IN THE SUPREME COURT OF FLORIDA

CASE NO.: 95,348 (No. 97-02316)

ELENA LAURA PESSINO GOMEZ DEL CAMPO,

Petitioner,

v.

ELENA GOMEZ DEL CAMPO DE LINDZON, JERRY M. LINDZON, MARIANA PESSINO GOMEZ DEL CAMPO JOSEPH A. FIELD, and ALFRED P. O'HARA, individually,

Respondents.

ON PETITION FOR CERTIORARI BASED ON CERTIFIED QUESTION OF GREAT PUBLIC IMPORTANCE FROM THE THIRD DISTRICT COURT OF APPEAL

RESPONDENTS' JOINT ANSWER BRIEF

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STATEMENT OF DESIGNATION OF PARTIES

For the sake of brevity and clarity, throughout this brief the following designations will be used to refer to the parties in this action:

"Elena Laura" refers to plaintiff-Petitioner Elena Laura Pessino Gomez Del Campo.

"Elena Lindzon" refers to defendant-Respondent Elena Gomez Del Campo de Lindzon.

"Jerry Lindzon" refers to defendant-Respondent Jerry M. Lindzon.

"Mariana" refers to defendant-Respondent Mariana Pessino Gomez Del Campo.

"Field" refers to defendant-Respondent Joseph A. Field.

"O'Hara" refers to defendant-Respondent Alfred P. O'Hara.

CERTIFICATE OF TYPE STYLE AND SIZE

Pursuant to the Court's Administrative Order of July 13, 1998, the Respondents' counsel certify by signing this brief that the type style and size conform with this Court's Order. The type style used is Times Roman (a proportionally spaced font) and the type size is 14 point-type.

INTRODUCTION

Petitioner Elena Laura — a citizen of Spain originally born in Cuba — filed this lawsuit in Dade County to redress the alleged wrongful conduct by the Respondents (the majority of which are non-Florida residents) relating to two foreign trusts: a Cayman Island trust ("the Cotorro trust"), and a Liechtenstein trust ("the Corniche trust"). The Cotorro and Corniche trusts are separate and distinct from each other: they have different terms and conditions, they have different beneficiaries, they are governed by different foreign law, and they are administered by different foreign trustees in different jurisdictions. Moreover, the Respondents' alleged wrongful conduct relating to the Cotorro trust is completely different from the Respondents' alleged wrongful conduct relating to the Corniche trust.

The gravamen of Elena Laura's complaint as it relates to the Cotorro trust is the propriety of amendments to the trust and subsequent invasions into the corpus of the trust — the same issues that Petitioner had already been litigating in the Cayman Islands immediately prior to filing the Dade County action.

In contrast to the Cotorro trust administrative issues, the gravamen of Elena Laura's complaint with regard to the Corniche trust is whether litigation she and others initiated over a decade ago in Liechtenstein relating to the Corniche trust was "frivolous," and whether she was wrongfully induced to participate in that litigation by the Respondents. In response to the complaint, the Respondents filed a motion to dismiss the complaint based on the doctrine of *forum non conveniens* and Rule 1.061, Florida Rules of Civil Procedure, which were newly revised by this Court in Kinney System Inc. v. The Continental Insurance Co., 674 So. 2d 86 (Fla. 1996). That motion was filed in conjunction with a motion to dismiss the complaint for lack of subject matter jurisdiction under Fla. Stat. § 737.201, et seq. (Florida courts shall not entertain jurisdiction over foreign trusts).

After extensive briefing and argument and the development of hundreds of pages of record evidence, the trial court granted the motion and dismissed the action on the basis of *forum non conveniens*. The trial court correctly concluded that Elena Laura, a citizen of Spain who has never been a citizen or resident of Florida, has no right to demand that a Florida court adjudicate her rights as a beneficiary to two non-Florida trusts, established by a non-Florida settlor outside of Florida, administered by non-Florida trustees in foreign jurisdictions pursuant to local foreign law as mandated by the respective trusts, and over trust assets that are not located in Florida.

Recognizing that Elena Laura had joined in one Florida lawsuit two separate and unrelated actions relating to foreign trusts governed and administered under the laws of the Cayman Islands and Liechtenstein, and acknowledging that the trial court has "substantial flexibility" in ruling on a forum non conveniens issue, the Third District correctly affirmed the trial court's order and concluded that under circumstances such as these a lawsuit could be dismissed in favor of two alternative fora. Despite the fact that this ruling is consistent with Kinney, Mendes v. Dowelanco Industrial Ltda., 651 So.2d 776 (Fla. 3d DCA 1995), Ciba-Geigy Ltd., BASF A.G. v. The Fish Peddler, Inc., 691 So.2d 1111 (Fla. 4th DCA 1997), review denied 699 So.2d 252 (Fla. 1997), and Smith Barney, Inc. v. Potter, 725 So. 2d 1223 (Fla. 4th DCA 1999), the Third District certified the issue of whether it is an abuse of discretion to dismiss an action on the basis of *forum non conveniens* if dismissal requires a plaintiff to refile in more than one alternative forum.

Elena Laura argues that this Court should answer "yes" to the certified question because, she claims, this case somehow involves a cohesive nucleus of operative facts that the trial court could not sever and that the trial court does not have "substantial flexibility" in ruling on a forum non conveniens issue. Neither of these arguments has

merit. In fact, this case is a textbook example of why trial courts must have "substantial flexibility" in protecting against Florida courts becoming a forum for the world at large.

In her Dade County action Elena Laura strategically chose to combine two unrelated actions: an action contesting amendments to a Cayman Island trust and the subsequent draw downs from that trust with an action arising out of her allegedly frivolous litigation in Liechtenstein relating to the Liechtenstein trust. Plainly, Kinney does not foreclose, and indeed requires, that a trial court reasonably deal with such a hodgepodge of claims in dismissing a case in favor of those foreign jurisdictions where those claims should be adjudicated, even if dismissal will result in actions being brought in more than one forum. Were the rule otherwise, any imaginative lawyer could undermine this Court's decision in Kinney simply by combining two or even more separate cases into one, leaving the trial court powerless to dismiss the "whole case" and leaving Florida's courts holding the proverbial bag. As this Court explained in Kinney:

> Nothing in our law establishes a policy that Florida must be a courthouse for the world, nor that the taxpayers of the state must pay to resolve disputes utterly unconnected with this state's interests.
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> [T]he obvious purpose underlying [the Florida constitutional right to access to our courts] is to guarantee access to a potential remedy for wrongs, not to provide a forum to the world at large. *Thus, the right of access will not bar dismissal to the degree that such Florida interests are weak and to the degree that remedies are available in convenient alternative fora with better connections to the events complained of.*
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> Florida courts exist to judge matters with significant impact upon Florida's interests, especially in light of the fact that the taxpayers of this state pay for the operation of its judiciary. *Nothing in our constitution compels the taxpayers to spend their money even for the rankest forum shopping by out-of-state interests.*

Kinney, 674 So. 2d at 88, 92-93 (emphasis added).

In light of this Court's expressed concerns in Kinney, the Third District correctly affirmed the trial court's order, based on sound judicial discretion, that dismissed two separate foreign actions in favor of the appropriate fora. Accordingly, Respondents urge the Court to reaffirm its decision and reasoning in Kinney by affirming the Third District's decision and answering the certified question in the negative: A trial court *does not* abuse its discretion if it dismisses an action on *forum non conveniens* grounds under Kinney when dismissal requires the plaintiff to refile the claims in more than one alternative jurisdiction.

STATEMENT OF THE CASE AND THE FACTS

A. An Objective Statement of Facts is Necessary

Rule 9.210(b)(3), Florida Rules of Appellate Procedure, requires the Petitioner to include a factual statement in the initial brief. Rule 9.210(c) affirmatively states that the answer brief shall omit a statement of the facts "unless there are areas of disagreement." As one appellate court has explained, because an appellate court must be able to rely on the Petitioner's statement of facts, the "clear implication is that our rules of appellate procedure place a square obligation upon Appellant to provide the court with a *full and fair* statement of facts. . . . An Appellant's statement of the facts must not only be *objective*, but must be cast in a form *appropriate to the standard of review* applicable to the matters presented." Thompson v. State, 588 So. 2d 687, 689 (Fla. 1st DCA 1991) (emphasis added).

Elena Laura's "Statement of Facts" in the initial brief is full of subjective allegations that consist of self-serving mischaracterizations of the record. Elena Laura failed to satisfy her obligations under Rule 9.210(b)(3) because she has not cast her statement (or her entire brief for that matter) in a manner appropriate to the standard of review in this case.

Indeed, Elena Laura has the misguided belief that this Court must accept as true and only rely on each and every one of the allegations in Elena Laura's complaint and her supporting affidavits. (Pet. Brief at 10 n.2). However, in contrast to the "de novo" standard that governs a traditional motion to dismiss filed under Rule 1.140, Fla. R. Civ. P., this case is based upon the application of Rule 1.061 and the Supreme Court's newly revised doctrine of *forum non conveniens* set forth in Kinney. On its face, Rule 1.061 requires the trial court below to analyze the record and weigh various factors and competing interests to determine if a lawsuit should be heard in this forum. The trial court makes those findings and conclusions, and an appellate court reviews them on an abuse of discretion standard.

Consequently, as written, neither this Court nor the Third District could adequately rely upon Elena Laura's "Statement of Facts." Because Respondents disagree with Petitioner's "Statement of Facts," pursuant to Rule 9.210(c), the Respondents submit to the Court their objective statement of facts which conforms with the standard of review that governs this case.[1]

B. Statement of Facts

The lawsuit involves two separate and unrelated foreign trusts settled by Elena Laura's grandmother, Maria Ernestina Bacardi y Gaillard (a Cuban citizen residing in Spain) ("the settlor"), in which Elena Laura has differing contingent interests that are triggered by different events. (Pet. Brief at 10-11; R.1-88 (A85-171)). The settlor established these two trusts for the benefit of her children and their respective progeny: the Cotorro trust was established for her daughter, Elena Lindzon, and the Corniche

[1] The Respondents will refer first to the pages in the record on appeal submitted by the Clerk of the Court, using the designation "R.____". For the Court's convenience, the Respondents may also refer to cross-designations to the appendix to the Respondents' Joint Answer accompanying this brief as "JA Tab ___ at ____". This appendix is provided to the Court, pursuant to Fla. R. App. P. 9.220. References to Elena Laura's appendix shall be as "A___" as referred to in the initial brief.

trust was established for her son Luis (who is not a party to this case). (R.887-1083 (JA Tab 7 at 446-47)). These trusts have different trustees, different beneficiaries, different provisions, and the trusts are governed and administered under different foreign laws. The Cotorro trust was settled under Cayman Island law and since its inception has been administered in and governed by Cayman Island law. (Id. (JA Tab 7 at 446)). By contrast, the Corniche trust was settled under the law of Liechtenstein and is governed by Liechtenstein law. (Id. (JA Tab 7 at 614)).

On December 9, 1996, Elena Laura — a citizen of Spain originally born in Cuba — filed this lawsuit in Dade County, joining unrelated issues relating to the Cotorro trust and the Corniche trust in a twenty-three count, sixty-one page complaint. The Dade County complaint on its face was divided into three factual categories: (1) the fraudulent alteration and amendment to the Cotorro trust (R.1-88 ¶¶ 49-83 (A96-103)); (2) the wrongful termination of the institutionalized monthly payments from the income Elena Lindzon derived from the Cotorro trust (Id. ¶¶ 94-108 (A107-09)); and (3) Elena Laura's frivolous and baseless litigation in Switzerland and Liechtenstein against Luis Bacardi relating to the Corniche trust (Id. ¶¶ 84-93 (A104-07)).

