IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-1908

SHAHLA M RABIE CORTEZ,

Petitioner,

vs.

PALACE RESORTS, INC, PALACE RESORTS, LLC,
& TRADCO, LTD., INC.,

Respondents.

PETITIONER'S INITIAL BRIEF ON THE MERITS

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INTRODUCTION

Shahla Rabie's plight brings to light several important questions of law which are now ripe for resolution by this Court. First, Shahla's case has exposed the dramatic rift that exists between this Court's original decision in *Kinney Sys., Inc. v. Con'l Ins. Co.,* 674 So. 2d 86 (Fla. 1996), and its subsequent application by district courts of appeal and trial courts across Florida. The lower courts have strayed from this Court's adoption of federal precedent in the area of forum non conveniens. This, in turn, has negatively impacted plaintiffs like Shahla who, although not Florida citizens, have a legitimate claim to access the courts of our state.

Second, Shahla's case highlights the need for fundamental reform in how motions to dismiss on forum non conveniens grounds are handled by the trial courts. This case offers a textbook example of the potential for abuse that exists in forum non conveniens practice. Because of the wooden approach the lower courts have taken in disposing of *Kinney* motions, defendants like those in this case have been able to win dismissals on the basis of false affidavit testimony that has not been subjected to rigorous cross-examination. As noted by Judge Rothenberg in her dissenting opinion here, the Florida Defendants have filed false affidavit testimony in several cases in an effort to improperly win dismissal on forum non conveniens grounds.

Third, the danger for abuse is compounded by a lack of clarity regarding the appellate standard of review. As seen here, the Third District's majority opinion glossed over the abusive practices of the Florida Defendants on the ground that such consideration would impinge the abuse of discretion standard of review. Yet, in the absence of a rule requiring an evidentiary hearing before resolving forum non conveniens motions, there must be a secondary check in place.

Finally, Shahla's case highlights an important federal constitutional issue. By denying Shahla her day in a Florida court, the trial court here, along with the Third District Court of Appeal, ratified, unwittingly, perhaps, a violation of the U.S. Constitution's Privileges and Immunities Clause. As a U.S. citizen, Shahla is entitled to litigate in Florida's courts, especially where, as here, the Defendants were based in Florida.

The public policy implications of this case are clear. The decision here may redefine how motions to dismiss on forum non conveniens grounds are handled across the state. That is critical given that such motion practice is common in Florida. Our state's geographic location, its major air and sea ports, its booming tourist industry, and its growing presence as a hub for international business all make clear that our courts have not seen the last of cross-border disputes with a strong Florida nexus.

STATEMENT OF FACTS

Shahla is deceived. Shahla Rabie is a Los Angeles, California school teacher who lives with her husband and two children. (R: 1285-1290).[1] In May of 2006, Shahla called Costco Travel to book a vacation. (R: 111). During the call, Costco's sales representative persuaded Shahla to change her vacation plans and book an all-inclusive package with the Palace Resorts Moon Palace ("Moon Palace"). *Id*. Shahla did not know that this vacation package was part of a marketing ploy developed by Palace Resorts to sell timeshares. *Id.*

Palace Resorts designed the timeshare scheme – which offered heavily discounted vacation packages to its properties in Cancun – in Florida. *Id*. Once at the resort, unsuspecting vacationers were cornered by salespeople – who would badger them into attending timeshare sales pitches. (R: 111-12). To induce guests to participate in the pitches, the sales team offered free golfing tours and massages. (R: 112).

Soon after arriving at Moon Palace on August 9, 2006, Shahla and her family were routinely surrounded by salespeople who hounded them into attending a timeshare presentation. *Id*. Although they resisted at first, Shahla and her husband eventually agreed to attend one of the pitches. (R: 112-113). A complimentary massage awaited Shahla after the presentation. (R: 113).

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[1] Citations to "R" refer to the record on appeal.

Shahla is raped. On August 11, 2006, Shahla called Moon Palace's spa to schedule her massage. *Id.* Shahla, who did not frequent spas, specifically requested a female masseuse at the time she made her reservation. *Id.* None were available, according to the resort. *Id.* When she arrived at the spa, Shahla again requested a female masseuse. *Id.* Once again, she was told that none were available. *Id.* The spa's receptionist, however, assured Shahla that her male masseuse was a reputable professional. *Id*.

Trusting the spa receptionist, Shahla relented. *Id*. While she lay on the massage table, her face covered by a hot towel, Shahla suddenly felt a severe pain in her vagina. *Id*. Moon Palace's "reputable" masseuse had forced his finger into Shahla's vagina. *Id*. In a panic, Shahla jumped off the massage table and ran into the spa's reception area crying for help. *Id*.

Shahla's cries were met with indifference. (R: 113-114). One hotel representative suggested that Shahla and her husband "take a walk" and "look at the moon" in order to calm down. *Id*. Another warned Shahla against filing a police report, saying that she would have to endure an "uncomfortable" physical exam. *Id*. Helpless and in a state of shock, Shahla and her husband, who had joined her, returned to their hotel room. *Id*.

The next morning, Shahla contacted Costco Travel's office in the United States, the U.S. consulate, and the local Cancun police. (R: 114). Shahla also

underwent a physical exam which confirmed the trauma to her vagina from the forced digital penetration she endured at the hands of the hotel's masseuse. *Id*. Shortly after the attack, Shahla and her family returned to the United States. *Id*.

