IN THE SUPREME COURT OF FLORIDA

Case No. 84,329

KINNEY SYSTEM, INC.,

Petitioner,

vs.

THE CONTINENTAL INSURANCE COMPANY,

Respondent.
_____/

ON CERTIFICATION OF A QUESTION OF GREAT PUBLIC IMPORTANCE BY THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT

RESPONDENT'S BRIEF ON THE MERITS

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February 13, 1995

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INTRODUCTION

In *Houston v. Caldwell*, 359 So. 2d 858 (Fla. 1978), this Court held that the doctrine of *forum non conveniens* cannot be applied where one of the parties is a resident of Florida. The question here is under what circumstances are foreign corporations "residents" under *Houston*.[1]

Kinney concedes that a foreign corporation with a principal place of business in Florida is a resident. Continental submits that a foreign corporation authorized to conduct business in Florida, and therefore having an office and resident agent in Florida, also is a resident under *Houston*. Authorized foreign corporations must have both offices and resident agents in Florida, and Florida law therefore grants them "the same but no greater rights" and "the same but no greater privileges" as domestic corporations.

The Petitioner and *amici* present a parade of horribles designed to terrorize this Court into overruling its precedent of 17 years. As Respondent explains in this brief, *Houston* is the *status quo,* and both Petitioner and its *amici* have utterly failed to demonstrate how that long-standing *status quo* has produced the dreadful results they predict if *Houston* is now upheld. To the contrary, *Houston* has produced no such ill effects, and merely implements this Court's considered judgment that where one party

[1] Although various friends of the Petitioner urge this Court to overrule *Houston*, neither the district court, in its certified question, nor the Petitioner, in its brief, present that issue.

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resides in Florida or the cause of action arose here, the relative conveniences can never weigh so heavily in a defendant's favor to justify denying a plaintiff its chosen forum.

STATEMENT OF THE CASE AND FACTS

While Respondent Continental Insurance Company agrees with the vast majority of Petitioner Kinney System, Inc.'s statement of facts, some important facts require emphasis. Continental discusses these below.

A. Relevant Facts

Continental is a New Hampshire corporation with its principal place of business in New Jersey (R. 1). Kinney is a Delaware corporation with its principal place of business in New York (R. 1, 56). Kinney operates parking garages (R. 14). It has a regional office, a registered agent, and at least four garages in Florida (R. 17, 80). Continental is authorized to do business in Florida and conducts business in Florida (R. 1). It has a claims office in Broward County (R. 80). It is the parties' respective businesses in Florida that, in great part, underlies this litigation.

Kinney contracted with Continental for workers compensation and employers' liability insurance (R. 2). The policy provided coverage for Kinney employees in several states, including Florida (R. 2). The parties agreed that premiums would be adjusted to reflect actual loss history, and Kinney would pay retrospective

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premiums due as a result of such adjustments (R. 2).

In Florida alone, Kinney submitted 41 workers compensation claims totalling nearly $172,000, which Continental paid (R. 80). Continental adjusted the premiums based on Kinney's past claims (R. 80). The retrospective premiums, based on five adjustments between 1988 and 1992, totalled $339,151 (R. 80).

Kinney refused to pay (R. 78-79). It accused Continental of mishandling four claims, which comprised 90% of the losses (R. 85-86). Half the disputed claims concerned injuries to Kinney employees in Florida (R. 78-79). These employees reside in Florida, received medical treatment in Florida, and had their claims adjusted in Florida (R. 79). The claims were governed by Florida's workers compensation law (R. 79). The claim files on these employees are located in Florida, and the physicians and therapists who treated the employees reside in Florida (R. 79). The remaining claims arose not where the parties' respective principal offices are located, but out of two other states. Thus, this case involves no less than seven different states: the parties' two states of incorporation, the two states where they have their principal places of business, and the three states out of which the disputed claims arose.

B. Course of Proceedings

In support of its motion to dismiss, Kinney filed the affidavits of its general counsel and its outside counsel (R. 56, 61). These testified that Kinney's principal place of business was

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New York, that the agreements were executed in New York, and that Kinney was invoiced for premiums in New York (R. 56-57). They also alluded to Continental's alleged payment of excessive claims (R. 57). They identified accounting experts in New York who had evaluated Continental's claims-handling practices (R. 58). They also testified that the dispute involved four workers compensation claims (R. 62), and that Continental's Vice-President told Kinney that Continental would file suit in Florida to increase Kinney's costs (R. 62).

Continental filed the affidavit of its Vice-President, which refuted Kinney's contentions about Continental's purpose for filing suit in Florida (R. 81-82). Suit was brought in Florida because two of the four disputed claims arose here, and the evidence and witnesses on those claims are located here (R. 81).

The order granting Kinney's motion to dismiss assumed the parties were foreign corporations conducting business in Florida (R. 122). The order found, however, that "notwithstanding" binding precedent from the Fourth District, both parties were non-residents for *forum non conveniens* purposes (R. 122-23). The court also found the cause of action accrued in New York (R. 123).

After finding the parties were foreign corporations with principal places of business in New York, the court did not employ any rigorous analysis to determine whether Florida was a more convenient forum; it merely mentioned that "it *appears* that the interests of justice would be better served by litigating this

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matter in New York, New York, where Defendant is amenable to service of process" (R. 123) (emphasis added).

Continental raised two points on appeal: (I) as the Fourth District Court of Appeal had already held, *see Nat'l Aircraft Service, Inc. v. New York Airlines, Inc.*, 489 So. 2d 38 (Fla. 4th DCA 1986), out-of-state companies conducting business in Florida are "residents" under *Houston,* so that the doctrine of *forum non conveniens* does not apply to actions involving such companies; and (II) even if the Doctrine applies in this case, application of the several factors, with the understanding that the factors must favor the defendant strongly for dismissal to be granted, militates in favor of a Florida forum.

The district court reversed the dismissal based solely on Continental's first argument, concerning whether the Doctrine should apply at all. Citing *Nat'l Aircraft,* 489 So. 2d at 38 and *Waite v. Summit Leasing & Capital Int'l Corp.*, 441 So. 2d 185 (Fla. 4th DCA 1983), the district court held that because Continental was registered to do business in Florida and both corporations conducted business in Florida, both parties were "residents" under *Houston* and the Doctrine did not apply. *Continental Ins. Co. v. Kinney System, Inc.*, 641 So. 2d 195, 196 (Fla. 4th DCA 1994). The court certified the following question as one of great public importance:

> Is a trial court precluded from dismissing an action on the basis of forum non conveniens where one of the parties is a foreign corporation that:

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(a) is doing business in Florida?

(b) is registered to do business in Florida?

(c) has its principal place of business in Florida?

Id. at 197. This petition followed.

