APPELLATE COURT CASE NO. A08-2105

STATE OF MINNESOTA
IN THE COURT OF APPEALS

C.H. Robinson Worldwide, Inc.,	)
Plaintiff/Respondent,	)
vs.	)
FLS Transportation, Inc., Domenic Di Girolamo, Michael Flinker, Arlien Casillas, Kenton K. Geghan, Scott Helton, Peter Katai, and Jody Winkler,	)
Defendants/Appellants	)
and	)
Mark Kummer, W. Russell Harp, Jerrod Marinello, and Fred Rand,	)
Defendants.	)

REPLY BRIEF AND SUPPLEMENTAL ADDENDUM OF APPELLANTS FLS TRANSPORTATION SERVICES, INC., DOMENIC DI GIROLAMO, MICHAEL FLINKER, ARLIEN CASILLAS, KENTON GEGHAN, SCOTT HELTON, PETER KATAI, AND JODY WINKLER

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

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I. INTRODUCTION

Respondent's arguments cannot remedy the deficiencies in the district court's fatally flawed order refusing to dismiss this action against Appellants. To exercise jurisdiction over the non-signatory Appellants based on forum selection clauses contained in agreements to which these Appellants were not parties would be an unconstitutionally broad exercise of personal jurisdiction. It would also require an improperly broad expansion of constitutionally permissive jurisdiction to conclude that the routine, centralized, administration of employees by a nation-wide company creates jurisdiction in the state in which the company is headquartered for all of its employees working throughout the country. Finally, one-sided forum selection clauses routinely inserted by companies into boiler-plate employment agreements are not – and should not be – blindly enforced.

Personal jurisdiction is lacking over all of the Appellants and, accordingly, the district court's Order finding jurisdiction must be reversed and the Respondent's Complaint must be dismissed as to each of the Appellants. Respondent should be required to bring the various and separate claims – consolidated together into a single lawsuit in Minnesota solely for Respondent's benefit – as individual lawsuits in the states wherein the various Appellants reside.

II. LEGAL DISCUSSION

A. The District Court Erroneously Ruled that Jurisdiction was Created Over the Non-Signatory Appellants as a Result of the Forum Selection Clauses

Respondent's argument that jurisdiction can be exercised against the non-

signatory Appellants based solely upon the existence of forum selection clauses in employment agreements signed by other Appellants must be rejected because it is not supported by any Minnesota appellate court decision, nor by any other persuasive legal authority.[1] Respondent and the district court heavily based their arguments on this point on only two federal district court decisions, the *ELA Medical* and *Medtronic* decisions.[2] Respondent fails to effectively rebut the treatment of those cases set forth in Appellants' opening brief. *See* Appellants' Opening Brief, p. 19. The most significant shortcoming in Respondent's argument is the absence of any caselaw holding that applicable constitutional due process considerations are satisfied when exercising personal jurisdiction over a non-signatory litigant based solely on the existence of forum selection clauses contained in contracts executed by other litigants. Respondent tellingly refuses to acknowledge that neither *ELA Medical* nor *Medtronic* actually involved a court's exercise of personal jurisdiction based upon such a third-party contract. The questions of proper venue (the issue actually addressed in those cases), on the one hand, and whether personal jurisdiction may be constitutionally exercised, on the other hand, are materially different questions – a point that even Respondent has conceded in its brief.[3]

Respondent's discomfort with the supposed foundation for this argument is made

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[1] Respondent does not contest that the forum selection clauses were the only foundation relied on by the district court for its exercise of jurisdiction over FLS and its officers.

[2] *ELA Medical, Inc. v. Arrhythmia Mgmt. Assoc.*, 2007 WL 892517 (D. Minn. March 21, 2007), and *Medtronic, Inc. v. Endologix, Inc.*, 530 F. Supp. 2d 1054 (D. Minn. 2008).

[3] In its argument on the issue of the enforceability of the forum selection clauses, Respondent distinguishes a case relied on by Appellants by stating: "In *Nelson*, the court

readily apparent by Respondent's ineffective attempt to buttress the two federal district court decisions with citations to other non-Minnesota court decisions. Those other cases are readily distinguishable from the circumstances present in this action and, therefore, do not provide actual support for the district court's flawed ruling. Significantly, none of the cases cited by Respondent involved the exercise of personal jurisdiction over an out-of-state defendant based on a forum selection clause contained in a contract to which the out-of-state defendant was not a signatory.[4] To the extent that Respondent relies heavily

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considered a motion to change of venue . . . not a motion to dismiss for lack of personal jurisdiction." (Respondent's Brief ("Resp. Brief"), n. 5, at p. 23.)