Shahla sues. In November 2008, Shahla sued Palace Resorts in Miami, Florida, the company's headquarters. (R: 768, 1286-90). Everything, including the representations contained in Palace Resorts' brochures and websites, the addresses and toll free numbers listed on Palace Resorts' marketing materials, and the representations made by Palace Resorts' timeshare sales representatives in Mexico, pointed to Miami as Palace Resorts' home base. *Id*. Shahla asserted negligence claims against three Florida Defendants, and multiple additional claims against two Mexican Defendants. (R: 109-128).

The Florida Defendants move to dismiss. The Florida Defendants moved to dismiss the complaint for forum non conveniens, contending that Shahla had to pursue her claims in Mexico. (R: 31-33, 50-63). Testifying for the Florida Defendants as an expert witness, Manuel Garcia Pimentel Caraza admitted that he had not litigated a civil case in Mexico in at least five years, and had never litigated any cases in Quintana Roo, the specific forum he advocated. (R: 760-61, 1241-42).

In formulating his "expert" opinion regarding Mexico as an adequate, alternative forum, Garcia Pimentel did not consider the Florida Defendants' role in

this case. (R: 167-180, 758-59, 1229-33). Indeed, Garcia Pimentel refused to offer any testimony regarding the Florida Defendants, or their liability. (R: 758, 1229-33) ("Well, I'm not giving testimony on that right now."). When he was pressed, Garcia Pimentel could not even correctly state whether Shahla's claims against the Florida Defendants and her underlying theories of liability were even recognized by Mexican law. (R. 759, 1234-46).

The Third District Court of Appeal departs from the Kinney standard. On June 22, 2011, a divided Third District panel affirmed the dismissal of Shahla's case in favor of Mexico. *See Rabie Cortez v. Palace Holdings, S.A. de C.V.*, 66 So. 3d 959, 959-964 (Fla. 3d DCA 2011). An equally divided panel subsequently denied Shahla's motion for rehearing and rehearing *en banc*. *See id.*, reh'g denied (Aug. 24, 2011).

In so ruling, the majority emphasized the fact that Shahla was not a Florida resident (she lives in California), *see id.* at 962-63, that she was sexually assaulted in Mexico, *see id.* at 960-61, and that she reported her allegations to U.S. and Mexican authorities, in Mexico. *See id.* at 960, 963, n. 7. Based on its finding that "[e]ach of the *Kinney* steps was fully addressed by the trial court in the trial court's Order Granting the Motion to Dismiss on Forum Non–Conveniens," the majority applied a pure abuse of discretion – rather than *de novo* – standard of review. *Id.* at 960-61. It held, "based on the test set forth in *Kinney*," that "Mexico is a more

convenient forum to litigate the lawsuit than Florida." *Id.* at 961. On account of its highly permissive standard of review, the majority refused to "re-weigh the evidence." *Id.* (holding that "the trial court did not abuse its discretion by granting the defendants' motion to dismiss on forum non conveniens grounds.").

In reaching its conclusion, the majority held that Quintana Roo, Mexico was an adequate and available forum under their *Kinney* analysis. *Id.* at 962. It found that "although procedures and remedies available in Mexico may be different from or offer a less favorable outcome than our courts, this is not enough to render Mexico an inadequate forum under *Kinney*," and that the demonstrated paucity of recoverable civil damages and Shahla's inability to obtain adequate counsel "does not render the [Mexican] forum inadequate." *Id.*

It further found that the private factors favored dismissal of Shahla's action, because the strong presumption against disturbing a plaintiff's choice of forum "is given less deference when, as here, the plaintiff is an out-of-state resident with very little, if any, contact with Florida." *Id.* at 963. It further determined that "[e]ven with deference to the Plaintiff's choice of forum, the private interest factors weigh more heavily in favor of proceeding against the defendants in Mexico. The Appellant, a California resident, chose to file suit in Florida, a forum that is not her residence; thus, she is not entitled to a strong presumption in favor of Florida as her initial forum choice. Without this strong presumption, the private interests

clearly favor dismissal and resolution in a Mexican forum where the most significant evidence and witnesses are located." *Id.*

Finally, the majority determined that under its *Kinney* analysis, the public interest concerns "also points [*sic*] toward Mexico as the most favorable forum." *Id.* at 963. Acknowledging the Florida Defendants' heavy presence in Florida, it found that "[t]hese entities' location in Florida does not provide a general nexus to Florida sufficient to outweigh the other *Kinney* factors." *Id.* (adding that "[t]his is so particularly where the plaintiff is not a Florida resident and this action, which is essentially a tort action, finds most of the witnesses and documents necessary for trial to be located in the foreign forum.").

In her dissent, Judge Rothenberg identified several points of tension between the majority's ruling and this Court's decision in *Kinney*. Judge Rothenberg recognized that Shahla sued in Florida *precisely because* this is where the corporate entities responsible for her "negligent vacation packaging" claim run their business, all of the defendants at issue are based in Florida, and their commercial activities in this state are extensive. In fact,

> Miami is the operational, managerial, and marketing center for the entire Palace Resorts group and [. . .] the Florida Defendants control: marketing; sales to individuals, groups, and travel agents; timeshare programs; customer service; press relations; and finance for the entire Palace Resorts Group. The Florida Defendants manage the entire U.S. market, which represents seventy percent of the Palace Resorts'

> business; [and] the president of most of the Palace companies lives and works in Miami . . . . [C]ustomer complaints are investigated by the Florida Defendants at their Miami headquarters; the Florida Defendants issue refunds to unhappy customers, design vacation packages for all Palace Resort hotels, approve all marketing literature, manage hotel websites, and issue all press releases at their Miami headquarters; and their Miami headquarters is the record-keeping center for the Mexican Palace Resorts hotels.

Rabie, 66 So. 3d 965-66 (Rothenberg, J. dissenting).

