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COURT OF APPEALS

STATE OF NEW YORK

WILSON,

Respondent,

-against-

No. 62

DANTAS,

Appellant.

20 Eagle Street
Albany, New York
May 2, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE ROWAN D. WILSON

Appearances:

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Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: The first matter on this
2 afternoon's calendar is appeal number 62, Wilson v. Dantas.
3 Counsel.

4 MR. KOROLOGOS: Madam Chief Justice, and may it
5 please the court. I request two minutes for rebuttal time.

6 CHIEF JUDGE DIFIORE: You - - - you may, sir.

7 MR. KOROLOGOS: The Appellate Division erred as a
8 matter of law in basing its forum non conveniens decision
9 on a lack of a right to jury in the Cayman Islands and
10 Brazil. This is error for three reasons. First, Mr.
11 Wilson agreed that Cayman was a convenient forum in the
12 shareholder's agreement. Second, Mr. Wilson has no right
13 to a jury in New York, in any event, because he asserts
14 equitable claims.

15 CHIEF JUDGE DIFIORE: Counsel, that was just one
16 factor, though, correct?

17 MR. KOROLOGOS: That was just one factor. But
18 the court should not let that factor stand, lest it create
19 an invitation like it did in the Palavi case. Another
20 reason the court erred on forum non conveniens - - -

21 JUDGE STEIN: Well, if - - - if agree with you
22 that the court erred as a matter of law in - - - in relying
23 on that factor, then wouldn't we want to send the matter
24 back to the Appellate Division to reconsider all the other
25 factors in light of the fact that that one factor would not

1 be appropriate?

2 MR. KOROLOGOS: That's certainly one option.
3 However, I believe that in this case, much like the Mashreq
4 Bank case, the factors are clear, and this court can render
5 on the issue of forum non conveniens.

6 JUDGE RIVERA: Well, let's say we disagree and
7 we're, as Judge Stein says, in a position that - - - that
8 we think the correct course is to send it back. What's the
9 point of that? Don't you have that as a defense now
10 against the amended complaint? Isn't that now under
11 consideration?

12 MR. KOROLOGOS: Well, the issue of forum non
13 conveniens, Your Honor, is to allow the court to decide up
14 front that with the inconvenience of the parties, the other
15 factors, including the burden on the court, which is
16 substantial here given the Cayman law issues involved - - -
17 that the court - - -

18 JUDGE RIVERA: True. But Supreme Court never had
19 enough - - - true but Supreme Court had not rendered a
20 decision originally on the forum non conveniens. The
21 Appellate Division addressed that - - - that matter, so now
22 you'd have the Supreme Court addressing the matter as the
23 initial court where it should go.

24 MR. KOROLOGOS: That is where it should have been
25 done. But much - - - much like the clock at 100 Centre

1 Street that was repaired, this is an issue that should get
2 done right. We're here now. It ought to get resolved.
3 The issues are clearly when you apply the Mashreq Bank
4 factors. Indeed, my opposition doesn't even respond to the
5 Mashreq Bank factor. So once you get to that point - - -

6 JUDGE RIVERA: If we - - - if we disagree with
7 you and - - - and think the Appellate Division should be
8 affirmed, does that foreclose consideration of your defense
9 that you've got now below on forum non conveniens?

10 MR. KOROLOGOS: No. It - - - it does not
11 foreclose - - -

12 JUDGE RIVERA: Because you're still seeking
13 dismissal based on forum non conveniens, right?

14 MR. KOROLOGOS: We still seek dismissal on that
15 basis. In fact, there's a pending motion by the other side
16 on that issue now, and that issue can be resolved.
17 However, that would require the parties in an already
18 advanced case to go back to the Supreme Court, then perhaps
19 the Appellate Division, and then perhaps up here to have
20 the issue finally resolved, when it can be resolved on the
21 factors that exist now.

22 JUDGE RIVERA: No. But I'm just saying, if - - -
23 if we affirm the Appellate Department, think they properly
24 exercised their discretion, does that foreclose - - - does
25 that lull the case? Does that mean that you are not going

1 to be able to argue forum non conveniens? That's really
2 what I'm trying to get to.