Based on these three factual categories and various legal theories for breach of trust, breach of fiduciary duties, and other claims, Elena Laura sought the following relief:

- return of trust property to the Cotorro trust (e.g. R.1-88 ¶156 (A121));
- removal of Jerry Lindzon and Elena Lindzon from the Management Committee of the Cotorro trust (Id.);
- an accounting to trust beneficiaries (R.1-88 ¶¶161-164 (A123-24));
- imposition of a resulting trust or constructive trust on Cotorro trust assets (R.1-88 ¶¶ 176-85 (A126-27)); and

- millions of dollars in money damages to Elena Laura for the damages suffered from her loss of interest in the Cotorro and Corniche trusts.

Before choosing Florida as the forum to litigate her claims relating to the Cotorro and Corniche trusts, Elena Laura instigated and participated in litigation in the Cayman Islands relating to the propriety of amendments to the Cotorro trust and the administration of the trust. In fact, the issues that Elena Laura caused to be raised to the Cayman Island court are virtually identical to the issues which Elena Laura raised in her Dade County complaint. The Cayman action was still pending when the Dade County complaint was filed.

Additionally, years before the filing of her Dade County complaint, Elena Laura and her sisters sued the trustees of the Corniche trust for impropriety and breach of trust. That litigation was filed in Liechtenstein and Switzerland. Additionally, subsequent litigation relating to the Corniche trust was also pending in Liechtenstein at the time the Dade County action was filed and is still ongoing today.

Cayman Island Litigation Over the Cotorro Trust

As a result of allegations made by Elena Laura challenging amendments to the Cotorro trust and the administration of the trust, the Trustee of the Cotorro trust, Coutts & Co. (Cayman) Ltd., filed an action in the Cayman Islands on April 7, 1995.[2] Under Cayman Islands procedure, the Trustee initiated this litigation by filing an "Originating Summons" with the Cayman Court. (R.305-419 Exh.E (JA Tab 1 at 95-98)). The Cotorro trust expressly required that the Cayman Islands be the proper forum for disputes surrounding the trust:

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[2] This Trustee was the successor to Roywest Trust Corp (Cayman) Ltd., the original Trustee named in the original trust instrument. (JA Tab 1 at 75). The action was styled *IN THE MATTER of the Cotorro Trust originally constituted by a Trust Agreement dated the 1st day of June 1979 between Maria Ernestina Bacardi y Gaillard and Roywest Trust Corporation (Cayman) Ltd., now named Coutts & Co. (Cayman) Ltd.,* Cause No. 153 of 1995.

1. Introduction: The trust designates "Roywest Trust Co. (Cayman) Ltd., a corporation organized and existing under the laws of the Cayman Islands and having its registered office at P.O. Box 707, Grand Cayman, British West Indies, as 'Trustee'". (R.887-1083 (JA Tab 7 at 446); JA Tab 1 at 75).

2. Article 19(A); Applicable Law and Jurisdiction: "The trust is established under the laws of the Cayman Islands and shall be principally administered in the Cayman Islands and shall be governed, construed, and regulated by such laws, to the exclusion of the laws of any other country or jurisdiction whatsoever." (R.887-1083 (JA Tab 7 at 446); JA Tab 1 at 89).

Thus, for a trust governed by Cayman law and administered in the Cayman Islands, the Cayman trustee initiated the Cayman action to obtain "directions" from the Cayman court as to how "to investigate further or otherwise deal with allegations or possible allegations *made by or on behalf of Elena Laura Pessino de Balmaseda*, a beneficiary of the trust, or Cesar de Balmaseda (Elena Laura's husband), claiming to represent his son." Elena Laura had asserted allegations that the trust was not validly created and that members of the management committee (including some of the Respondents) had breached their fiduciary duties to the beneficiaries through amendments to the trust and alleged invasions to the corpus of the trust. (R.305-419 Exh.E (JA Tab 1 at 96-97)).

The Grand Court of the Cayman Islands assumed jurisdiction over this litigation in order to resolve these legal issues raised by *Elena Laura* concerning the administration and management of the trust.[3] Thus, the issues raised by Elena Laura

[3] Specifically, the Cayman court held that the application correctly raised six main issues that would be addressed in the case, including (1) Elena Laura's possible challenge to the validity of the trust; (2) the uncertainty surrounding the nature of litigation filed in Spain regarding the settlor's non-trust estate; (3) Elena Laura's demands for access to trust documents; (4) the capital distributions made by Elena Lindzon from fifty percent of the capital of the trust and the validity of the amendments to the trust that permitted her to do so; (5) the income distributions made to Elena Lindzon under the trust; and (6) the interests of Elena Laura's children as beneficiaries to the trust, and the involvement that Count Balmaseda, Elena Laura's husband, was to have in the case. (R.305-419 Exh.C (JA Tab 1 at 43-46)).

that resulted in litigation in the Cayman Islands are the very same issues raised by Elena Laura in her Florida complaint two years later. Compare (R.305-419 Exh.C (JA Tab 1 at 39-74)), with (R.1-88 ¶¶ 49-83 (A96-103)).

The Trustee then filed a summons with the Cayman court requesting that Elena Laura be ordered to "particularize her claims against the Trust by way of affidavit evidence, within the time to be fixed for so doing, or else be estopped from raising them thereafter." (Id.) *In response to the Cayman court's order and the Trustee's summons, Elena Laura actively participated in the Cayman action*. Elena Laura filed her "cross-summons" on July 31, 1996, through which she expressly sought a determination as to the validity of several of the amendments to the Cotorro trust — the same amendments at issue in her Dade County complaint. (R.305-419 Exh.F (JA Tab 1 at 99-114)). Elena Laura's cross-summons also sought a declaration that members of the "Management Committee"[4] had fiduciary duties to the Cotorro trust beneficiaries, that members of the Management Committee had a conflict of interest in giving their consent to various amendments to the Cotorro trust, and that the members of the Management Committee acted in breach of any fiduciary duties they may have had. (Id. (JA Tab 1 at 103-4)).

The case then proceeded through various hearings and other cross-summons by other parties. After having participated in the Cayman action for almost two years, and in spite of her claims of breach of fiduciary duty and conflict of interest that were filed in the July 31st summons, Elena Laura and her lawyers then pursued a different

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[4] This is the three-member committee created by Article 7 of the Cotorro trust to instruct the Trustee on the management of the trust assets composed of stock in Bacardi company holdings. This is the same committee that was challenged in Elena Laura's complaint in this case, whose members were Respondents Elena Lindzon, Jerry Lindzon, and Mariana. (Pet. Brief at 11).

strategy. Elena Laura filed this action in Dade County while the Cayman action was still pending. (R.1-88).

After learning of the filing of the Dade County action, the Cayman judge entered an order on December 20, 1996 to temporarily *enjoin* Elena Laura from proceeding with the Florida action until a full hearing was scheduled. (R. 305-419 Exh. A (JA Tab 1 at 34-35)). The Cayman judge later explained the basis for the original temporary injunction and found that Elena Laura improperly filed this action in Dade County:

> It was plain from her complaint filed in Florida, that at the very heart of it were the *same allegations of self-dealing, fraud, conspiracy and breach of duty, which she had either raised in these proceedings in her summons of the 31st July 1996 or had alluded to in her affidavit earlier filed on 1st May 1996.* These were in essence also the same as she had adumbrated in the earlier allegations which had caused the trustee's concerns and its proper institution of the originating proceedings before this Court in April 1995.
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> *That history notwithstanding, the complaint failed to disclose to the Florida Court the fact that these proceedings were already engaged and that the Trust is a Cayman Islands trust and governed by the laws of the Cayman Islands.*

(Id. Exh. C (JA Tab 1 at 48-49)) (emphasis added).

The Cayman court had also provided Elena Laura with the opportunity to set aside its temporary order after further hearing. "She elected not to do so. Instead, on the 23rd December 1996, in a letter from her local attorneys to the Clerk of the Court, she purported to withdraw her summons filed in these proceedings [as the Third defendant]. . . and to advise that she intended to take no further part in these proceedings." (Id. (JA Tab 1 at 49)).

Extensive hearings were then scheduled for January 6-8, 1997, during which Elena Laura's withdrawal request was heard before the Cayman court, together with the full hearing on the injunction order, and the other parties' various petitions in the case.

Elena Laura voluntary chose not to appear even though she never formally requested and never received permission to withdraw as a party in the case. (See Appearances identified at Id. (JA Tab 1 at 39)).

The Cayman court then entered its January 17th Ruling and Orders. In the most relevant parts of its orders to this case, the court entered the following findings, that are a part of the record below:

First, the Cayman Islands is the only proper forum for this dispute. Elena Laura's attempt to withdraw her summons and abandon the case without leave of court was "misconceived." The court denied that application and instead granted the motion of Jerry and Elena Lindzon to dismiss Elena Laura's summons for failure to prosecute. (Id. (JA Tab 1 at 51)). The court made it clear, however, that Elena Laura "nonetheless remains a party and is amenable to the outcome." (Id. (JA Tab 1 at 54)). Consequently, the court's order dismissing her summons made it clear that she could continue to participate in the case. (Id. Exh.B (JA Tab 1 at 37)).

Second, the corpus of the Cotorro trust is based in the Bahamas and Cayman Islands. The court granted the motion to join Pictet Bank & Trust Ltd., a Bahamian trustee of the "Beto Trust" upon which capital distributions at issue in this litigation were settled. The court agreed that it was "prudent that Pictet Bank and Trust be now joined in the event a tracing claim becomes necessary after the determination of the 'self-dealing' issues to be tried in April." (Id. Exh.C (JA Tab 1 at 51)). Consequently, both the Cayman Islands Trustee and the Bahamas Trustee (to which possession of disputed Cotorro trust assets were transferred) were parties to the Cayman action.

Third, Elena Laura is bound by the Cayman action. The Cayman court entered a declaratory order that barred Elena Laura "once and for all" from challenging the validity of the trust amendments — *amendments pursuant to which Elena Laura has*

already derived more than $1 million worth of benefits from the distribution of income-producing securities.[5] (Id. (JA Tab 1 at 65-66)).

Fourth, Elena Laura's filing of the Dade County action was an improper attempt at forum-shopping. Of particular importance to this action and to the trial court's consideration of the motion to dismiss, the Cayman court addressed the forum-shopping issue directly and entered the following findings:

> *[T]he complaint filed in Florida, insofar as it relates to the 1st and 2nd defendants, was vexatious and intended to be oppressive. Insofar as it raises issues against the Cotorro Trust, or as to the validity of amendments to the Cotorro Trust for determination in Florida, it would seek to violate the obvious principle that Cayman Islands law governs the Trust and the fact that Cayman is the only proper forum for the determination of such issues.*
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> *I remain firmly of the view, not only that the Cayman Islands is the proper forum, but also that the proceedings instituted in Florida, while these here are pending and without that fact being disclosed to the Florida court, are intended for those and other reasons, to be vexatious and oppressive.*

(Id. Exh.C (JA Tab 1 at 49)) (emphasis added).

