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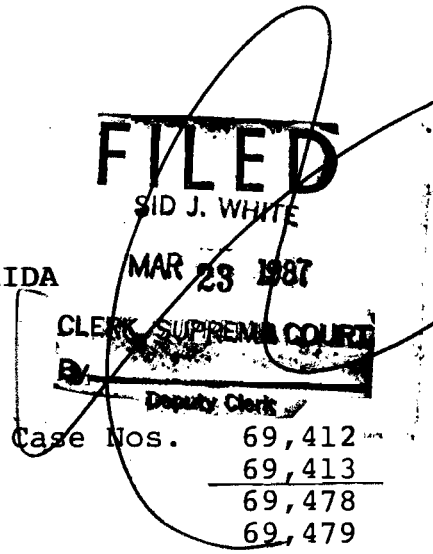

SUPREME COURT OF FLORIDA

RAUL GARCIA GRANADOS QUINONES, et al.,

Appellants/Defendants,

vs.

SWISS BANK CORPORATION (OVERSEAS) S.A., et al.,

Appellees/Plaintiffs.

_____/

Case Nos. 69,412
69,413
69,478
69,479

REPLY BRIEF OF PETITIONER RAUL GARCIA GRANADOS QUINONES

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I. STATEMENT OF THE FACTS AND OF THE CASE

The statement of the facts set forth in the brief of Respondents Swiss Bank Corporation (Overseas), S.A. ("Swiss Bank") and Banque National de Paris ("Bank of Paris") (collectively "Respondents") alleges the existence of facts totally irrelevant to the issues involved in this appeal.[1] Respondents admit that if RGG's statement of facts is true "it would be incomprehensible that this suit was not brought in Guatemala". (Respondents' brief at 2). Upon Respondents' brief being closely analyzed, it is apparent that Respondents do not dispute RGG's statement of facts. Instead, Respondents argue the existence of additional facts which have no bearing on and are irrelevant to the questions presented by this appeal.

Respondents devote approximately fifteen pages of their brief to setting forth their contentions of why RGG is liable for the debt and why Respondents contend RGG has fraudulently transferred property into Florida. Respondents' diatribe is not only inaccurate and wrong, but irrelevant to the clearly defined issues presented by this appeal. At trial, RGG shall present proof -- not argument-- which demonstrates the specious nature of

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[1] For example, Respondents make unfounded and inaccurate accusations in their Answer brief concerning the existence and operation of various corporations (EPICA, TAIPSA, etc.). Each of these corporations was formed by the Bank of Paris and their operation was closely controlled and monitored by the Bank of Paris throughout the relevant time period. (Exhibit 6 to the affidavit of Christiane Branliere which is Exhibit A to Swiss Bank's complaint; deposition of RGG, Vol. I at 47). The record does not support Respondents' accusations and RGG emphatically denies any alleged wrongdoing in connection with the formation and operation of these corporations.

Respondents' contentions.[2] It is unnecessary and a waste of precious judicial resources to prepare a line by line rebuttal to each of Respondents' irrelevant factual contentions. The relevant issues presented by this appeal are: (1) whether a contractual choice of forum clause bargained for in good faith is enforceable in Florida courts; (2) and whether this matter should have been dismissed pursuant to the doctrine of forum non conveniens. RGG has only provided this Court with the undisputed facts which are relevant to the Court's consideration of these issues.

II. ARGUMENT

A. The Parties' Voluntary, Freely Negotiated, Contractual Choice to Litigate in Either Guatemala or Panama is Enforceable in the Courts of Florida.

1. The Basis of Enforceability -- Respondents Have Failed to Demonstrate Enforcement Would be Unreasonable or Unjust.

The parties have specifically in good faith, freely negotiated, bargained for and agreed that any action involving the alleged agreements which are at issue in this matter shall be litigated in either Guatemala or Panama to the exclusion of all other jurisdictions, including Florida. (R. 78). This Court in *Manrique v. Fabbri*, 493 So.2d 437, 440 (Fla. 1986) recently held

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[2] This litigation is still in the pleading stage. RGG has concentrated his efforts in the trial court to attacking the court's jurisdiction and determining the appropriate forum to decide Respondents' claims. No evidence has been presented and no hearings have been held concerning the purported factual basis for the alleged claims presented by the amended complaint and RGG's defenses to such claims. Moreover, Respondents have sued fifty-eight defendants in connection with their breach of contract claims. Most of these defendants are located in Guatemala or other Latin American countries. At last count, Respondents have only been able to perfect service of process on seven of these fifty-eight defendants.

that

> forum selection clauses should be enforced in the absence of a showing enforcement would be unreasonable or unjust.

