

09-2231

United States Court of Appeals for the First Circuit



SHELDON G. ADELSON,
Plaintiff-Appellee,

v.

MOSHE HANANEL,
Defendant-Appellant.

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

BRIEF OF APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Appellant Sheldon G. Adelson is a natural person. Accordingly, a corporate disclosure statement is not required by Federal Rule of Appellate Procedure 26.1.

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COUNTER-STATEMENT OF THE ISSUES

1. Whether the party alleging the existence of and seeking to enforce a contract is relieved of the burden of proof merely because the other party preemptively sues for a declaratory judgment.

2. Whether a party waives the right to have the correct burden of proof applied by addressing the issue only when so directed by the court.

3. Whether the district court may exercise specific jurisdiction over a defendant who contracts with a Massachusetts company and whose business activities involve travel to Massachusetts and frequent communication with the Massachusetts head office.

4. Whether the trial court abused its discretion by denying a missing-witness inference to the defendant, where the defendant made no attempt to secure the witness's testimony.

5. Whether the district court committed clear error in evaluating the credibility of testimony and finding that there was no meeting of the minds on an alleged oral contract.

6. Whether the district court committed clear error by finding that, if an agreement existed, the defendant failed to earn any compensation, because (a) any reasonable gap-filling contract term would have required more work than the

defendant performed and (b) the defendant had not even satisfied the standard that he alleged the parties had agreed to.

PRELIMINARY STATEMENT

This declaratory judgment action sought adjudication of appellant Moshe Hananel's rights under a terminated oral contract. Plaintiff-appellee Sheldon Adelson is the owner of Interface Partners International, Ltd. ("IPI"), which employed defendant-appellant Hananel until 2000. The parties agree that Hananel was entitled to share in the profits of certain investments that he brought to a successful conclusion on IPI's behalf. Massachusetts employees regularly supervised and assisted Hananel, and his contract was formalized in Massachusetts. IPI fired Hananel in 2000.

Hananel later commenced litigation against Adelson in Israel, asserting that Hananel was entitled to some type of option, the exercise of which would obligate Adelson to transfer a 12-percent interest in a multi-billion-dollar casino and real estate development in Macau, China to Hananel. The basis for Hananel's claim was his own testimony that by handing Adelson a map and some investment brochures (relating not to Macau but to a region in mainland China), along with what Hananel himself calls a "hastily prepared" business plan, he "initiated" development of what has become one of the largest casinos in the world.

The district court held a three-week bench trial and found that there was "no meeting of the minds" on the option term of Hananel's contract, and that even if the contract had been as Hananel alleged, the ineffectual and unrelated efforts that

he described would not have been enough to trigger the finder's fee that he claimed. Hananel challenges these fact findings largely by repeating his own testimony, which Judge Saris found not credible. He comes nowhere near proving clear error.

Hananel also raises two procedural objections, relating to the assignment of the burden of proof and the denial of a missing-witness inference. Judge Saris's rulings on both issues are amply supported in the law, and it is clear from her findings of fact that neither issue affected the outcome of the case.

This Court should affirm the judgment below.

COUNTER-STATEMENT OF THE CASE

On August 19, 2001, defendant-appellant Moshe Hananel filed a lawsuit in Israel against plaintiff-appellee Sheldon Adelson and IPI asserting claims arising out of Israeli employment law. A650. On December 17, 2003, Hananel filed another lawsuit in Israel, claiming that he was entitled to some type of "option" in Las Vegas Sands Inc.'s proposed casino and real estate development in Macau, China. A659.¹

Seeking to resolve the option claim in a U.S. forum and to dispose of Hananel's option claims *in toto* (rather than limited to the Macau development), Adelson filed this declaratory judgment case on February 23, 2004. A3 (Docket

¹ As of the date of this brief, no judgment has been issued in the Israeli cases.