3 MR. KOROLOGOS: I - - - I understand Your Honor's
4 question. I believe it would, Your Honor.

5 JUDGE RIVERA: It - - -

6 MR. KOROLOGOS: I believe that it would.

7 JUDGE RIVERA: It would. Okay.

8 MR. KOROLOGOS: I believe that the - - - the
9 factors - - - once the court has decided the factors have
10 generally not changed. It's conceivable that as the case
11 progresses, the factors for forum non conveniens could
12 adjust, including whether there are or are not remaining
13 claims that deal with only foreign law and factors like
14 that. But I don't believe the factors will substantially
15 change as this case progresses. But there are - - - the
16 facts on Mashreq Bank that were applied, the parties are
17 not New York residents. They're not even U.S. residents.
18 Ultimately, you have a foreign agreement between foreign
19 residents for performance in a foreign country concerning
20 foreign investments.

21 JUDGE WILSON: There are several different
22 agreements here that the plaintiff's alleging claims under,
23 correct?

24 MR. KOROLOGOS: Pardon me?

25 JUDGE WILSON: One - - - one is the shareholder

1 agreement, but there's also other agreements. And those
2 other agreements seem to choose, on their face, New York
3 law, no?

4 MR. KOROLOGOS: There are other agreements.
5 Those other agreements, however, are not agreements on
6 which Mr. Wilson's claims are based. As the Second Circuit
7 and the District Court found when Mr. Wilson's claims were
8 in federal court, his compensation claims arise only out of
9 the shareholder's agreement and the purported oral
10 agreement from - - -

11 JUDGE WILSON: Is - - - is - - -

12 JUDGE STEIN: But aren't we talking about
13 convenience? So are we restricted to - - - I mean it
14 sounds like what you're talking about is more along the
15 lines of if we're looking at the question of personal
16 jurisdiction or - - - but if - - - if an entity has
17 substantial contacts with a forum, even if it may not be
18 directly related to the very agreement that you say is the
19 operative agreement here, wouldn't that still be a factor
20 that could be considered under the forum non conveniens
21 analysis?

22 MR. KOROLOGOS: I believe that factor would come
23 in, Your Honor, in terms of the difficulties for the
24 defendant in defending the case, the contacts with the
25 jurisdiction. And that is a factor that is included in

1 analysis of the forum non conveniens factors. The issue
2 here, however, is not going beyond that. For instance, if
3 the Appellate Division's ruling were to stand, any employee
4 in a foreign country of a foreign employer engaging in
5 management of foreign investments could claim that because
6 some of their paycheck came from investments from a New
7 York bank - - -

8 JUDGE STEIN: Well, but then - - -

9 MR. KOROLOGOS: - - - they could be - - -

10 JUDGE STEIN: There's a lot more here than that,
11 isn't there?

12 MR. KOROLOGOS: Not much when you get to the
13 claims. Now Mr. Wilson claims he was involved in designing
14 that - - - that system. But his claims are not about the
15 design. They're not about the joint venture or these other
16 agreements. His claims are about what is his compensation
17 to be.

18 JUDGE WILSON: As to which claims is he not
19 collaterally estopped, in your view, by the Second
20 Circuit's opinion?

21 MR. KOROLOGOS: He is not collaterally estopped,
22 I believe, to the breach of contract claim for breach of
23 the shareholder's agreement or for the alleged oral
24 agreement from 1997. That agreement, however, the oral
25 agreement, is plainly, on its face, an agreement to agree.

