

06-2281/06-2282

United States Court of Appeals
for the First Circuit



SHELDON G. ADELSON,
Plaintiff-Appellant / Cross-Appellee,

v.

MOSHE HANANEL,
Defendant-Appellee / Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF OF PLAINTIFF-APPELLANT/CROSS-APPELLEE

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

Plaintiff-appellant Sheldon G. Adelson is a natural person. As such, a corporate disclosure statement is not required. FED. R. APP. P. 26.1(a).

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Pursuant to Federal Rule of Appellate Procedure 34(a), counsel for Plaintiff-Appellee respectfully request 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 19, 2006. Notice of appeal was timely filed on July 19, 2006. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

PRELIMINARY STATEMENT

A defendant seeking dismissal for *forum non conveniens* “must bear the burden of proving * * * the likelihood of serious unfairness to the parties in the absence of a transfer to the alternative forum.” *Mercier v. Sheraton Int’l, Inc.*, 981 F.2d 1345, 1349 (1st Cir. 1992) (citing *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947)). In this case, a U.S. citizen brought suit for a declaratory judgment on the terms of a contract negotiated and formalized in Massachusetts with an employee who was supervised out of the Massachusetts office of the plaintiff’s firm. The defendant, an Israeli citizen, moved to dismiss for *forum non conveniens*. The court below found (1) that it had personal jurisdiction over the defendant, based on his transaction of business in Massachusetts, (2) that the defendant was able to litigate in Massachusetts, and (3) that the plaintiff’s choice of forum was not vexatious or harassing. The court did not find that the defendant had established “manifest injustice” from the plaintiff’s choice of forum or a strong balance of factors in favor of dismissal — in fact, it found the “private factors” at issue in the analysis to be “in equipoise,” and that both forums had an interest in the litigation.

The court below nonetheless dismissed the case. It brushed aside the plaintiff’s choice of forum and U.S. citizenship and gave dispositive significance to the concurrent pendency of an overlapping suit brought in Israel by the defendant

in this case. This decision not only introduced a new and irrelevant factor, hitherto unrecognized by this Court, to the *forum non conveniens* analysis, it also ignored the critical difference in scope between the narrow claims at issue in Israel and the plaintiff's request for a comprehensive declaration in Massachusetts.

As a practical matter, the American plaintiff will now have to bring his broader claim in the Tel Aviv District Court, solely because his adversary filed suit first in Israel. The Israeli proceedings are conducted in a language that the plaintiff does not speak and that was not the language of the parties' Massachusetts contract. While the law is clear that every plaintiff's choice of forum deserves substantial deference, the Magistrate Judge's approach is especially unsound in this case because the dismissal closes the doors of the federal courts to a U.S. citizen and forces him to litigate overseas.

STATEMENT OF THE ISSUES

When an American citizen files suit in federal court for declaratory judgment on a contract formed in the United States, does the pendency of an action brought by the opposing party, a foreign citizen, in his own home forum establish "manifest injustice" sufficient to overcome the strong presumption in favor of a plaintiff's choice of forum and require dismissal of the U.S. action for *forum non conveniens*, where all other factors are "in equipoise"?

STATEMENT OF THE CASE

Plaintiff-appellant Sheldon G. Adelson brought suit in the District Court, seeking a declaratory judgment. Complaint ¶ 33 (A-22).¹ As to the declaratory judgment count, Magistrate Judge Leonard Sorokin recommended denying defendant Moshe Hananel's motion to dismiss for lack of personal jurisdiction (Report and Recommendation on Defendant's Renewed Motion to Dismiss for Lack of Personal Jurisdiction ("Jurisdiction Report") 25 (ADD-25)), and Judge Lindsay accepted that recommendation. ADD-26-27. Magistrate Judge Sorokin later recommended dismissing the declaratory judgment count for *forum non conveniens*. Report and Recommendation of Defendant's Renewed Motion to Dismiss for Forum Non Conveniens ("FNC Report") 12 (ADD-39). Judge Lindsay accepted that recommendation, without opinion, on July 19, 2006. ADD-40. This timely appeal followed. Hananel has cross-appealed.

STATEMENT OF FACTS

The Parties

The plaintiff, Sheldon G. Adelson, is a U.S. citizen with a residence in Newton, Massachusetts. ADD-20, A-114. Adelson is a successful entrepreneur,

¹ The Complaint also sought damages and equitable relief for civil extortion, malicious interference with an advantageous business relationship, and disparagement and defamation. Complaint ¶¶ 35-47 (A-22-23). Those counts were dismissed for lack of personal jurisdiction. ADD-26.

real estate developer, and casino operator. He is the Chairman and a substantial shareholder of Las Vegas Sands, Inc., which built The Venetian hotel and the Sands Expo and Convention Center in Las Vegas. A-133. He seeks a declaratory judgment establishing the extent of his personal liability, if any, on an oral agreement made in Massachusetts between a company under his control (Interface Partners International Ltd., or “IPI”) and defendant Moshe Hananel. The agreement and all negotiations relating to it were conducted in English. ADD-21. IPI is a Delaware corporation with offices in Needham, Massachusetts; Las Vegas; and Tel Aviv; its finances are controlled out of its Needham office, and its Chief Financial Officer, Treasurer, and counsel are based in that office. ADD-5-6.

Hananel is an English-speaking Israeli citizen. ADD-6-7. He was employed by IPI to identify high-technology investments in Israel. A-162-63. He was terminated in 2000 for non-performance, an issue that, along with Hananel’s subsequently discovered embezzlement from IPI, is the subject of separate litigation. ADD-6.

Hananel’s Claims

After being fired for malfeasance, Hananel filed lawsuits in Israel in 2001 and 2003 asserting a right to shares in one of Adelson’s developments and making other claims under Israeli employment law. ADD-29-30. Specifically, Hananel has demanded 12% of Adelson’s shares in a multi-billion dollar real estate, casino,

resort hotel, and convention project in Macau, China. Complaint in Labor (TA) 7704/03 *Hananel v. IPI & Adelson* (the “2003 Complaint”) ¶ 1 (A-39). His claim is based on an oral contract, allegedly witnessed only by Adelson and Hananel himself. ADD-32. Hananel claims that the contract gives him an option on 12% of the Macau project because, *inter alia*, he “gave Adelson official publications by the Chinese government” on foreign investment in Macau, “presented to Adelson Macau’s location, historical and legal uniqueness, the condition of tourism therein and in nearby Hong Kong, and the possibilities embedded therein, including the possibility of building a casino,” and gave Adelson generic advice on how “to present himself to the locals” in Macau. 2003 Complaint ¶¶ 4.3, 4.5, 4.7 (A-41). Hananel has suggested generally that the contract entitles him to 12% of any development of Adelson or any of Adelson’s companies with respect to which Hananel had any connection whatsoever.