#1). The complaint also asserted claims for civil extortion, defamation, and malicious interference with business relationships. Hananel moved to dismiss, first for lack of personal jurisdiction, and then for *forum non conveniens*. A3, 4 (Docket #6, 8). Following jurisdictional discovery (A7 (Docket # 43)), on November 29, 2005, the late Judge Reginald C. Lindsay adopted the recommendation of Magistrate Judge Leo Sorokin and granted Hananel's motion as to three claims, but denied it without prejudice as to the declaratory judgment claim. A11 (Docket #78). On July 18, 2006, the district court granted Hananel's motion to dismiss for *forum non conveniens*. A18 (Docket #151). Judge Lindsay again adopted the recommendation of Magistrate Judge Sorokin, which found that the private factors of convenience were "in equipoise" but that the pendency of the Israeli lawsuit brought by Hananel established a strong balance in favor of dismissal. Report & Recommendation (3/28/06) at 5.

On appeal, this Court reversed as to *forum non conveniens* and, on a cross-appeal, affirmed as to jurisdiction. *Adelson v. Hananel*, 510 F.3d 43 (1st Cir. 2007). This Court found that Hananel had minimum contacts with Massachusetts, that the present case arises out of those contacts, and that the exercise of jurisdiction was reasonable. *Id.* at 52.

Following remand, the parties conducted merits discovery. Judge Patti B. Saris conducted a three-week bench trial, and found in favor of Adelson. A37 (Docket #319). This appeal followed. A37 (Docket #322).

COUNTER-STATEMENT OF THE FACTS

Sheldon Adelson

Sheldon G. Adelson is a United States citizen and Nevada domiciliary, with residences there and in Newton, Massachusetts. Tr. Vol. 1 at 7:20–11:18. Adelson grew up poor in Massachusetts, and lived in the state until about 1995. Add-2; Tr. Vol. 1 at 9:2–7.² A lifelong entrepreneur, Adelson, through The Interface Group, developed the COMDEX computer exhibition, one of the world’s largest computer trade shows. Following the sale of COMDEX, Adelson acquired a controlling interest in Las Vegas Sands Inc. (“LVSI”), a casino and hotel operator, the successor of which is now the owner of The Venetian hotel in Las Vegas and another successor of which is now the owner of the Sands Macao and The Venetian Macao Resort-Hotel in Macau, China. Add-3, 4.

In 1994, Adelson established IPI to manage existing and future investments in the Israeli high-tech industry. The office that was the predecessor to IPI’s Israeli

² “Add-” cites refer to the Addendum to Hananel’s brief. Pages Add-1 through -39 comprise the ruling from which Hananel appeals, *Adelson v. Hananel*, 641 F. Supp. 2d 65 (D. Mass. 2009). “Tr.” cites refer to the trial transcript. “A__” cites refer to the appendix.

office was first run by David Farbstein, Adelson’s brother-in-law. Tr. Vol. 1 at 36–40. Farbstein earned a salary and also had an opportunity to co-invest—*i.e.*, to invest alongside, and simultaneously with, his employer—in deals that he brought to the company. Add-7; Tr. Vol. 1 at 41:4–44:15.

Moshe Hananel

Appellant Moshe Hananel is an Israeli businessman and former personal friend of Adelson. He was hired in late 1995 to manage a branch office of IPI. Hananel managed IPI’s office in Ramat Gan, Israel, but IPI was substantially operated and overseen out of Needham, Massachusetts. Add-5. The Ramat Gan office was intended to identify and manage high-tech investments in Israel. Add-4, 8–10. It is uncontested that the course of Hananel’s business included regular reports to, and contact with Adelson personally and staff in the Massachusetts office. Add-13; Tr. Vol. 11 at 63:14–68:10.

Hananel claims that his oral contract entitled him to a 12% “option” in any investment opportunity anywhere in the world, “with the incongruous exception of the United States” (Add-36), that Hananel “initiated,” provided that Hananel “put up the proportionate costs of the investment *at any point*” in time.³ Add-9 (emphasis added); Hananel Br. at 10. In other words, Hananel does not claim co-

³ Hananel’s own description of this alleged term has evolved over time. Adelson’s proposed findings of fact (Docket #288 ¶ 136) summarizes the accounts in Hananel’s complaints and affidavits in Israel, and his testimony in this case.

investment rights, like Farbstein was granted, which would permit him to invest alongside Adelson; rather, he claims that he could wait indefinitely before deciding to buy out 12% of Adelson's stake at the original price. He also asserts that the alleged options would survive his termination from IPI, and could be triggered by Hananel's mere mention of an idea. Adelson and IPI's general counsel, Paul Roberts, testified, however, that Hananel was entitled only to a 12% stake in the "net profits of high tech investments in Israel that Hananel, found, recommended, and supervised and which came to fruition while he was employed at IPI, but only so long as he remained employed there." Add-9.