Given the Florida Defendants' strong ties to Florida, Judge Rothenberg added:

> The Florida Defendants, with a straight face, claim that Quintana Roo, Mexico, is a more convenient forum to litigate a United States citizen's negligent vacation packaging claim against them, although Miami is where their corporate headquarters is located, all the Palace Resort hotels' vacation packages are approved, and all customer complaints are investigated. Because Miami is the operational, managerial, and marketing center for the entire Palace Resorts group, the Florida Defendants control marketing and sales, and Miami is the record keeping center for the Mexican Palace Resorts hotels, it is difficult to understand how, based on [Petitioner's] causes of action, Mexico would be a more convenient forum.

Id. at 969 (Rothenberg, J. dissenting).

For these and the reasons that follow, this Court should reverse.

SUMMARY OF ARGUMENT

This Court should reverse because the Third District Court of Appeal's decision here expressly and directly conflicts with this Court's ruling in *Kinney Sys., Inc. v. Cont'l Ins. Co.*, 674 So. 2d 86 (Fla. 1996). In *Kinney,* this Court ruled that Florida courts should adopt the federal forum non conveniens standard. *Id.* at 93. In refusing to respect Shahla's choice of Florida as the most appropriate forum for this litigation, the Third District ignored one of the most important tenets of federal forum non conveniens law. Federal courts give great deference to a U.S. citizen's choice of forum, and so too should our state courts. The decisions of the trial court and the Third District are particularly remarkable where, as here, the Respondents are based in Miami.

The Third District also incorrectly applied a pure abuse of discretion standard in deciding this case. In doing so, the appellate court disregarded its own recent holdings, which shift away from a pure abuse of discretion standard in favor of *de novo* review. Especially where, as the dissent found, "no live testimony was presented and where the trial court's order is, for the most part, conclusory," *Rabie*, 66 So. 3d at 966; *see also* (R: 167-80, 424-38, 759, 761-63, 1234-237), a fact-intensive inquiry by our appellate courts is necessary.

Finally, the Third District's refusal to honor Shahla's choice of forum also violates the Privileges and Immunities Clause of the U.S. Constitution. Simply

stated, Florida courts cannot discriminate against Shahla because she is a California resident. Like any other Florida citizen, Shahla is entitled to full and free access to Florida's courts.

ARGUMENT

I. This Court Should Reverse Because The Decisions Below Expressly And Directly Conflict With This Court's Holding In *Kinney Sys., Inc. v. Cont'l Ins. Co.*, 674 So. 2d 86 (Fla. 1996).

A. Federal Forum Non Conveniens Precedent Governs This Action.

This Court announced in *Kinney* that "the time ha[d] come for Florida to adopt the federal doctrine of forum non conveniens." 674 So. 2d at 93; *accord Aerolineas Argentinas, S.A. v. Gimenez*, 807 So. 2d 111, 113 (Fla. 3d DCA 2002). When applying the *Kinney* factors, "opinions of the federal courts that harmonize with the [*Kinney* analysis] should be considered persuasive." *Kinney*, 674 So. 2d at 93.

B. No "Exceptional Circumstances" Justify The Trial Court's Dismissal On Forum Non Conveniens Grounds And Failure To Reverse Would Cause Petitioner To Suffer The Same Harms That The Doctrine Is Designed To Prevent.

Forum non conveniens is a narrow judicially-crafted doctrine, "based on the inherent power of the courts to decline jurisdiction in exceptional circumstances." *Paper Operations Consultants Int'l, Ltd. v. S.S. Hong Kong Amber,* 513 F.2d 667, 670 (9th Cir. 1975). Its underlying principle "is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of

a general venue statute." *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 507 (1947). It is "an exceptional tool to be employed sparingly," not a "doctrine that compels plaintiffs to choose the optimal forum for their claim." *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1224 (9th Cir. 2011); *see also Dole Food Co. v. Watts,* 303 F.3d 1104, 1118 (9th Cir. 2002).

The doctrine's limitations derive from the power of its impact. Indeed, "forum non conveniens is a drastic exercise of the court's inherent power because, unlike a mere transfer of venue, it results in the dismissal of a plaintiff's case." *Carijano*, 643 F.3d at 1224. And, "[t]he mere fact that a case involves conduct or plaintiffs from overseas is not enough for dismissal." *Id.*; *see also Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1181-82 (9th Cir. 2006). This is especially true in a case like this one which, at this point, involves no foreign party, and in which common law tort claims are made by a U.S. citizen plaintiff against an amalgamation of Florida-based corporations. *See* (R: 745-54, 964, 966-1012, 1067-117).

"[D]ismissal for forum non conveniens is the exception rather than the rule." *Murray v. British Broad. Corp.*, 81 F.3d 287, 290 (2d Cir. 1996). "[U]nless the balance [of factors] is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *S. Ry. Co. v. Bowling*, 129 So. 2d 433, 437 (Fla. 3d DCA 1961). Historically, the doctrine's purpose is not to impose strict

limits on a court's jurisdiction, nor to objectively "attempt[ ] to catalogue the circumstances which will justify or require either grant or denial of remedy." *Id.* It is far narrower – designed to root out exceptional instances where the "open door" of broad jurisdiction and venue laws "may admit [court access to] those who seek not simply justice but perhaps justice blended with some harassment." *Gilbert*, 330 U.S. at 507; *see also Bowling*, 129 So. 2d at 437. The doctrine has been found to be particularly applicable where a well-equipped plaintiff egregiously resorts "to a strategy of forcing the trial at a most inconvenient place for an adversary." *Id.* For example, in cases "where a plaintiff chooses a particular forum, not because it is convenient, but solely in order to harass the defendant or take advantage of favorable law." *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 249 at n. 15.