Adelson denies that Hananel’s responsibilities extended beyond identifying high-tech investments in Israel, that the oral contract included such an absurdly generous term, and that the alleged conversations involving Macau ever occurred.

Because Hananel contends that the purported agreement applies not only to Macau but to any of Adelson’s investments worldwide, and because Hananel asserts that the contract entitles him to shares in investments based on only *de minimis* involvement, there is no way for Adelson to predict which of his

investments might be subject to future claims. Hananel has previously used these claims to interfere with Adelson's businesses around the world, including in the United States. A-21. He has threatened the financiers of Adelson's companies and attempted to interfere with regulatory approval for the development in Macau. *Id.* There is thus a need for a comprehensive resolution of Hananel's claims, and that is what this lawsuit seeks.

The Litigation History

Various aspects of the parties' relationship are the subject of lawsuits brought by Hananel in the Tel Aviv District Labor Court, in Israel. One, filed in 2001, seeks compensation allegedly owed, pursuant to Israeli labor law, to Hananel by Adelson and IPI. ADD-29-30. Another suit, the 2003 Action mentioned above, filed by Hananel just two months before the present action, seeks 12% of the shares owned by Adelson (or IPI or any company under Adelson's control) in the casino development in Macau. *Id.* In addition, IPI is suing Hananel in the District of Massachusetts, seeking to recover salary that Hananel collected while working on personal business, IPI funds that he misappropriated for personal use, unearned vacation time for which he reimbursed himself, and damages for Hananel's

destruction of IPI documents upon his termination.² *Interface Partners Int'l, Ltd. v. Hananel* (D. Mass. No. 06-11708-RCL).

Although Hananel initiated the Israeli proceedings in August 2001, they have not progressed far. As the Israeli court recently explained, “[t]he claims are in the preliminary stages, under which appeals have also been filed with the national tribunal against this tribunal’s interim judgments. The evidence stage * * * has not yet started.” Labor (TA) 6245/01 *Moshe Hananel v. Sheldon G. Adelson*, Aug. 14, 2006 ¶ 2 (denying antisuit injunction) (ADD-85). Adelson has submitted two affidavits to the Israeli labor court; to date, the court has required that one of these affidavits be translated into Hebrew, a language Adelson does not speak.

Hananel’s claim for shares in the Israeli court does not seek a conclusive adjudication of the precise terms of the contract. Nor is it necessary that the Israeli court will reach such a result. The court may decide that, because the alleged conversations related to Macau never occurred, it need not reach the question of interpretation of the contract. Or the Israeli court may decide that the minimal effort on which Hananel bases his claim to shares in the Macau project is insufficient, without deciding what, if anything, might entitle Hananel to shares in other investments. In short, while this particular instantiation of Hananel’s claim

² IPI originally brought that lawsuit in Israel but withdrew it, without prejudice, shortly after filing the Massachusetts suit in 2006. Hananel demanded that IPI pay costs and attorney’s fees for the withdrawn suit, and IPI did not object.

for shares could, eventually, be decided by the Israeli court, the declaratory judgment action is the only one that is sure to resolve the entire conflict and thereby put an end to the uncertainty.

The Present Case

The Complaint seeks a declaration of the parties' rights "with respect to [real estate and casino developments in] Macau or otherwise." Complaint ¶ 29 (A-21); *id.* ¶ 33 (A-22) ("any business in which plaintiff has any interest"). Magistrate Judge Sorokin recommended dismissing that count for *forum non conveniens*. He made that recommendation despite finding that:

- Hananel "ha[d] failed to meet his burden" of showing that "many Israeli witnesses are important to this dispute" (*id.* at 5 (ADD-32));
- any Israeli witnesses "are, at best, of diminished importance" and could "testify by video hook-up" (*id.* at 5-6 (ADD-32-33));
- "Hananel can testify here; not only does he speak English, all of the discussions material to this case occurred in English" (*id.* at 6 (ADD-33));
- "[w]hile Hananel now suffers from diabetes and a variety of other health problems, I do not find these limitations are so great that they constitute such a significant burden to warrant defeating this Court's exercise of its jurisdiction" (*id.*);
- "Hananel[']s] conten[tion] that thousands of Hebrew documents located in Israel are relevant to this matter" was unfounded because "Hananel has identified no specific document or category of documents relevant to disposition of the claim at issue in this case (other than perhaps a draft proposal for a casino venture in Jordan, which I infer was in English because it was given to Adelson)" (*id.* at 6-7 (ADD-33-34)); and that

- “[t]he notion that the parties’ ‘course of conduct,’ as shown in every, or many, IPI documents generated in the course of Hananel’s years of employment by IPI, are relevant to this claim is simply incorrect” (*id.*).

Thus, he concluded that “Hananel could litigate his claims before this Court” (*id.* at 7 (ADD-34)) and that the “private factors” relevant to *forum non conveniens* were “in equipoise.” FNC Report at 5 (ADD-32).

As to the “public factors,” the Magistrate Judge similarly found that “the locus of the dispute does not decidedly tilt toward Israel or the United States.” *Id.* at 9 (ADD-36). In spite of all of those findings, the Magistrate Judge recommended dismissing the action because of the pendency of Hananel’s lawsuit in Israel. “I see no reason,” he wrote, “why Adelson cannot fairly litigate his claim in Israel. Therefore, there is no reason for this Court to adjudicate a matter already pending before the Israeli Court.” *Id.* at 10-11 (ADD-37-38).

SUMMARY OF THE ARGUMENT

The Magistrate Judge committed a number of reversible errors. First, he reversed the burden of proof, recommending dismissal of the case because he found “no reason” *to* exercise jurisdiction, rather than because he found strong reasons *not to*. The Magistrate Judge also brushed aside Adelson’s choice of forum and refused to give heightened deference to that choice because of his U.S. citizenship.

Second, the only factor that the Magistrate Judge believed did favor dismissal — the pendency of the Israeli suit — did not properly belong in the *forum non conveniens* analysis at all, as evidenced by an abundance of case law. The Magistrate Judge also erred in evaluating that factor, because he erroneously concluded that the American and Israeli suits are identical, despite differences that are apparent from the pleadings and that directly implicate Adelson’s reason for seeking a declaratory judgment.