After several years in which IPI's Israel office made a total of only two investments, Hananel was fired in 1999. Add-17–18.

The Macau Development

Macau, a former Portuguese colony, is now a Special Administrative Region of the People's Republic of China and since the 1960s has been one of the largest gambling centers in Asia. From the 1960s until 2002, Stanley Ho held the only government concession to operate a casino in Macau. Adelson and LVSI employees long had been aware of Macau and its potential, but they also were aware of Ho's monopoly and the looming transfer of the city from Portuguese to communist Chinese control. Tr. Vol. 5 at 78–84; Tr. Vol. 8 at 55:15–21; Tr. Vol 5 at 81:16–21.

Eventually, rumors began to circulate that the Macau government would consider liberalizing gambling. Add-18. In July 2001, Adelson met with Chinese officials in Beijing. Tr. Vol. 8 at 53:4–54:4. At the meeting, a Macau official asked whether Adelson would consider building a hotel in Macau, a suggestion that took Adelson by surprise. Tr. Vol. 8 at 54:4–58:6. The next month, on August 30, 2001, the Macanese authorities proposed to grant three casino concessions by tender offer. Add-19. Adelson, through LVSI, resolved to participate. Add-19–20.

The process proved complicated and expensive, requiring the concerted efforts of the LVSI staff. Add-19–21. LVSI ultimately failed to acquire a concession in its own right, but LVSI partnered with Galaxy Casino Company, one of the successful bidders, thus entitling LVSI to build and operate a casino in Macau. Add-20. Construction began on several properties in 2003, and the first LVSI-backed casino in Macau, the Macau Sands, opened in 2004. Add-20–21. As of the date of trial, the cost of Adelson’s Macau investment exceeded seven billion dollars. Add-21. Macau is now “the most profitable gaming destination in the world.” Add-18.

Hananel’s Claim

After Hananel learned of the Macau development, which began several years after his firing, he started claiming that he was entitled to an ill-defined “option” on

12% of the project pursuant to his oral employment contract. Specifically, Hananel argues that, because he provided Adelson with basic information about Macau and its potential as a gaming destination, he is entitled to a 12% share in the multi-billion dollar Macau operations of LVSI, a company that he never worked for or had any relationship with. Add-1, 9. As Hananel’s own appellate brief describes it, his efforts, in full, were as follows:

[Hananel and Arieh Lees] discussed Zhuhai⁴ and Macau and Lees provided him with investment guides about Zhuhai. Hananel proceeded to do some research on Zhuhai and Macau and the potential of investing there. At some point, Hananel discussed these ideas with Adelson. He prepared some limited materials on Zhuhai and Macau for Adelson and urged him to visit Macau.

Br. 19.

The trial record is hardly more expansive. Hananel testified that he came up with the idea of building casinos in Macau, and thereby initiated the LVSI developments, in a private meeting with Adelson in 1999. Tr. Vol. 8 at 53:1–3; Tr. Vol. 11 at 11:7–16:15. Adelson testified that “[t]he word ‘Macau’ never passed between me and Hananel, never.” Tr. Vol. 8 at 53:1–3. Hananel claims that he gave Adelson “a map of the Far East,” “the investment guide to Zhuhai,” and a “brochure with picture on Macau, which [Hananel] had from Israeli travel office.” Tr. Vol. 11 at 20:6-8, 29:19–35:21, 81–86, 94:13–96:18. Later, Hananel says, he

⁴ Zhuhai is “a special economic zone of China bordering Macau.” Add-19. Hananel’s description of Zhuhai as “a region of Macau” (Br. 11) is simply incorrect. Gambling is “a criminal offense” in Zhuhai. Tr. Vol. 13 at 19.

also sent Adelson a business plan, consisting of “a program for hotel in the size of 1,000 room, of a congress center modular, [a]n entertainment center separately, and [a]n exhibition,” together with an “article about the economical impact on casino on the surrounding population regarding job creation and impact on the economy.” Tr. Vol. 11 at 29-30. He also offered a sketchy piece of strategic advice: “We cannot go with the flag waving casino. We’ll need to use similar strategy to the strategy we used in Israel and Jordan, because of the sensitivities to casino.” Tr. Vol. 11 at 17:1–15. Subsequent events proved that advice to be flat wrong. Macau showed no “sensitivities to casino[s],” but actively marketed the concessions, and Adelson and LVSI had to pursue them aggressively.