[4] In *Hugel v. Corporation of Lloyd's*, 999 F.2d 206 (7th Cir. 1993), the court found that the two non-signatory corporate plaintiffs could be bound by a forum selection clause contained in an agreement between the owner of the two corporations (who was also a plaintiff) and the defendant, because the owner-plaintiff willingly involved the two corporate plaintiffs in an investigation conducted by the defendant pursuant to the agreement and the investigation was the basis of the plaintiffs' underlying lawsuit. Similarly, in *Tech USA Inc. v. Evans*, 592 F.Supp.2d 852 (D. Md. 2009), the court denied the defendant's motion to dismiss for improper venue finding that a forum selection clause in an employment agreement between one defendant (a former employee) and the plaintiff, could be applied to the non-signatory defendant which was a corporation solely owned and controlled by the former employee defendant, because the terms of employment were explicitly based on his operation of the non-signatory corporation. *Manetti-Farrow Inc. v. Gucci America*, et. al., 858 F.2d 509 (9th Cir. 1988), and *CFirstclass Corp. v. Silverjet PLC*, 560 F.Supp.2d 324 (S.D. N.Y. 2008), are initially distinguishable because the parties seeking to enforce the forum selection clause were the non-signatories. Additionally, in *CFirstclass Corp.* the non-signatory party was a successor in interest to the party who signed the contract containing the forum selection clause and in *Magnetti-Farrow*, the non-signatory parties were affiliate entities or individual directors of the signing party and its affiliates. In *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190 (3d Cir. 1983), *abrogated on other ground by Lauro Lines, S.R.I. v. Chasser*, 490, U.S. 495 (1989), the non-signatory plaintiff was a party to a separate building contract with a contractor and was a third party beneficiary to the supply contract between the contractor and the defendant, which contract contained the forum selection clause. *In re EGL Eagle Global Logistics, L.P.*, 89 S.W.3d 761 (Tex. App. 2002), and *Gatz Mgmt*

upon judicial decisions to apply a contract provision *against a plaintiff signatory* for the benefit of a non-signatory defendant, it must be noted that this distinguishing factor is of extreme significance. "The binding thread in cases which hold that a non-signatory party should 'benefit from and be subject to' a forum selection clause is an overriding concern to prevent a contracting party from escaping contractual obligations which he bargained for and/or agreed upon." *Sparks Tune-Up Centers, Inc. v. Strong*, 1994 WL 188211 at * 5 (N.D. Ill. May 12, 1994) (Supp. Add. 20). That consideration is not, of course, applicable here.

Accordingly, there is inadequate legal authority to support the constitutional exercise of personal jurisdiction against the non-signatory Appellants (FLS, Di Girolamo, Flinker, Helton, and Katai) based upon the forum selection clauses included in the employment agreements executed by the other Appellants.

Svcs., LLC v. Weakland, 171 F.Supp.2d 1159 (D. Colo. 2001), are inapposite because they involve arbitration clauses, not forum selection clauses, and also because the courts in those cases held that the doctrine of equitable estoppel *allowed* the non-signatories to compel arbitration under the terms of the agreement to which they were not parties. *See* 89 S.W.3d 764-65; 171 F.Supp.2d at 1166-67. As such, the new employers in those cases agreed to voluntarily submit to arbitration, the court did not find that they were bound by the arbitration provision in the employment agreements to which they were not parties. *Hy Cite Corp. v. Advanced Marketing Int'l*, 2006 WL 3377861 (W.D. Wis. 2006) (Respondent's Add. 47), is also distinguishable insofar as the new employer and former employees were the plaintiffs seeking a declaratory judgment as to the scope of the non-competition agreements which contained the forum selection clauses. Therefore, because Hy Cite's claims depended entirely on an interpretation of the agreements containing the forum selection clauses, the court concluded that the closely related and foreseeability requirements for binding a non-signatory to a forum selection clause were met. *Hy Cite Corp.*, 2006 WL 3377861 at * 5.

B. The District Court Erroneously Ruled that Sufficient Forum State Contacts Existed to Create Jurisdiction Over the Former Employee Appellants

In arguing that adequate "Minnesota contacts" exist to create specific jurisdiction over the former employee Appellants, Respondent mischaracterizes Appellants' key position on this point. Appellants are not urging this Court to analyze each alleged contact in a vacuum, but rather assert that a meaningful analysis is required and that contacts of an inadequate nature to create jurisdiction may not be somehow magically transformed into adequate contacts merely by stacking them up like so much cord wood. Respondent, on the other hand, would have this Court confer personal jurisdiction in essence upon only conclusory – and therefore empty – characterizations of the Appellants' supposed "Minnesota contacts." A careful analysis of the alleged contacts, as was done in Appellants' opening brief, clearly exposes the deficiencies in the contacts relied upon by Respondent (and the district court) for the exercise of specific jurisdiction over these Appellants. Respondent has failed to meaningfully rebut Appellants' detailed analysis.

The cases cited by Respondent regarding the nature and level of contacts necessary for the exercise of specific jurisdiction are inapplicable to this case. Only two of those cases are based on Minnesota law, and neither is the decision of a Minnesota state court. *West Pubs' Corp. v. Stanley* involved the alleged breach of a noncompete agreement by the founder of Findlaw, who had become a high-level executive at Westlaw Corp. when he sold Findlaw to Westlaw. *West Pubs' Corp. v. Stanley*, No. 03-5832, 2004 WL 73590 (D. Minn. Jan. 7, 2004) (Respondent's Add. 63). In holding that