Finally, the Magistrate Judge erroneously balanced the factors, relying exclusively on a single factor and dismissing the case despite an express finding that the “central concern” of *forum non conveniens* — vexation and harassment of the defendant — was absent.

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.” *Iragorri*, 203 F.3d 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 Court Below Improperly Reversed The Burden Of Proof And Applied The Wrong Legal Standard To Dismiss The Case

A. The Governing Legal Standard Requires The Defendant To Prove A Strong Balance In Favor Of Dismissal

The Supreme Court has held that “the plaintiff’s choice of forum should rarely be disturbed.” *Gilbert*, 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). To win dismissal, the defendant must prove that the plaintiff’s forum is “*non conveniens*,” not just that another forum might be *more* convenient: “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.” *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1180 (9th Cir. 2006) (internal quotation omitted). The defendant is

obligated make such a showing even where the plaintiff “fail[s] to provide competing evidence on this issue.” *Mercier*, 935 F.2d at 425.

Dismissal requires more than a simple balance in favor of another forum. It is a central theme of *forum non conveniens* jurisprudence that the defendant bears the burden of proving the **strong** balance of interests in favor of another forum. See *Williams v. Green Bay & W. R.R. Co.*, 326 U.S. 549, 559-60 (1946) (reversing dismissal where defendant failed to prove the plaintiff’s forum to be “vexatious and oppressive”); *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.” (emphasis added) (quoting *Koster*, 330 U.S. at 530)); *Mercier*, 935 F.2d at 423-24 (noting defendant’s burden of proof).³

³ See also *Bigio v. Coca-Cola Co.*, 448 F.3d 176, 179 (2d Cir. 2006) (“even where the degree of deference is reduced [because the plaintiff is a non-citizen], ‘[t]he action should be dismissed only if the chosen forum is shown to be genuinely inconvenient and the selected forum significantly preferable.’” (quoting *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 74-75 (2d Cir. 2001) (en banc))); *In re Ford Motor Co.*, 344 F.3d 648, 651 (7th Cir. 2003) (trial in the selected forum

B. A U.S. Plaintiff's Choice Of A U.S. Forum Warrants Even Greater Deference

As this Court has noted, dismissal is an even more extreme, and therefore disfavored, remedy where, as here, it would force an American plaintiff to seek relief in a foreign court. See *Mercier*, 981 F.2d at 1355 (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) (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.”); *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: “It is settled that while an American citizen suing in his own right does not have an absolute right under all circumstances to maintain his suit in a

must be “oppressive and vexatious to the defendant, out of all proportion to the plaintiff’s convenience”).

federal court, his election of such a forum should not be disregarded in the absence of persuasive evidence that the retention of jurisdiction will result in *manifest injustice to the defendant.*” *Hoffman v. Goberman*, 420 F.2d 423, 428 (3d Cir. 1970) (emphasis added).⁴ In a case of “a U.S. plaintiff suing at home for valid reasons,” a court must be cognizant of the “very strong deference traditionally given a U.S. plaintiff suing in her home forum,” and “the starting point will be one that substantially favors the plaintiff.” *Gross v. British Broad. Corp.*, 386 F.3d 224, 231 (2d Cir. 2004).

⁴ See also *SME Racks, Inc. v. Sistemas Mecanicos Para Electronica, S.A.*, 382 F.3d 1097, 1102, 1104 (11th Cir. 2004) (reversing dismissal where district court failed to recognize “rule that positive evidence of unusually extreme circumstances must be present and that the court must be thoroughly convinced that material injustice is manifest before ousting a domestic plaintiff from this country’s courts” and noting the “strong federal interest in making sure that plaintiffs who are United States citizens generally get to choose an American forum for bringing suit, rather than having their case relegated to a foreign jurisdiction” (internal quotations omitted)); *Olympic Corp. v. Societe Generale*, 462 F.2d 376, 378 (2d Cir. 1972); *Burt v. Isthmus Dev. Co.*, 218 F.2d 353, 357 (5th Cir. 1955) (“[C]ourts 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)); 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.*”) (emphasis added) (citing *Mobil Tankers Co., S.A. v. Mene Grande Oil Co.*, 363 F.2d 611, 611 (3d Cir. 1966)); *United States Merchants’ & Shippers’ Ins. Co. v. A/S Den Norske Afrika Og Australie Line*, 65 F.2d 392, 393 (2d Cir. 1933) (L. Hand, J.) (holding that U.S. citizenship is conclusive against dismissal).

Indeed, regardless of citizenship, the plaintiff's choice of a home forum is entitled to heightened deference.⁵

Where there are only two parties to a dispute, there is good reason why it should be tried in the plaintiff's home forum if that has been his choice. He should not be deprived of the presumed advantages of his home jurisdiction except upon a *clear showing* of facts which either (1) establish such *oppressiveness and vexation* to a defendant as to be out of all proportion to plaintiff's convenience, which may be shown to be slight or nonexistent, or (2) make trial in the chosen forum *inappropriate* because of considerations affecting the court's own administrative and legal problems.

Koster, 330 U.S. at 524 (emphasis added); see also *Piper Aircraft*, 454 U.S. at 255-56 ("When the home forum has been chosen, it is reasonable to assume that this choice is convenient."); *Alpha Therapeutic Corp. v. Nippon Hosho Kyokai*, 199 F.3d 1078, 1090 (9th Cir. 1999). Thus, "the choice of a home forum 'may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum.'" *Royal Bed*, 906 F.2d at 52 (quoting *Piper Aircraft*, 454 U.S. at 255).

⁵ Adelson's "home forum" for purposes of this lawsuit is anywhere in the United States. This Court has held that, as between a U.S. and a non-U.S. forum, it is national, not state, residence that determines the home forum. See *Mercier*, 935 F.2d at 429 ("[T]he district court erred in concluding that the [plaintiffs'] non-Massachusetts citizenship and residence favored dismissing the case. Rather, the [plaintiffs'] *United States* citizenship and residence * * * are factors that make this a controversy local to the United States, if not necessarily to Massachusetts." (emphasis in original)); accord *Reid-Walen*, 933 F.2d at 1394 (where the alternative is foreign, "the 'home' forum for the plaintiff is any federal district in the United States, not the particular district where the plaintiff lives"). Moreover, as described *supra*, Adelson has strong ties to Massachusetts.