1 That's not opposed in the briefing before this court. On
2 its face it says the parties - - - I believe the phrase is
3 Mr. Wilson will be contracted on the following term. That
4 is a classic agreement to agree. It is also superseded by
5 the shareholder's agreement, which is the only agreement of
6 all of the agreements Your Honor has mentioned that all of
7 the parties to this case have signed. And it has a clear
8 agree - - - totality clause that makes clear that there are
9 no other agreements that the parties are relying on - - -

10 JUDGE STEIN: Did you - - -

11 MR. KOROLOGOS: - - - other than that agreement.

12 JUDGE STEIN: Did you move to dismiss based on
13 documentary evidence?

14 MR. KOROLOGOS: We moved to dismiss, Your Honor,
15 and - - - including on issues related to complaint - - - or
16 to documents that are related to the complaint. I believe
17 the actual complaint - - -

18 JUDGE STEIN: Well, I mean under - - - under
19 (a)(1). Under 3211(a)(1). Let me - - - let me step back
20 for a second. Is your motion to dismiss in the record
21 before us? Do we have a copy of that?

22 MR. KOROLOGOS: Yes, Your Honor.

23 JUDGE STEIN: Where is that?

24 MR. KOROLOGOS: It - - - I believe it is in the
25 joint appendix that was sent to the Appellate Division.

1 I'll get - - - when I come back up for rebuttal - - -

2 JUDGE STEIN: Okay. Thank you.

3 MR. KOROLOGOS: - - - I'll get you a page cite.

4 JUDGE STEIN: I had trouble finding it.

5 JUDGE FAHEY: Can I - - - I'm struggling a little
6 bit with the relationship between the original complaint
7 and the amended complaint. This - - - this appeal is
8 solely on the original complaint, isn't it?

9 MR. KOROLOGOS: Yes, Your Honor.

10 JUDGE FAHEY: So - - - but the amended complaint
11 has been a motion to dismiss that has been denied, so that
12 means that the amended complaint is alive; is that correct?

13 MR. KOROLOGOS: It is, Your Honor.

14 JUDGE FAHEY: So - - - so my question is is what
15 are we doing here until we know which complaint we're
16 moving forward on?

17 MR. KOROLOGOS: Well, that issue's been before
18 this court three times already, Your Honor, in terms of
19 jurisdiction. And as argued, the amend - - - and as they
20 state in their own papers, the amended complaint did not
21 substantially change the claims. And in fact, they relied
22 on that fact before the Supreme Court in seeking to deny
23 our second motion - - -

24 JUDGE FAHEY: They did a side-by-side - - - I'm
25 sorry. Go ahead. Finish - - - finish your point.

1 MR. KOROLOGOS: They relied on that - - - the
2 consistency of their claims to argue to the Supreme Court,
3 Justice Ramos, that our motion to dismiss should be denied
4 for the amended complaint, which he did deny for the reason
5 stated by the Appellate Division, but the Appellate
6 Division didn't actually state any reasons.

7 JUDGE FAHEY: But - - - but I am correct, the
8 amended - - - the amended complaint has - - - that hasn't
9 been appealed. That denial hasn't been appealed. So
10 that's a valid complaint.

11 MR. KOROLOGOS: It - - - it is a valid complaint
12 subject to it being dismissed as a result of the ruling
13 that this court would make for the reasons as we state in
14 our response - - -

15 JUDGE FAHEY: You mean - - -

16 MR. KOROLOGOS: - - - to their motion - - -

17 JUDGE FAHEY: - - - on forum non conveniens or
18 the causes of action in the original complaint? Because I
19 don't see how we dismiss the original complaint - - - or
20 the amended complaint for - - - for an action on the
21 original complaint.

22 MR. KOROLOGOS: It would be the following way,
23 Your Honor. The claims in the original complaint do not
24 state a claim. Then we would have an issue before the
25 Supreme Court as to whether the claims are sufficiently

1 different that this ruling dismissing the original claims -
2 - -

3 JUDGE FAHEY: I see.

4 MR. KOROLOGOS: - - - also dismiss those claims.

5 JUDGE FAHEY: So you're - - - you're saying that
6 a side-by-side comparison of the two complaints then would
7 show us that they're essentially the same?

8 MR. KOROLOGOS: Yes, Your Honor.

9 JUDGE FAHEY: I see. Thank you.

10 MR. KOROLOGOS: For claims that were allowed to
11 proceed by the Appellate Division. They did drop the
12 claims that the Appellate Division dismissed.