jurisdiction was appropriate in Minnesota, even though the defendant lived in California, the court noted that the defendant "entered into contracts to sell his business to and then work for West, a Minnesota company," and that as part of his work for West, he "traveled regularly to Minnesota" and "directly supervised a group of employees in West's Minnesota offices." *Id.* at * 4. *ComputerUser.com, Inc. v. Tech Publications, LLC*, is likewise distinguishable. That case involved a franchise relationship, unlike the employment relationships at issue here, and the license agreement in that case demonstrated numerous connections between the contract and Minnesota, which was apparently the only state out of which the plaintiff in that case operated. *ComputerUser.com, Inc. v. Tech Publications, LLC*, 2002 WL 1634119 at * 6 (D. Minn. July 20, 2002) (Respondent's Add. 5). In contrast, in this case, although the former employee Appellants' contracts with Respondent included Minnesota choice of law provisions, the contracts did not otherwise provide any connections to Minnesota.[5] The former employee Appellants' contacts with Minnesota are far more analogous to the contacts at issue in *Smarte Carte* and *Addison Ins. Marketing, Inc.* (and the other cases cited in Appellants' opening brief) than to the contacts at issue in the *West* or

[5] Respondent also relies upon three non-Minnesota cases, which are not controlling precedent and are also distinguishable. In *RDO Food Co. v. United Brands Int'l, Inc.*, the North Dakota court based its finding of jurisdiction, in part, on the fact that the individual defendant (who was not an employee) was integrally involved with the plaintiff's North Dakota operations, visited North Dakota one to two times per year in relation to his work, and directed production at the North Dakota plant with regard to certain customers. 194 F. Supp.2d 962, 968 (D. N.D. 2002.) The other two cases relied upon by Respondent, *Blue Beacon Int'l, Inc. v. Am. Truck Washers, Inc.*, 866 F. Supp. 485, 490-91 (D. Kan. 1994), and *Surgical Corp. v. Imagyn Med. Techs, Inc.*, 25 F. Supp.2d 40, 44-45 (D. Conn. 1998), were previously distinguished in Appellants' Opening Brief (at pp. 25-26).

ComputerUser.com cases cited by Respondent.[6]

A careful review of all the allegations in Respondent's Complaint and supporting affidavits demonstrate that, as a matter of Minnesota law, Respondent has failed to allege or establish sufficient facts to demonstrate that the former employee Appellants have "purposefully availed" themselves of the privilege of doing business in Minnesota. Specific jurisdiction, accordingly, cannot be properly asserted over these Appellants.

C. The District Court Correctly Ruled that Respondent did not Satisfy the *Griffis/Calder* Effects Test

The district court correctly ruled that Respondent could not satisfy the requirements of the *Griffis/Calder* "effects" test and thus could not establish personal jurisdiction over FLS and its officers via that doctrine. In its October 8 Order, the district court rejected this argument, stating:

> [T]he Court cannot find that the FLS defendants aimed their alleged tortious acts at Minnesota. To adopt Plaintiff's argument that the "Effects" test subjects the FLS defendants to jurisdiction in this case would amount to extending jurisdiction to any party causing injury to a Minnesota resident.

(October 8 Order at p. 18)

That decision is well-reasoned, correct and should be affirmed.

In *Calder v. Jones,* the U.S. Supreme Court held that a defendant may be subject to specific personal jurisdiction in a state if it engages in intentional, and allegedly tortious, actions in a foreign state that are expressly aimed at the forum state. 465 U.S.

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[6] *See* Appellants' Opening Brief, pp. 30-32, discussing *Smarte Carte, Inc. v. Tran*, 1996 WL 689782 (Minn. Ct. App. Dec. 3, 1996), and *Addison Ins. Marketing, Inc. v. Evans*, 2002 WL 31059806 (N.D. Tex. Sept. 12, 2002).

783, 789 (1991). The Minnesota Supreme Court has cautioned, however, that *Calder* should not be applied "too broadly." *Griffis v. Luban*, 646 N.W.2d 527, 534 (Minn. 2002). The Minnesota Supreme Court has adopted the majority view among the U.S. Courts of Appeals and has held that in order for a court to assert specific personal jurisdiction under *Calder,* a plaintiff must show that: "(1) the defendant committed an intentional tort; (2) the plaintiff felt the brunt of the harm caused by that tort in the forum such that the forum state was the focal point of the plaintiff's injury; and (3) the defendant expressly aimed the tortious conduct at the forum such that the forum state was the focal point of the tortious activity." *Griffis*, 646 N.W.2d at 534 (citing *Imo Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 261 (3d Cir. 1998)).

Respondent cannot satisfy either the second or third prongs of this test. First, the brunt of the injuries Respondent alleges to have suffered were not in fact experienced in Minnesota. If Respondent has indeed suffered any injuries, the brunt of those injuries were felt in its branch offices in the states where the former employee Appellants worked (and now work for FLS). Nor is there any record support for a finding that the allegedly wrongful conduct was aimed at Minnesota.

