

No. A07-2199

STATE OF MINNESOTA  
IN SUPREME COURT

---

Ambrose Harry Rajamannan, et al.,

Appellants,

vs.

Paulownia Plantations  
de Panama Corporation,

Respondent.

---

---

APPELLANTS' REPLY BRIEF

---

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

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

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

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

**TABLE OF CONTENTS**

TABLE OF CONTENTS .....i

TABLE OF AUTHORITIES ..... ii

STATEMENT OF FACTS .....1

    I. ARGUMENT .....11

        A. The District Court Correctly Determined Panama to be an “Available and Adequate” Alternative Forum and Correctly Ordered Dismissal .....11

            1. The Text and Timing of Article 1421-J Demonstrate the Statute Does Not Affect this Case.....12

            2. This Case Would Proceed without Obstacle in Panama .....13

            3. Relevant Precedent Uniformly Supports Dismissal .....15

            4. The Record .....18

            5. The Public and Private Interest Factors.....20

        B. This Case Should be Dismissed Regardless of Whether Panama will Accept Jurisdiction .....20

        C. PPP’s Various Additional Arguments against Dismissal are Unavailing .....24

            1. The district court appropriately found Appellants’ motion timely .....24

            2. The district court properly considered Appellants’ expert affidavit .....24

CONCLUSION .....25

CERTIFICATE OF COMPLIANCE WITH MINN. R. APP. P. 132.01, SUBD. 3 .....27

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>CASES</b>	
<u>Aguinda v. Texaco, Inc.</u> , 142 F. Supp. 2d 534 (S.D.N.Y. 2001) .....	12, 13, 22
<u>Aguinda v. Texaco, Inc.</u> , 303 F.3d 470 (2d Cir. 2002) .....	13
<u>Bergquist v. Medtronic, Inc.</u> , 379 N.W.2d 508 (Minn. 1986) .....	20, 21, 24
<u>Bonzel v. Pfizer, Inc.</u> , No. C9-03-47, 2003 WL 21743768 (Minn. Ct. App. July 29, 2003).....	24
<u>Chandler v. Multidata Sys. Int’l Corp.</u> , 163 S.W.3d 537 (Mo. Ct. App. 2005) .....	16, 17
<u>Del Rio v. Ballenger Corp.</u> , 391 F. Supp. 1002 (D.S.C. 1975) .....	16
<u>Fullerton-Krueger Lumber Co. v. N. Pac. Ry. Co.</u> , 206 U.S. 435 (1925) .....	13
<u>Gulf Oil Corp. v. Gilbert</u> , 330 U.S. 501 (1947) .....	20
<u>Johnston v. Multidata Sys. Intern. Corp.</u> , No. G-06-CV-313, 2007 WL 1296204 (S.D. Tex. April 30, 2007).....	17, 18
<u>Johnston v. Multidata Sys. Intern. Corp.</u> , No. G-06-CV-313, 2007 WL 2064817 (S.D. Tex. July 13, 2007).....	17
<u>Johnston v. Multidata Sys. Intern. Corp.</u> , No. G-06-CV-313, 2007 WL 3998804 (S.D. Tex. Nov. 14, 2007).....	18
<u>Scotts Co. v. Hacienda Loma Linda</u> , 2 So.3d 1013 (Fla. Dist. Ct. App. 2008).....	passim
<u>Scotts Co. v. Hacienda Loma Linda</u> , 942 So.2d 900 (Fla. Dist. Ct. App. 2006).....	15
<u>State v. Armstrong</u> , 1860 WL 2856, 4 Minn. 335 (Minn. 1860).....	13

Trader’s Trust Co. v. Davidson,  
178 N.W. 735 (Minn. 1920) .....18, 19

**STATUTES AND OTHER AUTHORITIES**

Minn. Stat. § 599.01 .....18

Minn. Stat. § 599.07 .....25

Henry St. Dahl, Forum Non Conveniens, Latin America and Blocking Statutes, 35  
U. Miami Inter-Am. L. Rev. 21, 35 (2003) .....14, 19

Michael Wallace Gordon, Forum Non Conveniens Misconstrued: A Response to  
Henry St. Dahl, 38 U. Miami Inter-Am. L. Rev. 141, 148 (2006).....15, 19, 23

Panamanian Judicial Code Article 1421-J .....passim

Panamanian National Assembly Law No. 38 .....12

## STATEMENT OF FACTS

This discussion of the facts is more detailed than Appellants would prefer. Appellants believe the factual summaries of either the Court of Appeals (AD.37-38)<sup>1</sup> or the district court (AD.3-6) are sufficient for purposes of this appeal. The Statement of Facts in Appellants' opening brief was largely a verbatim quotation of the Court of Appeals' factual summary, with supporting citations to the record. This lengthier summary is compelled by the need to correct the brief of Respondent Paulownia Plantations de Panama Corporation ("PPP"), which is replete with inaccurate, overheated, and under-supported statements and presents issues that are very much in dispute as "undisputed" or "admitted."