Hananel’s assertion that Adelson “even admitted to Hananel that he had never heard the word ‘Macau’ before” (Br. 12) is refuted by the very testimony on which he relies. Adelson explained that “I knew the name Macau, but I had no interest, didn’t know of the possibility at all, had no interest. And the possibility of Americans or anybody besides the monopolists doing business in Macau was never heard of, not thought of by the Macau government.” Add-47 (at 328:18–22). Adelson’s testimony is consistent with the conclusion that, while everyone in the gaming industry knew about Macau, everyone also knew that in 1999 it was impossible for foreigners to invest there. Hananel attempts to turn his ignorance of the latter point into proof of his strategic vision.

Whatever Hananel may have done, his “efforts” failed: more than a year later, and months after Hananel’s termination, when others brought Macau to Adelson’s attention, he rightly regarded the opportunity as either impossible, or not yet ripe, and declined to pursue it. Add-19, 38; Tr. Vol. 8 at 50:14–22.

Danny Raviv

Danny Raviv has worked on and off for IPI and LVSI. His contract provided that he would receive eight percent of business brought by him to IPI, subject to certain limitations. Tr. Vol. 1 at 61:3–63:16. At trial, Raviv was in Israel. Tr. Vol. 2 at 58:5–9. Hananel made no attempt to call him as a witness. Add-22 n.3.

Adelson consistently argued that the only witnesses with relevant testimony were the two parties. Magistrate Judge Sorokin agreed, stating that this case is “essentially a swearing contest” between Adelson and Hananel. Report & Recommendation (3/28/06) at 7. Hananel, however, attempting to prove the impracticability of litigating this case in Massachusetts, argued that legions of foreign witnesses, including Raviv, would be required to testify. Hananel succeeded in delaying trial for many months while he pursued letters rogatory and telephonic depositions of those witnesses. Nonetheless, even though Hananel had included Raviv on his own witness list (A261), he made no attempt to call or depose him, or to guarantee his testimony by deposition or letter rogatory. Tr. Vol. 15 at 68:5–12.

SUMMARY OF THE ARGUMENT

This appeal should be the last step in Hananel’s attempt to extract hundreds of millions of dollars from Adelson based on his uncorroborated testimony about a single meeting and an irrelevant investment brochure. The questions here are considerably simplified by two prior rulings. First, this Court previously rejected Hananel’s claim that Massachusetts courts lack jurisdiction over him. That holding technically was made under a different evidentiary standard, but Judge Saris’s findings of fact support almost all of the allegations on which this Court relied. Second, Judge Saris’s findings of fact and credibility evaluations eviscerated Hananel’s claim on the merits. She found that (1) there was no enforceable option agreement; (2) Hananel’s minimal efforts were insufficient to satisfy any reasonable gap-filling term that the court could supply; and (3) Hananel’s efforts were insufficient to satisfy even the low standard that he claims the contract set. Any one of these findings is independently sufficient to support judgment for Adelson, and Hananel quibbles with those findings merely by repeating his own testimony. He does not establish clear error.

1. Judge Saris correctly applied Massachusetts law in finding that the “natural plaintiff” bears the burden of proof on a contract claim, even if the other party is the plaintiff seeking declaratory relief. Hananel’s assertion that Adelson waived this issue is completely unsupported by Massachusetts law. In any event, even if

the burden of proof were as Hananel wishes it to be, any error would have been harmless, as the court below found that “it is clear” that Hananel’s claim failed for multiple reasons.