The fact that Respondent's principle place of business is in Minnesota is insufficient to confer jurisdiction on the Minnesota courts. As the Minnesota Supreme Court noted in *Griffis*, "courts have consistently refused to find jurisdiction based on *Calder* **merely because the plaintiff was located in the forum state** and therefore felt the effects of the alleged intentional tortious conduct there." 646 N.W.2d at 533 (emphasis added). Similarly, in *Hicklin Eng'g, Inc. v. Aidco, Inc.*, the Eighth Circuit

found that Iowa did not have personal jurisdiction over a Michigan Company that sent allegedly defamatory letters to customers of the Iowa-based plaintiff, where the customers to whom the letters were sent were all located outside of Iowa. 959 F.2d 738, 739 (8th Cir. 1992). As noted in *Griffis*, "foreseeability of injury in the forum state is not enough" and "something more than more effects in the forum state is required." 646 N.W.2d at 534-535.

Respondent's argument is premised upon the assumption – unsupported by any legal authority – that Appellants intended, directed, and caused harm to Respondent within this state in the form of supposed damage to C.H. Robinson's goodwill. Relying solely on the fact that Respondent is headquartered in this state, it argues that if Appellants intended to cause harm to Respondent that harm necessarily was "aimed at Minnesota by FLS and the FLS Officer Appellants" and that any harm presumed to have flowed from such alleged tortious action necessarily was felt primarily in Minnesota. (Resp. Br., p. 44.) This flawed argument is premised upon the assumption that the "goodwill" of C.H. Robinson is property that resides in Minnesota and that damage to goodwill can, in turn, satisfy the *Griffis/Calder* effects test. The district court properly rejected this novel argument. Indeed, to accept Respondent's argument would be to hold that the demanding *Griffis/Calder* effects test may be automatically satisfied for all out-of-state tortious conduct involving any company that also happens to conduct activities in states beyond the state in which it is headquartered.[7]

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[7] Respondent ineffectively and misleadingly over-reaches by suggesting that the mere filing in Minnesota of "Federal criminal charges" somehow constitutes evidence

There is no direct, causal relationship between Respondent's claims and any activity in or directed at Minnesota by FLS or its officers. The district court, accordingly, properly concluded that the *Griffis/Calder* test was not satisfied.

D. The District Court Correctly Rejected Respondent's Conspiracy-Based Jurisdiction Argument

The district court correctly ruled that the conspiracy-based theory of personal jurisdiction does not provide jurisdiction over the Appellants. "To establish personal jurisdiction based on a conspiracy theory, [a plaintiff] must show '(1) the existence of a conspiracy; (2) the nonresident's participation in or agreement to join the conspiracy; and (3) an overt act taken in furtherance of the conspiracy within the forum's boundaries.'" *Personalized Brokerage Srvs., LLC v. Lucius*, 2006 WL 208781 at *5 (D. Minn. Jan. 26, 2006) (Respondent's Add. 57) (quoting *Remmes v. Int'l Flavors and Fragrances, Inc.*, 389 F. Supp.2d 1080, 1095-96 (N.D. Iowa 2005)). The district court correctly ruled that Respondent could not meet the third element of this test because the Complaint does not allege that any of the defendants engaged in an overt act in furtherance of the conspiracy within Minnesota's boundaries. (October 8 Order at pp. 15-16.)

Respondent argues that because its alleged confidential information and customer goodwill are supposedly located in Minnesota, conspiracy jurisdiction is appropriate.

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establishing that the brunt of harm alleged to have been suffered by Respondent *from the acts of Appellants* occurred within this state. Respondent cites no legal authority for this proposition. More importantly, Respondent fails to acknowledge that the "Federal criminal charges" were only filed against Fred Rand, who is not one of the Appellants.

(Resp. Br. at 42.) Even if this were true,[8] those circumstances do not equate to an overt act by any of the defendants in furtherance of an alleged conspiracy. *See Northwest Airlines, Inc. v. Friday*, 617 N.W.2d 590, 593 (Minn. Ct. App. 2000) (holding that when a defendant sent allegedly defamatory e-mails from her computer in Washington to individuals in Minnesota, the defendant acted in Washington, not Minnesota); *Bible & Gospel Trust, and Brethren v. Richard Wyman,* 354 F. Supp.2d 1025, 1029 (D. Minn. 2005) (holding that defendant's "act" in maintaining an allegedly defamatory website was committed in Winnipeg where his computer was located, not in site's host state of Minnesota); *Peterson v. Wallace*, Civ. No. 08-1126, 2008 WL 5172808 (D. Minn. Dec. 10, 2008) (Supp. Add. 13) (making telephone calls to individual in Minnesota is not an overt act in Minnesota sufficient to support conspiracy-based jurisdiction); *Pres-Kap, Inc. v. System One, Direct Access, Inc.*, 636 So.2d 1351, 1353 (Fl. Ct. App. 1994) (a New York defendant's use of a computer terminal in New York to access plaintiff's computer system, which was located in Florida, was insufficient to confer personal jurisdiction on the defendant in Florida).[9]

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[8] This assertion strains both common sense and common language usage. A company's goodwill is intangible. To the extent it can be located anywhere, it is located in the states where the customers are located, not the location of the company's headquarters. Similarly, it is a legal fiction to say that Respondent's confidential information and trade secrets are located in Minnesota. Such information may be located on a computer server in Minnesota, but it is also located in every state in which one of Respondent's employees accesses and uses the information, prints off the information, or simply learns and retains the information.

