IN THE SUPREME COURT OF FLORIDA

CASE NO.: 95,348 (No. 97-2316)

ELENA LAURA PESSINO
GOMEZ DEL CAMPO BACARDI

Petitioner,

vs.

ELENA GOMEZ DEL CAMPO BACARDI
DE LINDZON, et al.,

Respondents.

ON CERTIFIED QUESTION OF GREAT PUBLIC IMPORTANCE
FROM THE DISTRICT COURT OF APPEAL,
THIRD DISTRICT OF FLORIDA

INITIAL BRIEF OF PETITIONER

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ISSUES PRESENTED FOR REVIEW

(as framed by the certified question of great public importance)

DOES THE TRIAL COURT ABUSE ITS DISCRETION IF IT DISMISSES AN ACTION ON FORUM NON CONVENIENS GROUNDS UNDER KINNEY SYSTEM, INC. v. CONTINENTAL INS. CO., 674 So.2d 86 (Fla. 1996), WHEN DISMISSAL REQUIRES THE PLAINTIFF TO REFILE THE CLAIMS IN MORE THAN ONE ALTERNATIVE JURISDICTION?

Threshold issues exist which are presumed satisfied and are not stated in the certified question. Therefore, Petitioner restates the certified question as follows:

I. DOES THE TRIAL COURT ABUSE ITS DISCRETION IF IT DISMISSES AN ACTION ON FORUM NON CONVENIENS GROUNDS UNDER KINNEY SYSTEM, INC. v. CONTINENTAL INS. CO., 674 So. 2d 86 (Fla. 1996), WHEN THE COURT *FAILS* TO ESTABLISH THAT *AN ALTERNATIVE FORUM EXISTS* WHICH POSSESSES *JURISDICTION OVER THE WHOLE CASE* AND DISMISSAL REQUIRES THE PLAINTIFF TO REFILE THE CLAIMS IN MORE THAN ONE ALTERNATIVE JURISDICTION?

II. DOES THE TRIAL COURT ABUSE ITS DISCRETION WHEN THE COURT DEVIATES FROM THE KINNEY PROCEDURAL FRAMEWORK AND STANDARD BY FAILING TO ENGAGE IN THE SUBSTANTIVE FOUR-STEP ANALYSIS MANDATED IN KINNEY AND REQUIRED BY FLA. R. CIV. P. 1.061?

III. DOES THE TRIAL COURT ABUSE ITS DISCRETION BY FAILING TO ALLOW PLAINTIFF TO CONDUCT ANY DISCOVERY IN THE CASE, INCLUDING DISCOVERY RELATED TO JURISDICTIONAL ISSUES RAISED IN RESPONDENTS' MOTIONS TO DISMISS BEFORE A HEARING AND DISMISSAL PURSUANT TO KINNEY AND FLORIDA'S FORUM NON CONVENIENS DOCTRINE?

INTRODUCTION

In 1996, Petitioner ELENA LAURA PESSINO GOMEZ DEL CAMPO BACARDI ("ELENA BACARDI" or "Petitioner" or "Plaintiff") sued Defendant ELENA GOMEZ DEL CAMPO BACARDI DE LINDZON ("ELENA LINDZON") and Respondents JERRY M. LINDZON ("JERRY LINDZON"), JOSEPH A. FIELD ("FIELD"), ALFRED P. O'HARA ("O'HARA") and MARIANA PESSINO GOMEZ DEL CAMPO BACARDI ("MARIANA BACARDI") (referred to herein jointly as "Respondents" or "Defendants").[1] (A. 172) The Petitioner filed a twenty-three count complaint for damages against the five Defendants asserting civil conspiracy, fraud, five counts of breach of fiduciary duty, conversion, negligent misrepresentation, unjust enrichment, promissory estoppel, several counts of professional malpractice, tortious interference with a gift or devise, breach of trust, breach of duty as co-trustee, breach of duty to inform and account to beneficiaries, imposition of a constructive trust, imposition of a resulting trust, fraud in the inducement, intentional infliction of emotional distress and intentional interference with an expectancy; all arising from the Defendants' tortious conduct in Florida. (A. 85-171, 174) Petitioner's action is

[1] An Appendix, pursuant to Fla. R. App. P. 9.220, accompanies this Initial Brief of Petitioner. All citations and references to the appendix will be indicated as "(A. ___)". The Index to the Appendix provides a cross-reference indicating where each Appendix document appears in the record (denoted by "R. ___").

essentially a tort and conspiracy case. The gravamen of the case is a conspiracy orchestrated from Florida with a single monolithic goal: to use whatever resources were at the disposal of the various co-conspirators including the trust funds invaded, managed and controlled by the conspirators, to enrich Defendants ELENA LINDZON and JERRY LINDZON and those conspiring with them at the expense of ELENA BACARDI and her descendants, and to maximize their enrichment by taking whatever steps were necessary to maintain the continued viability of their conspiracy, including massive fraud. ELENA BACARDI's complaint in the case asserts claims against all the Defendants individually and together as co-conspirators and seeks to hold them liable for all tortious acts committed by each of them in Florida.

The trial court granted Defendants' motion to dismiss the complaint for *forum non conveniens* pursuant to Kinney System, Inc. v. Continental Ins. Co., 674 So.2d 86 (Fla. 1996) and Fla. R. Civ. P. 1.061, including Defendant, ELENA LINDZON's motion to dismiss even though she was and continues to be in default. (A. 6-8) A panel of the Third District Court of Appeals reversed the trial court's order as it pertains to ELENA LINDZON as well as the legal malpractice claim against JERRY LINDZON, a Florida resident and member of the Florida Bar, and affirmed the order *as it pertains to the claims involving the trusts* against JERRY LINDZON, MARIANA BACARDI, FIELD and O'HARA by suggesting that the trial court

"implicitly severed" the Petitioner's claims before dismissing the case on *forum non conveniens* grounds in favor of *various* alternative foreign jurisdictions. The order was also affirmed as to the legal malpractice claim against FIELD. Recognizing the inherent conflict with this Court's decision in Kinney and Florida's *forum non conveniens* doctrine as adopted in Fla. R. Civ. P. 1.061, the Third District panel certified to this Court a question of great public importance:

> DOES THE TRIAL COURT ABUSE ITS DISCRETION IF IT DISMISSES AN ACTION ON FORUM NON CONVENIENS GROUNDS UNDER KINNEY SYSTEM, INC. v. CONTINENTAL INS. CO., 674 So.2d 86 (Fla. 1996), WHEN DISMISSAL REQUIRES THE PLAINTIFF TO REFILE THE CLAIMS IN MORE THAN ONE ALTERNATIVE JURISDICTION?

Bacardi v. Lindzon, 728 So.2d 309, 313 (Fla. 3rd DCA 1999). (A. 1-5) The panel sensibly recognized that its decision is inconsistent with the federal doctrine of *forum non conveniens* and this Court's decision in Kinney, which provides "[1]As a prerequisite, the court must establish whether *an adequate alternative forum* exists which possesses jurisdiction *over the whole case* ... [4]if he decides that the balance favors such *a ... forum*, the trial judge must finally ensure that the plaintiff can reinstate their suit in *the alternative forum without undue inconvenience or prejudice*". Kinney, 674 So.2d at 90 (citations omitted, brackets in original; emphasis added).

Contrary to the *forum non conveniens* doctrine, the Third District panel answers the certified question by affirming the trial court's dismissal of *one* plaintiff's claims

in favor of *multiple* alternative foreign jurisdictions. Its opinion cites to no federal or Florida court precedent to support such a position.

Although the Third District's certified question suggests this is a question of first impression, this is so only because the court's decision deviates fundamentally from the body of law comprising the common law and federal doctrine of *forum non conveniens* and this Court's decision in Kinney. The question presented to this Court for review presumes that the trial court and appellate court have followed Kinney and Fla. R. Civ. P. 1.061. However, the certified question of great public importance can only be answered in the affirmative if this Court is to remain consistent with Kinney, Fla. R. Civ. P. 1.061 and the federal *forum non-conveniens* doctrine. The trial court and Third District abandon the bright-line test and vigorous standard set forth by the Kinney court and Fla. R. Civ. P. 1.061, and therefore, undermine Florida's *forum non-conveniens* doctrine adopted in Kinney. A careful examination of the opinion and the transcript of the trial court hearing and dismissal order reveals this material divergence from Kinney. The Kinney mandate contemplates structured discretion by Florida's trial courts, within the boundaries of a four-step procedural framework and analysis guiding each court's decision-making process. The impact of the Third District holding reaches well beyond the certified question; it is at odds with the "most convenient forum" premise underlying this Court's decision in Kinney and the

common law and federal doctrine of *forum non-conveniens*. Because Petitioner believes that preliminary and threshold issues relating to the *forum non conveniens* analysis exist which, although dispositive in this case, are presumed to have been satisfied prior to reaching the certified question, the Petitioner has restated the certified question as appears on page xiv herein.

