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 REPLY BRIEF ON THE MERITS

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I. The Florida Respondents Fail To Rebut The Express And Direct Conflict Between The Majority's Opinion Below And This Court's Decision In *Kinney Sys., Inc. v. Cont'l Ins. Co.*, 674 So. 2d 86 (Fla. 1996).

A. The Florida Respondents Distort The Required Deference In Favor Of Preserving Shahla's Choice Of A Florida Forum.

Respondents concede that "[u]nder *Kinney* there is a strong presumption against disturbing a plaintiff's choice of forum . . . ." Ans. Br. at 6. Indeed, this Court determined in *Kinney* that "the reviewing court always should remember that a strong presumption favors the plaintiff's choice of forum." *Kinney*, 674 So. 2d at 91. But despite this fact, Respondents cling desperately to the fiction that "[t]he deference shown to [Shahla] was consistent with the doctrine of forum non conveniens," because "the presumption is given less deference when the plaintiff is an out-of-state resident with little or no contact with Florida." Ans. Br. at 42, 6. This contention should be rejected, because it (1) grossly understates the required level of deference to Shahla's choice of a Florida forum and (2) demonstrates yet another attempt to draw attention away from the Florida Respondents' own well-established and undisputed ties to this State.

Deference to a U.S. citizen plaintiff's forum choice "is more than just one factor that the court must consider." *Pain v. United Technologies Corp.*, 637 F.2d 775, 783 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981). Rather, it carries with it a strong presumption of correctness, rebuttable only if litigation in the

chosen 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 (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).

Contrary to the Respondents' distorted reasoning, Florida's state and federal appellate courts 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)); *see also McLane v. Los Suenos Marriott Ocean & Golf Resort*, No. 11-11860, 2012 WL 1414602, *1-*2 (11th Cir. Apr. 24, 2012).[1] The Eleventh Circuit has reaffirmed this high threshold in at least two of its most recent decisions.

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[1] "[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). As the Third District itself has held, "unless 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).

In *McLane*, decided less than one month ago, the federal court of appeals reversed a trial court's dismissal for forum non conveniens where "the district court adequately identified the private factors involved in this case *but committed an abuse of discretion in its balancing of them*." 2012 WL 1414602 at *2 (emphasis added). In reversing, the appellate court chided the lower court's failure to give due deference to a U.S. citizen plaintiffs' choice of forum in Florida, finding that even though the trial court "should have weighed the presumption against disturbing the plaintiffs' choice in its balancing of private factors, [ ] there is no indication that it did so." *Id.*

Consistent with longstanding precedent, the panel in *McLane* determined that "nowhere in the its opinion did the district court acknowledge that this presumption is at its strongest when plaintiffs are U.S. citizens, and nowhere did the district court point to 'unusually extreme circumstances' or manifest extreme injustice that would merit denying a U.S. citizen access to U.S. courts." *Id.* (noting that in the Eleventh Circuit, "a district court's failure to weigh the presumption in favor of the plaintiffs into the balancing of private factors has been held to be a clear abuse of its discretion.") (citing *SME Racks, Inc.*, 382 F.3d at 1101-03).

In another recent opinion, the Eleventh Circuit – as it did in *McLane* – 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. "[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)).

As in both *McLane* and *Prophet*, the Third District repeatedly acknowledged in its decision below that *Kinney* controlled its analysis. *See, e.g.*, *Rabie Cortez v. Palace Holdings, S.A. de C.V.*, 66 So. 3d 959, 962-63 (Fla. 3d DCA 2011). The majority did so, even as it failed to heed this Court's clear mandate in *Kinney* – and one of the key tenets of the federal forum non conveniens analysis – that "the reviewing court always should remember that a strong presumption favors the plaintiff's choice of forum." *Kinney*, 674 So. 2d at 91; *see also McLane*, 2012 WL 1414602 at *2, n.2 ("a recitation of the law regarding the presumption is not sufficient; this presumption must be integrated into the balancing of the private factors."); *SME Racks, Inc.*, 382 F.3d at 1102 ("[w]hile the district court referenced the presumption in favor of plaintiffs' choice of forum in the introductory portion of its discussion, . . . [it] failed to apply any presumption in its analysis . . . or incorporate[ ] the presumption into its calculus once it actually engages in weighing the private interests.").

