

**No. A07-2199**

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**STATE OF MINNESOTA  
IN THE SUPREME COURT**

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Paulownia Plantations de Panama Corporation,

Respondent,

vs.

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

Appellants.

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**RESPONDENT'S BRIEF**

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**RESPONDENT'S COUNSEL:**

MOHRMAN & KAARDAL, P.A.  
William F. Mohrman, Atty. No.: 168816  
Erick G. Kaardal, Atty. No.: 229647  
33 South 6<sup>th</sup> St.  
Suite 4100  
Minneapolis, Minnesota 55402  
(612) 341-1074

**APPELLANTS' COUNSEL:**

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

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## STATEMENT OF ISSUES PRESENTED

- I. Did the District Court err in holding Panama is an “available” forum despite un rebutted evidence of unequivocal Panamanian law providing its Courts will not have subject matter jurisdiction over this case?

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

Law: *Johnston v. Multi-Data Systems International Corp.*, No.G-06-CV-313, U.S. Dist. 2007 WL 1296204 (S.D.Tex. April 29, 2004)  
(reversed on other grounds, 523 F.3d 602 (5<sup>th</sup> Cir. 2008).

- II. Did the District Court err in relying on Appellants’ attorney’s speculations regarding Panamanian law as opposed to admissible evidence regarding Panamanian law?

District Court Holding: District Court relied on Appellants’ attorney’s speculations regarding Panamanian law as opposed to admissible evidence regarding Panamanian law.

Law: Minn. Stat. §599.04, et seq.; *Bridgeman v. Gateway Ford Truck Sales*, 269 F.Supp. 233 (D.Ark.1969).

III. Did the District Court err in granting Appellants' *forum non conveniens* motion filed 28 months after Appellants served their Answer?

District Court Holding: Appellants did not waive right to bring *forum non conveniens* motion 28 months after Answering complaint.

Law: *In Re Crash New Orleans*, 821 F.2d 1147 (5<sup>th</sup> Cir. 1987).

IV. Did the District Court err in holding the private interest factors and public interest factors weigh heavily in favor of dismissal on Appellants' *forum non conveniens* motion?

District Court Holding: The private and public interest factors support dismissal.

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

## STATEMENT OF THE CASE

This is an appeal pursuant to Minn. R. Civ. App. Rule 117 subd. 2. (a) from the Court of Appeals decision reversing the Honorable Barry Sullivan's Judgment, Tenth Judicial District, dismissing Respondent's Complaint under the doctrine of *forum non conveniens*. The Court of Appeals reversed finding that Panama was not an "available" forum to adjudicate Appellant's claims.

This action involves a classic investment scam by Appellant Harry Rajamannan and his corporation, Appellant Agro-K, Inc. In 1998, Rajamannan convinced Australian investors to invest in an (alleged) paulownia tree farm in Panama through Respondent Paulownia Plantation De Panama Corporation, a corporation formed to invest in the Panamanian paulownia tree farms ("Respondent"). Although Rajamannan's wholly owned corporation Appellant Perla Verde Service Corporation ("PVSC") allegedly operated the paulownia tree farm, Rajamannan told Respondent to wire transfer its investment monies through Appellant Agro-K's TCF bank account in Anoka County. Rajamannan told Respondent that Agro-K would then transfer the monies to Appellant PVSC in Panama for use on the paulownia tree farm. In reliance on Rajamannan's representations, Respondent wire transferred to Agro-K's bank account in Minnesota \$898,831.26 from 1998 through 2001. In 2001, Rajamannan claimed the paulownia tree farm failed never selling one tree.

Respondent commenced this action on December 29, 2004 asserting claims for fraud, unjust enrichment, conversion and breach of contract. Appellants Answered on January 18, 2005 asserting counterclaims and an affirmative defense of *forum non conveniens* claiming Panama was an available forum. Appellants admitted that Respondent wire transferred at least \$898,831.26 to Agro-K's Minnesota bank account. Appellants also admitted they failed to produce any documentary evidence or testimony that Agro-K ever sent Respondent's monies to Appellant PVSC for use on the paulownia tree farm. In fact, Appellants records revealed Rajamannan used at least \$450,000 of Respondent's investment monies to purchase a Pacific oceanfront estate in Panama.

Despite the fact that (i) Appellants' *forum non conveniens* affirmative defense required expert testimony on Panamanian law and (ii) required Appellants to *timely* file the motion, Appellants failed to disclose in discovery their Panamanian legal expert and failed to bring their motion to dismiss based on *forum non conveniens* until 28 months after serving their Answer.

On May 10, 2007, Appellants and Respondent filed cross-motions for summary judgment. Appellants also moved to dismiss for *forum non conveniens* relying solely on the expert affidavit of a Panamanian attorney whose only opinion was Respondent's action originally "could have been brought in Panama." However, the issue is whether Panamanian courts will exercise subject matter jurisdiction over this case after a *forum non conveniens* dismissal. Respondent's expert testified the Panamanian legal doctrine of preemptive jurisdiction and Panamanian Code Section 1421-J unequivocally prohibited

Panamanian courts from exercising subject matter jurisdiction over cases previously dismissed on *forum non conveniens*:

In 2006, the Panamanian National Assembly passed a statute that deprives Panamanian courts of jurisdiction over cases filed in foreign countries that have been dismissed under the doctrine of *forum non conveniens*.

*Johnston*, No. G-06-CV-313, U.S. Dist. 2007 WL 1296204, at 21, (S.D. Tex. April 29, 2004) (emphasis supplied)(reversed on other grounds, 523 F.3d 602 (5<sup>th</sup> Cir. 2008)).

Respondent's Appendix ("RA") at RA-47.

The Court of Appeals reversed the District Court's *forum non conveniens* dismissal finding Panamanian Code Section 1421-J prevented Panamanian Courts from exercising subject matter jurisdiction over Respondent's case.

### **STATEMENT OF FACTS**

Appellants' three page Statement of Facts are incomplete, misleading and inaccurate violating Rule 128.02 requiring Appellants to state the facts "fairly with complete candor" as demonstrated by the fact that the parties presented over 35 pages in "facts" in their Court of Appeals briefs. Appellants assert that Respondent is simply dissatisfied with their investment in Appellants' paulownia tree farm. This is not Respondent's claim. Rather, Rajamannan instructed Respondent to wire transfer over \$1,000,000 in investment funds to Agro-K's Minnesota bank account representing that Agro-K would wire transfer these funds to Appellant PVSC in Panama. However,

Appellants failed to produce any evidence - such as bank or accounting records - establishing that Agro-K ever sent Respondent's monies to Appellant PVSC. Despite the fact Rajamannan owns PVSC, Rajamannan failed to produce any bank records for PVSC. Respondent filed this action in Minnesota because Rajamannan and his wholly owned corporation Agro-K converted Respondent's monies *in Minnesota*.

A. Parties.

Respondent is a Vanuatu corporation organized to invest in Appellant PVSC's (alleged) paulownia tree farm operation in Panama. Robert Shepherd, an Australian citizen, investor and accountant ("Shepherd"), is Respondent's principal. *Shepherd Deposition, p. 10- 13*. The Shepherd Deposition Transcript is attached to the May 31, 2007 William Mohrman Affidavit ("Mohrman Affidavit") as Exhibit 1.

Appellant Harry Rajamannan ("Rajamannan") is the President and primary shareholder of Appellant Agro-K and the alleged owner of Appellants PVSC and Perla Verde, SA. *Rajamannan Deposition, p. 7-8*. (Mohrman Affidavit, Exhibit 2). Rajamannan has spent most of his business career in the plant and tree fertilizer business. In the 1990's, Rajamannan became interested in the plantation and harvesting of paulownia trees. *Rajamannan Deposition at p.5-6, p.306-307* (Mohrman Affidavit, Exhibit 2).

Appellant Agro-K is a Minnesota corporation engaged in selling fertilizers throughout the world including Panama. *Rajamannan Deposition, p. 14* (Mohrman

Affidavit, Exhibit 3). Rajamannan convinced investors around the world to invest in Respondent Agro-K's operations. *Rajamannan Deposition, p. 14-17* (Mohrman Affidavit, Exhibit 2). Rajamannan admitted that despite earning millions in annual revenues, Agro-K has failed to turn an annual profit in over 25 years and has not made any distributions to shareholders. *Rajamannan Deposition, p. 74-76* (Mohrman Affidavit, Exhibit 2). Nonetheless, Rajamannan is working "harder" than ever "hoping" Agro-K will hit a "home run" in order to make a return for his investors or actually the grandchildren of those investors because, as Rajamannan admitted, "most of the investors are dead." *Rajamannan Deposition, p. 16-17; p. 77-79* (Mohrman Affidavit, Exhibit 2).

Although Rajamannan claims Appellant PVSC is a Panamanian corporation he owns, Rajamannan testified that PVSC has not issued any shares of stock and Appellants failed to produce evidence of PVSC's actual existence. *Rajamannan Amended Responses to Interrogatory No. 11* (Mohrman Affidavit, Exhibit 4). Although PVSC is the corporation Respondent contracted with to plant, maintain and harvest the paulownia trees in Panama, Rajamannan admitted PVSC never owned or leased the land on which it claimed to plant, maintain and harvest the paulownia trees in Panama. *March 12, 1999 Planting and Service Contract* (RA – pp. 103-108) and *Rajamannan Deposition, p. 354* (Mohrman Affidavit, Exhibit 2). Appellants also failed to produce any bank records for PVSC evidencing its receipt of Respondent's investment monies for the paulownia tree farm. *Mohrman Affidavit, ¶22*.