C. The Court Below Reversed The Burden Of Proof⁶

The Magistrate Judge did not even purport to find that Hananel had met his burden of proving a strong balance of factors in favor of dismissal. Instead, the Magistrate Judge reversed the burden of proof, requiring Adelson, the plaintiff, to demonstrate that he could not litigate in Israel. FNC Report at 10 (ADD-37) (“Put another way, *I see no reason why Adelson cannot fairly litigate his claim in Israel.*”); *id.* at 11 (ADD-38) (“Therefore, there is *no reason for this Court to adjudicate [the] matter.*” (emphasis added)). That was a glaring error of law: It is emphatically not the plaintiff’s burden to provide reasons for the court to exercise jurisdiction; it is the defendant’s burden to prove a “strong balance” in favor of dismissal. See *Mercier*, 935 F.2d at 423-24 and other cases cited *supra* in Section I.A. As the Second Circuit recently put it, “[t]he task of a district court evaluating a request for dismissal based on a parallel foreign proceeding is not to articulate a justification *for* the exercise of jurisdiction, but rather to determine whether exceptional circumstances exist that justify the surrender of that jurisdiction.” *Royal & Sun Alliance Ins. Co. of Canada v. Century Int’l Arms, Inc.*, 466 F.3d 88,

⁶ Improper application of the burden of proof is an error of law mandating reversal of a *forum non conveniens* dismissal. See *Reid-Walen*, 933 F.2d at 1396 (reversing where trial court’s “approach appears to shift the burden to the plaintiffs to convince the court that their forum choice is more convenient than the alternative forum”); *Alpha Therapeutic*, 199 F.3d at 1092 (reversing dismissal because “[t]he court improperly placed the burden on [plaintiffs], instead of deferring to their choice of forum”).

2006 U.S. App. LEXIS 25350, at *9 (2d Cir. Oct. 10, 2006) (emphasis in original).

There was no such determination here.

Moreover, even if the Magistrate Judge's finding that he could see "no reason for this Court *to* adjudicate" somehow meant instead that the District Court should *not* exercise jurisdiction, it is indisputable that he made no finding that the balance was lopsided enough to warrant dismissal. A finding that the factors are in or close to equipoise means that dismissal would simply shift inconvenience from the defendant to the plaintiff. Thus, dismissing where the "balance of the public and private interest factors is not *strongly* in favor of the defendants" is an error of law. *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1335 (9th Cir. 1984) (reversing dismissal) (emphasis added); see also *Ravelo Monegro v. Rosa*, 211 F.3d 509, 514 (9th Cir. 2000) (reversing where, "rather than treating forum non conveniens as an exceptional tool to be employed sparingly, the district court perceived it as a doctrine that compels plaintiffs to choose the optimal forum for their claim").

The Third Circuit recently reversed a dismissal by a district court whose approach bears a striking resemblance to the Magistrate Judge's Report in this case:

We are concerned that the District Court may not have applied the proper standard to weighing the private and public interest factors. As stated above, [defendant] bears the burden of establishing that litigation in New Jersey would be oppressive and vexatious to him. In

Lony I, we took exception to a district court’s suggestion that dismissal was appropriate where the balance of private factors was ***at equipoise or tipped toward dismissal***. Here, it is ***unclear*** whether the District Court concluded that litigation in New Jersey was vexatious and oppressive to [defendant] out of all proportion to [plaintiff]’s convenience, or whether, ***all things being equal, Russia was a better forum***. The former is a basis for dismissal; the ***latter is not***. The District Court concluded its private interest analysis by stating that “I think I have given a sufficient recitation to show that there are no private factors and certainly no interest of this forum factors that favor retaining jurisdiction in this forum.” The problem is that dismissal is not appropriate just because the private and public factors do not favor retaining jurisdiction.

Tech. Dev. Co., Ltd. v. Onischenko, 174 Fed. Appx. 117, 122-23 (ADD-53) (3d Cir. 2006) (unpub.) (emphasis added and citation omitted); see also *Royal & Sun*, 466 F.3d at —, 2006 U.S. App. LEXIS 25350, at *9 (holding that a district court need not find “a justification *for* the exercise of jurisdiction” but must instead “determine whether exceptional circumstances exist that justify the surrender of that jurisdiction”); *Lony v. E.I. Du Pont de Nemours & Co.*, 886 F.2d 628, 635 (3d Cir. 1989) (“If the balance of private interest factors is ***close to equipoise***, as the district court found it to be, that would not favor dismissal. * * * When the court found these private interest factors to be ‘***at equipoise***’ (***or tipped toward the defendant***), it should have concluded that they weighed in favor of retaining jurisdiction.” (emphasis added)).

The Sixth Circuit, too, has held that a district court’s finding that the balance of factors “clearly point towards trial in the alternative forum” or “weigh in favor”

of dismissal is insufficient to justify dismissal of a suit by a U.S. plaintiff. *Duha v. Agrium, Inc.*, 448 F.3d 867, 873-74 (6th Cir. 2006) (quoting *Piper Aircraft*, 454 U.S. at 255 and *Duha v. Agrium, Inc.*, 340 F. Supp. 2d 787, 801 (E.D. Mich. 2004) (alteration omitted)). Similarly, the Eighth Circuit has reversed a *forum non conveniens* dismissal simply because “[t]he court **made no finding** of exceptional circumstances or that the defendants’ interests ‘strongly’ favored dismissal.” *Lehman v. Humphrey Cayman, Ltd.*, 713 F.2d 339, 342 (8th Cir. 1983) (emphasis added).

Like the district court in *Onischenko*, the Magistrate Judge below found that the private factors and all but one of the public factors were in “equipoise” (see FNC Report at 5, 8 (ADD-32, 35)); and that the overall balance, at most, tipped toward the defendant. See *id.* at 10 (ADD-37) (asserting, without explanation, that the “public interest factors * * * weigh more heavily here”). Further, he not only failed to find vexation and oppression from the plaintiff’s choice of forum but expressly rejected that claim. See *id.* at 9 n.4 (ADD-36) (“Hananel makes much of the fact that choosing a forum in order to vex or harass an opponent may defeat the presumption that a plaintiff otherwise enjoys. On the record before the Court, however, Hananel has not established such a purpose.”). The rule that dismissal requires a **strong** balance of interests permeates the *forum non conveniens* case law. The failure even to assert, much less establish, such a strong balance is an

error of law that warrants reversal. An acknowledgement that, indeed, all but one of the factors are “in equipoise” must necessarily result in reversal.