The Florida Respondents offer no authority to contest the well-entrenched presumption in favor of a U.S. citizen plaintiff's choice of her home forum.[2] Instead, they merely recite from portions of the majority opinion, finding that Shahla's forum choice here was entitled to less deference because she is from another state "with very little, if any, contact with Florida." *Rabie*, 66 So. 3d 959, 962-63; Ans. Br. at 6, 42-45. Contrary to *Kinney* and otherwise persuasive federal precedent, the Florida Respondents rely exclusively upon the majority's erroneous position that Shahla was "not entitled to a strong presumption in favor of Florida as her initial forum choice" due to her status as "a California resident [who] chose to file suit in Florida, a forum that is not her residence." *Rabie*, 66 So. 3d at 963; *see also* Ans. Br. at 6, 28, 31-34, 42-45 (repeatedly emphasizing that "petitioner is not a Floridian").

No reading of *Kinney* or any of a long line of federal forum non conveniens cases would support the Third District's decision, or the Florida Respondents' contention, that Petitioner should be treated as a second-class citizen in Florida's courts. As this Court made clear in *Kinney*, a U.S. citizen's choice of forum "should rarely be disturbed," and can only be scrutinized if "the balance is strongly in favor of the defendant." *Kinney*, 674 So. 2d at 89; *see also King v. Cessna*

[2] Nor do the Florida Respondents contest Shahla's argument that 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); *see also* Init. Br. at 16.

Aircraft Co., 562 F.3d 1374 (11th Cir. 2009) (reversing dismissal for forum non conveniens as to U.S. plaintiff but affirming as to European co-plaintiffs, noting that "citizenship often acts as a proxy for convenience in the forum non conveniens analysis").

"Before exercising any such discretion as may exist to deny a United States citizen access to the courts of this country," defendants must present "positive evidence of unusually extreme circumstances" such that courts can "be thoroughly convinced that material injustice is manifest." *Telemundo Network Group, LLC*, 957 So. 2d at 711; *McLane*, 2012 WL 1414602 at *1; *SME Racks*, 382 F.3d at 1101; *Campbell v. Starwood Hotels & Resorts Worldwide, Inc.*, No. 07-61744-CIV, 2008 WL 2844020, *2-*3 (S.D. Fla. Jul. 23, 2008); *see also Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981) (same).

Shahla's case presents no such exceptional circumstance. To the contrary, it is the Florida Respondents who have been abusing the judicially crafted forum non conveniens doctrine, using it as a means 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 from her injuries. *See* (R: 429-30); *see also Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1224 (9th Cir. 2011); *Dole Food Co. v. Watts*, 303 F.3d 1104, 1118 (9th Cir. 2002). As Shahla has explained and Respondents do not contest, the Palace Resort conglomerate has

been carrying out this abuse with unclean hands, including submitting 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) ("[t]he Florida Defendants and Ms. Rodriguez *now admit that each and every one of these [sworn] statements was false*.") (emphasis added).[3]

Accordingly, this Court should reverse.

B. The Florida Respondents Ignore Their Own Extensive Ties To This State.

Respondents allude to their own strong Florida ties just once in their fifty-page Answer Brief. *See* Ans. Br. at 27-28; *but see* Init. Br. at 1-2, 8-10, 17-20; *Rabie*, 66 So. 3d 965-69 (Rothenberg, J. dissenting). In doing so, Respondents downplay the sheer magnitude of the companies' undeniably close ties with their Miami-Dade County headquarters – a nexus critical to any court's analysis of the private interest factors under *Kinney*.

As Shahla has repeatedly shown, Respondents' connections to this forum are extensive. They regularly conduct business in Florida in a manner directly relevant

[3] Respondents also do not contest Shahla's argument that the majority below further ran afoul of *Kinney* by disposing of these troubling admissions in a short footnote, claiming that the issue was before the trial court and that the reviewing court should not "reweigh this evidence." *Rabie*, 66 So. 3d 962, n. 4.

to this suit and from which Petitioner's claims at issue 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). Indeed, notwithstanding the already heightened deference due to Shahla because of her U.S. citizenship, "[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) (emphasis added).

