MINNESOTA STATE LAW LIBRARY

3

NO. A11-851

State of Minnesota
In Court of Appeals

In re John Ward Gillman
Engraved June 20, 1775 Copper Printing Plate:

State of New Hampshire,

Appellant,

vs.

Gary Eldon Lea,

Respondent,

vs.

Heritage Auctions, Inc.,

Defendant.

BRIEF AND APPENDIX OF APPELLANT STATE OF NEW HAMPSHIRE

Bennett A. Myers, Esq.
BOSSHARD AND PARKE, LTD.
P.O. Box 96
505 King Street, Suite 334
La Crosse, WI 54603-0966

Attorney for Respondent Gary Eldon Lea

Richard Brainerd, Esq.
3500 Maple Avenue
Dallas, TX 75219

Attorney Defendant Heritage Auctions, Inc.

Michael A. Delaney
New Hampshire Attorney General
Peter C.L. Roth (*pro hac vice*)
Senior Assistant Attorney General
Environmental Protection Bureau
33 Capitol Street
Concord, NH 03301-3679
(603) 271-3679

Attorneys for Appellant State of New Hampshire

2011 – BACHMAN LEGAL PRINTING – FAX (612) 337-8053 – PHONE (612) 339-9518 or 1-800-715-3582

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).

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. CONCISE STATEMENT OF THE LEGAL ISSUE 1

II. STATEMENT OF THE CASE AND FACTS 1

A. Procedural Posture and Disposition 1

B. Factual Background 3

III. ARGUMENT 7

A. The Court Should Review The District Court's Conclusions Of Law De Novo 7

B. The District Court Should Have Dismissed The Case Against The State Of New Hampshire For Lack Of Personal Jurisdiction 7

1. The District Court's Decision 8

2. The District Court Erred In Finding That This Case Was Pure In Rem 9

3. The District Court Erred In Not Determining Whether Jurisdiction Over New Hampshire Comported With Due Process 11

4. This is the "Unusual" Case In Which The State Where the Property Is Located Does Not Have Jurisdiction Over Its Owner 15

5. The Court Should Not Have Followed *Cable News Network* Because Its Holding Does Not Comport With Due Process 16

IV. CONCLUSION 19

TABLE OF AUTHORITIES

Cases **Page**

Applewhite v. Metro Aviation, Inc., 875 F.2d 491 (5th Cir. 1989) 18

Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminum Factory", 283 F.3d 208 (4th Cir. 2002) 18

Bearden v. Byerly, 494 So.2d 59 (Ala. 1986) 18

Beter v. Intrepid Holdings, Inc., 2009 WL 1444144 (Minn. App. 2009) 7

Brennan v. Roman Catholic Diocese of Syracuse, New York, Inc., 575 F. Supp. 2d 1256 (M.D. Fla. 2008) 18

Cable News Network L.P. v. CNNews.com, 162 F. Supp. 2d 484 (E.D. Va. 2001) 17

Camacho v. Todd and Leiser Homes, Inc., 2004 WL 2940812 (Minn. App. 2004) 7

Curtis v. Altria Group, Inc., 792 N.W.2d 836 (Minn. App. 2010) 7

Elliot & Callan, Inc. v. Crofton, 2009 WL 3297506 (D. Minn. Oct. 13, 2009) 14

FleetBoston Financial Corp. v. Fleetbostonfinancial.com, 138 F. Supp. 2d 121 (D. Mass. 2001) ..... *passim*

Ford Motor Co. v. Greatdomains.com, Inc., 177 F. Supp. 2d 656 (E.D. Mich. 2001) ..... *passim*

Hanson v. Denckla, 357 U.S. 235 (1958) 11

Hunt v. Nevada State Bank, 172 N.W.2d 292 (Minn. 1969) 7

International Shoe Co. v. Washington, 326 U.S. 310 (1945) ..... *passim*

Juelich v. Yamazaki Mazak Optonics Corp., 682 N.W.2d 565 (Minn. 2004) 7, 12

Land-O-Nod Co. v. Bassett Furniture Indus., Inc., 708 F.2d 1338 (8th Cir. 1983) 17

Marshall v. Inn on Madeline Island, 610 N.W.2d 670 (Minn. Ct. App. 2000) 12

Mattel, Inc. v. Barbie-Club.com, 2001 WL 436207 at *2 (S.D.N.Y. 2001) 17

McGee v. International Life Ins. Co., 355 U.S. 220 (1957) 11

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 9-10

Pennoyer v. Neff, 95 U.S. 714 (1877) 13

Pittsburgh Terminal Corp. v. Mid Allegheny Corp., 831 F.2d 522 (4th Cir. 1987) 18