### **Paulownia in Panama**

Dr. Ambrose Harry Rajamannan ("Rajamannan") resides in Minnesota. (Affidavit of A. Harry Rajamannan filed May 31, 2007 ("First Raj. Aff.") ¶ 1.) In 1976, Rajamannan started Agro-K Corporation ("Agro-K"), a corporation that markets fertilizer products around the world. (First Raj. Aff. ¶¶ 1-2.) As part of that marketing, Rajamannan traveled to Panama and became interested in growing paulownia trees commercially. (First Raj. Aff. ¶ 4, 6-9.) Paulownia is a fast growing tree that can be harvested quickly and is prized for commercial uses, especially in Asian markets. To pursue his interest in paulownia trees, Rajamannan formed two Panamanian corporations, Appellants Perla Verde Service Corporation ("PVSC") and Perla Verde S.A. ("Perla Verde"). (First Raj. Aff. ¶ 9.)

---

<sup>1</sup> Citations to "(AD)" refer to portions of Appellants' Addendum.

In October 1997, Robert Shepherd, who became the principal organizer of PPP, met Rajamannan in Australia, where Rajamannan had traveled on Agro-K business. (Complaint ¶ 8; Deposition of Robert Shepherd (“Shepherd Dep.”) 9-11, 21.)<sup>2</sup> Shepherd and Rajamannan discussed the attributes of paulownia trees and the prospects for growing them in Panama. (Shepherd Dep. 27-28.) Shepherd understood that paulownia was new to Panama and had not been established as an industry. (Shepherd Dep. 70.) Shepherd and Rajamannan agreed to further discuss the possibility of a project. (Shepherd Dep. 28.)

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

In October 1998, Shepherd traveled to Panama and met with Rajamannan. (Shepherd Dep. 68-69.) They drove to a paulownia growing operation managed by Rajamannan. (Shepherd Dep. 70-74.) Shepherd observed and was impressed seeing one-year-old paulownia trees that were already 20 to 25 feet tall and three inches around. (Shepherd Dep. 71-73.) Shepherd visited a nursery where young paulownia trees were growing, in his opinion, “very well” under a quarter-acre shade cloth. (Shepherd Dep. 74-75.) He also visited a pepper growing operation and observed pepper vines that were “prolific in their production” growing around the trunks of trees. (Shepherd Dep. 80.)

Recalling his visit, Shepherd stated: “the itinerary was such that I was shown enough information to make my investment in paulownia and pepper viable in my mind ...” (Shepherd Dep. 82-83.) Shepherd recalled telling Rajamannan that he was satisfied

---

<sup>2</sup> Transcripts of the depositions of Shepherd and Rajamannan are Exhibits 1 and 2, respectively, to the Affidavit of William F. Mohrman filed May 31, 2007.

with what he had seen and would be interested in looking at the possibility of approaching some of his contacts to invest in a project to be managed by Rajamannan. (Shepherd Dep. 100-101.)

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

In November 1998, PPP was formed as an investment vehicle for Australian investors recruited by Shepherd. (Complaint ¶ 11.) PPP was incorporated in the Republic of Vanuatu so PPP investors could exploit favorable Australian tax laws. (Shepherd Dep. 12.) Neither Rajamannan nor any entity in which he had an interest was a PPP investor. (First Raj. Aff. ¶ 11.)

On December 30, 1998, Perla Verde, a Panamanian corporation, entered into multiple twenty year agreements for the lease of land in Panama ("Farm 1"). (Complaint ¶ 16.) On March 12, 1999, PPP entered into two contracts with PVSC, another Panamanian corporation. The first was a License to Occupy Land (the land being Farm 1). (Complaint ¶ 18.) The second was the Paulownia and Black Pepper Management Contract ("Management Contract"), the contract at issue in this litigation. (Complaint ¶ 18.) The Management Contract required PPP to make periodic payments to PVSC and required PVSC to:

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

(RA-103-109.)<sup>3</sup> All of these actions were to take place in Panama. PVSC did, in fact, clear Farm 1 and plant paulownia trees and pepper plants. (First Raj. Aff. ¶ 12.)

The Management Contract did not require PVSC to use funds received from PPP for any particular purpose. (RA-103-109; First Raj. Aff. ¶ 13.) Thus, once PPP made a management fee payment required by the Management Contract, those funds became the property of PVSC. (First Raj. Aff. ¶ 13.) They were not earmarked to be used for specific expenses related to the project and could be used by PVSC as PVSC elected, whether that use benefited PPP or not. (First Raj. Aff. ¶ 13.) To be sure, the Management Contract required PVSC to lease land, clear the land, supply paulownia and pepper plants, and plant and care for those plants, but PVSC was not required to use the money it obtained from PPP to meet its responsibilities and certainly was not required to spend all of the funds in that manner. (First Raj. Aff. ¶ 13.)

PVSC did, in fact, spend a great deal of money on the paulownia and pepper projects during the time it managed them. In fact, Rajamannan testified that PVSC spent more money in Panama performing under the Management Contract than it received from PPP. (First Raj. Aff. ¶ 23.)

Shepherd made subsequent trips to Panama to observe the PPP project in July 1999, June 2000, March 2001, January 2002, and May-June 2002. (Shepherd Dep. 48.) Harold Tomblin, another PPP investor, traveled to Panama in July 1999, early 2001,

---

<sup>3</sup> Citations to “(RA)” refer to portions of Respondent’s Appendix.