STATEMENT OF THE CASE

ELENA BACARDI brought a multi-count complaint against five Defendants alleging fraud, conspiracy and other torts arising from conduct in Florida and governed by Florida law. (A. 85-171) Although the trial court found that "four of the five Defendants live here [in Miami-Dade County, Florida] or have sufficient contact [to Florida]" (A. 81:8-9), Defendants moved to dismiss the complaint on grounds of *forum non conveniens*. After conducting a hearing, the circuit court granted Defendants' motion and dismissed the action. (A. 47-84) Petitioner appealed. The Third District reversed in part, affirmed in part and certified a question of great public importance. Bacardi, 728 So.2d at 313. (A. 1-5) This appeal followed.

At the outset, it should be noted that this case involves the exceptional situation in which ELENA LINDZON, JERRY LINDZON and MARIANA BACARDI have been sued in their home forum and have claimed that their home forum is

inconvenient. Florida courts have observed that a *forum non conveniens* argument coming from a party sued where he resides is both "puzzling" and "strange." See Sanwa Bank, Ltd. v. Kato, 1999 WL 355093,*3 (Fla. 5th DCA 1999) citing Lony v. E.I. du Pont de Nemours & Co., 935 F.2d 604, 608 (3d Cir. 1991) (reversing trial court's *forum non conveniens* dismissal).

Although Kinney gives discretion to the trial judge to evaluate the case and weigh evidence before it, it does so within a framework adopted in Florida by this Court which by definition limits discretion to create harmony and uniformity among Florida trial and appellate courts passing on *forum non-conveniens* motions. The trial court's discretion therefore may be said to be "structured discretion" because Kinney mandates that each trial court *must* engage in a substantive four-step analysis within the procedural framework set forth in Kinney, and adopted in Fla. R. Civ. P. 1.061. Kinney, 674 So.2d at 90. Under the Kinney standard, a *forum non conveniens* motion requires a trial court to make the following analysis:

> [1] *As a prerequisite*, the court *must* establish whether *an adequate alternative forum* exists which possesses *jurisdiction over the whole case*. [2] Next, the trial judge *must* consider all relevant factors of private interest, weighing in the balance a strong presumption against disturbing plaintiff's initial forum choice. [3] If the trial judge finds this balance of private interests in equipoise or near equipoise, he *must* then determine whether or not factors of public interest tip the balance in favor of trial in [another] forum. [4] If he decides that the balance favors

> such a...forum, the trial judge *must* finally ensure the plaintiffs can reinstate their suit in the alternative forum without undue inconvenience or prejudice."

Id. at 90 (brackets in original; emphasis added). In this case, the courts below fundamentally deviate from the Kinney framework and resist this Court's clear mandate by failing to apply the vigorous four-prong test in favor of reciting general principles relating to *forum non-conveniens* arbitrarily applied to the trial court's conclusory findings and Respondents counsel's bare allegation of facts not supported by the evidence in the record. Dismissal here is affirmed despite the fact that the trial court: (1) never found one alternative forum exists which possesses jurisdiction over the whole case (a fact which all of the parties and the Third District Court concede); (2) never gave any weight whatsoever to the Petitioner's choice of the Florida forum; (3) never balanced the private and public interest factors; and (4) clearly failed to ensure that the case could be brought in one alternative jurisdiction without undue prejudice and inconvenience to Petitioner.

The Third District's trifurcation of Petitioner's complaint into at least three different fora (Florida, the Cayman Islands and Liechtenstein) is logically inconsistent with a doctrine which provides that the trial court must ensure that plaintiff will not be unduly inconvenienced or prejudiced. Id. at 92. Central to the doctrine is convenience of the parties for trial. Only one forum, Florida, has been determined to

provide an appropriate venue and jurisdiction over the parties and subject matter and therefore is the most suitable forum for trial.

It is axiomatic that before a court may consider a *forum non conveniens* motion it must have subject matter jurisdiction over the case, personal jurisdiction over the parties, and proper venue. Allstate Life Insurance Co. v. Linter Group, Ltd., 782 F.Supp. 215, 219 (S.D.N.Y. 1992). The United States Supreme Court, in Gulf Oil Corporation v. Gilbert, declared that: "[T]he doctrine of forum non conveniens can never apply if there is absence of jurisdiction or mistake of venue." 330 U.S. 501, 504, 67 S.Ct. 839, 841 (1947). The application of the doctrine of *forum non conveniens* presupposes that the trial court below determined that the Florida court has proper venue and both personal and subject matter jurisdiction in this action. See also Kinney, 674 So.2d at 87.

The courts below disregard the Kinney court's test allowing Respondents to evade responsibility for the serious harms they have caused Petitioner from Florida. The Petitioner is left with limited or no recourse in an assortment of multiple fora that do not have subject matter jurisdiction over most of the causes of action asserted by her complaint. Therefore, this dismissal effectively deprives ELENA BACARDI of her day in court, as she will have "no remedy at all" for a majority of her causes of action. Even the trial court conceded this point, recognizing the absence of subject

matter jurisdiction in the alternative fora, ruling "[t]he causes of action may not be recoverable in some areas". (A. 82:19-20) This part of the trial court's ruling is conspicuously omitted from the order. Due to the outcome determinative effect of such dismissal, it is impossible for ELENA BACARDI to bring her case in the supposedly more convenient multiple fora. The trial court is unjustifiably protecting Respondents from any liability and in effect tacitly condoning Respondents' tortious conduct by affording them immunity in allowing Petitioner's claims to go unanswered. Contrary to Kinney, the remedy potentially available is only illusory. Id. at 92.

Only Florida, Respondents' "home" forum, is a truly *adequate* and *available* venue to provide remedies for all of ELENA BACARDI'S causes of action as alleged in the complaint. Under Kinney, the case cannot be bifurcated and dismissed in favor of two alternative fora. It is the Third District panel's own recognition of conflict with this Court's clear pronouncements in Kinney which results in the certified question. Under Kinney, a trial court must first make a determination that an alternative forum exists which possesses jurisdiction over the whole case; if such a forum does not exist, the court is obligated to hear the case in Florida. Id. at 90; See Sanwa Bank, 1999 WL 355093, *3; Woods v. Nova Companies Belize Ltd., 1999 WL 357485,*3 (Fla. 4th DCA 1999). As discussed more fully below, the record and evidence presented by

ELENA BACARDI clearly established that no forum other than Florida can adequately adjudicate the whole case.

STATEMENT OF THE FACTS [2]

This lawsuit involves the Bacardi Rum fortune and the Gomez Del Campo Bacardi family, lineal descendants of the founder of the Bacardi Rum family empire, Don Facundo Bacardi y Maso. (A. 85) The Gomez Del Campo Bacardi family owns and controls approximately twelve (12%) percent of Bacardi Limited, Bacardi's holding company, worth in excess of Five Hundred Million Dollars ($500,000,000.00). (A. 86) Maria Bacardi abdicated the management and control of her stock holdings and voting rights to her son, Luis Bacardi. (A. 92) In order to seize control of the Bacardi shares from Luis Bacardi, Defendants conspired in Florida

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[2] These facts are derived from the Petitioner's affidavit testimony and the allegations contained in her complaint, which must be accepted as true for purposes of Respondents' motion to dismiss. Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); Jackson v. Okaloosa County, Fla., 21 F.3d 1531, 1534 (11th Cir. 1994). See, e.g., McBee v. Sandals Resorts International, 659 So.2d 471 (Fla. 3d DCA 1995); Lewis v. Barnett Bank of South Florida, N.A., 604 So.2d 937, 938 (Fla. 3d DCA 1992). See also Lugones v. Sandals Resorts, Inc., 875 F.Supp. 821, 823 (S.D. Fla. 1995) (when ruling on a motion to dismiss, "a court must view the complaint in the light most favorable to the plaintiff and accept the plaintiff's well pleaded facts as true") (citing Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); Chiquita International Ltd. v. Fresh Del Monte Produce, 690 So.2d 698 (Fla. 3rd DCA 1997).

and did cause Maria Bacardi, Plaintiff's grandmother, to establish two trusts; the Cotorro Trust in favor of ELENA LINDZON, her daughter and her descendants; and the Corniche Trust in favor of Luis Bacardi, her son and his descendants. (A. 92-96) ELENA BACARDI is a beneficiary of the Cotorro Trust and a contingent beneficiary of the Corniche Trust. (A. 95) At the time the Cotorro Trust was settled, Defendants conspired and initiated a scheme in Florida to divest ELENA BACARDI of her share of the family assets. (A. 96-107) In furtherance of their conspiracy, Defendants began taking managerial control over the Bacardi family assets and investments, including the Bacardi shares. (A. 93-106) Although the Cotorro Trust was established by the Defendants under the Laws of the Cayman Islands, from the outset, the Cotorro Trust was managed and principally administered from Miami, Florida, by Petitioner's mother, ELENA LINDZON, father-in-law, JERRY LINDZON and sister, MARIANA BACARDI, who served as the managing trustees of such trust assets. (A. 19, 21, 22, 23, 97) Complete managerial control of that trust was accomplished by the mysterious removal of the only independent member of the management committee. (A. 19, 99) Once they obtained complete dominion and control of the management of that trust, they invaded the trust, removing in excess of 50% of trust assets, comprised primarily of Bacardi shares, to the exclusion of ELENA BACARDI, a rightful owner of a beneficial interest in those shares and other assets. (A. 33, 98, 99,