Verde Tech, S A. is a Panamanian corporation Rajamannan owns and operates as Agro-K's distributor in Panama. *Rajamannan Deposition*, p. 71-72, (Mohrman Affidavit, Exhibit 2).

**B. Rajamannan's Solicitation for Appellant to Invest in Rajamannan's "Alleged" Paulownia Tree Farm in Panama.**

In 1997, Rajamannan met and solicited Shepherd in Australia to invest in Rajamannan's paulownia tree farms in Panama. *Rajamannan Deposition*, p. 305-307. (Mohrman Affidavit, Exhibit 2). Paulownia trees grow very fast, can be harvested and dried quickly and paulownia lumber is highly regarded for commercial uses in Asian markets such as China. *Rajamannan Deposition*, p. 98-106 (Mohrman Affidavit, Exhibit 2). Rajamannan represented to Shepherd that paulownia trees grew quite rapidly and would fetch substantial profits after ten years of growth. *Rajamannan Amended Responses to Requests for Admission, Request No. 7* (Mohrman Affidavit, Exhibits 5 and 6).

It is at this point Rajamannan began his fraud. Rajamannan provided Shepherd with a budget containing specific financial projections of gross revenues per acre and estimated net yields "over the first ten years" for the paulownia trees. *Rajamannan Responses to Requests for Admission, Request No. 16*, (Mohrman Affidavit, Exhibits 5 and 6). Rajamannan knew Shepherd would take Rajamannan's financial representations and incorporate them into an offering memorandum for Respondent's investors. *Rajamannan Deposition*, p. 586-590 (Mohrman Affidavit, Exhibit 2) and *the Offering*

*Memorandum at page PPP 0725 (Mohrman Affidavit, Exhibit 11).* However, incredibly, Rajamannan admitted in written discovery his financial representations were false:

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

*Rajamannan Responses to Requests for Admission, Request No. 16 (Mohrman Affidavit, Exhibits 5 and 6).*

Respondent relied on Rajamannan's false financial representations to invest in Rajamannan's Panamanian paulownia tree plantation. *Shepherd Deposition, p. 97.* (Mohrman Affidavit, Exhibit 1).

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

Rajamannan admitted he demanded Respondent make its investment payments through Agro-K's bank account in Minnesota rather than directly through PVSC. *Rajamannan Responses to Requests for Admission, Request No. 39 (Mohrman Affidavit, Exhibits 5 and 6).* Rajamannan represented Agro-K would transfer these payments to PVSC's (non-existent) bank account in Panama. *Rajamannan Responses to Requests for Admission, Request No. 39 (Mohrman Affidavit, Exhibits 5 and 6).* However, Rajamannan admitted that he did not transfer any of Respondent's investment monies to PVSC's bank account in Panama. *Rajamannan Responses to Requests for Admission, Request No. 39 (Mohrman Affidavit, Exhibits 5 and 6).*

**D. Respondent Contracts With PVSC To Invest In The Paulownia Tree Farm But Appellants Fail to Use The Investment Monies For The Paulownia Tree Farm.**

Based on Rajamannan's false financial projections, Respondent signed a "Management Contract" with PVSC under which Respondent agreed to pay PVSC \$4,000 per acre of land planted over the course of three years for the investment – a total of \$1,344,000. *Management Contract* (RA-103).

Appellants will presumably argue that the "Management Contract" did not require Appellants to spend Respondent's investment monies on the paulownia tree farm. Appellants will make this absurd argument because Appellants have absolutely no evidence that Appellants ever spent one nickel on the paulownia tree farm in which Respondent invested \$1,319,823. According to Appellants, Respondent invested \$1,319,823 in exchange for – *nothing!* On the contrary, under 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. RA-103-06. Moreover, Appellants admitted PVSC would use Respondent's investment monies solely on the paulownia tree farm project. *Rajamannan Amended Responses to Appellant's First Request for Admissions, Request No. 36* (Mohrman Affidavit, Ex. 5 and 6).<sup>1</sup> Furthermore, Appellants' argument is completely contrary to the unambiguous terms of the Management Contract. *Paragraphs 1 and 2 of*

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<sup>1</sup> As set forth above, Appellants have no documentation establishing the investment monies were ever used on PVSC's paulownia tree farm.

*the Management Contract* (SA- pp.103). Finally, Appellants' argument is actually conclusive proof of Appellants' intentional fraud. Rajamannan admitted it takes ten years to harvest and generate revenues from paulownia trees. However, PVSC, which was not incorporated until December 9, 1998, would not have any source of revenues to "manage" the paulownia tree farm absent use of Respondent's investment monies. *Respondent Rajamannan's Deposition, p. 557* (Mohrman Affidavit, Exhibit 2); *Rajamannan Affidavit at ¶ 9; Rajamannan Amended Responses to Requests for Admission, Request No. 7* (Mohrman Affidavit, Exhibits 5 and 6). If PVSC was not required to spend Appellant's investment monies on the "costs" of operating the paulownia tree farm as required in the Management Contract at a time when PVSC had no operating revenues, *then exactly where was PVSC going to obtain the funds necessary to pay the "costs" of operating the paulownia tree farm?*

**E. Discovery Revealed Unequivocal Evidence of Appellants' Fraud.**

Discovery revealed substantial evidence of Appellants' fraud. First, Rajamannan admitted PVSC never received any of Respondent's monies and Appellants never produced any bank records for PVSC. *Rajamannan Deposition, p.509-510* (Mohrman Affidavit, Ex. 2) and *Mohrman Affidavit*.

Second, Rajamannan admitted he had no idea whether the \$898,831.26 Respondent transferred to Agro-K ever went to PVSC's paulownia tree farm operation. Rajamannan admitted he could not testify whether Respondent's investment monies

identified on "Exhibit 23," a list Rajamannan prepared of Agro-K's wire transfers made to Panama were ever used on the paulownia tree farm:

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

A. That's right. Correct.

*Rajamannan Deposition, p. 135-148 (Mohrman Affidavit, Ex. 2) and Rajamannan's Amended Response to Interrogatory No. 23 (Mohrman Affidavit, Exhibit 4).*

Third, Appellants failed to produce any documents substantiating what, if anything, Appellants did with the \$898,831.26 Respondent sent to Agro-K. While Rajamannan created a document at the end of discovery setting forth all transfers Appellants' claim Respondents made to Agro-K for the paulownia investment, Rajamannan admitted Appellants have no evidence - either in documentation or testimony - that the \$898,831.26 Respondent sent Agro-K ever went to PVSC or the paulownia tree farm. RA-49.<sup>2</sup> Rather, Rajamannan testified that Respondent's money went to Verde Tech or persons Rajamannan claimed to control but who are all *Agro-K creditors*. Agro-K's admission it transferred Respondent's investment monies to persons or entities under Rajamannan's control means that Rajamannan had the ability to produce

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<sup>2</sup> Respondent actually sent Agro-K and Verde Tech \$1,319,823.00 from 1998 through 2001 for use by PVSC on the paulownia tree farm rather than only \$898,831.26.

banking or accounting documentation establishing these entities transferred Respondent's funds to PVSC. However, Appellants produced no such documentation.

Finally, Appellants did produce documentation from Rajamannan's wholly owned corporation, Verde Tech. *Verde Tech's accounting transaction report* (Mohrman Affidavit, Exhibit 16.) While Verde Tech's transaction report fails to identify who paid Verde Tech or who Verde Tech paid, the report does contain handwritten notes referencing the purpose of the transactions. However, there is not one reference to PVSC or the paulownia tree farm project. *Verde Tech's accounting transaction report* (Mohrman Affidavit, Exhibit 16). Moreover, Agro-K is required under American accounting and tax laws to fully and accurately account for the purpose of every dollar it acquires. Despite this, Agro-K failed to produce any business documentation establishing that the Respondent's *documented* wire transfers to Agro-K were in fact transferred to PVSC for use on the paulownia tree farm. *Mohrman Affidavit*.<sup>3</sup>

Simply put, Appellants admit the following:

1. Appellants received at least \$898,831.26 from Respondent;

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<sup>3</sup> Because Appellants admit receiving Respondent's investment monies, the burden of production shifts to Appellants to come forward with evidence accounting for Appellants' use of those funds and proving such use was not unjust. *Midland Oil and Royalty Co. v. Schuler*, 126 N.W.2d 149 (N.D. 1964). Moreover, Respondent is entitled to draw all reasonable inferences from Appellants' failure to produce records subject to their control – such as Agro-K never sent the investment monies to Panama. *Kmetz v. Johnson*, 113 N.W.2d 96, 100 (Minn. 1962).

2. Rajamannan represented Agro-K would transfer Respondent's investment monies to PVSC for the paulownia tree farm;
3. Agro-K did not send Respondent's investment monies to PVSC but rather to creditors of Agro-K including Verde Tech;
4. While Agro-K *alleges* Respondent's monies were expended on the paulownia tree farm, Appellants produced no documentation evidencing such expenditures and;
5. Rajamannan testified that he has no idea where Respondent's investment monies went even though Rajamannan wholly owned and controlled each and every entity to which Agro-K sent Respondent's investment monies.