SUMMARY OF ARGUMENT

In *Houston v. Caldwell*, 359 So. 2d 858 (Fla. 1978), this Court held that the doctrine of *forum non conveniens* cannot be applied where one of the parties is a resident of Florida. The question here is under what circumstances are foreign corporations considered "residents" under *Houston*. As quoted above, the certified question identifies three possibilities. Kinney concedes that a foreign corporation with its principal place of business in Florida should be considered a resident. Continental submits that a foreign corporation authorized to conduct business in Florida, and therefore having an office and resident agent in Florida, also is a resident under *Houston*. Florida law already considers such corporations residents. Authorized foreign corporations must have both an office and a resident agent here. Florida law therefore grants them "the same but no greater rights" and "the same but no greater privileges" as domestic corporations. § 607.1505(2), Fla. Stat. (1993). Therefore, an authorized foreign corporation should both be granted access to a Florida court to the same extent as a Florida corporation and should be required to defend actions to that same extent.

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Other Florida statutes are consistent with this mandate. Under the venue statutes, an authorized foreign corporation resides where it has an agent and conducts business. *Enfinger v. Baxley*, 96 So. 2d 538, 540 (Fla. 1957). Moreover, authorized foreign corporations and Florida corporations share the same procedure for service of process. *See* § 48.081, Fla. Stat. (1993). Authorized foreign corporations also are residents for purposes of tolling the statute of limitations and for purposes of the attachment statute.

Several *amici* for the Petitioner urge this Court to overrule *Houston*. This issue was never raised below, and Kinney does not raise that issue here. The *amici* have no standing to inject new issues. The issue of whether *Houston* should be overruled, therefore, is not properly before the Court. If this Court considers it, however, it should reaffirm *Houston*. That case reflects a moderate approach to *forum non conveniens*, a compromise between rejection of the Doctrine and its unbridled application.

Some states have rejected the Doctrine altogether, and others have not even decided whether to apply it in their states. Still other courts have adopted the Doctrine in full. Florida, along with several other states, has adopted a limited version of the Doctrine. Florida, like many other states, prohibits application of the Doctrine when one of the parties resides in the state. *Houston* reflects this Court's judgment that where one party resides in Florida or the cause of action accrued here, the relative conveniences can never weigh so heavily in a defendant's favor

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to justify denying a plaintiff its chosen forum. Its bright-line rule avoids the often-tedious analysis such issues require, precisely in those cases where the vast majority of decisions will, in the end, sustain the plaintiff's choice.

Although some *amici* argue a trend toward full application of the Doctrine, the Doctrine remains surrounded by controversy. Several commentators have recently urged its abolishment or curtailment. As many commentators argue has happened in other states, unrestricted application of the Doctrine would replace the current certainty with certain confusion. Courts would regularly become involved in the tedious, time-consuming, and expensive balancing of factors in cases where, ultimately, the balance will not favor the defendant strongly enough to warrant dismissal.

Moreover, Florida's Constitution prohibits a full application of the Doctrine. Article I, section 21 provides that "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay." This section prohibits an application of the Doctrine that would deny Florida residents a Florida forum.

Even if the Doctrine applies, the Court must then determine whether Florida is an inconvenient forum. Two of the four claims underlying this dispute occurred in Florida. The injuries resulting in those claims occurred in Florida. The treatment for the injuries occurred in Florida. The adjusters, physicians, and injured employees reside in Florida. The claim documents are

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located in Florida. Neither of the two other claims arose in New York. Therefore, although no totally convenient forum exists, Florida is the most convenient.

ARGUMENT

I. FOREIGN CORPORATIONS AUTHORIZED TO CONDUCT BUSINESS IN FLORIDA ARE "RESIDENTS" UNDER *HOUSTON*

In *Houston v. Caldwell*, 359 So. 2d 858 (Fla. 1978), this Court held that the doctrine of *forum non conveniens* (the "Doctrine") cannot be applied where one of the parties is a resident of Florida. This case concerns the circumstances under which foreign corporations are considered "residents" under *Houston*. The certified question identifies three possibilities: (1) where a foreign corporation is doing business here; (2) where it is registered to do business here; and (3) where this is its principal place of business.

Kinney concedes (brief at 11) that a foreign corporation with its principal place of business in Florida is a resident for these purposes. Moreover, this Court has already resolved that issue. *See Seaboard Coastline R. Co. v. Swain*, 362 So. 2d 17, 18 (Fla. 1978). *See also Adams v. Seaboard Coastline R. Co.*, 224 So. 2d 797, 801 (Fla. 1st DCA 1969) (same). As to the second scenario -- whether a foreign corporation merely doing business in Florida without being authorized to do business is a resident -- Continental adopts without discussing the argument of *amicus curiae* Academy of Florida Trial Lawyers (brief at 22-24). In this brief, Conti-

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nental submits that, given the status under Florida law of foreign corporations authorized to conduct business in Florida, such corporations must be considered residents under *Houston*.

A. Florida law treats authorized foreign corporations the same as domestic ones

Defining a resident under *Houston* as including authorized foreign corporations is consistent with the policy in this state, expressed through a series of statutes, granting the same rights and duties to authorized foreign corporations as to Florida corporations. This statutory scheme gives content and order to the *Houston* rule, which was decided against this statutory background. Consistent with this policy, several Florida statutes treat authorized foreign corporations the same as domestic corporations for their various purposes. As *Houston* makes clear, *forum non conveniens* analysis should be no different.

1) The Florida Business Corporation Act requires certain foreign corporations to obtain a certificate of authority, and in return grants them the same rights and duties as domestic corporations

The Florida Business Corporation Act requires foreign corporations conducting substantial business activity in this state to obtain a certificate of authority. § 607.1501(1), Fla. Stat. (1993). These authorized foreign corporations must have both a registered office and a resident agent in Florida. § 607.1507(1),

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Fla. Stat. (1993).[2] In return, the Act grants such corporations the same rights and privileges as domestic corporations:

> A foreign corporation with a valid certificate of authority has the same but no greater rights and has the same but no greater privileges as, and except as otherwise provided by this act is subject to the same duties, restrictions, penalties, and liabilities now or later imposed on, a domestic corporation of like character.

§ 607.1505(2), Fla. Stat. (1993).[3] Under the statute's plain meaning, an authorized foreign corporation should be granted access to a Florida court to the same extent as a Florida corporation, and should be required to defend actions to that same extent. As this Court has stated, "[b]y formally qualifying to do business in Florida and registering an agent . . . , a foreign corporation submit[s] itself to the jurisdiction of Florida courts because it acknowledge[s] that it [does] sufficient business in Florida to make it amenable to suit and service of process here." *White v. Pepsico, Inc.*, 568 So. 2d 886, 889 (Fla. 1990).

The courts of Texas have held that a similar statute precludes courts from applying the Doctrine to authorized foreign corporations. The Texas statute provides that foreign corporations with valid certificates of authority shall "enjoy the same, but no

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[2] Similarly, insurance companies must obtain certificates of authority and have authorized and licensed insurance agents in the state. §§ 624.401, 624.425, Fla. Stat. (1993).

[3] This provision was substantially the same when *Houston* was decided. *See* § 607.307, Fla. Stat. (1977).