After extensive hearings, submissions, and a trial of the Cayman action, with the remaining named defendants still participating and with Elena Laura still bound by the results per the Cayman court's order, the Cayman court entered a *final judgment* in the case on June 2, 1997. (R.887-1083 (JA Tab 7 at 445-509)). The Court's judgment in pertinent part ruled that: (1) Elena Laura remained a party of the Cayman action in spite of her attempted and improper withdrawal from the proceedings (R.887-1083 (JA Tab

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[5] The Court explained that under Cayman law, a beneficiary who has elected to receive benefits under an instrument cannot later reject the instrument and claim rights inconsistent with it. (Id. (JA Tab 1 at 65-66)). Again, however, the court permitted Elena Laura to seek to set aside the declaratory order within 21 days, failing which the order would become final. (Id. (JA Tab 1 at 68)). There is no dispute that Elena Laura never tried to do so.

7 at 446)); (2) The court affirmed the validity of the Cotorro trust amendments and the alleged improper distributions of trust assets that resulted from those amendments (Id. (JA Tab 7 at 448-49)); (3) under Cayman law, Elena Laura's claims of breach of trust and fiduciary duty by the Respondents were unfounded (Id. (JA Tab 7 at 507-09)).

The Cayman court's judgment has, to date, not been challenged by Elena Laura in the Cayman Islands. Instead, Elena Laura continues to insist that a Florida court is the proper forum to determine whether a Cayman Island trust has been administered in accordance with the terms of the trust — a trust administered by a Cayman trustee and governed by Cayman Island law.

Liechtenstein Litigation Over the Corniche Trust

Totally unrelated to the Cotorro trust and the litigation in the Cayman Islands, years of legal proceedings have also been underway involving the Corniche trust.[6] The Corniche trust was administered by a Liechtenstein trustee and governed by Liechtenstein law.[7] In the late 1980's, Elena Laura and her two sisters (as well as a member of the management committee of the Corniche trust) filed lawsuits in Liechtenstein (as well as Switzerland) challenging a trustee's pledging of a substantial

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[6] The Corniche trust designated Luis as the primary income beneficiary, and upon his death his surviving spouse would be entitled to receive one-quarter of the trust income and his children would be entitled to receive the remaining three-quarters income from the trust. If, however, he did not have any children of his own, income would devolve to the settlor's issue (other than Elena Lindzon) to wit: Elena Lindzon's children, including Elena Laura. (R.887-1083 (JA Tab 7 at 447); R.1-88 ¶45 (A95)). At the present time, Luis does not have any children and thus Elena Laura is currently a contingent beneficiary of the Corniche trust.

[7] The Corniche trust provides that: "This trust is established under the laws of the Principality of Liechtenstein and shall be principally administered in Liechtenstein and shall be governed, construed and regulated by such laws, to the exclusion of the laws of any other country or jurisdiction whatsoever. All parties having an interest in this trust shall, with respect to this trust, be bound by the rights or powers created by such laws." (R.887-1083, Exh.16 ¶12 (JA Tab 7 at 614)).

portion of the Corniche trust assets, as well as certain other irregularities involving the corpus of the Corniche trust. (R.887-1083 Exh.16 ¶16-17 (JA Tab 7 at 615)). Elena Laura, who was represented by local counsel, participated in that litigation, which ended some time prior to 1990. (Id. ¶18 (JA Tab 7 at 615)).

Subsequent actions involving the Corniche trust were also filed in Liechtenstein. (Id. ¶19 (JA Tab 7 at 615)). That litigation involved, among other things, the alleged improper amendment of the Corniche trust that would have effectively removed Elena Laura and her sisters as beneficiaries of the trust. (R.1-88 ¶¶87-88 (A104-05)). During the course of appeal of part of that action, pending before the Princely Liechtenstein Court of Appeals (Case No. 2C 251/92), Elena Laura withdrew her appeal and her claim for damages against defendant Luis Bacardi. (R.887-1083 Exh. 6 (JA Tab 7 at 557-58)).

Years later and half a world away, Elena Laura decided to assert in Dade County that her participation in frivolous and baseless litigation in Liechtenstein resulted in the elimination of her beneficial interests in the Corniche trust via the "Sixth Amendment" dated on or about June 30, 1990. (R.1-88 (A104); R.887-1083 Exh. 7 (JA Tab 7 at 557-58)). However, at the time this pending action was filed on December 9, 1996, and at the time the Florida case was dismissed on July 8, 1997, litigation over the Sixth Amendment to the Corniche trust was still pending in Liechtenstein. Legal proceedings had been commenced in February of 1995 in the Princely Court of Liechtenstein, Case No. 3C56/95. (R.305-419 Exh.G, (JA Tab 1 at 115-16)) . The purpose of that action was to *restore* the beneficial interests of Elena Lindzon's daughters (including Elena Laura) in the Corniche trust. (Id.) In fact, Substantial evidence and testimony had already been taken in that case and further proceedings were still ongoing. (Id.)

Elena Laura's Preferred Forum: Dade County, Florida

In what has been characterized by the Court in the Cayman Islands as blatant forum shopping, Elena Laura filed this action in Dade County in order relitigate the same issues that were the subject of the Cayman Island proceedings and to ask a Florida court to determine whether litigation she filed in Liechtenstein and Switzerland was frivolous. Despite 23 counts and five defendants, *all* of Elena Laura's claims directly relate to the construction, interpretation, and enforcement of her alleged beneficial interests in the Cotorro trust or her interests or rights under the Corniche trust.

The named defendants were Elena Laura's mother, Elena Lindzon (a non-Florida resident); Joseph Field (a lawyer who lives in London and who has never practiced law in Florida); Alfred P. O'Hara (a non-Florida lawyer); Elena Laura's step-father, Jerry Lindzon (a Florida lawyer), and Elena Laura's sister, Mariana (a Florida resident). (R.1-88). When these trusts were settled in 1979, no defendant was a resident of Florida and no events relating to either trust took place in Florida. Although Jerry Lindzon and Mariana have Florida connections, Elena Lindzon is not a resident of Florida and has not been since 1979. Indeed, she is not a citizen or resident of the State of Florida or the United States, and does not own any property in the United States. (R.447-524 Exh.A ¶5 (JA Tab 2 at 135)).

Likewise, Field and O'Hara are not residents of Florida. Field is a lawyer employed by the firm of Bryan Cave, L.L.P. and presently resides in London, England. (R.181-200 Exh.1 ¶2 (JA Tab 3 at 210)). Field is an attorney licensed to practice in California and the District of Columbia, but has never been a member of the Florida Bar, never been a Florida resident, and never practiced law in Florida. (Id. ¶¶3-4 (JA Tab 3 at 210)). O'Hara is a citizen and resident of New York. (R.257-283 Exh.1 ¶3 (JA Tab 4 at 235)). O'Hara is a member of the New York bar, but he too has never been a member of the Florida Bar nor ever practiced law in Florida. (Id. ¶¶3-6 (JA Tab 4 at 235)).

The Trial Court's Dismissal of the Action

In response to the Complaint, the Respondents filed numerous motions to dismiss the complaint based on multiple grounds, including a motion to dismiss for *forum non conveniens* in which all Respondents joined. (R.284-86). At the initial hearing before the second assigned judge to the case, the Honorable Judge David L. Tobin, the court announced that the first motion he would hear would be the motion on the *forum non conveniens* issue. (R.1231). The parties then presented the trial court with volumes of memoranda of law, affidavits, documents, copies of much of the Cayman and Liechtenstein proceedings, and other exhibits in support and opposition to the motion.

After a lengthy hearing held on June 25, 1997, the trial court orally announced that he would grant the Respondents' motion to dismiss based upon the tenuous connection between this case and Florida and the availability of adequate alternative fora that could better adjudicate the litigation. (R.1279-80). On July 8, 1997, the court rendered its order dismissing the case. (R.1511-13 (A6-8)). The trial court entered a finding that the complaint in this case presents a textbook example of the abuse of Florida's courts that was intended to be remedied in Kinney:

> This case involves a plaintiff who is not a resident or citizen of Florida, and who is asking this Court to adjudicate her rights as a beneficiary of a non-Florida trust, established by a non-Florida lawyer, administered by a non-Florida trustee in a foreign country pursuant to non-Florida law, and having no trust assets in the State of Florida. This is exactly the type of case Justice Kogan spoke of when he said Florida cannot be jurisdiction to litigation of the multinationals throughout the world.

(R.1512; R.1279-80).

Elena Laura appealed the order to the Third District Court of Appeals.

The Third District's Decision and the Basis for This Court's Jurisdiction

After briefing and argument, the Third District affirmed-in-part and reversed-in-part the trial court's dismissal order. Bacardi, 728 So. 2d 309 (A1-5). First, the Third District affirmed that the record and evidence in the record fully supported the trial court's dismissal. The court rejected the argument that the face of the trial court's order did not adequately delineate the bases for the trial court's decision. 728 So. 2d at 312. Further, the Court rejected the argument that the trial court erred in denying Elena Laura *merit* discovery that she sought prior to the disposition of the motion to dismiss.

Second, the Third District affirmed the dismissal under Kinney even though the "whole case" was not necessarily being dismissed in favor of one alternative forum. Relying on the "substantial flexibility" now accorded to Florida trial courts in ruling on *forum non conveniens* issues, the Third District joined with the Fourth District Court of Appeals and other federal cases presented with similar issues by affirming the dismissal of discrete claims to two alternative fora; in this case, the Cayman Islands had jurisdiction over the whole case relating to the Cotorro trust, and Liechtenstein had jurisdiction over the issues relating to the Corniche trust. Id. at 312-13.

Third, the Third District certified this narrow issue to this Court for further consideration as a question of great public importance. Id. This certification thereby provides this Court with jurisdiction to review the Third District's decision on certiorari review pursuant to Fla. R. Pet. P. 9.030(a)(2)(v).

Fourth, the Third District affirmed the trial court's determination that the record demonstrated that both the private and public interest in this case favored dismissal of all claims and parties related to the Cotorro or Corniche trusts, except for one claim against Jerry Lindzon (a Florida bar member) for legal malpractice. 728 So. 2d 313-14. Although the Third District found that all other issues raised in the complaint did not have any meaningful relationship with Florida, the legal practice claim alleged in Count

XVI of the Complaint (R.1-88 (A131-33)) should have been litigated in Florida. That legal malpractice claim alleges that an attorney-client relationship had existed between Elena Laura and her step-father Jerry Lindzon, and that Mr. Lindzon had breached that relationship by various alleged acts of malfeasance and misfeasance involving the Cotorro and Corniche trusts. (A131).

Finally, the Third District also reversed the trial court's order in so far as Elena Lindzon was concerned based upon the trial court's failure to vacate a clerk default previously entered against Elena Lindzon. 728 So. 2d at 314. Although Elena Lindzon had timely moved to vacate that clerk default — obtained through improper means by Elena Laura's counsel — the trial court, by its own instructions, had never heard that motion before dismissing the case. The Third District held that this procedural error required remand of the dismissal relating to Elena Lindzon in order for the trial court to set aside the dismissal, after which Elena Lindzon could again seek dismissal of the claims against her. Id.

SUMMARY OF ARGUMENT

Under Kinney and the new doctrine of *forum non conveniens* in Florida, a trial court has the discretion to dismiss an action when an adequate alternative forum exists in a foreign jurisdiction and where private and public interest factors favor the dismissal of the litigation. This discretion exists even when some of the parties to the action are residents of Florida, do business in Florida, or have some other Florida connection. See Kinney, 674 So. 2d at 87.