101) In furtherance of their scheme, ELENA LINDZON, attorneys FIELD and JERRY LINDZON hand-selected and deceptively imposed their co-conspirator, attorney O'HARA, as one of the managing trustees of the Corniche Trust. From the outset, O'HARA's actions were secretly controlled by FIELD, JERRY LINDZON and ELENA LINDZON. (A. 160, 169-170) The conspirators have exercised dominion and control over the Bacardi assets from Florida with the sole purpose of enriching themselves to the detriment of ELENA BACARDI and further, by exacting greater voting control within Bacardi Limited. (A. 27) Their greed was not sufficiently satisfied with the Bacardi assets they stole from ELENA BACARDI and her descendants. Using their agent, attorney O'HARA, who feigned his loyalty to ELENA BACARDI as her fiduciary and as a member of the managing committee of the Corniche Trust, ELENA LINDZON, JERRY LINDZON and MARIANA BACARDI, fraudulently and deceptively caused Petitioner to engage attorney FIELD, and they instigated, managed and controlled lawsuits from Florida in Europe in an attempt to gain dominion and control of the Corniche Trust, whose principal beneficiary was Luis Bacardi, Petitioner's uncle. (A. 31, 104-107)

In addition to the malpractice claim against FIELD, the Third District affirms the trial court's order as to Respondents JERRY LINDZON, MARIANA BACARDI, O'HARA and FIELD, but <u>only</u> *as it pertains to the claims involving the trusts.*

However, like the legal malpractice claim against JERRY LINDZON severed to Florida, Petitioner's complaint pleads many causes of action which are not dependent on determinations relating to the Cotorro or Corniche Trusts. Although all of the causes of action asserted by Petitioner arise in Florida from the same fraudulent scheme, tortious conduct and conspiracy orchestrated by the Defendants from Miami, many of ELENA BACARDI's claims do not pertain to or involve the Cotorro Trust or the Corniche Trust. Bacardi, 728 So.2d at 314. (A. 5) Each of these claims can sustain an independent cause of action, but arise from the same operative facts, conduct, misrepresentations, negligence, conspiracy, fraud and other tortious conduct alleged in the complaint. Each involves the same parties, witnesses and documentary evidence as those of ELENA BACARDI's claims directly pertain to the Cotorro and Corniche Trusts, respectively.

For instance, in Count III of her complaint, ELENA BACARDI brought suit against JERRY LINDZON for breach of fiduciary duties relating to this case that are beyond the scope of the Cotorro and Corniche Trusts because he: (a) failed to advise her of his financial interests in transactions; (b) improperly advised her on the tax consequences of transactions; and (c) failed to properly advise Petitioner regarding her interests in real estate and other property matters as well as failing to properly advise her as to the adverse consequences of said transactions. (A. 112-114)

Counts V and XV are against FIELD for breach of fiduciary duty and legal malpractice, respectively, relating *to conduct which does not pertain to* and is beyond the scope of any of the *many trusts* referred to in the case, including: (a) representing the interest of ELENA LINDZON and JERRY LINDZON and failing to advise the Petitioner of his conflict of interest; (b) communicating directly with JERRY LINDZON and ELENA LINDZON rather than Petitioner regarding material matters relating to Petitioner's legal representation and financial interests; (c) giving tax and business advice to ELENA BACARDI which was detrimental to her interest, but favorable to JERRY LINDZON and ELENA LINDZON; and (d) failing to advise ELENA BACARDI that she had a cause of action against JERRY LINDZON and ELENA LINDZON. (A. 116-118, 129-131)

In Count XXII, Petitioner sued all Defendants for intentional interference with an expectancy resulting from their conspiracy and their joint unauthorized and unjustified interference with her actual and beneficial interest and expectancy in trusts, inheritances, gifts, property and devises created by ELENA LINDZON further alleging that the co-conspirators acted in concert with the intent to deprive the Petitioner of her property. (A. 141-143)

In Count XIV, Petitioner sued ELENA LINDZON for promissory estoppel. This cause of action *does not pertain to the Cotorro or Corniche Trusts*. (A. 128-129)

In Count XIX, her suit is against all conspirators for fraudulently inducing her to hire attorney FIELD to bring a lawsuit against her uncle in furtherance of their fraudulent scheme to seize voting control of the other half of the family's Bacardi shares. Petitioner alleges that Respondents made specific false statements and fraudulent misrepresentations to her in Florida to convince her and her sisters to file and maintain the lawsuit against Luis Bacardi. Petitioner's fraud action was brought in Florida where Respondents' conspiracy and tortious conduct arose. (A. 137-138)

Counts XX and XXI are against ELENA LINDZON and JERRY LINDZON, respectively, for intentional infliction of emotional distress in relation to damages suffered by her as a direct result of Respondents' actions in Florida, including conspiracy to defraud Petitioner of property and trust assets, some of which are neither assets of the Cotorro Trust or the Corniche Trust. (A. 138-141) All of these causes of action cannot be readily severed, *do not pertain to the claims involving the Cotorro and the Corniche Trusts*, nor can they be dismissed to fora which clearly do not have subject matter jurisdiction over them.

Petitioner's complaint, affidavit and the record support the following additional key facts of the case for *forum non conveniens* purposes:

1. All members of the management committee, the managing trustees of the Cotorro Trust, reside in Miami, Florida. (A. 19)

2. The Cotorro Trust is managed and administered by ELENA LINDZON, JERRY LINDZON and MARIANA BACARDI, and the members of the management committee from Miami, Florida. (A. 19)

3. The Petitioner and the Respondents are neither residents nor citizens of the Cayman Islands, nor of the Principality of Liechtenstein. (A. 20)

4. Maria Bacardi, the grantor of the Cotorro Trust and the Corniche Trust, respectively, was neither a resident nor a citizen of the Cayman Islands, nor of the Principality of Liechtenstein. (A. 18)

5. None of the beneficiaries of the Cotorro Trust and the Corniche Trust are residents or citizens of the Cayman Islands, or Liechtenstein. (A. 20)

6. The majority of the beneficiaries of the Cotorro Trust are U.S. residents, and principally reside or have resided in the State of Florida. (A. 20)

7. None of the Respondents maintain or have maintained residence in either proposed "alternative" forum. (A. 20)

8. Since its inception, the Bacardi family and members of the management committee of the Cotorro Trust have been advised by their American lawyer, FIELD, who individually and through his agents, has engaged in substantial and not isolated activity within the State of Florida. (A. 19, 33-44)

9. Respondents' conspiracy and fraudulent scheme was "hatched" in Miami,

Florida. (A. 32-45, 147-152) As alleged in the complaint and confirmed by the Petitioner's affidavit testimony, Respondents' plan was developed, orchestrated, implemented, achieved and continues to be perpetuated from Respondents' residences and/or offices in Miami, Florida. (A. 32-45)

10. All five Defendants engaged in substantial activity within the State of Florida and committed tortious acts within the State of Florida. (A. 87-90, 19-20) Countless meetings were held in Miami-Dade County by Respondents to conspire to commit the tortious conduct alleged in the complaint. (A. 32-45) Thousands of letters, faxes and telephone calls in furtherance of such tortious conduct originated from and were directed at Florida. (A. 32-45) In fact, much of the very conduct took place and was generated from Respondents' homes in Florida, which is clearly evident from the address borne on the letterhead of most of the correspondence. (A. 164, 172)

11. All Respondents actively participated in meetings concerning the management and administration of the Cotorro Trust and the Corniche Trust as well as many other family trusts in Florida, exercised Bacardi shareholder voting rights in Florida at Bacardi Corporation annual shareholder meetings held in Florida (A. 44).

12. The Gomez del Campo Bacardi family held what were described as "family business meetings" in Miami organized to discuss financial investments, tax matters, legal matters and other issues relating to the family assets and relating to trust

management and administration. (A. 32-45) These meetings were also used to make decisions regarding the distribution and increases in monthly dividends to ELENA LINDZON's daughters, including ELENA BACARDI. (A. 107-109, 32-45)

13. At these family meetings, attorneys and fiduciaries FIELD and JERRY LINDZON advised the entire family regarding the institutionalized "monthlies," Bacardi company dividends, investment strategy, tax advice, and other legal and business advice. (A. 108, 34-38) FIELD attended all such regularly scheduled meetings and advised both ELENA BACARDI and ELENA LINDZON, JERRY LINDZON and MARIANA BACARDI in Miami-Dade County, Florida, in furtherance of the conduct complained of in this action. (A. 89-90, 35-37)

14. The record establishes that many of the trust assets belonging to the Gomez del Campo Bacardi family, including those held by the Cotorro Trust and the other family trusts, are located in Florida. (A. 32-45) The family's trust assets managed and administered by the Respondents include Florida real property and shares of corporations headquartered in Florida, including Bacardi-Martini, U.S.A., Inc. and Bacardi-Martini, Inc. (A. 39)

15. The majority of the Respondents and various key witnesses, including officers, directors and employees of Bacardi-Martini, Inc. and Bacardi-Martini, U.S.A., Inc. reside in Florida, where the torts arose. (A. 35-45, 75-76) Most of the

documentary evidence is in Florida.