"The fact that the defendants are located in this country is one indication that it would be less burdensome for the defendants to defend suit in this country than it would be for [the plaintiff] to litigate in a foreign country." *Lehman v. Humphrey Cayman, Ltd.*, 713 F.2d 339, 346 (8th Cir. 1983). Indeed, "[t]he deference accorded to the plaintiff's choice of forum is *enhanced* when the plaintiff has chosen a forum in which the defendant maintains a substantial presence." *Mercier v. Sheraton Int'l, Inc.*, 981 F.2d 1345, 1354 (1st Cir. 1992), *cert. denied*, 508 U.S. 912 (1993) (emphasis added).

As such, Petitioner's choice of Florida makes perfect sense. "Miami is the operational, managerial, and marketing center for the entire Palace Resorts group."

Rabie, 66 So. 3d 965-66 (Rothenberg, J. dissenting). From their Miami base, "[t]he Florida Defendants manage the entire U.S. market, which represents seventy percent of the Palace Resorts' business." *Id.* What is more, Roberto Chapur, "the president of most of the Palace companies lives and works in Miami." *Id.* The Florida Respondents offer nothing to contest these findings.

As well, the Florida Respondents failed to make the required showing that trial in Mexico would alleviate hardship related to the witnesses and documents necessary to sustain the claims and defenses in this action. Instead, Respondents resort to making broad, unsubstantiated claims of a "language barrier," that Shahla's lawsuit "revolves around the customs, practices, laws and ordinances of Mexico as to the control and regulation of hotels and resorts in that country, as well as labor laws and the licensing of masseuses," and of the supposed difficulties involved in making travel arrangements for third-party witnesses. *See* Ans. Br. at 28-29. None of these unsupported claims even remotely help establish that documents and witnesses pertinent to Shahla's claims 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).

But even if the bulk of the evidence is indeed only available from Mexico, such a fact would harm – not help – Respondents' position given their maintenance of extensive operations in Florida. *See*, *e.g.*, (R: 745-54, 964, 966-1012, 1067-117). 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 v. FPB Bank*, 879 So. 2d 1247, 1250 (Fla. 3d DCA 2004) (quoting *Sanwa Bank, Ltd. v. Kato*, 734 So. 2d 557, 561 (Fla. 5th DCA 1999)); *Tananta v. Cruise Ships Catering & Services Int'l., N.V.*, 909 So. 2d 874, 898 (Fla. 3d DCA 2004); *see also Rabie*, 66 So. 3d at 969 (Rothenberg, J. dissenting) (noting that "it is difficult to understand how, based on [Shahla's] causes of action, Mexico would be a more convenient forum," and that given their Miami base of operations, the Florida Defendants cannot, "with a straight face," cry foul for having to litigate in their home forum).

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 such that it would be manifestly unjust for them to litigate in her choice of forum – their home forum. Respondents have not met that burden. Accordingly, this Court should reverse.

II. The Florida Respondents Failed To Rebut The Applicability Of A *De Novo* Standard Of Review.

A. Mere Issuance Of A Written Order Is Insufficient To Evade The Required *De Novo* Review, Where The Trial Court Failed To Make Specific Findings Of Fact And Conclusions Of Law With Respect To Each Of The *Kinney* Factors.

Respondents offer little to contest Shahla's argument that the Third District should have reviewed the trial court's decision *de novo*, rather than for mere abuse of discretion. *See* Ans. Br. at 45-47. Critically, they do not dispute that the trial court entered its perfunctory order of dismissal despite the lack of any evidence showing that the private or public factors outweigh the high deference to be shown to Shahla's choice of forum. *See id.* at 46-47. Instead, Respondents emphasize the mere fact that a written order of dismissal was issued, claiming incorrectly that "the trial court, in a *thorough order*, discussed the factual background of this lawsuit and addressed the *Kinney* factors." *Id.* at 47 (emphasis added).

As the dissent recognized, the trial court's "thorough order" states – in its entirety – only the following three sentences in making its ultimate finding as to the adequacy of the foreign forum:

> [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). As Shahla has posited and as the dissent finds, 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).