[9] In this argument, Respondent again ineffectively points to the criminal indictment of Fred Rand. The indictment makes clear that Fred Rand was in Mississippi, not Minnesota, when he allegedly engaged in wrong-doing. At most, such an indictment

The *Hunt v. Nevada State Bank* case relied upon by Respondent is easily distinguishable. In *Hunt*, a meeting of several alleged conspirators took place in St. Paul, Minnesota. 172 N.W.2d 292, 311 (Minn. 1969).[10] In contrast, conspiracy-based jurisdiction over the Appellants is inappropriate in this case because none of the defendants are alleged to have engaged in any overt act within Minnesota's boundaries in furtherance of the conspiracy. *See, e.g., Peterson v. Wallace*, 2008 WL 5172808 at * 8 (dismissing argument of conspiracy-based jurisdiction because neither of alleged conspirators "was physically located [in Minnesota] nor did either of them engage in an act in Minnesota in furtherance of the alleged conspiracy.")

Respondent's argument should also be rejected because the first two elements required to establish conspiracy-based jurisdiction cannot be met.[11] The conspiracy allegation in the Complaint is a bare-bones, general allegation that does not identify any particular connection to Minnesota. (Complaint ¶¶ 112-116 (App. 35).) This broad allegation, without reference to a specific Minnesota connection, is insufficient to

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demonstrates an allegation by the U.S. Attorney that Fred Rand has sufficient contacts with Minnesota to be subject to jurisdiction in Minnesota.

[10] Respondent relies on *Hunt* for the proposition that all that is needed to establish conspiracy-based jurisdiction in Minnesota is that the conspiracy have an effect in Minnesota. This proposition overstates the holding in *Hunt*, where the Minnesota Supreme Court relied on more than the mere "effects" of an alleged conspiracy in holding that jurisdiction over the conspirators comported with due process. Moreover, to the extent that personal jurisdiction may be based on "effects" of a conspiracy in Minnesota, the Court must look to the *Griffis/Calder* test to determine whether a tort has had an "effect" within Minnesota. As explained in section II(C) of this brief, Respondent cannot satisfy this test.

[11] The district court erred in finding that these two elements were satisfied.

establish conspiracy-based jurisdiction. *BTC-USA Corp. v. Novacare*, Civ. No. 07-3998, 2008 WL 2465814 (D. Minn. 2008) (Supp. Add. 8) ("In order to properly assert a claim of conspiracy, the plaintiff must allege specific facts suggesting that there was a meeting of the minds between the conspiring parties"); *First Chicago Int'l v. United Exchange Co., Ltd.*, 836 F.2d 1375, 1378-9 (D.C. Cir. 1998) (internal quotations omitted) ("a plaintiff 'must allege specific acts connecting [the] defendant with the forum,' and that the 'bare allegation' of conspiracy or agency is insufficient to establish personal jurisdiction").

Furthermore, conspiracy-based jurisdiction is inappropriate because the Complaint does not alleged an actionable conspiracy. A conspiracy requires a plurality of actors. *Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 752, 769 (1984). "[O]fficers or employees of the same firm do not provide the plurality of actors imperative for a … conspiracy." *Id.*; *see also Pink Supply Corp. v. Herbert, Inc.*, 788 F.2d 1313, 1316 (8th Cir. 1986) ("A corporation cannot, for example, conspire with its own officers and employees"). In this case, all of the individual defendants are employees or former employees of the sole corporate defendant, FLS, and all of the conduct the individual defendants are alleged to have engaged in was in connection with their employment with FLS. As a matter of law, based on the facts alleged in the Complaint, there can be no conspiracy. *See Copperweld Corp.*, 467 U.S. at 769; *see also Phoenix Renovation Crop. v. Rodriguez*, 461 F. Supp.2d 411, 429 (E.D. Va. 2006) ("a conspiracy cannot exist if Defendants were agents of the same principle acting within the scope of agency"); *Stock v. Heiner*, 696 F. Supp. 1253 (D. Minn. 1988) (dismissing conspiracy claims against

corporate defendants and their agents as a matter of law because "under Minnesota law, a corporation cannot conspire with itself").

Respondent cannot demonstrate the necessary elements to establish conspiracy-based jurisdiction over the Appellants. The district court correctly rejected this argument.

E. The District Court Committed Legal Error In Holding That the Forum Selection Clauses Are Enforceable and Provide a Valid Basis For the Exercise of Jurisdiction

Respondent fails to effectively rebut Appellants' arguments demonstrating that the forum selection clauses are not enforceable under Minnesota law. Minnesota law requires that when the validity of a forum selection clause is challenged, the court must engage in a case-by-case determination of whether the forum selection clause is reasonable. *Hauenstein & Bermeister, Inc. v. Met-Fab, Indus., Inc.*, 320 N.W.2d 886, 890 (Minn. 1982). The district court committed legal error by not engaging in a fact-specific analysis related to the forum-selection clauses at issue. Similarly, Respondent does not even attempt to make an argument that the forum selection clauses in these Confidentiality and Noncompete Agreements ("CNAs") are fair and reasonable under the facts and circumstances presented here. Rather, Respondent discounts the analytical factors set forth in *Hauenstein* and the particular facts at issue in favor of technical definitions and factually distinguishable case law. That is the wrong approach. Under *Hauenstein*, these forum selection clauses are not enforceable and do not provide valid consent to the exercise of jurisdiction by Minnesota courts.