January 2002, and May-June of 2002 (Tomblin Dep. 16, 38, 42, 67.)<sup>4</sup> PPP's Complaint refers in detail to observations Shepherd and Tomblin claim to have made and statements they say Rajamannan made during these visits to Panama, as well as to statements Rajamannan allegedly made in Australia. Significantly, neither Shepherd nor any other representative of PPP claims to have ever traveled to Minnesota prior to the initiation of this action, or to have met with Rajamannan or any other representative of PVSC or Perla Verde in any location other than Panama or Australia.

### **Problems with Tree Growth**

By July 2001 the paulownia trees on Farm 1 were not growing as well as PPP and PVSC had hoped. (Complaint ¶ 30.)<sup>5</sup> Paulownia trees on an adjoining 360 acres of land ("Farm 2") that PVSC was managing for itself and Shepherd outside of PPP were growing better and had less damage from sunburn than the trees on Farm 1, most likely because PVSC had not cleared the grass between the trees on Farm 2, while grass had been cleared between the trees on Farm 1, exposing them to direct sun. (Rajamannan Dep. 574-575, 814.)

Rajamannan traveled to Australia for an October 31, 2001 meeting of the PPP shareholders, bringing photographs of the trees on both Farms. (Rajamannan Dep. 575.) He offered to substitute the trees on Farm 2 for those on Farm 1 at no cost to PPP, allowing PPP to take control of the healthier paulownias on Farm 2 under the same terms as were in place for Farm 1. (Rajamannan Dep. 575-576.) Shepherd's Report to

---

<sup>4</sup> Relevant portions of the Harold Tomblin deposition are reproduced in Exhibit B to the Affidavit of Aaron Mills Scott filed May 31, 2007 ("First Scott Aff.").

<sup>5</sup> The Complaint erroneously alleges July 2000 rather than July 2001.

Shareholders of PPP for the meeting recited these problems and recorded PPP's acceptance of PVSC's offer:

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

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

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

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

### **The April 2002 Fire**

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

When Shepherd traveled to Panama shortly after the fire, he observed that most of the paulownia trees on Farm 2 had been coppiced. (Shepherd Dep. 334.) Tomblin accompanied Shepherd and testified that “[w]hen I went back in late May, June 2002 I could see the trees were shooting and growing again.” (Tomblin Dep. 75.) He said the trees were “3 or 4 feet high.” (Tomblin Dep. 75.) In a June 7, 2002 letter to PPP shareholders, Shepherd stated: “The resultant coppicing of the trees has resulted in a new tree to grow in its place and I was very surprised at the recovery rate (over 95%) and growth of the new trees.” (First Scott Aff. Ex. E, at PPP 0768.) Minutes from the June 20, 2002 PPP shareholder meeting stated: “Despite the fire all of the Paulownia trees had reshot and, after coppicing, had shown excellent growth characteristics. This is as a result of having a two-year root system in place and the onset of the wet season which will last until December.” (First Scott Aff. Ex. E, at PPP 0763.) By July 1, 2002 a PPP representative observed: “The paulownia farm looks very good with very good growth with trees already ... more than 8 feet tall.” (First Scott Aff. Ex. B; Tomblin Dep. Ex. 16.)

Despite the recovery of the paulownia trees, Shepherd and Tomblin traveled to Panama in May 2002 to, in Shepherd’s words, “confront” Rajamannan with complaints about PVSC’s management. (Shepherd Dep. 280.) Over several days, Shepherd, Tomblin, and a Panamanian lawyer met to discuss their strategy. (Shepherd Dep. 313.) A May 22, 2002 memo from Shepherd reveals that PPP’s “preferred result in all of this is as follows: Dr. Rajamannan . . . agrees that Pearla Verde Service Corporation gives up immediately the management of all the projects.” (First Scott Aff. Ex. A; Shepherd Dep.

Ex. 25, at 103-04.) Though no formal agreement was reached, Shepherd's actions forced PVSC to stop managing the PPP project at the end of May 2002. (Tomblin Dep. 124.) PPP then retained Roberto Barnett, Rajamannan's key assistant, as manager of the project. (First Scott Aff. Ex. B; Tomblin Dep. Ex. 16.) Ultimately, however, PPP – not PVSC – abandoned the paulownia project. (Shepherd Dep. 358-359.)

### **The Supposed Minnesota Connection**

Disappointed that their venture in Panama was not successful, PPP brought this action in Minnesota. PPP attempts to justify this decision by pointing to PVSC's agreement to accept payments from PPP by wire transfer receipt into Agro-K's bank account with TCF Bank. Use of the Minnesota bank account arose from a December 1998 agreement between Rajamannan and Shepherd, motivated by concerns about the security and accessibility of funds, that wire transfers from PPP would be sent to Agro-K's account and then transferred to Panama as needed, rather than leaving large amounts of cash in accounts in Panama. (Complaint ¶¶ 43-44.) Rajamannan and Shepherd have different recollections<sup>6</sup> about whether this was Shepherd's idea or Rajamannan's idea, but it is undisputed that beginning in December 1998 most PPP management fee payments to PVSC were wired to Agro-K's bank account. (First Raj. Aff. ¶ 15.)

