

08-1983

IN THE
United States Court of Appeals
FOR THE FIRST CIRCUIT

—————
INTERFACE PARTNERS INTERNATIONAL LTD.,

Plaintiff-Appellant,

v.

MOSHE HANANEL,

Defendant-Appellee.

—————
*On Appeal from an Order of the United States District Court
for the District of Massachusetts*

**BRIEF FOR PLAINTIFF-APPELLANT
INTERFACE PARTNERS INTERNATIONAL LTD.**

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**PLAINTIFF-APPELLANT'S RULE 26.1
CORPORATE DISCLOSURE STATEMENT**

Interface Partners International, Ltd. ("IPI") has no parent corporation, and no publicly-held corporation owns more than 10% of the stock of IPI.

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Pursuant to Federal Rule of Appellate Procedure 34(a), counsel for Plaintiff-Appellant respectfully requests oral argument. We believe that oral argument will assist the Court in deciding this appeal, which involves a number of important legal issues. Oral argument will enable the parties to address these issues adequately and respond to the Court's questions and concerns.

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of the United States District Court for the District of Massachusetts, entered on July 7, 2008. Notice of appeal was timely filed on August 1, 2008. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

PRELIMINARY STATEMENT

In this case, an American company headquartered in Newton, Massachusetts, seeks to recover damages from a former employee for embezzling funds and paying himself compensation to which he was not entitled. The employee, who managed plaintiff's office in Ramat Gan, Israel, claims to have conducted business for the firm and its owner around the world. The District Court, adopting without comment the Magistrate Judge's recommendation, granted the defendant's motion to dismiss for *forum non conveniens* in favor of the Israeli courts, ignoring the approximately even balance of relevant witnesses and evidence between Massachusetts and Israel, and instead relying almost entirely on what the court imagined to be the plaintiff's motivation in bringing this suit in Massachusetts.

The Magistrate Judge's recommendation rests on two errors. The first is its assumption that plaintiff's motivation for bringing the suit in Massachusetts is more significant than the balance of convenience. That is an error of law—*forum non conveniens* does not provide for a standardless inquiry into privileged litigation decisions; it depends, instead, on an analysis of objective convenience factors. The focus of the inquiry is the effect on the *defendant* of the plaintiff's forum choice, not the *plaintiff's* reasons for choosing that forum. The Magistrate Judge's second error is his largely unquestioning acceptance of defendant's

assertions about the necessary evidence. The defendant simply asserted that dozens of Israeli witnesses and huge quantities of documents would be relevant, without providing any support for that assertion. More is required before the doors of an American court will be closed to an American plaintiff.

STATEMENT OF THE ISSUES

1. Whether a District Court, considering a motion to dismiss for *forum non conveniens*, may decline to give the plaintiff's choice of forum substantial deference based on purported findings regarding the plaintiff's motive in selecting the forum.

2. Whether a District Court abuses its discretion by finding that the *forum non conveniens* convenience factors weigh in favor of an alternative forum based largely on witnesses whose names and the substance of whose testimony are absent from the record.

STATEMENT OF THE CASE

Plaintiff Interface Partners International Ltd. brought suit in the Superior Court of the Commonwealth of Massachusetts on July 12, 2006. ADD-1. Defendant Hananel removed the case to the U.S. District Court for the District of Massachusetts on September 21, 2006. *Id.*

Hananel first moved to dismiss for *res judicata*. Dkt. #2, 3. Magistrate Judge Sorokin recommended denial of that motion. Dkt. #17. Hananel also filed a motion to dismiss for lack of personal jurisdiction. Dkt. #2, 4. At a hearing on November 7, 2006, the Magistrate Judge invited Hananel to move to dismiss for *forum non conveniens*, but Hananel declined to do so. The Magistrate Judge recommended denial of both motions to dismiss. Dkt. #17. Judge Lindsay accepted the recommendations and denied both motions. Dkt. 1/4/07.