The certified question in this case is whether that discretion under Kinney allows for dismissal of a case in favor of two alternative fora as opposed to only one specific jurisdiction. The answer to that question is already found in Kinney itself. This Court's decision repeatedly emphasized that the fundamental purpose for revising Florida's common law was to ensure that only those cases "with *substantial* connections to state interests," "with *substantial* effect on the taxpayers of this state," and "with *significant* impact upon Florida's interests" should be litigated in Florida. Id. at 88-89, 92-93 (emphasis added). Consequently, the Court expressly approved of dismissal of "the litigation" where its connection with Florida was weak as compared with convenient "alternative fora" with better connections to the events at issue. Id. at 92-93 (emphasis added).

Elena Laura ignores this reasoning and language in the Kinney opinion and hinges her hopes on a hyper-technical reading of the language in the newly created rule that requires the trial court to find "that an adequate alternative forum exists which possesses jurisdiction over the *whole case* . . . ." Kinney, 674 So. 2d at 94 (quoting Rule 1.061(a)(1)) (emphasis added). Yet, the trial court did address the "whole case." The claims in "the litigation" were dismissed in favor of the "convenient alternative fora" with better connections to the events complained of. As the Third District explained, the asserted claims in this case lacked any "identity of legal or factual

issues." Bacardi, 728 So. 2d at 312. That was true because Elena Laura chose to file a complaint that combined two separate unrelated cases — involving two different foreign trusts, different foreign law, and wholly different facts — into one complaint. Thus, Elena Laura gave the trial court no choice but to separately consider the very different trusts and issues alleged in this complaint in exercising the discretion required by Kinney.

The trial court first correctly held that the claims relating to the Cayman Cotorro trust had no "substantial connection" to Florida. The plaintiff-beneficiary was a Spanish citizen; the defendants were both residents and non-residents of Florida; the trust was settled and governed by Cayman law; the trust was administered by a Cayman trustee; and the corpus of the trust were located in the Cayman Islands and the Bahamas. These are very weak Florida connections indeed. The Cayman Islands, on the other hand, was the obvious and better available forum to adjudicate claims arising under the Cotorro trust, as evidenced in the record by the fact an action adjudicating the same issues was already pending in the Cayman Islands prior to this action being filed.

Second, in considering the very different issues and claims relating to the Corniche trust, the trial court correctly reached the same conclusion that those claims had no substantial connection to Florida. On the face of the complaint, Elena Laura alleged that she was entitled to relief from this court based upon the Respondents' alleged wrongful "inducement" of Elena Laura to file frivolous litigation *in Liechtenstein* with regard to that particular trust governed by Liechtenstein law. Apart from the fact that a Florida court cannot possibly have subject matter jurisdiction over these claims, Florida is obviously not the proper or best forum to decide whether Liechtenstein judicial proceedings, conducted primarily in German, were "frivolously" filed or "baseless." Under basic principles of *forum non conveniens* and comity, Elena

Laura's claims pertaining to the Corniche trust had to have been dismissed in favor of litigation in Liechtenstein. (R.1511-13).

Therefore, under the deferential standard of review that governs this case, the Third District's decision affirming the trial court's dismissal of these claims was entirely correct and should be affirmed by this Court by answering the certified question in the negative. Additionally, the Third District also correctly rejected Elena Laura's arguments that she was improperly denied merit discovery before dismissal or that the malpractice claim against Field should not have been included in the dismissal.

ARGUMENT

I.

The Third District Correctly Held That the Trial Court Did Not Abuse its Discretion In Dismissing This Foreign Trust Action Under *Kinney*

The genesis for this case and the certified question that gives rise to this Court's jurisdiction is the trial court's dismissal of the action based upon the doctrine of *forum non conveniens*. The doctrine of *forum non conveniens* was recently revised in Kinney System, Inc. v. The Continental Ins. Co., 674 So. 2d 86 (Fla. 1996), and codified in Rule 1.061 of the Florida Rules of Civil Procedure. In Kinney, this Court abandoned the "less vigorous" standard that previously characterized the courts' application of *forum non conveniens* for the more stringent federal standard. This Court's reasons for revising Florida's standard are clearly set forth in the Kinney decision, certain portions of which are particularly important in answering the certified question at issue:

> While it is true that the Florida Constitution guarantees every person access to our courts for redress of injuries, . . . that right has never been understood as a limitless warrant to bring the world's litigation here. *Even Houston is premised on the assumption that reasonable limits must be imposed where* ***the litigation's*** *connection to Florida interests is tenuous at best.* Moreover, the obvious purpose underlying [Florida's constitution] is to guarantee access to a potential remedy for wrongs, not to provide a forum to the world at

> large. *Thus, the right of access will not bar dismissal to the degree that such Florida interests are weak and to the degree that remedies are available in convenient* ***alternative fora*** *with better connections to the events complained of.*

Id. at 92-93 (emphasis added).

Under the new doctrine of *forum non conveniens* in Florida, a trial court has the discretion to dismiss an action when an adequate alternative forum exists in a foreign jurisdiction and where private and public interest factors favor the dismissal of the litigation. Id. (citing Piper Aircraft v. Reyno, 454 U.S. 235, 242-43 (1981); Pain v. United Technologies Corp., 637 F.2d 775 (D.C. Cir. 1980)). This discretion exists even when some of the parties to the action are residents of Florida, do business in Florida, or have some other Florida connection. See Kinney, 674 So. 2d at 87 (trial court could consider dismissal of action for *forum non conveniens* even between corporations registered and doing business in Florida), disapproving Houston v. Caldwell, 359 So. 2d 858 (Fla. 1978).

Exercising this discretion, the trial court dismissed this complaint. Under the narrow and deferential standard of review that governs this case, the Third District's decision affirming the trial court's dismissal of these claims was entirely correct and should be affirmed by this Court.

A. The Narrow Standard of Review

Florida case law requires that an appellate court afford significant deference to the trial court's application of the Kinney criteria. Indeed, this certified question presents a narrow issue: did the trial court abuse its discretion in dismissing the action. The inquiry begins with this Court's definition of the abuse of discretion standard:

> Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused *only where no reasonable man would take the view adopted by the trial court*.

Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980) (citation omitted; emphasis added). Canakaris expressly requires that courts reviewing a discretionary decision fully recognize the superior vantage point of the trial judge and apply the "reasonableness" test; that is, "[i]f reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion." Id.

In other words, this is not de novo review. Even if this Court, or the Third District, could have reached a different conclusion in reviewing the entire record, neither is in the position to reverse the trial court on that basis. Nevertheless, Elena Laura's argument ignores this critical issue, urging this Court to supplant its judgment for that of the trial court. As is particularly the case in venue and *forum non conveniens* cases, a trial court is in the best position to consider all the issues involved to make a determination whether a given case belongs in a particular forum. See, e.g., Hyatt Corp. v. Howarth, 678 So. 2d 823, 824 (Fla. 3d DCA 1996) ("We may not, under the abuse of discretion standard, simply supplant this decision with this court's preference on a de novo review of the same venue factors ").

The reasons for the dismissal are clear and convincing. No reasonable person would *not* have dismissed this complaint given the countless factors in favor of dismissal. Nevertheless, to sustain the order, the Respondents need only establish that the trial court did not abuse its discretion because even if reasonable persons could differ as to the application of all the Kinney factors in this case, the trial court's judgment was reasonable and strongly supported by the record.

B. An Adequate Alternative Forum Was Available To Adjudicate Elena Laura's Foreign Trust Claims

Both the trial court and the Third District have unequivocally found that "an adequate alternative forum exists for the 'whole case.'" Bacardi, 728 So. 2d at 312. Put simply, because all defendants are amenable to process in both Liechtenstein and

the Cayman Islands, those fora are, by definition, "available."[8] That is, the first criteria under this threshold test,"availability", is simply whether the defendant is amenable to service of process in another jurisdiction. Kinney, 674 So. 2d at 90; Ciba-Geigy Ltd. v. The Fish Peddler, Inc., 691 So. 2d 1111, 1115 (Fla. 4th DCA 1997). The second criteria, "adequacy", is whether the "remedy available [in the alternative forum] *clearly* amounts to no remedy at all." Kinney, 674 So. 2d at 90 (emphasis added).

1. A Single Alternative Forum is Not Required For Dismissal Under Kinney

The focus of Elena Laura's appeal is based on her argument that no single forum, other than Florida, can adjudicate her "whole case." (Pet. Brief at 23-30). In other words, Elena Laura claims that because the courts in the Cayman Islands could not adjudicate the Corniche trust issues, and because the Liechtenstein courts could not adjudicate the Cotorro trust issues, the *forum non conveniens* doctrine could not apply. (Id.) Elena Laura's logic is hopelessly flawed and notably underscores the lack of

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[8] By jointly moving for dismissal under Kinney and Rule 1.061, the Respondents have stipulated by law to accepting service of process in either jurisdiction as of the date of filing of this action. See Kinney, 674 So. 2d at 92. This stipulation by itself distinguishes the cases cited by Elena Laura (Pet. Brief at 25-30) and the amicus brief (Am. Brief at 5-9) that involved multiple-defendant cases where motions to dismiss for *forum non conveniens* were denied because all the defendants had not agreed to accept service of process in the alternative jurisdictions. E.g., Watson v. Merrell Dow Pharmaceuticals, Inc., 769 F.2d 354, 357 (6th Cir. 1985) (affirming dismissal of primary defendant in favor of alternative forum but reversing as to secondary parties *unless they consented to jurisdiction in the alternative forum*); United States Fidelity & Guar. Co. v. Braspetro Oil Svs., Co., 1999 WL 307666, at *17 (S.D.N.Y. May 17, 1999) (motion denied as some defendants did not consent to jurisdiction in proposed alternative forum and local law governed the dispute in any event); United States Fidelity & Guar. Co.v. Petroleo Brasileiro S.A.-Petrobras, 1999 WL 307642, at *11-12 (S.D.N.Y. May 17, 1999) (same); ESI, Inc. v. Coastal Power Production Co., 995 F. Supp. 419, 426 (S.D.N.Y. 1998) (motion denied in part because not all defendants had consented to jurisdiction in the alternative forum); Madanes v. Madanes, 981 F. Supp. 241, 266 (S.D.N.Y. 1997) (same).

cohesion between the various, plentiful and discrete claims espoused in the 60-page complaint.

Florida has little to do with any of these claims. Elena Laura improperly joined two or more separate lawsuits into one regarding two entirely different trusts, different beneficiaries, that are governed by different foreign laws and procedures, and that involve different parties and witnesses in a single action. This classic example of throwing the proverbial "kitchen sink" into a complaint in order to create sufficient confusion to avoid dismissal only reinforces the reasoning and policy concerns this Court expressed in Kinney. Elena Laura forces the absurd conclusion that trial courts are helpless to dismiss a case that, in whole and in part, does not belong in Florida court. However, the discretion that Kinney affords a trial court carries with it the ability to ameliorate such gamesmanship.