Rush v. Savchuk, 444 U.S. 320 (1980) 12, 17

Savchuk v. Rush, 272 N.W.2d 888 (Minn. 1978) 12, 14

Shaffer v. Heitner, 433 U.S. 186 (1977) ..... *passim*

Shamrock Develop., Inc. v. Smith, 754 N.W.2d 377 (Minn. 2008) 13

State v. Continental Forms, Inc., 356 N.W.2d 442 (Minn. App. 1984) 14, 17

State v. Northwestern Nat'l Bank of Minneapolis, 18 N.W. 2d 569 (Minn. 1945) 13

Sterling Consulting Corp. v. Indian Motorcycle Trademark, 1997 U.S. Dist. LEXIS 21301, 2-3 (D. Colo. Sept. 5, 1997) 18

Torgelson v. Real Property Known as 17138 880th Ave., Renville County, Minnesota, 734 N.W.2d 279 (Minn. App. 2007) 14

Tyler v. Court of Registration, 175 Mass. 71 (1900) 9

West American Ins. Co. v. Westin, Inc., 337 N.W.2d 676 (Minn. 1983) 14

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) 11

Statutes **Page**

Minn. Stat. (2010) c. 518-C 8

Minn. Stat. (2010) § 518-C.314 8

Minn. Stat. (2010). § 543.19 8

1844 N.H. Laws c. 180 (Dec. 11. 1844) 5

1845 N.H. Laws c. 281 (June 1845) 5

1849 N.H. Laws c. 895 5

1850 N.H. Laws c. 1018 ..... 5, 6

1852 N.H. Laws c. 1332 6

N.H. Rev. Stat. c. 5, 6, & 11 (1842) 4

N.H. Rev. Laws c. 7 (1926) 4

N.H. Rev. Laws c. 12 (1942) 4

N.H. Rev. Laws c. 15, § 16 (1926) 4

N.H. Rev. Stat. Ann. 5:19 4

N.H. Rev. Stat. Ann. 5:29, V 3

N.H. Rev. Stat. Ann. 8:19 (1955 & Supp. 1970) 4

N.H. Rev. Stat. Ann. 20:10 4

N.H. Rev. Stat. Ann. 21-I:11 4

N.H. Rev. Stat. Ann. c. 546-B 8

N.H. Rev. Stat. Ann. 546-B:25 8

Rules **Page**

Minn. R. App. Proc. 103.03 7

Other Authorities **Page**

N.H. Const., Part 1, Article 8 3

N.H. Const. Part 2, Article 68 3

I. CONCISE STATEMENT OF THE LEGAL ISSUE

The State of New Hampshire, by and through its attorneys, the New Hampshire Office of the Attorney General, moved the District Court for Fillmore County to dismiss Petitioner's Petition for Declaratory Judgment and Amended Complaint pursuant to Minnesota Rules of Civil Procedure, Rule 12.02, for lack of personal jurisdiction, and lack of subject matter jurisdiction. In an Order and Memorandum, entered March 7, 2011, the District Court, (Benson, J.) denied the State's motion holding that personal jurisdiction was not necessary in an *in rem* action. The State moved the District Court on March 11, 2011, for rehearing and the District Court upheld its original order on March 23, 2011. The State filed a timely notice of appeal on May 9, 2011.

The Appellant relies upon, among others, the following principal cases:

1. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945);
2. *Shaffer v. Heitner*, 433 U.S. 186 (1977).

The following are the most apposite Constitutional and statutory provisions:

1. United States Constitution, Amendment XIV, Due Process Clause;
2. Minnesota Statutes (2010) § 543.19.

II. STATEMENT OF THE CASE AND FACTS

A. Procedural Posture and Disposition

Gary Eldon Lea (the "Respondent"), a Minnesota resident, brought a Petition for Declaratory Judgment naming the State of New Hampshire as an "interested party" (the "Petition") in the District Court for Fillmore County, Minnesota (the "District Court") on

August 13, 2010. App. at 1. On September 9, 2010, the Respondent filed an Amended Complaint with the District Court, naming the State of New Hampshire as a "defendant" (the "Amended Complaint"). App. at 18. The Petition, the Amended Complaint, and a Summons were served in hand upon the State of New Hampshire at the Office of the Attorney General on September 22, 2010. App. at 37.

The Petition and the Amended Complaint sought a declaratory judgment that Respondent was the "sole and proper owner" of a certain John Ward Gilman engraved June 20, 1775 copper printing plate that had been produced by the pre-revolutionary Provincial Government of the New Hampshire Colony (the "John Ward Gilman Plate"), which the Respondent had purchased in an estate sale in Minnesota in 2009. App. at 2-6, 18-21. The Respondent also sought through the Petition and the Amended Complaint to "deny[] and extinguish[]" any claims by third parties as to ownership of the John Ward Gilman Plate. App. at 6, 21.

On November 30, 2010, the State of New Hampshire filed a Notice of Motion and Motion to Dismiss. App. at 38. On December 21, 2010, the State of New Hampshire filed a Memorandum of Law in Support of its Motion to Dismiss. App. at 41. The State of New Hampshire asserted a lack of personal jurisdiction over it and a lack of subject matter jurisdiction because of the State of New Hampshire's sovereign immunity. The State of New Hampshire submitted a Reply Memorandum of Law to the District Court on January 12, 2011. App. at 84. In the Reply, the State of New Hampshire argued the inapplicability of Minnesota's long-arm statute, the lack of minimum contacts such as to satisfy due process of law, the lack of *in rem* jurisdiction without due process through minimum contacts and

personal jurisdiction, and sought an exercise of comity from the Minnesota courts for the State of New Hampshire's sovereignty. App. at 86-92.