Finally, on January 15, 2007, Hananel moved to dismiss for *forum non conveniens*, arguing that Israel was a more convenient forum. Dkt. #23.¹ Magistrate Judge Sorokin recommended granting that motion. ADD-1 *et seq.* Judge Lindsay did not act on the recommendation while this Court considered an appeal in a related case, *Adelson v. Hananel*, Nos. 06-2281/06-2282. On December 5, 2007, this Court reversed the *forum non conveniens* dismissal in *Adelson*. See 510 F.3d 43. After Judge Lindsay sent this case back for reconsideration in light of *Adelson*, Magistrate Judge Sorokin issued a Revised Report and Recommendation (ADD-1 *et seq.* (“Report”)), which District Judge Young adopted without opinion on July 2, 2008. Dkt. 7/2/08.

¹ Hananel also moved to delay the time to answer and postpone the Rule 16 scheduling conference until after a ruling on that motion. This motion, too, was denied. Dkt. 1/24/07.

STATEMENT OF FACTS

Defendant Moshe Hananel is a former employee of plaintiff Interface Partners International, Ltd. (“IPI”). IPI is a Delaware corporation headquartered in Needham, Massachusetts. According to Hananel, he worked on behalf of IPI and its owner, Sheldon G. Adelson, on business development projects around the world. See A-294-97 ¶¶ 16, 19 (Israel, (“Jordan, Italy, Rhodes (Greece), Bulgaria, Ireland, and elsewhere”) (Hananel affidavit filed in Israel); A-289 ¶ 8 (“Adelson and I spent time, together, in the U.S.” and 12 other countries); A-300-02 ¶ 23 (describing travel for IPI “to the U.S.A.” and 7 other countries). This suit seeks to recover funds misappropriated by Hananel for his personal use, salary Hananel paid himself for time that he spent working for his own business, and damages for Hananel’s destruction of corporate documents upon his termination. As noted in the Complaint (A-33 ¶ 13), IPI previously brought the present claims in Israel but withdrew them, without prejudice, in order to bring the present action.

The disputed issues on Hananel’s *forum non conveniens* motion are twofold: IPI’s motivation for moving the suit from Israel to Massachusetts and the location and identity of relevant evidence. The Magistrate Judge’s Report and Recommendation devoted four pages to an inquiry into IPI’s motives for withdrawing the suit in Israel and refiled in Massachusetts. ADD-11-14. As IPI explained below, it withdrew the Israeli suit because, in another case in which

Hananel has sued IPI and Adelson on an alleged oral contract, for billions of dollars worth of stock options, for supposedly finding an investment opportunity, Hananel had used the pendency of the IPI suit to assert that Israeli courts have jurisdiction over Adelson personally. By withdrawing its suit in Israel, IPI hoped to negate that ground for jurisdiction.

When the Magistrate Judge asked for evidence concerning the reasons for the withdrawal, IPI submitted a transcript of the hearing in which it withdrew the Israeli suit. Dkt. #65, citing Dkt. #11, Exhibit D (A-36). The transcript showed that IPI gave the Israeli court, in open court, without contradiction either by the judge or by Hananel's counsel, exactly the same reason for withdrawing the suit as it gave the Massachusetts court. A-36. In fact, not only did Hananel's lawyers not deny that that was IPI's purpose, Hananel himself stated that the move was "legitimate from the point of view of the present Plaintiffs." A-37. The contents of that transcript were not disputed by Hananel. Nonetheless, the Magistrate Judge did not believe IPI's explanation, concluding that "[t]his assertion * * * is without substantial support in the record." ADD-12. The Magistrate Judge then leapt to the further conclusion that "IPI's choice of forum * * * was motivated by a desire to vex and oppress Hananel and, accordingly, that IPI is not entitled to the heavy presumption ordinarily accorded to a Plaintiff's choice of forum." ADD-13. The Report cited no direct evidence to support this alternative hypothesis. Because of

this finding, the Magistrate Judge decided “that IPI is not entitled to the heavy presumption ordinarily accorded to a Plaintiff’s choice of forum.” ADD-13.