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greater, rights and privileges as a domestic corporation." Tex. Bus. Corp. Act Art. 8.02(A) (Vernon Supp. 1993). Relying on this provision and cases construing it, the court held that "the Texas Legislature has abolished the doctrine of *forum non conveniens* in cases involving foreign corporations which have permits to conduct business in Texas." *21 Intern. Holdings, Inc. v. Westinghouse Electric Corp.*, 856 S.W.2d 479, 484 (Tex. Ct. App. 1993).[4]

This Court should reach the same conclusion. Florida courts already recognize that section 607.1505(2) prohibits treating authorized foreign corporations any differently from domestic ones. *See Hollander v. Rosen*, 555 So. 2d 384, 385 (Fla. 3d DCA) (imposing statutory penalty for wrongful refusal to allow inspection of the corporation's business records against a Georgia corporation authorized to do business in Florida, applying predecessor provision of § 607.1505(2)), *review denied*, 564 So. 2d 488 (Fla. 1990). *Accord Padovano v. Wotitzky*, 355 So. 2d 871 (Fla. 2d DCA 1978).

Applying the Doctrine to authorized foreign corporations would violate section 607.1505(2) by denying authorized foreign corporations like Continental their choice of venue in actions against nonresidents, while preserving that privilege for domestic corporations. Such differential treatment is precisely what

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[4] The court also noted a statute authorized corporations to "sue and be sued, complain and defend, in its corporate name." Tex. Bus. Corp. Act Art. 2.02(A)(2) (Vernon Supp. 1993). *Id.* at 482. Florida grants these same powers. *See* § 607.0302, Fla. Stat. (1993).

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section 607.1505(2) prohibits. On the other hand, a rule defining a resident as including authorized foreign corporations is easy to apply and entails little or no satellite litigation.

2) Other Florida statutes treat an authorized foreign corporation the same as a domestic corporation

Consistent with section 607.1505(2), several Florida Statutes treat an authorized foreign corporation the same as a domestic corporation. Chief among these is the venue statute, which provides that a foreign corporation "resides" where it has an office and a resident agent. Because authorized foreign corporations are required to have an office and an agent in this state, they will always reside wherever such an office is located.

In defining a resident for *forum non conveniens* purposes, *Houston* relied on the distinction in Florida's venue statutes between a resident and a nonresident. The logic of this reliance is impeccable, and recently confirmed by the United States Supreme Court, which declared that "the doctrine of *forum non conveniens* is nothing more or less than a supervening venue provision." *American Dredging Co. v. Miller*, ___ U.S. ___, 114 S. Ct. 981, 988 (1994). The *Houston* rule ensures that Florida's common law "supervening venue provision" comports with its venue statute.

Florida's venue statute governing "actions against corporations" applies to Florida residents, including authorized foreign corporations. It provides that:

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> Actions against domestic corporations shall be brought only in the county *where such corporation has, or usually keeps, an office for transaction of its customary business*, where the cause of action accrued, or where the property in litigation is located. Actions against foreign corporations doing business in this state shall be brought in a county *where such corporation has an agent or other representative*, where the cause of action accrued, or where the property in litigation is located.

§ 47.051, Fla. Stat. (1993) (emphasis added). The emphasized language is analogous to the general venue statute: "Actions shall be brought only in the county *where the defendant resides*, where the cause of action accrued, or where the property in litigation is located. This section shall not apply to actions against nonresidents." § 47.011, Fla. Stat. (1993) (emphasis added).

Florida courts have regularly applied this provision to authorized foreign corporations. As this Court has held, an authorized foreign corporation is a resident within the venue statutes where it has an agent and conducts business. *Enfinger v. Baxley*, 96 So. 2d 538, 540 (Fla. 1957) (authorized foreign corporation resides where it has an agent or other representative, quoting predecessor to § 47.051). *See also Sinclair Fund, Inc. v. Burton*, 623 So. 2d 587, 588 (Fla. 4th DCA 1993) (for venue purposes, when a foreign corporation has an office in Florida, it resides in the county where the office is located); *Methodist Hosp. Foundation, Inc. v. Irvin*, 403 So. 2d 496, 498 (Fla. 1st DCA 1981) (same).

On the other hand, section 47.051 does *not* apply to unauthorized foreign corporations doing business in Florida, which

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are treated as nonresidents and must defend an action anywhere jurisdiction is obtained. *United Engines, Inc. v. Citmoco Services, Inc.*, 418 So. 2d 409, 410 (Fla. 2d DCA 1982). *Accord Puerto v. Mid-Gulf Services, Inc.*, 519 So. 2d 689 (Fla. 3d DCA 1988).

Other Florida Statutes also treat authorized foreign coporations as residents. For example, authorized foreign corporations share the same procedures for service of process as domestic ones. *See* § 48.081, Fla. Stat. (1993). They are also considered residents when determining whether the statute of limitations is tolled, *Roess v. Malsby Co.*, 69 Fla. 15, 67 So. 226, 227 (Fla. 1915); and for purposes of section 76.04, Florida Statutes (1989), concerning attachment of assets. *Hordis Bros., Inc. v. Sentinel Holdings, Inc.*, 562 So. 2d 715, 717 (Fla. 3d DCA 1990).

The Court of Appeal's opinion, and the cases on which it relied, reflect this statutory policy equating authorized foreign corporations with domestic ones. The Fourth District previously held, for example, that a suit by an authorized foreign corporation against another authorized foreign corporation cannot be dismissed on the basis of *forum non conveniens*. When venue statutes are satisfied, "foreign corporations licensed to do business in Florida, with a place of business in Florida cannot be prevented from pursuing a cause of action in Florida based upon the doctrine of *forum non conveniens*." *Nat'l Aircraft Service, Inc. v. New York Airlines, Inc.*, 489 So. 2d 38, 39 (Fla. 4th DCA 1986). *See also Sempe v. Coordinated Caribbean Transport, Inc.*, 363 So. 2d 194

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(Fla. 3d DCA 1978), *cert. denied,* 372 So. 2d 467 (Fla. 1979) (refusing to apply Doctrine where several defendants had offices in Florida); *Sibaja v. Dow Chemical Co.*, 757 F.2d 1215, 1217, 1219 (11th Cir.) (recognizing that under *Houston*, suit by foreign individuals against an authorized foreign corporation could not be dismissed), *cert. denied*, 474 U.S. 948, 106 S.Ct. 347, 88 L.Ed.2d 294 (1985); *Waite v. Summit Leasing & Capital Int'l Corp.*, 441 So. 2d 185, 185 (Fla. 4th DCA 1983) (partnership with an office in Florida and a partner living in Florida considered a resident).[5]

As demonstrated above, Florida law requires authorized foreign corporations to maintain offices and resident agents in the state. Therefore, the Florida Statutes consistently consider such corporations residents for their respective purposes.

