

**No. A07-2199**

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**STATE OF MINNESOTA  
IN COURT OF APPEALS**

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Paulownia Plantations de Panama Corporation,

Appellant,

vs.

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

Respondents.

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**APPELLANT'S REPLY BRIEF**

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## INTRODUCTION

The main issue on this appeal is whether, as Appellant's expert on Panamanian law testifies and fully supports with a detailed case and statutory analysis, the Panamanian doctrine of preemptive jurisdiction, as clarified by the Panamanian legislature's adoption of Section 1421-J, prohibits Panamanian courts from exercising subject matter jurisdiction over Appellant's case after the District Court's *Forum non conveniens* dismissal. In their Response Brief, Respondents fail to directly address Appellant's arguments regarding the "availability" of Panamanian courts. Rather, Respondent attempts to shift the Court's focus to the Respondent's *alleged* operation of the paulownia tree farm in Panama and argues on that ground alone the case should be litigated in Panama. However, as fully addressed in Appellant's main brief, the District Court was required, as a threshold requirement, to determine based on the evidence of foreign law presented to the District Court whether Panamanian courts are available to adjudicate Appellant's case *before* the District Court engages in any "balancing" of factual factors.

Simply put, because the undisputed *evidence* on Panamanian law prohibits Appellant from litigating its case in Panama, the District Court's judgment should be reversed.

## ARGUMENT

### A. Appellant's Primary Claims Involve A Direct Connection To Minnesota – Agro-K's Conversion Of Appellant's Monies and Its Unjust Enrichment.

Respondents argue that Appellant's Statement of Facts did not accurately present the facts and set forth too many facts. Not surprisingly, Respondents factual presentation is not accurate and actually illustrates why Minnesota courts are a proper jurisdiction for this matter.

In its Complaint, Appellant brings claims of conversion and unjust enrichment against Respondent Rajamannan and his wholly owned corporation, Agro-K. Respondents fully admit that Respondent Rajamannan (i) demanded that Appellant send its investment monies to Respondent Agro-K in Minneapolis through Agro-K's bank account at TCF Bank and (ii) represented that Agro – K would then transfer these funds to Respondent PVSC in Panama. *See, Rajamannan Responses to Requests for Admission, Request No. 39* (Mohrman Affidavit, Ex. 5 and 6). However, Respondents fully admit that Agro-K never transferred Appellant's investment monies to Respondent PVSC. Rather, Respondents state they transferred the investment monies "to Panama" where Agro-K already had significant business operations:

Between December 1998 and April 2002, Agro-K received 24 such wire transfers from [Appellant], totaling \$898,831.45. In turn, Agro-K made 153 wire transfers from its bank account *to persons or entities in Panama* between January 5, 1998 and May 17, 2002. These transfers totaled \$2,426,164. Both Agro-K's accountant Eugene Logan and Agro-K's office manager Concie Rajamannan, who reviewed and were familiar with the wire transfer and bank records of Agro-K, stated in

unequivocal terms that all funds received from [Appellant] were transferred *to Panama*.

*See, Response Brief at p. 12.*

What is critical here is that Respondents state that Agro-K transferred Appellant's investment monies "to Panama" – Respondents do not state that the investment monies were transferred to Respondent PVSC as required under the Management Contract. Moreover, if Respondent Agro-K and Rajamannan had transferred the investment monies to Panama, Respondents would have produced in discovery the bank records for Rajamannan's wholly owned corporations, Respondent PVSC, verifying that Respondent Agro-K had in fact transferred Appellant's investment monies to Respondent PVSC. However, Respondents failed to produce any bank records for Respondent Rajamannan's wholly owned corporation, Respondent PVSC, much less any account records which would show Respondent PVSC's receipt of such funds. *See, Third Mohrman Affidavit at ¶ 2.* Because Respondents admit receiving Appellant's investment monies, the burden of production shifts to Respondents to come forward with evidence accounting for Respondent's use of those funds and proving that such use was not unjust. *Midland Oil and Royalty Co. v. Schuler*, 126 N.W.2d 149 (N.D., 1964); *County of Essex v. First Union Nat. Bank*, 373 N.J.Super. 543, 862 A.2d 1168 (2004). Moreover, as a result of Respondents failure to produce such records, Appellants are entitled to draw all reasonable inferences from the lack of production – such as Agro-K never sent the investment monies to Panama. *Kmetz v. Johnson*, 261 Minn. 395, 401, 113 N.W.2d 96, 100 (1962).

Thus, Respondents' statement that it transferred Appellant's investment monies "to Panama" proves nothing. Agro-K had significant business operations in Panama and these monies could have been used for those business operations or could have been used to pay for Respondent Rajamannan's personal business ventures in Panama. Logan provides no analysis delineating how much of the "\$2,426,164," *if any*, was used on the paulownia farm as opposed to Agro-K's business. In fact, Agro-K's accountant, Logan, actually testified that part of the "\$2,426,164" Agro-K transferred to Panama was used "for Dr. Rajamannan's non-Agro-K business ventures in Panama" - such as the \$450,000 transferred to Andre Rigaux for the Respondent Rajamannan's oceanside estate *See, Logan Aff. at ¶3*. Most importantly, no one for Respondents, including Logan, provides any testimony or documents, like bank statements and accounting records, demonstrating that Respondent PVSC ever received Appellant's investment monies or that Respondents spent the investment monies on the paulownia tree farm.