The Respondent filed opposing memoranda. App. at 56, 94.

After a telephonic hearing on January 18, 2011, where the parties presented oral arguments, the District Court denied the State of New Hampshire's motion, and denied a request for a rehearing. App. at 100 ("Order and Memorandum") & at 114 (Letter, from Robert R. Benson, Judge of District Court to New Hampshire Attorney General, et al., dated March 23, 2011 at 2, (the "Letter Decision")). The District Court subsequently heard the Respondent's motion for entry of a default judgment and the State of New Hampshire's opposition thereto but had not ruled on the motion prior to the filing of the Notice of Appeal by the State of New Hampshire.

B. <u>Factual Background</u>

The John Ward Gilman Plate was created by John Ward Gilman, formerly of Exeter, New Hampshire, at the request of and for the Governor and Council of the New Hampshire Colony in or around June 1775, which Gilman used in the service of the Colony to print provincial currency notes in the denominations of 40s, 20s, 6s, and 1s. App. at 52-55. (See Exhibits A & B, true copies of State archival records authorizing and appropriating payment to Gilman for 1775 Copper Printing Plate and Gilman's account itemizing work performed in producing the 1775 Copper Printing Plate). This object is a one of kind colonial antiquity that is a record of the State of New Hampshire. *See* N.H. Const. Part 2, Article 68 ("The records of the state shall be kept in the office of the secretary . . ."); N.H. Const., Part 1, Article 8 (protecting the public's right of access to governmental records); N.H. Rev. Stat. Ann. 5:29, V ("'Record' means . . . other material, regardless of physical form or

characteristics, made or received pursuant to law or in connection with the transaction of official business").

The John Ward Gilman Plate was the property of the Colony and therefore became property of the State of New Hampshire by act of the Fourth Session of the General Court, when the legislature enacted Chapter 1, on September 11, 1776, which transformed the Colony into the State of New Hampshire.

> Whereas by a late Declaration of the Honorable Continental Congress, the United Colonies of North America, are declared Free and Independent States.—
>
> Therefore be it Enacted by the Council and assembly, that henceforth this Colony, assume and take the Name and Stile, of the State of New Hampshire. And where any Law hath directed the Name & Stile of the Colony of New Hampshire, or the Name & Stile of the Province of New Hampshire or the Name & Stile of the Province of New Hampshire to be used in any Commissions, Processes, or Writings whatever; In Lieu thereof shall be now used, the Name & Stile of the State of New Hampshire, & not otherwise.

The State of New Hampshire keeps and manages its property in accordance with statute. *See* N.H. Rev. Stat. Ann. 21-I:11; N.H. Rev. Stat. Ann. 5:19 and 20:10 (providing for the keeping and management of provincial records and documents). Upon information and belief, the removal of the John Ward Gilman Plate was without proper authorization or privilege and contrary to law, and occurred in the 1840s.[1] App. at 12.

In the summer of 2010 the State of New Hampshire became aware that Heritage Auction Galleries, Inc. ("Heritage Auction") had possession of the John Ward Gilman Plate,

---

[1] *See also* N.H. Rev. Stat. Ann. 8:19 (1955 & Supp. 1970); N.H. Rev. Laws c. 12 (1942); N.H. Rev. Laws c. 7 (1926); N.H. Rev. Laws c. 15, § 16 (1926) (secretary of state is keeper of "province records" which shall be kept in vaults of state library or some other place provided by the Governor and Council); N.H. Rev. Stat. c. 5, 6, & 11 (1842) (providing for keeping of State House, State Library and State papers).

and that in all likelihood it had been removed without authorization from the State of New Hampshire's possession at some unknown time. Heritage Auction is a national and international auction house that had advertised to sell the John Ward Gilman Plate to the highest bidder at public auction in Boston, Massachusetts on August 11, 2010, on behalf of the Respondent. Upon request of the State of New Hampshire, App. at 16, the Respondent and Heritage Auction voluntarily agreed to withdraw the John Ward Gilman Plate from the auction.[2] App. at 17.