This case presents no such exceptional circumstance. To the contrary, it is the Florida Respondents who have been abusing the forum non conveniens doctrine to force Petitioner to bring her suit in Mexico, an inadequate and unavailable forum where she will almost certainly be deprived of any meaningful relief. *See* (R: 429-30). Respondents have been carrying out this abuse with unclean hands, including their admitted submission of perjured affidavits by Lourdes Rodriguez, the Chief Operating Officer of Palace Resorts, Inc., in support of their motion to dismiss. *See* (R: 44-49, 195-202, 742-747, 846-847, 852-853,

857-878, 950-954, 956-962); *see also Rabie*, 66 So. 3d at 965 (Rothenberg, J. dissenting) (recognizing that "*[t]he Florida Defendants and Ms. Rodriguez now admit that each and every one of these [sworn] statements was false*.") (emphasis added).[2]

Upholding dismissal here for forum non conveniens does more than defeat "the need for achieving justice." *Kinney*, 674 So. 2d at 89. It would, as well, inequitably divest Petitioner – a U.S. citizen – of her chosen U.S. forum (which incidentally and no less importantly is also the operational, managerial, and marketing center for the entire Palace Resorts group). *See* (R: 745-54, 964, 966-1012, 1067-117). It would, in the end, unconscionably cause Petitioner to suffer the precise harm that the judge-made doctrine has been created to prevent: "forcing the trial at a most inconvenient place for an adversary." *Gilbert*, 330 U.S. at 507; *see also Piper Aircraft Co.,* 454 U.S. at 249, n. 15.

C. The Lower Courts Failed To Accord Petitioner The Required Deference As To Her Choice Of A Home Forum.

The U.S. Supreme Court has held that a U.S. plaintiff cannot be denied access to her chosen home forum, unless litigation in that forum would be "oppressive and vexatious" to the defendant "out of all proportion to plaintiff's convenience." *Koster v. Lumbermens Mut. Casualty Co.*, 330 U.S. 518, 524

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[2] The majority below disposes of these troubling admissions by simply indicating, in a footnote, that the issue was before the trial court and that this Court should not "reweigh this evidence." *Rabie*, 66 So. 3d 962, n. 4.

(1947); *see also Duha v. Agrium, Inc.*, 448 F.3d 867, 873-74 (6th Cir. 2006) (reversing dismissal for forum non conveniens where "the district court did not apply the deference required for a forum non choice made by a U.S. citizen plaintiff under [*Koster*].") (internal citation omitted).

Both state and federal appellate courts in Florida have long mandated that, before denying a U.S. citizen access to the courts of this country, the trial court must require "positive evidence of unusually extreme circumstances, and . . . be thoroughly convinced material injustice is manifest." *Telemundo Network Group, LLC v. Azteca Int'l Corp.*, 957 So. 2d 705, 711 (Fla. 3d DCA 2007) (quoting *SME Racks, Inc. v. Sistemas Mecanicos Para Electronica, S.A.*, 382 F.3d 1097, 1100-01 (11th Cir. 2004) (internal quotation marks omitted)). For example, in a recent *per curiam* opinion issued ***after*** the parties' jurisdictional briefing here, a federal court of appeals cited a trial court's failure to apply this heighted burden to the moving defendants as the sole reason for reversing a dismissal on forum non conveniens grounds. Explained the Eleventh Circuit: "[the] presumption in favor of the plaintiffs' initial forum choice in balancing the private interests ***is at its strongest*** when the plaintiffs are citizens, residents, or corporations of this country." *Prophet v. Int'l Lifestyles, Inc.*, 447 F. App'x 121, 125 (11th Cir. 2011) (per curiam, decided Nov. 18, 2011) (emphasis added) (citing *Wilson v. Island Seas Investments, Ltd.*, 590 F.3d 1264, 1270 (11th Cir. 2009)).

The Third District repeatedly acknowledged in its decision below that *Kinney* controlled here. *Rabie*, 66 So. 3d at 962-63. Nevertheless, it ignored one of the key tenets of the federal forum non conveniens analysis – that U.S. citizens are entitled to "great deference" in their choice of a "home forum" in which to initially bring suit. *Iragorri v. United Technologies Corp.*, 274 F.3d 65, 71 (2d Cir. 2001). Federal forum non conveniens principles define a plaintiff's "home forum" as "any federal district [court] within the United States." *Reid-Walen v. Hansen*, 933 F.2d 1390, 1394 (8th Cir. 1991). In contrast, the majority below found that Shahla's forum choice here was entitled to less deference because Petitioner is from another state "with very little, if any, contact with Florida." *Rabie*, 66 So. 3d 959, 962-63. Yet, *Kinney* made clear that a U.S. citizen's choice of forum "should rarely be disturbed," and can only be subject to scrutiny if "the balance is strongly in favor of the defendant." *Kinney*, 674 So. 2d at 89.

Contrary to *Kinney* and otherwise persuasive federal precedent, the Third District concluded that Petitioner was "not entitled to a strong presumption in favor of Florida as her initial forum choice . . . ." *Rabie,* 66 So. 3d at 963. The appellate court based its determination on Petitioner's status as "a California resident [who] chose to file suit in Florida, a forum that is not her residence." *Id.* No reading of *Kinney* or any of a long line of federal forum non conveniens cases would support

the Third District's decision to treat Petitioner as a second-class citizen in Florida's courts.