Finally, it is important to point out that Logan never attached to his Affidavit "Agro - K's books and records" as required under Rule 56.05: "Sworn or certified copies of all papers or parts thereof *referred to* in an affidavit shall be attached thereto or served therewith."<sup>1</sup> In fact, Agro-K refused to produce in discovery any of Agro-K's financial records unrelated to the paulownia tree farm claiming that the documents were not relevant to this case (which is why Logan did not attach the records to his Affidavit).

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<sup>1</sup> This also makes Logan's testimony inadmissible hearsay under Minn. R. Evid. 801 and 802.

Obviously, Logan cannot now use those same documents to provide evidence Respondents now claim is critical to their case.

Because of Respondents failure to produce even one document demonstrating that Appellant's investment monies were ever sent to Panama, much less to Respondent PVSC, Minnesota is the only jurisdiction with any connection to Appellant's claims.

**B. Respondents' Argument That the "Management Contract" Did Not Require Respondent PVSC To Use Appellant's Investment Monies On the Paulownia Tree Farm Is Directly Contrary To The Terms of the Management Contract, Respondent Rajamannan's Previous Testimony and Common Sense.**

Respondents argue in their Response Memorandum that the "Management Contract" which governed Appellant's investment did not require Respondents to spend Appellant's investment monies on the paulownia tree farm. Respondents make this argument not because they want to – Respondents must make this absurd argument because, as set forth above, Respondents have absolutely no evidence that Respondents ever spent one nickel on the paulownia tree farm in which Appellant invested \$1,319,823. Apparently, Appellant made this \$1,319,823 investment in exchange for – *nothing!* Not only are Respondents' arguments absurd – who would invest \$1,319,823 in a corporate business investment without an obligation for the corporation to expend the investment monies on the investment - but the argument constitutes a further admission of Respondents' fraud.

First, the unambiguous language of the Management Contract required Respondent PVSC to use the \$1,319,823 “contracted management fee” on, not surprisingly, Respondent PVSC's “management” of the paulownia tree farm. There is absolutely no language in the Management Contract supporting Respondents’ newly created “interpretation” that the Management Contract did not require Respondent PVSC to spend Appellant’s \$1,319,823 on the paulownia tree farm. *See, Management Contract attached as Exhibit B to the Complaint.*

Second, Respondents admitted in Response to Appellant’s Request for Admissions, that Respondents would use the investment monies on the paulownia tree farm project, *See, Rajamannan Amended Responses to Appellant’s First Request for Admissions, Request No. 36* (First Mohrman Affidavit, Ex. 5 and 6)(emphasis supplied):

Request No. 39 - Admit that the vast majority of funds paid to Agro-K were never transferred to PVSC, or otherwise used to support the ventures with [Appellant] and Panaust.

Response to Request No. 39: “Denies #39. No funds were paid to Agro-K. All funds transmitted by or on behalf of one of [Appellant] through Agro-K's accounts in Minneapolis, and much more, were transferred to Panama bank accounts held in the names of Verde Tech, Roberto Barnett and Barnett, S.A., and ***used by him or at his direction for the Respondent PVSC plantations at the Farm, the Second Farm, and the Pepper Property.***<sup>2</sup>

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<sup>2</sup> Of course, as set forth above, Respondents have no banking or accounting documentation proving, as Respondents put it, that the investment monies were “***used [on] Respondent PVSC plantations at the Farm, the Second Farm, and the Pepper Property***”

Third, and most importantly, Respondents' argument is completely *at odds* with the unambiguous terms of the Management Contract. Paragraphs 1 and 2 of the Management Contract specifically spell out that Respondent PVSC is to manage the paulownia tree farm "for 3 years including the planting year of 1999 at a *cost* of US \$4,000 *total cost* per acre." In exchange for Respondent PVSC's management, paragraph 3 of the Management Contract specifically states that "[Appellant] agrees it will pay Respondent PVSC the *contracted* \$4,000 *management fee* [over the course of three years]." Thus, the Management Contract specifically provided that Appellant paid the \$4,000 per acre "contracted management fee" in exchange for Respondent PVSC's "costs" in managing the paulownia farm which required Respondent PVSC to spend the "contracted management fee" on the paulownia tree farm.

Fourth, the reason the "contracted management fee" is \$4,000 per acre over the course of three years to manage the tree farm is because that was the budget projection Respondent Rajamannan provided to Appellant prior to Appellant's investment in the paulownia tree farm. In fact, Respondent Rajamannan admitted that the budget he prepared estimated that the "total expenditures" of operating the paulownia tree farm for the first three years would equal \$4,000 per acre. *See, Rajamannan Depo. T. at p. 586, l. 6 - p. 590, l.2* (First Mohrman Affidavit, Ex. 2); *see also, the Offering Memorandum at page PPP 0725* (First Mohrman Affidavit, Ex. 11).