13 JUDGE FAHEY: I see. Thank you.

14 CHIEF JUDGE DIFIORE: Thank you, counsel.
15 Counsel.

16 MR. REED: Madam Chief Justice, may it please the
17 court. My name is Terrance Reed, and I am here on behalf
18 of Robert Wilson. First, I'd like to - - - to say that
19 what the appellants are seeking here is to have this court
20 go back in time to review the sufficiency of a five-year-
21 old complaint that was superseded two years ago, as to
22 which there's been a motion to dismiss the amended
23 complaint. That has been denied. They didn't take a - - -
24 an appeal from that. The - - - there's been two - - -

25 JUDGE RIVERA: It was denied based on the

1 Appellate Department's decision in this case, which they
2 have appealed. So if we agreed with them that all of the
3 claims should have been dismissed, how - - - how can your
4 amended complaint survive?

5 MR. REED: Well, we - - - with all due respect,
6 we believe that the merits don't justify a dismissal. We
7 think that the - - - Appellate Division was correct. But
8 for - - - for purposes of this court, the amended complaint
9 is not only pending, has been pending for two years, but
10 they're - - - it's now in cross-motions for summary
11 judgment, which has been briefed before the trial court.
12 On the issue of forum non conveniens, that issue has
13 actually been briefed on - - - on cross - - - on our motion
14 for summary judgment on forum non conveniens. The issue
15 that they say that the - - -

16 JUDGE RIVERA: Why aren't they correct about the
17 error of law in the forum non conveniens?

18 MR. REED: Well, because their timing is wrong.

19 JUDGE RIVERA: You don't - - - even the Supreme
20 Court has said you don't have a right to a jury because
21 you've got these equitable claims and you've - - - relief
22 requests, and so you've waived the right to a jury.

23 MR. REED: They did not - - - first off, they did
24 not raise a challenge to the jury until after the Appellate
25 Division decision. They raised it on remand for the first

1 time and - - - and, you --- in conjunction with - - -

2 JUDGE RIVERA: But the Appellate Division did - -
3 - did ident - - - the majority did identify this as a
4 factor, and the dissent disagreed.

5 MR. REED: Right. And they didn't - - - they
6 didn't challenge that before the Appellate Division,
7 either. The point is they - - - they first raised that
8 after the Appellate Division ruled. And second, there's an
9 important factor here that somewhat overshadows all of
10 this, and that is that in February of this year, the
11 defendants filed a multibillion dollar lawsuit in the
12 federal court in New York basically seeking to reopen the
13 prior counterclaims they had in 2005 through 2008 in
14 federal court in New York.

15 JUDGE RIVERA: I mean but the - - - let's stay
16 with this lawsuit. Let me just go back to your point about
17 didn't challenge this question about whether or not you had
18 a jury trial right to the Appellate Department, but the
19 Appellate Department reached the issue. Are you saying
20 we're foreclosed from reaching this issue?

21 MR. REED: No. I'm not saying you're foreclosed
22 from reaching the issue. I'm just saying that they - - -
23 they didn't challenge that - - - the jury trial right until
24 after the Appellate Court Division decision. In the trial
25 court, they answered the amended complaint, they asserted

1 the defense of forum non conveniens.

2 JUDGE RIVERA: Right.

3 MR. REED: But they never moved to dismiss for
4 the last two years.

5 JUDGE RIVERA: On that basis?

6 MR. REED: On that basis. No. So - - -

7 JUDGE RIVERA: But can't we reach it because the
8 majority and dissent - - -

9 MR. REED: Well - - -

10 JUDGE RIVERA: - - - reached that question or use
11 - - - or the majority based on its analysis, in part at
12 least, on that factor?