In *most* instances, the "entire case" can be dismissed in favor of a single, alternative forum because the alleged wrongs and demanded remedies all stem from one transaction or event. Elena Laura and the amicus rely on cases denying motions to dismiss these typical cases, all of which fall within this category. That is, these cases usually involve *only* one possible alternative forum and the question is whether all the related claims and parties may be sued in that forum . None of those cases, therefore, support the proposition that only one single forum can ever be considered because none of those courts were confronted with multiple alternative fora.[9] This case is thus unique

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[9] E.g., Sanwa Bank, Ltd. v. Kato, 1999 WL 355093, at *5 (Fla. 5th DCA June 4, 1999) (reversing dismissal under Kinney where only one alternative forum existed but it did not have jurisdiction over all the defendants to a single breach of contract claim); Pafco Gen. Ins. Co. v. Wah-Wai Furniture Co., 701 So. 2d 902, 904 (Fla. 3d DCA 1997) (foreign defendant manufactured defective chairs sold to Florida and out-of-state distributors; dismissal in favor of one alternative forum denied because insurance company's subrogation claims arose from injuries all related to the same defect that could be filed in Florida where defendants were subject to general jurisdiction); In re Air Crash Disaster Near New Orleans, La., 821 F.2d 1147, 1169 (5th

because it involves a hodgepodge of different and very severable claims and different foreign law wrapped into one global complaint. "No basis exists to require the defendants to litigate the readily severable claims in one Florida proceeding." Bacardi, 728 So. 2d at 312.

The one case that Elena Laura repeatedly cites as an "analogous case" that allegedly rejected two alternative fora, Madanes v. Madanes (cited in Pet. Brief at 24-29), did not actually involve the multiple fora issue presented here. 981 F. Supp. at 265-67. Rather, in that multiple-defendant/multiple-claim case, the defendants all joined in a motion to dismiss for *forum non conveniens* citing two possible alternative fora (Argentina and Switzerland); however, not all the defendants consented to jurisdiction in either jurisdiction. Id. at 266 and n.19. Without such agreement, the defendants' motion could not possibly be granted.

This case, on the other hand, involves clearly distinct issues and distinct parties joined in one action that has no business being adjudicated in Florida. The defendants have all consented to either Cayman Island or Liechtenstein jurisdiction for the respective claims that arise in those jurisdictions. Accordingly, the trial court presented with these facts must have the discretion to consider those issues and parties separately and does not have to dismiss the case as a whole in favor of one alternative forum. This is part and parcel of the "substantial flexibility" that a trial court is afforded in ruling on a *forum non conveniens* issue. Bacardi, 728 So. 2d at 912 (quoting Van Cauwenberghe v. Biard, 486 U.S. 517, 529 (1988)). See, e.g., Mendes v. Dowelanco Industrial Ltda., 651 So. 2d 776 (Fla. 3d DCA 1995); Ciba-Geigy Ltd., BASF A.G. v.

Cir. 1987) (one alternative forum proferred could not adjudicate the whole case where one defendant (the United States) had not stipulated to Uruguayan jurisdiction), vacated on other grounds, 490 U.S. 1032 (1989), reinstated on remand, 883 F.2d 17 (5th Cir. 1989).

The Fish Peddler, Inc., 691 So. 2d 1111 (Fla. 4th DCA 1997), review denied, 699 So. 2d 522 (Fla. 1997); Smith Barney, Inc. v. Potter, 725 So. 2d 1223 (Fla. 4th DCA 1999).

Elena Laura and the Amicus brief nevertheless argue that the trial court's order and the Third District's decision runs counter to the federal court's application of the doctrine. Yet, the very federal case they rely upon that first used the "whole case" language in delineating the four-prong test, Pain v. United Technologies, actually *affirmed* a dismissal in favor of not one but *five* alternative fora. 637 F.2d at 780, 785-95. Multiple foreign plaintiffs from differing foreign countries had sued an American defendant over an action arising on foreign soil. The foreign jurisdictions were better fora in which the plaintiffs could have their individual cases heard. Thus, the D.C. Circuit affirmed the implied severance of the plaintiffs and the dismissal of the "whole case" in favor of multiple alternative fora. Thus, the application of the *forum non conveniens* doctrine in the federal courts fully supports, not opposes, the dismissal of the complaint in this case.[10]

Moreover, other Florida decisions applying the *forum non conveniens* doctrine also support the Third District's decision. For instance, in Mendes, (a case this Court cited with approval in Kinney, 674 So. 2d at 92), the court held that a trial court has the discretion to dismiss or stay certain claims or issues in a case under the doctrine of *forum non conveniens* while retaining jurisdiction over part of the case as may be necessary to secure judgment obtained in the foreign proceedings. 651 So. 2d at 778 (trial court correctly reserved jurisdiction over assets and stayed under *forum non conveniens* doctrine the substantive claims that were already being litigated in foreign

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[10] See also Banco Latino v. Lopez, 17 F. Supp. 2d 1327, 1333 (S.D. Fla. 1998) (on *forum non conveniens* motion court severed claims of one plaintiff and dismissing remaining plaintiff's claims to alternative forum); Proyectos Orchimex de Costa Rica S.A. v. E.I. DuPont de Nemours & Co., 896 F. Supp. 1197, 1201 (M.D. Fla. 1995) (Jamaica and Costa Rica were available fora where defendants agreed to submit to their jurisdiction).

country). The Third District thus affirmed the trial court's order even though it had not dismissed the whole case in favor of one alternative forum to protect the plaintiff's rights. When this Court approved of this type of exercise in discretion in Kinney, the Court also explained that these and other steps were by no means "exhaustive of all possible measures the dismissing court may properly take." 674 So. 2d at 92 n.5. This Court thus contemplated that some unique cases would require unique measures to deal with the issues they presented.

This situation was also faced by the Fourth District in Ciba-Geigy, 691 So. 2d at 1111-16. That case also involved distinct breach of contract and tort actions against distinct defendants. The contract claims could have been tried in Florida, but the tort claims filed by foreign third-party plaintiffs who had joined in the case involved causes of action arising only in Ecuador that should have been tried in Ecuador. The trial court denied a motion to dismiss under Kinney principally because it would have been more convenient for all the claims to be adjudicated in one country rather than two. Id. at 1116. The Fourth District, however, rejected that argument, holding that the trial court could have exercised its discretion to consider the distinct contract claims separately from the remaining tort claims that had no connection to Florida and should have been adjudicated elsewhere. Id. at 1116-25.

Similarly, faced with an abundance of claims that lack legal and factual identity, the trial court in this case properly treated the claims separately and dismissed all the claims that did not have a substantial connection to Florida. The majority of the factual and legal claims made in the complaint relate to the "fraudulent alteration" of the Cotorro trust and the alleged improper invasion of Cotorro trust assets. Those claims, on their face, are dependent upon legal construction of the Cotorro trust under Cayman law. Those claims, moreover, demand equitable remedies that the trial court could not grant without the Cayman trustee being present, and furthermore require a Florida court

to second-guess what the Cayman courts were already doing. Without doubt, the obvious alternative forum for those claims relating to the Cotorro trust was the Cayman Islands.

Because Elena Laura also joined in her complaint the tort allegations arising from her filing of allegedly "frivolous" and "baseless" litigation in Liechtenstein over the Corniche trust (a different foreign trust with different parties and issues governed by Liechtenstein law), the trial court here faced the same problem presented in Ciba-Geigy. These allegations have no connection with Florida or the Cayman Islands; rather they have everything to do with Liechtenstein. *Liechtenstein* is where the litigation at issue was filed, where the Corniche trust is principally administered, where the Corniche trustees are located, and where the law that governs the Corniche trust can best be determined. If litigation filed in Liechtenstein was in fact "frivolous," a Liechtenstein court should make that determination.

Accordingly, this was a case where there is no one forum to adjudicate the "whole case" due to "the utter lack of a legally cognizable connection" among the different parties and the different claims. Smith Barney, 725 So. 2d at 1226. Breach of trust and fiduciary claims regarding a Cayman trust have been joined with claims of "frivolous" actions over a Liechtenstein trust, together with legal malpractice claims against lawyers licensed in New York, California and the District of Columbia, and Florida. The trial court, therefore, had ample discretion and substantial evidence in the record with which to dismiss the complaint in favor of two alternative fora that existed for the "entire case."

Reasonable persons may have taken alternative paths. The Third District or this court may have exercised the discretion differently, possibly by severing the claims and parties before dismissing the case under Kinney. Nevertheless, the fact that reasonable persons may have differed is not a basis for reversing the trial court's order.

Notwithstanding potential alternative approaches, the correct and obvious conclusion remained: the Cotorro trust issues should be decided in the Cayman Islands while the very different Corniche trust issues should be litigated in Liechtenstein. The Third District correctly concluded that the trial court did not abuse his discretion when he impliedly severed the unrelated claims and dismissed in favor of alternative fora which corresponded to those two distinct groups of claims.[11]

2. The Cayman Islands is the Proper and Adequate Alternative Forum to Remedy All Claims Relating to the Cotorro Trust

a. The Cayman Islands is an "Available" Forum

The trial court correctly found that the Cayman Islands is an available forum to adjudicate the claims in the case relating to the Cotorro trust. This minimal requirement was clearly satisfied here because all the Respondents joined in the motion to dismiss, thereby automatically consenting to accept service of process in the alternative fora pursuant to Rule 1.061(c). (R.181-200; R.257-286; R.284-296). Moreover, the trial court's order specifically relied upon those stipulations through which respondents agreed to accept service of process for the "Grand Court of the Cayman Island or the courts of the Principality of Liechtenstein, whichever is applicable to the specific claim and/or Defendants." By definition, therefore, each party defendant in this case is available in the alternative fora. E.g., Ciba-Geigy, 691 So. 2d at 1115 (Ecuador was available forum where all defendants submitted to jurisdiction there).

Additionally, three of the respondents were "available" in the Cayman Islands insofar as they had been litigating with Elena Laura in that forum since 1995. These

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[11] The Third District, however, did find that one of the claims, a professional malpractice claim against Jerry Lindzon (Elena Laura's step-father and a Florida lawyer) should not have been dismissed. Unlike the other claims alleged, Florida had a greater interest in adjudicating a malpractice claim against a Florida attorney. Kinney. 728 So. 2d at 315. Respondent Jerry Lindzon has not cross-appealed from that part of the Third District's decision.

respondents, formerly or current members of the "management committee" that is one focus of this complaint, were already party defendants in the Cayman action, both as members of the management committee and as beneficiaries to the Cotorro trust. (R.305-415 Exh.C (JA Tab 1 at 39)). Elena Laura, of course, was also a party defendant in the Cayman action and actively participated in the action until she chose to unilaterally abandon that forum in favor of another courtroom more to her liking. (Id. (JA Tab 1 at 51)). The Cayman court, however, has repeatedly held that Elena Laura remained bound to the Cayman action and subject to that court's jurisdiction. (Id. (JA Tab 1 at 51)). There is no question that these respondents are "available" in the Cayman Islands.

The remaining two defendants, Respondents Field and O'Hara, family trust lawyers who were named in the complaint as "co-conspirators" in the fraudulent acts affecting the Cotorro trust, also joined in the motion to dismiss and accepted jurisdiction in the Cayman Islands. Indeed, respondent O'Hara accepted the jurisdiction of the Cayman courts even though his supporting affidavit clearly attested that he had never had any involvement in the first place with the Cotorro trust. (R.257-283 Exh. 1 (JA Tab 4 at 239, ¶¶ 22-23)). Despite Elena Laura's representations, his affidavit was filed in the record below and relied upon in support of his motion to dismiss under Kinney. (R.257-283 (JA Tab 4 at 234-245)). For all of these reasons, the trial court correctly found that the Cayman forum was an "available" forum.

b. The Cayman Islands is an "Adequate" Forum

The trial court also correctly found that the remedies available in the Cayman Islands for the Cotorro trust issues were "adequate." "A foreign forum is adequate when the parties will not be deprived of all remedies or treated unfairly, even though they may not enjoy the same benefits as they may receive in an American court." In re Air Crash, 821 F.2d at 1165. As Kinney explained:

> alternative fora are not "clearly unsatisfactory" merely because the available legal theories or potential recovery there are less generous than those available where suit was brought. Rather, the alternative fora are inadequate under the doctrine only if the remedy available there clearly amounts to no remedy at all.