Moreover, "[t]he deference owed to a plaintiff's choice [of forum] is at its highest level when that choice was motivated by legitimate reasons, i.e., the plaintiff's convenience and the ability to obtain jurisdiction over the defendant." *Hilton Int'l Co. v. Carrillo*, 971 So. 2d 1001, 1006 (Fla. 3d DCA 2008). The majority here made it seem as if there was no legitimate basis for suing in Florida. *Rabie*, 66 So. 3d at 962-63 (noting that since "the plaintiff is an out-of-state resident with very little, if any, contact with Florida . . . she is not entitled to a strong presumption in favor of Florida as her initial forum choice," and that "[w]ithout this strong presumption, the private interests clearly favor dismissal and resolution in a Mexican forum where the most significant evidence and witnesses are located.").

But Petitioner's choice of Florida made perfect sense. As the dissent explained:

> Miami is the operational, managerial, and marketing center for the entire Palace Resorts group and [. . .] the Florida Defendants control: marketing; sales to individuals, groups, and travel agents; timeshare programs; customer service; press relations; and finance for the entire Palace Resorts Group. The Florida Defendants manage the entire U.S. market, which represents seventy percent of the Palace Resorts' business; [and] the president of most of the Palace companies lives and works in Miami . . . . [C]ustomer

> complaints are investigated by the Florida Defendants at their Miami headquarters; the Florida Defendants issue refunds to unhappy customers, design vacation packages for all Palace Resort hotels, approve all marketing literature, manage hotel websites, and issue all press releases at their Miami headquarters; and their Miami headquarters is the record-keeping center for the Mexican Palace Resorts hotels.

Rabie, 66 So. 3d 965-66 (Rothenberg, J. dissenting).

In addition to dismissing Petitioner's choice of forum, the majority below also failed to properly weigh the public and private interest factors at issue in any forum non conveniens analysis. For example, Respondents advanced no specific evidence showing that trial in Mexico would alleviate hardship related to the witnesses and documents necessary to sustain the claims and defenses in this action. Further, the record is devoid of a single piece of competent evidence establishing that these documents and witnesses are indeed currently in Mexico. *See, e.g.*, *Wynn Drywall, Inc. v. Aequicap Program Administrators, Inc.*, 953 So. 2d 28, 30 (Fla. 4th DCA 2007) (requiring affidavits or other competent evidence for determining forum non conveniens disputes); *Hu v. Crockett*, 426 So. 2d 1275, 1279 (Fla. 1st DCA 1983) (basing forum non conveniens determination on the competent evidence in the record).

A claim that evidence is only available in Mexico would strain credulity – given that Respondents maintain extensive operations in Florida. As multiple Florida district courts of appeal have found, "a forum non conveniens argument

coming from a party sued where [it] resides is both puzzling and strange." *Cardoso*, 879 So. 2d at 1250 (quoting *Sanwa Bank, Ltd.*, 734 So. 2d at 561); *see also Tananta v. Cruise Ships Catering & Services Int'l., N.V.*, 909 So. 2d 874, 898 (Fla. 3d DCA 2004). As noted by the dissent:

> The Florida Defendants, with a straight face, claim that Quintana Roo, Mexico, is a more convenient forum to litigate a United States citizen's negligent vacation packaging claim against them, although Miami is where their corporate headquarters is located, all the Palace Resort hotels' vacation packages are approved, and all customer complaints are investigated. Because Miami is the operational, managerial, and marketing center for the entire Palace Resorts group, the Florida Defendants control marketing and sales, and Miami is the record keeping center for the Mexican Palace Resorts hotels, it is difficult to understand how, based on [Petitioner's] causes of action, Mexico would be a more convenient forum.

Rabie, 66 So. 3d at 969 (Rothenberg, J. dissenting).

In the same vein, the majority below also misconstrued the significance of *Tananta v. Cruise Ships Catering & Services Int'l, N.V.*, by concluding that Respondents' "location in Florida does not provide a general nexus to Florida sufficient to outweigh the other *Kinney* factors." *Rabie*, 66 So. 3d at 963-64 (citing *Tananta*, 909 So. 2d at 874). Actually, *Tananta* proves Petitioner's point. There, the only demonstrated nexus to Florida was the location of the defendant's corporate marketing arm, *and nothing else*. 909 So. 2d at 886. As Petitioner has repeatedly shown, the Defendants' connections to this forum are extensive. They

regularly conduct business in Florida in a manner directly relevant to this suit and from which Petitioner's claims arise. *See* (R: 745-54, 964, 966-1012, 1067-117). Florida, moreover, has an interest in ensuring that harmful actions originating in Florida, which violate duties imposed by Florida law, are properly addressed in Florida courts. *See Chan Tse Ming v. Cordis Corp.*, 704 F. Supp. 217, 219 (S.D. Fla. 1989).

The courts below failed to "consider all relevant factors of private interest, weighing in the balance a strong presumption against disturbing plaintiff's initial forum choice." *Kinney,* 674 So. 2d at 90. Petitioner is a United States citizen, who filed her lawsuit in Miami, Florida, against three Florida Defendants, who are headquartered there. Petitioner cannot be denied access to the courts of this country absent a strong showing by the Respondents that her lawsuit against them would result in substantial inconvenience for them to litigate in her choice of forum. Respondents have not met that burden. Accordingly, this Court should reverse.

II. This Court Should Reverse Because The Majority Below Failed To Apply The Correct Standard Of Review.

A. The Majority Below Failed To Conduct The Required *De Novo* Review, Despite The Trial Court's Failure To Make Specific Findings Of Fact And Conclusions Of Law With Respect To Each Of The *Kinney* Factors.