D. The Trial Court Failed To Give The Legally Required Heightened Deference To Adelson’s U.S. Citizenship⁷

As discussed *supra* in Section I.B, the trial court is obliged to grant a U.S. plaintiff’s choice of forum heightened deference. See also *Swift & Co. Packers v. Compania Colombiana del Caribe, S.A.*, 339 U.S. 684, 697 (1950) (“[S]uit by a United States citizen against a foreign respondent brings into force considerations very different from those in suits between foreigners.”); *Koster*, 330 U.S. at 525 (describing plaintiff’s residence as “a fact of ‘high significance’” (quoting *Int’l Milling Co. v. Columbia Transp. Co.*, 292 U.S. 511, 520 (1934))). Adelson is a U.S. citizen and Dorchester native, with a residence in Newton. IPI, the company for which Hananel worked, has an office in Needham, as does The Interface Group, another Adelson-owned company. The contract was finalized and, according to the Magistrate Judge, at least partially negotiated in Massachusetts, and Hananel’s employment required regular reporting to the Needham office. As a

⁷ Failure to give heightened deference to a plaintiff’s U.S. citizenship, above and beyond the substantial deference due to any plaintiff’s choice, is an error of law. See *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 99-100 (2d Cir. 2000) (finding that “as a matter of law, in balancing the competing interests, the district court did not accord proper significance to a choice of forum by lawful U.S. resident”); *Guidi v. Inter-Continental Hotels Corp.*, 224 F.3d 142, 146 (2d Cir. 2000) (same); *Gates Learjet*, 743 F.2d at 1335 (reversing because, *inter alia*, “the district court did not recognize or consider in its balancing that [plaintiff] is a United States citizen”).

result, the Magistrate Judge found that Massachusetts has “a meaningful connection” to this litigation. See FNC Report at 9 n.4 (ADD-36).⁸

Nonetheless, Adelson’s U.S. citizenship and his connections to Massachusetts received short shrift in the Magistrate Judge’s opinion. The authority requiring a trial court to give substantially greater deference (1) to a U.S. plaintiff’s choice of a U.S. forum, and (2) to any plaintiff’s choice of his home forum is overwhelming, as Plaintiff’s Objections to the Report explained. See, *e.g.*, sources cited in *supra* Sections I.A, I.B, *supra* note 4. The lower court’s failure to grant extra weight to Adelson’s citizenship is a clear error of law that requires reversal.

II. The Lower Court Relied Exclusively On An Irrelevant Factor — The Pendency Of The Israeli Action

The court below relied *exclusively* on an improper factor, the pendency of another action between Hananel and IPI in Israel. Having found that all other factors were “in equipoise,” the Magistrate Judge decided that this single factor overcame the “heavy presumption” in favor of the plaintiff’s forum. FNC Report at 9 (“Weighed against these factors is the fact that the very issue Adelson brings to this court is already pending before the Court in Israel, in the form of the 2003

⁸ See *Lehman*, 713 F.2d at 344 n.4 (“When . . . it is shown that there exists a significant relationship between the forum at issue and the litigation, the plaintiff’s choice of forum must be accorded great weight and, for that reason, should rarely be disturbed.”) (omission in *Lehman*; internal quotations omitted)).

action brought by Hananel.”). But there is no support in *forum non conveniens* law for assigning any weight at all, let alone dispositive significance, to the pendency of another action.

A. Pendency Of A Concurrent Action Is Not Relevant To The *Forum Non Conveniens* Analysis

1. Neither The U.S. Supreme Court Nor Lower Courts Factor Concurrent Litigation Into The *Forum Non Conveniens* Analysis

The pendency of litigation in other forums does not appear as a relevant factor in any Supreme Court *forum non conveniens* case. As discussed above, the question posed by a *forum non conveniens* motion is whether the plaintiff’s chosen forum presents unbearable inconvenience or injustice, not whether it is the best forum from the perspective of administrative efficiency. In fact, various courts have expressly rejected the notion that concurrent litigation should factor into *forum non conveniens* analysis. The Second Circuit has pointed out that “[t]he existence of related litigation, while of major significance in § 1404(a) cases [transferring venue between federal courts], is not listed as a relevant factor in the *forum non conveniens* analysis laid out in *Gilbert*.” *Guidi*, 224 F.3d at 148; see also *Zelinski v. Columbia 300, Inc.*, 335 F.3d 633, 643 (7th Cir. 2003) (affirming

pre-trial denial of *forum non conveniens* motion based on concurrently pending litigation). Courts have made this exact observation time and again.⁹

Indeed, this Court has recognized the “accepted proposition that parallel proceedings on the same *in personam* claim generally should be allowed to proceed simultaneously. The decisional calculus must take account of this ***presumption in favor of concurrent jurisdiction.***” *Quaak v. Klynveld Peat Marwick*, 361 F.3d 11, 16 (1st Cir. 2004) (emphasis added and citation omitted); see also *Laker Airways Ltd. v. Sabena*, 731 F.2d 909, 926 (D.C. Cir. 1984). And relying solely on the Israeli litigation is especially inappropriate here, because that suit was brought by the defendant in the U.S. action. Dismissing Adelson’s suit for

⁹ See also *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 911 F.2d 993, 1005 n.8 (5th Cir. 1990) (explaining that pendency of concurrent action is not relevant to *forum non conveniens*); *Peach v. Shopshire*, No. CV05-0369C, 2006 WL 456772, at *9 (ADD-66) (W.D. Wash., Feb. 23, 2006) (unpub.) (“the U.S. Supreme Court has never noted the fact of pending litigation in an alternative forum as a relevant factor in a *forum non conveniens* analysis”); *Am. Stock Exch., LLC v. Towergate Consultants Ltd.*, No. 03Civ. 856(RMB), 2003 WL 21692814, at *5 (ADD-46) (S.D.N.Y., July 21, 2003) (unpub.) (“the pendency of the United Kingdom action does not factor into the *forum non conveniens* decision”). Courts also refused to dismiss for this reason before *Gilbert* formally embraced the *forum non conveniens* doctrine for federal courts. See *Asiatic Petroleum Corp. v. Italia Societa Anonima Di Navigazione*, 119 F.2d 610, 613 (3d Cir. 1941) (“It is also settled that the pendency of a suit in personam is not a bar to suits brought in other jurisdictions upon the same cause of action.”); *Rederiaktierbolaget v. Compania De Navegacion “Anne” S.A.*, 124 F. Supp. 118, 118-19 (S.D.N.Y. 1954) (concurrent litigation “involv[ing] the same parties and the same issues” in Canal Zone District Court did not require dismissal).

no reason other than the pendency of Hananel's would simply reward the race to the courthouse.