Kinney, 674 So. 2d at 90-91. There is simply no case that Elena Laura can cite that stands for the proposition that an alternative forum must have "specific and codified legal remedy for each of the plaintiff's claims . . . ." (Pet. Brief at 28).

The trial court had more than ample record evidence to support his finding that the Cayman Islands was adequate to adjudicate all the issues in the complaint related to the validity or interpretation of the Cotorro trust. In this case, the Cayman court itself issued a valid binding order, expressly enjoining Elena Laura from litigating in Florida precisely because the Cayman Islands was the proper and adequate forum to adjudicate these issues. (R.305-419, Exh. A (JA Tab 1 at 34-35)).

Further, the trial court was presented with the Cayman Court's judgment on the very same trust issues that Elena Laura sought to adjudicate all over again. (R.887-1083 Exh. 1 (JA Tab 7 at 445-509)). The first time these issues were decided, the Cayman Court interpreted the Cayman trust under Cayman law, determined what fiduciary duties were owed to Elena Laura, and upheld the validity of the trust and its amendments. (Id. (JA Tab 7 at 507-09)). Here, every claim against every defendant that touches upon the Cotorro trust is predicated upon the allegation that fiduciary duties were breached by these defendants by permitting the fraudulent alteration of the trust and the "diversion" of trust assets. To a great degree, these allegations have now been disposed of by the judgment of the Cayman court. To the extent that they have

not been, any fiduciary duties that she is entitled to under the trust should be determined and enforced under Cayman law by the Cayman court.[12]

In addition to the Cayman court's own orders and findings that supported this order, the trial court was presented with affidavit evidence from a respected Cayman lawyer, educated and licensed in the United States, who reviewed the allegations in the complaint and confirmed that "an adequate judicial forum exists in the Cayman Islands that would offer the Plaintiff a full and fair opportunity to present her claims. Any action challenging the execution or construction of the Cotorro trust, a Cayman Islands' trust, is properly asserted in the Cayman Islands, where the judicial system provides a complete, adequate forum to resolve these issues and impose a binding order." (R.839-848 ¶¶21-22 (JA Tab 5 at 250-51)).[13]

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[12] This record evidence also defeats Elena Laura's attempt to concoct a Florida law issue in this case. As a matter of law, the trial court, in examining the trust document that was of record and the Cayman court's orders, reasonably reached the conclusion that Cayman or Liechtenstein law would have to govern the claims in this case, almost all of which derive from the allegation that the Cotorro trust was fraudulently amended and violated. (R.1511-13(A608)). Elena Laura's argument that Florida tort law governs because some of the alleged wrongful acts occurred here is belied by well-established case law which holds that for venue purposes generally a tortious act accrues where the tort had its impact and caused damage to Plaintiff. E.g., Ryder Truck Rental, Inc. v. Rosenberger, 699 So. 2d 713, 715-16 (Fla. 3d DCA 1997); Weiner v. Prudential Mortg. Investors, Inc., 557 So. 2d 912 (Fla. 3d DCA 1990). The Plaintiff being a Spanish citizen, and the Cotorro trust being a Cayman trust, any alleged tortious conduct, even if it touched on Florida shores, resulted in an alleged tort which arose in either Spain or the Cayman Islands.

[13] The trial court was entitled to rely upon this testimony in support of his finding, and discount the counter-affidavit filed by Elena Laura, that principally argued that the Cayman Islands was not an adequate forum because the issues running to the Corniche trust and the "frivolous" Liechtenstein litigation could not be adjudicated there. (R.1107-1114; (A9-16)). Further, the trial court heard and rejected the very same attempts to discredit the Respondents' expert testimony that Elena Laura repeats in her brief. (Pet. Brief at 27-28).

Elena Laura contends that there was no evidence in the record to support the trial court's findings. As the Third District found, that argument is clearly meritless. She then claims that the Cayman Islands was not adequate because the court lacked subject matter jurisdiction over certain counts of the complaint that she claims cannot be asserted in the Cayman Islands. (Pet. Brief at 27-28). Elena Laura, however, ignores the fact that the test is not whether the particular counts or the exact damage recovery she sought in the complaint are recoverable in the foreign forum. "[I]t is entirely irrelevant that the alternative forum does not duplicate or approximate the American jury system, so long as a fair mechanism for trial exists in a broad and basic sense." Kinney, 674 So. 2d at 91. The foreign forum does not have to grant the exact same causes of action or remedies that the plaintiff could obtain from a local court. Id. at 90-91 ("the Supreme Court has emphasized that alternative fora are not 'clearly unsatisfactory' merely because the available legal theories or potential recovery there are less generous than those available where suit was brought."); Piper Aircraft, 454 U.S. at 249-51 ("possibility of an unfavorable change in the law" does not have conclusive or substantial weight in a *forum non conveniens* inquiry); Sigalas v. Lido Maritime, Inc., 776 F.2d 1512 (11th Cir. 1985) ("It is no longer sufficient to retain jurisdiction simply because the remedy available in an alternative forum is less substantively generous.").

Contrary to Elena Laura's contention that various "counts" in her complaint cannot be duplicated in the Cayman Islands, the test for determining whether there is any remedy at all does not depend on a finding that the same amount or basis for damages exists in the alternative forum. E.g., Piper, 454 U.S. at 249-50 (Supreme Court's past precedents "repeatedly emphasized the need to retain flexibility" and thus "if conclusive or substantial weight were given to the possibility of a change in law, the *forum non conveniens* doctrine would become virtually useless"); Lockman Foundation

v. Evangelical Alliance Mission, 930 F.2d 764, 768-69 (9th Cir. 1991) (inability to assert a RICO or Lanham Act claim in foreign forum does not preclude *forum non conveniens* dismissal); Transunion Corp. v. Pepsico, Inc., 811 F.2d 127, 129 (2d Cir. 1987) (inability to recover RICO damages was not relevant for *forum non conveniens* inquiry).

Here, through various overlapping counts for breach of trust, breach of fiduciary duty, fraud, conspiracy, unjust enrichment, and other claims, Elena Laura seeks the same basic relief. (See Statement of Facts supra at 6-7). The record contains substantial competent evidence that the Cayman Islands' judicial system (which is also based on English common law under which ultimate appeal lies in the Privy Council in England) provides the Cayman court with a broad range of legal and equitable powers. These powers include the power to grant declaratory relief, grant injunctive relief, impose constructive trusts, order accounting of profits, as well as award damages for breach of trust, breach of fiduciary duty, and fraud for both pecuniary and non-pecuniary losses. (R.839-48 ¶¶15-16 (JA Tab 5 at 249)). The trial court had ample record evidence to support his finding that the Cayman Islands courts are well-equipped to provide the same basic relief Elena Laura sought in this case. In short, Elena Laura cannot show that the Cayman court would leave her with no remedy at all.

3. Liechtenstein is the Proper and Adequate Alternative Forum to Remedy All Claims Over the Corniche Trust and the Related Litigation Elena Laura Filed in Liechtenstein

The trial court correctly found that there was an available and adequate alternative forum for the Corniche trust issues — *Liechtenstein.* Indeed, Elena Laura's brief does not explain how or why any other forum could ever adjudicate the issues raised in the complaint over the Corniche trust.

First, Respondents' agreed to submit to the jurisdiction of the Liechtenstein if Elena Laura chooses to pursue claims there. As explained earlier, this fact alone satisfies the availability requirement.

Second, the record fully supported the trial court's finding that if any court could consider claims related to the Corniche trust, the courts of Liechtenstein would have to do so. The Respondents submitted the sworn affidavit of Dr. Thomas Hasler, a practicing attorney in Liechtenstein, who affirmed that the courts of that country are courts of general jurisdiction, able to determine whether litigation previously filed in Liechtenstein was frivolous. (R.849-853). Dr. Hasler also affirmed that Liechtenstein law would have to apply, or at least be analyzed, in order to determine whether the litigation in question was, in fact, frivolous. (Id.) If the litigation was not frivolous, then the claims in the complaint that are predicated upon Elena Laura's filing of frivolous litigation are necessarily eliminated-- a fact against which Elena Laura failed to proffer any contrary testimony or evidence.

Whether frivolous litigation was filed in Liechtenstein, under the laws and procedures which governed that litigation, depends entirely upon the construction and interpretation of the Corniche trust, which is undeniably governed by Liechtenstein law. (R.257-283 Exh.1 ¶¶10-15 (JA Tab 4 at 236-37)). Again, the forum best equipped to interpret the provisions of that trust, as governed by Liechtenstein law, is simply Liechtenstein.

The trial court's conclusion with regard to those claims relating to Liechtenstein was eminently correct. Indeed, it is bewildering how a Florida court could ever determine that an action filed in a foreign country, involving a trust that is governed by the foreign country's law, was "frivolous" or "baseless."[14] Elena Laura does not

[14] Indeed, this argument was the basis of the Respondents' motion to dismiss all the Corniche trust allegations in the complaint on the basis of lack of subject matter

explain how; she instead argues that Liechtenstein courts could not adjudicate the Cotorro trust issues. As explained above, however, the trial court had the discretion to find that Liechtenstein was the adequate alternative forum to decide the Corniche trust issues, and the Cayman Islands was the adequate alternative forum to decide the Cotorro trust issues. That being the case, there was nothing left for the Florida court to adjudicate.

C. The Private and Public Interests Involved in This Foreign Trust Action Favored Alternative Fora

The trial court found that the private interest factors involved in adjudicating a trust action governed by two separate foreign trusts weighed in favor of two alternative fora. The trial court further found that even if the private interest factors were in equipoise, the public interest factors that so clearly favor alternative fora outweighed any competing private interests. These findings are well supported by the record and were correctly affirmed by the Third District.

1. The Private Factors Favored Dismissal

After determining that an available and adequate alternative forum exists, the trial court must next balance the private factors favoring the alternative forum such as access to evidence, access to witnesses, enforcement of judgments, and other practicalities of litigation in the alternative forum. Rule 1.061(a)(1); Kinney, 674 So. 2d at 91. The Third District agreed with the trial court's decision that the private factors favored dismissal:

> [A] balance of the relevant private factors favors dismissal. As to the Cotorro Trust, the Cayman Islands provided more convenient access to evidence by virtue of the action concerning the trust in that jurisdiction. The same reasoning applies to ... the Corniche Trust in Liechtenstein.

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jurisdiction and comity. (R.230-256). After deciding that the complaint should have dismissed on *forum non conveniens* grounds, the trial court never addressed the Respondents' motion to dismiss these claims.

Bacardi, 728 So. 2d at 313.