B. Considering an authorized foreign corporation a Florida resident under *Houston* reflects the modern trend toward multi-state commerce

As one commentator has said, "[t]he reality of modern economic life is that multi-nationals have multiple 'homes'." Reynolds, *The Proper Forum for a Suit: Transnational Forum Non*

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[5] Kinney's assertions (brief at 9, 17, 19) that *Nat'l Aircraft* is "aberrant" are false. Only two districts have considered this issue. The only conflicting case is *Nat'l Rifle Assoc. v. Linotype Co.*, 591 So. 2d 1021 (Fla. 3d DCA 1991), which itself conflicts with another case in that district. *See Sempe,* 363 So. 2d at 194. The other cases Kinney cites held that a corporation with a principal place of business here is a resident, but did not address whether foreign corporations without principal places of business here could be considered residents. *See Seaboard Coastline R. v. Swain*, 362 So. 2d 17, 18 (Fla. 1978); *Adams v. Seaboard Coastline R.R.*, 224 So. 2d 797, 801 (Fla. 1st DCA 1969).

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Conveniens and Countersuit in the Federal Courts, 70 Tex. L. Rev. 1663, 1695 (1992). As the United States Supreme Court has recognized, a concomitant of this expanding commerce is that "modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223, 78 S.Ct. 199, 201, 2 L.Ed.2d 223 (1957).

Because of this trend, an authorized foreign corporation's "principal place of business" should not be dispositive. In today's business world, corporations routinely conduct operations in many states and in many countries. Even an *amicus curiae* supporting the Petitioner recognizes that "the realities of modern commerce dictate that this Court no longer consider a corporation's principal place of business as a determinative factor in its *forum non conveniens* analysis" (Florida Chamber at 17). The fact that a corporation's principal place of business is elsewhere does not bear on the significance or extent of its presence in Florida. As the Third District recognized in holding that a foreign corporation that does business in Florida is a "resident" within the meaning of the attachment statute, "[t]he fact that [plaintiff] is incorporated in Pennsylvania, and has its principal place of business outside of Florida, is of no moment; the inquiry here is one of presence in this jurisdiction." *Hordis Bros.*, 562 So. 2d at 717.

At least one other court has recognized that "[a] corporation may be created under the laws of one state, have its head-

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quarters in another state, and do its primary business in yet one or more other states." *Anglim v. Missouri Pac. R.R.*, 832 S.W. 2d 298, 304 (Mo.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 831, 121 L.Ed.2d 701 (1992). In *Anglim*, the Missouri Supreme Court affirmed a trial court's refusal to dismiss a case where the defendant corporation, although headquartered in Nebraska, had offices, employees, a registered agent, tracks, and maintenance facilities in Missouri. *Anglim* is consistent with the proposition that an authorized foreign corporation, which by definition must maintain an office and resident agent in the state, is a resident.

This trend toward multi-state corporate offices also complicates determining a corporations "principal" place of business. In some cases it may be the state of incorporation, in other cases the corporation's headquarters, and in some cases it may be a third state, where the corporation is not headquartered but conducts most of its business. In contrast to the possible complexities of undertaking such an analysis, which may entail presentation of evidence and testimony, determining whether a corporation is incorporated in Florida or authorized to do business here is refreshingly simple.

C. A holding that an authorized foreign corporation is a resident under *Houston* would not abrogate the Doctrine

Kinney argues that statutes designed to change the common law must be clearly expressed, and therefore Florida's corporate statutes should not be interpreted as abrogating the Doctrine

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(brief at 25). The statutes adopting registration requirements for foreign corporations, however, existed 19 years *before* Florida recognized the Doctrine in 1936. *See* Chapter 5717, Acts of 1907; *Hagen v. Viney*, 124 Fla. 747, 169 So. 391 (1936). Therefore, these statutes confine and circumcribe the Doctrine's application.

In fact, the Doctrine itself constitutes a derogation of the ancient common law rule that a judge must exercise jurisdiction in every case in which he is seized of it, which explains the historical hesitation to apply the Doctrine. *See* Gibb, *The International Law of Jurisdiction In England And Scotland*, 220 (1926). That common law rule is enshrined in Florida's Constitution. Art. I, § 21, Fla. Const. (1968) (see Section II.C., *infra*). In adopting a limited version of the Doctrine, this Court in *Hagen* respected this rule, stating that "access to the court's process should be easily available." *Hagen*, 169 So. at 395.

Kinney also argues that the *Houston* rule, as applied by the Fourth District, "comes very close to extinguishing" the Doctrine because the Doctrine would essentially be subsumed into personal jurisdiction analysis (brief at 26).[6] Continental's proposed definition of resident, which includes only authorized foreign corporations, comes nowhere near abolishing the Doctrine. It allows application of the Doctrine when corporations not autho-

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[6] As more fully discussed below (Section II.B.2, *infra*), several commentators have argued for exactly that. *See* Stewart, *Forum Non Conveniens: A Doctrine in Search of a Role*, 74 Cal. L. Rev. 1259, 1324 (1986); Comment, *The Continued Use of Forum Non Conveniens: Is it Justified?*, 58 J. Air L. & Com. 845 (1993).

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rized to conduct business in Florida are involved. The Florida Business Corporation Act identifies a litany of business activities that do not constitute "transacting business" in Florida requiring authority from the state. § 607.1501(2), Fla. Stat. (1993). These include maintaining bank accounts, selling through independent contractors, soliciting or obtaining orders, creating or acquiring indebtedness, transacting business in interstate commerce, conducting an isolated transaction, and owning real or personal property. The statute's itemized list is not exhaustive. § 607.1501(3), Fla. Stat. (1993). Therefore, a vast number of foreign corporations can still invoke the Doctrine. Only those who obtain a certificate of authority, and therefore acquire all the privileges of a Florida corporation, are obligated to defend suits here.

The Doctrine also remains applicable in a vast area in which long-arm jurisdiction may be asserted under section 48.193, Florida Statutes (1993). This includes committing a tortious act in Florida, contracting for insurance here, causing injury to persons or property here, and breaching a contract by failing to perform a required act here. Defining a resident as including an authorized foreign corporation does not abrogate the Doctrine; it merely recognizes the Florida policy treating such corporations the same as domestic ones.

II. IF THIS COURT RECONSIDERS *HOUSTON*, IT SHOULD REAFFIRM IT

Kinney does not argue that *Houston* should be overruled; only certain *amici* raise this issue. Therefore, the issue is not

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properly before this Court. Should this Court decide to consider it, however, it should re-affirm *Houston*. That case reflects a moderate approach to the Doctrine, applied by several other states, which represents a reasonable balance between unbridled application of the Doctrine and its total exclusion. This approach provides certainty and avoids the expensive satellite litigation that *forum non conveniens* analysis entails. Moreover, Florida's Constitution prohibits the unrestricted application of the Doctrine. Finally, Florida's limitations on the Doctrine do not overburden courts or discourage businesses from locating here.