SUMMARY OF ARGUMENT

I. Kinney requires that a trial court must, as a condition precedent to dismissing for *forum non conveniens*, establish that the alternative forum *exists* which provides jurisdiction over *the whole case*. Kinney, 674 So.2d at 90. The trial court abused its discretion when it dismissed the sole plaintiff ELENA BACARDI's action because it failed to establish that one alternative forum exists which possesses jurisdiction over the whole case and because such dismissal requires ELENA BACARDI to file her claims in more than one alternative jurisdiction. Following the mandate of the decision below, ELENA BACARDI must file at least two other lawsuits; one in the Cayman Islands and the other in Liechtenstein, while proceeding against JERRY LINDZON in Florida on the legal malpractice claims and against defaulted ELENA LINDZON on damages with respect to all of her claims. Such a trifurcation of ELENA BACARDI's case is inconsistent with Kinney and is in direct violation of Florida's *forum non conveniens* doctrine adopted in Fla. R. Civ. P. 1.061.

During the hearing, the trial court never specifically ruled in favor of any identifiable alternative forum. Although the order signed by the court referred to both Liechtenstein and the Cayman courts, this order was prepared by opposing counsel for

the trial court’s signature and goes well beyond the scope of the trial court’s oral ruling at the hearing which makes no specific finding of fact or law relating to existence of alternative forum in Liechtenstein or Cayman. As the Third District and Respondents concede, the uncontroverted evidence in the record establishes that neither a Cayman court nor a Liechtenstein court has subject matter jurisdiction over the entire case.

Only Florida can provide a complete resolution for each of ELENA BACARDI's conspiracy and tort claims, all of which arose in Florida from Respondents' conspiracy and other tortious conduct within Florida and governed by Florida law. (A. 9-14) Severance of ELENA BACARDI’s claims here is inappropriate. The trial court failed to ensure that the Petitioner could in fact reinstate her lawsuit in *one* alternative forum without undue inconvenience or prejudice as is required under Kinney. It is safe to say that the Petitioner would be greatly prejudiced and unduly inconvenienced by litigating her claims in at least three different jurisdictions.

II. This Court’s mandate in Kinney, which contemplates that Florida courts must exercise structured discretion founded on the procedural framework set forth in Fla. R. Civ. P. 1.061, is abandoned below. The trial court’s failure to analyze and weigh the factors established by Kinney for deciding a *forum non conveniens* motion,

standing alone, requires a reversal of its order dismissing the complaint. Woods, 1999 WL 357485, at *3; Carenza v. Sun International Hotels, Ltd., 699 So.2d 830, 832 (Fla. 4th DCA 1997); Rikamor Ltd. v. Oded, 690 So.2d 697 (Fla. 3rd DCA 1997). Further, the trial court abused its discretion by granting Respondents' motion because Respondents had failed to file verified motions, introduce sworn testimony at the hearing or submit their sworn affidavits in connection with their motion to dismiss for *forum non conveniens* as required by Florida and federal law.

The trial court's decision is egregious for its complete failure to weigh *any* presumption in favor of ELENA BACARDI's choice of forum. Especially where, as here, ELENA BACARDI sued in ELENA LINDZON, JERRY LINDZON and MARIANA BACARDI's home forum -- Miami, Florida -- *forum non conveniens* motions are rarely granted. Lehman v. Humphrey Cayman Ltd., 713 F.2d 339, 347 (8th Cir. 1983), cert. denied, 464 U.S. 1042 (1984) (citation omitted); see, e.g., Gilbert, 330 U.S. at 504. Although not dispositive, residence continues to be a significant factor. See, Sanwa Bank, 1999 WL 355093, at *3; Chiquita, 690 So.2d at 699-700.

The trial court abused its discretion by ruling against the weight of the evidence in the record which clearly demonstrates that each of the Kinney factors, including the interests relating to the private and public conveniences, weighs heavily in favor of

Florida as the most convenient and the only available and adequate forum for *all* of ELENA BACARDI's claims against Respondents.

III. Finally, the trial court did not allow Petitioner to conduct discovery with respect to the jurisdictional matters and other factual issues in connection with Respondents' *forum non conveniens* motion. As a matter of law, the trial court abused its discretion as ELENA BACARDI was entitled to discovery in connection with all of the jurisdictional issues raised by the Respondents' motions, especially in light of the lower court's peculiar rationale in affirming dismissal of the legal malpractice claim against FIELD, which suggests that neither Florida, Liechtenstein nor Cayman have personal or subject matter jurisdiction over Petitioner's claim. Gleneagle Ship Management v. Leondakos, 602 So.2d 1282, 1284 (Fla. 1992) Further, the trial court abused its discretion by failing to allow ELENA BACARDI discovery as to defaulting Defendant ELENA LINDZON. Bacardi, 728 So.2d at 314.

ARGUMENT

I.

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DISMISSED PETITIONER'S ACTION BECAUSE IT FAILED TO ESTABLISH THAT AN ALTERNATIVE FORUM EXISTS WHICH POSSESSES JURISDICTION OVER THE WHOLE

CASE AND DISMISSAL REQUIRES THE PETITIONER TO FILE HER CLAIMS IN MORE THAN ONE ALTERNATIVE JURISDICTION IN DIRECT VIOLATION OF THE FOUR-STEP KINNEY TEST AND FLORIDA'S FORUM NON CONVENIENS DOCTRINE ADOPTED IN FLA. R. CIV. P. 1.061

A. AS NEITHER PROPOSED FORUM, THE CAYMAN ISLANDS NOR LIECHTENSTEIN, IS AN ADEQUATE ALTERNATIVE FORUM, THE TRIAL COURT ABUSED ITS DISCRETION

A threshold issue to any dismissal under the doctrine of *forum non conveniens* is the existence of an alternative forum where ELENA BACARDI can litigate all of her claims against all of the Respondents, as is the case in the Florida forum. See, e.g., Gilbert, 330 U.S. at 501. The existence of *one* suitable and identifiable alternative forum under the Kinney analysis is both critical and dispositive.

This Court has held squarely that "dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute," Kinney, 674 So.2d at 90 (quoting Piper Aircraft v. Reyno, 454 U.S. 235, 254 n.22 (1991)), and that: "As a prerequisite, the court must establish whether *an adequate alternative forum exists* which possesses jurisdiction *over the whole case*." Id. at 90 (emphasis added). In the absence of an alternative forum, with both subject matter and personal jurisdiction over the entire case, the other Kinney factors are moot and irrelevant and the trial court's *forum non conveniens* dismissal must be reversed. Id. at 90; Sanwa Bank, 1999 WL 355093, at *4; See, e.g., Polythane Sys., Inc. v. Marina

Ventures Int'l. Ltd., 993 F.2d 1201, 1207, reh'g denied, 4 F.3d 992 (5th Cir. 1993), cert. denied, 114 S.Ct. 1064 (1994); P&D Int'l v. Halsey Publishing Co., 672 F. Supp. 1429, 1433 (S.D. Fla. 1987).

In Bacardi, the court below affirms the trial court's dismissal of *one* plaintiff's claims in favor of *multiple* alternative foreign jurisdictions. The Third District's opinion here is in direct conflict with Kinney, Phoenix Canada Oil Company Limited v. Texaco, Inc. 78 F.R.D. 445 (Del. 1978), Piper, 454 U.S. at 235 and both federal and Florida precedent which require that the alternative forum possess "jurisdiction over the whole case" including subject matter jurisdiction. See e.g., Sanwa Bank, 1999 WL 355093, at *4; Madanes v. Madanes, 981 F.Supp 241, 265 (S.D.N.Y. 1997); Mobil Tankers Co. v. Mene Grande Oil Co., 363 F.2d 611, 614 (3d Cir. 1966), cert. denied, 385 U.S. 945, 87 S.Ct. 318, 17 L.Ed 2d 225 (1966); Hoffman v. Goberman, 420 F.2d 423, 426 (3d Cir. 1970). The Kinney court, quoting the United States Supreme Court in Piper, explicitly states:

> Thus, for example, dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute.

674 So.2d at 90 (quoting Piper, 454 U.S. at 254 n. 22)

The first prong in Kinney, whether an adequate alternative forum exists, is a two-step test. The moving defendant must show the availability *and* adequacy of a

proposed alternative forum. In re Air Crash Disaster Near New Orleans, La., 821 F.2d 1147, 1165 (5th Cir. 1987), vacated on other grds. sub nom., 490 U.S. 1032 (mem.), op. reinstated, 883 F.2d 17 (5th Cir. 1989) (*en banc*)

1. NO "AVAILABLE" ALTERNATIVE FORUM EXISTS

With regard to availability, "[a] foreign forum is available when the *entire case* and *all parties* can come within the jurisdiction of that forum." Air Crash, 821 F.2d at 1165 (emphasis added). This is a *condition precedent* that must exist under Kinney before any action may be dismissed. Kinney *supra* at 90; see also Herbstein v. Bruetman, 743 F.Supp. 184, 190 (S.D.N.Y. 1990) (finding a foreign forum inadequate where it will not provide complete resolution of the issues underlying the complaint); Phoenix Canada, 78 F.R.D. at 445. However, in this case, none of ELENA BACARDI's claims against defaulting Defendant ELENA LINDZON have been dismissed and therefore it is factually impossible for *all of the parties* to come within the jurisdiction of any other alternative forum. Pursuant to the decision in Bacardi, *all* of ELENA BACARDI's claims against defaulting Defendant ELENA LINDZON remain in Florida.

