondents bear the evidentiary and legal burden on a *forum non conveniens* motion and they have failed to meet this burden. For instance, if Respondents wanted to move this matter to Panama, they certainly could have interviewed these witnesses after 28 months of litigation and presented their Affidavits supporting this motion. The fact that Respondents do not have these affidavits suggests that these witnesses do not exist or Respondents may not be able to locate these witnesses if this matter were transferred to Panama.

Moreover, this is not an abstract matter. Factually, as Mr. Shepherd testifies, Mr. Barnett, who is a significant witness, currently resides in the Philippines, not Panama as Respondent's counsel "suggests" at ¶3 of his Affidavit. *See, Second Shepherd Affidavit, p. 4, filed June 19, 2007.* In addition, legally, Panamanian courts only allow four

witnesses to testify as Appellant's expert, Mr. Dahl, testifies at ¶43 of his Affidavit. AA – pp. 66-67. If Respondents Harry Rajamannan, Concie Rajamannan and Defendant Agro-K's accountant, Eugene Logan testify, this leaves only one other witness. Furthermore, as Mr. Dahl testifies, "the mechanisms for compelling witnesses [to testify] in Panama are extremely unreliable and weak, just as the evidence. In practice, a witness can easily ignore a Panamanian court order, particularly if he lives abroad." *See, Mr. Dahl Affidavit* at ¶44 – AA – p. 67. Finally, as Mr. Dahl testifies, oral testimony carries little weight procedurally in Panama. *See, Mr. Dahl Affidavit* at ¶43-44 - AA – pp. 66-67.

Second, Respondents claim that they need the testimony of these witnesses in Panama to prove that Defendant PVSC made efforts to perform work under the Management Contract. Contrary to Respondents' arguments, the heart of this case is not in Panama where PVSC allegedly performed its work — rather, it is in Minnesota where the financial transfers and financial records are located and the fraud occurred. The issue is the amount of money Respondents allegedly spent on the paulownia farm — not the work performed. Moreover, Respondents do not need the testimony from the Panamanian workers Respondents identified *by category as opposed to by person* in order to get information regarding the operation of the paulownia tree farm into evidence. Respondent Harry Rajamannan has testified that he was a witness to the work performed. Thus, all of this alleged testimony from Panamanian witnesses would be cumulative and merely corroborative of Respondent Rajamannan's testimony. Contrary to Respondents' claims,

the evidence which is relevant is Respondents' and Verde Tech's financial records which, of course, Respondents have not produced.

In addition, Respondents argue that Respondents cannot compel these Panamanian witnesses to attend trial in Minnesota. Again, unlike Panama, Respondents could take the video deposition of these witnesses in Panama and use those depositions in the Minnesota forum. Moreover, if Respondents can compel the attendance of these witnesses at trial in Panama, Respondents certainly can compel their depositions through the Hague Convention.

As a result of Respondents' failure to identify any witnesses in Panama, their presumed testimony or the fact that they could testify, Respondents have failed to establish that Panama is a more convenient forum for the witnesses.

b. Enforceability of Judgment.

Respondents have failed to prove that a Minnesota court would be incapable of enforcing a judgment against Respondents. In fact, three of the Respondents against whom Appellants would seek to enforce a judgment, Respondents Harry Rajamannan, Concie Rajamannan and Agro-K are Minnesota residents. Respondent failed to prove and Appellant fails to see how it would be any more convenient for a Panamanian court to enforce a judgment against Minnesota residents than it would be for a Minnesota Court. This factor weighs against dismissal and militates in favor of retention.

c. **Appellant Did Not File In Minnesota In Order To Vex, Harass or Oppress.**

The District Court did not find, and Respondents have failed to present any evidence, that by choosing Minnesota as its forum, that Appellant has done so to “vex, harass or oppress” Respondents “by inflicting upon [them] expense or trouble not necessary to his own right to pursue the remedy.” *Hague*, 289 N.W.2d at 46 (quoting *Gulf Oil*, 67 S.Ct. at 843). Therefore, this is not a factor.

d. **Language Barrier.**

Finally, while Respondents assert that some of the documents will be in Spanish, this is not a factor in this analysis as most of the documents are in English and the court system is well equipped to translate documents if need be.

As set forth above, Appellant has made a strong showing that the Minnesota forum is more convenient under the private interest factors.

3. **The District Court Erred Dismissing Appellant’s Complaint Because Respondent Failed to Show That The Balance of Public Factors Weigh In Favor Of Dismissal.**

In determining whether to dismiss the action based on *forum non conveniens*, the District Court relied heavily on the public interest factors. The District Court relied on several unsubstantiated representations Respondents made including:

- that Panamanian law will predominate;
- that at Minnesota judge and jury would be required to understand and apply Panamanian law;

- that a jury would be required to make factual findings out of context and that they would not have common sense or experience to guide them in their decisions; and
- that a trial this complicated would be lengthy and burdensome on the local court system.