13 MR. REED: We think this court should do what it
14 did - - - or at least should take cognizance of what it did
15 last November in the Rushaid case where this court said,
16 look, these are issues for the trial court in the first
17 instance. And in this case, they exhausted two years of
18 discovery in front of the trial court incl - - - including
19 obtained third-party discovery of Citibank of some 400,000
20 documents. The - - - our motion for summary judgment takes
21 into fact - - - into consideration all the facts including
22 - - - not just including what was at issue five years ago,
23 but the - - - but the current record and also including the
24 fact that the defendant - - -

25 JUDGE RIVERA: But if we agree with them, let's

1 say the majority had said, look, these are the five factors
2 and these are five reasons we think that the forum non
3 conveniens motion should be denied, and we agree with them
4 that one of those factors was improperly considered. There
5 is no basis to consider one of those factors. Why doesn't
6 that go back to the AD, or why should we then decide
7 otherwise?

8 MR. REED: Well, again, this court said in
9 Rushaid you have a case with no discovery, which was the
10 situation here, and this is five years ago. There's been a
11 lot of developments since, including two years of
12 discovery. That the - - - the proper place for - - - to
13 exercise that discretionary judgment is the - - - is the
14 trial court, and in fact, that's what's going on right now.

15 JUDGE RIVERA: So - - - so your position is that
16 if - - - even if we agree with them that it was error to
17 consider the right to a jury, that nevertheless, they're
18 not foreclosed from pursuing this defense, and it very well
19 could be that Supreme Court decides now based on the
20 discovery or now based on what's before me, regardless of
21 what the Court of Appeals now says, I can grant that - - -
22 the Supreme Court could say I grant the motion?

23 MR. REED: And so it's - - -

24 JUDGE RIVERA: And then you'd appeal it
25 potentially.

1 MR. REED: What's that?

2 JUDGE RIVERA: And then you might appeal it.

3 MR. REED: Well, it depends on the result, of
4 course. But - - -

5 JUDGE RIVERA: If you lose, obviously.

6 MR. REED: If we lose.

7 JUDGE RIVERA: You got to - - - it's got to be
8 held adversely to you. Yes.

9 MR. REED: Yes. Then - - - then we would likely
10 seek an appeal to the Appellate Division where they would
11 have the same record that is now before the trial court on
12 summary judgment.

13 JUDGE WILSON: I take it your view is that the
14 Second Circuit decision doesn't collaterally estop any of
15 your claims. Can you explain why, if that's right?

16 MR. REED: Well, the first - - - the first and
17 foremost reason is that the - - - the federal courts
18 declined to exercise subject matter jurisdiction over all
19 of plaintiff's claims against these defendants. It denied
20 the exercise of what's called supplemental jurisdiction.
21 Fundamental rule of due process - - -

22 JUDGE WILSON: That answers the question about
23 res judicata but not collateral estoppel.

24 MR. REED: The same - - - same principle lies.
25 Both res judicata and collateral estoppel are inapplicable

1 where the court doesn't exercise jurisdiction. It's - - -
2 that's - - - you have to have a full and fair opportunity
3 to present your claim in order to even be - - - have
4 collateral estoppel or - - - issue preclusion. So from
5 jump street, there's nothing - - - there's no collateral
6 impact of the federal court proceedings because of the
7 nature of how they got sent back to state court. The - - -
8 the federal district court judge says I'm not exercising
9 any subject matter jurisdiction over this case. So this
10 goes to the - - - back to the state court where it came
11 from. And so - - -

12 JUDGE WILSON: Okay.

13 MR. REED: - - - that's our - - - that's our
14 initial position. We also don't think that there's
15 anything in particular as the - - - the rulings as they
16 applied to, say, Citibank that has negative consequences
17 for our claims here. The - - - the court didn't address
18 the contract claim of plaintiff vis-a-vis Dantes - - - in
19 fact the court was quite clear it wanted that to be
20 resolved in the state court, which is where we are now.

21 JUDGE RIVERA: Can you address the causes of
22 action?

23 MR. REED: Sure. Briefly, on the cause of
24 action, breach of fiduciary duty, both sides have pled and
25 indeed, are pleading, the same joint venture. So we think

1 the existence of a duty is both admitted by both sides
2 through the pleading of the joint venture - - -

3 JUDGE STEIN: What - - - what can we consider on
4 that - - - that aspect that - - -

5 MR. REED: You could - - -

6 JUDGE STEIN: - - - failure to state a cause of
7 action. Can we consider other agreements, other alleged
8 agreements, or are we limited to the - - - the parameters
9 of the complaint?