Finally, Respondents' argument that Respondent PVSC was not required to use Appellant's investment monies for Respondent PVSC's management of the paulownia

tree farm is actually conclusive proof of Respondents' intentional fraud. Because Respondent Rajamannan admitted it takes ten years to harvest and generate revenues from paulownia trees, Respondent PVSC, which was not incorporated until December 9, 1998, would not have any source of revenues to "manage" the paulownia tree farm at \$4,000 per acre. *See, Respondent Rajamannan's Depo. T. at p. 557, l. 9-11* (First Mohrman Affidavit, Ex. 2); *Respondent Harry Rajamannan Affidavit at ¶ 9* and *Rajamannan Amended Responses to Requests for Admission, Request No. 7* (Mohrman Affidavit, Ex. 5 and 6). If Respondent PVSC was not required to spend Appellant's investment monies on the "costs" of operating the paulownia tree farm as specifically set forth in the Management Contract at a time when PVSC had no operating revenues, *then exactly where was Respondent PVSC going to obtain the funds necessary to pay the "costs" of operating the paulownia tree farm?*

These facts point to one conclusion – Respondent Rajamannan had Respondent Agro-K use Appellant's investment monies for either Agro-K's or Rajamannan's purposes. Respondent PVSC was a sham set up to defraud Appellant.

**C. Respondents' Arguments That Respondent PVSC Actually Created A Paulownia Tree Farm and Properly Managed It Are Hotly Disputed.**

Similarly to Respondents, Appellant would also refer the Court to Appellant's Memoranda of Law in Support of its Motion for Summary Judgment and in Response to Respondents' Motion to Dismiss. Nonetheless, Appellant hotly disputes several facts set forth in Respondent's Response Brief.

First, at page 6 of the Response Brief, Respondents assert that Rajamannan “obtained young paulownia trees” for the tree farm citing Rajamannan’s Affidavit. However, Respondents have no other evidence such as sales receipts or expense reports detailing the purchase. Moreover, Respondent PVSC agreed under the Management Contract to lease property in Panama to plant, maintain and harvest paulownia trees. However, Defendant PVSC never leased any property as Rajamannan fully admits. *See, Rajamannan Depo. T. at p. 509, l. 17 – p. 510, l. 22* (Mohrman Affidavit, Ex. 2). Rather, Perla Verde, S.A. entered into the “Prime Lease” and allegedly “subleased” the farm to Respondent PVSC; however, the Prime Lease did not allow for subleases.

Second, Appellant is deeply concerned that the two Panamanian corporate entities, Respondent PVSC and Perla Verde, do not even exist. Respondents specifically admitted that neither Respondent PVSC nor Perla Verde has ever issued any shares of stock. *See, Respondent Rajamannan’s Amended Responses to Appellant’s Interrogatory No. 11 and 12* (Mohrman Affidavit, Ex. 4). Moreover, Respondents admitted that despite the fact that Respondent Perla Verde was the tenant under the Prime Lease, Perla Verde never had a bank account from which to pay the rent. *See, Rajamannan Depo. T. at p. 176, l. 5 - p. 177, l.15* (Mohrman Affidavit, Ex. 2). Finally, while Respondents assert that PVSC was responsible for handling millions of dollars in business operating funds, Respondents have never produced any bank records for Respondent PVSC.

Third, Respondents argue that one of the reasons that the paulownia investment failed was due to an unfortunate fire. Respondents fail to point out that Appellant

demanding, quite reasonably, that Respondent PVSC purchase and maintain a fire insurance policy for the paulownia tree farm. However, Respondent Rajamannan refused to obtain a fire insurance policy representing in a letter to Appellant in October, 1999 that the paulownia tree farm will not need fire insurance because forest fires do not happen in Panama. *See, Rajamannan Depo. T. at p. 809, l. 1 – p. 816, l. 3* (Mohrman Affidavit, Ex. 2); *see, Rajamannan Letter to Shepherd dated October 9, 1999* (Mohrman Affidavit, Ex. 13).

Finally, Respondents assert that Appellant forced Respondents to abandon the paulownia farm by obtaining a sequestration order from a Panamanian court. Similarly to Respondents' failure to produce bank records, Respondents never produced any court documents showing that Appellant or any of its investors ever commenced an action against any of the Respondents in Panama. In actuality, as Respondents admit, Respondent Rajamannan's former partner, Roberto Barnett, obtained something called a "sequestration order" from the Panamanian courts against Respondent PVSC and closed down PVSC, to the extent it ever existed. Defendant Agro-K's and Defendant PVSC's assets were seized as a result of the sequestration order Mr. Barnett obtained. *See, Respondent Rajamannan Depo. T. at p. 198-199* (Mohrman Affidavit, Ex. 2).

In summary, Respondents argue in their Introduction that the underlying facts in this matter occurred in Panama based on Respondents PVSC's and Perla Verde's operation of the paulownia tree farm and it would be unfair to have these "Panamanian Defendants" litigate this case in Minnesota. However, as set forth above, it is very

questionable whether Respondents PVSC and Perla Verde even exist and Respondents have no banking or other accounting records showing that any monies were ever spent on the paulownia tree farm. Appellants are very doubtful that Agro-K ever sent Respondent PVSC any of the investment monies and, therefore, no facts relevant to this case actually happened in Panama. The District Court judgment should be reversed.

**D. Respondents' Argument in Their "Standard of Review" Section That Appellant, as a Foreign Entity, Is Entitled to Virtually No Deference In Its Forum Selection Is Erroneous.**

Respondent's contention that Appellant is entitled to almost no deference with respect to its choice of Minnesota as a forum to litigate this matter citing *Bergquist v. Medtronic, Inc.*, 379 N.W.2d 508, 511-512 (Minn. 1986) is erroneous. *Bergquist* did not address the reason why courts carefully scrutinize a foreign plaintiff's forum selection; however, federal courts have thoroughly addressed the issue:

Parsing the language of *Piper*, we stated that "the reason for giving a foreign plaintiff's choice less deference is not xenophobia, but merely a reluctance to assume that the choice is a convenient one." *Lony*, 886 F.2d at 634. We noted, however, that this reluctance "can readily be overcome by a strong showing of convenience." *Id.* Accordingly, we held that [in *Lony*]:

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 170, 179 (3<sup>rd</sup> Cir. 1991).