A. The issue of whether *Houston* should be overruled is not properly before this Court

The district court's opinion assumes *Houston*'s continued vitality. Nowhere does the opinion even hint that *Houston* should be overruled, or that it was wrongly decided. Similarly, Kinney defers to its *amici* the argument whether *Houston* should be overruled (Kinney brief at 20 n.6). Only they raise this issue. They have no standing, however, to inject new issues. *See Higbee v. Housing Authority of Jacksonville*, 143 Fla. 560, 197 So. 479, 485 (1940); *Acton v. Ft. Lauderdale Hospital*, 418 So. 2d 1099, 1101 (Fla. 1st DCA 1982), *approved*, 440 So. 2d 1282 (Fla. 1983). The issue of whether *Houston* should be overruled, therefore, is not properly before the Court, and this Court should refuse to consider it. In an abundance of caution, however, Continental demonstrates below why *Houston* remains as wise today as it was 17 years ago, and

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why this Court, if it considers the issue, should reaffirm *Houston*.

B. *Houston* represents a reasonable balance between unbridled application of the Doctrine and its total exclusion

Petitioner's *amici* characterize *Houston* as extremist and obsolete. In reality, the case represents a compromise between rejection of the Doctrine and its unbridled application. As shown below, the Florida rule has become increasingly common and, unlike either extreme, remains true to the Doctrine's original purpose.

1) Several states have either refused to apply the Doctrine or, like Florida, restrict its application

As Petitioner's *amici* admit (AT&T at 15-16; Florida Chamber at 7), several states have rejected the Doctrine. *See, e.g., Smith v. Board of Regents*, 165 Ga. App. 565, 565-66, 302 S.E.2d 124, 125-26 (1983). *See also Haug v. Burlington Northern R.R.*, 236 Mont. 368, 770 P.2d 517 (1989) (refusing to apply Doctrine in FELA cases, but leaving the question open in others). *See generally Dow Chemical Co. v. Castro Alfaro*, 786 S.W.2d 674, 686 & n.9 (Tex. 1990), *cert. denied*, 498 U.S. 1024, 111 S.Ct. 671, 112 L.Ed.2d 663 (1991) (Doggett, J., concurring) (ten states do not recognize the Doctrine); Note, *Dismissal of Suits Under Forum Non Conveniens*, 32 Harv. Int'l L. J. 517 (1991) (same).

Other courts, such as those in Rhode Island and South Dakota, have not decided whether the Doctrine should apply in their states. Some have noted the issue without deciding it. *See Nelson*

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v. World Wide Lease, Inc., 110 Idaho 369, 374 n.1, 716 P.2d 513, 518 n.1 (Ct. App. 1986).

Contrary to *amici*'s arguments, however, the remaining states have not wholeheartedly embraced the Doctrine. They differ in the extent to which they apply it. Many do so only in limited circumstances. In Vermont, for example, dismissal is inappropriate unless the plaintiff is "seeking to vex, harass, or oppress the defendant" or to "abuse" the defendant's rights. *Burrington v. Ashland Oil Co.*, 134 Vt. 211, 216, 356 A.2d 506, 510 (1976). In Louisiana, the Doctrine can be applied only to federal claims (except the Jones Act or federal maritime law). La. Code Civ. Proc. Art. 123 (1989).

Moreover, contrary to *amici*'s assertions that "Florida stands alone" in conditioning application of the Doctrine on complete non-residency (AT&T at 12; PLAC at 13; Florida Chamber at 7-8), several states apply the Doctrine only when the litigants are non-residents. *See, e.g., PMI Mortgage Ins. Co. v. Deseret Fed. Sav. & Loan*, 757 P.2d 1156 (Colo. 1988); *Santa Fe Engineers, Inc. v. Carolina Door Products, Inc.*, 275 S.C. 215, 268 S.E.2d 581 (1980); *Loftus v. Lee*, 308 S.W.2d 654, 658 (Mo. 1958). Others refuse to apply the Doctrine if the plaintiff resides in the state. *See* § 71.051, Tex. Civ. Prac. & Rem. Code (1993);[7] Va. Code 1950,

[7] Kinney's *amici* cite this law as evidence that Texas has adopted the Doctrine in full (AT&T at 30 & n.40; PLAC at 31 n.9; Florida Chamber at 8 n.1; Dep't of Commerce at 9). They fail to mention that by its express terms the statute applies only in death and personal injury cases, prohibits dismissal against plaintiffs

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§ 8.01-265. *See also Crowson v Sealaska Corp.*, 705 P.2d 905, 907-08 (Alaska 1985) (when plaintiff is bona fide resident, Doctrine has "extremely limited application"); *Archibald v. Cinerame Hotels*, 15 Cal.3d 853, 858, 126 Cal.Rptr. 811, 814, 544 P.2d 947, 950 (1976) (except in extraordinary cases the court has no discretion to dismiss an action under the Doctrine against a California resident). In fact, *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1005 (1947), which *amici* repeatedly invoke, itself involved non-residents. *Cf. Hughes v. Fetter*, 341 U.S. 609, 71 S.Ct. 980, 95 L.Ed.2d 1212 (1951) (dismissal reversed where parties resided in the forum).

Florida, therefore, does not stand alone. Rather, like many other states, it has adopted a moderate approach that applies the Doctrine, but only in those cases where its application is likely to result in dismissal, so that the time and expense necessary to litigate *forum non conveniens* issues is spent efficiently.

2) Florida's moderate approach provides certainty and avoids the expensive satellite litigation that *forum non conveniens* analysis entails

This Court first adopted the Doctrine in *Hagen v. Viney*, 124 Fla. 747, 169 So. 391 (1936). That case made clear that the Doctrine applied only in cases involving non-resident parties and a cause of action that accrued out-of-state: "It is settled law that Courts of one state are not required to assume jurisdiction of

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residing in Texas, and contains several other exceptions.

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causes between non-residents arising in other jurisdictions, though by the rule of comity rather than that of strict right, they generally do so." 169 So. at 392-93.

Houston, of course, re-affirmed this rule, which this Court recognized is "just, is serving well, and is easier to apply" than an unrestricted Doctrine. *Id.* at 861. This Court believed that "the certainty of resolution of the dispute outweighs the possible benefits achieved by dismissal in favor of a more convenient forum." *Id.* Thus, *Houston* reflects this Court's judgment that where one party resides in Florida or the cause of action arose here, the relative conveniences can never weigh so heavily in a defendant's favor to justify denying a plaintiff its chosen forum. *Houston* eliminates the satellite litigation resulting whenever a defendant believes victory is more likely elsewhere. Its bright-line rule avoids the often-tedious analysis such issues require, precisely in those cases where the vast majority of decisions will, in the end, sustain the plaintiff's choice.

Florida's limited use of the Doctrine does not, as Petitioner's *amici* suggest, contradict *Gilbert*; it merely applies it.[8] In *Gilbert*, the United States Supreme Court cautioned that the Doctrine should only be applied in rare cases and only when "the balance is *strongly* in favor of the defendant, . . ." 330 U.S. at 508. Florida's limited use of the Doctrine merely heeds

[8] In any event, any contradiction is irrelevant. The Doctrine is a creature of common law, not constitutional directive, and states are free to reject it.