The Magistrate Judge also found that the private and public *forum non conveniens* factors favored Israel. As to the location of evidence, the parties previously identified their witnesses for the Israeli court. IPI identified nine witnesses; their affidavits were submitted to the District Court and appear at A-197-245. Six are U.S. citizens and residents. They would testify to the central elements of IPI’s claims:

- 1) The number of vacation days to which Hananel was entitled (A-210, A-221) (Stephen O’Connor (IPI’s Chief Financial Officer), Adelson);
- 2) Hananel’s order to IPI’s bank [in Massachusetts] to transfer funds to his own account in compensation for supposedly unused vacation time (A-210, A-221) (O’Connor, Adelson);
- 3) Hananel’s agreement in Massachusetts with IPI, through Adelson, and witnessed by IPI’s General Counsel, Paul G. Roberts, to work full-time for IPI (A-213, A-221) (Roberts, Adelson); and
- 4) Adelson’s and IPI’s lack of knowledge of Hananel’s breach of that promise by devoting the majority of his time to Galilee Tours, a company substantially owned by Hananel’s family (A-221, A-215, A-

217, A-219) (Adelson, Lawrence Marder, Irwin Chafetz, and Ted Benard-Cutler).

The nature of Hananel's obligations to IPI and his breach of those obligations are, of course, the fundamental elements of IPI's claims.

Hananel, according to his affidavit, identified 29 witnesses in the Israeli court. A-63-64. The Report noted that the record contains affidavits from only ten. ADD-17. Furthermore, Hananel "identifies only ten of these witnesses by name." *Id.* Nonetheless, the Report concluded that not only the ten named witnesses but also the nineteen unknowns have evidence that "bears not only on whether Hananel breached but it may also bear on the terms of the parties' employment relationship." *Id.*

SUMMARY OF THE ARGUMENT

The court below erred in granting Hananel's motion to dismiss for *forum non conveniens*. This ruling was erroneous because it rested largely on a finding regarding IPI's motivation in bringing the suit, a finding that is both legally irrelevant and without evidentiary support. The ruling below was also erroneous because the court relied on naked assertions about the location of relevant defense evidence and gave insufficient weight to the need for IPI to present testimony by American witnesses.

ARGUMENT

Standard of Review

Errors of law pertaining to a *forum non conveniens* dismissal are reviewed *de novo*. *Iragorri v. Int'l Elevator, Inc.*, 203 F.3d 8, 12 (1st Cir. 2000). Other errors in applying the doctrine are reviewed for abuse of discretion. *Id.* “Such an abuse transpires if the *nisi prius* court (1) fails to consider a material factor; (2) relies substantially on an improper factor; or (3) assesses the appropriate factors but clearly errs in weighing them, with the result that its assessment falls outside the universe of plausible outcomes.” *Id.* at 12; see also *Nowak v. Tak How Invs., Ltd.*, 94 F.3d 708, 719 (1st Cir. 1996). “Emphasis on the district court’s discretion, however, must not overshadow the central principle of the *Gilbert* doctrine that ‘unless the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed.’” *Manu Int’l, S.A. v. Avon Prods., Inc.*, 641 F.2d 62, 65 (2d Cir. 1981) (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)).

Discussion of the Issues

I. The Defendant Faces a Heavy Burden on a *Forum Non Conveniens* Motion.

A. The Court Must Give Substantial Deference to the Plaintiff's Choice of Forum.

The Supreme Court has instructed that “the plaintiff’s choice of forum should rarely be disturbed.” *Gulf Oil*, 330 U.S. at 508; see also, e.g., *Howe v. Goldcorp Invs., Ltd.*, 946 F.2d 944, 950 (1st Cir. 1991); *Mercier v. Sheraton Int’l, Inc.*, 935 F.2d 419, 424 (1st Cir. 1991). The defendant “bears the heavy burden of establishing that an adequate alternative forum exists and that ‘considerations of convenience and of judicial efficiency *strongly* favor litigating the claim in the second forum.’” *Adelson v. Hananel*, 510 F.3d 43, 52 (1st Cir. 2007) (quoting *Iragorri*, 203 F.3d at 12) (emphasis in *Adelson*); see also *Howe*, 946 F.2d at 950 (“[*F*]orum non conveniens is * * * designed to avoid trials in places so ‘inconvenient’ that transfer is needed to avoid *serious unfairness*.”) (emphasis added) (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 259 (1981)); *Royal Bed & Spring Co. v. Famossul Industria e Comercio de Moveis Ltda.*, 906 F.2d 45, 48 (1st Cir. 1990) (“[T]he question to be answered is ‘whether the actions brought are vexatious or oppressive or whether the interests of justice require that the trial be had in a more appropriate forum.’) (quoting *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 530 (1947)); *Mercier*, 935 F.2d at 423-24 (noting defendant’s burden of proof); *Burt v. Isthmus Dev. Co.*, 218 F.2d 353, 357 (5th Cir. 1955)

(“courts should require positive evidence of *unusually extreme circumstances*, and should be thoroughly convinced that *material injustice* is manifest before exercising any such discretion to deny a citizen access to the courts of this country”) (emphasis added).