This Court emphasized that to meet that burden

> it . . . [is] incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so grossly difficult and inconvenient that for all practical purposes he will be deprived of his day in court. Absent that, there is no basis for concluding that it would be unfair, unjust or unreasonable to hold that party to his bargain.

Id. at 440 n. 4, *citing, M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18, 92 S.Ct. 1907, 1917, 32 L.Ed.2d 513 (1972). (Emphasis added).

Swiss Bank has not made or even attempted such a showing below. Swiss Bank virtually admits it is impossible for it to make such a showing. Swiss Bank states without reservation "finally [Swiss Bank is] able to pursue [a] legitimate judicial remedy in Guatemala." (Respondents' brief at 13). This admission should end any further discussion on the question of the enforceability of the contractual choice of forum clause. This matter should have been dismissed based on the parties' contractual choice of another forum.

2. Swiss Bank's Argument Against Enforceability.

Swiss Bank argues that this matter should not have been dismissed by the trial court because the forum selection clause in the contract is permissive as opposed to mandatory. Moreover, Swiss Bank argues that even if the clause were mandatory this

Court's decision in *Manrique* should not be followed. Neither of these arguments is persuasive.

a. The Clause at Issue is Mandatory.

Swiss Bank argues that the contract clause in question provides that the parties may choose to bring the action in the courts of Guatemala or in the courts of Panama. Swiss Bank ignores the only relevant and competent evidence in the record as to whether the clause is mandatory or permissive. The December 1980 agreement between the parties which was written in Spanish contains a clause (Clause 17) which provides that any disputes arising between the parties must be litigated in either Guatemala or Panama, to the exclusion of all other jurisdictions.[3] (R. 78).

Rather than create an issue concerning the accuracy of any translation from one language to another, RGG submitted to the trial court affidavits of experts on Guatemala law concerning the interpretation, meaning and legal effect of the choice of forum clause. These experts stated that Clause 17:

> [Is] valid, enforceable and mandatory under the laws of Guatemala. The language used in Clause 17 is effective to preclude, by agreement of the parties, the bringing of any action by the creditor [Bank of Paris] (or any assignee) in any jurisdiction other than Guatemala or Panama.

(R. 115). (Emphasis added). Swiss Bank did not file anything to rebut the sworn statements of these experts and apparently

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[3] The clause also provides for the choice of law: If the suit were brought in Guatemala, Guatemala law would apply; if the suit were brought in Panama, the law of Panama would apply.

decided not to contest the meaning and legal effect given to Clause 17 by those experts. This was despite Swiss Bank submitting expert affidavits in opposition to other aspects of RGG's motion. [4] Swiss Bank's sole argument that the Clause is permissive as opposed to mandatory is based upon a translation of the document from Spanish to English by a French translator who is clearly not an expert in the law of Guatemala. Swiss Bank's entire argument that the language used is permissive is simply irrelevant since there is nothing in the record that the language is permissive.

Moreover, Swiss Bank overlooks the very language at issue in this Court's decision in *Manrique*. In *Manrique* the forum selection language in the settlement agreement at issue provided:

> The law of the Netherlands Antilles shall control in case of such conflict or dispute between the parties to this agreement, who submit themselves to that jurisdiction . . . .

Id. at 438. (Emphasis added). The option agreement at issue in *Manrique* provided:

> The laws of the Netherlands Antilles shall govern and control in any conflict among the parties who expressly submit themselves to the venue and jurisdiction of the Courts of the Netherlands Antilles.

Id. at 438. (Emphasis added). The District Court had held those clauses unenforceable primarily because "the phrase 'who submit

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[4] RGG's motion in the trial court was a motion to: (1) Dismiss Plaintiffs' Amended Complaint and in the Alternative Motion for Summary Judgment; (2) Strike Claim for Attorneys' Fees and Punitive Damages; and (3) Strike References to Prior Law Suits. Swiss Bank submitted affidavits which contested RGG's position concerning his liability as a guarantor.