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this warning. *Houston* reflects this Court's conclusion, consistent with those of other states, that the balance will rarely, if ever, favor the defendant "strongly" when one party resides in Florida or the cause of action accrued here, and that the substantial time and expense involved in litigating where to litigate does not justify a broader rule that would allow dismissal in those rare cases where the factors strongly favor the defendant although one party resides in Florida. As the First District said in *Adams*, 224 So. 2d at 801, "it can hardly be contended that suing defendant at the place of its official residence constitutes a harassment or imposition."

Florida's limited use of the Doctrine also remains faithful to the Doctrine's original purpose. As one court said, the Doctrine's "original application was limited to instances in which all parties were non-residents. In this country it was applied to similar instances, as where the parties were all aliens." *Flaiz v. Moore*, 353 S.W.2d 74 (Tex. Ct. App.), *rev'd on other grounds*, 359 S.W.2d 872 (Tex. 1962) (citations omitted).

Some of Petitioner's *amici* argue a trend toward full application of the Doctrine. Contrary to these assertions, the Doctrine remains surrounded by controversy. Several commentators have recently urged its abolishment or curtailment. *See, e.g.*, Stewart, 74 Cal. L. Rev. at 1324 (Doctrine should be abolished because the relevant factors and policies are best considered in jurisdictional contexts); Note, *California Supreme Court Rejects Consideration of the Favorable Law of a Foreign Plaintiff's Forum*

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as an Element in Forum Non Conveniens Analysis, 105 Harv. L. Rev. 1813, 1818 (1992) (urging that the Doctrine be abolished to the extent it allows a domestic corporation to argue that it would be inconvenient to litigate in its own country);[9] Comment, *Dow Chemical Co. v. Castro Alfaro: The Problems with the Current Application of Forum Non Conveniens*, 17 Brook. J. Int'l L. 717, 743-45 (1991) (the main consideration in applying the Doctrine should not be which forum is more convenient, but whether the litigation has substantial connections with the forum in which the plaintiff filed suit); Comment, *The Continued Use of Forum Non Conveniens: Is it Justified?*, 58 J. Air L. & Com. 845 (1993) (urging a stricter application of the Doctrine, under which the relative convenience of the parties is adequately addressed through personal jurisdiction analysis). *See also* Robertson, *Forum Non Conveniens in America and England: A Rather Fantastic Fiction*, 103 Law Quarterly Rev. 402, 414, 426 (1987) (it is inappropriately time-consuming for parties to have to "litigate in order to determine where they shall litigate. . . . In terms of delay, expense, uncertainty, and a

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[9] This note also argued that state legislatures, not courts, should determine to what extent their tort systems should regulate the foreign activities of their corporations. *Id.* at 1813. Some state laws apply the Doctrine in full. *See* Ark. Code. § 16-4-101 (Supp. 1993); Mass. Gen. Laws Ch. 223A, § 5 (1994); N.Y. Civ. Prac. L. & R. 327 (1994). Others, only in limited circumstances. *See* La.Code Civ.Proc. Art. 123 (1989) (dismissal allowed when suit brought under federal statute); § 71.051, Tex. Civ. Prac. & Rem. Code (1993) (applying the Doctrine in wrongful death cases accruing out-of-state where the plaintiff does *not* reside in Texas, and applying a different standard when the plaintiff is a United States resident); Va. Code 1950, § 8.01-265 (applying Doctrine where plaintiff resides outside Virginia).

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fundamental loss of judicial accountability, . . . *forum non conveniens* clearly costs more than it is worth"); Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. Pa. L. Rev. 781, 785 (1985) (*forum non conveniens* has resulted in "a crazy quilt of ad hoc, capricious, and inconsistent decisions"); Speck, *Forum Non Conveniens and Choice of Law in Admiralty: Time for an Overhaul*, 18 J. Mar. L. & Com. 185, 186 (1987) (citing inconsistency and unpredictability as problems with the application of the Doctrine).

As many of these commentators argue has happened in other states, unrestricted application of the Doctrine would replace certainty with confusion. Out-of-state defendants would regularly move for dismissal on the basis of *forum non conveniens*. A flood of affidavits and counter-affidavits, and sometimes even the taking of testimony, would result whenever a non-resident of Florida is sued. Courts would regularly become involved in the tedious, time-consuming, and expensive balancing of factors in cases where, ultimately, the balance will not favor the defendant strongly enough to warrant dismissal. Thus, the courts will spend inordinate and unnecessary time determining these issues, only to have the case remain where it began.[10] In contrast, determining whether a corporation is incorporated in Florida or authorized to do business here is a simple task.

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[10] The factual recitation in the brief of *amicus curiae* Carnival Corporation, et al. (at 18-19) provides an excellent example of the protracted litigation this satellite issue produces.

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C. Florida's Constitution prohibits the unrestricted application of the Doctrine

In arguing that this Court should adopt the Doctrine in full, Petitioner's *amici* stress that several states have done so. Those states, however, encountered no statutory or constitutional obstacle to doing so. As the Second Circuit noted in *Alcoa S.S. Co., Inc. v. M/V Nordic Regent*, 654 F.2d 147, 155 n.10 (2d Cir.), *cert. denied*, 449 U.S. 890, 101 S.Ct. 248, 66 L.Ed.2d 116 (1980), however, "[o]f the scattered states which do not follow the doctrine, some have declined to do so because of peculiar provisions of their state constitutions which have been construed to guarantee residents a local forum. *E.g., McDonnell-Douglas Corp. v. Lohn*, 557 P.2d 373 (Colo. 1976); *Chapman v. Southern Ry.*, 230 S.C. 210, 95 S.E.2d 170 (1956)." Other states also have ruled that constitutional provisions preclude application of the Doctrine. *See Brown v. Seaboard Coast Line R.R.*, 192 S.E.2d 382 (Ga. 1972); *Haug*, 236 Mont. at 375, 770 P.2d at 521.

Florida's Constitution contains similar free access provisions. Article I, section 21 provides that "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay." This section prohibits an unrestricted application of the Doctrine that would deny Florida residents a Florida forum.[11]

Florida courts recognize that Article I, section 21

[11] In *Houston*, this Court was presented with this argument, but declined to consider it. 359 So. 2d at 861 & n.4.

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guarantees to every person the right to access to the courts free of unreasonable burdens and restrictions. *See Swain v. Curry*, 595 So. 2d 168, 174 (Fla. 1st DCA), *review denied*, 601 So. 2d 551 (Fla. 1992); *G.B.B. Investments, Inc. v. Hinterkopf*, 343 So. 2d 899 (Fla. 3d DCA 1977). "The right to go to court to resolve our disputes is one of our fundamental rights. . . . The history of [section 21] shows the court's intention to construe the right liberally in order to guarantee broad accessibility to the courts for resolving disputes." *Psychiatric Assoc. v. Siegel*, 610 So. 2d 419, 424 (Fla. 1992). Moreover, in cases of ambiguity, judicial construction should favor access to the courts. *Swain*, 595 So. 2d at 174.