If the defendant fails to show such “material injustice” from the plaintiff’s chosen forum, it is irrelevant that another forum might be more convenient: *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1180 (9th Cir. 2006) (internal quotation omitted) (“a plaintiff need not select the optimal forum for his claim, but only a forum that is not so oppressive and vexatious to the defendant as to be out of proportion to plaintiff’s convenience”), cert. denied, 127 S. Ct. 723 (2006); WRIGHT, MILLER & COOPER, FEDERAL PRACTICE & PROCEDURE: JURISDICTION 2D § 3828 (1986) (“While a citizen of the United States may have no absolute right to have a case tried in the federal court, his election of such forum should not be disregarded in the absence of persuasive evidence that retention of jurisdiction will result in manifest injustice to the respondent, and this is true even though the more convenient forum may be the foreign one.”) (citing *Mobil Tankers Co., S.A. v. Mene Grande Oil Co.*, 363 F.2d 611, 611 (3d Cir. 1966)).

B. The Choice of a U.S. Forum by a U.S. Plaintiff, Like IPI, Warrants Heightened Deference.

Dismissal is an even more disfavored result where, as here, it would require an American plaintiff to seek relief in a foreign court. See *Adelson*, 510 F.3d at 53

(noting “heightened deference which accompanies a plaintiff’s choice of *home* forum”); *Mercier v. Sheraton Int’l, Inc.*, 981 F.2d 1345, 1355 (1st Cir. 1992) (noting “strong presumption favoring the American forum selected by American plaintiffs”). “At least when the plaintiff is a U.S. citizen . . . , the plaintiff’s forum choice *always* should be accorded substantial deference at the outset. Only then should the district court analyze the *Gilbert* factors, keeping in mind that the defendant bears the burden of proof on each factor and must overcome the heavy presumption against disturbing the plaintiff’s forum choice.” *Reid-Walen v. Hansen*, 933 F.2d 1390, 1396 (8th Cir. 1991) (emphasis added) (citation omitted); see also *Mizokami Bros. of Ariz., Inc. v. Baychem Corp.*, 556 F.2d 975, 977 (9th Cir. 1977) (“Numerous cases suggest that a defendant must meet an *almost impossible burden* in order to deny a citizen access to the courts of this country.”) (emphasis added); *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1344 (2d Cir. 1972) (same). Mere inconvenience, therefore, does not warrant dismissal of an American plaintiff’s suit. *Hoffman v. Goberman*, 420 F.2d 423, 428 (3d Cir. 1970).

II. The Report Mistakenly Focuses on IPI’s Motivation, Rather Than Judicial and Party Convenience.

The doctrine of *forum non conveniens* is intended to “avoid trials in places so ‘inconvenient’ that transfer is needed to avoid serious unfairness.” *Howe*, 946 F.2d at 950 (quoting *Piper Aircraft v. Reyno*, 454 U.S. 235, 259 (1980)). The

Supreme Court has emphasized “that the central focus of the *forum non conveniens* inquiry is convenience.” *Piper*, 454 U.S. at 249. Yet the Magistrate Judge’s Report did not identify any such unfairness or inconvenience. Rather, it sought to punish IPI for what the court perceived, based on no record evidence, as IPI’s bad motives for choosing a home forum. The reliance on IPI’s subjective motivation for choosing a Massachusetts forum, rather than the balance of objective convenience factors, was not only an error of fact, but also an error of law.

The Report correctly stated that “[t]o obtain a dismissal based upon forum non conveniens, a defendant bears the heavy burden of showing (1) that an adequate alternative forum exists; and (2) that ‘considerations of convenience and judicial efficiency strongly favor litigating the claim in the alternative forum.’” ADD-9 (quoting *Iragorri*, 203 F.3d at 12). Nonetheless, the Report relied heavily, not on convenience, but on the Magistrate Judge’s unfounded perception of IPI’s motives for bringing the suit in Massachusetts. See ADD-13 (“I find that Hananel has borne his heavy burden of establishing that IPI’s choice of forum . . . was *motivated* by a desire to vex and to oppress Hananel.”) (emphasis added).