Between December 1998 and April 2002, Agro-K received 24 wire transfers from PPP, totaling \$898,831.45. (Affidavit of Eugene Logan filed May 31, 2007 (“Logan Aff.”) ¶ 5, Ex. 1.) In turn, between January 5, 1998 and May 17, 2002, Agro-K made 153

---

<sup>6</sup> Rajamannan testified that this arrangement was Shepherd's idea. (First Raj. Aff. ¶ 15.) Shepherd testified that he was aware of this arrangement and had no objection to it. (Shepherd Dep. 238.)

wire transfers totaling \$2,426,164.00 from its bank account to persons or entities in Panama. (Logan Aff. ¶ 7, Ex. 2.) Both Agro-K's accountant and Agro-K's office manager, who reviewed and were familiar with the wire transfer and bank records of Agro-K, state in unequivocal terms that all funds received from PPP were transferred to Panama. (Logan Aff. ¶ 24; Affidavit of Concie Rajamannan filed May 31, 2007 ¶ 18.) There is no contrary evidence in the record.

When it chose Minnesota as the forum to bring its lawsuit, PPP decided to no longer describe the payments made under the Management Contract as "management fees" (as they are called in the contract, RA-103, 107). Rather, PPP now calls these payments an "investment" and insists that all Management Fees were required to pass through a PVSC bank account (rather than the account of any of the related Panamanian companies) and be used wholly and only to perform under the Management Contract. This reading of the Management Contract is inconsistent with its plain language.<sup>7</sup>

The preceding discussion corrects many of the inaccuracies in PPP's brief, but a few specific inaccuracies require individual attention. PPP states that: "Appellants have absolutely no evidence that Appellants ever spent one nickel on the paulownia tree farm." (Res. 10.) This is incorrect. Rajamannan testified at length to the amounts expended by PVSC to perform its obligations and provided affidavit testimony that PVSC spent more money attempting to make the operation successful than PPP paid in Management Fees.

---

<sup>7</sup> Among many other examples, the Management Contract states that "PPP agrees that it will pay PVSC the contracted management fee" ; "PPP agrees to pay the lease and management fees" ; "PVSC acknowledges that all trees and vines planted for PPP will be the property of PPP . . ." (RA-103-106.) Moreover, Schedule 1 to the Management Contract sets out the "Gross Management Fees" payable by PPP. (RA-107.)

(First Raj. Aff. ¶ 23.) Moreover, as the foregoing factual statement reflects, PPP representatives repeatedly visited the project and observed the growth of trees, maintenance by workers, and the coppicing and post-fire re-growth of the trees, all of which is evidence of work performed and money spent by PVSC.

PPP also mistakes the facts with respect to wire transfers and bank accounts, claiming: (1) “Agro-K never sent Respondents’ investment monies to Panama.” (Res. 57); and (2) “Appellants failed to provide any documents demonstrating that Respondents’ investment moneys ever left Agro-K’s Minnesota bank account.” (Res. 57.) PPP’s use of the term “investment monies” again misstates the nature of the Management Contract. PPP’s larger point is also incorrect. As set forth above, during the period in which PVSC managed the PPP project, Agro-K received \$898,831.45 in wire transfers from PPP, but transferred \$2,426,164.00 to Panama. (Logan Aff. ¶¶ 5, 7, Ex. 1-2.) Agro-K bank records demonstrating the transfers to Panama were produced in discovery and filed with the district court. (Second Affidavit of Eugene Logan filed June 25, 2007 Ex. 1-2.)

Finally, PPP tries to support its inaccurate reading of the Management Contract by claiming that: “[U]nder the Management Contract, PVSC (allegedly) owned the land and the paulownia trees; therefore, PVSC was not ‘managing’ Respondent’s land, PVSC was managing its own land in which Respondent invested.” (Res. 10.) This is a flatly incorrect representation of what the Management Contract states. It clearly describes the land as leased, not owned, states that PPP, not PVSC, would make the lease payments, and provides that: “PVSC acknowledges that all trees and vines planted for PPP will be

the property of PPP and further PVSC agrees to register the property in the name of PPP ...” (RA-104.)

## **I. ARGUMENT**

### **A. The District Court Correctly Determined Panama to be an “Available and Adequate” Alternative Forum and Correctly Ordered Dismissal**

There is no dispute that PPP could have brought this case in Panama from the beginning. Similarly, there is no denying that every published American decision considering *forum non conveniens* dismissal to Panama in circumstances such as these has ordered the case dismissed.

Hoping to avoid the fate of plaintiffs in all other similar cases that have considered the issue, PPP argues this case cannot be dismissed because of a Panamanian legal concept expressed in (1) Article 1421-J, passed in August 2006 and (2) the concept of pre-emptive jurisdiction, which PPP dates to 1916 and which was allegedly codified by Article 1421-J. (RA-56; Res. 25.)

The district court considered PPP’s arguments under both Article 1421-J and pre-emptive jurisdiction, but determined that Panama is an “available and adequate” alternative forum for this case. (AD.10-18.) The district court articulated numerous bases supporting its conclusion. This brief will focus on three: (1) the text and timing of Article 1421-J demonstrating that the statute does not apply to this case; (2) the fact that this case includes two Panamanian defendants and a non-Panamanian plaintiff; and (3) the unbroken chain of American precedent reaching the same conclusion as the district court.

**1. The Text and Timing of Article 1421-J Demonstrate the Statute Does Not Affect this Case**

Although this case was filed in Anoka County in August 2005, the first version of Article 1421-J was not enacted until almost year later, on August 1, 2006. (Notice of Case Filing; RA-56.) Article 1421-J was then repealed in February 2008 with enactment of a law that “abrogate[d] article 1421-J of the Judicial Code.” (AD.24-25.) Months later, on June 26, 2008, the Panamanian National Assembly issued Law No. 38, enacting a revised Article 1421-J. (AD.33-34.) Law No. 38 states that it “shall start in force and effect as of its promulgation.”<sup>8</sup> (AD.33.)