Apart from its inherent logic and good sense, the rule of *Houston* is mandated by the Florida Constitution. Without such a restraint, a Florida resident's free access to the courts in Florida would be illusory. Justice in a Florida court would be denied, and any justice at all would be substantially delayed, all in contravention of section 21's guarantee.

D. Limits on the Doctrine do not overburden courts or discourage businesses from locating here

Kinney's *amici* argue that limiting the Doctrine to non-residents will overburden the courts of this state and result in disparity of treatment (PLAC at 25, 28). As stated earlier, however, other states also limit the Doctrine or refuse to apply it at all. These states have not been overburdened with litigation. *See, e.g., Dow Chemical*, 786 S.W.2d at 686 & n.9 (Doggett, J.,

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concurring) (no evidence that docket congestion has occurred in ten states not recognizing the Doctrine); Note, *Dismissal of Suits Under Forum Non Conveniens*, 32 Harv. Int'l L. J. 517 (1991) (the ten states not recognizing the Doctrine, including those with high concentrations of multinational corporate activity, have not been overburdened with international litigation).

Petitioner's *amici* also argue that the Florida rule deters corporations from locating in Florida (PLAC at 34; Florida Chamber at 17); Dep't of Commerce at 5-6). Yet although *Houston* has been the law in this state for 17 years, *amici* support their argument with nothing but conjecture. They provide no statistics demonstrating that corporations have shown a reluctance to move their headquarters to Florida, or establish offices in Florida, simply because of *Houston*. In fact, one *amicus* admits that "Florida's growth as a center for national and international business has accelerated substantially since 1978" (AT&T at 17), and cites statistics demonstrating both Florida's growth and the increased number of companies doing business here (AT&T at 18). Obviously, *Houston* has not deterred companies from Florida. Indeed, it strains credulity to suggest that, given Florida's propitious geographic location, its warm weather, its labor force, its favorable tax laws, its tourist industry, and its abundance of international banks, a corporation would not locate here simply because it would have to defend a lawsuit here.

Petitioner's *amici* also argue that the Florida rule

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invites foreign nationals to file lawsuits in Florida whose causes of action accrued in other countries whenever the multi-national corporation involved happens to do business in Florida (AT&T at 22-23; PLAC at 28, 33-34; Florida Chamber at 10, 13; Dep't of Commerce at 12). This case, of course, does not involve foreign nationals. The Court can, however, as other states have done, fashion a rule that distinguishes between suits solely between United States residents, such as this one, and those involving foreign nationals. *See Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 255-256, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981) (recognizing that a foreign plaintiff's choice of forum deserves less deference); § 71.051, Tex. Civ. Prac. & Rem. Code (1993) (making it much more difficult to dismiss a case against U.S. residents than against foreign nationals).

III. IF THE DOCTRINE IS APPLIED, THE BALANCE OF FACTORS FAVORS A FLORIDA FORUM

Even if the Doctrine applies, the inquiry does not end. The court must then determine "whether the criteria necessary to bring into play the doctrine of *forum non conveniens* have been met." *Adams*, 224 So. 2d at 801. Although the district court did not rule on this issue, Continental raised it, and Kinney addresses it in its brief (at 28-33). Therefore, this Court can properly consider it. *See Savoie v. State*, 422 So. 2d 308, 312 (Fla. 1982) (once Florida Supreme Court has jurisdiction, it is free to consider all issues appropriately raised in the appellate process).

The trial court's holding that the interests of justice

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would be better served by litigating this matter in New York constituted an abuse of discretion. The court did not analyze the several factors to determine whether Florida was an inconvenient forum. Rather, it apparently assumed that because the cause of action accrued in New York, the case should be litigated there. As explained below, because the factors do not strongly favor Kinney, and in fact favor Continental, dismissal was inappropriate.

A. Dismissal under the Doctrine is inappropriate unless all the relevant factors weigh strongly in defendant's favor

While a trial court has the discretion to dismiss a case on *forum non conveniens* grounds, that discretion "is not unbridled." *Southern Ry. Co. v. McCubbins,* 196 So. 2d 512, 516 (Fla. 3d DCA 1967). In fact, it is rather limited:

> We are here dealing with a final judgment dismissing a complaint which has been filed in a proper forum in accordance with the venue statutes of this state, the effect of which might well be to either destroy the cause of action or greatly prejudice the rights of the plaintiff. Under these circumstances a trial court is required to exercise a much higher standard of discretion . . . .

Adams, 224 So. 2d at 801. In *Houston*, 359 So. 2d at 860, this Court also warned that dismissal based on *forum non conveniens* is a drastic remedy that should be ordered only under the most compelling circumstances. *Cf. United States v. Nat'l City Lines*, 334 U.S. 573, 589 n.35, 68 S.Ct. 1169, 92 L.Ed. 1584 (1948) (a mere balance of convenience in defendant's favor is insufficient to

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apply the Doctrine; a dismissal is warranted only to avoid vexatious and oppressive consequences); *Gilbert*, 330 U.S. at 508 (to justify dismissal, trial in plaintiff's chosen forum must impose a heavy burden on defendant).

The court should disturb the plaintiff's choice of forum only when the balance favors the defendant *strongly*. *Armadora Naval Dominicana, S.A. v. Garcia,* 478 So. 2d 873, 876 (Fla. 3d DCA 1985); *Cruickshank v. Cruickshank,* 420 So. 2d 914, 915 (Fla. 1st DCA 1982). Therefore, the balance must tip in Kinney's favor not just slightly, but substantially. Florida courts have often refused to dismiss cases even when both parties reside outside Florida. *See, e.g., British-American Ins. Co., Ltd. v. Cladakis,* 321 So. 2d 448 (Fla. 3d DCA 1975); *Southern Ry. Co. v. Bowling,* 129 So. 2d 433 (Fla. 3d DCA 1961); *Adams,* 224 So. 2d at 798.

To determine whether Florida is an inconvenient forum, some courts apply the nine factors enunciated in *Gilbert,* 330 U.S. at 501. *See, e.g., Garcia,* 478 So. 2d at 876; *Bowling,* 129 So. 2d at 434. These can be divided into six "private interest" factors and three "public interest" factors.

In considering these factors, this Court should bear in mind the issues in this case. This case does not, as Kinney argues (brief at 31), involve contract interpretation. Although Continental's claim against Kinney is for breach of a contract, and the contract was technically "breached" in New York, where Kinney refused to pay the retrospective premiums, Kinney cannot seriously

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argue that the issues in this litigation will concern an interpretation of the contract. Kinney admits it refused to pay the premiums, and raised as its sole reason Continental's handling of four worker's compensation claims arising from three different states outside New York. Therefore, the issues concern not the formation of and performance under the contracts, but Continental's handling of these four claims. As discussed below, the *Gilbert* factors do not strongly favor Kinney; in fact, they favor Continental because half of the disputed claims occurred in Florida.