Neither the Respondent nor Heritage Auction has alleged that they are in possession of any evidence establishing that the John Ward Gilman Plate was obtained by anyone from the State of New Hampshire by lawful means. Despite a diligent search by the State of New Hampshire archivist, the State of New Hampshire has been unable to locate any record showing that the John Ward Gilman Plate was sold or otherwise disposed of by the State of New Hampshire in accordance with law, resolution, or order of any authorized State official. New Hampshire's legislative enactments between 1835 and 1854 contain no record of disposition. Moreover, it is certain that such a record would have been made had a disposal been properly done. *See, e.g.,* 1849 N.H. Laws c. 895 (resolution authorizing the disposal and replacement of the State House north fence); 1850 N.H. Laws c. 1018 (resolution requiring a suitable person to locate and recover missing books from the State Library); 1844 N.H. Laws c. 180 (Dec. 11. 1844) (authorizing the Secretary of State to sell duplicate copies of library books) and 1845 N.H. Laws c. 281 (June 1845) (repealing provision for sale of

[2] The State of New Hampshire believes that when Respondent first initiated this action, Heritage Auction had the John Ward Gilman Plate in its possession in Massachusetts. *See* App. at 3 (*Affidavit of Gary Eldon Lea*, dated 8/13/2010, describing the location of the Copper Plate as in Massachusetts).

duplicate books). In addition, the State of New Hampshire has long shown reverence for its colonial patrimony. *See, e.g.,* 1852 N.H. Laws c. 1332 (resolution requiring Secretary of State to index revolutionary war documents); N.H. Rev. Stats. c. 55:1 (1897) (requiring that certain provincial records be moved from Exeter (location of New Hampshire's first capital) to State Library); 1850 N.H. Laws c. 1018 (relocating missing books resolution).

Other accounts suggest that an unauthorized person with access to the State House in the 1850s removed the John Ward Gilman Plate from a State House vault and delivered it to a noted collector of Colonial specie in Baltimore, Maryland, known as Dr. Joshua Cohen. *See* Heritage Auction Galleries Catalogue, Currency Auction No. 3511, Aug. 11, 2010, at 76, App. at 22-28; *The Cohen Collection of Colonial Paper Money Sold,* THE NUMISMATIST, Feb. 1930, at 86, 87.

The Respondent alleged that the State of New Hampshire has minimum contacts with the State of Minnesota. He claimed that because the State of New Hampshire is a "sister state" with Minnesota, it responded to the Complaint, retained local counsel, and allegedly had previously litigated child support collection cases in Minnesota courts, that it would be reasonable that it might expect to be haled into court here. App. at 65-67.

The State of New Hampshire disputed that it had minimum contacts with Minnesota and in particular with respect to the subject matter of the case. App. at 85-88. The District Court made no finding as a matter of fact or law that the State of New Hampshire had minimum contacts with the State of Minnesota, expressly declining to do so. App. at 102-103, 105.

III. ARGUMENT

A. The Court Should Review The District Court's Conclusions Of Law De Novo.

The standard of review for denial of a motion to dismiss for lack of personal jurisdiction is *de novo*. *Curtis v. Altria Group, Inc.*, 792 N.W.2d 836 (Minn. App. 2010). A district court's order denying a motion to dismiss for lack of personal jurisdiction is "immediately appeal[able] as a determination of right." *Camacho v. Todd and Leiser Homes, Inc.*, 2004 WL 2940812 (Minn. App. 2004) (*citing Hunt v. Nevada State Bank*, 172 N.W.2d 292 (Minn. 1969)); *see also* Minn. Rules App. Proc. 103.03. Because the issue of personal jurisdiction is a question of law, it is subject to *de novo* standard of review. *Beter v. Intrepid Holdings, Inc.*, 2009 WL 1444144 (Minn. App. 2009) (*citing Juelich v. Yamazaki Mazak Optonics Corp.*, 682 N.W.2d 565 (Minn. 2004)). When the defendant challenges personal jurisdiction, the plaintiff has the burden to prove that sufficient contacts exist with the forum state. *Juelich*, 682 N.W.2d at 569-70. Pre-trial, plaintiff's factual allegations and evidence supporting personal jurisdiction are taken as true. *Id.*

B. The District Court Should Have Dismissed The Case Against The State Of New Hampshire For Lack Of Personal Jurisdiction

The State of New Hampshire argued in its Motion to Dismiss that the District Court lacked personal and subject matter jurisdiction because the State of New Hampshire does not have minimum contacts with Minnesota such as to satisfy due process of law. The State of New Hampshire did not cause the John Ward Gilman Plate to be delivered to Minnesota or even allow it to be taken there by others. The State of New Hampshire did not begin the litigation or in any other way purposefully avail itself of the courts of Minnesota with respect to the John Ward Gilman Plate. Moreover, its other contacts with Minnesota are

inconclusive and at best sporadic and completely unrelated to the John Ward Gilman Plate.[3] Indeed, it is by no means clear that Minnesota's long-arm statute by its terms even applies to the State of New Hampshire because the State is not a foreign corporation or non-resident individual. *See* MINN. STAT. (2010) § 543.19 (long-arm jurisdiction applies to non-resident individuals and foreign corporations). The State of New Hampshire is a sovereign.