The reason Minnesota courts generally enforce forum selection clauses is that "persuasive public policy reasons exist for enforcing a forum selection clause in a

contract freely entered into by parties who have negotiated at arm's length." *Hauenstein*, 320 N.W.2d at 889. However, in *Hauenstein,* the Minnesota Supreme Court recognized that there may be cases where it is unfair and unreasonable to enforce a forum selection clause. This is one of those cases.

Respondent argues that the CNAs are not contracts of adhesion because they are not agreements for a public service and they do not meet certain technical definitions of a contract of adhesion. (Resp. Br. 22.) Minnesota courts do not always confine the term "contract of adhesion" to the narrow definitions recited by Respondent. *See Folsom v. MPM Signs, L.L.C.*, No. C5-00-967, 2000 WL 1780282 (Minn. Ct. App. 2000) (Supp. Add. 1) ("Great disparity in bargaining power or lack of an opportunity to negotiate, coupled with a take-it-or-leave-it offer, may constitute an adhesion contract"); *Lyon Fin. Servs., Inc. v. Film Funding, Inc.*, No. C4-00-1978, 2001 WL 506928 (Minn. Ct. App. 2001) (Supp. Add. 5) ("an adhesion contract is a 'take-it-or-leave-it' contract that is the product of the parties' unequal bargaining power").[12]

More importantly, the Court in *Hauenstein* did not apply the technical definitions recited by Respondent. Rather, the *Hauenstein* Court set forth several factors that must be analyzed in determining whether a contract is a contract of adhesion for purposes of enforcing the forum-selection clause. Those factors include whether the contract is a boilerplate agreement offered on a take-it-or-leave-it basis, whether there was a great

[12] In other contexts, Minnesota courts have noted that insurance contracts are contracts of adhesion. *Vierkant v. Amco Ins. Co.*, 543 N.W.2d 117, 120 (Minn. Ct. App. 1996) ("Insurance contracts are contracts of adhesion between parties not equally situated."); *Canadian Universal Ins. Co. v. Fire Watch, Inc.*, 258 N.W.2d 570, 574-75 (Minn. 1977).

disparity in bargaining power, whether there was any real opportunity for negotiation, whether the contract was part of an arm's length transaction between persons having business experience, and whether the goods or services being contracted for could have been obtained elsewhere. *Hauenstein*, 320 N.W.2d at 891.

As Appellants demonstrate in their opening brief, the facts in this case demonstrate that all of the *Hauenstein* factors are met here and that the CNAs at issue are contracts of adhesion.[13] First, Respondent does not dispute that the CNAs here are identical boilerplate, take-it-or-leave-it agreements that were not negotiated by the parties. Rather, Respondent simply argues that these factors, alone, are not enough to make the forum selection clauses unenforceable. (Resp. Br. 22.) As a general matter, this is true; however, the other *Hauenstein* factors indicating unenforceability are also present here. There was a great disparity of bargaining power between the parties because the former employees were financially dependent on Respondent for their continued employment. The fact that, more than four years after their employment began, these Appellants were required to sign the CNAs and agree to a forum for litigation of disputes more than 900 miles away from their homes, demonstrates that C.H. Robinson took unfair advantage of this disparity in bargaining power. *See National Recruiters, Inc. v. Cashman*, 323 N.W.2d 736, 741 (Minn. 1982) ("[t]he practice of not telling prospective employees all of the conditions of employment until after the

[13] *See* Appellants' Opening Brief, at pp. 36-41.

employees have accepted the job . . . takes undue advantage of the inequality between the parties").[14]

Likewise, this is also not a case where both parties to the contract were sophisticated business persons. These Appellants were not high-level employees of C.H. Robinson, but rather were "transportation sales employees" who worked in Respondent's branch offices. (Complaint ¶¶ 25, 26, and 32 (App. 11-12).) *See Alpha Systems Integration, Inc. v. Silicon Graphics, Inc.*, 646 N.W.2d 904, 910 (Minn. Ct. App. 2002) (distinguishing an employer-employee relationship from a business-to-business relationship and citing with approval *Nelson v. Master Lease Corp.*, 759 F. Supp. 1397, 1401-02 (D. Minn. 1991)). Finally, the "goods and services" Casillas, Geghan and Winkler received in exchange for signing the agreements – the ability to continue their

[14] The fact that Casillas, Geghan, and Winkler were required to sign the CNAs, as a condition of employment, several years after their employment began is highly relevant because it demonstrates the disparity of bargaining power between the parties and the fact that the CNAs were not freely-negotiated agreements. (Resp. Br. 23-24.) Furthermore, contrary to C.H. Robinson's argument, the consideration of this fact, along with the other factors in this case, is not tantamount to holding that forum selection clauses in noncompete agreements are *per se* invalid. For one, many noncompete agreements are properly presented to employees before their employment begins so that, unlike the situation here, the employees are aware of all the conditions of employment before accepting the job. *See National Recruiters, Inc. v. Cashman*, 323 N.W.2d 736, 741 (Minn. 1982). Furthermore, the *Hauenstein* analysis requires a fact-specific, case-by case determination. Any holding that the forum selection clauses at issue here are unenforceable is a case-specific holding – not a *per se* rule. While forum selection clauses in employment agreements that select a forum away from where the employee worked may be unenforceable in some cases, there will be other cases when such clauses are reasonable under the circumstances.

jobs with C.H. Robinson – could not readily be obtained elsewhere.[15] The former employees would likely have faced significant economic hardship had they lost their employment as a result of not signing the CNAs. All of the *Hauenstein* factors indicating a contract of adhesion with an unreasonable and unenforceable forum selection clause are present in this case.