Moreover, in analyzing the weight to give a plaintiff's forum selection on a *forum non conveniens* motion, "[t]he more it appears that a domestic or foreign plaintiff's choice of forum has been dictated by reasons that the law recognizes as valid, the greater the deference will be given to the plaintiff's forum choice." *Iragorri v. United Technologies Corp.*, 274 F.3d 65, 71-72 (2d Cir.2001) (en banc). "One of the [valid] factors that necessarily affects a plaintiff'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 has made a strong showing of convenience and the reasons for its selection of Minnesota as a litigation forum are legally "valid." Appellant chose Minnesota for several reasons: Respondents are amenable to process in Minnesota,<sup>3</sup> both parties have ready access to efficient sources of proof including deposition testimony, the causes of action arise from conduct occurring in Minnesota and the fact finder will be fluent in 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; therefore, Appellant sued Respondents in their home jurisdiction.

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<sup>3</sup> In *Norex Petroleum Limited v. Access Industries, Inc.*, 416 F.3d 146 (C.A. 2 N.Y. 2005), the court placed great deference on plaintiff's choice of forum based upon plaintiff's desire to obtain jurisdiction over the defendant: "the failure to give due consideration to this jurisdictional concern was a key factor informing our decision to vacate and remand the *forum non conveniens* dismissal in *Iragorri v. United Technologies Corp.*, 274 F.3d at 73." *Id.* at 156.

This Court, in analyzing this matter, should accord Appellant's forum selection of Minnesota with great deference.

**E. The District Court's Decision That Panama Is An "Available" And "Adequate" Forum Was Erroneous And An Abuse Of Discretion**

As Respondents fully admit, in order for a court to dismiss a case based on *forum non conveniens*, there must be "an available alternative forum" in which a plaintiff can litigate its claims. *Odita v. Elder Dempster Lines, Ltd.*, 286 F.Supp. 547, 551 (D.C. N.Y. 1968). However, in an attempt to bolster the argument that Panama is "an available alternative forum," Respondents, on page 14 of their Response Brief, blithely argue that Panama is "available" because "Respondents are subject to jurisdiction of Panamanian courts" and that "this entire case could have been brought against the same parties in Panama." However, as set forth below, the central issue on this appeal is whether Panama is "available" as an alternative forum in light of the Panamanian doctrine of preemptive jurisdiction and Section 1421-J which prohibit its courts from exercising subject matter jurisdiction over cases previously dismissed under the doctrine of *forum non conveniens*.

**1. Respondents "Amenability To Process" in Panama is Irrelevant To The "Availability" of Panamanian Courts in this Case Because Panamanian Law Specifically Prohibits Panamanian Courts from Exercising Subject Matter Jurisdiction Over Cases Previously Dismissed Based on *Forum Non Conveniens*.**

It is apparent from the fact that Respondents' Brief devotes only a single paragraph at page 14 of its Response Brief to the availability analysis that Respondents

are attempting to ignore this critical threshold issue and divert the Court's attention to other less important issues that are not relevant to the *forum non conveniens* analysis. Respondents' argument that simply because Respondents agree to be amenable to service in Panama one can then leap to the conclusion that "the entire case and all parties come within the jurisdiction of the Panamanian courts," is simply erroneous. Other courts have specifically rejected a defendant's argument that a defendant's consent to jurisdiction in a foreign court can somehow waive a foreign court's lack of subject matter jurisdiction and failed:

As for Defendants' offer to consent to the jurisdiction of the Mexican legal system, Mr. Dahl makes clear in his affidavit that many procedural rights that are subject to negotiation in the United States legal system cannot be agreed to by the parties in a Mexican court. According to Mr. Dahl, stipulations made before a United States court to waive the Mexican statute of limitations are meaningless in Mexico. The Court questions whether Defendants' consent or submission to the jurisdiction of a Mexican court would actually confer jurisdiction under the laws of Mexico.

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Moreover, there is a question of whether a Mexican court would even accept jurisdiction over this action. Mr. Dahl explains in his affidavit that the theory of preemptive jurisdiction is deeply rooted in Mexican law, and the filing before this Court preempts Mexican jurisdiction. Plaintiffs have not chosen, and will not be voluntarily choosing, the Mexican forum to file suit as is required under Article 8 of Nayarit's Civil Procedure law-no matter how adamantly Defendants want to submit themselves to the jurisdiction of the Mexican court or if this Court dismisses this case on *forum non conveniens* grounds.

*See, Sacks v. Four Seasons Hotel Limited*, 2006 WL 783441 (E.D. Tex. 2006).

As specifically detailed in Appellant's main brief, the Panamanian doctrine of "preemptive jurisdiction" and the Panamanian Assembly's passage of Section 1421 –J, unequivocally prohibit Panamanian courts from exercising subject matter jurisdiction over this case because of the District Court's dismissal based on *forum non conveniens*. As more fully set forth below, Respondents have simply ignored this issue and ignored the fact that they failed to provide any admissible expert evidence contradicting Mr. Dahl's analysis of the Panamanian doctrine of "preemptive jurisdiction" and Section 1421 –J.