**F. Appellants' Records Reflect \$450,000 In Payments For Rajamannan's Panamanian Oceanfront Made Immediately After Respondent Wire Transferred \$450,000 To Appellants.**

While Appellants failed to provide documentation that Respondent's investment monies were actually used on the paulownia tree farm, records Appellants produced reveal Rajamannan used at least \$450,000 of Respondent's investment monies to pay for Rajamannan's oceanfront estate in Panama.

First, Appellants admit that Respondent wire transferred to Agro-K \$205,655.64 on December 29, 1998. The next day, Agro-K made a \$150,000 "foreign wire transfer" the purpose of which Rajamannan failed to identify. *Agro-K's TCF Bank statements* (Mohrman Affidavit, Exhibit 17). However, Rajamannan produced his mortgage payment register for his oceanfront estate which reflects a January 2, 1999 "transfer" of \$150,000 from Rajamannan - exactly the amount of Agro-K's December 30, 1998 "foreign wire transfer." *Rajamannan's Register of Mortgage Payments* (Mohrman Affidavit, Exhibit 19).

Second, on June 11, 1999, Rajamannan, acting from Minnesota, directed Respondent to transfer \$335,152.48 directly to Verde Tech's account in Panama instead of to Agro-K's account in Minneapolis. *Rajamannan's Amended and Supplemental Responses to Interrogatories, Exhibit A, at p. 4* (Mohrman Affidavit, Exhibit 4). On June 15 and June 22, 1999, Verde Tech made two payments on Rajamannan's oceanfront estate mortgage totaling \$300,000. *Rajamannan's Register of Mortgage Payments* (Mohrman Affidavit, Exhibit 19).

**G. Minnesota Litigation.**

Respondent commenced this action on December 29, 2004. Appellants Answered on January 18, 2005 asserting *forum non conveniens* as an affirmative defense. Respondent served Interrogatories on December 29, 2004 requesting Appellants identify expert witnesses and opinions. However, Appellants never identified any expert witnesses. RA-85. Appellants waited until May 10, 2007 to file their *forum non conveniens* motion – 28 months after this case commenced and after completion of discovery – relying on an expert opinion Appellants never disclosed in discovery. On September 25, 2007, the District Court dismissed Respondent's Complaint under the doctrine of *forum non conveniens* holding that Panama was an available and adequate forum to adjudicate Respondent's claims.

## ARGUMENT

### A. Introduction.

The doctrine of *forum non conveniens*, a common law doctrine, involves a two step analysis allowing a court with subject matter jurisdiction over a case and personal jurisdiction over a defendant to nonetheless dismiss the case because *another court* would be more convenient to adjudicate the case. The first *threshold* step requires the court to determine if another court is (i) “available” – i.e., the court has subject matter jurisdiction over the case and personal jurisdiction over the defendant - and (ii) “adequate” – i.e., the court is not corrupt or so procedurally deficient the parties cannot fairly adjudicate the case.

The second step requires the court to determine if another court is more “convenient” for the parties based on several discretionary factors. The first step is subject to de novo review. The second step is subject to abuse of discretion review.

The first step is a *threshold* step - failure to establish another court is available to adjudicate the case is fatal to a *forum non conveniens* motion and there is no need to engage in the second step of the analysis. Absent the availability of another court to adjudicate the case, dismissal of the case would simply deprive plaintiffs of their right to adjudicate their cases as opposed to providing *all parties* with a more convenient forum. *Forum non conveniens* does not allow a court to dismiss a case because it is “inconvenient” for the court or the defendant without ensuring another forum exists to litigate the case:

Obviously, if there is jurisdiction but there is no alternative forum, then the mere inconvenience to any party or indeed, focusing on the public interest factors, the inconvenience and burdens to the local citizenry, become irrelevant; for the litigation cannot be dismissed on *forum non conveniens* grounds if to do so would be to leave plaintiff with no available forum.

*Mandell v. Bell Atlantic Nynex Mobile*, 717 A.2d 1005 (N.J.Super.L. 1997).

The main issue on this appeal involves the first part of the first step of the *forum non conveniens* analysis – the availability of Panamanian courts to adjudicate this case. However, unequivocal Panamanian law prohibits Panamanian courts from exercising subject matter jurisdiction over any case previously dismissed on *forum non conveniens*; thus, Panamanian courts are not “available.” Knowing this, Appellants’ Brief completely muddles the *forum non conveniens* analysis by addressing the second step of the analysis first – the convenience factors –and then lumping those factors into their analysis of the first threshold step of availability in hopes that this Court will (i) apply an abuse of discretion standard to both steps and (ii) find that the first step is not a threshold requirement but merely part of an overall discretionary analysis. The Court of Appeals decision is correct.

**B. Standard of Review.**

As set forth above, the District Court’s analysis of the private and public convenience interest factors is subject to an abuse of discretion standard. *Bergquist v. Medtronic, Inc.*, 379 N.W.2d 508 (Minn. 1986). However, Minnesota Courts have not addressed the standard of review with respect to the first step of the *forum non*

*conveniens* analysis - “availability and adequacy”. Other jurisdictions hold that a court’s determination of whether there is an available alternative forum is a “nondiscretionary” legal question “subject to de novo review.” *American Cemwood Corp. v. American Home Assurance Co.* 87 Cal.App.4th 431, 436 (2001). Most importantly to this appeal, “[b]ecause the defendant has the burden of establishing that an adequate alternative forum exists, this court will reverse when ‘the affidavit through which [the defendant] attempted to meet its burden contains substantial gaps.’” *El Fadl v. Central Bank of Jordan*, 75 F.3d 668, 677 (D.D.C. 1996).

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

Under the *forum non conveniens* doctrine, Respondent’s choice of forum is entitled to a “strong presumption” and Appellants’ bear the burden of persuasion to establish all elements of the *forum non conveniens* analysis. *Bergquist*, 379 N.W.2d at 511; *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). In order to meet that burden, the Appellants must provide “unequivocal, substantiated evidence” on each element. *Baris v. Sulpicio Lines, Inc.*, 932 F.2d. 1540, 1550 n. 14 (5<sup>th</sup> Cir. 1991). *See also, In re Ford Motor Co. v. Bridgestone/Firestone North American Tire*, 344 F.3d 648, 652 (7<sup>th</sup> Cir. 2003). Finally, Appellants’ burden of proving that the alternative foreign forum is “available” and “adequate” is, like their burden on all other *forum non conveniens* elements, a “heavy one.” *El Fadl*, 75 F.3d at 677-78. “[U]nless the balance is strongly in

favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Gulf Oil*, 330 U.S. at 508.

**D. On Forum Non Conveniens Motions, Courts Must First Determine An "Available and Adequate Alternative Forum" Exists and Then Evaluate the Public and Private Interest Factors.**

Minnesota follows the standards and factors federal courts use in determining *forum non conveniens* motions under *Piper Aircraft Corp. v. Reyno*, 454 U.S. 235 (1981) and *Gulf Oil*, 330 U.S. 501 (1947). *Bergquist v. Medtronic, Inc.*, 379 N.W.2d 508, 511 (Minn. 1986). Nonetheless, Appellants assert at page 15 of their Brief that Minnesota has not adopted the "available and adequate" test as a threshold prerequisite in *forum non conveniens* motions and further assert that other courts do not consider the "available and adequate" test as a threshold factor.<sup>4</sup> Appellants' assertions are wrong. While Minnesota has not specifically adopted the "available and adequate" threshold test, this Court has specifically adopted the federal court's *forum non conveniens* analysis which includes the "available and adequate" threshold test:

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<sup>4</sup> Appellants cite one case holding that the lack of an alternative forum will not bar application of *forum non conveniens*. *Islamic Republic of Iran v. Pahlavi*, 467 N.E.2d 245 (N.Y. 1984). However, *Pahlavi* is a classic example of bad facts making bad law. In *Pahlavi*, Iran sued the former Shah for billions in damages based on the Shah's reign. Iran made its courts unavailable as an alternative forum. However, Iran was the plaintiff in *Pahlavi*. Simply put, it is reasonable for American courts to dismiss on *forum non conveniens* when the plaintiff is a foreign government that has made its courts unavailable or inadequate to hear the case. *See also, Kinney System, Inc. v. Continental Ins. Co.*, 674 So.2d 86, 91(Fla. 1996).

Minnesota *forum non conveniens* law is patterned after the doctrine set forth by the United States Supreme Court in *Gulf Oil*.

*Bergquist*, 379 N.W.2d 508, 511.

Contrary to Appellants' arguments, federal courts uniformly hold that "availability" of an alternative court is a threshold prerequisite test:

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

*Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 717 F.2d 602, 607 (D.C. Cir. 1983)(emphasis supplied); *see also, Lacey v. Cessna Aircraft Co.*, 932 F.2d 170, 180 (3<sup>rd</sup> Cir. 1991); *McLennan v. American Eurocopter Corp., Inc.*, 245 F.3d 403, 424 (5th. Cir. 2001); *In re Ford Motor Co., Bridgestone/Firestone North American Tire, LLC*, 344 F.3d 648, 651 -652 (7th. Cir. 2003); *Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279, 1282 (11th. Cir. 2001); Wright, Miller & Cooper, vol. 14D, *Federal Practice and Procedure*, §3828.3 (3d ed., West 2007) (“[F]or purposes of the [*forum non conveniens*] motion to dismiss some other court must be both available for the parties and be adequate in order to be considered an alternative forum. Although some courts conflate these issues, the availability and adequacy of the supposed alternative forum are better seen as raising independent issues that warrant separate consideration by the court.”)