2. The district court’s finding of jurisdiction was based on this Court’s prior ruling and its own fact findings, which were not clearly erroneous. By seeking out employment with a Massachusetts company, engaging in frequent communications with the head office in Massachusetts and with Adelson himself, and traveling to Massachusetts on company business, Hananel purposefully directed his conduct towards the jurisdiction. Hananel’s attempt to argue that jurisdiction is otherwise unreasonable is identical to the argument previously rejected by this Court.

3. The district court properly declined Hananel’s request to draw an adverse inference based on Adelson’s failure to bring Danny Raviv from Israel. Hananel made a tactical decision to take the testimony of numerous other Israeli witnesses but not Raviv, and it has never been clear how Hananel thinks that Raviv’s testimony could have helped him. The court cannot grant an adverse inference based on hypothetical testimony that there is no reason to believe that the witness would have given. Moreover, as with the burden of proof, the district court’s findings made plain that any inference from missing third-party testimony would not have resulted in a judgment in Hananel’s favor.

4. Finally, the district court's findings of fact were not clearly erroneous. The district court found in Adelson's favor on several independent grounds. Hananel's bland recitation of his own evidence (mainly his own testimony, which the court did not believe) falls far short of proving clear error.

ARGUMENT

Standard of Review

The district court's allocation of the burden of proof is reviewed *de novo*. See *Estate of Abraham v. Comm'r*, 408 F.3d 26, 35 (1st Cir. 2005).

A district court's findings of fact in support of jurisdiction, made under the preponderance-of-the-evidence standard, are reviewed for clear error. See *Foster-Miller, Inc. v. Babcock & Wilcox Canada*, 46 F.3d 138, 147 (1st Cir. 1995). It is not clear why Hananel cites *Reich v. Newspapers of New England, Inc.*, which did not address personal jurisdiction at all. Hananel Br. 30 (citing 44 F.3d 1060, 1069 (1st Cir. 1995)). Review of legal conclusions from those facts is *de novo*. See *Foster-Miller*, 46 F.3d at 147.

An appellate court may reject a trial court's findings of fact only for clear error. Where evidence admits of multiple conclusions, the district court's choice of one cannot, as a matter of law, constitute clear error. See *Amadeo v. Zant*, 486 U.S. 214, 225–26 (1988); *Northern Ins. Co. v. Point Judith Marina, LLC*, 579 F.3d 61, 67 (1st Cir. 2009). Moreover, “when a trial judge's finding is based on his

decision to credit the testimony of one of two . . . witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error.” *Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985).

The denial of a “missing witness” instruction is reviewed for abuse of discretion. See *Latin Am. Music Co. v. Am. Soc. of Composers, Authors & Publishers*, 593 F.3d 95, 101 (1st Cir. 2010). Where the trial judge is also the factfinder, her decision concerning how much weight to give to any such inference is a finding of fact subject to independent review for clear error.

Discussion of the Issues

I. The District Court Properly Assigned Hananel the Burden of Proof.

Hananel’s first issue on appeal is Judge Saris’s conclusion that, as the claimant in this contract action and thus the “natural plaintiff,” Hananel bore the burden of proof, even though Adelson was the nominal plaintiff seeking declaratory relief. There is no indication in the decision below that the facts were so close that the burden of proof had any effect on the outcome, and in any event, the district court’s decision was amply supported by Massachusetts law, which holds that courts may not penalize a party for commencing a declaratory judgment suit by imposing on him a burden that he would not bear in any other procedural posture.

A. As the Natural Plaintiff in the Underlying Contract Claim, Hananel Bears the Burden of Proof.

The allocation of the burden of proof is a question of substantive law and, therefore, in diversity actions, is governed by state law. See *Palmer v. Hoffman*, 318 U.S. 109, 117 (1943). Under Massachusetts law, the defendant in a declaratory judgment case bears the burden of proof on any issue as to which he is the “natural plaintiff.” See, e.g., *Haskell v. Versyss Liquidating Trust*, 912 N.E.2d 481, 486 (Mass. App. Ct. 2009) (“In a declaratory judgment action, the determination concerning which party has the burden of proof depends on the nature of the underlying action.”). The “burden does not shift,” therefore, “merely because it was [the other party] which initiated the declaratory judgment proceedings.” *Ranger Ins. Co. v. Air-Speed, Inc.*, 401 N.E.2d 872, 875 n.9 (Mass. App. Ct. 1980).