1. The District Court's Decision

In its Order and Memorandum and the Letter Decision the District Court held that because the Respondent's action was pure *in rem*, it did not require an exercise of personal jurisdiction in order to determine the rights of the State of New Hampshire to the John Ward Gilman Plate. *See* App. at 103, 105 (Order and Memorandum at 3, 5-- declining to analyze personal jurisdiction factors). When the State of New Hampshire sought leave to move for rehearing, it cited *Shaffer v. Heitner*, 433 U.S. 186, 207 (1977) for the proposition that even *in rem* actions after *Shaffer* require minimum contacts for the *in rem* action to satisfy due process. In response, the District Court in the Letter Decision denied the request and reiterated its position that with a pure *in rem* case, *Shaffer* did not require a due process analysis, and that the foundational reasoning in *Shaffer* to the contrary was merely "non-binding dicta." App. at 115, 116.

---

[3] Respondent cited five cases brought between 1981 and 2010 under the Uniform Interstate Family Support Act, N.H. Rev. Stat. Ann. c. 546-B; Minn. Stat. (2010) c. 518-C. App. at 76. Under this uniform act Minnesota support officials brought petitions in Minnesota courts to enforce New Hampshire support orders owed to New Hampshire individuals, upon referrals from New Hampshire officials. The Uniform Acts expressly disclaim that this process will "confer personal jurisdiction over the petitioner in another proceeding." N.H. Rev. Stat. Ann. 546-B:25; Minn. Stat. (2010) § 518C.314. Therefore, even if the Uniform Family Support Act cases were deemed to be brought by the State of New Hampshire as "petitioner", a doubtful proposition itself, the current statutory scheme does not permit the process to be used to confer personal jurisdiction over the State of New Hampshire.

2. The District Court Erred In Finding That This Case Was Pure In Rem.

Pure *in rem* actions include forfeiture, condemnation and escheat, probate, and arrests of vessels in admiralty. *See FleetBoston Financial Corp. v. Fleetbostonfinancial.com*, 138 F. Supp. 2d 121, 132 (D. Mass. 2001). Obviously, the Respondent's lawsuit over the John Ward Gilman Plate does not fit in any of these pure *in rem* categories. A second type of *in rem* proceeding is *quasi in rem* and it involves the allocation of property rights as against particular named persons. *Id. Quasi in rem* actions include actions to remove a cloud on title to land or actions that seek to quiet title against a particular rival's claim. *Id.* A third type of *in rem* action is known as *quasi in rem* type II and it involves primarily attachments to property but not the underlying ownership of the property. *Id.* Using this definitional construct, Respondent's claim fits very easily into the category of *quasi in rem type I*, but not well at all into a true *in rem* or *quasi in rem* type II classes. It was thus an error of law for the District Court to classify the action as one of true *in rem.*

Although the terms to refer to these various types of actions are still used, the distinctions of *in rem*, *quasi in rem*, and *in personam* have lost much of their jurisdictional significance over the past century, "All proceedings, like all rights, are really against persons." *See Tyler v. Court of Registration*, 175 Mass. 71, 76, 55 N.E. 812, 814 (Holmes, C.J.), *appeal dismissed*, 179 U. S. 405 (1900). Fifty years after *Tyler*, the United States Supreme Court in *Mullane v. Central Hanover Bank & Trust Co.,* disapproved of the characterizations of *in rem* and *in personam* jurisdiction stating: "the requirements of the Fourteenth Amendment ... do not depend upon a classification [of *in personam*, *in rem* or *quasi in rem*] for which the standards are so elusive and confused generally and which, being

primarily for state courts to define, may and do vary from state to state." 339 U.S. 306, 312 (1950). Significantly, in *Shaffer*, the Court further dismantled the *in rem* versus *in personam* classification for purposes of determining the extent of state-court jurisdiction over non-residents: "[t]he fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification. Its continued acceptance would serve only to allow state-court jurisdiction that is fundamentally unfair to the defendant." 433 U.S. at 212. The Supreme Court in *Shaffer* reasoned,

> The case for applying to jurisdiction in rem the same test of 'fair play and substantial justice' as governs assertions of jurisdiction in personam is simple and straightforward. It is premised on the recognition that '(t)he phrase, "judicial jurisdiction over a thing", is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing.' ...This recognition leads to the conclusion that in order to justify an exercise of jurisdiction *in rem*, the basis for jurisdiction must be sufficient to justify exercising 'jurisdiction over the interests of persons in a thing.'

Shaffer, 433 U.S. at 207 (internal citation omitted). While the District Court erroneously considered the instant case *in rem*, the interest is really the personal ownership interests of the State of New Hampshire and the Respondent, and in reality those interests fit better into the *quasi in rem* order. For such cases, *Shaffer* requires minimum contacts to ensure due process. 433 U.S. at 208-209. With due process of law being the Constitutional objective, there is no reason not to apply the test in all types of cases, regardless of the "ancient form." The Supreme Court thought it had with *Shaffer* and "nothing that the Supreme Court has done subsequently casts doubt on that holding." *FleetBoston Financial Corp.*, 138 F. Supp. 2d at 133.