In this case, only Florida possesses subject-matter jurisdiction over the entire case. Judge Michael Hart, Queens Counsel, ELENA BACARDI's Cayman law expert, a distinguished jurist specializing in Cayman and British law opines

unequivocally that "the Cayman forum would not permit litigation of the subject-matter of the Florida suit in its entirety." See Affidavit of Michael Hart Q.C. (A. 12)[3] The record establishes that neither the Cayman Islands nor Liechtenstein is an adequate alternative forum for the whole case. This point has been conceded by the Third District, the trial court and the Respondents. For instance, Judge Hart opines that the Cayman Islands lack subject-matter jurisdiction over Petitioner's causes of action for unjust enrichment, tortious interference with a gift or devise, resulting trust, promissory estoppel, conversion, intentional infliction of emotional distress and intentional interference with an expectancy. See Affidavit of Michael Hart Q.C. (A. 10-11) Similarly, Liechtenstein lacks subject-matter jurisdiction over most of the claims, including Petitioner's counts for legal malpractice, promissory estoppel, unjust enrichment, conversion and for fraud, breach of trust and breach of fiduciary duty pertaining to the Cotorro Trust.

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[3] Judge Hart states: "[t]here are several causes of action pleaded in the Florida action in relation to the Cotorro Trust which the Cayman Islands court would not entertain . . . (A. 14) "[n]ot all the claims made in the Florida action do concern the Cotorro Trust. While some do, others clearly do not, and a third category (e.g. Counts XVI, XVIII and XIX) only does so in a very general sense . . . [e]ven in relation to questions which do "concern the Cotorro Trust" . . . [i]f Mr. Paget-Brown is implying . . . that a beneficiary in the Plaintiff's position would, as a matter of Cayman Islands trust law, be entitled to a remedy in damages (or equitable compensation) awardable to her personally, he is incorrect: see the discussion in *Underhill and Hayton, Law of Trusts and Trustees*, 15th (1995) ed, at pp 825-829." (A. 13-14)

Because the torts were actually committed within or directed at Florida, only Florida has personal jurisdiction over *all* of the tortfeasors. The Third District, for example, found no basis either in the Cayman or Liechtenstein courts to assert jurisdiction over Respondents FIELD and JERRY LINDZON for legal malpractice. Bacardi, 728 So.2d at 314. (A. 5) In this case, a Cayman court does not have personal jurisdiction over FIELD and O'HARA and a Liechtenstein court does not have personal jurisdiction over JERRY LINDZON, ELENA LINDZON and FIELD. See, e.g., Madanes, 981 F.Supp. at 266.

2. NO "ADEQUATE" ALTERNATIVE FORUM EXISTS

The Petitioner's initial choice of forum must not be disturbed as neither proposed forum affords ELENA BACARDI an adequate remedy for all her claims. See Piper, 454 U.S. at 254 n.22 ("where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate forum").

Under Cayman law, ELENA BACARDI would have no remedy at all for Counts X, XI, XIII, XIV, XVII, XX, XXI and XXII of the complaint. (A. 11-12) Further, the Cayman court would be prohibited, by its own law, to look to the law of any other jurisdiction in adjudicating the Florida claims for which it lacks a legal equivalent. Since the Florida causes of action have no comparable causes of action

in the Cayman Islands, the Cayman court cannot entertain these at all. (A. 13)[4]

The Third District's opinion in Bacardi is in direct conflict with Phoenix Canada Oil cited to by both Kinney and Piper as authority on this threshold issue of subject matter jurisdiction in the alternative forum. In Phoenix Canada Oil, the plaintiff's complaint claimed that the defendants committed acts and omissions giving rise to three legal theories of recovery: (1) breach of contract; (2) unjust enrichment; and (3) intentional infliction of economic distress. The court in Phoenix Canada Oil, refusing to dismiss, reasoned that:

> [E]ven if an Ecuadorian tribunal will hear the case, jurisdiction is had over all defendants, and plaintiff financially is able to proceed in Ecuador, it appears that *no* generally codified Ecuadorian *legal remedy exists for unjust enrichment or the tort claims asserted here*. Thus, this case may not simply be one in which a lesser remedy could be obtained elsewhere than in the United States, *but rather one in which no remedy could be obtained for two of three legal theories advanced*. (emphasis added)

78 F.R.D. at 456. In adopting the rationale of Phoenix Canada Oil, both Kinney and Piper recognize the principle that the alternative forum must have a specific and codified legal remedy for each of the plaintiff's claims, which clearly neither Cayman

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[4] Note, Respondent expert, Ian Paget-Brown's glaring omission in his affidavit of the case of Paget-Brown v. Scenic Limited, 1988-89 CILR, where he personally was sent from Cayman back to California on the grounds of *forum non conveniens*. (A. 9-14, 64) (R. 1195-1199)

nor Liechtenstein has in this case. Bacardi, 728 So.2d at 312. See Affidavit of Michael Hart. (A. 9-16) Like the plaintiff in Phoenix Canada Oil, ELENA BACARDI has asserted unjust enrichment and intentional infliction claims, among others, for which neither the Cayman Islands nor Liechtenstein provide a legal remedy.

In a factually analogous case, involving an Argentine citizen who brought action against her brothers and their counsel for conspiring to divest plaintiff of her share of the family assets, Madanes, 981 F.Supp. at 265, the U.S. District Court for the Southern District of New York denied a *forum non conveniens* motion where defendant brothers argued that two countries, Argentina or Switzerland, were superior forums because the trust assets and accounts at issue were located in each of those forums. The Madanes court held that neither *one* was an adequate alternative forum. Id. at 265.

The Third District's decision also directly contradicts its own holding in Chiquita, 690 So.2d at 699, which reversed on *forum non conveniens* because a Philippine court did not have subject matter jurisdiction and therefore no "adequate alternative forum exists which possesses jurisdiction over the whole case." Like the courts in Kinney, Piper, Madanes and Phoenix Canada Oil, *supra*, the Chiquita court found the absence of subject matter jurisdiction in the alternative forum to be

"dispositive." Id. at 699.

Similarly, in Pafco General Ins. Co. v. Wah-Wai Furniture, 701 So.2d 902, 904 (Fla. 3d DCA 1997), the Third District affirmed the trial court's rejection of *forum non conveniens* motions by Hong Kong defendants for claims arising in several states including Florida because, "[l]itigation of related claims in the same tribunal is favored in order to avoid duplicative litigation, attendant unnecessary expenses, loss of time to courts, witnesses and litigants, and inconsistent results." Id. at 904 (quoting Cambridge Filter Corp. v. International Filter Co., 548 F.Supp. 1308, 1310 (D.Nev. 1982)).

In Bacardi, the absence of subject matter jurisdiction in the Cayman Islands and Liechtenstein is dispositive and Respondents' unsworn motion should have been denied for this reason alone.[5]

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[5] Respondents' inability to meet their burden here is apparent even from a review of their arguments at the *forum non conveniens* motion hearing:

> Ms. Du Fresne: "I can find no case anywhere, Your Honor, that says Lichtenstein *[sic]* is adequate or inadequate. The proceedings are all in German." (A. 53:1-3) and
>
> Ms. Du Fresne: "We are supposed to look at the congestion of this court's docket as compared to the dockets of the courts abroad. I have no idea what they are like in Lichtenstein *[sic]*." (A. 55:12-16)

B. SEVERANCE OF PETITIONER'S CLAIMS IS INAPPROPRIATE WHERE THE TRIAL COURT DID NOT AND COULD NOT SEVER PETITIONER'S CLAIMS AS ALL CLAIMS ASSERTED HAVE IDENTITY OF BOTH LEGAL AND FACTUAL ISSUES AND ARE DEPENDENT ON THE SAME FACTS AND CIRCUMSTANCES NECESSARY TO SUPPORT EACH OF THE CAUSES OF ACTION ASSERTED BY PETITIONER

In its opinion the Third District states that "the trial court *implicitly severed* the *claims pertaining to each trust* before dismissing the case on *forum non conveniens* grounds." Bacardi, 728 So.2d at 312. (emphasis added). In making this statement, the Third District takes a giant leap of faith to circumvent the clear Kinney and federal mandate that "one" alternative forum must be determined to exist by the trial court for the "whole case." The record is unequivocal that no motion for severance was made by Respondents nor did the trial court expressly sever ELENA BACARDI's multiple claims. Had the trial court made a determination to sever, it would be evident from the hearing transcript. Each step of the Kinney analysis and resulting findings would have to be necessarily applied to each particular alternative forum. The private and public interest analysis would also greatly vary as between jurisdictions and could not be accomplished summarily without abandoning Kinney and Fla. R. Civ. P. 1.061. In fact, at the hearing, the trial court ruled as follows:

> Number one, that an adequate alternative forum does exist which possesses jurisdiction over the whole case. Although the causes of action may not be recoverable in some areas, generally speaking, we are not dealing with the law of some strange type of foreign power or dictatorship.