PPP devotes only one footnote to the question of whether the statute underlying its entire argument actually applies, retroactively, to this case. (Res. 28, n.7.) PPP never quotes or discusses the language of Law No. 38. PPP’s argument basically consists of the statement, “This is absurd.” (Res. 28, n.7.)

PPP incorrectly asserts that Appellants have no Panamanian legal authority supporting their position. Appellants’ argument stems from the plain language of the Panamanian statutes themselves. In contrast, PPP has cited no case law or expert opinion addressing the text of Law No. 38 or suggesting how statutes that are not retroactive could apply to cases filed prior to their enactment. In fact, PPP’s argument is *contrary* to case law. Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 546-47 (S.D.N.Y. 2001) found Ecuador to be an “available” alternate forum despite the existence of an Ecuadorian

---

<sup>8</sup> The 2006 version of Article 1421-J contains similar language, which the district court examined before concluding that it is not “at all clear that Panamanian courts will give [Article 1421-J] retroactive application and bar actions occurring and forum selections exercised prior to its adoption.” (AD.15.)

blocking statute, Law 55, similar to Panama's Article 1421-J. Id. at 546. The court found it a "doubtful assumption. . . that Law 55 is retroactive and applies to lawsuits, like these, that were filed prior to the enactment of Law 55 in 1998." Id.

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

Id. at 546-47. On appeal, the Second Circuit agreed: "We agree with the district court's skepticism as to the law's retroactivity. . ." Aguinda v. Texaco, Inc., 303 F.3d 470, 477 (2d Cir. 2002). The logic of Aguinda applies with equal force to Panama's similar statute, passed long after this case began.

In addition, PPP has not distinguished or even addressed the longstanding precedent recognizing that the proper presumption with all statutes, including foreign statutes, is that they do not apply retroactively. "It is a rule of construction, that all statutes are to be considered prospective, unless the language is express to the contrary, or there is a necessary implication to that effect." Fullerton-Krueger Lumber Co. v. N. Pac. Ry. Co., 206 U.S. 435, 437 (1925). "The production of Statutes of another State may raise the presumption that the law has continued to be the same as at the date of their passage, until an amendment or appeal is shown, but it cannot run retrospectively." State v. Armstrong, 1860 WL 2856, at \*8, 4 Minn. 335 (Minn. 1860).

## **2. This Case Would Proceed without Obstacle in Panama**

The words of PPP's own expert, Henry St. Dahl, demonstrate why this case could be re-filed in Panama after dismissal without violating a retroactively (and incorrectly)

applied Article 1421-J or principles of pre-emptive jurisdiction. St. Dahl states that where a Latin American defendant seeks dismissal for *forum non conveniens* in order to defend a case in its own country, then no illegal effects are caused and dismissal may appropriately be ordered.

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

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

PPP has avoided informing this Court that its own expert disagrees with the argument PPP is now advancing. The Affidavit of Henry St. Dahl consisted of a 24-page affidavit and 23 exhibits, together comprising nearly 300 printed pages. Although the table of contents in St. Dahl's affidavit lists Exhibit 7 as: "Dahl, *Forum Non Conveniens, Latin America and Blocking Statutes*" examination of that exhibit reveals that PPP – in an out-of-character nod to brevity – included only selected pages, excluding the acknowledgement that: "Normally when the defendant is Latin American, the effect of FNC would probably not violate the law of the Latin American country concerned." Id.

St. Dahl's opinion makes perfect sense when one considers that the purpose of blocking statutes like Article 1421-J is to allow Latin American plaintiffs to sue American defendants in the United States without having their cases dismissed. Scotts Co. v. Hacienda Loma Linda, 2 So.3d 1013, 1016 (Fla. Dist. Ct. App. 2008); Michael

Wallace Gordon, Forum Non Conveniens Misconstrued: A Response to Henry St. Dahl, 38 U. Miami Inter-Am. L. Rev. 141, 148 (2006). Further confirming the purpose of blocking statutes, St. Dahl's law review article includes a quotation from the attorney general of Ecuador, which passed its own blocking statute, stating that: "My country considers that our citizens are treated in a discriminatory way due to the application of the *forum non conveniens*." (RA-80.)

In this case a non-Panamanian, non-Latin American (indeed, non-American) plaintiff seeks to turn blocking principles on their ear by using them to prevent two Panamanian corporations from being permitted to defend themselves in their home country, where this dispute is centered. The district court found that: "According to Plaintiff's own assertions, Panama's preemptive jurisdiction law was not designed to protect Plaintiff." (AD.14.) There is no basis for applying Article 1421-J or pre-emptive jurisdiction in this case where neither the plaintiff's nor the defendants' nationality makes application appropriate.

### **3. Relevant Precedent Uniformly Supports Dismissal**

In seeking a determination that Panama is not an "available and adequate" forum, PPP asks this Court to reach a conclusion not supported by a single published decision in any court in the country. In an unbroken series of cases, American courts have found it appropriate to dismiss cases for *forum non conveniens* in favor of litigation in Panama.