themselves to that jurisdiction' cannot reasonably be interpreted to require that all disputes be resolved in the Netherlands Antilles". *Manrique v. Fabbri*, 474 So.2d 844, 845 (Fla. 3d DCA 1985), *reversed, Manrique v. Fabbri*, 493 So.2d 437 (Fla. 1986). In other words, the clause is permissive. This Court reversed that decision and held such clause sufficient to preclude that action from being brought anywhere but in the Netherlands Antilles. In other words, the clause represented a mandatory choice. The language in *Manrique*, which this Court approved, is virtually identical to the language in the case principally relied upon by Swiss Bank in its Answer brief. *Citro Florida, Inc. v. Citrovale, S.A.*, 760 F.2d 1231 (11th Cir. 1985). The clause in Citrovale provided: "place of jurisdiction is Sao Paulo/Brazil." Id. at 1232. More importantly, the language is virtually identical to another clause of the December 1980 agreement which is involved in this case. Clause 21 of the December 1980 agreement provides (even giving Swiss Bank the benefit of its translation) in pertinent part:

> That [the parties] waive the law of their domicile and submit to the jurisdiction of the competent courts of the City of Guatemala, Republic of Guatemala or to the competent courts of the city of Panama, Republic of Panama, as freely chosen by the Creditor.

(R. 209).[5] (Emphasis added.)

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[5] As RGG has consistently and repeatedly maintained, he has no personal liability on the alleged "guarantee". The agreement(s) at issue in this matter, contrary to Swiss Bank's assertion, are not simple promissory notes and guarantees as such instruments are commonly used in Florida. Under Guatemala law and the terms of the agreement(s) in question, the instruments are known as "public deeds". As such, RGG does not have any personal

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The intent of the clauses at issue in this case are legally no different than the intent of the clauses in *Manrique*. As in *Manrique*, this Court should enforce the clause involved in this appeal.

Swiss Bank also asserts the forum selection clause should not be honored because "Clause 17 was inserted into Document 130 (the December 1980 agreement) in the form drafted by [RGG] and his attorneys". (Respondents' brief at 30.) That statement is a perfect example of how Swiss Bank blantantly mischaracterizes the record for its own purposes. The exact testimony of RGG which Swiss Bank cites to in support of its assertion is as follows:

> A. And, I signed it and I cannot deny that I signed it, all right, now that agreement, according to the explanation I got from my son-in-law and from deals with him, was an agreement similar to the others where we, the guarantors, had no personal responsibility.
>
> Not only because the Guatemalan laws says that, but because they were very emphatic to introduce a paragraph in clause 17 where it says exactly what the bank can do. The bank can go after the mortgages, can go after the crop mortgages or can go after both. They don't say anything about the guarantors, I mean, they don't have any actions against us in Guatemala or Panama. (App. II, 22-24). (Emphasis added.)

The clause RGG is referring to is the second part of Clause 17, not the forum selection aspect.[6] RGG did not testify his

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liability. Under Guatemala law, "public deeds" and the agreement(s) in question specifically require that any action be brought in the jurisdiction where the collateral security is located. The December 1980 agreement (public deed 130) incorporates and ratifies the earlier agreement(s), including public deeds 106 and 109, and specifically limits collection of any "guarantee" contained in such public deeds to the collateral security (real property) located in Guatemala and any crop mortgage(s) affecting such real property. (R. 220-21, 239).

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attorneys drafted Clause 17. He testified, at best, that his attorneys insisted Clause 17 set forth how Swiss Bank must proceed with any lawsuit under the agreement. RGG's attorneys did not draft the forum selection clause aspects of Clause 17 and there is no reason to construe it against RGG. In fact, Respondents admit in their brief that the December 1980 agreement "was signed after extensive negotiation." (Respondents' brief at 32).

Swiss Bank argues further, in trying to avoid the agreement which was negotiated and freely entered into, that RGG inserted Clause 17 with the obvious intent of controlling the litigation in Guatemala "where he was in control" or in Panama "where he had substantial influence". (Respondents' brief at 31). Again, there is no record support for such an outlandish statement. As noted, Swiss Bank has already admitted it can get a fair trial in Guatemala. Swiss Bank is a Panamanian corporation. No reason exists which precludes Swiss Bank from bringing suit there.

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6 That second part of Clause 17 provides:

> If the proceedings are carried out in the City of Guatemala, Republic of Guatemala, the parties hereto explicitly agree that the Creditor will have the choice between: (a) Suing for security only b) Suing for security and if the security turns out to be insufficient to cover the total amount of the loan, including interest and legal and other costs, suing for mortgage for the resulting outstanding balance; and c) Suing at the same time both for security and for mortgage on the pledged crops and the pledged property [cotton-gins] and mortgaged property in order to recover the total amount of the borrowed capital plus the agreed interest accrued and any legal or non-legal expenditure incurred therein. (R. 206-07)

This is the provision which Swiss Bank really seeks to avoid. Swiss Bank simply made a bad bargain and now seeks to ignore that bargain by forum shopping in an effort to avoid the terms of the agreement(s) and to avoid having a Guatemala court which is knowledgeable in the subject matter decide the issues.