**2. Respondents "Adequacy" Arguments Focusing On "Availability of a Remedy" Are Likewise Irrelevant.**

At pages 15-18 of their Response Brief, Respondents argue that Panamanian Courts are "adequate" because the Panamanian courts will provide Appellant with a "remedy." Once again, Respondents have ignored Appellant's arguments regarding adequacy – i.e., the corruption, delay and procedural inadequacies of the Panamanian courts – and instead erected the "remedy" straw man.

First, Respondents take quotes from *Piper Aircraft Corp. v. Reyno*, 454 U.S. 235 (1981) and *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) – that the "remedy offered by the other forum is clearly unsatisfactory" - as the only grounds on which to find a foreign court inadequate. However, courts often look to issues concerning corruption, delay in adjudicating the case and lack of procedural mechanisms in finding a foreign court inadequate. *Davetree Limited v. Republic of Azerbaijan*, 349 F.Supp.2d 736 (S.D.N.Y.

2005). Respondents fail to address the precise evidence Appellant's offered regarding corruption in the Panamanian courts (corruption Respondent Rajamannan admits to), delay in the Panamanian courts (delay Respondent Rajamannan admits to) and the problems with obtaining foreign testimony through a deposition. *See, Appellant's Main Brief at pp. 40-41.*

Rather than address Appellant's arguments regarding the Panamanian court's inadequacy to litigate this case by providing expert testimony regarding the adequacy of the Panamanian courts (which, like the lack of testimony regarding preemptive jurisdiction, Respondents simply do not have), Respondents assert that Appellant is arguing that as a result of "difference in the substantive law [of Panama]", Appellant argues that Panama is inadequate. *See, p. 17 of Respondents' Brief.* Simply put, Appellant makes no such argument.

**F. The District Court's Analysis Of, And Respondents' Arguments Regarding, The Panamanian Preemptive Jurisdiction Doctrine Are Erroneous.**

At pages 18-26, Respondents finally address Appellant's arguments regarding the Panamanian doctrine of preemptive jurisdiction and the application of Section 1421-J. However, prior to addressing these arguments, it is important to note that Respondents addressed the preemptive jurisdiction doctrine in the section of their legal arguments regarding the adequacy of Panamanian courts. Respondents are once again attempting to confuse the issues. Appellant's preemptive jurisdiction argument relates to the determination of "availability" - not to the determination of "adequacy" - of the

Panamanian courts. The primary thrust of Respondents argument in the face of the application of the preemptive jurisdiction doctrine is to rely on the District Court's "conditional dismissal" of this action. However, as more fully set forth below, courts cannot conditionally dismiss a case on grounds of *forum non conveniens* unless the Court has first determined that the foreign jurisdiction is "available" and "adequate."

1. **Respondents' Failed to Argue That They Have Any Evidence – i.e., An Expert Opinion - That The Panamanian Doctrine Of Preemptive Jurisdiction and Section 1421-J Prohibit Panamanian Court From Exercising Subject Matter Jurisdiction Over This Matter.**

As set forth in Appellant's main brief, Appellant's present specific and detailed testimony from its expert witness, Mr. Dahl, who unequivocally testified that the Panamanian doctrine of preemptive jurisdiction and Section 1421 – J will prohibit Panamanian courts from exercising subject matter of jurisdiction over this case if it is re-filed in Panama. (Dahl Affidavit and AA – p. 56-57). On pages 18 – 19 of their Response Brief, rather than offering any evidence to rebut Mr. Dahl's testimony, Respondents argue that the District Court's "conditional dismissal" cures any concern regarding the issue of Panamanian subject matter jurisdiction because, if the Panamanian courts dismiss this case based on subject matter jurisdiction, Appellant can simply re-file the case in Minnesota. However, the federal courts have rejected similar arguments that the trial court could eliminate any concerns as to the availability or adequacy of the foreign courts by conditioning the *forum non conveniens* dismissal on the foreign court's acceptance of jurisdiction:

The court stated in no uncertain terms that "[c]onditions cannot transform an inadequate forum into an adequate one." *Id.* Accordingly, the conditions defendants propose do not release the Court from its obligation to assess the adequacy of the Canadian forum.

*In re CINAR Corp. Securities Litigation*, 186 F.Supp.2d 279, 299 at fn. 12 (E.D.N.Y. Feb 25, 2002)( quoting *Bank of Credit and Commerce International (Overseas) Ltd. v. State Bank of Pakistan*, 273 F.3d 241, 248 (2d Cir. 2001).

Likewise, in *Sacks v. Four Seasons Hotel Ltd.*, 2006 WL 783441 (E.D. Tex. March 24, 2006), the district court rejected defendant's request to conditionally dismiss the case on grounds of *forum non conveniens* based on plaintiff's expert (the same Mr. Henry Dahl) testimony that the doctrine of preemptive jurisdiction prohibited Mexican courts from exercising subject matter jurisdiction over the case:

A 'return jurisdiction' clause (i.e., conditions in the *forum non conveniens* dismissal) does not change the Court's opinion [denying the motion to dismiss based on *forum non conveniens*]. Defendants have failed to show that a Mexican forum is available in this case. The Court need not proceed further into the *forum non conveniens* inquiry.