Hananel attempts to avoid that result by arguing that Adelson was “attempting to avoid liability under an acknowledged oral contract” (Opp. 26), a description that makes it sound as if Adelson was seeking to rescind or modify a contract. That is not accurate. Adelson sought a declaration that Hananel’s demand for options lacked a contractual basis; the fact that there happened to be *a* contract between the parties (which did not include such a term) does not change Adelson’s suit into one seeking “affirmative relief.” Massachusetts courts consistently hold

that seeking a declaratory judgment does not shift the burden to the plaintiff. See *Stop & Shop v. Ganem*, 200 N.E.2d 248, 252 (Mass. 1964); *Ranger Ins.*, *supra*.

Hananel’s discussion of the cases rests on the erroneous assertion that “there was no general rule placing the burden of proof on Hananel.” Opp. 28. In a suit for damages, however, Massachusetts allocates the burden of proof to the party seeking to enforce a contract. See *Michelson v. Digital Fin. Servs.*, 167 F.3d 715, 720 (1st Cir. 1999); *Canney v. New England Tel. & Tel. Co.*, 228 N.E.2d 723, 727 (Mass. 1967).

In light of that rule, the trial court’s reliance on *Stop & Shop* was entirely appropriate. Hananel argues that the defendant there properly bore the burden because he “asked the Court to affirmatively recognize and enforce an alleged implied covenant.” Opp. 27. But the *Ganem* defendant “asked the Court” for that relief only by resisting the plaintiff’s request for a declaration—precisely what Hananel asked the court for here. The S.J.C.’s reasoning is therefore directly on point:

Had the [defendants] brought an action for damages for breach of an implied covenant to continue operations they would, of course, have had the burden of showing the covenant. That the [plaintiff] initiated the proceeding for declaratory relief does not shift that burden to the [plaintiff].

200 N.E.2d at 252. Hananel would bear the burden in any action for damages, he bears the burden in his Israeli suit for declaratory judgment, and he does here as well.

Hananel's attempts to distinguish the other cases cited by Judge Saris are equally unpersuasive. While it is correct that this case, unlike *Foley v. McGonigle*, does not involve an alleged easement (Hananel Br. 27-28), the rule that "the party asserting an easement" bears the burden in a declaratory suit brought by his adversary (326 N.E.2d 723, 724 (Mass. Ct. App. 1975)) cannot be squared with Hananel's position that the plaintiff always bears the burden, even when he seeks only declaratory relief. Likewise, while *Ranger Insurance* and *Camp Dresser & McKee, Inc. v. Home Ins. Co.*, 568 N.E.2d 631, 633 (Mass. Ct. App. 1991) (Hananel Br. 28) were not contract cases, they were applications of the general rule that a declaratory judgment suit does not shift the burden to the party seeking to avoid contract liability.

B. Any Error Was Harmless.

Even if placing the burden of proof on Hananel was error, it was harmless. An error concerning the burden of proof is harmless unless "the court's . . . decision at the end of the trial turned on 'burden of proof' rules rather than on the weight of the evidence in the record." *Applewood Landscape & Nursery Co., Inc. v. Hollingsworth*, 884 F.2d 1502, 1506 (1st Cir. 1989). Only where the evidence is

evenly balanced can the burden of proof influence the outcome; otherwise, it is irrelevant. See *Liberty Mut. Ins. Co. v. Sweeney*, 216 F.2d 209, 211 (3d Cir. 1954) (“The only occasion we would have to face up to the question of who bears the burden of proof under the procedure followed in this case would be if, at the end of the testimony, the matter stood in even balance in the mind of the trier of fact.”); *Pacific Portland Cement Co. v. Food Mach. & Chem. Corp.*, 178 F.2d 541, 548 (9th Cir. 1949) (burden of proof error harmless where “there is no showing that, during the trial of this case, at any time or as to any of the matters in issue, [the judge] found himself confronted with that hypothetical situation of ‘evidence evenly balanced’”).