> Number two, the relevant facts of private interest favor the alternative forum.
>
> Number three, if the balance of private interest is at or near equipoise, the court turns to the public interest.
>
> Ultimately, I am sure that the plaintiff can bring suit in an alternative forum. (A. 82-83)

Nowhere in the trial court's ruling does the trial court actually make a determination that either Cayman or Liechtenstein was an adequate alternative forum which possesses jurisdiction over the whole case, and certainly not that both fora possess jurisdiction over the whole case. The trial court never identifies which of the two alternative fora proposed by the Respondents is the single "forum" possessing jurisdiction over the whole case. However, what is unequivocal is that the trial court is referring to a "single alternative forum" in his ruling. (A. 82-83)

Because neither forum possesses jurisdiction over the whole case, the Respondents argued that the trial court severed Petitioner's claims asserting the following premise, which is both factually and legally incorrect: "the Cayman Islands have jurisdiction over the whole case involving the Cotorro Trust, and Liechtenstein has jurisdiction over the case involving the Corniche Trust."

However, ELENA BACARDI's claims cannot be categorically split into two cases; one involving the Cotorro Trust and the other the Corniche Trust. The complaint is replete with factual allegations of tortious conduct in Florida, pursuant to which Petitioner advanced legal theories that do not pertain to either the Cotorro

Trust or the Corniche Trust. A review of Petitioner's complaint reveals there is no such thing as "the *case* involving the Cotorro Trust or the *case* involving the Corniche Trust." (A. 85-171, 174) Further, even assuming arguendo, that you could sever portions of Petitioner's case, the courts below never determined the appropriate forum for those claims not *pertaining to the claims involving the trusts* but similar to the legal malpractice claims; for example, Counts XIV, XXII, XX, XXI and XXIII. (A. 5, 174) Further, the trial court never made a factual determination that either of these forum would have jurisdiction over such imaginary Cotorro and Corniche Trust cases.

This case is easily distinguished from Ciba-Geigy, Ltd., v. Fish Peddler, Inc., 691 So.2d 1111 (Fla. 4th DCA) review denied, 699 So.2d 1372 (Fla. 1997). In Ciba-Geigy, the trial court severed the breach of contract action because it held that the twenty-eight fourth-party complaint tort cases arising in Ecuador did not involve either Fish Peddler or Pink Star, the original plaintiff and defendant, and because the trial court made a factual and legal determination upon a motion to sever that there was no identity of legal or factual issues between the contract action brought by Fish Peddler and Pink Star and the twenty-eight tort actions brought by the Ecuadorian shrimp farmers. Id. at 1116. Most importantly, nowhere in Ciba-Geigy does the Fourth District endorse dismissal in favor of more than one alternative jurisdiction.

All of the facts essential to the maintenance of this action are identical and arise out of the same conspiracy and other tortious conduct alleged in the complaint. Severance of claims in this case, would entail at least three trials in three different jurisdictions, each involving the same parties and essentially the same issues, facts and circumstances which may unnecessarily result in inconsistent verdicts. Fla. R. Civ. P. 1.250(a); See e.g., Travelers Express, Inc. v. Acosta, 397 So.2d 733, 737 (Fla. 3rd DCA 1981); Anderson v. Brown, 524 So.2d 457 (Fla. 3rd DCA 1988) rev. denied, 531 So.2d 1352 (Fla. 1988); Roberts v. Keystone Trucking Co., 259 So.2d 171, 174 (Fla. 4th DCA 1972). Further, the trial court below never made the *factual determination* that there was a misjoinder of causes of action to sever the claims under Fla. R. Civ. P. 1.250(a) as has been required by the Third District prior to severance. Alanco v. Bystrom, 544 So.2d 217, 218 (Fla. 3rd DCA 1989).

Finally, Petitioner found no case law in Florida other than the Third District's opinion in this case that supports the proposition that claims may be "implicitly severed" without an express determination by the trial court as to which causes of action are being severed. Especially in light of Petitioner's complex 23-count complaint, which pleads multiple claims within certain counts, it would have been an abuse of discretion within the context of a *forum non conveniens* motion for a trial judge to properly weigh the relative private and public conveniences without first

determining which claims were severable, if any. Compare, Ciba Geigy, 691 So.2d at 1116. Further, the Third District's decision in Bacardi is internally inconsistent as none of ELENA BACARDI's claims against defaulted Defendant ELENA LINDZON were severed. See Air Crash, 821 F.2d at 1168-69.

C. THE THIRD DISTRICT'S DECISION IS DEPENDENT ON ITS FINDING THAT THE TRIAL COURT IMPLICITLY SEVERED AND DISMISSED PARTS OF THE CASE BECAUSE THE ASSERTED CLAIMS LACK IDENTITY OF LEGAL OR FACTUAL ISSUES; SUCH SEVERANCE IS NOT POSSIBLE IN THE INSTANT CASE BECAUSE PETITIONER'S COMPLAINT ALLEGES A SINGLE OVERALL CONSPIRACY INVOLVING ALL DEFENDANTS

In the instant case, where the Petitioner has filed one lawsuit against five co-conspirators, severance is inappropriate.[6]

The complaint asserts claims against all the Defendants together as co-conspirators in a single overall conspiracy and fraudulent scheme and seeks to hold all of the Defendants jointly and severally liable for all acts committed by any of them in furtherance of their conspiracy. It is generally recognized that it is improper to

[6] *See* United States v. Leavitt, 878 F.2d 1329, 1340 (11th Cir. 1989) ("In a conspiracy case, co-conspirators should usually be tried together"), cert denied, 493 U.S. 968 (1989); United States v. Astling 733 F.2d 1446, 1454 (11th Cir. 1984) ("It hardly needs statement that the character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole."); United States v. Patten 226 U.S. 525, 544 (1913); Beltz Travel Service, Inc. v. Int'l Air Transport Ass'n, 620 F.2d 1360, 1366 (9th Cir. 1980).

attempt to split up a conspiracy claim; all aspects of a conspiracy, and all co-conspirators in a conspiracy case, should be joined in the same trial. Severance is only appropriate where there are issues or claims that are distinct from the rest of the dispute and can be litigated separately, without litigating the same issues in two courts. See Wilcox v. Stout, 637 So.2d 335, 337 (Fla. 2nd DCA 1994).

In this case, there are no claims or issues between specific parties that can be separated off from the overall dispute. All claims, issues and parties are part of one overall alleged conspiracy, and any part which might be severed to be tried in a Cayman or Liechtenstein court would have to be litigated simultaneously as part of whatever claims and parties remained before the trial court, including the legal malpractice claim against JERRY LINDZON and presumably all claims against ELENA LINDZON.

D. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO ENSURE THAT THE PETITIONER COULD REINSTATE THE WHOLE CASE IN EITHER THE CAYMAN ISLANDS OR LIECHTENSTEIN WITHOUT UNDUE INCONVENIENCE OR PREJUDICE

The fourth level of the Kinney analysis applies only if the trial court deems dismissal proper. Dismissal in favor of both alternative fora is in direct violation of the fourth prong of Kinney. Dismissal of ELENA BACARDI's claims to multiple fora is an abuse of discretion because it is conclusively inapposite to the logic of

Kinney; three trials would be clearly oppressive, inconvenient and prejudicial to ELENA BACARDI.

Countless federal cases make it clear that it is not sufficient for a trial court to "punt" on the issue of alternative forum jurisdiction.[7] Petitioner's right to constitutional procedure, procedural due process for her judicial claims, is protected by the Fourteenth Amendment. U.S. Const., amend. XIV, §1; See Logan v. Zimmerman Brush Co., 455 U.S. 422, 428-33 (1982); Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314 (1950). A right of action constitutes property that a court may not take away without a properly reasoned hearing taking into account something more than its own concerns with judicial efficiency. Here the trial court merely went through the motions of considering the private and public interest factors by giving them mention, but in fact failed to give those factors adequate weight or engage in Kinney's balancing of conveniences. Dismissal in this case was unreasonable, arbitrary and capricious and in violation of due process. Moreover, Florida's Constitution affords ELENA BACARDI a substantive due process right to access to Florida courts in Art. I, § 21, Fla., Const.; therefore, dismissal to any

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[7] Ceramic Corporation of America v. Inka Maritime Corporation, Inc., 1 F.3d 947, 949-50 (9th Cir. 1993) (reversing trial court's *forum non conveniens* dismissal as an abuse of discretion where the plaintiff provided affidavit evidence that Japan, the proposed alternative forum, would dismiss the action on its own motion and the district court simply elected to "leave [this issue] to the Japanese courts").

alternative forum, which would afford her no procedural due process or where some of the claims are not actionable, constitutes a substantive due process violation under Florida law.

ELENA BACARDI would be greatly prejudiced by litigating elsewhere, especially in the Cayman Islands.[8] The record shows that the Cayman forum will not give the Petitioner access to its courts or access to evidence unless she first executes a draconian Deed of Acknowledgment which violates Fla. Stat. § 737.207 prohibiting "no-challenge clauses" and is contrary to U.S. notions of due process.[9]

E. THE COURT BELOW APPLIED AN INCORRECT LEGAL STANDARD IN AFFIRMING DISMISSAL OF THE LEGAL MALPRACTICE CLAIM AGAINST FIELD

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[8] Indeed, a Cayman court, acting on the representations and affidavit of Respondents' counsel in this action, has unsuccessfully attempted to enjoin Petitioner from prosecuting her claims in Florida. That Cayman court's injunction is vexatious, oppressive and unreasonably prejudicial: it attempts to enjoin Petitioner and her attorneys from prosecuting this action or any other claims *anywhere in the world, against anyone, for any reason*. (A. 15-25) Compare, Chiquita, 690 So.2d at 698.