10 MR. REED: You - - - you can consider what the
11 trial court is now considering, and that is in the - - - in
12 the cross motions for summary judgment on this issue, you
13 can consider - - -

14 JUDGE STEIN: Well, what - - -

15 MR. REED: - - - the entire ten-year history of
16 the - - - of the relationship - - -

17 JUDGE STEIN: But one thing - - - one motion is
18 for summary judgment and another is for - - - for a motion
19 to dismiss. Aren't there different - - -

20 MR. REED: Well, but the - - - the issue is what
21 - - - what is the factual basis for the - - - the
22 recognition of the duty. What - - -

23 JUDGE STEIN: I thought we were limited to the
24 four corners of - - - of the complaint on a motion to
25 dismiss for failure to state a cause of action.

1 MR. REED: Yes. That's true. But here we plead
2 - - - we plead a quasi-partnership, which is what the - - -
3 the Cayman courts found. We've pleaded joint venture,
4 which is what they're pleading. They - - -

5 JUDGE STEIN: So what I'm asking you is is you
6 make certain allegations in support of those claims.

7 MR. REED: Yes.

8 JUDGE STEIN: And don't we have to accept those
9 allegations as true - - -

10 MR. REED: Absolutely.

11 JUDGE STEIN: - - - or are we allowed to look
12 outside your complaint to the defense's and the other
13 arguments that are being raised by the defendants?

14 MR. REED: We submit that - - - that you need to
15 look to the four corners of the complaint. In our
16 complaint, both the original and the amended, we
17 incorporate the references to the joint venture that they
18 previously made in the earlier lawsuit, which they're
19 renewing today in this new lawsuit. And those establish -
20 - - a joint venture, by definition, establishes a
21 fiduciary relationship. But more importantly, the - - -
22 they have taken the position in the - - - themselves, and
23 we provided on page 41 of our brief, the - - - we quoted at
24 - - - at length their position to the federal court back in
25 2005 in real time when these events were taking place that

1 it was not permissible for the federal court to rule on the
2 existence of a fiduciary duty as a matter of law. That is
3 by definition a factual issue based on the assertion of a
4 joint venture.

5 JUDGE FAHEY: One of the things - - - and your
6 time's running out here. And it seems one of the cores are
7 the - - - the defendant really has to show here the
8 plaintiff's selection of New York is "not in the interest
9 of substantial justice," quoting the Appellate Division.
10 So what's your response to that? What do you say to that?

11 MR. REED: Well, here - - -

12 JUDGE FAHEY: Why is it in the interest of
13 substantial justice?

14 MR. REED: It is in the interest of substantial -
15 - - substantial justice because this - - - the side-by-side
16 investment system, which is the heart of this started in
17 New York in - - - in 1996, ended in New York, so-to-speak,
18 in 2007 through a settlement agreement to divest all of the
19 side-by-side terms, which itself is exclusively governed by
20 New York Law, which has given rise to a new lawsuit trying
21 to reopen all of these disputes as to who is entitled to
22 the proceeds of the - - -

23 JUDGE FAHEY: Yeah. That's the substance of it,
24 but the procedural basis, which is the way I understand
25 their argument, that - - - that no jury trial, et cetera.

1 What do you say to that?

2 MR. REED: Well, I - - - you know, that is a
3 factor that - - - that the court can consider and that - -
4 - that the Appellate Division did consider at a time when
5 they had not raised any challenge to the - - - to the jury
6 trial right. But it is a - - - it's completely
7 overshadowed by the fact that all of these events are - - -
8 are rooted in - - - in New York. The operating agreement,
9 which covers the entire joint venture, requires application
10 of New York Law and is - - - has a New York forum
11 provision, as well. So there's bouillabaisse of - - - of
12 New York contacts here. And, you know, the - - - the jury
13 trial right is one factor amongst many, but it's certainly
14 not dispositive. And we - - - we take the fundamental
15 view, which is if - - - if New York is a good enough place
16 for them to bring a lawsuit, it's a good enough place for
17 them - - -