However, the evidence Appellant presented reveals that all of these factors weighed in favor of denial of Respondents' motion and the court abused its discretion in analyzing the public interest factors.

First, the District Court found that the "nexus between the dispute and this forum is marginal." AA – p. 21. However, Appellant has shown that Anoka County has plenty to do with this action. The main actors in this case, Respondents Harry and Concie Rajamannan, live in Anoka County and Agro-K is a Minnesota corporation. This case originates in Minnesota. Appellant's main claim is for unjust enrichment, assumpsit, fraud and conversion against Respondent Agro-K because Agro-K is believed to have assets amenable to collection. All of Agro-K's actions in this case took place in Minnesota. In fact, Respondents have failed to demonstrate that Appellant's investment monies are not still resting in Agro-K's Minnesota bank account. Additionally, Anoka County has an interest in ensuring that its citizens who are accused of conducting fraud in Anoka County are held accountable in order to prevent them from committing additional frauds against Anoka County residents. Therefore, the cost of bringing the action in Anoka is it unduly burdensome for the citizens of Anoka County.

Second, while the District Court found that Panamanian law will apply in this case, the Court's opinion fails to identify exactly which of Appellant's 13 counts Panamanian law will apply to. Respondents' Panamanian law expert failed to testify that a transfer to Panama would not result in a dismissal of Appellant's claims because Panama does not provide a remedy for those claims. Nonetheless, with respect to Appellant's unjust enrichment, assumpsit, conversion and negligent misrepresentation claims against Agro-K, Minnesota law will apply because Agro-K committed its acts in Minnesota. Similarly, Minnesota law will apply to Appellant's unjust enrichment, assumpsit, conversion, negligent misrepresentation and fraud claims against Respondents Harry and Concie Rajamannan because their actions, primarily fraudulent representations by phone and fax to Mr. Shepherd, occurred in Minnesota.

Third, the District Court held that despite the fact that Minnesota has a "strong interest in policing the financial misconduct of residents, insuring its banking institutions are not used for such purposes, and holding those to account in a court of law," the District Court abused its discretion when it found, without citing to any evidence, that "Panama's interest seems greater as the case involves the *use or misuse of valuable natural resources in Panama* by foreign investors, and the integrity of Panamanian legal, corporate and community institutions are involved." *See*, AA – p. 21. As set forth in the facts above, the reason this lawsuit was filed is because Respondents took Appellants money in Minnesota and never put it to "*use*" on the "*valuable resources in Panama.*"

Rather, the only fact that is certain is that Appellant's money was wire transferred to Agro – K's bank account in Minnesota.

In summary, "[t]he Court in both *Gulf Oil and Koster [v. Am. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524, 67 S.Ct. 828, 831, 91 L.Ed. 1067 (1947)] emphasized that no one private or public interest factor should be given conclusive weight and that the plaintiff's initial choice is usually to be respected." *In re Air Crash Disaster Near New Orleans, Louisiana on July 9, 1982 v. Pan American Airways, Inc.*, 821 F.2d 1147, 1163 (5th Cir. 1987). Based on this analysis, the District Court abused its discretion in finding that Minnesota is not the appropriate forum and Respondents' motion to dismiss based on forum non conveniens should have been denied.

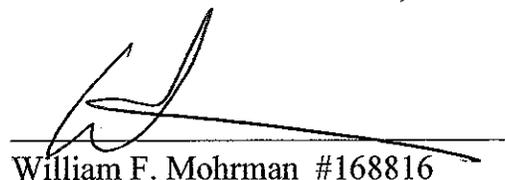
CONCLUSION

Appellant respectfully requests that this Court reverse the District Court's Order.

DATED: January 7, 2008.

Respectfully submitted,

MOHRMAN & KAARDAL, P.A.



William F. Mohrman #168816

Erick G. Kaardal #229647

Tona T. Dove #232130

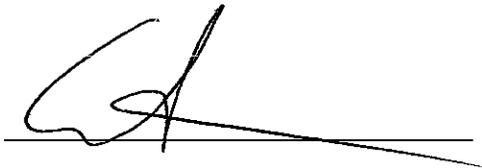
33 So. 6th Street, Suite 4100

Minneapolis, MN 55402

ATTORNEYS FOR APPELLANT

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

The undersigned certifies that the Brief submitted herein contains 13,682 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 13 pt. The word count is stated in reliance on Microsoft Word 97-2003, the word processing system used to prepare this Brief.

A handwritten signature in black ink, appearing to be 'W. F. Mohrman', written over a horizontal line.

William F. Mohrman

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the Appellant's Brief on the following parties, by regular mail, postage prepaid, on 1/7, 2008.



William F. Mohrman

Subscribed and affirmed before me

this 7 day of January, 2008.

Notary Public