That process gets the *forum non conveniens* analysis exactly backward. *Forum non conveniens* discourages the *deliberate* choice of an inconvenient forum simply by making *all* cases brought in inconvenient forums subject to dismissal. As this Court has held, “the term ‘oppressiveness and vexation’” does not “create[]

an independent standard.” *Iragorri*, 203 F.3d at 15.² The Magistrate Judge’s Report, by contrast, treated IPI’s motivation as the first and central inquiry, and then on relied a finding of impure motives to find inconvenience. See ADD-22 (“I find that * * * considerations of convenience and judicial efficiency strongly favor litigating the claim in Israel *because* [Hananel] has made a clear showing of vexation by IPI in its choice of forum.”) (emphasis added).

This procedure is contrary to the rulings of this and other courts, which have followed the principle that objective considerations of convenience, not the plaintiff’s subjective motivation, are the relevant inquiry. Specifically, the “oppressiveness and vexation” standard relates not to what result the plaintiff intended, but to the effect of the plaintiff’s forum choice on the defendant. Thus, in *Royal Bed & Spring*, this Court held that “the question to be answered is ‘whether the *actions brought* are vexatious or oppressive’” (906 F.2d at 48 (quoting *Koster*, 330 U.S. at 530) (emphasis added)), not whether the plaintiff brought the action with a vexatious or oppressive purpose. See also *Tuazon*, 433

² See also *id.* (“a defendant’s right to obtain a dismissal on *forum non conveniens* grounds hinges on whether it can show that considerations of convenience and judicial efficiency strongly favor the proposed alternative forum. After all, the ‘strongly favors’ language has roots in Supreme Court precedent, and the Court’s subsequent mentions of the *Koster* dictum [*i.e.*, ‘oppressiveness and vexation’] lend no support to the notion that the dictum somehow supplanted the ‘strongly favors’ test”).

F.3d at 1180 (noting that the question is whether the forum is “oppressive and vexatious *to the defendant*”) (emphasis added).

To hold otherwise would require the absurd result of dismissing cases in which the forum is unquestionably convenient but the plaintiff’s reasons for choosing it are in doubt. Each case would be delayed (as this one has been for more than two years) with a sideshow over the plaintiff’s intent, an inquiry that will rest ultimately on privileged work product. This case was dismissed largely because of the court’s misunderstanding of Israeli rules of jurisdiction and argument preservation and its unfounded disbelief of IPI’s explanation for why it chose *not* to litigate in *Israel*—rather than factors relating to litigating in Massachusetts. There was no evidence whatsoever that the reason that IPI withdrew the suit in Israel differed from what it told both the Israeli court and the Magistrate Judge below. The wholesale reliance on baseless guesses in this case illustrates the point that the plaintiff’s motivation is impossible to evaluate accurately and has no justifiable place in the analysis.

III. Hananel Has Failed To Prove A Strong Balance Of Convenience Favoring Israel.

A. The Private Factors Do Not Strongly Favor Dismissal.

The District Court previously ruled, in the earlier suit between Adelson and Hananel, that the private factors of convenience are “in equipoise.” Report and

Recommendation in *Adelson v. Hananel* (04-cv-10357) (Dkt. #135) at 5.³ The only difference that the Report identifies between this case and *Adelson* with regard to the private factors is speculation that some evidence, possibly located in Israel, that was not relevant in *Adelson* might be relevant to the present claims. In the court below, Hananel did not identify a significant amount of such evidence or explain how any of it is relevant, let alone necessary, to a fair adjudication.

1. The Balance Of Witness Convenience Does Not Favor Israel.

The Magistrate Judge wrote that the availability of witnesses and documents strongly favored dismissal. ADD-18. That conclusion, however, improperly relied on Hananel's conclusory and utterly unverifiable assertion that dozens of his witnesses reside in Israel and that their testimony is critical to the resolution of this case.