State courts likewise also hold that that the “available and adequate” test is a threshold prerequisite test:

We hold, therefore, that the existence of a viable alternate forum is a prerequisite to the application of the doctrine of *forum non conveniens*.

*Binder v. Shepard's Inc.*, 133 P.3d 276, 279-80 (Okla. 2006); *see also*, *Wieser v. Missouri Pacific R. Co.*, 456 N.E.2d 98, 100 (Ill. 1983); *Cray v. General Motors Corp.*, 207 N.W.2d 393, 398 (Mich. 1973); *UFJ Bank Ltd. v. Ieda*, 123 P.3d 1232, 1240 (Haw. 2005); *Bartsch v. Bartsch*, 636 N.W.2d 3, 10 (Ia. 2001); *Voisine v. Tomlinson*, 955 A.2d 748, 750 (Me. 2008); *Kedy v. A.W. Chesterton Co.*, 946 A.2d 1171, 1183 (R.I.2008); Am. Jur. 2d, Courts, §12 (“A suit may not be dismissed on the ground of *forum non conveniens* where the alternative forum in a foreign country does not permit litigation of the subject matter of the dispute ....”).

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

**E. Under the Panamanian Doctrine of Preemptive Jurisdiction and Article 1421-J of the Panamanian Code, Panamanian Courts Have No Subject Matter Jurisdiction Over Cases Previously Dismissed Based On *Forum Non Conveniens*.**

Panamanian law is clear and unequivocal – Panamanian courts are not available because Panamanian courts have no subject matter jurisdiction over any case previously dismissed for *forum non conveniens* under the Panamanian doctrine of preemptive jurisdiction and Article 1421-J of the Panamanian Civil Code.

**1. Appellants Must Prove The Interpretation and Application Of Foreign Law Through Admissible Evidence – Not The Unsubstantiated Arguments of its Minnesota Counsel.**

The central issue on this appeal is whether Panamanian law prohibits the exercise of subject matter jurisdiction over Respondent's case after a *forum non conveniens* dismissal. However, the interpretation of foreign law, such as Panamanian law, must be proved through admissible evidence under Minnesota's codification of the "Uniform Judicial Notice of Foreign Law Act" – Minn. Stat. §599.01, et seq.

First, Minn. Stat. §599.01 provides that foreign law is to be "proved as facts:"

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.

Second, if parties intend to introduce evidence of foreign law, Minn. Stat. §599.07 requires the parties give notice of such foreign law:

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.

Minn. Stat. §599.07.

Third, the court may not take judicial notice of foreign laws:

The law of a jurisdiction other than those referred to in section 599.04 [American law] shall be an issue for the court, but shall not be subject to the provisions of sections 599.04 to 599.07 concerning judicial notice.

Minn. Stat. §599.08.

Finally, “[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.” *Traders' Trust Co. v. Davidson*, 178 N.W. 735, 737 (Minn. 1920). “The determination of the law of a foreign jurisdiction is generally classed as a question of fact rather than of law.” 31 *Am.Jur.2d Expert and Opinion Evidence* §124; *Bridgeman v. Gateway Ford Truck Sales*, 269 F.Supp. 233, 238 (D.Ark. 1969) (“A question of foreign law has been considered historically as being a question of fact”).

Minn. Stat. §599.07 required Appellants provide notice to Respondent of any foreign law they would rely on and Minn. Stat. §599.01 required Appellants provide admissible “evidence” of such law. Despite this, Appellants failed to identify the Panamanian law they would rely on and failed to introduce evidence regarding the application of Panamanian law. Contrary to Appellants, Respondent presented unrebutted evidence in the form of an expert opinion which cited Panamanian Civil Code sections, Panamanian court decisions and U.S. court decisions and specifically opined that Panamanian law prohibited its courts from exercising subject matter jurisdiction after a *forum non conveniens* dismissal.<sup>5</sup>

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<sup>5</sup> Finding foreign law through “evidence” is of critical importance now because Appellants rely heavily, for the first time on appeal to this Court, on one Law Review “commentator’s” – Michael Gordon - criticisms of Dahl’s analysis of the doctrine of preemptive jurisdiction. Suffice it to say, the commentator’s comments are not

**2. In Order For A Court To Rely On Foreign Law In Dismissing An Action Based *Forum Non Conveniens*, The Court Must Have A “Justifiable Belief” In Its Application of Foreign Law Based On “Evidence In The Record” Of Foreign Law.**

Consistent with the “heavy burden” imposed on the Appellants in *forum non conveniens* motions, federal courts hold that in analyzing and applying foreign law in the context of *forum non conveniens* motions, the Court must have a “*justifiable belief*” in its application of foreign law. *Bank of Credit and Commerce Int'l v. State Bank of Pakistan*, 273 F.3d 241, 248 (2d Cir.2001); *Schertenleib v. Traum*, 589 F.2d 1156, 1163 (2<sup>nd</sup> Cir. 1978). More importantly, the Court’s “*justifiable belief*” must be based on “*evidence in the record*” of foreign law:

Th[e] case law does not, however, excuse the district court from engaging in a full analysis of those issues of foreign law or practice that are relevant to its [*forum non conveniens*] decision, or from closely examining all submissions related to the adequacy of the foreign forum. If, in the end, the court asserts its “*justifiable belief*” in the existence of an adequate alternative forum, *it should cite to evidence in the record that supports that belief*. In doing so, the district court should keep in mind that it remains the movant's burden to demonstrate the existence of an adequate alternative forum.

*Bank of Credit and Commerce Int'l*, 273 F.3d at 247-48 (emphasis supplied).

Thus, for the Court to find that Panama will exercise subject matter jurisdiction in this matter based on its analysis of Panamanian law, the Court must have a “justifiable belief” in its application of Panamanian law based on evidence in the record submitted at

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“evidence,” Respondent has not been able to cross examine this “commentator” and the Court must disregard these “comments” under Minn. Stat. §599.01 et seq.

trial. However, Appellants failed to submit *any* evidence regarding the Panamanian doctrine of preemptive jurisdiction or Article 1421-J.

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

In its response to Appellants' *forum non conveniens* motion, Respondent submitted the Affidavit of Henry Dahl, an expert on Latin American procedural law generally and Panamanian procedural law specifically. RA-50-73. Dahl specifically testifies that Panamanian law prohibits Panamanian courts from exercising jurisdiction over Respondent's claims.

**a. Panama Adopted The Old Roman Doctrine Of "Preemptive Jurisdiction" In 1916 Prohibiting Panamanian Courts From Exercising Subject Matter Jurisdiction Over Any Action Previously Dismissed by Another Court.**

Dahl testifies that Panama adopted the old Roman doctrine of "preemptive jurisdiction" in 1916. *Dahl Affidavit, Exhibit 7, fnt. 37*. The doctrine is grounded on Roman concepts of "*forum praeventionis*" and "*perpetuatio jurisdictionis*" meaning that once jurisdiction accrues it cannot be altered. RA-80. "In a situation in which more than one court claims the power to adjudicate concurrently, the plaintiff's choice, *once exercised*, cannot be disturbed or twisted by a court of law." RA-57. The Inter-American Juridical Committee explains how preemptive jurisdiction applies in Panama:

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

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

*Proposal for an Inter-American Convention on the Effects and Treatment of the Forum Non Conveniens Theory.* RA-58.

Dahl further testifies that the federal courts have recognized that Costa Rica’s doctrine of preemptive jurisdiction prevented a *forum non conveniens* dismissal: <sup>6</sup>

Thus, when plaintiffs filed suit against defendants in this Court, by operation of CCP 31, as of that filing, the Costa Rican courts --if they ever had jurisdiction -- were divested of jurisdiction in favor of this Court. Because the courts of Costa Rica may no longer assert jurisdiction over plaintiffs’ claims, they must be considered unavailable.”

*Canales Martinez v. Dow Chemical Corp.*, 219 F.Supp.2d 719, 728 (E.D.La. 2002). RA-58.

Dahl further testifies that Panama codified the doctrine of preemptive jurisdiction in Articles 238, 255, 256 and 259 of the Panamanian Judicial Code. RA-57-60. Dahl

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<sup>6</sup> As Dahl testifies, Costa Rica’s preemptive jurisdiction rule (Article 31 of the Code of Civil Procedure) is similar to Panama’s (Article 238, Judicial Code). RA-58.

cited the Panamanian case of *Escalante Romero et al. v. Multidata Systems International, et al*, in which court explicitly dismissed a Panamanian lawsuit based on preemptive jurisdiction after a U.S. court had previously dismissed the case based on *forum non conveniens*:

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

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

*Escalante Romero et al. v. Multidata Systems International et al. - RA-58-59.*

Dahl unequivocally testifies that the Panamanian doctrine of preemptive jurisdiction doctrine will prevent Panamanian courts from exercising subject matter jurisdiction over Respondent's claims if this Court affirms the *forum non conveniens* dismissal.

- b. **Panamanian Article 1421-J Specifically and Unequivocally Prohibits Panamanian Courts From Exercising Jurisdiction Over Cases Previously Dismissed Based On *Forum Non-Conveniens*.**

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

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

RA-56-57.