As evidenced in the Third District's decision, the Cayman Islands, with respect to the Cotorro trust, provides the best access to witnesses and evidence. The Cayman court's orders and judgment were based on evidence taken from all the beneficiaries to the Cotorro trust, including Elena Laura. (R.305-419 Exh.A-C (JA Tab 1 at 34-74)). The Cayman court's orders further established that the Cayman trustee designated in the trust itself, Coutts & Co., Ltd., was an active participant in that litigation. (Id.) Moreover, the record shows that another trustee, a Bahamian trustee who was in possession of the actual trust assets that Elena Laura alleges were wrongfully diverted, was also a party in that case in the Cayman Islands. (Id.). Therefore, the trial court correctly found that, as evidenced by two prior years of litigation, the Cayman court had the existing and best access to the witnesses and evidence that might be necessary to resolve the issues raised in Elena Laura's complaint.

The Third District agreed that "[t]he enforceability of judgments concerning administration of the trusts would be adequate in the jurisdiction that governs the respective trust . . . ." Bacardi, 728 So. 2d at 313. Accordingly, the trial court correctly relied upon the fact that enforcement of a Cayman judgment that predated any judgment in this case was more important in the balance than speculating whether a Florida judgment could be imposed upon a Cayman trustee who did not participate in the Florida action. As argued in the Respondents' Motion to Dismiss for Failure to Join an Indispensable Party, the Cayman trustee — the plaintiff in the Cayman action who was named by the trust itself and who has administered the trust for almost twenty years — must be a party to any action seeking to set aside amendments to the trust or diversion of trust assets.[15] (R.420-46 (JA Tab 6 at 399-401)). Without question, the

[15] E.g., Wilson v. Russ, 17 Fla. 691 (Fla. 1880) (a trustee is an indispensable party in a suit involving the trust); Griley v. Marion Mortgage Co., 182 So. 297, 300

Cayman trustee was not and could not be a party here, and nothing that Elena Laura can conclusorily allege will change that fact.

With respect to the Corniche trust issues, the trial court relied correctly on the same factors. Litigation involving the Corniche trust was pending. (R.305-419 Exh.G ¶¶2-3 (JA Tab 1 at 115-16)). Substantial evidence and testimony had already been taken in that case and would continue to be taken; evidence and testimony to which the Florida trial court would have no access. (Id. ¶5 (JA Tab 1 at 116)).

Elena Laura simply ignores these facts and asks this Court to take de novo review of the issue from her perspective and extend tremendous deference to her choice of forum. Again, however, under the federal *forum non conveniens* doctrine:

> When [a plaintiff's] home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. *Because the central purpose of any forum non conveniens inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference.*

Piper Aircraft, 454 U.S. at 255-56 (emphasis added); accord Pain v. United Technologies Corp., 637 F.2d 775, 799 (D.C. Cir. 1980) (concluding that no special weight should have been given to a foreign plaintiff's choice of forum); Ciba-Geigy, 691 So. 2d at 1118 (same); Hu v. Crockett, 426 So. 2d 1275, 1279 (Fla. 1st DCA 1983) (same); cf. United States Fidelity & Guar. Co., 1999 WL 307666, at *17 ("there is a strong presumption that the plaintiff's choice of forum should be honored. . . . That interest is greatest where the plaintiff is a United States citizen or resident and the alternative forum is foreign.").

(Fla. 1937) ("The general law is, that in suits respecting trust property, brought either by or against the trustees, the cestuis que trustent as well as the trustees are necessary parties") (citing Carey v. Brown, 92 U.S. 171, 172 (1875)).

Accordingly, the trial court here correctly found that Elena Laura was not entitled to a strong presumption in favor of her choice of forum half-a-world away from her home in Spain. (R.1511-13(A6-8)). See Ryder Truck Rental, Inc. v. Rosenberger, 699 So. 2d 713, 715-16, 720 (Fla. 3d DCA 1997) (reversing trial court's denial of motion to dismiss, court did not accord strong presumption to foreign plaintiffs and reversed; Judge Shevin dissented but acknowledged that presumption is lessened for foreign plaintiff).

The trial court also correctly rejected Elena Laura's argument that enforcement of any judgment would not be possible in the Cayman Islands because the trust assets were located here. Elena Laura argues nonetheless that trust assets are present in Florida because one of the Bacardi subsidiary companies has an office located here. However, as the Third District noted "[i]f Plaintiff has any concerns about satisfying a judgment, she may request that the trial court retain jurisdiction over any assets located in Florida." Bacardi, 728 So. 2d at 313. In any event, the "assets" themselves are the shares of stock in the Bacardi companies. (R.1280) Those shares of stock are in trust in the Bahamas. (Id.) The Cayman court expressly found as much in joining the Bahamian trustee as a party defendant in the Cayman action so that the court could trace, if necessary, any of the allegedly diverted funds. (R.305-419 Exh.C (JA Tab 1 at 51)). Either way, the record evidence did not support Elena Laura's argument.

The trial court also rejected the argument that private interests favored Florida as a forum for the Corniche trust issues because of the language barrier involved in litigating in Liechtenstein, where German is spoken. That argument is nonsensical. An English-language forum makes no more sense than a German-language forum to adjudicate the claims of a Spanish-language plaintiff. In order for the trial court to begin to adjudicate the claim that Elena Laura was wrongly induced to file frivolous litigation in Liechtenstein, costly and painstaking translation of German pleadings and

documents would have to be undertaken *before* the case ever got started. The trial court correctly rejected this non-sense, believing that only Liechtenstein courts could adjudicate this claim over "frivolous" Liechtenstein litigation without ever having to translate anything. That, of course, is a reasonable basis upon which to conclude that the private interests in this case favored the foreign fora.

2. Even if Private Factors Were in Equipoise, Public Interest Factors Required Dismissal

The next step in the Kinney analysis requires the trial court to balance the "public interests" if the private interests are in equipoise. Rule 1.061(a)(3).

In this case, no reasonable conclusion could be drawn that there is any equipoise at all. Despite the myriad factors that weigh in favor of the Liechtenstein or Cayman fora, Elena Laura — who is neither a Florida citizen nor a Florida resident — clearly chose this forum in an attempt to circumvent the pre-existing foreign actions and put her mother and step-father through the perils and costs of ceaseless litigation. Nevertheless, the trial court found that, even if the private interests did not favor dismissal as clearly as they did and were in equipoise, the balance of public interests *still* require dismissal. (R.1279-80). The trial court did not abuse its discretion in making this finding. Indeed, the Third District indicated

> even if we assume that the private factors are in equipoise, the public factors weigh in favor of dismissal . . . the litigation has a stronger nexus to the trusts' governing jurisdictions as Plaintiff's claims are premised on actions affecting the trusts, and both jurisdictions have entertained ongoing legal actions concerning the trusts.

Bacardi, 728 So. 2d at 314 (citing Banco Latino, 17 F. Supp. 2d at 1332; Cambridge Filter Corp. v. International Filter Co., Inc., 548 F. Supp. 1308, 1310 (D. Nev. 1982)).

The balance of public interests requires the court to weigh the private interests at issue against the nexus between the action and the current forum. The trial court should also consider the congestion of the court's dockets, and the problem of applying

foreign law in a foreign jurisdiction. Kinney, 674 so. 2d at 92. In this case the first public interest to consider — the nexus between the action and the current forum — must predominate over all other interests as a matter of law. The trial court's power to adjudicate any actions involving trustees and beneficiaries is expressly limited and governed by Fla. Stat. § 737.201 ("Court powers over trusts"). This statute expressly provides that Florida courts *shall not* exercise jurisdiction over cases involving foreign trusts such as this one:

> Over the objections of a party, *the court shall not entertain proceedings* under § 737.20l for a trust registered, or having its principal place of administration, in another state unless all interested parties could not be bound by litigation in the courts of the state where the trust is registered or has its principal place of administration.

Fla. Stat. § 737.203 (emphasis added).

Elena Laura's complaint fell squarely within the provisions of this statute as she sought to adjudicate claims relating to the validity of the Cotorro trust and its amendments, trust distributions and administration, and other matters involving the rights of the trustees and beneficiaries to these foreign trusts. As the record evidence shows, pursuant to the terms of the trust, the principal place of administration over the Cotorro trust is in the Cayman Islands. (R.181-200 Exh.1 ¶8 (JA Tab 3 at 211)).

Section 737.203, therefore, favored, and indeed may require, dismissal of Elena Laura's claims over the Cotorro trust. The "principal place of administration" is first determined by the trust agreement itself. See Fla. Stat. § 737.101. Here, there is no question that the settlor designated the Cayman Islands as the principal place of administration. (R.305-419 Exh.D (JA Tab 1 at 75-94)). As a matter of law, therefore, the issue is settled. Section 737.203 provides that this court "shall not" entertain any proceedings related to a trust administered in a foreign jurisdiction.

Accordingly, under section 737.203, even though the trial court did not expressly rely on this statute in making his public interest finding, the trial court's conclusion is correct as a matter of law. See Grunert v. Machover, 617 So. 2d 1153 (Fla. 3d DCA 1993) (ordering trial court to dismiss Florida action by beneficiary concerning administration of a Virgin Islands trust, governed by Virgin Island law, that did not involve a Florida grantor, Florida trustee or Florida trust assets). The Florida legislature has already expressly determined that Florida will not be a forum for the resolution of any foreign trust action that reaches our shores. As a matter of public policy, if a trust is registered or principally administered in a foreign jurisdiction, a Florida court *shall not* litigate issues arising under that foreign trust.

The same is true for the Corniche trust, which is administered in Liechtenstein, by a Liechtenstein trustee, and which trust assets are shares in a Liechtenstein entity. The public interest of this state, as defined by the Florida legislature, does not permit this jurisdiction to adjudicate the rights of beneficiaries to such a trust, especially when the bizarre claim in question further requires the Florida court to determine if legal proceedings filed in Liechtenstein related to this trust were "frivolous." Put simply, as the Third District opined "in light of the nature of the claims, Florida lacks the requisite significant connection." Bacardi, 728 So. 2d at 314.

Moreover, the trial court correctly held that public interest required dismissal of this complaint based upon the necessity to apply both Cayman and Liechtenstein law under this complaint. As Kinney explained:

> Thus, even when the private conveniences of the litigants are nearly in balance, a trial court has discretion to grant forum non conveniens dismissal upon finding that retention of jurisdiction would be unduly burdensome to the community, that there is little or no public interest in the dispute, *or that foreign law will predominate if jurisdiction is retained.*

674 So. 2d at 92 (emphasis added). See also Sigalas, 776 F.2d at 1519 (11th Cir.) ("the need to resolve and apply foreign law should 'point [the trial court] towards dismissal'") (citing Piper Aircraft, 454 U.S. at 249).

In response, Elena Laura argues that, notwithstanding the fact a Cayman and Liechtenstein trust are at the center of her complaint, Florida law would govern. (Pet. Brief at 10-13). This imaginative theory is based on the idea that because there were family meetings in Florida, correspondence was sent to and from Florida, and the residence of some of the Respondents is in Florida, the wrongful conduct took place in Florida and Florida tort law would govern. Assuming solely for the sake of argument that these facts were true, the trial court obviously found that it would still have to rely on Cayman and Liechtenstein law as a predicate for any Florida tort. That being the case, the more appropriate fora to make those predicate determinations should be in the Cayman Islands and Liechtenstein.