B. The private interest factors favor Continental because half of the physical evidence and non-party witnesses are located in Florida

The six private interest factors concern access to sources of proof, such as witnesses and evidence. As shown below, these factors militate in Continental's favor because half of the evidence is located in Florida, and the other half in states other than New York.

1) the relative ease of access to sources of proof: Of the four disputed claims, two arose out of Florida. On these claims, the injuries occurred in Florida, the evidence is located in Florida, the claim files are located in Florida, the claims adjusters are located in Florida, and the treating physicians are located in Florida. Access to this evidence will be much easier from here than from anywhere else.

The remaining two claims arose from two other states, but not where either party is incorporated or has its principal place

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of business. Therefore, litigation in New York, as the trial court ordered, would be substantially less convenient because the parties would be forced to travel to three different states to gain access to sources of proof.

Kinney argues that the relevant documents are located in New York (brief at 31). These, however, are *copies* of documents (which Continental voluntarily produced), the originals of which are located in Continental's respective claims offices. Moreover, Kinney does not argue that the volume of relevant documents is so unwieldy that they cannot simply be mailed from one place to another, regardless of their location.

2) the availability of compulsory process for attendance of unwilling witnesses: All unwilling witnesses (i.e., factual witnesses unrelated to either party) reside outside New York, half of them in Florida. For the Florida claims, the treating physicians, therapists, and witnesses to the accidents all reside in Florida. For the remaining two claims, these witnesses reside in states other than New York.

Kinney identified accountants in New York, who would testify on Kinney's behalf about Continental's files and claims handling. These experts are far from "unwilling;" they are paid experts. On the other hand, the witnesses, physicians, and therapists have no interest in the litigation, will probably resist any attempt to call them to New York, and cannot be compelled to testify by subpoena. Their convenience, not the parties', should

be paramount in determining the most convenient forum.

3) the cost of obtaining the attendance of willing witnesses: No matter where the case is tried, both parties will spend money calling witnesses. It could not be otherwise: witnesses are located in five different states. The issue is where the litigation will be *least* costly. Half the disputed claims arise out of Florida, and the other half from states other than New York. Several willing witnesses reside in Florida, such as Continental's claims adjusters and the injured Kinney employees who received the disputed benefits. There is no perfect place to file this lawsuit, but Florida is the least *im*-perfect, and no compelling reason exists to deny Continental its choice of forum.

4) the possibility of view of the premises: The only relevant premises would be the places where the employees suffered their injuries. Half of these are located in Florida; the other half in states other than New York.

5) the enforceability of a judgment: Because Kinney conducts business in Florida, and presumably owns property here, any judgment can be executed in Florida.

6) all other practical problems that make trial of a case easy, expeditious and inexpensive: As stated before, no matter where trial is held, inconvenience will result. The claims arose in three different states, and the parties have their principal offices in two others. But if inconvenience is necessary, it should, to the extent possible, be imposed on the parties -- who

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have a stake in the outcome -- rather than on non-parties. Moreover, the inconvenience to Kinney and Continental will be the same, because they have their principal offices in adjoining states equidistant to Florida. To the extent they must bring witnesses here, their burdens are identical.

C. The public interest factors favor a Florida forum because judicial efficiency dictates that trial be held where most of the evidence and witnesses are located

The three public interest factors concern judicial efficiency. These factors also militate in Continental's favor because most of the evidence is located in Florida.

1) the administrative difficulties resulting from litigation being piled up in congested forums instead of being handled at its origin: The "origin" of this case is where the disputed claims arose. Because they arose in different states, the logical forum is where most of them arose. That forum is Florida. Moreover, Kinney presented no evidence that the courts of Broward County are any more congested than those of New York City. The converse is more likely.

2) The local interest in having localized controversies decided at home: Because Florida residents were injured and received workers compensation benefits now in dispute, this case has local interest.

3) The judicial interest in adjudicating the case in a forum at home with the governing law: It is undisputed that Kinney

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refused to pay retrospective premiums. The crucial issue will be whether, as Kinney asserted in defense of its breach of contract, Continental mishandled certain claims, half of which arose in Florida. Continental paid those benefits as required by Florida's worker's compensation laws, and whether Continental mishandled the claims will be judged according to those laws even if the case is litigated in New York. Therefore, a Florida forum would be "at home" with the governing law as to half the claims. As to the others, the laws of other states may apply, but certainly not the law of New York.

D. Kinney fails to offer any compelling reason to litigate this case in New York

Kinney virtually ignores the many witnesses located in several states other than New York (brief at 30-33). Kinney does not even discuss the *Gilbert* factors. Instead, it argues that the case should be litigated in New York simply because the contract was executed there, any breach occurred there, and the witnesses to the execution and breach reside in New York. The formation of the contract, however, is not disputed; nor is Kinney's refusal to pay retrospective premiums. What *is* disputed is whether Continental mishandled the four claims that resulted in those premiums. This case, wherever it is litigated, will revolve around that issue, not, for example, on whether the contract was properly witnessed under New York law.

Kinney also argues that the trial court properly dis-

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missed the case because evidence suggested Continental was forum-shopping (brief at 32-33). That issue was never resolved. Kinney submitted an affidavit suggesting that Continental was forum-shopping, but failed to show what legal or strategic advantange Continental stood to gain. Continental submitted an affidavit refuting that allegation. The trial court did not mention the issue in its order, and no other evidence remotely suggests the court resolved that issue. Kinney cannot now use that issue as a basis for dismissal.

Kinney also cites *Reyno*, 454 U.S. at 255-56, 102 S.Ct. at 266, in arguing that Continental's choice of forum deserves no deference because it is a "foreign" plaintiff. Whether Continental is "foreign" or resident, of course, is an issue for this Court (see Section I, *supra*). Moreover, *Reyno* concerned residents not of different states, but of different countries. *Id.* at 242. The Supreme Court held that a foreigner's case could be dismissed under the Doctrine even if the law of the alternative country was less favorable. *Id.* at 247. The Court talks about "resident" and "citizen" plaintiffs interchangeably, *Id.* at 255-56, and its statements about "foreign" plaintiffs should be viewed in this context as referring to foreign nationals.

As this Court said in *Houston,* 359 So. 2d at 860, dismissal based on *forum non conveniens* is a drastic remedy that should be ordered only under the most compelling circumstances. Kinney offers no such circumstances. If this Court applies the

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Doctrine, it should nevertheless reverse the dismissal because the balance of factors does not favor Kinney strongly, and in fact favors Continental.

CONCLUSION

For the reasons stated, this Court should reverse the order of dismissal and remand the case to allow the litigation to proceed in Broward County, Florida.

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CERTIFICATE OF SERVICE

I CERTIFY that a copy of this brief was mailed on February 13, 1995 to counsel on the attached service list.

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