Hananel asserts that 29 Israeli witnesses are necessary, yet he describes the testimony of only ten. The rest are not even named. The record offers little reason to believe that Hananel would even benefit from some of the proffered testimony. Hananel himself said only that “[t]hese [Israeli witnesses] have personal knowledge of *events* and/or of my performance as an employee of Adelson/IPI and/or *awareness* of my work for Galilee Tours, and they would be necessary to me to rebut the false allegations in the present case.” A-63 (emphasis added). It is

³ Notwithstanding that finding, the District Court dismissed *Adelson* for *forum non conveniens*. This Court reversed. 510 F.3d 43 (1st Cir. 2007).

impossible to evaluate the relevance of witnesses who, even according to Hananel, merely have “personal knowledge of [unspecified] events.” Furthermore, it is not disputed that Hananel worked for Galilee Tours; indeed, IPI claims that he did so *instead* of working for IPI. A-32 ¶¶ 6-7. Thus, testimony that witnesses were “aware” of Hananel’s work for Galilee Tours would not even be relevant, let alone so essential that the trial must be moved to Israel to accommodate them.⁴ In short, the record simply does not show that the Israeli witnesses are even relevant, let alone so critical to Hananel’s defense that proceeding in the United States would cause “manifest injustice.” It is hardly unfair to require Hananel, the movant, who asked the court to take the extraordinary step of refusing to exercise jurisdiction, to provide that evidence.

As for IPI’s witnesses, the Report gave no weight at all to the uncontested fact that the majority of them are American. It said nothing about whether IPI could proceed effectively in Israel without many of its witnesses or about the burden and expense of travel to Israel. ADD-6. These witnesses, as their affidavits prove, would testify to (1) the details of Hananel’s agreement with IPI and his expected commitment to IPI and (2) the numerous breaches of that

⁴ The witnesses’ own knowledge about Hananel’s outside work would only be relevant insofar as it would have suggested that that work was common knowledge and thus that IPI knew of it. Yet the court below concluded that the contrary testimony of IPI’s *own employees* was not sufficiently important to tip the balance in favor of Massachusetts. That conclusion is simply illogical.

agreement by Hananel. See *supra* at 7. Because the Magistrate Judge was apparently swayed only by the raw number of Hananel's purported witnesses and not the substance of their testimony, it is especially unfair to dismiss the case where Hananel has not even identified the majority of them, except by name and nation of origin.

The Report also "concludes that many of the documents created and maintained in Israel are in Hebrew." ADD-16. Yet neither the Report nor Hananel identified a single such document.⁵ Hananel simply asked the court to assume that innumerable Hebrew-language documents were relevant, and, over IPI's objection, the Report accepted this assertion uncritically. To the contrary, it is not disputed that none of the Massachusetts officers of IPI speaks Hebrew, while Hananel is fluent in English; as a result, all communications between Hananel and IPI's witnesses in IPI's head office was in English. At the very least, the court should have granted IPI's request for limited discovery to identify the supposedly relevant Israeli witnesses and the predominant language of relevant documents.

2. The Magistrate Judge Correctly Rejected the Remainder of Hananel's Private Factor Allegations.

Hananel also claimed that his financial condition and various physical ailments prevent him from litigating in Massachusetts. But he presented no

⁵ Hananel did describe "many hundreds of pages of court filings" and "three boxes of papers" (A-64 ¶ 63) but failed to mention that those were not evidence but motions and briefs, which would be neither necessary nor admissible in this action.

evidence in support of either claim. The Magistrate Judge thus had little choice but to conclude that “[t]he record in this case suggests that [Hananel] has sufficient resources to litigate” and that he “has not shown that his health issues have changed significantly [since the First Circuit decision], making him unable to travel to Massachusetts to defend this lawsuit.” ADD-19-20.

B. The Public Factors Do Not Strongly Favor Dismissal.

The Magistrate Judge also found that two public factors favored dismissal. That discussion boiled down to two points: (1) IPI had previously brought these claims in Israel, and (2) the defendant’s assertion that Israel has a stronger connection to the issues in dispute. ADD-9-11. Neither is a valid basis for dismissal.

1. The Prior Pendency of the Case in Israel Is Irrelevant

IPI has never sought to conceal the fact that it previously brought these claims in Israel. See, *e.g.*, A-33 ¶ 13. The Israeli court, which never adjudicated the case on the merits, allowed IPI to withdraw the claims after IPI stated that it intended to pursue them here.