Here, there is no indication that Judge Saris believed that the evidence was in equipoise. She wrote that “*it is clear* that there was no meeting of the minds” and “*it is clear* that the parties simply did not discuss this issue sufficiently to reach a true agreement.” Add-36 (emphasis added). Furthermore, Judge Saris found not only that there was no meeting of the minds, but also that, even had the option term been included in the contract, Hananel’s purported work concerning Macau did not trigger it. She wrote that “[i]n *Hananel’s best case*” his work “is insufficient to constitute initiating the investment.” Add-37 (emphasis added). Even accepting all of Hananel’s testimony and ignoring Adelson’s and Roberts’s, the court below

would have found in Adelson’s favor. The burden of proof did not affect the outcome.

C. Adelson Did Not Waive the Burden of Proof Issue.

The parties briefed the burden of proof after a request from the court, prior to which neither side had raised the issue. Hananel argues that by responding to the court’s request, rather than raising the issue at some indefinite point in the past, Adelson waived the right to have the burden of proof assigned in conformity with Massachusetts law. Br. 29. Put another way, his position is that the court lacked the authority to assign the burden of proof correctly. That suggestion is baseless.

Hananel simply assumes that “as plaintiff, [Adelson] would assume the burden of proof.” Br. 29. As shown above, that is simply wrong—the plaintiff in a declaratory judgment suit does not bear the burden unless it is the natural plaintiff on the underlying claim. Even if Hananel were correct, neither of the ancient foreign cases he cites purports to set a deadline for “shifting” the burden. It appears that the plaintiff in *Liberty Mutual Insurance Co. v. Sweeney*, did not raise the issue until appeal. 216 F.2d at 211. In *N.Y. Life Insurance Co. v. Stoner*, the court stated enigmatically that the plaintiff had “assumed the burden of proof.” 109 F.2d 874, 876 (8th Cir. 1940), *rev’d on other grounds*, 311 U.S. 464 (1940). If that referred to the failure to raise the issue before the trial court, as in *Liberty*, it

does not apply here. And if the plaintiff “assumed” the burden merely by suing for declaratory judgment, then it is inconsistent with Massachusetts law.

And, of course, Hananel cannot show any prejudice from the timing of the court’s ruling. This was a bench trial subject to the preponderance of the evidence standard. If Hananel had known earlier that he would bear the burden, what would he have done? Put on a better case? Given more credible testimony? This objection deserves no consideration.

II. The District Court Properly Exercised Jurisdiction Over Hananel.

Next, Hananel argues that the district court lacked personal jurisdiction. This Court has already held “that the Massachusetts long-arm statute grants jurisdiction over Hananel and that the exercise of that jurisdiction comports with the Due Process Clause of the Fifth Amendment.” *Adelson*, 510 F.3d at 48. While that decision was based on the prima facie standard, the district court made findings of fact—unchallenged by Hananel—supporting almost all of the relevant allegations. This Court must defer to those findings unless they are clearly erroneous. See *Adams v. Adams*, No. 09-1443, 2010 WL 1224233 at *3 (1st Cir. Mar. 31, 2010) (weighing jurisdictional facts under the clear-error standard).

A. The District Court’s Finding of Purposeful Availment Was Correct.

The point most strongly urged by Hananel is that, although his employment relationship with IPI entangled him with companies and personnel in

Massachusetts, the location of those contacts was fortuitous and arose from unilateral decisions by Adelson, rather than any “purposeful availment” on Hananel’s part. That approach is both factually and legally flawed.

1. The district court’s findings of jurisdictional facts are correct and unchallenged.

Judge Saris found that Hananel’s employment was rife with Massachusetts contacts:

Here, Hananel sought out and obtained employment with a company with a Massachusetts office and Massachusetts-based officers, which received substantial assistance from a related Massachusetts-based company, Interface Group Massachusetts. Throughout his employment, Hananel had regular contacts with the employees at the Needham office, including the key officers of IPI. He regularly faxed budgets to the Needham office for approval, and forwarded correspondence for Adelson and sent essential communications to others who worked there. Having sought out a position, Hananel’s contacts with Massachusetts were voluntary, and such a lawsuit in Massachusetts was foreseeable.

Add-26. Hananel does not dispute those findings. Br. 33-34.