Other courts have denied *forum non conveniens* motions even where the *same plaintiff* had brought suits on the same cause of action in multiple forums. See *Ravelo Monegro*, 211 F.3d at 511; *Asiatic Petroleum*, 119 F.2d at 613; *Minibooster Hydraulics A/S v. Scanwill Fluid Power ApSv*, 315 F. Supp. 2d 286, 290-91 (W.D.N.Y. 2004).¹⁰ If administrative concerns did not mandate dismissal in those cases, where the same party was responsible for both suits, they can hardly be *dispositive* in this case, where the plaintiff has selected only one forum, his home forum.

2. The Cases On Which The Magistrate Judge Relied Are Not To The Contrary

In support of his decision to rely solely on the pendency of concurrent litigation abroad, the Magistrate Judge cited two inapposite district court cases and one case from this Court that affirmed an *exercise* of jurisdiction. *LinkCo, Inc. v. Nichimen Corp.* involved not merely a concurrent proceeding, but a prior foreign *judgment* in favor of one defendant, which the court was required to credit according to the principle of comity. 164 F. Supp. 2d 203, 213 (D. Mass. 2001).

¹⁰ Cf. *Royal & Sun*, 466 F.3d at —, 2006 U.S. App. LEXIS 25350, at *17 (“Even if we were to adopt the district court’s conclusions that the Canadian action is a parallel action and that Canada provides an adequate forum for RSA’s claims against Century America, those conclusions do not support the district court’s dismissal of the action [on grounds of comity.]”).

LinkCo, moreover, denied the *forum non conveniens* motion of a related defendant and allowed that action to proceed in Massachusetts. See *id.* at 214-16. In *MLC (Bermuda) Ltd. v. Credit Suisse First Boston Corp.*, the plaintiff was a foreign citizen whose suit was dismissed in favor of a proceeding in a foreign court. Unlike here, the court in *MLC* held that the private factors favored litigating overseas and that the parties and issues in the two actions were substantially identical. See 46 F. Supp. 2d 249, 251-53 (S.D.N.Y. 1999).

Finally, *Pritzker v. Yari* did not involve a *forum non conveniens* motion at all — there, this Court *exercised* jurisdiction, in part to avoid forcing the plaintiff to file multiple suits in different courts. 42 F.3d 53, 64 (1st Cir. 1994). This Court did not hold that concerns about administrative efficiency could overcome “the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them.” *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

None of these decisions comes close to finding that a concurrent action against an American citizen in a foreign court mandates — or even justifies — dismissal of a suit in his home forum, where no other factor overcomes the strong presumption in favor of the plaintiff’s forum and where the cause of action arises

out of a contract formed and at least partially negotiated in the forum state.¹¹ Moreover, the existence of concurrent actions is of especially little relevance where, as here, the action in the alternative forum is not far advanced. Compare *Ocean Shelf Trading Inc. v. Flota Mercante Grancolombiana S.A.*, 638 F. Supp. 249, 253 (S.D.N.Y. 1986) (“Since the Colombian action has advanced no further than this one, this factor weighs only minimally in defendants’ favor.”) with *LinkCo*, 164 F. Supp. 2d 203 (granting motion where alternative forum had conducted trial and rendered judgment). Though the Israeli litigation began in 2001, and the Israeli litigation on the Macau claim began in December 2003, the trial has not begun nor has a date for trial been set. The Israeli court has recently acknowledged that its proceedings are still “in preliminary stages.” *Hananel*, Decision on Antisuit Injunction ¶ 2 (ADD-85).

¹¹ The Magistrate Judge also stated that his decision was “consistent” with the decision in *Diatronics, Inc. v. Elbit Computers, Ltd.*, 649 F. Supp. 122 (S.D.N.Y. 1986). FNC Report at 11 (ADD-38). The Second Circuit, however, later emphasized why *Diatronics* has no bearing on a case like this: “In [*Diatronics*], an American corporation had purchased a majority interest in one Israeli corporation from a second Israeli corporation. The contracts at issue had been negotiated and executed in Israel, and the purchaser had hired an Israeli attorney for the negotiations.” *DiRienzo v. Philip Servs. Corp.*, 294 F.3d 21, 33 (2d Cir. 2002). Here, by contrast, “the contract[] at issue w[as] negotiated and executed in” Massachusetts, for employment by a Massachusetts-based corporation. In *DiRienzo*, the Second Circuit, applying the general rule, denied a *forum non conveniens* motion, explaining that “unless the balance strongly favors defendant, plaintiffs’ choice of forum should rarely be disturbed.” 294 F.3d at 30-31 (citing *Gilbert*, 330 U.S. at 508) (internal quotation omitted).

3. **Duplicative Litigation Is Not The Harm That *Forum Non Conveniens* Was Designed To Address**

The persistent refusal of the Supreme Court and the Courts of Appeal to mention concurrent litigation in the context of *forum non conveniens* is no accident, because concurrent litigation is not relevant to the historic roots of the doctrine. *Forum non conveniens* was introduced to the United States in the 20th Century, in part to ease congestion in “major urban centers, which had undergone rapid industrial expansion [and] found their courts extremely crowded. Although the causes were no doubt complex, one of the reasons for the congestion was perceived to be the solicitation of lawsuits properly belonging in other districts” by lawyers who were based in cities or expected larger verdicts there. Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 802-03 (1985); see also Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1, 1, 34 (1929) (lamenting congestion in “larger centers of population” caused by “a desire to sue where verdicts are largest”); *Gilbert*, 330 U.S. at 508 (“Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin.”).

The evil that the doctrine was intended to prevent, therefore, was not the near-simultaneous filing of partially overlapping suits by opposing parties; rather, it was the systematic shift of cases from rural to urban courts, depriving the former

of control over local disputes and imposing additional costs on the latter. Massachusetts, needless to say, does not face a crush of litigation over disputes with connections to Israel.