18 JUDGE RIVERA: But is your position that - - -

19 MR. REED: - - - to fight it.

20 JUDGE RIVERA: I'm sorry. Is the plaintiff's
21 position that you are entitled to the jury trial right? To
22 a jury - - -

23 MR. REED: We - - -

24 JUDGE RIVERA: That the - - - that the Supreme
25 Court got it wrong?

1 MR. REED: To be honest with you - - -

2 JUDGE RIVERA: Please. That would be refreshing.

3 MR. REED: We think - - - we think so. We think
4 that there's a constitutional right to a jury, and - - -
5 but, you know, this case has enough issues as it is. We
6 anticipate that summary judgment is going to - - - their
7 summary judgment is going to be denied, ours is - - - will
8 either be granted or denied, and we'll be in trial within
9 three, four months.

10 CHIEF JUDGE DIFIORE: Thank you, counsel.

11 Counsel.

12 MR. KOROLOGOS: Thank you. First, Judge Stein,
13 the motion to dismiss itself is not in the record in the
14 joint appendix. However, it's on file at February 19,
15 2013. The affidavit in support that puts in some of the
16 evidence we relied on is in the record at - - - starting at
17 page 73 of the joint appendix.

18 With respect to the timing of motion to strike
19 the jury, no need to do that before trial. We did it.
20 That issue was not appealed. There's clearly no right to
21 jury in New York where there are equitable claims, even if
22 those equitable claims are later withdrawn or dismissed.
23 The Outer Shade (ph.) case is not applicable. That was a
24 case where there was no exercise of discretion by the
25 Supreme Court or the Appellate Division at all. This court

1 declined to exercise discretion over something that hadn't
2 been exercised by the courts below in the first place.

3 To one of the questions earlier to my colleague,
4 if there is one factor that is wrong in the - - - the
5 decision below, either this court needs to render in the
6 opposite direction or to send it back for reconsideration
7 to see whether that alters the mix of the analysis for
8 forum non conveniens.

9 With respect to the issue of the joint venture
10 points that my colleague has made, we do have a lawsuit
11 that relates to a joint venture that is different than any
12 venture that Mr. Wilson was a part of. He's clearly not
13 and does not allege to be a member of that joint venture.
14 Instead, the shareholder's agreement is clear that he - - -
15 that there is not a partnership relationship among the
16 parties to this lawsuit. And there is no finding in the
17 quasi-partnership context in this case. And instead, I
18 refer to the 2002 Privy Council Demarco decision which
19 makes clear that a shareholder in the Cayman Islands has no
20 rights of a fiduciary nature. Instead what they have is
21 the ability to go for a winding up procedure, to wind up
22 the entity. That is their sole claim. I refer to
23 paragraphs 13 to 16 of that decision. It makes clear that
24 unlike English law where there are rights for oppression
25 from - - - for minority shareholders, there are no such

1 rights in the Cayman Islands, which is what matters here
2 because the shareholders were - - -

3 JUDGE FAHEY: Of course, that - - - that would be
4 why you'd have Cayman Island law but you'd still have the
5 New York forum selection, right? Isn't that what - - -

6 MR. KOROLOGOS: No. That - - - that agreement
7 has Cayman Islands as a forum selection.

8 JUDGE FAHEY: Oh, I see.

9 JUDGE WILSON: Non - - - nonexclusive, correct?

10 MR. KOROLOGOS: Pardon me?

11 JUDGE WILSON: Nonexclusive selection.

12 MR. KOROLOGOS: Nonexclusive. That's correct.

13 JUDGE FAHEY: I see.

14 MR. KOROLOGOS: Well, I'm sorry. It is exclusive
15 for Cayman law to apply. It's nonexclusive for Cayman
16 jurisdiction.

17 JUDGE WILSON: Right.

18 CHIEF JUDGE DIFIORE: Thank you, counsel.

19 MR. KOROLOGOS: Thank you, Your Honor.

20 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Wilson v. Dantas, No. 62 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: May 07, 2017