*Sacks v. Four Seasons Hotel Ltd.* 2006 WL 783441 E.D.Tex.,2006.

As set forth in Appellant's main brief, a district court must first determine whether the foreign court is both "available" and "adequate" and cannot circumvent these determinations by simply issuing a conditional dismissal providing for "return jurisdiction" if, in this case, the Panamanian courts dismiss for lack of subject matter jurisdiction. Absent a requirement that the district court make findings that the foreign court is both "available" and "adequate" before issuing a conditional dismissal of "return

jurisdiction,” any district court could simply forgo any serious analysis on a *forum non-conveniens* motion by issuing a conditional dismissal of “return jurisdiction.”

Moreover, allowing the District Court to avoid its obligation to specifically ensure that the Panamanian courts are both “available” and “adequate” would cause tremendous inconvenience and undue expense to the parties in this case - which of course is exactly what the doctrine of *forum non-conveniens* is designed to prevent. Imagine this nightmarish – and quite likely – scenario: Appellant re-files in Panama, the Panamanian trial court refuses to dismiss based on lack of subject matter jurisdiction, thereby forcing the parties to undergo an extensive and lengthy trial *which Appellant wins*, only to have the Supreme Court of Panama reverse the trial verdict and dismiss the case *sua sponte* for lack of subject matter jurisdiction. This “nightmarish scenario” fully explains why the Supreme Court in *Piper*, in its footnote 22, specifically stated that district courts should never dismiss a case on grounds of *forum non-conveniens* if the district court is even merely “unclear” whether a foreign court could exercise “subject matter jurisdiction” over the case.<sup>4</sup> This “nightmarish scenario” also explains exactly why *In re CINAR Corp.* and *Sacks* found it inappropriate for the district court to assuage any concerns it had

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<sup>4</sup> Moreover, this also explains why conditional dismissals of “return jurisdiction” generally “condition” the dismissal on the defendant’s agreement not to assert certain procedural defenses – such as lack of personal jurisdiction - in the foreign court. Such “conditions” are fully within the control of the defendant. The problem in this case is that District Court’s “condition” of dismissal – the Panamanian court’s exercise of subject matter jurisdiction – is completely outside the control of either party and under the exclusive control of the Panamanian courts.

regarding subject matter jurisdiction by simply issuing a conditional dismissal of “return jurisdiction.”

Finally, it is important to point out that in Appellant’s opinion Respondent Rajamannan was not a credible witness and his testimony, even though on cross examination, is critical to Appellant’s case. However, Dr. Rajamannan is believed to be over 75 years old. Appellant is extremely concerned that by the time this matter gets to trial in Panama, or on “return” from Panama, Dr. Rajamannan will not be able to testify.

The District Court’s conditional dismissal providing for the reassertion of the Minnesota District Court’s jurisdiction over this case in the event that Panamanian courts refused to exercise subject matter jurisdiction does not, paraphrasing *In re CINAR Corp.*, “transform an unavailable forum into an available one.” The District Court’s judgment should be reversed.

**2. Each of the Cases Respondents Cite On Pages 18-19 Of Its Response Brief Are Easily Distinguishable.**

On pages 18-19 of their Response Brief, Respondents’ cite *Chandler v. Multidata Sys. Intern. Corp.*, 163 S.W.3d 537, 547-48 (Mo.Ct.App. 2005) to argue why a conditional dismissal of “return jurisdiction” is appropriate in this case. First, it is important to point out that despite Appellant’s thorough analysis of *Chandler* and *Chandler’s* reliance on plaintiff’s failure to provide the court with credible expert testimony on Panamanian law, Respondent simply ignored Appellant’s arguments. Second, the *Chandler* court failed to address whether a conditional dismissal can be

issued if there are doubts regarding the foreign court's subject matter jurisdiction. *In re CINAR Corp.* and *Sacks* specifically addressed this issue and rejected allowing a conditional dismissal of "return jurisdiction" in the face of substantial questions regarding the foreign court's availability or adequacy. Much like the *Chandler* plaintiff's failure to provide to the *Chandler* court with accurate expert testimony regarding the Panamanian doctrine of preemptive jurisdiction, the *Chandler* plaintiff also failed to argue that a conditional dismissal of "return jurisdiction" is completely inappropriate in such cases.

On page 19, Respondent's reliance on *Del Rio v. Ballanger Corp.*, 391 F. Supp. 1002, 1006 (D.S.C. 1975) is distinguishable because the *Del Rio* plaintiff never argued the Panamanian doctrine of preemptive jurisdiction prohibited Panamanian courts from exercising subject matter jurisdiction and the *Del Rio* court never addressed the issue in its opinion. Rather, the *Del Rio*'s condition of dismissal required that if the defendant "resisted" personal jurisdiction in the foreign court, the case could return to the initial forum. The question of subject matter jurisdiction was not even addressed.

Finally, in *Scotts Co. v. Hacienda Loma Linda*, 942 So.2d 900, 903 (Fla. Dist. Ct. App. 2006), the Appellate Court reversed a denial of a motion to dismiss on grounds of *forum non conveniens* and conditioned the dismissal on a "return jurisdiction" clause. However, similarly to *Chandler*, the *Scotts Co.* court never addressed the propriety of a conditional dismissal in the face of the challenge to the foreign court's subject matter

jurisdiction as set forth above in *In re CINAR Corp.* and *Sacks*.