Dahl testifies the Panamanian National Assembly passed Article 1421-J only to clarify the doctrine of “preemptive jurisdiction” in the context of cases previously dismissed in a foreign jurisdiction based on *forum non-conveniens* and ensure that such cases are “dismissed sua sponte.” *See, Statement of National Assembly- RA-56-57.*<sup>7</sup>

**4. Appellants Submitted No Evidence Addressing Panama’s Doctrine of Preemptive Jurisdiction or Article 1421-J.**

Appellants bore the burden of establishing that Panama was an available jurisdiction under *forum non conveniens*, and, because Appellants relied on Panamanian law, Minn. Stat. §599.07 required Appellants to present admissible evidence in the form of expert testimony to support their arguments. However, Appellants failed to present

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<sup>7</sup> While before the Court of Appeals, Panama repealed Article 1421-J on February 18, 2008 and reinstated Article 1421-J in a law entitled “Whereby the force of Article 1421-J of the Judicial Code is reinstated” on May 20, 2008. Addendum – pp. 1-6. Appellants argue that Panamanian Courts will not apply the reinstatement of Article 1421-J “retroactively” if Respondent re-files in Panama. This is absurd. First, Panamanian Courts do not have subject matter jurisdiction over Respondent’s claims under *both* the *preemptive jurisdiction doctrine* and Article 1421-J. Second, Panamanian Courts will not be applying 1421-J retroactively - if Respondents re-file in Panama because 1421-J will be in effect at the time of filing. Finally, Appellants cite no Panamanian legal support for their argument.

any evidence regarding the Panamanian doctrine of preemptive jurisdiction or Article 1421-J.

a. **Appellants Failed To Disclose Their Expert Witness In Discovery.**

Before reviewing the merits of Appellants' expert's opinion, Respondent moved to strike Appellants' expert testimony because Appellants never disclosed the expert in response to Interrogatories. *Appellant's June 19, 2007 Motion to Strike and Defendant Rajamannan's Supplemental and Amended Responses to Interrogatories, Interrogatory No. 7 and 8.* RA-85. Appellants' failure to disclose the expert opinion prevented Respondent from cross examining Appellants' expert regarding Panama's doctrine of preemptive jurisdiction and Article 1421-J. Appellants' expert's responses, if truthful, would have defeated Appellants' motion. Nonetheless, Appellants argued they need not disclose expert witnesses who would not testify *at trial*.

Federal courts specifically hold 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 Appellants really believe that they can simply first spring their expert opinion regarding foreign law on Respondent in their *forum non conveniens* motion and expect Respondent to prepare a response in 19 days! The District Court should have struck Appellants' expert's affidavit.

**b. Appellants' Expert Failed To Testify in Any Way Whether Panamanian Courts Can Exercise Subject Matter Jurisdiction Over This Case After A *Forum Non Conveniens* Dismissal.**

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

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

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

RA-75.

Appellants' expert's opinion is borderline disingenuous. Despite being a Panamanian attorney, Appellants' expert fails to address the Panamanian doctrine of preemptive jurisdiction or Article 1421-J. Appellants' expert's failure to address these fundamental issues of Panamanian procedural law is surely not because he did not know about them.

Moreover, Appellants' expert opinion is meaningless. Appellants' expert did not opine that Panamanian courts *will be* "available" to hear this case after a *forum non conveniens* dismissal. Rather, Appellants' expert testifies in the past tense that "[Respondent's] case *could have been* brought in Panama." Appellants' Memorandum

in Support of their *Forum Non Conveniens* Motion reveals that Appellants knew of their difficulty with the “availability” issue because Appellants’ Memorandum likewise failed to even discuss Panama’s availability to hear this case even though “availability” of the foreign jurisdiction is the first factor this Court must address in evaluating a *forum non conveniens* motion. *Respondents’ Memorandum of Law in Support of Their Motion at pages 28-29.*

Furthermore, unlike Dahl’s testimony, Appellants’ expert’s testimony is devoid of any Panamanian statutory or case citations.

Finally, Appellants argue they need not prove the existence of Panamanian jurisdiction in light of Respondent’s evidence of Panamanian law citing *Ford v. Brown*, 319 F.3d 1302 (11<sup>th</sup> Cir. 2003). However, *Ford* does not support Appellants’ argument. The *Ford* plaintiff failed to provide any evidence of foreign law supporting its argument that Hong Kong courts would accept jurisdiction; thus, *Ford* relied on a presumption of availability in the absence of any counterevidence.

It is extremely difficult to believe that Appellants’ Panamanian law expert did not know of the foundational concept of preemptive jurisdiction or was unaware of the statute enacted in 2006 - Article 1421-J - that unequivocally strips Panamanian courts of subject matter jurisdiction over this case. Further, it is strange to think that American lawyers of some obvious expertise would so misunderstand the *forum non conveniens* test as to think that Panama’s availability as an *initial forum* was what was at issue, rather than Panama’s availability and adequacy *as an alternative forum* to hear this case after

the *forum non conveniens* dismissal. These facts compel point to one conclusion - Appellants failed to disclose their expert opinion in discovery and carefully couched the opinion to state that Respondent's case "could have been brought in Panama" in the first instance in the hopes that Respondent would not learn of the Panamanian doctrine of preemptive jurisdiction and Section 1421-J.

**5. Dahl's Opinion is Fully Supported By The U.S. District Court Decision in *Johnston v. Multi-Data Systems International Corp.***

The U.S. District Court in *Johnston* denied a defendant's *forum non-conveniens* motion based on Article 1421-J:

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

RA-42 (emphasis supplied). The *Johnston* court's opinion fully supports the Dahl opinion.<sup>8</sup>

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<sup>8</sup> The Fifth Circuit later reversed *Johnston* on other grounds – i.e., lack of personal jurisdiction.

**6. The District Court Abused Its Discretion By Misconstruing *Piper*, Disregarding Dahl's Opinion And Relying On Inadmissible Speculations Of Appellants' Attorney Regarding Panamanian Law.**

The District Court's Memorandum analyzed whether Panama was available as an alternative forum. However, the District Court simply muddled its analysis by failing to take into account the complete footnote 22 from *Piper*, disregarding Dahl's testimony and relying on the inadmissible speculations of Appellants' attorney.

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

The District Court properly acknowledged that Appellants must establish that Panama is an available forum as a threshold test. RA-8. However, the District Court quotes *part* of footnote 22 from *Piper* in justifying its *forum non conveniens* dismissal despite Article 1421-J:

At the outset of any *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum. Ordinarily, *this requirement will be satisfied when the defendant is "amenable to process" in the other jurisdiction.* *Gilbert*, 330 U.S., at 506-507, 67 S.Ct., at 842. In rare circumstances, however, where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirement may not be satisfied....

RA-9 (emphasis supplied).

Relying on *part of* footnote 22 of *Piper* regarding “amenability to process”, the District Court ignored Dahl’s opinion that Panama would have jurisdiction over the case after a dismissal based on *forum non conveniens*:

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

RA-11.

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

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

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

More importantly, the District Court only quoted part of *Piper’s* footnote 22 as reflected in the ellipsis at the end of the quote. The remainder of *Piper* footnote 22 states

that courts should not dismiss a case on *forum non conveniens* even if they are only “unclear” whether the alternative forum would have subject matter jurisdiction over the dispute:

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

*Piper Aircraft Corp. v. Reyno*, 454 U.S. 235, footnote 22 (1981) (emphasis supplied).<sup>9</sup>

The District Court erred in relying on *Piper* footnote 22. In fact, pursuant to *Piper* footnote 22 the District Court should have denied Appellants’ motion because, far from being “unclear” that Panamanian courts would have jurisdiction over Respondent’s case, it is crystal clear Panamanian courts do not have jurisdiction over Respondent’s case.

b. **The District Court Improperly Relied On Appellants’ Attorney’s Speculation That Panama May Not Enforce Article 1421-J in Cases Involving Non-Citizens of Panama Because Such Speculation Is Not “Evidence” Under Minn. Stat. §599.01.**

The District Court’s analysis of Appellants’ arguments that Panamanian courts will exercise subject matter jurisdiction over this case after a *forum non conveniens*

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<sup>9</sup> This part of *Piper* footnote 22 supports the Circuit Court’s requirement that Courts have a “justifiable belief” that the foreign law will allow the foreign court to exercise jurisdiction before issuing a *forum non conveniens* dismissal. *Infra*, p. 22.

dismissal is fundamentally flawed in relying on Appellants' bare assertions unsupported by admissible evidence:

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

[Appellants] argue that the fundamental purpose of the Panamanian preemptive jurisdiction law which [Respondent's] expert articulates in his affidavit, is not a concern in the present case. [Appellants] contend that "the bias in some Latin American countries against the *forum non conveniens* doctrine is motivated by concern that residents of those countries will be deprived of their chosen forum (frequently the United States) when they choose to sue foreign defendants." ([Respondents' Reply Brief of June 25, 2007, p. 9). Defendants' contention coincides with Mr. Dahl's notation in his article in the University of Miami Inter – American Law Review, which quotes the Attorney General of Ecuador as stating, "my country considers that our citizens are treated and discriminatory way due to the application of the *forum non-conveniens*."

RA-13.

The District Court's analysis is erroneous under Minn. Stat. §599.01 *et.seq.* regarding proof of foreign law. The District Court's statements regarding Panamanian law *are not* supported by evidence of Panamanian law: There is simply no evidence in the record that (i) "Panamanian law allows parties to consent to [subject matter] jurisdiction," (ii) "that the purpose of the preemptive jurisdiction is to prevent resident plaintiffs of Panama from being deprived of their chosen forum," or (iii) that the Attorney General of Panama has opined that Article 1421–J is unconstitutional.