But the fact remains that Elena Laura's "Florida law" theory is totally meritless. As argued earlier, it is well-established in Florida that for venue purposes generally a tortious act accrues where the tort had its impact and caused damage to a plaintiff. E.g., Ryder, 699 So. 2d at 715-16 (this court reversing trial court's denial of *forum non conveniens* motion where non-Florida plaintiff suffered alleged tortious injury outside Florida); Weiner, 557 So. 2d at 912. Only in unusual cases will a court find that a tort cause of action arose in a forum other than where the injury took place. Ryder, 699 So. 2d at 716. Thus, the Plaintiff being a Spanish citizen, and the Cotorro trust being a Cayman trust, any alleged tortious conduct, even if it touched on Florida shores, constitutes only an alleged tort arising in either Spain or the Cayman Islands. The same is true for the Corniche trust issues; that is, the alleged conduct, inducing the filing of a frivolous claim, materialized only when Elena Laura participated in litigation

in Liechtenstein. Consequently, Liechtenstein law would govern whether the litigation was in fact frivolous. Again, the Third District confirmed the trial court's findings:

> [I]t appears that Florida law will not apply as the trust documents dictate that either Cayman Islands or Liechtenstein law governs the trusts respectively. Accordingly, the trial court properly concluded that "retention of jurisdiction would be unduly burdensome to the community. . . . [and] that foreign law will predominate if jurisdiction is retained."

Bacardi, 728 So. 2d at 314 (quoting Kinney, 674 So. 2d at 92; Ciba-Geigy, Ltd., 691 So. 2d at 1124-25)).

In sum, the trial court's balancing of the private and public interest issues in this case should be affirmed. Two different trial judges in separate jurisdictions, in addition to the Third District have all unequivocally concluded that this case has no business being filed in Florida, lending weight to the court's contention that this is exactly the type of case that Kinney intended to prevent. (R.1511-13 (A6-8)). This is why the Cayman court *enjoined* Elena Laura from prosecuting the case any further, calling this action "vexatious and oppressive," in a manner that directly appealed to the Florida court to properly respect the Cayman court's obvious jurisdiction. (R.305-419 Exh.C (JA Tab 1 at 49)). Elena Laura is now trying to second-guess these multiple judicial findings. This Court, like the trial court and Third District, should decline the invitation.

3. There is No Prejudice to Elena Laura in Having to Pursue Her Claims in Appropriate Alternative Fora

The fourth and final step in the Kinney analysis requires the trial court, before dismissing a case under this doctrine, to ensure that the plaintiffs can reinstate their action in the alternative forum. Rule 1.061(a)(4). Here, the trial court found that the Cayman Islands or Liechtenstein were available and adequate alternative fora in which to prosecute Elena Laura's claims. (R.1511-13(A6-8)). The court further found that

in balancing the public and private interests involved, the interests of convenience and justice warranted dismissal of the case. (Id.) Finally, the court provided that the respondents would accept service of process before the courts of the Cayman Islands or Liechtenstein, where these claims belonged. (Id.) The trial court thus satisfied the fourth and final prong of the Kinney test.

Elena Laura is simply not unduly inconvenienced by having to raise or continue to litigate her claims in the proper fora. The trial court found that Elena Laura is a non-Florida plaintiff, suing under non-Florida trusts and governed by non-Florida law. In fact, the only "convenience" Elena Laura seeks is to find a judge who will agree with her meritless arguments after other judges have already rejected them. Kinney, however, prohibits such rank forum-shopping. 674 So. 2d at 92.

To bolster their argument, Elena Laura and her Amicus claim that the Third District's decision to reverse the dismissal order only as to the professional malpractice claim against Jerry Lindzon, a Florida lawyer, enhances the "inconvenience" and "hardship" she would have to suffer if forced to litigate the remaining claims in the better foreign jurisdictions. (Pet. Brief at 35-38; Am. Brief at 4-12). Again, however, the reason that this has become necessary is the fact Elena Laura chose to include totally separate and distinct legal claims in one complaint filed in Dade County, only one of which — the Florida malpractice claim — could possibly be adjudicated here. And the cases they rely upon do not foreclose the possibility of treating discrete defendants differently in such circumstances. E.g., Watson v. Merrell Dow, 769 F.2d at 357 (affirming dismissal of corporate defendant in favor of alternative forum but reversing as to individual defendants unless they stipulated to foreign jurisdiction).

Moreover, Elena Laura will not in fact be inconvenienced by a third forum to litigate her claims at the same time. All the Respondents, including Jerry Lindzon, originally moved to stay or abate the action pending resolution of the foreign claims in

the respective foreign jurisdictions after the complaint was filed. (R.305-419 (JA Tab 1 at 1-33)). That motion, of course, became moot after the trial court dismissed the action on different grounds. Now that one claim may have to remain, however, Jerry Lindzon stipulates that he will seek a stay of that claim pending resolution of the foreign litigation that Elena Laura would first have to pursue under the trial court's order.[16]

The Third District's decision, affirming the trial court's order with some modifications, should be affirmed as all four prongs of the Kinney test have been satisfied in this case.

II.

The Trial Court Did Not Abuse Its Discretion In Dismissing The Case Without Permitting Any Merit Discovery

Elena Laura's last tag-along argument claims that the trial court abused its discretion in refusing her any discovery running to the merits of the motion to dismiss under Kinney. Elena Laura's argument is yet another distortion of the record. The stay of discovery entered by the first judge assigned to the case related to the *merit* discovery which Elena Laura served upon all the parties at the outset of the litigation that included a set of 50 requests for production, 119 requests for admission, and 106 interrogatory questions (not including subparts). Faced with such oppressive merit

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[16] Indeed, Florida law is well settled that a malpractice claim such as this one should be stayed pending other ongoing proceedings that will determine whether or not any redressable cause of action even exists. See, e.g., Bierman v. Miller, 639 So. 2d 627 (Fla. 3d DCA 1994). Here, the malpractice claim is expressly dependent on findings that Jerry Lindzon, in fact, breached his fiduciary duties relating to the Cotorro trust and fraudulently induced Elena Laura to file the Liechtenstein litigation over the Corniche trust. (A132-33). Only after those findings are made in Elena Laura's favor can there be any cause of action for professional malpractice arising from those events. That can be litigated in Florida only after the Cayman or Liechtenstein proceedings have finally been concluded.

discovery at the start of a case, and because they filed multiple jurisdictional motions to dismiss the case, the Respondents jointly moved to stay this voluminous discovery. (R.204-07; 297-301; 531-35; 557-561). The trial court granted that motion pending disposition of the motions to dismiss. (R.621-22).

Counsel for Elena Laura then claimed that he needed discovery in order to address the jurisdiction issues. When the trial court asked counsel what discovery he needed, counsel could not respond with any definitive explanation of what discovery he needed to defend the jurisdictional motions. After the new trial judge was assigned to the case, and after that judge announced his intention to hear the Kinney motion first, counsel again demanded discovery. Again, however, when asked what jurisdictional discovery he believed he needed, counsel could only respond with the request that he needed to know the status of the other pending actions that the Respondents were relying upon in their motions to dismiss. (R.1233). The trial court agreed to lift the stay to permit discovery running to that request. (R.1234-35). Thereafter, the Respondents provided Elena Laura with informal discovery that responded to counsel's request. That was the end of the discovery issue before the hearing on June 25, 1997.

Elena Laura thus *never served any discovery requests going to the jurisdictional issues in the case.* And, beyond the request for information about the status of other pending actions that were the basis for the Respondents' motions, which prompted the trial court to lift the stay of discovery, *no other discovery was requested*. Elena Laura, therefore, has no credible basis to raise any discovery issue in this appeal.[17]

III.

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[17] A trial court's management of the discovery issues in a case is entitled to "wide discretion," reversible on appeal only for a gross abuse of discretion. E.g., American Southern Co. v. Tinter, Inc., 565 So. 2d 891 (Fla. 3d DCA 1990); Lorei v. Smith, 464 So. 2d 1330 (Fla. 2d DCA 1985). There is no basis to find in this case that any abuse of discretion took place on a discovery issue that was not the basis for the appellate jurisdiction in this court.

The Third District Also Correctly Affirmed the Dismissal of Malpractice Claims against Joseph Field

Also without merit is Elena Laura's argument that the Third District misapplied the law in affirming the dismissal of the malpractice claim against Field. Specifically, Elena Laura argues that the Third District erred by concluding that Florida has no meaningful relationship to the legal malpractice claim against Field by dismissing the malpractice claim to an unspecified forum while at the same time recognizing that Cayman and Liechtenstein lacked jurisdiction over the malpractice claim. Neither argument is supported by the law or the record.

Elena Laura, a Spanish citizen, asserted a malpractice claim against Field based upon advice he allegedly gave or failed to give. (A129-31). Field resides in London and is not a member of the Florida Bar. (JA Tab 3 at 210). He has never practiced law in Florida and he has never held himself out as practicing under the laws of Florida. (Id.) The linchpin of Elena Laura's argument is that the Court was not at liberty to consider these compelling and undisputed facts that show Florida has no public interest in resolving the malpractice claim against Field because to do so is tantamount to a collateral attack on jurisdiction. Elena Laura has not cited any authority that would support such an argument and the law is to the contrary. Specifically, while a *forum non conveniens* analysis presupposes that the court has jurisdiction and venue, one prong of the forum non conveniens analysis is the public interest prong. The public interest prong focuses on "whether the case has a general nexus with the forum sufficient to justify the forum's commitment of judicial time and resources to it." Kinney, 674 So. 2d at 92 (quoting Pain, 637 F.2d at 791). Thus, an analysis of the public interest prong necessarily includes consideration of many of the same facts that are considered in determining jurisdiction and/or venue. However, by merely considering these facts, the Court is not permitting a collateral attack on jurisdiction or

venue. Instead, it is applying the analysis dictated by Kinney and Rule 1.061 to the facts.

Moreover, Elena Laura's assertion that the Third District violated Kinney and Rule 1.061 by dismissing the malpractice claim against Field to an unspecified forum while recognizing that both Cayman and Liechtenstein lack jurisdiction over her claim for legal malpractice is pure fiction that is not supported by the Third District's opinion or the record that it relied upon. That record evidence included Elena Laura's own expert who recognized the existence of a malpractice claim in the Caymans by his exclusion of the malpractice claim from the lists of claims which in his opinion Cayman law would not recognize. (R.181-200 (A9-14)).[18]

Additionally, to the extent that the malpractice claim against Field relates to his advising Elena Laura to pursue what she claims was frivolous litigation in Liechtenstein, the record shows that Liechtenstein would likely have jurisdiction to resolve that issue and would afford Elena Laura relief if she proved her case. (R.849-853). Thus, contrary to Elena Laura's assertion, the Third District did not recognize that Cayman and Liechtenstein lacked jurisdiction over the malpractice claim and the Court did not dismiss the claim to an unspecified forum.

CONCLUSION

For the foregoing reasons, the Respondents jointly request that the Court affirm the Third District decision in all respects and answer the certified question in the negative: A trial court *does not* abuse its discretion if it dismisses an action on *forum non conveniens* grounds under Kinney when dismissal requires the plaintiff to refile the claims in more than one alternative jurisdiction.

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[18] While Michael Hart QC (the Plaintiff's expert) states that he finds it "difficult to see" the basis for a Cayman court asserting jurisdiction over Field on the malpractice claim, this is a non-issue since Field has consented to the Cayman's court's exercise of jurisdiction.

Dated: August 2, 1999

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. mail to the counsel of record on the attached service list this 2nd day of August, 1999.

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