The court below found that the litigation history in Israel would somehow make that forum more efficient. Yet it identified no judicial effort that would be duplicated by proceeding here: The evidentiary discovery that the parties conducted in Israel could easily be transferred to Massachusetts, allowing this case

to proceed without protracted discovery. The fact that Hananel cannot even produce affidavits from the majority of his purported witnesses suggests that little effort would in fact be duplicated.

The fact that the Israeli court would be no *less* efficient is, of course, not a legally valid reason to dismiss. The Report did note that “discovery rules in the United States differ from those that govern in Israel” but did not identify any specific differences. ADD-20. In fact, the main difference is that American discovery is more extensive than that in Israel—therefore, little or no effort that has been expended in Israel would be wasted in the U.S. proceedings. It is, no doubt, true that many cases could be resolved more expeditiously if the narrow discovery procedures of foreign courts were applied, but policy choices by the drafters of the Federal Rules cannot be a reason to force American litigants overseas.

2. Massachusetts Law Should Govern the Contract

Despite finding that (1) the law that governs the parties’ contract is disputed and (2) various facts “may, under a choice of law analysis, suggest that Israeli law governs some of the disputed issues,” the Report finds that the “governing law” factor favors Israel. ADD-21-22. Without a clear ruling on choice of law, this conclusion is unwarranted.

In this lawsuit, IPI, a largely Massachusetts-based firm, seeks damages for breach of an employment contract formed in its Massachusetts office and for funds embezzled after being disbursed from its Massachusetts bank accounts and those of its primary shareholder, a Massachusetts native and homeowner. The S.J.C. has held that “Massachusetts has an interest not only in providing a forum for its residents, but also in enforcing business transactions consummated within its boundaries.” *Carlson Corp. v. Univ. of Vt.*, 402 N.E.2d 483, 486 (Mass. 1980); see also *id.* (“failure to honor a contractual obligation incurred in a state cannot be said to be without consequences there”) (quoting *Davis H. Elliot Co. v. Caribbean Utils. Co.*, 513 F.2d 1176, 1181-82 (6th Cir. 1975)); *Jet Wine & Spirits, Inc. v. Bacardi & Co.*, 298 F.3d 1, 12 (1st Cir. 2002) (a state “has a legitimate and constitutional interest in . . . enforcing the contracts entered by its businesses”).

Furthermore, the District Court held in *Adelson*, a case arising out of basically the same employment relationship, that:

Several factors heighten Massachusetts’ interest: two or three of IPI’s executive officers work in Massachusetts; IPI’s corporate funds are held in Massachusetts, at least until disbursed to Israel; and IPI’s corporate funds are managed or monitored from Massachusetts.

* * *

And finally, with respect to substantive social policies, Massachusetts has an interest in redressing harms inflicted on businesses operating here.

Report and Recommendation in *Adelson* (D. Mass. 04-cv-10357-RCL), Oct. 31, 2005, at 22-23 (adopted by the District Court). This Court subsequently ruled that litigating in Massachusetts does not pose such a burden on Hananel that it warrants relinquishing the District Court's jurisdiction. *Adelson*, 510 F.3d 43.

The only Israeli with any interest in this case is Hananel himself, who chose to work for IPI, executed his contract in Massachusetts, communicated with and requested funds from IPI employees here, and who claims to have traveled around the world on IPI's behalf. A-339-40 ¶ 74.3; A-289 ¶ 8, A-300-02 ¶ 23, A-318 ¶ 30 (describing business trips to at least 18 countries); A-310-11 ¶ 27.11 (describing "my contacts with one of the richest families in Cyprus"); A-312-13 ¶ 27.16 (describing meetings with Mayors of Tel Aviv and Haifa, Israeli Prime Ministers Ehud Olmert, Shimon Peres, and Ariel Sharon, and Israeli President Moshe Katzav); A-313 ¶ 27.17 (describing correspondence with King Hussein of Jordan). Even supposing that Israel might have a marginally stronger connection to the case, proceeding in Massachusetts to vindicate interests recognized by the Commonwealth's highest court would not impose such an unjustifiable burden as to warrant the extraordinary remedy of *forum non conveniens* dismissal.

CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully requests that this Court vacate the judgment below and remand for further proceedings.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,966 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2002 in 14-point Times New Roman.

3. I further certify that the electronic copy of this brief filed with the Court is identical in all respects except the signature to the hard copy filed with the Court, and that a virus check was performed on the electronic version using the Norton Anti-Virus software program.

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