[9] Pursuant to this mandatory "Deed of Acknowledgment" Petitioner would: (a) waive her rights to bring any claims against *any* person (including the Respondents to this suit) or any property (including Florida real property, Bacardi trust shares and the stock of Florida domiciled corporations); and (b) forever waive, release and indemnify *any* person (including the Respondents to this action) from *any* claims *arising out of the laws of any jurisdiction of the world*. (A. 21-22) The overbreadth of such Deed of Acknowledgment illustrates a Cayman court's unreasonableness and establishes unequivocally that ELENA BACARDI would suffer undue prejudice and inconvenience in that forum. (A. 24)

Because venue and jurisdiction are presumed to exist, the *forum non conveniens* doctrine is immune from collateral jurisdictional attacks. Gilbert, 330 U.S. at 504; Kinney, 674 So.2d at 87; Allstate Life Insurance Co., 782 F. Supp. at 219.

The Third District has misapplied Kinney and Pearl Cruises v. Bestor, 678 So.2d 372 (Fla. 3d DCA 1996), review denied, 689 So.2d 1068 (Fla. 1997) with respect to the claim for legal malpractice against FIELD. See Bacardi, 728 So.2d at 314. (A.5) A trial court engaging in the *forum non conveniens* analysis presupposes that such Florida court has a meaningful relationship to parties and claims asserted, i.e., the Florida court has both personal and subject matter jurisdiction and is proper venue over all the parties and all the claims.

The Third District's decision clearly implies that despite its recognition that both Cayman and Liechtenstein lack jurisdiction over Petitioner's claim for legal malpractice against FIELD it may nevertheless be dismissed to an *unspecified* forum. This determination is in clear violation of the Kinney doctrine, Fla. R. Civ. P. 1.061 and is an abuse of discretion.

II.

THE TRIAL COURT ABUSED ITS DISCRETION WHEN THE TRIAL COURT DEVIATED FROM KINNEY'S PROCEDURAL FRAMEWORK AND STANDARD BY FAILING TO ENGAGE IN THE SUBSTANTIVE FOUR-STEP ANALYSIS MANDATED IN

KINNEY AND REQUIRED BY FLA. R. CIV. P. 1.061

Kinney adopts the federal standard for *forum non conveniens* precisely to provide Florida courts with structured discretion founded on a procedural framework guiding the court's decision-making process while receding from Florida's less rigorous *forum non conveniens* doctrine in Houston v. Caldwell, 359 So.2d 858 (Fla. 1978). Kinney, 674 So.2d at 88; Air Crash, 821 F.2d at 1165; Pain v. United Technologies Corp., 637 F.2d 775, 784-85 (D.C. Cir. 1980), cert. denied, 454 U.S. 1128 (1981) (cited with approval in C.A. La Seguridad v. Transytur Line, 707 F.2d 1304 (11th Cir. 1983). The decisions below directly conflict with this Court's clear pronouncements in Kinney - that Florida courts must engage in a detailed Kinney four-prong analysis; "the bright-line rule" adopted by this Court in Fla. R. Civ. P. 1.061 and ignored by the trial court. Compare, Smith Barney, Inc. v. Potter, 725 So.2d 1223 (Fla. 4th DCA 1999).

The legal precedent set forth below in Bacardi erodes Kinney's vigorous standard. The trial court below never established that either forum had jurisdiction over each of the parties or the subject matter, did not balance the positive and negative relevant private interest factors or public interest factors, did not weigh the presumption in favor of plaintiff's choice of forum and did not ensure that Petitioner could in fact reinstate her lawsuit in either alternative forum.

Florida appellate courts, including the Third District, have not hesitated to reverse *forum non conveniens* decisions where the trial court misapplied the relevant criteria, where the record evidence did not support the court's decision, or where it was not possible for the appellate court to understand the basis for the trial court's decision. See, e.g., Rikamor, 690 So.2d at 697; Kelly v. Sun & Sea Estates, Ltd., Inc., 681 So.2d 922 (Fla. 3d DCA 1996); Carenza, 699 So.2d at 830; PAFCO, 701 So.2d at 902; Booker v. Booker. 636 So.2d 796, 800 (Fla. 1st DCA 1994); Air Crash, 821 F.2d at 1166 (citing Gates Learjet Corp. v. Jensen, 743 F.2d 1325, 1334 (9th Cir. 1984), cert. denied, 471 U.S. 1066 (1985)); C. A. La Seguridad v. Transytur Line, 707 F.2d 1304, 1308 (11th Cir. 1983); Founding Church of Scientology v. Verlag, 536 F. 2d 429, 436 (D.C. Cir. 1976); see also Lacey v. Cessna Aircraft Co., 862 F.2d at 38 (3rd Cir. 1988) (a trial court is "required to develop adequate facts to support its decision and to articulate specific reasons for its conclusion").

Much has been made of the conclusory and glib trial court statement which was incorporated in the order:

> [t]his case involves a plaintiff who is not a resident or citizen of Florida, and who is asking this court to adjudicate her rights as 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. (A. 7)

However, a thorough review of this inaccurate statement reveals that the trial court

simply, albeit incorrectly, adopts wholesale Respondents' mantra. Most glaring is that the court's conclusory statement clearly refers to only *one* unidentified trust, *one* unidentified trustee, *one* unidentified lawyer, *one* unidentified foreign country and unidentifiable foreign laws and trust assets.[10]

This statement cannot possibly be substituted for the detailed analysis and balancing of conveniences required by Kinney. However, because Respondents and the Third District concede dismissal in favor of one alternative forum is impossible, the legal quagmire led the Third District, reluctant to reverse, to advance the theory that the case was "implicitly severed."

The trial court abused its discretion by dismissing ELENA BACARDI's claims

[10] Contrary to the court's statement, Plaintiff's uncontroverted affidavit evidence (A. 17-46) and the record show that: (a) the managing trustees of the Cotorro Trust are ELENA LINDZON, JERRY LINDZON and MARIANA BACARDI, who reside in Florida; (b) O'HARA was a managing trustee of the Corniche Trust; (c) the managing trustees of the Cotorro Trust manage and administer the Cotorro Trust and other family trusts from Florida; (d) trust assets are located in Florida; (e) the lawsuit involves other issues and trusts which do not pertain to the Corniche or the Cotorro Trust; (f) because the Cotorro Trust is managed, controlled and administered in Florida, the trust is really a Florida trust and its trustees may be sued here; (g) the corporate trustee of the Cotorro Trust is merely an agent of the managing trustees; (h) FIELD, JERRY LINDZON and O'HARA participated in preparing, drafting and establishing both the Cotorro and Corniche Trusts; (i) FIELD and JERRY LINDZON have participated in establishing and managing other trusts and have advised ELENA BACARDI in relation to those trusts and trust assets in Florida, including other Bacardi family trust assets; (j) JERRY LINDZON is a Florida lawyer; and (k) most importantly, ELENA BACARDI's complaint asks the trial court to adjudicate a conspiracy clearly arising under Florida law.

based entirely on conclusory assertions by Respondents' lawyers in unsworn motions. ELENA LINDZON, JERRY LINDZON and MARIANA BACARDI submitted no personal affidavit evidence in support of their motion.[11] Respondents' memoranda of law in support of their respective motions never list any names of potential witnesses, much less the significance or relevance of their testimony. It was abuse of discretion for the trial court to dismiss this case based on the bare allegations made in Respondents' motions. The Fourth District has held that absent proof in the form of affidavits or depositions, defendants cannot fulfill their burden under the second Kinney requirement relating to the private interests or conveniences of the parties. W.R. Grace & Company v. Matschke, 1999 WL 313366,*1 (Fla. 4th DCA 1999) citing Bottom v. Elbaz, 722 So.2d 974 (Fla. 4th DCA 1999), and Ground Improvement Techniques, Inc. v. Merchants Bonding Company, 707 So.2d 1138, 1139 (Fla. 5th DCA 1998) (holding that "[T]o be clear: any defendant seeking dismissal of a suit based on Rule 1.061 *forum non conveniens* must support the motion by affidavit or evidence offered under oath"). See also La Seguridad, 707 F.2d at 1308, 1306. See also, Baris v. Sulpico Lines, 932 F.2d 1540, 1550 n.14, (5th Cir.), cert. denied, 502 U.S. 963 (1991).

[11] FIELD and O'HARA submitted affidavits specifically in connection with their respective motions to dismiss for lack of personal jurisdiction.