The forum selection clauses contained within the CNAs are also otherwise unreasonable for several reasons, as previously addressed by Appellant in its opening brief, including: 1) public policy prohibits the use of such clauses to vex, harass, or oppress a defendant; 2) the clauses are inconsistent with Minnesota's public policy of disfavoring noncompetition agreements;[16] and 3) the inclusion of the clause in Appellant

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[15] Unlike the *Carnival Cruise Lines, Inc.,* case cited by Respondent, the loss of one's employment as a result of not signing a boilerplate agreement presents risks of severe economic hardship. The loss of one's employment is far more similar to the loss of a public necessity than to the loss of ability to engage in certain entertainment, such as a cruise. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

[16] Contrary to Respondent's contention, Appellants do not contend that forum selection clauses in all noncompetition agreements are *per se* unenforceable, only that, like other aspects of a noncompetition agreement, they must be carefully scrutinized and only enforced to the extent that they are necessary to protect a legitimate business interest and do not impose an undue burden on the employee.

Winkler's agreement violates Louisiana law.[17] *See* Appellants' Opening Brief, at pp. 41-43.

Respondent wrongly asserts that "Appellants have failed to cite even a single decision in which a court refused to enforce a forum selection clause on facts similar to those in this case." (Resp. Br. 20.) This is not true. In *Nelson v. Master Lease Corp.*, 759 F. Supp. 1397, 1401-02 (D. Minn. 1991), the court refused to enforce the forum selection clause in an employment agreement because the court found that the clause was not freely negotiated and resulted from the employer's unfair bargaining power. Although the *Nelson* decision arose in the context of a motion to transfer venue, its reasoning is even more compelling in the context of personal jurisdiction, which implicates constitutional due process considerations.[18] Moreover, the factors relied upon by the court in *Nelson* in refusing to enforce the forum selection clause are the same

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[17] Respondent argues that the fact that it required a Louisiana employee to agree to a contract provision that is "null and void" under Louisiana law is irrelevant to the determination of whether the forum selection clause is "otherwise unreasonable" under *Hauenstein.* This is simply not true. Although Minnesota law governs whether Minnesota courts have jurisdiction, under *Hauenstein*, Minnesota courts may analyze the reasonableness of a forum selection clause and can give deference to the Louisiana policy that states that, in Louisiana, forum selection clauses in noncompetition agreements are null and void. Louisiana has far more connections to the employment relationship between Winkler and C.H. Robinson than does Minnesota, and its laws regarding employment contracts with Louisiana employees should not be simply ignored. A contract provision that is "null and void" in the state in which it was entered into by one of the parties should not be considered as a valid consent to the jurisdiction of another state.

[18] In footnote 5 of its brief, Respondent argues that *Nelson* is inapposite because *Nelson* involved a motion to change venue, not a motion to dismiss for lack of personal jurisdiction. Beyond not being a material distinction here, this argument is also

factors that must be considered under the *Hauenstein* test. In *Nelson* the forum selection clause was not given substantial weight in the change of venue analysis because it was not freely negotiated and resulted from a disparity in bargaining power between an employer and mid-level employee. Similarly, here, the forum selection clause in the CNAs of Casillas, Geghan, and Winkler should not be considered valid consent to the jurisdiction because the CNAs were not fairly bargained for at arm's length and clearly resulted from Respondent's unequal bargaining power.[19]

Based on all of the facts and circumstances in this case, the choice of forum clauses are unenforceable under the *Hauenstein* test and do not provide a valid basis for a Minnesota court to exercise personal jurisdiction over Casillas, Geghan, and Winkler.

F. Dismissal on the Grounds of Forum Nonconveniens Is Appropriate

In arguing against application of the doctrine of *forum non conveniens*, Respondent recites the appropriate public interest factors, but ignores the other half of the *forum non conveniens* test – the private interest factors. (Resp. Br. 45-48.) In applying the doctrine of *forum non conveniens*, "[t]he trial court must balance a series of public and private interest factors." *Bergquist v. Medtronic*, 379 N.W.2d 508, 511 (Minn.

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inconsistent with Respondent's strong reliance on change of venue cases, in section IV(C) of its brief.

[19] In contrast to *Nelson*, the federal court cases cited by Respondent should be given little weight because those courts did not apply the *Hauenstein* test or carefully consider the factors set forth in the *Hauenstein* test. *See Medtronic, Inc. v. Endologix, Inc.*, 530 F. Supp.2d 1054, 1058-59 (D. Minn. 2008) (enforceability of forum selection clauses not challenged by employee defendants); *ELA Med., Inc. v. Arrhythmia Mgmt. Assoc.*, 2007 WL 892517 (D. Minn. March 21, 2007) (Add. 45) (*Hauenstein* factors not considered in addressing enforceability of forum selection clause in noncompetition agreement);

1986). As explained in the Appellants' opening brief, the private interest factors, including questions related to enforceability of judgments, location of witnesses, and sources of proof, favor application of *forum non conveniens. See* Appellants' Opening Brief, pp. 43-49.