These cases include recent Florida decisions both before and after the enactment of Article 1421-J, Scotts Co. v. Hacienda Loma Linda, 942 So.2d 900, 902-03 (Fla. Dist. Ct. App. 2006) and Hacienda, 2 So.3d at 1017, as well as reported decisions in Missouri,

Chandler v. Multidata Sys. Int'l Corp., 163 S.W.3d 537, 547-48 (Mo. Ct. App. 2005), and South Carolina, Del Rio v. Ballenger Corp., 391 F. Supp. 1002, 1006 (D.S.C. 1975).

These cases considered the same arguments now raised by PPP. The Florida cases found Panama “available and adequate” despite arguments asserting both pre-emptive jurisdiction and Article 1421-J. 942 So.2d at 902-03; 2 So.3d at 1017. The Chandler court held that “the trial court did not abuse its discretion in finding that Panama is an available forum” despite considering the plaintiffs’ arguments that proceedings in Panama would be barred by pre-emptive jurisdiction. 163 S.W.3d at 548. In Del Rio, the court dismissed for *forum non conveniens* in favor of litigation in Panama, but did so conditionally, permitting the plaintiff to return in the event of “resistance” to jurisdiction in Panama. 391 F. Supp. at 1006.<sup>9</sup>

PPP makes a half-hearted attempt to distinguish these cases. According to PPP, the Hacienda cases are distinguishable because they involved “activities which unequivocally occurred in Panama,” but that is clearly the case here, too, as the district court found: “In short, this case has little to do with Minnesota and everything to do with Panama.” (AD.21.)

As to Del Rio, PPP claims the plaintiff, “never asserted the Panamanian doctrine of preemptive jurisdiction.” (Res. 39, n.10.) PPP cites nothing to support this claim and the court’s opinion does not indicate whether the argument was raised or not. If

---

<sup>9</sup> As discussed in Appellants’ opening brief, courts have repeatedly reached the same conclusion when considering *forum non conveniens* motions related to other Latin American countries with statutes or pre-emptive jurisdiction principles similar to Panama’s. (Appellants’ opening brief 23-24, 31-32.)

anything, the court's decision to dismiss conditionally, with the option to return to the U.S. in the event of "resistance" to jurisdiction in Panama, suggests that the court did, in fact, consider a pre-emptive jurisdiction argument.

As to Chandler, PPP asserts the court's decision to affirm dismissal and reject a pre-emptive jurisdiction argument somehow supports PPP's position because PPP believes it has done a better job advocating its position than did the Chandler plaintiffs. (Res. 38-41.) Even if PPP has properly assessed the quality of its advocacy, the fact remains that the Chandler court considered the doctrine of pre-emptive jurisdiction but still dismissed, just as other courts have done.

Faced with a string of decisions finding Panama "available and adequate" and rejecting its arguments, PPP settles its focus on a single unpublished decision that is no longer good law, Johnston v. Multidata Sys. Intern. Corp., No. G-06-CV-313, 2007 WL 1296204 (S.D. Tex. April 30, 2007). PPP correctly states that "The Fifth Circuit later reversed Johnston on other grounds – i.e., lack of personal jurisdiction," but this statement scarcely begins to tell the story. The order denying *forum non conveniens* dismissal in Johnston was issued by now-former federal judge Samuel Kent. In July 2007, Judge Kent denied a motion for immediate interlocutory appeal of the order. Johnston, 2007 WL 2064817, at \*1 (July 13, 2007). Shortly thereafter, Judge Kent was suspended from the bench and the Southern District of Texas undertook the task of reviewing his case docket and revisiting the wisdom of some of his decisions. This process resulted in an order *sua sponte* vacating Judge Kent's denial of interlocutory review and instead certifying the order for immediate interlocutory appeal based on

“serious concerns” over Judge Kent’s order. Johnston, 2007 WL 3998804, at \*1 (Nov. 14, 2007). The Fifth Circuit Court of Appeals reversed Judge Kent’s original order, found that it could not exercise jurisdiction over the defendants, and stated that it would therefore not consider the remaining issues, including *forum non conveniens*. Johnston, 523 F.3d 602, 605 (5th Cir. 2008). Johnston provides no support to PPP and does not undercut the district court’s opinion or break the clear chain of cases finding Panama “available and adequate.”

#### **4. The Record**

Spread throughout its brief, PPP advances the position that the Court may only look at a limited universe of evidence to determine the application of Panamanian law. PPP begins by citing Minn. Stat. § 599.01:

The existence and the tenor or effect of all foreign laws may be proved as facts by parol evidence; but, if it appears that the law in question is contained in a written statute or code, the court may, in its discretion, reject any evidence of such law which is not accompanied by a copy thereof.

PPP cites Trader’s Trust Co. v. Davidson, 178 N.W. 735, 737 (Minn. 1920) for the statement that, “[t]he existence of a foreign law is a fact to be proven the same as any other fact, and we can take notice of none of the laws of Manitoba not proven in this case.” (Res. 23.)

PPP applies the instruction that “the existence of a foreign law is a fact to be proven the same as other fact” to argue that in deciding whether and how a foreign statute applies to a Minnesota case, courts may not consider the texts of the relevant statutes themselves, cases interpreting them, or commentaries addressing them. PPP asserts that

only “admissible evidence in the form of expert testimony” can be considered, and elsewhere restricts this to expert opinion that is filed “in the record” of a particular case. (Res. 24, 28.)