Swiss Bank is avoiding those jurisdictions because Swiss Bank knows it will lose if the case is brought before a court familiar with the law involved and the language (Spanish) used in the agreement. Swiss Bank will lose not because of RGG's purported influence, but rather Swiss Bank will lose because a court familiar with the laws of Guatemala or Panama will quickly recognize that RGG has no personal liability.

Finally, Swiss Bank argues that the clause should not be honored because the clause is procedural and, therefore, the clause should be interpreted under Florida and not Guatemala law. In support of this argument, Swiss Bank accuses RGG of misciting cases. The cases cited by RGG in his initial brief in support of this argument were *Pfaudler Co. v. Slyvachem Corp.*, 400 So.2d 503 (Fla. 3d DCA 1981); *Jemco, Inc. v. United Parcel Service, Inc.*, 400 So.2d 499 (Fla. 3d DCA 1981) and *C.A. May Marine Supply Co. v. Brunswick Corp.*, 577 F.2d 1163 (1977). These cases stand for the proposition that in interpreting a clause in a contract which selects a certain jurisdiction's law to govern the interpretation of a contract the court should look to the law of the chosen forum to determine if the clause effectively selects that jurisdiction's law. RGG asserts the "better rule" in determining if a forum selection clause is valid is to do the same thing -- look to the law of the forum selected. That proposition, although not directly stated by the cases cited by RGG, certainly follows from the reasoning of such opinions. Since RGG cited the cases with the introductory signal

"See", RGG's citation of the cases was appropriate and accurate.[7]

Swiss Bank overlooks what is obviously a two step process in deciding forum selection issues. First, the forum Court should look to the law of the chosen forum to understand what the clause means, i.e., does the clause effectively select venue, the forum or the law to apply. Then the forum court should look to its own law to determine if such a clause is enforceable and will be honored by the forum court.

RGG submitted expert evidence as to what the forum selection clause meant in the chosen forum. Swiss Bank submitted no such evidence. RGG then points to this Court's decision in *Manrique* for the proposition that such clauses are enforceable in Florida. Swiss Bank cites cases from other jurisdictions for the proposition that clauses like the clause at issue here and the clause at issue in *Manrique* are not enforceable. Obviously, the analysis suggested by RGG is better and the one this Court has already adopted in *Manrique*.

b. The Location of Assets in Florida Is Irrelevant To the Issues on Appeal.

Swiss Bank admits in its brief that if the facts are as stated by RGG, that it is "incomprehensible that this suit was

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[7] Apparently Swiss Bank is unfamiliar with or does not understand introductory citation signals, as prescribed by the "Blue Book":

> "See Cited authority directly supports the proposition. 'See' is used instead of '[no signal]' when the proposition is not stated by the authority but follows from it".

A Uniform System of Citation, §2.2 (14th ed. 1986).

not brought in Guatemala". (Respondents' Brief, at 2). RGG agrees. What Swiss Bank overlooks is that the facts cited by RGG are the only ones relevant to the issues on appeal. Swiss Bank attempts to overcome this fact, not by disputing these relevant facts, but rather by injecting a whole set of facts which are simply irrelevant to the issues on appeal.

In essence, Swiss Bank argues that because RGG allegedly has assets in Florida, Swiss Bank can ignore the forum selection clause in the contract and has the right to bring its breach of contract action in Florida to determine RGG's liability under the contract. However, Swiss Bank has failed to cite a single case to support this contention. RGG submits no such case exists. If this Court were to uphold such an argument, then any creditor who did not want to be bound by its prior contractual agreement to litigate in a specific forum other than Florida, would merely have to allege that the debtor was guilty of a fraudulent transfer of assets into Florida and that allegation alone (at least according to Swiss Bank's argument) would prevent the court from dismissing the action and honoring the parties' contractual choice of forum. That obviously should not be the law of Florida. Moreover, even in the event of a fraudulent transfer, the attachment statute provides creditors like Swiss Bank with ample protection. If they can meet the burden of proof required by the attachment statute, there is no reason a creditor could not, while litigating the contract action in the chosen forum, seek and maintain the attachment of the assets in Florida until

the contract action is resolved in the forum chosen to decide such action. No prejudice would be suffered by the creditor. RGG submits that this is the procedure which should be followed in this action. Swiss Bank has attached all assets which it contends RGG controls in Florida. Accordingly, the attachment, if proper, can remain in effect until such time as the contract issues are properly resolved by the courts in either Guatemala or Panama.