Respondents also claim that the majority's application of a pure abuse of discretion standard "was done pursuant to the mandate of this Court." Ans. Br. at 46 (citing and quoting from *Kinney*, 674 So. 2d at 86). But this argument misses the point. As the dissent points out, the majority's decision directly conflicts with the Third District's own recent holdings, which move away from a pure abuse of discretion standard in favor of *de novo* review. *See id.* at 966 (Rothenberg, J. dissenting). 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)). And contrary to Respondents' assertions, the Third District in *Telemundo* 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).[4]

No less importantly, the trial court's order should not have withstood even the most permissive review for abuse of discretion. The order never acknowledges the established presumption in favor of a U.S. citizen plaintiff's choice of a home forum, nor does it pinpoint any "unusually extreme circumstances" or "manifest extreme injustice" that would merit denial of a U.S. citizen's access to U.S. courts. *McLane*, 2012 WL 1414602 at *2 (emphasis added); *see also SME Racks, Inc.*, 382 F.3d at 1101-03.

As such, the Florida Respondents' arguments do not justify the majority's failure to conduct a *de novo* review of the trial court's dismissal for forum non conveniens. Accordingly, this Court should reverse.

B. The Florida Respondents Cannot Recast Lourdes Rodriguez's Admitted Perjury As "Pre-Deposition Retractions Of Incorrect Statements."

Respondents make no effort to contest the abundant evidence demonstrating that Lourdes Rodriguez tendered a knowingly false affidavit in support of

[4] 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* 957 So. 2d at 708, 713-14. The Third District reviewed both orders *de novo* without reference to the thoroughness of the trial court's *Kinney* analysis.

Defendants' motion to dismiss. *See* (R: 44-49, 195-202, 742-747, 846-847, 852-853, 857-878, 950-954, 956-962). Instead, they downplay the significance of her crime, emphasizing that Rodriguez has since sought to amend her perjured affidavit. *See* Ans. Br. at 38-41. But recantation is no defense to perjury where it is "motivated more by the fear of a perjury charge than by any concern with having the truth known." *State v. Godby*, 498 So. 2d 692, 695 (Fla. 5th DCA 1986).

The motivation behind Rodriguez's sudden change of heart is unlikely to be a noble one. "[T]he 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). As Shahla has pointed out, the record is replete with examples of Rodriguez's false testimony, which appears in at least four of the other affidavits submitted on Respondents' behalf. *See* List, Init. Br. at 24-25; *see also Rabie*, 66 So. 3d at 965 at n. 8-11 (Rothenberg, J. dissenting). Not surprisingly, Respondents offer no evidence that Rodriguez had ever formally amended any of these prior statements in the interest of truth.

In the face of the trial court's failure to conduct an evidentiary hearing – despite Rodriguez's admitted perjury and clear conflicts in the experts' affidavit testimony – Respondents provide no justification for the majority's decision to

affirm. *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).

An order based on the perjured statements of key witness compels reversal.

III. The Privileges And Immunities Clause Entitles U.S. Citizen Plaintiffs Access To Their Home Forum.

The Florida Respondents fail to reconcile the Third District's decision to treat a U.S. citizen plaintiff as a foreigner with this Court's recognition of the federal Constitution's Privileges and Immunities clause. *See 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."). Instead, they merely repeat the already discredited claim that "the courts below did not violate the Privileges and Immunities Clause by giving less deference to petitioner's choice of forum, since she is an out-of-state resident with little or no contact with Florida." Ans. Br. at 49-50.

Respondents cite to no relevant authority in support of their position. Although they refer to a long line of cases, only two touch upon the Privileges and Immunities Clause in the forum non conveniens context. *See* Ans. Br. at 47-49. Of those two – *State of Mo. ex rel. S. Ry. Co. v. Mayfield*, 340 U.S. 1 (1950), and

Douglas v. New York, N.H. & H.R. Co., 279 U.S. 377 (1929) – both are limited to specific *statutory* claims under the Federal Railroad Employers' Liability Act. *See* 45 U.S.C. § 51 (1939).

Moreover, unlike the present case, both *Mayfield* and *Douglas* are inapposite because they involve adjudication of forum non conveniens claims for domestic, interstate conduct, as opposed to conduct abroad. Further, none of the authorities cited by Respondents go to the core of Shahla's claim here – that "[t]he 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.)). 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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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was hand-delivered this 23rd day of May 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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