3. The District Court Erred In Not Determining Whether Jurisdiction Over New Hampshire Comported With Due Process

The District Court's decision is remarkable for its complete rejection of due process concern. But the Due Process Clause of the United States Constitution requires that however it is styled, the exercise of jurisdiction must be based on minimum contacts by the defendant with the forum state so that the exercise of jurisdiction will be consistent with "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). In addition, personal jurisdiction consistent with due process can be found where the defendant has performed some act "by which [it] purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235 (1958); *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957). Further, the defendant's contacts must be such that the defendant can reasonably anticipate being haled into the forum state's court. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). But if the only link to the forum is the presence of property, jurisdiction is lacking. *Shaffer*, 433 U.S. at 209 ("If those other ties do not exist, cases over which the State is now thought to have jurisdiction could not be brought in that forum.")

The District Court in this case declined to analyze whether its exercise of jurisdiction met any part of this essential landmark standard. Nevertheless, courts in Minnesota use the following factors to determine whether jurisdiction is proper and within traditional notions of fair play and substantial justice: (1) the quantity of the contacts with the forum state; (2) the nature and quality of the contacts; (3) the source and connection of the cause of action with these contacts; (4) the interest of the state in providing a forum; and (5) the convenience of

the parties. *See, e.g., Juelich v. Yamazaki Mazak Optonics Corp.*, 682 N.W.2d 565, 570 (Minn. 2004); *Vikse v. Flaby*, 316 N.W.2d 276, 282 (Minn. 1982); *Marshall v. Inn on Madeline Island*, 610 N.W.2d 670, 674 (Minn. Ct. App. 2000). The District Court, however, found that it was unnecessary to worry about due process for the State of New Hampshire because it erroneously concluded as a matter of law that this was a "pure *in rem*" action to which such concerns had no application and because of its dismissal of *Shaffer's* essential reasoning as "unnecessary ... non-binding dicta." App. at 103 (Order and Memorandum at 3): App at 115, 116 (Letter Decision). However, the United States Supreme Court in *Shaffer* rejected essentially the same "cryptic" analysis and concluded that "the standard for determining whether an exercise of jurisdiction over the interests of persons is consistent with the Due Process Clause is the minimum-contacts standard elucidated in *International Shoe*." 433 U.S. at 195 & n. 11, and 207.

The District Court's flawed analysis is similar to that undertaken in *Savchuk v. Rush*, 272 N.W.2d 888, 892-93 (Minn. 1978). There the Court relied on the *in rem* nature of the dispute, the guarantee of notice under the sequestration statute, the policy of providing a forum to local parties, and certain other jurisprudential safeguards, to obviate the need for a thorough minimum contacts analysis. *Id.* at 891-93. The United States Supreme Court reversed. *Rush v. Savchuk*, 444 U.S. 320 (1980). In its holding, the United States Supreme Court upheld a broader view that *Shaffer* requires all assertions of state-court jurisdiction to be supported by minimum contacts analysis consistent with due process so as not to offend traditional notions of fair play and substantial justice. *Id.* at 327. *See also Savchuk*, 272 N.W.2d at 893-96 (Otis, J. dissenting). The District Court should have found that a the state statute authorizing jurisdiction in an *in rem* action alone, without a due process analysis was

not enough to subject a non-resident defendant to its jurisdiction, even in a "true *in rem*" case.

Instead, the District Court relied upon a 1945 Minnesota decision. App. at 105 (Order and Memorandum at 5, citing *State v. Northwestern Nat'l Bank of Minneapolis*, 18 N.W.2d 569 (Minn. 1945)). *Northwestern Nat'l* involved a pure *in rem* question of the State's right to escheat abandoned deposits of a bank. *Id.* at 481-82. For the proposition quoted by the District Court, however, *Northwestern Nat'l* garners its authority from a case that relies upon *Pennoyer v. Neff*. *See Northwestern Nat'l Bank*, 18 N.W.2d at 576 (quoting *First Trust Co. of St. Paul v. Matheson*, 246 N.W. 1 (1932)); *Matheson*, 246 N.W. at 2-3 (citing *Pennoyer v. Neff*, 95 U.S. 714 (1877) for proposition that territorial jurisdiction over things and compliance with the statute on service is all that is required); App. at 105 (Order and Memorandum at 5, citing *Northwestern Nat'l* for the *Pennoyer*-type proposition that jurisdiction can be accomplished simply by means of substituted service and exercise of control over chattels). Not surprisingly given the jurisprudential sea change that occurred later the same year, *Northwestern Nat'l Bank,* which predated *International Shoe* by eight months and *Mullane* by five years, has never been cited in a published decision for the strength of its jurisdictional approach.[4] *Pennoyer v Neff*, of course, was put to rest by *International Shoe* and *Shaffer*. *See Shaffer*, 433 U.S. at 206.