**3. Johnston Is Still Precedent.**

Respondents' argue that *Johnston v. Multi-Data Systems International Corp.*, No. G-06-CV-313, U.S. Dist. 2007 Westlaw 1296204 (S.D. Tex. April 29, 2004); is no longer precedent by focusing on the fact that the *Johnston* Judge, Samuel Kent, has been suspended from the bench and the new judge granted a motion to certify for appeal to the Fifth Circuit Kent's April 30, 2007 Order denying Defendant's motion to dismiss.<sup>5</sup> However, an order for certification does not vacate the decision – otherwise, there would be nothing to appeal. An order to certify is effectively no different than if the case was fully adjudicated and appealed in the first instance. The precedential value of the case is not affected unless and until the reviewing court overrules or overturns the previous court's decision.

Moreover, Respondents argue on page 24 that Panamanian code Sections 244, 247, 248 and 249 allow Respondents to waive jurisdictional defenses citing *Johnston*. Once again, Respondents have not attached these statutes as required under Minn. R. App. 128.04 and have no expert opinion evidence as to their effect. As *Johnston* stated:

The Canadian Defendants have presented the Court with no expert testimony indicating that, in such circumstances, the conflict would be resolved in favor of

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<sup>5</sup> Appellant's counsel review of news material from Texas newspapers indicates that a special panel convened by the U.S. Court of Appeals for the Fifth Circuit suspended Kent based on allegations of sexual harassment by a court employee. The charges are serious enough that news reports stated that U.S. House members are considering an impeachment investigation. Nonetheless, these allegations have absolutely nothing to do with the soundness of Kent's reasoning in *Johnston*.

[Sections 244, 247, 248 and 249] ... especially in the face of the clearly contrary 2006 statute [Section 1421-J]. Again, the Court cannot dismiss this case based on the *possibility* that the Panamanian Courts may determine that the statutory conflict should be resolved in favor of maintaining jurisdiction over defendants who have waived the jurisdictional issue.

*Johnston*, (emphasis in original). at AA-47.

4. **Respondents “Arguments” Regarding the Inapplicability of the Preemption Doctrine and Section 1421-J Are Not “Evidence of Foreign Law” and Do Not Apply.**

At pages 22-26, Respondents erect numerous arguments challenging Dahl’s expert opinion that Panama is not available. First, Respondent argues that the Panamanian doctrine of preemptive jurisdiction and Section 1421-J only apply to Panamanian citizens. Appellant addressed these arguments in its main brief. Simply put, Respondent provides no evidence supporting this argument other than his own opinion. This is not evidence of foreign law.

Second, Respondents argue that Section 1421-J does not apply because it is limited to a *forum non conveniens* **judgment** from a foreign court. (Resp. Brief p. 23). Respondents then argue a *forum non conveniens* dismissal is not a “judgment.” This is absurd in the extreme! Judge Sullivan issued an Order to Dismiss to the Clerk of Court and the Clerk of Court entered a judgment of dismissal which forms the basis of this appeal. Respondent then argues that the *forum non conveniens* dismissal is not a “judgment” because it was not a decision on the merits. Taking Respondents’ argument to its logical extreme, Section 1421-J could never apply because *forum non conveniens* judgments are *never* on the merits.

Third, Respondents argue that because this case was commenced in Minnesota in 2004, Panamanian courts will not apply Section 1421-J, which was passed in 2006, “retroactively” to this case. This is likewise absurd. To begin, Respondents have no *evidence of Panamanian law – i.e., case or statutory law* – to support this argument and therefore Respondents cannot make this argument. In addition, Panama would not apply Section 1421-J retroactively – it would be applied well after its passage in 2006 if Appellant ever re-files in Panama.

Fourth, Respondents cite *Hill v. Upper Mississippi Towing Corp.*, 89 N.W.2d 654, 660 (Minn. 1958) to argue that whether a foreign jurisdiction is “available” for *forum non conveniens* analysis is determined when the case was first filed in the domestic jurisdiction and not when the district court is considering the *forum non conveniens* motion. Like many of their other arguments, the *Hill* quote is taken out of context and is directly contrary to federal case law:

the second step of the *forum non conveniens* analysis does not concern itself with the reason why an alternative forum is **no longer available**; its singular concern is the fact of **present availability**.”

*Norex Petroleum Ltd. v. Access Industries, Inc.*, 416 F.3d 146, 159 (2d Cir. 2005).

Moreover, Respondents citation to *Hill* is inaccurate. In *Hill*, the defendant argued Tennessee was an available jurisdiction even though Tennessee did not have personal jurisdiction over the defendant or the cause of action. The Minnesota Supreme Court held that where only one forum has jurisdiction over a case when the cause of action accrues, a defendant cannot for purposes of a *forum non conveniens* motion suggest that

another forum is available which never had any jurisdiction over the case when the action started. *Id. at 660*. Essentially, Respondent is arguing that it could have argued that *Iceland* was an available and alternative forum in this case because Respondents would consent to jurisdiction. This is of course absurd. *Hill* has nothing to do with when a court evaluates whether an available alternative forum is available under *forum non conveniens*. In fact, in concluding its *forum non conveniens* analysis, the *Hill* court cited to *Tivoli Real Estate v. Interstate Circuit*, 167 F.2d 155, 156 (5<sup>th</sup> Cir. 1948), stating, ‘\* \* \* At least two such forums must be open to the plaintiff before the doctrine comes into play; and they shall not be dependent merely upon the will or grace of the defendant, but must be provided by law.’ (Italics supplied.) *Id. Hill* actually supports Appellant’s arguments.