The reference to Attorney General of Panama's alleged opinion and Appellants other statements that Article 1421-J *may* be unconstitutional are particularly disturbing. First, Appellants presented the Attorney General of Panama's opinion *in Spanish and Appellants never had it translated*. As such, it is inadmissible because no one knows if the Attorney General of Panama ever expressed this opinion. Second, even if admissible, Appellants failed to provide any *admissible evidence* that the Attorney General's opinion regarding the constitutionality of Panamanian statutes carries any weight under Panamanian law. In Minnesota, the Attorney General's opinion regarding the constitutionality of a statute is not precedent in this Court. *West St. Paul Federation of Teachers v. Independent School Dist. No. 197*, 713 N.W.2d 366, 373 (Minn. 2006). Third, Appellants assert on page 26 that Article 1421-J has been challenged in the Supreme Court of Panama *without providing any citation for this bare assertion*.

Second, the District Court's conclusion that "Panama has subject matter jurisdiction, i.e., this action could have been initiated in Panama" is simply not relevant. The issue is whether Panamanian courts can exercise subject matter jurisdiction over the case after this Court dismisses based on *forum non conveniens*. The answer to this issue based on the only evidence in the record – Article 1421-J – is **NO!**

Third, the District Court states that "[Appellants] contend" that Panama will not enforce Article 1421-J in favor of foreign citizens such as Appellant *citing to Appellants' Reply Memorandum*. Suffice it to say, Appellants' arguments in their Reply Memorandum are not evidence of Panamanian law.

Finally, the District Court quotes *Ecuador's* Attorney General stating that the purpose of Ecuador's preemptive jurisdiction statute is to protect its citizens. How is Ecuador's Attorney General's opinion possibly relevant? Would this Court consider Hawaii's Attorney General's opinion regarding an issue of Minnesota law relevant?

The *evidence* of Panamanian law is clear – Article 1421-J prohibits Panamanian courts from exercising subject matter jurisdiction over this matter and therefore Panamanian courts are not “available.” That an American court's expectations based on Appellants' speculations of what Panamanian law ought to be is neither relevant nor surprising. Neither the District Court nor Respondents' attorney can speculate as to how the Panamanian courts will apply the Panamanian laws at issue in this case. This Court may not, as the District Court chose to do, superimpose its own view of what the law of Panama ought to be over the testimony of experts on Panamanian law and on what the law of Panama in fact *says*.

c. **The District Court's Citations to *Del Rio* and *Chandler* Are Inapposite – In Fact, *Chandler* Actually Supports Respondent's Arguments Regarding the Evidence Needed to Prove Foreign Law In *Forum Non Conveniens* Motions.**

As set forth above, a court's determination of foreign law applicable to a *forum non conveniens* motion is a *factual determination* based on the *evidence* admitted in court. Thus, it is not surprising that there are American cases holding that Panama is an available jurisdiction after a *forum non conveniens* dismissal because the plaintiff failed to properly present evidence of Panamanian law demonstrating that Panama was

unavailable – i.e., if the plaintiff failed to obtain an expert witness or simply failed to discover the relevant provisions of Panamanian law. *Chandler v. Multidata Systems Intern. Corp., Inc.*, 163 S.W.3d 537 (Mo. App. 2005), a case cited by the District Court, provides an excellent example of a plaintiff who failed to provide sufficient evidence of Panamanian law on the issue before this court.<sup>10</sup>

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

Although [plaintiff’s expert] acknowledged that the [Panamanian] Judicial Code allows a plaintiff to sue a defendant where the injury occurred, [plaintiff’s expert] explained that once you choose one forum, you cannot choose the other. ***[Plaintiff’s expert however] did not cite to any Judicial Code or Civil Code articles, but he did argue that the Bustamante Code supported his conclusion.***

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<sup>10</sup> *Del Rio* is a stark example of a plaintiff’s failure to properly present Panamanian law. In *Del Rio* plaintiff never asserted the Panamanian doctrine of preemptive jurisdiction and the court never addressed the issue. In addition, *Del Rio* was decided in 1975. Article 1421-J was not enacted until 2006.

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

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

Because the *Chandler* plaintiff's expert failed to testify regarding the Panamanian doctrine of preemptive jurisdiction under or cite specific Articles of the Panamanian Judicial Code, the *Chandler* plaintiff, not surprisingly, lost the *forum non conveniens* motion.

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

Two points deserves special emphasis. First, in contrast to the *Chandler* plaintiff's expert, Appellants' expert did present specific evidence of the Panamanian doctrine of preemptive jurisdiction under Articles 238, 255, 256 and 259 of the Panamanian Judicial

Code accompanied with the further citation and opinion regarding Article 1421-J.<sup>11</sup> Moreover, unlike the *Chandler* defendants, Appellants' failed to cite to *any* Panamanian Judicial or Civil Code citations and failed to rebut Dahl's testimony.

Second, *Chandler* demonstrates that it is not surprising that attorneys arguing *forum non conveniens* motions will often cite what appear to be conflicting prior *American* court decisions on whether a foreign jurisdiction is "available." However, these decisions are not "conflicting" in the sense of legal precedent because these prior courts are simply ruling on the "availability" issue *based on the expert opinions and evidence on foreign law actually presented to those courts*. Thus, it is not surprising that *Chandler* ruled Panama was "available" and *Johnston* ruled Panama was "unavailable" because the *Johnston* plaintiffs, similarly to Respondent, presented actual evidence and opinions, supported by citations, that the Panamanian doctrine of preemptive jurisdiction and with Article 1421-J prohibited Panamanian courts from exercising subject matter jurisdiction after a *forum non conveniens* dismissal.

d. ***Scotts Co. v. Hacienda Loma Linda, The Recent Florida Decision, Was Wrongly Decided and Distinguishable.***

Appellants rely heavily on *Scotts Co. v. Hacienda Loma Linda*, 2 So.3d 1013 (Fla. Dist. App. 2006). *Scotts'* analysis of *forum non conveniens* is wrong and is completely

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<sup>11</sup> It is also important to note that in addition to the factual distinctions in *Chandler*, the *Chandler* plaintiff's expert also did not provide testimony regarding Section 1421-J because Section 1421-J was not passed until 2006.

distinguishable. In *Scotts*, a Panamanian corporation brought suit against a Florida corporation regarding activities which unequivocally occurred in Panama. The trial court initially denied defendant's *forum non conveniens* motion but the Appellate Court reversed and issued a conditional dismissal providing that the case could be refiled in Florida if the Panamanian courts refused to exercise jurisdiction. The *Scotts* plaintiff immediately filed an action in Panama and informed the Panamanian court of the previous *forum non conveniens* dismissal. The Panamanian judge immediately dismissed the case sua sponte under Article 1421-J. The plaintiff then re-filed in Florida and defendant moved to dismiss based on *forum non conveniens* which the trial court denied. The *Scotts* Court again reversed. *Scotts* made several findings that are disturbing.

First, *Scotts* described the Panamanian doctrine of preemptive jurisdiction and Article 1421-J as laws designed to enhance the ability of Panamanian citizens to sue in U.S. Courts. However, *Scotts* provided no support for this assertion – because it is baseless and false.<sup>12</sup> Dahl testified that the preemptive jurisdiction doctrine dates back over 2,000 years to the Roman Code and Panama adopted the preemptive jurisdiction doctrine in 1916 when international tort claims hardly existed. Simply put, there is no

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<sup>12</sup> Appellants also argue at pages 27-31 of their Brief that Panama adopted the preemptive jurisdiction doctrine to “block” lawsuits previously dismissed based on *forum non conveniens*. However, Appellants offer no evidentiary support that Panama, *in 1916*, adopted the doctrine of preemptive jurisdiction or Article 1421-J to “block” the adjudication of cases previously dismissed in the United States. These arguments are nothing more than Appellants’ attorney’s rank speculation which is why Minnesota law requires actual evidence of foreign law.

basis to conclude that Panama adopted the preemptive jurisdiction doctrine in response to Panamanian citizens having their American lawsuits dismissed on *forum non conveniens*.

Second, *Scotts* found that plaintiff's counsel engaged in "manipulation" by informing the Panamanian court of the previous *forum non conveniens* dismissal in an effort to have the Panamanian courts apply the doctrine of preemptive jurisdiction to dismiss this case. *Scotts'* assertion that plaintiff's counsel did something wrong in informing the Panamanian courts of the prior *forum non conveniens* dismissal is astounding. Plaintiff's counsel had a duty to both the Panamanian court and their client to inform the court of possible problems with subject matter jurisdiction. U.S. federal courts can sanction attorneys who make false assertions of subject matter jurisdiction. *Orange Prod. Credit Ass'n v. Frontline Ventures Ltd.*, 792 F.2d 797, 801 (9th Cir.1986).