The majority applied a pure abuse of discretion standard in deciding this case. *See Rabie*, 66 So. 3d at 960-62. As the dissent aptly points out, the majority's decision directly conflicts with the Third District's own recent holdings, which shift away from a pure abuse of discretion standard in favor of *de novo* review. *See id.* at 966 (Rothenberg, J. dissenting).

Contrary to the decision below, the Third District has already held that "the *Kinney* standard has evolved into an abuse of discretion/de novo standard, depending on the extent of the trial judges['] analysis and whether the appellate record is sufficient to allow the reviewing court to reach its own conclusions." *Telemundo*, 957 So. 2d at 709 (quoting *Kawasaki Motors Corp. v. Foster*, 899 So. 2d 408, 410-11 (Fla. 3d DCA 2005), citing *Aerolineas Argentinas, S.S.*, 807 So. 2d at 115 (Sorondo, J. specially concurring) (citing *Bacardi v. de Lindzon*, 728 So. 2d 309 (Fla. 3d DCA 1999), *app'd*, 845 So. 2d 33 (Fla. 2002); *Sun & Sea Estates v. Kelly*, 707 So. 2d 863 (Fla. 3d DCA 1998))).

The majority explains in a footnote that *de novo* review of a forum non conveniens dismissal contemplates "only a limited exception where the trial court did not address all of the *Kinney* factors, and where the reviewing court addressed the remaining factors for the first time on appeal. Otherwise, the standard of review remains abuse of discretion." *Rabie*, 66 So. 3d at 961, n. 2. Yet, in *Telemundo*, this Court reversed a lower court's order granting a motion to dismiss

on forum non conveniens grounds, despite the fact that the trial court had "entered a commendably thorough, twenty-page order addressing ***all*** the factors outlined in [*Kinney*]." *Telemundo*, 957 So. 2d at 708 (emphasis added). Notably, the *Telemundo* Court applied the *de novo* standard to reverse not only the trial court's comprehensive order dismissing Telemundo's claims against defendant Azteca America Network, but also those claims against co-defendant Bolas, LLC, which the trial court had summarily dismissed without any explanation. *See id*. at 708, 713-14. There, the Third District reviewed both orders *de novo* without reference to the thoroughness of the trial court's *Kinney* analysis.

Ultimately, as the dissent notes, the Third District's abuse of discretion/*de novo* standard "makes perfect sense when, as here, no live testimony was presented and where the trial court's order is, for the most part, conclusory." *Rabie*, 66 So. 3d at 966 (Rothenberg, J. dissenting); *see also* (R: 167-80, 424-38, 759, 761-63, 1234-237). Indeed, as the dissent recognized, in making its finding as to the adequacy of the foreign forum, the trial court's order states only the following:

> [B]ased on the affidavits supplied by Defendants, the Court is of the opinion that the State of Quintana Roo, Mexico, will provide Plaintiff with an adequate remedy. Moreover, the parties will be provided with adequate access to evidence and relevant sites. As such, this Court finds that Cancun, State of Quintana Roo, Mexico is an adequate forum.

Rabie, 66 So. 3d at 966 (Rothenberg, J. dissenting).

The majority's failure to conduct a *de novo* review of the trial court's dismissal for forum non conveniens, which the trial court entered despite the lack of any evidence showing that the private or public factors outweigh the high deference to be shown to Petitioner's choice of forum, is alone sufficient for reversal.

B. The Majority Below Failed To Account For Unrebutted Evidence Demonstrating The Unavailability And Inadequacy Of The Mexican Forum, And The Fact That Resort To The Mexican Court Would Result In Undue Inconvenience Or Prejudice.

The trial court's decision would not have withstood *de novo* review. In assessing the availability of the Quintana Roo court in Mexico to hear Petitioner's claim, the majority ignored Petitioner's expert's unrebutted testimony that the Mexican court lacks jurisdiction over the Florida Respondents. Petitioner's expert testified that in a "personal action" – as this case would be labeled in Mexico – jurisdiction is premised on the defendant's domicile. *See* (R: 428-429).

Since Defendants are not domiciled in Mexico, the Quintana Roo court would have no jurisdiction over them. *See id*; *see also Baranek v. Am. Optical Corp.*, 941 So. 2d 1214, 1217 (Fla. 4th DCA 2006) (a foreign forum is only available when the court can assert jurisdiction over all defendants). Notably, Defendants' own expert confirmed that a Mexican court could only exercise jurisdiction over those defendants physically domiciled within the court's territorial limits. *See* (R: 765, 1229-33). The evidence establishes that the

Quintana Roo court does not possess personal jurisdiction over these Florida Defendants, making it an unavailable and inadequate forum. *See Baranek*, 941 So. 2d at 1217.

The majority accorded no significance to Lourdes Rodriguez's perjured testimony. As Rodriguez admitted, her affidavit, filed in support of Defendants' motion to dismiss, contained false testimony. *See* (R: 44-49, 195-202, 742-747, 846-847, 852-853, 857-878, 950-954, 956-962). The majority disposed of these remarkable admissions by simply indicating, in a footnote, that the issue was before the trial court and that this Court should not "reweigh this evidence." *Rabie*, 66 So. 3d 962, n. 4. But this appeal was necessary in part because the trial court failed to consider this evidence in the first place.

As the dissent recognized, "the record in this case reflects that the Florida Defendants and Ms. Rodriguez have a long history of deceiving or attempting to deceive the courts of this State by submitting affidavits with similar false statements, but which they now admit were false." *Rabie*, 66 So. 3d at 965 (Rothenberg, J. dissenting). The record is replete with examples of Rodriguez's false testimony:

- On December 26, 2006, Rodriguez submitted an affidavit in *Discipio v. Operadora Palace Resorts, S. de R.L. de C.V.*, *et. al.*, Case No. 06-26242 CA 10, in which she swore that "[n]one of the [Florida] Defendants received any funds of any kind as a result of Ms. Discipio's stay at the Aventura Spa Palace in Mexico." (R: 744, 950-52). At her deposition, Rodriguez admitted that this statement was "untrue." (R: 744, 874).