B. Even If Concurrent Litigation Were Relevant, It Would Provide No Reason To Dismiss The Present Case

1. The Differences Between The Two Cases Are Too Great To Warrant Dismissal

The present action and the Israeli suit differ critically in scope. In the 2003 Israeli action, Hananel demands shares in *only* the Las Vegas Sands development in Macau. The American lawsuit, by contrast, seeks a declaration that Adelson “owes defendant nothing and that defendant is not entitled to any option, interest or claim to *any business* in which plaintiff has any interest.” Complaint ¶ 33 (A-22).¹² The Amended Complaint, which the District Court did not mention in its one-sentence order, makes this point even clearer. Compare Amended Complaint ¶ 42 (A-24h) (requesting “declaratory judgment that Hananel has no rights in any of the casino/hotel/real estate/investments *anywhere in the world* made by plaintiff or in which plaintiff has any interest”) with Hananel’s Israeli Complaint ¶ 1 (A-39) (“This Complaint concerns the Defendants’ undertaking to give the Plaintiff stock

¹² See also Complaint ¶ 29 (A-21) (Hananel’s “persistence has created a bogus dispute as to what the IPI employment agreement negotiated between the parties provides, if anything, to Hananel with respect to Macau *or otherwise*.”) (emphasis added).

options in a casino venture in the Macau region of the People’s Republic of China.”).

That is a vital distinction. Hananel has repeatedly asserted a right to obtain a 12% share of any of Adelson’s projects worldwide — not just in Macau.¹³ These broader allegations are not at issue in the Israeli proceedings. If this case is dismissed, the legitimacy of Hananel’s claim for rights beyond the Macau project will not be adjudicated anywhere. Indeed, Hananel could *lose* the Israeli action yet still try to claim shares in investments outside Macau. That would not be the case if Adelson prevails in the Massachusetts suit. Adelson has brought suit in this Court to have his rights vis-à-vis Hananel determined once and for all.

AAR International, Inc. v. Nimelias Enterprises S.A. is directly on point. There, the Seventh Circuit reversed the dismissal (on abstention grounds) of a U.S. action because “it is possible that VH could prevail in the Greek action without defeating all of AAR’s claims in the federal action.” 250 F.3d 510, 521 (7th Cir. 2001). Similarly, it is possible in this case that Adelson could prevail in the Israeli action without defeating all of Hananel’s claims that are the subject of the present action. Therefore, the dismissal of the action here would leave Hananel’s broader

¹³ See, e.g., February 22, 2005 Hananel deposition at 135-36 (A-276) (claiming entitlement to shares if Adelson invests in Ireland, Malta, Morocco, “Bulgaria, Italy, Rhodes, [Cyprus,] Turkey, Jordan, * * * Czechoslovakia, * * * Israel, * * * and maybe others”); Hananel affidavit filed in Tel Aviv District Labor Court ¶¶ 8, 21-23, 27.11, 27.18, 30, 48, 65, 74.3 (A-179, 187-92, 200-01, 203, 208, 214, 221-22, 229-30).

claims unresolved. (Moreover, the AAR court held, “even if we were to conclude that either of the Greek actions were parallel to the federal action, we would not affirm the district court’s decision to abstain in this case.” *Id.* at 522.)

The difference between the two actions here, moreover, goes to the heart of the purpose of declaratory judgment: “[T]he purpose of the Declaratory Judgment Act is to enable those threatened to remove such a cloud on their commercial activity, instead of being obliged to await the convenience of the threatening party.” *Phillips Plastics Corp. v. Kato Hatsujou Kabushiki Kaisha*, 57 F.3d 1051, 1053 (Fed. Cir. 1995).¹⁴ The Israeli litigation, the scope of which is controlled by Hananel, ***will not remove the uncertainty***. Even if the Israeli court rejects Hananel’s claim as to an alleged ownership interest in the Macau project, he will remain free to litigate (and threaten to litigate) over other investments around the world in which he claims he was involved years ago, however peripherally. Only this case ensures a comprehensive adjudication of the dispute.

The Magistrate Judge could only go so far as to offer this tenuous characterization of the relationship between the present case and the Israeli litigation:

¹⁴ See also *Great Am. Ins. Co. v. Houston Gen. Ins. Co.*, 735 F. Supp. 581, 584 (S.D.N.Y. 1990) (“[T]he declaratory judgment procedure ‘enable[s] a party who is challenged, threatened, or endangered * * * to initiate the proceedings against his tormentor and remove the cloud by an authoritative determination.’” (quoting BORCHARD, DECLARATORY JUDGMENTS 280 (2d ed. 1941)) (alteration in original)).

Both of Hananel's Israeli suits (and the suit that Adelson filed in Israel noted in footnote 1) share *some common facts* with the instant suit; each involves *roughly the same parties* fighting over *various aspects* of Hananel's employment relationship or work for Adelson and/or IPI.

FNC Report at 3 (ADD-30) (emphasis added). Even if a complete identity of foreign and U.S. cases could outweigh the "strong presumption" in favor of a U.S. plaintiff's choice of a U.S. forum, there is no such identity here — the Magistrate Judge found only that the Israeli actions have some issues in common with the present suit, the whole purpose of which is to resolve the dispute comprehensively.

2. Dismissal Of The Present Suit Does Not Conserve Judicial Resources, As This Is The Only Action That Can Completely Resolve The Parties' Dispute

Dismissing the present action, far from avoiding duplicative litigation, would likely condemn Adelson — and courts around the world — to an endless torrent of claims by Hananel. The limited scope of the share claim in Israeli is not surprising. Hananel, as plaintiff in that lawsuit, determines what issues are before the Israeli court. He appears to have tailored his complaint in Israel so as to avoid adjudication of the parties' entire dispute. In fact, in an affidavit filed in Israel in November 2004, Hananel began laying the groundwork for additional claims by asserting an entitlement to future investments, even those made long after Hananel's termination, and by describing trips to over a dozen countries, which he supposedly took on Adelson's behalf. See Hananel's Israeli affidavit ¶¶ 8, 21-23, 27.11, 27.18, 30, 48, 65, 74.3 (A-179, 187-92, 200-01, 203, 208, 214, 221-22, 229-

30). He has not, however, directly asserted any legal claims in the pending Israeli action relating to those other ventures. Thus, that “work” could serve as the basis for a claim if Adelson makes an investment in any of those countries.

That prospect of endless litigation motivated Adelson to bring this action, in the jurisdiction in which the parties formed the contract, to resolve once and for all the terms of that contract and Hananel’s entitlement, if any, to shares in Adelson’s ventures. Dismissing this suit so that Hananel can pursue repetitive piecemeal litigation around the world is short-sighted and will not conserve judicial resources.