Finally, *Scotts* 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).<sup>13</sup> However, *Aguinda* did not dismiss under *forum non conveniens* despite finding that Peruvian and Equadorian courts were unavailable. Rather, based on the evidence submitted, *Aguinda* found it had a

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<sup>13</sup> *Scotts* also cited *Morales v. Ford Motor Co.*, 313 F.Supp.2d 672, 676 (S.D.Tex.2004) and *In re Bridgestone/Firestone, Inc. Tires Products Liability Litigation*, 470 F.Supp.2d 917 (S.D.Ind.2006) which are both distinguishable. *Morales* involved whether the foreign court had personal jurisdiction over the defendant and the defendant consented such to personal jurisdiction. *Bridgestone* involved serious allegations that plaintiff engaged in actual fraud in having the foreign court dismiss the case and conducted extensive evidentiary hearings in establishing the fraud.

*“justifiable belief” based on the admissible evidence of foreign law* that Peruvian and Equadorian law would provide for subject matter jurisdiction. *Aguinda v. Texaco, Inc.*, 142 F.Supp.2d 534, affirmed 303 F.3d 470, 477 (2<sup>nd</sup> Cir. 2002). In fact, the 2<sup>nd</sup> Circuit noted that the Equador Supreme Court had found the Equadorian procedural provisions the *Aquidar* plaintiffs relied on were unconstitutional. *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 477 (2<sup>nd</sup> Cir. 2002).

Finally, *Scotts* based its decision on the fact that Latin American citizens were inundating Florida courts with cases arising in Latin American countries with preemptive jurisdictional statutes similar to Panama’s. Because of the proximity of Florida to Latin America, this is an issue uniquely parochial to Florida and uniquely “unparochial” to Minnesota. On the contrary, Minnesota is adjacent to Canada whose laws are based on English common law. Minnesota courts will rarely encounter the preemptive jurisdiction doctrine.

**F. The District Court’s “Conditional Dismissal” Does Not Cure Panama’s Lack of Subject Matter Jurisdiction.**

Appellants argue that the District Court’s “conditional dismissal” “cures” Panama’s lack of subject matter jurisdiction because Respondent can simply re-file the case in Minnesota if Panamanian courts dismiss for lack of subject matter jurisdiction. However, federal courts will not issue conditional dismissals when there is no “justifiable belief” the foreign court has subject matter jurisdiction because such dismissals in fact exacerbate the inconvenience of the parties which the *forum non conveniens* doctrine is

intended to prevent. 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's 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); *see also, In re CINAR Corp. Securities Litigation*, 186 F.Supp.2d 279, 299 (E.D.N.Y. 2002) (*quoting Bank of Credit*, 273 F.3d 241, 248 (2d Cir. 2001).

The cases Appellants cite at pages 31-33 are to support their argument that a conditional dismissal may be entered are wrong because the evidence submitted in those cases provided those courts with a "justifiable belief" that the foreign courts would exercise jurisdiction. In fact, *Schertenleib* held "a district court should not dismiss unless it justifiably believes that the alternative forum will take jurisdiction". *Id.*, 589 F.2d at 1163. Likewise, *El Fadl*, 75 F.3d at 677 specifically held "[T]o show the existence of an adequate alternative forum, the defendant 'must provide enough information to enable the District Court' to evaluate the alternative forum." Appellants' argument that a conditional dismissal may be issued when they failed to submit provide evidence supporting a "justifiable belief" that Panama would exercise jurisdiction is simply wrong.

The District Court cannot circumvent its obligation to determine the availability of subject matter jurisdiction in Panama by simply issuing a conditional dismissal providing for “return jurisdiction” if Panama dismisses for lack of subject matter jurisdiction. Absent requiring the district court to make findings that the foreign court is “available” before issuing a conditional dismissal of “return jurisdiction,” any district court could simply forgo any serious analysis on *forum non-conveniens* motions by issuing a conditional dismissal of “return jurisdiction.”

Moreover, allowing the District Court to avoid this obligation through a conditional dismissal would lead to this nightmarish and, in this case, quite likely, scenario: Respondent 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 Respondent 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 *Piper*, in 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>14</sup> This “nightmarish scenario”

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<sup>14</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

also explains exactly why *In re CINAR Corp.* and *Sacks* found it inappropriate for the district court to assuage any concerns it had regarding subject matter jurisdiction by simply issuing a conditional dismissal of “return jurisdiction.”

**G. Panamanian Courts Are Not “Adequate” Because They Suffer From Significant Corruption and Panamanian Procedural Rules Will Not Allow Respondent To Adequately Present Its Case.**

The Panamanian judicial system is “inadequate” because it is corrupt and suffers from numerous procedural defects. The State Department has investigated Panamanian courts and concluded Panamanian courts suffer from significant corruption. *U.S. Dept. of State, Doing Business in Panama. A Country Commercial Guide for U.S. Companies (2006), at p.53* attached to the June 19, 2007 Mohrman Affidavit at Exhibit 2).<sup>15</sup> Indeed, Rajamannan admitted that “you can buy” Panamanian courts, “the law does not exist in Panama” and Panamanian courts suffer from a severe case backlog. *Rajamannan Deposition, p. 124-127* (Mohrman Affidavit, Exhibit 2).

Moreover, Dahl testified the Panamanian Court system is not adequate to litigate cases involving international witnesses because Panamanian procedural rules do not allow the introduction of deposition testimony. RA-66. Thus, Respondent could not present testimony from many witnesses including Rajamannan and Agro-K employees.

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subject matter jurisdiction – is completely outside the control of either party and under the exclusive control of the Panamanian courts.

<sup>15</sup> U.S. Department of State reports are admissible on the issue of forum adequacy in *forum non conveniens* litigation. *Bridgeway Corp. v. Citibank*, 201 F.3d 134, 142 (2d Cir. 2000).

Appellants' former employee, Roberto Barnett, resides in the Philippines and Respondent will request issuance of letters rogatory under the Hague Convention to compel Barnett's trial deposition in the Philippines. *Mohrman Affidavit filed June 19, 2007*. In Panama, Respondent could not present Barnett's testimony.

Dahl also testified that evidence under the Panamanian legal system is more difficult to present than under American law. In Panama, there is no discovery and no depositions. Testimony in court is more limited than in the United States. Judges, not lawyers, examine witnesses based on written questions submitted to the Judges. Witnesses are limited to four for each party. There is no ability to secure production of documents from the opposing party or third parties and the mechanisms for compelling witnesses to testify are extremely unreliable and weak. Finally, Respondent is not entitled to a jury trial. RA – pp. 66-67.

**H. Appellants Failed To Timely Bring Their Forum Non Conveniens Motion.**

“[T]he moving defendant must submit its *forum non conveniens* motion in a timely manner.” *In Re Crash New Orleans*, 821 F.2d 1147, 1164 (5<sup>th</sup> Cir. 1987); *see also*, Wright, Miller & Cooper, vol. 14D, *Federal Practice and Procedure*, §3828.3 (3d ed., West 2007). Delays as little as eight months have resulted in denial of a *forum on conveniens* motion. *Cable News Network L.P., L.L.L.P. v. CNNNews.com*, 177 F.Supp.2d 506 (E.D. Va. 2001) (*vacated on other grounds*).

Appellants did not bring their *forum non conveniens* motion until 28 months after serving their Answer asserting *forum non conveniens* as an affirmative defense.

Appellants' delay prejudiced Respondent. Respondent has taken and defended over 1400 pages of deposition testimony all of which is useless in Panamanian courts because Panama does not admit deposition testimony. *Mohrman Affidavit filed June 19, 2007*. Moreover, Appellant will have lost almost five years litigating this matter in Minnesota, only to be forced to start again in Panama where Dahl and Rajamannan have testified cases can take years before they go to trial.

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

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

While District Court erred in finding Panama an "available" and "adequate" forum, and should not have even analyzed the private and public factors, the District Court's analysis of the public and private factors was an abuse of discretion.

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

In *Bergquist*, this Court cited the "strong presumption" in favor of the *plaintiff's choice of forum* and noted that "the trial court must balance a series of public and private interest factors in determining whether the defendant has successfully rebutted the presumption that the *plaintiff's choice of forum* will not be disturbed." *Bergquist*, 379

N.W.2d at 511. “The more it appears that a domestic or foreign Appellant’s choice of forum has been dictated by reasons that the law recognizes as valid, the greater the deference will be given to the Appellant’s forum choice.” *Iragorri v. United Technologies Corp.*, 274 F.3d 65, 71-72 (2d Cir.2001) (en banc). “One of the factors that necessarily effects Respondent’s choice of forum is the need to sue in a place where the defendant is amenable to suit.” *Id.* at 72. Respondent chose Minnesota for several reasons:

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

Respondent’s choice of Minnesota, Appellants’ home jurisdiction, was based entirely on legitimate factors.

Despite the fact that Respondent made a strong showing of convenience, the District Court found that because the Respondent was “foreign,” the presumption in favor of Respondent’s choice forum should receive less deference. However, while it is true that a non-U.S. plaintiff’s choice of forum is entitled to less deference than that of a U.S. plaintiff, the District Court is nonetheless obligated to give weight to Respondent’s

choice of forum. *Piper*, 454 U.S. 235, 255-256. “Less deference” does not mean “no deference.”<sup>16</sup>

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*, 932 F.2d at 179 (3<sup>rd</sup> Cir. 1991).

Moreover, “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 [and] that reluctance can readily be overcome by a strong showing of convenience.” *Lony v. E.I. Du Pont de Nemours & Co.*, 886 F.2d 628, 634 (3d Cir.1989).