- In *Weiss v. Palace Resorts, Inc., et al.*, 07-03385 CA 11 (R: 953-954), Rodriguez submitted an affidavit in which she swore that "[a]ll bookings and reservations for the Palace Resorts Hotels in Mexico are done in Mexico through the general reservation center located at Moon Palace, Cancun, Mexico; the reservations are booked by Palace Resorts, S.A. de C.V." (R: 744, 953-54). Rodriguez now admits that this statement was also false. (R: 744, 876).

- Rodriguez submitted an affidavit in *Shapiro v. Palace Resorts, Inc., et al.*, 06-23603 CA 8 (R: 956-58), in which she swore that "[a]ll bookings and reservations for the Palace Resorts Hotels in Mexico are done in Mexico through the General Reservation Center located at the Moon Palace, Cancun, Mexico, the reservations are booked by Palace Resorts, S.A. de C.V.," and "[n]either of the Defendants received any funds of any kind as a result of Mr. Shapiro's stay at the Aventura Spa Palace in Mexico." (R: 744, 956-58). These statements, Rodriguez now concedes, were also false. (R: 745, 877-78).

- In an affidavit submitted in *Kobryn v. Palace Resorts, Inc., et al.*, 06-06555 CA 06 (R: 959-62), Rodriguez swore that "PRT d/b/a PRI did not receive any funds of any kind as a result of Plaintiff's stay at the hotel in the Beach Palace Resort" (R: 745, 959-62), and "[a]ll booking and reservations for the Palace Resorts Hotels in Mexico – including the Beach Palace Hotel – are done in Mexico through the 'General Reservation Center' located at the Moon Palace, Cancun, Mexico. The reservations are booked by Palace Resorts, S.A. de C.V." *Id.* These statements, Rodriguez admits, were lies. (R: 745, 877-78).

See also Rabie, 66 So. 3d at 965 at n. 8 - 11 (Rothenberg, J. dissenting).

Despite conflicts in the experts' affidavit testimony, including Rodriguez's admitted perjury, the lower court failed to conduct an evidentiary hearing. *See Tobacco Merchants Ass'n of the U.S. v. Broin*, 657 So. 2d 939, 941 (Fla. 3d DCA 1995); *see also Quality Holdings of Fla. Inc. v. Selective Inv., IV, LLC*, 25 So. 3d

34, 37 (Fla. 4th DCA 2009) (remanding for trial court to hold an evidentiary hearing to resolve the conflict between competing affidavits).

The majority further failed to account for the fact that a dismissal on forum non conveniens grounds is improper where a court is uncertain as to whether the foreign tribunal can preside over a certain cause of action. *See Jackson v. Grupo Indus. Hotelero, S.A.*, No. 07-22046-CIV-HUCK, 2008 WL 4648999, *10-11 (S.D. Fla. Oct. 20, 2008) (denying forum non conveniens motion where court was unsure whether Mexican court could preside over intellectual property case). Here, it is undisputed that Shahla's "negligent vacation packaging" claim is not cognizable in Mexico. (R: 429-30).

Even if Shahla's claims were cognizable, the standard of proof applied in the Quintana Roo court effectively leaves her with no remedy. *See Kinney*, 674 So. 2d at 91 (a foreign forum is inadequate "if the remedy available there clearly amounts to no remedy at all."). In sexual assault cases in Mexico, the victim must present the testimony of *two witnesses*. *See* (R: 430). Here, the only two witnesses present were Shahla the victim, and the masseuse, her attacker, who later disappeared. Although the masseuse admitted that he sexually assaulted Shahla, Defendants have failed to present evidence as to whether such a statement would be admissible in the Quintana Roo courts. Consequently, Shahla is precluded from even presenting a *prima facie* case in that forum.

The majority also disregarded the fact that critical portions of Shahla's expert testimony were never refuted. Although the parties' experts disagreed on many points, they *agreed* on facts which established that Quintana Roo, Mexico is not an available forum. Both agreed that in order to file suit in Quintana Roo, Shahla would have to utilize obscure "causes of action" under Mexican law that are essentially unrecognized and uncognizable in the Quintana Roo courts. *See* (R: 429-30, 759, 1234-46); *see also Telemundo*, 957 So. 2d at 710 (finding that plaintiff's potential causes of action in Mexico amounted to no remedy at all, partly due to lack of precedent).

Both also agreed that not a single individual has initiated "a civil action in the Courts of Mexico involving allegations of personal injury as a result of sexual assault." *Id.*; *see also Norex Petroleum, Ltd. v. Access Indus.*, 416 F.3d 146, 159 (2d Cir. 2005) ("Implicit in such a conclusion [that a foreign forum is adequate] . . . is a finding that the foreign jurisdiction is as ***presently*** capable of hearing the merits of plaintiff's claim . . . as the United States court.") (emphasis added). Both agreed that sexual assault cases are resolved exclusively through Quintana Roo's criminal court system. *See* (R: 430); *see also Kinney*, 674 So. 2d at 92 (requiring that "courts in the alternative forum must genuinely be open and available to potentially provide a convenient remedy").