The rule urged by PPP, in addition to being inconsistent with Minnesota law, would create an inefficient process prone to abuse. Both American courts, Hacienda, 2 So.3d at 1016, and commentators, e.g. Gordon, supra, at 148, have observed that Article 1421-J and similar Latin American blocking statutes are specifically designed to allow Latin American plaintiffs to bring suit in the United States more effectively. But in PPP’s view the Court must ignore this material, because it is not “evidence” in the form of “expert testimony.” (Res. 28.) PPP’s construction of the evidentiary rules (coupled with its selective submission of only portions of its expert’s key publication) would also block the court from considering its expert’s acknowledgement that: “Normally when the defendant is Latin American, the effect of FNC would probably not violate the law of the Latin American country concerned.” (St. Dahl, supra, at 35.) According to PPP, this maneuver would bar the Court from considering the statement because it is not among the pages of the law review article “on file” in this case. (Res. 24.)

Properly viewed, the evidentiary rules relevant to foreign laws actually make far more sense than PPP would have the Court believe. The existence of a foreign law must be proven as a fact, Trader’s Trust, 178 N.W. at 737, but in this case there is no dispute as to the existence of Article 1421-J. The question confronting the Court is not whether Article 1421-J exists. The question is whether and how it applies. No Minnesota statute or case instructs that courts are barred from reviewing cases, commentaries, or the texts

of the relevant statutes to make that determination. Forcing Minnesota courts to ignore the collective wisdom of other American courts and commentaries makes no sense and is unsupported in Minnesota law.

## **5. The Public and Private Interest Factors**

In their opening brief, Appellants laid out in detail how an analysis of the private and public interest factors articulated in Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947) and Bergquist v. Medtronic, Inc., 379 N.W.2d 508, 512, n.4 (Minn. 1986) demonstrates that this case belongs in Panama, not Minnesota. Appellants believe PPP's arguments on these points were adequately anticipated by Appellants' opening brief, the district court's opinion, and the briefing below. Appellants will therefore not further respond in this brief.

### **B. This Case Should be Dismissed Regardless of Whether Panama will Accept Jurisdiction**

Appellants' opening brief set out the reasons that this Court should sustain the trial court's order even if Article 1421-J or principles of pre-emptive jurisdiction make Panama unavailable. (Appellants' opening brief 27-30.) Appellants will not repeat those arguments here, but will respond to PPP's arguments.

In December 2008, the Florida District Court of Appeal determined that Florida courts will not host cases that properly belong in Panama simply because Panama has enacted a statute attempting to force that result. Hacienda, 2. So.3d at 1017. The court reviewed the history of blocking statutes, finding that their purpose is clearly to make it easier for foreign plaintiffs to keep their cases in the United States where they have

access to favorable discovery rules, jury verdicts, and other legal processes. Id. at 1016. Rejecting the notion that Article 1421-J could limit the Florida court's discretion to dismiss a case that obviously belonged in Panama (where, as here, the agricultural operation at issue was located) the court ordered dismissal for *forum non conveniens* without any right to return to Florida. Id. at 1017. On March 12, 2009 the plaintiffs' petition for rehearing and rehearing *en banc* was denied and the case has now been formally published at 2 So.3d 1013.

This case provides the Court with an opportunity to define Minnesota's response to blocking (or "forum shopping support") statutes passed in foreign countries to undermine American concepts of *forum non conveniens*. Id. at 1016. The Court is well within its authority in defining the contours of the judicially-created doctrine of *forum non conveniens* to hold that Minnesota courts may order dismissal regardless of blocking principles in foreign jurisdictions. That holding would be fully consistent with this Court's decision in Bergquist, where the Court observed:

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

Bergquist, 379 N.W.2d at 512. Foreign blocking statutes require an update of the Bergquist logic for the 21<sup>st</sup> century, in which some foreign countries have crafted laws designed to force Minnesota courts to consume precious judicial time and resources resolving cases that have everything to do with a foreign country like Panama and precious little to do with Minnesota.

PPP attempts to discredit Hacienda with the *non sequitur* argument that the court wrongly determined that Article 1421-J was enacted to assist Panamanian plaintiffs wishing to maintain cases in the United States that would otherwise be more appropriately venued in Panama. That argument has been put to rest by the cases and commentaries discussed earlier in this brief. More importantly, the argument misses the point of Hacienda. That point is that foreign countries should not be permitted to use statutory provisions or principles of pre-emptive jurisdiction designed to frustrate the proper application of *forum non conveniens* to destroy jurisdiction that would otherwise exist in the foreign country, compelling courts in the United States to expend resources trying cases that have only marginal connections to the U.S. and should rightfully be tried in the foreign country. That logic applies whether the party from the foreign jurisdiction is the plaintiff, as in Hacienda, or one (or two) of the defendants, as in this case.