Respondent's arguments related to the public interest factors are also flawed. In arguing that the first, third, and fourth public interest factors are satisfied, Respondent makes the conclusory and factually-dubious assertion that Minnesota "is the focal point of this litigation." (Resp. Br. 46.) Contrary to Respondent's assertion, the Complaint does not allege that the Appellants (or any of the defendants for that matter) engaged in any alleged misconduct *in the state of Minnesota.* Rather, the alleged conduct all took place outside of Minnesota, in the states where the former employee Appellants worked for C.H. Robinson and now work for FLS. The fact that Respondent has its corporate headquarters in Minnesota is the only thing "connecting" this lawsuit to Minnesota at all. Indeed, the district court's rejection of Respondent's arguments for jurisdiction under the *Griffis/Calder* "effects" test and under the conspiracy theory reflect the court's conclusion that the connections to Minnesota in this case are tenuous at best.

Although Minnesota courts have an interest in providing a forum to injured citizens, Minnesota courts also have an interest in ensuring that its courts and citizens are not forced to bear the costs and administrative burdens of litigation that is not truly related to this forum. The Minnesota Supreme Court has noted that "jury duty is a

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Guidant Sales Corp. v. George, 2001 WL 1491317 at *4, 6 (D. Minn. Nov. 19, 2001) (same) (Respondent's Add. 40).

burden that ought not to be imposed upon the people of a community which has no relation to the litigation" and that there is a "local interest in having localized controversies decided at home." *Bergquist,* 379 N.W.2d at 512, n.4. C.H. Robinson is an international corporation with offices throughout the country and world. It is subject to the laws of the states and countries where it does business. The taxpayers and courts of Hennepin County should not be required to bear the burden of litigation based entirely on the company's out-of-state business operations. Those concerns are even more heightened in times when our judicial system is suffering from acute budget deficiencies.

Respondent also severely discounts the complicated choice of law analyses that will be involved if this case remains in Minnesota. Without any legal authority, Respondent asserts that "there is no basis for the Court to apply the substantive laws of states other than Minnesota with respect to Plaintiff's statutory and common law claims against Defendants." (Resp. Br. 47.) This is simply not true. All of the conduct the Appellants are alleged to have engaged in took place in states other than Minnesota. In cases like this, courts must engage in a choice of law analysis to determine which state's laws apply. *See, e.g., Jepson v. Gec. Cas. Co. of Wisc.,* 513 N.W.2d 467, 469-473 (Minn. 1994) (applying choice of law analysis). Although the employment contracts in question contain choice of law clauses, the district court will have to determine whether the choice of law clauses are enforceable in light of the public policies of the states where the former employee Appellants worked, which laws disfavor noncompetition agreements. *See* Appellants' Opening Brief, at pp. 47-48. Furthermore, even if Minnesota law applies to some of the contract claims, which Appellants do not concede, the district court will still

have to determine which state's laws apply to the eight non-contract claims Respondent has asserted against the Appellants.

Respondent's 116-Count Complaint essentially lumps together eight separate cases for violation of eight separate noncompete agreements and other claims. The former employee Appellants worked in various states across the country and were terminated from or quit their employment with C.H. Robinson at various times between 2005 and 2007. If Respondent wants to attack FLS's alleged strategy of targeting former employees of Respondent for hire (which is not a legally actionable claim in Minnesota), it can do that in any of the states where FLS has operations. If it wants to sue the former employee Appellants for breaches of their employment agreements and other obligations to Respondent, it can do that in the states where it employed those Appellants. It creates an unnecessary burden on this Court, and on all the parties, to lump these eight separate cases into a single lawsuit in a state with a tenuous, at best, connection to any of the alleged misconduct, merely for the extreme benefit of Respondent. Accordingly, even if, for the sake of argument, the Court was to determine that it could constitutionally exercise jurisdiction over some of the Appellants, this is a classic case warranting *forum non conveniens* dismissal. *See, e.g., Aware v. Ramirez-Mireles*, No. 011134BLS, 2001 WL 755822, *1 (Mass. Super. 2001) (Add. 43) (dismissing on *forum non conveniens* grounds a case brought by an employer in its home state which case involved claims against a former employee who had worked for employer in a different state).

III. CONCLUSION

For all of the reasons stated herein and those set forth in Appellants' opening brief,

Appellants respectfully request that this Court reverse the district court's determinations that jurisdiction exists over the Appellants and dismiss Respondent's Complaint as to each of the Appellants. It would violate constitutional due process requirements to forcibly hale into the courts of Minnesota out-of-state (and out-of-country) parties with such minimal connections to this state.

Dated: April 20, 2009.

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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132 for a brief produced with proportional font and typeface in 13-point Times New Roman using Microsoft Word 2003.

The length of this brief is 6,895 words, excluding the Table of Contents, Table of Authorities, caption and signature block.

Dated: April 28, 2009.

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