3. The Magistrate Judge’s Assumption That The American Court, Rather Than The Israeli Court, Should Relinquish Jurisdiction Was Unjustified

Finally, even assuming that judicial economy did argue in favor of consolidating the cases, the Magistrate Judge provided no legitimate reason why *this* action should be dismissed, rather than the Israeli one. *Cf. Peach*, 2006 WL 456772, at *9 (pendency of action filed by same plaintiff in another forum “fails to demonstrate why litigating the *present* case in [this forum] raises administrative difficulties” (emphasis added)). As the Magistrate Judge himself acknowledged, Adelson filed this suit to disclaim any personal responsibility to Hananel “merely two months after Hananel’s 2003 suit first raised the Macau venture issue.” FNC Report at 9 n.4 (ADD-36). Significantly, the Israeli court has denied Hananel’s

attempt in Israel to block this U.S. lawsuit. See *Hananel*, Decision on Antisuit Injunction ¶ 7 (ADD-87-88). The Israeli courts’ indication that they have no objection to allowing this case to proceed should factor heavily against dismissal. See *Bigio*, 448 F.3d at 180 (reversing *forum non conveniens* dismissal and noting that “Egypt has never raised any objection to the U.S. court deciding this case”).

Massachusetts has expressed its strong interest in adjudicating contract disputes such as this one. As the S.J.C. put it, “Massachusetts has an interest not only in providing a forum for its residents, but also in enforcing business transactions *consummated within its boundaries*. * * * We think failure to honor a contractual obligation incurred in a state cannot reasonably be said to be without consequences there. The effects of such a breach of contract on the general conduct of business may not be readily quantifiable, but they are, nonetheless, real.” *Carlson Corp. v. Univ. of Vt.*, 380 Mass. 102, 108, 402 N.E.2d 483, 486 (Mass. 1980) (emphasis added and internal quotation and alteration omitted).

As the Magistrate Judge previously concluded in the Jurisdiction Report,

Massachusetts has an interest not only in providing a forum for its residents, but also in enforcing business transactions consummated within its boundaries. Carlson, 380 Mass. at 108. 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.

Jurisdiction Report at 22-23 (ADD-22-23).¹⁵ Under these circumstances there was no reason to give the Israeli case priority.

III. The Magistrate Judge’s Balancing Was An Abuse Of Discretion

Even if the Magistrate Judge were permitted to consider the legally improper factors on which he relied so heavily, his weighing of those factors would still have been a reversible abuse of discretion. A *forum non conveniens* dismissal must be reversed when the lower court “clearly err[ed] in weighing the[factors].” *Iragorri*, 203 F.3d at 12; see also *Wiwa*, 226 F.3d at 101 (reversing where “the factors that led the district court to dismiss in favor of a British forum were not particularly compelling”).

A. Exclusive Reliance On A Single Factor Is An Abuse Of Discretion

“As a general rule, a trial court may not predicate a *forum non conveniens* dismissal on a single factor.” *Lacey v. Cessna Aircraft Co.*, 932 F.2d 170, 189 (3d Cir. 1991); see also *In re Air Crash*, 821 F.2d 1147, 1163 (5th Cir. 1987) (“The Court in both *Gulf Oil* and *Koster* emphasized that no one private or public interest

¹⁵ The forum state’s interest in the litigation is a relevant public factor under *Gilbert*. See 330 U.S. at 509 (noting “local interest in having localized controversies decided at home”); see also *Mercier*, 981 F.2d at 1354. The Magistrate Judge found that this factor, too, was evenly balanced. See FNC Report at 8-9 (ADD-35-36).

factor should be given conclusive weight.”). The Supreme Court has explained that “[i]f central emphasis were placed on any one factor, the *forum non conveniens* doctrine would lose much of the very flexibility that makes it so valuable.” *Piper Aircraft*, 454 U.S. at 249-50. The court below flouted that rule, finding that all factors but one were “in equipoise” but nonetheless dismissing the case based on a single factor (itself of dubious relevance, as discussed *supra* in Section II.A).

B. This Case Does Not Implicate The “Central Concern” Of *Forum Non Conveniens* — Vexation And Harassment

In balancing the factors, the Magistrate Judge ignored the fact that this case does not present the “central concern of the *forum non conveniens* doctrine.” *Lony*, 935 F.2d at 615. The Supreme Court explained in *Gilbert* that the purpose of the doctrine is to deal with “those who seek not simply justice but perhaps justice blended with some harassment.” 330 U.S. at 507. The Third Circuit elaborated, before vacating a dismissal:

[W]e note that in this case, the central concern of the *forum non conveniens* doctrine is not implicated. The Supreme Court has explained that the primary danger against which the doctrine guards is the plaintiff’s “temptation to resort to a strategy of forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself,” so that he can “‘vex,’ ‘harass,’ or ‘oppress’ the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy.”

Lony, 935 F.2d at 615 (quoting *Gilbert*, 330 U.S. at 507, 508).

In this case, the Magistrate Judge made an express finding that this “central concern” was absent:

Hananel makes much of the fact that choosing a forum in order to vex or harass an opponent may defeat the presumption that a plaintiff otherwise enjoys. On the record before the Court, however, *Hananel has not established such a purpose*. Plainly this Court possesses subject matter jurisdiction over the complaint. Plainly, on the evidence submitted by Plaintiff, Massachusetts has a meaningful connection to the litigation. * * * On this record, I do not find that this suit was filed to vex or harass.

FNC Report at 9 n.4 (ADD-36). The Israeli court agrees. See *Hananel*, Decision on Antisuit Injunction ¶ 6 (ADD-87) (“We have not been persuaded that the claim filed abroad was filed by [Adelson] in bad faith or that it is a vexatious claim. We have no data before us from which one can deduce that justice requires [us] to deny a hearing into that claim.”).

Given that the Magistrate Judge found that the concern that motivates the entire doctrine was absent, it is not surprising that he did not find a strong balance in favor of dismissal. Nonetheless, he recommended, and the District Court ordered, the “rare” remedy of dismissal. *Gilbert*, 330 U.S. at 508. This misbalancing was so egregious as to constitute reversible error.

CONCLUSION

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

November 14, 2006

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 9,353 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.

November 14, 2006

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**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

SHELDON G. ADELSON,
Plaintiff-Appellant /
Cross-Appellee,

v.

MOSHE HANANEL,
Defendant-Appellee /
Cross-Appellant.

06-2281 & 06-2282

CERTIFICATE OF SERVICE

I, Andrew H. Schapiro, admitted pro hac vice to this Court, hereby certify that on Tuesday, November 14, 2006, I caused to be served upon counsel of record for Appellee Moshe Hananel two paper copies and one disc containing an electronic copy of the Brief for Appellant Sheldon G. Adelson via overnight mail to the address below.

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