Finally, Respondents argue that they did not need to disclose their expert opinion in discovery because Mr. Igelsias was not testifying at trial. No kidding. *Forum non-conveniens* motions are not made at trial, they are made in an evidentiary pretrial motion on which discovery is allowed. *Drexel Chem. Co. v. SGS Depauw & Stokoe*, 95 F.3d 170 (6<sup>th</sup> Cir. 1995)(motion to dismiss for lack of personal jurisdiction). Moreover, federal courts specifically state that experts relied on for pretrial motions must be disclosed in discovery. “Disclosure is required of information that an expert would rely on and testify to, *including in a declaration supporting a pretrial motion.*” *Single Chip Systems Corp. v. Intermec IP Corp.*, 495 F.Supp.2d 1066, 1074 (S.D. Cal. 2007)(emphasis supplied). Do Respondents really believe that they can simply spring their expert opinion regarding

foreign law on Appellant by serving a motion to dismiss and expect Regardless of whether or not Respondents intended to use their expert at trial, they were still required to disclose the information that the expert was testifying to for purposes of a pretrial motion.

**G. Respondent's Arguments Regarding the Private Interest Factors Do Not Justify Dismissal.**

Appellant addressed the District Court's failure to properly analyze the private and public interest factors in its main brief. In Reply, two points deserve special emphasis.

First, with respect to the location of documents and witnesses, as set forth above, Respondents have not established that anything happened in Panama with respect to the Management Contract. Contrary to Respondents' argument, Appellant not only claims no services were provided in Panama, Appellant also claims its money never ended up with Respondent PVSC and Appellant claims that PVSC does not even exist.

Respondents have no evidence of any of this other than the uncorroborated testimony of Rajamannan.

Second, Respondents allege that it would be "profoundly and prejudicially inconvenient for Respondents" because the witnesses are located in Panama. (Resp. Brief, p. 28). However, Dahl testifies that Panamanian courts only allow four witnesses to testify and Respondent did not rebut this testimony. (AA – pp. 66-67). Moreover, while Respondents identified two Panamanian witnesses, they failed to specify in even a general way what the witnesses will testify to which Respondents are required to do.

*Brian Jackson & Co. v. Eximias Pharmaceutical Corp.*, 248 F. Supp. 2d 31 (D.R.I. 2003)(venue transfer). Finally, unlike Panama, Respondents could take the video

deposition of these witnesses in Panama and use those depositions in the Minnesota forum compelling the testimony under the Hague Convention.

**H. Respondents' Timeliness Cases Are Distinguishable.**

Respondents inaccurately argue that two Minnesota appellate cases affirmed dismissal based on a *forum non conveniens* motion even though the courts did not dismiss the cases *until one year after the cases were commenced*. *Bergquist v. Medtronic, Inc*, 379 N.W.2d 508 (Minn. 1986) and *Bonzel v. Pfizer, Inc.*, No. C9-03-47 (Minn. App.) 2003 WL 21743768. Respondents statement is not accurate because delay is not measured by the Court's dismissal order; rather it is measured by the timing of defendant's filing of the motion to dismiss which occurred in much less than one year in each case. In *Bergquist*, defendant filed its Answer on June 2, 1983 and filed its Motion to Dismiss on February 22, 1984 – an eight month delay). In *Bonzel*, plaintiff commenced the action in July, 2000 and defendants filed a motion to dismiss based on forum non conveniens in April, 2001 – a nine month delay. In this case, Respondents filed their *forum non-conveniens* motion on May 10, 2007 – 28 months after this case was commenced.

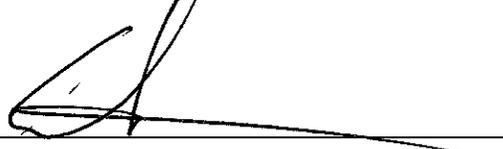
CONCLUSION

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

DATED: February 21, 2008.

Respectfully submitted,

MOHRMAN & KAARDAL, P.A.

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

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Erick G. Kaardal #229647

Tona T. Dove #232130

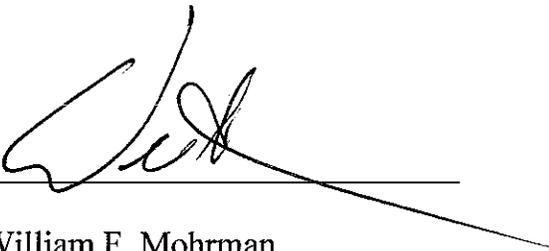
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**CERTIFICATE OF COMPLIANCE  
WITH MINN. R. APP. P. 132.01, Subd. 3**

The undersigned certifies that the Reply Brief submitted herein contains 6,877 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.

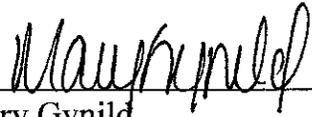


William F. Mohrman

**CERTIFICATE OF SERVICE**

I hereby certify that I served a copy of the Appellant's Reply Brief on the following parties, by regular mail, postage prepaid, on February 21, 2008.

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\_\_\_\_\_  
Mary Gynild

Subscribed and affirmed before me  
this 21 day of February, 2008.

  
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Notary Public