Finally, *Kinney* requires that a dismissing court make certain that a plaintiff can reinstate her suit in the proposed alternative forum. *Kinney*, 674 So. 2d at 90; *see also Telemundo*, 957 So. 2d at 713. In finding that Shahla might reinstate her action in Quintana Roo, Mexico, the majority noted that the Florida Defendants stipulated to waiving any statute of limitations defenses, and consented to the jurisdiction of the Mexican Court. *See Rabie*, 66 So. 3d at 962. In reaching this conclusion, the majority overlooked the fact that the Quintana Roo Court would not have jurisdiction over the Florida Defendants, and that it would be barred from exercising jurisdiction over a non-domiciled party, despite any proposed waiver by the parties. *See* (R: 424-438, 765, 1225-33).

Clearly, the adequacy determination cannot be upheld. The majority's decision would prejudice Shahla by precluding her from gaining redress either in a Mexican court or in her chosen forum. It relied exclusively upon an affidavit submitted by one defense witness who admitted that material representations in the affidavit were false. Further, it disregarded the fact that the trial court admittedly failed to consider material adequacy factors weighing heavily against Quintana Roo, Mexico as an adequate forum when making its determination. Accordingly, this Court should reverse.

III. This Court Should Reverse Because The Lower Courts' Failure To Give Deference Towards The Forum Choice Of A Sister State's Citizen Violates The U.S. Constitution's Privileges And Immunities Clause.

A. The Privileges And Immunities Clause Protects The Right Of Every Citizen To Access The Courts Of The United States.

A Florida court's decision to afford less protection to the forum choice of a sister state's citizen violates the Privileges and Immunities Clause of the United States Constitution. *See* U.S. CONST. art. IV, § 2, cl. 1. The Clause states: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." *Id.*

"The object of the Privileges and Immunities Clause is to strongly constitute the citizens of the United States as one people, by placing the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." *Lunding v. N.Y. Tax Appeals Tribunal*, 522 U.S. 287, 296 (1998) (citing *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868)) (internal quotations omitted). The Clause thus "provides important protections for nonresidents who enter a State," acting to "bar discrimination against citizens of other States where there is *no substantial reason for the discrimination beyond the mere fact that they are citizens of other States*." *Saenz v. Roe*, 526 U.S. 489, 502 (1999) (emphasis added, internal quotations and citations omitted). The Clause requires States to treat all U.S. citizens, resident and nonresident, equally "[o]nly with respect to those 'privileges' and 'immunities'

bearing upon the vitality of the Nation as a single entity . . . ." *Baldwin v. Fish & Game Comm'n of Mont.*, 436 U.S. 371, 383 (1978). Courts have consistently included within this narrow protected class the right of citizens to have equal access the courts of states in which they do not permanently reside.

The U.S. Supreme Court has also long singled out access to courts as a protected fundamental right under the Privileges and Immunities Clause. *Canadian N. Ry. Co. v. Eggen*, 252 U.S. 553, 562 (1920) (holding that "the right of a citizen of one state . . . to institute and maintain actions of any kind in the courts of another" comes within the scope of "fundamental privileges" within protection of the Privileges and Immunities Clause) (citing *Slaughter-House Cases*, 83 U.S. 36, 76, (1872); *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823)); *see also McBurney v. Cuccinelli*, 780 F. Supp. 2d 439, 449 (E.D. Va. 2011) ("The right to access courts is protected under the Privileges and Immunities Clause."), *aff'd sub nom.*, *McBurney v. Young*, 667 F.3d 454 (4th Cir. 2012).

B. Florida Must Accord Citizens Of Other States Equal Rights Of Access To Its Courts.

"The power of a State to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them is, of course, subject to the restrictions imposed by the Federal Constitution. The privileges and immunities clause requires a state to accord to citizens of other states substantially the same right of access to its courts as it accords to its own citizens." *Howlett By*

& Through Howlett v. Rose, 496 U.S. 356, 383, n. 26 (1990) (quoting *McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 233 (1934) (Brandeis, J.)).

This Court has long recognized that Article IV's Privileges and Immunities Clause "places citizens of each state upon the same footing with citizens of other states so far as the advantages resulting from citizenship in those states are concerned . . . ." *State v. Bd. of Ins. Com'rs of Fla.*, 20 So. 772, 772 (Fla. 1896); *see also Scott v. Gunter*, 447 So. 2d 272 (Fla. 1st DCA 1983) ("the privileges and immunities secured by the Constitution are [those] of American citizens, whether resident or nonresident of a particular state."). The State of Florida is required, in turn, to accord to Petitioner – a California resident – an equal right of access to its courts as it accords to residents of Florida. *Howlett By & Through Howlett*, 496 U.S. at 383, n. 26; *see also Chambers v. Baltimore & O.R. Co.*, 207 U.S. 142, 148-49 (1907) (holding that "[a]ny law by which privileges to begin actions in the courts are given to its own citizens and withheld from citizens of other states is void . . . .").

Shahla's right of access to her chosen forum in Miami-Dade County, Florida – where all of the Florida Defendants base their business – should not have been denied on account of her California residency. The Third District's decision to treat Shahla as a foreigner expressly and directly conflicts with this Court's recognition of the federal Constitution's Privileges and Immunities clause. It also

goes against a long line of U.S. Supreme Court precedent requiring a state to accord to citizens of other states an equal right of access to its courts. Accordingly, this Court should reverse.

CONCLUSION

Based on the foregoing points and authorities, this Court should reverse and remand this case for trial in Miami-Dade County, Florida.

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I certify that a copy of the foregoing was hand-delivered this 4th day of April 2012 to the party listed below.

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I certify that the foregoing brief complies with the font requirements contained in FLA. R. APP. P. 9.210(a)(2).

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