A. THE COURTS BELOW FAILED TO APPLY KINNEY'S STRONG PRESUMPTION IN FAVOR OF PETITIONER'S CHOICE OF FORUM

It is well settled that a plaintiff's initial choice of forum is to be given great deference. See, generally, Gilbert, 330 U.S. at 501; Kinney, 674 So.2d at 94; Fla. R. Civ. P. 1.061 (a)(2). Emphasis on the trial court's discretion "must not overshadow the central principal of the Gilbert doctrine that unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." Lehman v. Humphrey Cayman, Ltd., 713 F.2d at 342. The trial court failed to give *any* weight to the Petitioner's choice of forum. See, e.g., Manu Int'l S.A. v. Avon Products, Inc., 641 F.2d 62, 67 (2d Cir. 1981); Lony, 886 F.2d at 628, 634; Reid-Walen v. Hansen, 993 F.2d 1390, 1395 (8th Cir. 1991).

In Chiquita, although the plaintiff was a foreign corporation organized under the laws of Bermuda and headquartered in Cincinnati, Ohio, this Court nevertheless "weigh[ed] in the balance a *strong* presumption against disturbing the plaintiff's initial forum choice." Chiquita, 690 So.2d at 699-700 (emphasis added).[12]

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[12] The Third District misapprehended the application of Blanco v. Banco Industrial de Venezuela, S.A., 997 F.2d 974, 981-82 (2d Cir. 1993) to Petitioner's case. (A. 4) The Blanco court specifically held that for *forum non conveniens* purposes, when a treaty with a foreign nation accords its nationals access to our courts equivalent to that provided to United States citizens, our courts are precluded from imposing any discount on a foreign plaintiff's choice of forum. See Blanco, 997 F.2d at 981. Such treaties exist here between the United States and the Cayman Islands, the United States and Principality of Liechtenstein and the United States and Spain.

B. THE PRIVATE INTERESTS WEIGH IN FAVOR OF FLORIDA

The balance of the private interests weighs in favor of a Florida forum. A trial court cannot look solely to the alleged disadvantages of a Florida forum, but must "weigh relative advantages and obstacles to fair trial in each forum." La Seguridad, 707 F.2d at 1307 (quoting Gilbert, 330 U.S. at 508). The trial court failed to meet that obligation and abused its discretion.

The private interest factors do not tilt strongly in favor of either Liechtenstein or Cayman. First, regarding access to sources of proof, the central most important location for the testimony of witnesses in this case is Miami. Specifically, the three principal Defendants reside in Miami and many, if not all, the central figures in establishing the evidence concerning the family's assets, are located in Miami, as is almost everyone associated with the Gomez del Campo family. Most of the crucial legal documents are located in Miami, as are witnesses who can authenticate them. As most of the witnesses reside in Florida, the travel costs for witnesses will be less if the location of this trial is Miami. O'HARA maintains a residence in Key Biscayne. Similarly, FIELD also frequently travels to Florida on business and represents clients in Miami. Other key witnesses, including officers, directors and employees of Bacardi-Martini, Inc. and Bacardi-Martini, U.S.A., Inc. -- corporations headquartered in Florida -- are also located here. See, eg. Chiquita, 690 So.2d at 699-700. Indeed,

JERRY LINDZON is an active member of the Florida Bar. See Herbstein, 743 F.Supp. 189 ("court should dismiss on a *forum non conveniens* ground *only* where trial in the United States would be "'unjust, oppressive or vexatious'") (quoting Koster v. American Lumbermens Mutual Casualty Co., 330 U.S. 518, 524, 67 S.Ct. 828, 831, 91 L.Ed. 1067 (1947)) (emphasis added).

Additionally, in Liechtenstein, one of the Respondents' proposed fora, there exists the additional impracticality of a language barrier. (A. 53:1-3) German interpreters and translators would greatly increase the cost and time of litigating in that proposed "alternative" forum. Similarly, in Cayman, the parties would have the magnified expense of importing learned Queen's Counsel from England, in addition to local Cayman Island attorneys, to argue at any hearing or trial, as is the common practice in Cayman courts at hourly rates regularly in excess of US$600 per hour.

The Respondents' motion for *forum non conveniens* is without merit in light of the many contacts and practicalities of trying this case in Miami. Indeed, most of the Respondents, who are important witnesses themselves, would have to travel no more than five miles to the courthouse to testify if the action stays in Miami, rather than 500 miles to a courthouse in the Cayman Islands and 5,000 miles to a courthouse in Vaduz, Liechtenstein.

C. THE PUBLIC INTERESTS WEIGH IN FAVOR OF FLORIDA

Kinney requires the trial court to consider whether there is "a general nexus with the forum sufficient to justify the forum's commitment of judicial time and resources to it." Id. at 92. At the *forum non conveniens* hearing, the trial judge did not discuss Kinney's public interest factors, but merely stated "if the balance of private interests is at or near equipoise the court *turns* to the public interest." (A. 82:25-83:1-2) ELENA BACARDI's case clearly has the significant connections to Florida to warrant the court's commitment of time and resources. See, e.g., AMEDEX International Corp., et al. v. Marino, 722 So.2d 836 (3d DCA 1999); Madanes, 981 F.Supp. at 266; Herbstein, 743 F.Supp. at 189.[13]

III.

THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO ALLOW PLAINTIFF TO CONDUCT ANY DISCOVERY IN THE CASE, INCLUDING DISCOVERY RELATED TO JURISDICTIONAL ISSUES RAISED BY RESPONDENTS' MOTIONS TO DISMISS, BEFORE THE HEARING AND DISMISSAL PURSUANT TO KINNEY AND FLORIDA'S FORUM NON CONVENIENS DOCTRINE

[13] In a factually analogous case, the Fifth District reversed dismissal and found allegations that a managing trustee of a Cayman trust had breached his fiduciary duties from Miami, Florida, were sufficient to retain jurisdiction over the case, despite the fact that the trust contained a Cayman forum selection clause. Beaubien v. Cambridge Consolidated, Ltd., 652 So.2d 936 (Fla. 5th DCA 1995).

From the outset of this case, the trial court stayed discovery. This Court has adopted "[t]he federal courts' policy allowing discovery on questions of jurisdiction because limited discovery in such instances will provide the trial court with additional information on which to base its decision regarding jurisdiction." Gleneagle Ship, 602 So.2d at 1284; see also, Venetian Salami Co. v. Parthenais, 554 So.2d 499 (Fla. 1989).

Where as here, a *forum non conveniens* motion and motions to dismiss for lack of personal jurisdiction were both pending before the court, the court must first consider the jurisdictional objections. See Allstate Life Insurance Co., 782 F.Supp. at 219; See Madara v. Hall, 916 F.2d 1510, 1514 (11th Cir. 1990); Kelly v. Kelly, 911 F.Supp. 518, 520 (M.D. Fla. 1995). As a matter of law, then, the Petitioner was entitled to discovery in connection with all jurisdictional motions raised by the Respondents.[14] See Gleneagle Ship, 602 So.2d at 1284. Accordingly, discovery

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[14] ELENA LINDZON, FIELD and O'HARA have waived their challenges to in personam jurisdiction by filing and arguing motions to change venue, including the Fla. R. Civ. P. 1.061 motion and for abatement and stay of proceedings. Each such motion constitutes a request for affirmative relief by which they submitted themselves to the jurisdiction of the trial court. Babcock v. Whatmore, 707 So.2d at 702 (Fla. 1998) (holding "that a defendant waives a challenge to personal jurisdiction by seeking affirmative relief - such requests are logically inconsistent with an initial defense of lack of jurisdiction"); Hubbard v. Cazares, 413 So.2d 1192, 1193 (Fla. 2nd DCA 1981); cert denied, 417 So.2d 329 (Fla. 1982); Odom v. Odom, 568 So.2d 988, 989 (Fla. 3rd DCA 1990).

should have been allowed on that basis alone. See Silk v. Sieling, 7 F.R.D. 576, 577 (E.D.Pa. 1947); Blanco v. Carigulf Lines, 632 F.3d 656, 658 (5th Cir. 1980). This especially is true in light of the Third District's peculiar rationale to affirm dismissal of the legal malpractice claim against FIELD, which suggests that Florida does not have personal or subject matter jurisdiction over ELENA BACARDI's claim for legal malpractice (A. 5); and where most of the conclusory statements made by the trial court in its dismissal order also imply that Florida lacks personal or subject matter jurisdiction over the case. (A. 6-7) Compare, e.g., Ciba-Geigy, 691 So.2d at 1114, 1122 (allowing extensive discovery on *forum non conveniens* motions, including depositions of expert witnesses and the parties). The trial court further abused its discretion in failing to allow ELENA BACARDI to conduct discovery by granting defaulting Defendant ELENA LINDZON's motion to stay discovery, failing to lift the say on Petitioner's motion when "'the defaulting party may not "participate as a party or otherwise defend against plaintiff's claims against [the non-defaulting parties]"' Bacardi, 728 So.2d 309, 314 (quoting Days Inns Acquisition Corp. v. Hutchinson, 707 So.2d 747 (Fla. 4th DCA 1997) review denied, 717 So.2d 532 (Fla. 1998).

CONCLUSION

For all the foregoing reasons, the certified question as stated by the Third District and as restated by Petitioner should be answered in the affirmative and the trial court's dismissal order should be reversed and the entire case remanded for trial in Florida.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by hand delivery this 16th day of June, 1999 to all local counsel of record for Respondents\Defendants and served by FedEx to all out of state counsel as appear on the attached service list.

Respectfully submitted,

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