PPP also challenges the accuracy of the Hacienda court's citation of case law. First, PPP states that the Hacienda court "asserted that other courts have issued *forum non conveniens* dismissals even though the other jurisdiction was 'unavailable' citing Aguinda v. Texaco, Inc., 142 F.Supp.2d 534 (S.D.N.Y. 2001)." (Res. 43.) This argument directly misreads the Hacienda decision, which cites Aguinda as an example of a case in which "Federal courts have declined to recognize foreign laws purporting to make the country's courts 'unavailable' merely because of a prior U.S. filing and forum non conveniens decision." 2 So.3d at 1017. The Hacienda court found Panama *available* despite the existence of Article 1421-J, noting that but for the plaintiffs' decision to "lead with their chin" and manipulate a procedural bar in Panama by almost begging the

Panamanian courts to dismiss their action, “the Panamanian court would have retained jurisdiction.” *Id.* For this reason, the Hacienda court’s citation of Aguinda, which found Ecuador to be an available alternative forum despite the existence of a blocking statute, is entirely appropriate. Aguinda, 142 F. Supp. 2d at 546-47. The larger point of the Hacienda decision is that dismissal can and should be ordered *regardless* of whether Panama has enacted provisions designed to compel a finding that the Panamanian forum was “unavailable.”

PPP concludes its argument by attempting to distinguish Hacienda based on geography, stating that, unlike Florida, Minnesota courts will not be inundated with cases affected by blocking statutes or concepts of pre-emptive jurisdiction. (Res. 44.) PPP’s argument fails to consider that reported *forum non conveniens* cases involving dismissal to Panama arise not only in states like Florida, but also in places like Missouri and South Carolina. Moreover, this issue affects cases more appropriately belonging in any country that has enacted, or will in the future enact, blocking or pre-emption statutes. To date, countries including Panama, Guatemala, Costa Rica, and Ecuador have enacted blocking statutes. Gordon, supra at 144-45. There is no reason to believe these cases will avoid Minnesota in the future. More importantly, frequency is not the issue. The issue is whether this Court should accede to a foreign country’s attempt to compel this state to expend its resources resolving suits that do not belong here and which could have proceeded in the foreign country but for the plaintiffs’ orchestrated effort to prevent that result. This Court should not countenance that result.

### **C. PPP's Various Additional Arguments against Dismissal are Unavailing**

PPP asserts a grab bag of additional arguments attacking various aspects of the district court's decision and the proceedings below. None of these arguments are persuasive and Appellants will address only two of them here.

#### **1. The district court appropriately found Appellants' motion timely**

The district court's decision specifically found Appellants' motion to dismiss timely, noting that it "cannot find waiver" because the parties asserted *forum non conveniens* as a defense in their initial pleadings, discovery was necessary to lay the factual background for the motion, and it was inevitable that such a motion would be brought. (AD.21.) The district court properly understood that Appellants should not be penalized for pursuing the discovery required to disentangle themselves from the jurisdiction of a court that has no real interest in this dispute. The district court's discretionary rejection of PPP's suggestion that Appellants' motion was untimely is supported by Bergquist, 379 N.W.2d at 509 and Bonzel v. Pfizer, Inc., No. C9-03-47, 2003 WL 21743768, at \*2 (Minn. Ct. App. July 29, 2003), and should be affirmed.

#### **2. The district court properly considered Appellants' expert affidavit**

PPP argues that Appellants' expert affidavit should be struck and not considered because Appellants failed to identify their expert witness in response to PPP's Interrogatories Nos. 7 and 8. (Res. 29.) Interrogatory No. 7 asked Appellants to: "State the name and address for each person *you intend to call as an expert witness at trial.*" (RA-85.) (emphasis added.) Interrogatory No. 8 asked for a list of information "[w]ith

respect to each expert *whom you intend to call as a witness at trial.* (RA-85.) (emphasis added). Appellants' Panamanian expert was not retained as a trial expert. Therefore, information about him was not responsive to the Interrogatories.

PPP also accuses Appellants of failing to "identify the Panamanian law they would rely on" and violating Minn. Stat. § 599.07, but that statute states:

Any party may also present to the trial court any admissible evidence of such laws, but, to enable a party to offer evidence of the law in another jurisdiction or to ask that judicial notice be taken thereof, reasonable notice shall be given to the adverse parties **either in the pleadings or otherwise.**

(emphasis added.) Both Appellants' Answer asserting the *forum non conveniens* defense and the papers supporting their motion to dismiss including the Affidavit of Humberto Iglesias provided "reasonable notice. . . in the pleadings or otherwise" under Minn. Stat. § 599.07 that the superiority of Panama as a forum for this case, where it indisputably could have been brought against these defendants, would be argued.

### CONCLUSION

For the reasons set forth herein and in Appellants' initial brief, Appellants ask this Court to reverse the decision of the Court of Appeals and reinstate the order of the district court, both for the principled reasons articulated by the district court and because Minnesota courts should not be bound by foreign statutes designed to compel Minnesota to retain cases that otherwise should and would be dismissed on the basis of *forum non conveniens*.

Dated: April 30, 2009

OPPENHEIMER WOLFF & DONNELLY LLP

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

Gary Hansen (#40617)

Aaron Mills Scott (#33943X)

Plaza VII, Suite 3300

45 South Seventh Street

Minneapolis, Minnesota 55402-1609

Telephone: (612) 607-7000

Facsimile: (612) 607-7100

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

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

The undersigned certifies that the Brief submitted herein contains 6,958 words and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Brief was prepared using a proportional spaced font size of 13pt. The word count is stated in reliance on Microsoft Word 2003, the word processing system used to prepare the Brief.

  
\_\_\_\_\_  
Aaron Mills Scott