In this case, Respondent sued Appellants in their home forum – Minnesota. The central fact of Respondent’s case is Appellants’ use of Agro-K’s Minnesota bank account to receive wire transfers from Respondent. The underlying acts of Rajamannan consist of ***faxed documents and phone calls from Minnesota*** to Respondent in Australia requesting Respondent send its investment monies to Agro-K’s ***Minnesota bank account***.

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<sup>16</sup> “Courts should be mindful that, just as plaintiffs sometimes choose a forum for forum-shopping reasons, defendants will move for a *forum non conveniens* dismissal not because of genuine concern with convenience, but because of similar forum-shopping reasons. “District courts should therefore arm themselves with an appropriate degree of skepticism in assessing whether the defendant has demonstrated genuine inconvenience and a clear preferability of the foreign forum.” *Irragorri v. United Tech. Corp.*, 274 F.3d 65, 71, 75 (2d Cir 2001) (en banc).

Rajamannan then made representations *from Minnesota* that Agro-K would transfer those funds *from Minnesota* to PVSC. However, Appellants never intended to transfer Appellant's funds from Minnesota to Panama and Appellants presented no evidence that they transferred the funds to PVSC. Appellants' deceptive and fraudulent acts which give rise to their liability were: (i) Appellants' solicited Respondent's funds *from Minnesota*, (ii) Appellants received those funds *in Minnesota* and (iii) Appellants' failed to account for funds *received in Minnesota*. Finally, even if Appellants transferred Respondent's investment monies out of Minnesota, Appellant presented no evidence demonstrating that those transfers were not for the purposes Appellants represented to Respondent — the investment monies would be transferred to Panama for use on the paulownia tree farm in which Respondent invested.

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

2. **The District Court Erred In Finding The Balance of Private Factors Weigh In Favor Of Dismissal.**

The private interest factors evaluate the effect a grant or denial of a *forum non conveniens* motion would have on the parties. Appellants did not meet their "heavy burden" to justify dismissal.

a. **Appellants Failed To Identify Panamanian Witnesses or Describe Their Testimony.**

The District Court held that Appellants *may* require the testimony of many Panamanian witnesses. However, in order to establish this factor under *forum non conveniens*, Appellants must (i) identify the witnesses, (ii) demonstrate that the witnesses still live in Panama and (iii) describe the witnesses' testimony so the Court could determine whether the testimony was material:

If the moving party merely has made a general allegation that necessary witnesses are located in the transferee forum, without identifying them and providing sufficient information to permit the district court to determine what and how important their testimony will be, the application for transferring the case should be denied, as was true in the many cases cited in the note below.

Wright, Miller & Cooper, vol. 14D, *Federal Practice and Procedure*, §3851 (3d ed., West 2007) (transfer of venue) (emphasis supplied).

As with most of Appellants' arguments, Appellants failed to provide the factual or legal predicate establishing the necessity of any Panamanian witnesses' *live* testimony or the ability to get the testimony into court — i.e., do these witnesses currently reside in Panama, would they be willing to come to Minnesota, what is the cost of obtaining their testimony in Minnesota, what is their anticipated testimony, etc? If Appellants wanted to move this matter to Panama, they certainly could have interviewed these witnesses after 28 months of litigation and obtained their affidavits supporting the motion. The fact that Appellants do not have these affidavits suggests that these witnesses do not exist or Appellants may not be able to locate these witnesses if this matter were transferred to

Panama. Appellants bear the evidentiary and legal burden on a *forum non conveniens* motion and they have failed to meet this burden. Furthermore, as Dahl testifies, “the mechanisms for compelling witnesses [to testify] in Panama are extremely unreliable and weak, just as the evidence. In practice, a witness can easily ignore a Panamanian court order, particularly if he lives abroad.” RA-67. Finally, oral testimony carries little weight procedurally in Panama. RA-66-67.

This is not an abstract matter. As Shepherd testifies, Barnett, who is a significant witness, currently resides in the Philippines, not Panama as Appellants’ counsel “suggests” at ¶3 of his Affidavit. *Shepherd Affidavit, p. 4, filed June 19, 2007*. As Dahl testified, Appellants can only call four witnesses under Panamanian law. RA-67. If Appellants call Rajamannan, Concie Rajamannan, Agro-K’s accountant and Barnett to testify, Appellants will not be able to call these unidentified “Panamanian” witnesses.

Second, Appellants claim that they need this testimony in Panama to prove that PVSC made efforts to perform work under the Management Contract. Contrary to Appellants’ arguments, the heart of this case is in Minnesota where the financial transfers and financial records are located and the fraud occurred. The issue is whether Appellants transferred Respondent’s investment to PVSC for use on the paulownia farm — not the work performed on the farm. Moreover, Appellants do not need the testimony from the Panamanian workers Appellants failed to identify in order to get information regarding the operation of the paulownia tree farm into evidence. Rajamannan testified he was a witness to the work performed. Thus, all of this alleged testimony from Panamanian witnesses would be cumulative and merely corroborative of Rajamannan’s testimony.

Contrary to Appellants' claims, the relevant evidence is Appellants' and Verde Tech's financial records.

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

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

**b. Enforceability of Judgment.**

Appellants failed to prove that Minnesota courts would be capable of enforcing a Panamanian judgment against the Minnesota Appellants. This factor thus weighs against dismissal.

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

The District Court did not find that Respondent filed this action in Minnesota to "vex, harass or oppress" Appellants "by inflicting upon [them] expense or trouble not necessary to his own right to pursue the remedy." *Hague*, 289 N.W.2d at 46 (quoting *Gulf Oil*, 67 S.Ct. at 843). This factor thus weighs against dismissal.

**d. Language Barrier.**

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

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

**3. The District Court Erred Dismissing Respondent's Action The Balance of Public Interest Factors Do Not Weigh In Favor Of Dismissal.**

The District Court relied heavily on the public interest factors in its dismissal relying heavily on Appellants *unsubstantiated* representations including:

- Panamanian law will predominate;
- A Minnesota judge and jury would be required to understand and apply Panamanian law;
- A jury would be required to make factual findings out of context and they would not have common sense or experience to guide them in their decisions; and
- A trial this complicated would be lengthy and burdensome on the local court system.

The evidence Respondent presented reveals that all of these factors weighed in favor of Respondent and, thus, the District Court abused its discretion.

First, the District Court found that the “nexus between the dispute and this forum is marginal.” RA-21. On the contrary, Respondent’s main claims are for unjust

enrichment and conversion against Agro-K because Agro-K never sent Respondent's investment monies to Panama. Agro-K's actions all took place in Minnesota and Appellants failed to provide any documents demonstrating that Respondent's investment monies ever left Agro-K's Minnesota bank account. Anoka County has an interest in holding accountable its citizens who conduct frauds in Anoka County in order to prevent the commission of further frauds against Anoka residents.

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

Third, while the District Court held that despite the fact that Minnesota has a "strong interest in policing the financial misconduct of residents, insuring its banking institutions are not used for such purposes, and holding those to account in a court of law," the District Court abused its discretion when it found, again without citing to any

evidence, that “Panama’s interest seems greater as the case involves the *use or misuse of valuable natural resources in Panama* by foreign investors, and the integrity of Panamanian legal, corporate and community institutions are involved.” RA-21. Respondent filed this lawsuit because Appellants converted Respondent’s investment monies in Minnesota and Appellants failed to produce any documents that they put those monies to “*use*” on “*valuable resources in Panama.*” Rather, the only fact that is certain is that Respondent’s monies were wire transferred to Agro-K’s bank account in Minnesota.

Finally, “[t]he Court in both *Gulf Oil* and *Koster* emphasized that no one private or public interest factor should be given conclusive weight and that the plaintiff’s initial choice is usually to be respected.” *In re Air Crash Disaster Near New Orleans v. Pan American Airways, Inc.*, 821 F.2d 1147, 1163 (5<sup>th</sup> Cir. 1987). The District Court abused its discretion in finding Minnesota an inconvenient forum and dismissing Respondent’s Complaint based on *forum non conveniens*.

### CONCLUSION

The Panamanian doctrine of preemptive jurisdiction and Article 1421-J are plain and unequivocal – Panamanian courts no longer subject matter jurisdiction over this case. Despite ample opportunity, Appellants failed to present contrary evidence of Panamanian law because, Respondents would assert, none exists. Rather, Appellants argue that this Court should simply disregard Panamanian law and disregard the fundamental and

longstanding threshold requirement of *forum non conveniens* motions – establishing the availability of an alternative court. Under a common law doctrine ironically intended to provide greater convenience to the parties, Appellants argue that the parties should expend time and expense in Panamanian courts which, under Article 1421-J's plain and unequivocal language, have no subject matter jurisdiction over this matter and will ultimately dismiss this case. It is Appellants who are now engaged in forum shopping for the sole purpose of delay. The Court of Appeals decision should be affirmed.

DATED: April 20, 2009.

Respectfully submitted,

MOHRMAN & KAARDAL, P.A.



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William F. Mohrman #168816

Erick G. Kaardal #229647

Tona T. Dove #232130

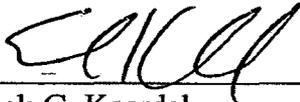
33 South Sixth Street, Suite 4100

Minneapolis, Minnesota 55402

ATTORNEYS FOR RESPONDENT

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

The undersigned certifies that the Brief submitted herein contains 13,682 words and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Brief was prepared using a proportional spaced font size of 13 pt. The word count is stated in reliance on Microsoft Word 97-2003, the word processing system used to prepare this Brief.



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Erick G. Kaardal