Fortunately, Minnesota has already rejected the District Court's anachronistic approach and requires due process through minimum contacts regardless of the classification

---

[4] Turning the clock back to the pre-*International Shoe* jurisprudence, however, could lead the District Court into the bramble of *Pennoyer v. Neff* rules. *See Shaffer*, 433 U.S. at 196-99 (explaining effects of *Pennoyer* type jurisdictional analysis that was prevalent before *International Shoe*); *Shamrock Develop., Inc. v. Smith*, 754 N.W.2d 377, 383-84 (Minn. 2008).

of the case within the *in rem* taxonomy. *See, e.g., Savchuk v. Rush*, 272 N.W.2d at 892 ("...*Shaffer* compels perforation of the *in rem* fiction as a jurisdictional base..."), *rev'd on other grounds*, 444 U.S. 320 (1980); *Torgelson v. Real Property Known as 17138 880th Ave., Renville County, Minnesota*, 734 N.W.2d 279, 284 (Minn. App. 2007) (agreeing with *Shaffer* that *in rem* jurisdiction for the assertion of jurisdiction over the owner is a fiction, declining to perpetuate that fiction and requiring personal jurisdiction for a true *in rem* action), *aff'd*, 749 N.W.2d 24 (Minn. 2008); *State v. Continental Forms, Inc.*, 356 N.W.2d 442, 444 (Minn. App. 1984) ("It is well settled that 'all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.'"); *West American Ins. Co. v. Westin, Inc.*, 337 N.W.2d 676, 678-79 (Minn. 1983) (noting that there had been a "dramatic shift" in jurisdictional analysis and that the focus now is on the "'relationship among the defendant, the forum and the litigation'"); *see Rush v. Savchuk*, 444 U.S. at 327 ("In *Shaffer v. Heitner* we held that 'all exercises of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.'"); *accord Elliot & Callan, Inc. v. Crofton*, 2009 WL 3297506 (D. Minn. Oct. 13, 2009) at *5, n. 5 ("The Supreme Court has since held that a state may not exercise *in rem* jurisdiction unless the minimum contacts standard is met.") *Savchuk* taught that due process does not come in half measures simply because the case may be treated as *in rem*. But the District Court erred by not seeing the significance of "traditional notions of fair play and substantial justice" in this case, perhaps because of its understandable compassion for a sympathetic plaintiff and an over-emphasis on the importance of providing that plaintiff an affordable forum to resolve his claim to his exciting discovery of a piece of the Nation's colonial

history. App. at 58, 60 (Respondent stressing his circumstances and need of convenient forum); App. at 102 (factual finding no. 9).

4. This Is The "Unusual" Case In Which The State Where The Property Is Located Does Not Have Jurisdiction Over Its Owner.

The Court in *Shaffer* noted that "the fact that the presence of property in a State may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation ... when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction." *Shaffer*, 433 U.S. at 207-08. The Court also noted, however, that this inference may not always be permissible. *Id.* Examples of such situations include: "property brought into a state by fraud, for purposes of litigation, without the consent of the owner, or in other some other manner negating the inference that the property owner expected to benefit from the state's interest in protecting property within its territory." *Ford Motor Co. v. Greatdomains.com, Inc.*, 177 F. Supp. 2d 656, 659 (E.D. Mich. 2001); *FleetBoston Financial Corp.*, 138 F. Supp. 2d at 133-34 (using *in rem* procedure to pull defendant into a state in which he "could not have expected to be haled into ...plainly offends traditional notions of fair play and substantial justice.") In his concurrence in *Shaffer,* Justice Stevens noted that due process requires "fair warning that a particular activity may subject a person to the jurisdiction of a foreign sovereign." *Shaffer v. Heitner*, 433 U.S. at 218 (Stevens, J., concurring). While the presence of one's property in state may in many cases "indicate that he expected to benefit from the State's protection of his interest," the location of the property alone is not enough to justify this inference. *See Shaffer,* 433 U.S. at 207-08. Importantly, the analysis returns to where it should – is it fair

for the owner to be haled into court in a foreign state simply because its property has been brought there without its consent?

The State of New Hampshire has a good faith colorable claim to ownership of the John Ward Gilman Plate. But it did not cause the plate to come to Minnesota and has no other reason to expect to be haled into court here. Yet, by the Respondent's choice, his assertion of personal jurisdiction and his attempt to obtain a personal judgment against it in the guise of an *in rem* action, the State of New Hampshire now finds itself compelled to defend in the District Court of Fillmore County Minnesota. With utmost respect to the judicial system of Minnesota, the sovereign State of New Hampshire has no contacts with the District Court's jurisdiction, had no expectation of being haled into court there and would not have chosen to have its rights in its property determined there. This is the unusual case that the Supreme Court considered in *Shaffer*.

5. The District Court Should Not Have Followed *Cable News Network* Because Its Holding Does Not Comport With Due Process

Because the property in *Shaffer* that provided for the jurisdiction at issue was unrelated to the underlying claim, (making it a *quasi in rem* action rather than "true" *in rem*), the District Court determined not to follow the statement of the Supreme Court that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny," *Shaffer*, 433 U.S. at 211-12, because it believed that this was a "pure *in rem*" case. *See* App. at 103, 105 (Order and Memorandum at 3, 5 ("the determination of ownership rights over the Copper Plate is a pure *in rem* action."). The District Court instead relied upon a federal District Court decision from Virginia in support of its variance. *See Cable News Network L.P. v. CNNews.com*, 162 F. Supp. 2d 484 (E.D.