As this Court noted in *Manrique*, there is simply no reason why the Court should not honor the legitimate expectations of the parties. The two countries chosen by the contracting parties are the domiciles of the litigants. RGG and most of the defendants are from Guatemala.[8] This Court should hold that the forum selection clause is enforceable and remand with direction that this matter be dismissed.

B. This Matter Should Be Dismissed Pursuant To The Doctrine of Forum Non Conveniens.

Swiss Bank argues that the determination by the trial court that this matter should not be dismissed and such decision should not be disturbed by this Court absent a clear abuse of discretion simply ignores the fact that a clear abuse of discretion has occurred. The trial court followed, as it was bound to do,

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[8] Swiss Bank in its brief states that "after RGG's expulsion from Guatemala" he has spent virtually no time in Guatemala. This statement is simply not true and represents another example of Swiss Bank's reckless accusations, and moreover, has absolutely no record support. The only testimony in this record concerning that issue is that of RGG and he testified that he voluntarily left Guatemala and he spends considerable time in Guatemala traveling back and forth between the United States, Guatemala and other South American countries. (Deposition of RGG, Vol. I at 103).

decisions of the Third District Court of Appeal which have now been disapproved by this Court. Swiss Bank responds to the factual analysis made by RGG concerning the relevant criteria in determining whether the matter should have been dismissed pursuant to the doctrine of forum non conveniens by stating that RGG makes conclusory statements about such criteria. In fact, Swiss Bank is the one which makes the conclusory statements. What Swiss Bank overlooks is that the only evidence in the record concerning the criteria is the evidence submitted by RGG. Swiss Bank submitted no evidence and does not dispute the evidence submitted by RGG on this issue. What Swiss Bank did below was simply make legal arguments about the criteria. For example, Swiss Bank argues that in the principal case upon which RGG relies "there was none of the extensive activity in Florida by the defendant which is so prevalent in this case". (Respondents' Brief at 37). Swiss Bank misperceives the appropriate test. The test consists of the nine factors set forth in *Armadora Naval Dominicana, S.A. v. Garcia*, 478 So.2d 873 (Fla. 3d DCA 1985) and other cases. Moreover, any purported activity by RGG and the other fifty-seven defendants in Florida (most of whom are not and cannot be served) has no relationship to the execution and/or enforcement of the agreement(s) which are in dispute.

As noted in RGG's affidavit, virtually all the witnesses in this case reside in Guatemala. All the relevant documents are located in Guatemala. The Guatemala forum would alleviate the problem of having to translate the testimony of most witnesses

and all documents from Spanish to English. Any judgment would be more easily enforceable in Guatemala since the land given as collateral security for the loans is located there and that is where the headquarters of ACIA, the principal defendant and obligor (which has not been served) under the agreement(s), is located.[9] Swiss Bank does not dispute this fact, what Swiss Bank states without any record support or any affidavits is "the witnesses necessary for this lawsuit are primarily witnesses to the tort actions". That simply is not true, but moreover, Swiss Bank continues to ignore that the tort counts in this complaint are totally dependent upon the resolution of the contract counts. The contract counts must be proven first. RGG vigorously disputes that he has any liability at all for the alleged debts in this matter. Until such time as Swiss Bank can establish RGG's liability under the agreement(s) based upon Guatemala law, the tort counts are absolutely irrelevant to anything. This forum is an extremely inconvenient and improper forum in which to litigate the contract dispute. This matter should have been dismissed pursuant to the doctrine of forum non conveniens.

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[9] In connection with the loan transaction, Bank of Paris appraised the land given as collateral security located in Guatemala to have a value in excess of 40 million dollars. (Deposition of RGG, Vol. II at 125).

III. Conclusion

For the foregoing reasons, the RGG respectfully requests that this Court enter an order (1) quashing the decision of the Third District Court of Appeal; (2) remanding the case to that Court with directions to vacate the trial court's order denying RGG's motion to dismiss; and (3) remanding the case to that Court with instructions to the trial court to dismiss this case for the reasons stated herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been served to all counsel of record on the attached list by first class mail this 20th day of March, 1987.

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