Va. 2001). In *Cable News Network*, the court declined to provide a "minimum contacts" analysis per *International Shoe* and *Shaffer*, because, like the District Court here, it believed that the action brought under the federal law's jurisdictional provision was considered pure *in rem*. 162 F. Supp. 2d at 491. Other cases involving trademark infringement and cybersquatting brought under the same statute, however, have observed that "even reading § 1125(d)(2)(C) as a distinct authorization for asserting *in rem* [ ] jurisdiction, the court must determine [whether] sufficient minimum contacts ... exist to satisfy the due process clause of the Constitution." *Ford Motor Co. v. Greatdomains.com, Inc.*, 177 F. Supp. 2d at 658-60; *see, e.g., FleetBoston Financial Corp.*, 138 F. Supp. 2d at 133-35 (holding that *Shaffer* analysis requires minimum contacts for all three types of *in rem* action including those brought under the trademark act); *Mattel, Inc. v. Barbie-Club.com*, 2001 WL 436207 at *2 (S.D.N.Y. 2001); *cf. Land-O-Nod Co. v. Bassett Furniture Indus., Inc.*, 708 F.2d 1338 (8th Cir. 1983) (requiring minimum contacts analysis for trademark case). *Cable News Network* thus does not represent the only, or even necessarily the best, analysis of this question in federal trademark litigation.

At the same time, while the court in *Cable News Network* read a limited holding of *Shaffer*, the majority of other courts, including this one, have followed *Shaffer* to apply the minimum contacts test of *International Shoe* to <u>all</u> state exercises of jurisdiction. *See, e.g., Rush v. Savchuk*, 444 U.S. at 327 (*Shaffer* holding is that "'all exercises of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.'"); *Continental Forms, Inc.*, 356 N.W.2d at 444 ("It is well settled that 'all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.'"); *see also Base Metal Trading, Ltd. v. OJSC*

"Novokuznetsky Aluminum Factory", 283 F.3d 208, 213 (4th Cir.) ("*Shaffer* eliminated all doubt that the minimum contacts standard in *International Shoe* governs *in rem, quasi in rem* as well as *in personam* actions."), *cert denied*, 537 U.S. 822 (2002); *Applewhite v. Metro Aviation, Inc.*, 875 F.2d 491, 495 (5th Cir. 1989) ("Thus ... regardless of whether the action is instituted *in personam, quasi in rem* or otherwise, all exercises of jurisdiction must be measured by the terms of the due process clause of the United States Constitution."); *Pittsburgh Terminal Corp. v. Mid Allegheny Corp.*, 831 F.2d 522, 526 (4th Cir. 1987) ("The narrow holding of [*Shaffer*] was a simple one: the minimum contacts rule of *International Shoe* would henceforth be applied to actions *in rem* and *quasi in rem,* as well as to actions *in* personam."); *Brennan v. Roman Catholic Diocese of Syracuse, New York, Inc.*, 575 F. Supp. 2d 1256, 1264-65 (M.D. Fla. 2008) ("*Shaffer* squarely decides that the standard for asserting personal jurisdiction and the standard for asserting *in rem* (or *quasi in rem*) jurisdiction are identical."), *on appeal*, 322 Fed. App. 852 (11th Cir. 2009); *Sterling Consulting Corp. v. Indian Motorcycle Trademark*, 1997 U.S. Dist. LEXIS 21301, 2-3 (D. Colo. Sept. 5, 1997) ("Requirements of due process for personal jurisdiction apply equally to *in rem* and *in personam* actions. Thus, plaintiff gains no benefit for personal jurisdiction purposes by styling this action *in rem*. Any eventual judgment in an *in rem* proceeding would not be enforceable against parties outside the Court's jurisdiction."); *Ford Motor Co. v. Greatdomains.com, Inc.*, 177 F. Supp. 2d at 658-59 (*Shaffer* applies to jurisdiction beyond *quasi-in rem* type II); *see also Bearden v. Byerly*, 494 So.2d 59 (Ala. 1986) ("Since *Shaffer,* it is clear that in *all* cases 'a state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist 'minimum contacts' between the defendant and the forum State.'")

IV. CONCLUSION

For the reasons set forth above, the Court should overturn the District Court's Order denying the State of New Hampshire's Motion to Dismiss, and order the dismissal of this case due to the lack of personal jurisdiction by the District Court over the State of New Hampshire.

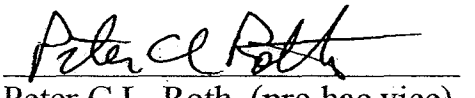
Respectfully submitted,

Dated: June 7, 2011

STATE OF NEW HAMPSHIRE

By its attorneys

MICHAEL A. DELANEY
NEW HAMPSHIRE
ATTORNEY GENERAL



Peter C.L. Roth, (pro hac vice)
Senior Assistant Attorney General
Environmental Protection Bureau