The record shows that Massachusetts staff constituted the first line of supervision on all financial matters. Tr. Vol. 4 at 112-27; Tr. Vol. 5 at 7-8. Massachusetts staff also provided support for investments brought to the company by Hananel. When Hananel caused IPI to invest in the Israeli company IMDSOFT, for example, Hananel was made the Chairman of the Board, and IMDSOFT hired a marketing staff based out of Needham, Massachusetts, for the purpose of soliciting contacts in the Commonwealth. Add-15; Tr. Vol. 4 at 31:6-22. Paul Roberts, also

working out of Needham, became IMDSOFT's Vice President and General Counsel, and from there assisted IMDSOFT in legal matters, including an employment dispute. Tr. Vol. 4 at 37:4-20. Hananel attended meetings in Massachusetts on behalf of IMDSOFT. Add-15. While Hananel may have called Adelson at his home in Nevada, it remains undisputed that he also called him at his offices in Massachusetts. Tr. Vol. 4 at 36:1-9.

2. The Massachusetts contacts were not incidental.

Hananel now argues that these contacts were "incidental" and insufficient for jurisdiction. Br. 34. This Court has previously rejected that argument. In the prior appeal, this Court held that

given that it was Hananel who sought this employment contract with a company whose key officers were all located in Massachusetts and whose financial accounts were all administered out of Massachusetts, the court properly concluded that Hananel had purposefully availed himself of Massachusetts law.

Adelson, 510 F.3d at 50. While that ruling was based on the prima facie standard, the district court has now made findings of fact supporting the relevant allegations. Add-26.

Hananel relies on one case, *Lyle Richards International v. Ashworth, Inc.*, 132 F.3d 111 (1st Cir. 1997). The facts of that case are not comparable to those here. *Lyle Richards* notes, first, that "[o]ften, the 'transacting business' test is importantly informed by ascertaining whether the nonresident party initiated or

solicited the business transaction in Massachusetts.” 132 F.3d at 113. Here, the trial court found that “Hananel sought out” employment with IPI. Add-26.

Moreover, in *Lyle Richards* the Massachusetts party was expected to perform the contract out-of-state, and the other party was from California; thus, neither was expected to do anything in Massachusetts. 132 F.3d at 113. Here, while Hananel’s work was primarily in Israel, he knew all along that IPI was based in Massachusetts, and, as the trial court found, he communicated regularly with IPI officers here. Add-26. That IPI conducted administrative functions out of its own *headquarters* was not fortuitous, nor was Hananel’s inevitable extensive contact with those offices. And as Hananel himself testified, in his capacity as the chairman of IMDSOFT, a position he attained by virtue of his employment with IPI, Hananel traveled to Andover, Massachusetts for a meeting designed to solicit industry connections between IMDSOFT and similar companies. Tr. Vol. 11 at 65:7-66:10. The Massachusetts contacts on which the district court relied, therefore, were not “unilateral” acts, as in *Lyle Richards*, but were an essential part of the parties’ relationship from the beginning. See *Burger King v. Rudzewicz*, 471 U.S. 462, 479 (1985) (“prior negotiations and contemplated future consequences, along with the terms of the contract and the parties’ actual course of dealing” relevant to finding minimum contacts).

Courts in this Circuit, and in Massachusetts, have routinely exercised jurisdiction based on less substantial contacts. In *Good Hope Industries, Inc. v. Ryder Scott Co.*, the S.J.C. held that the defendant’s transmission of “periodic appraisal reports” and “monthly invoices” to Massachusetts, along with the plaintiff’s “frequent initiation of telephone communications” from the district, meant that the defendant “could have foreseen that significant managerial decisions, based on the information it provided, would be made in Massachusetts.” 389 N.E.2d 76, 80-81 (Mass. 1979). Even where a relationship exists entirely in another state, where communications into the Commonwealth pertained to and related to the control of the relationship, this Court has found jurisdiction. See *Hahn v. Vermont Law School*, 698 F.2d 48, 51 (1st Cir. 1983); *Ganis Corp. of Calif. v. Jackson*, 822 F.2d 194, 198 (1st Cir. 1987). Initiating, as Hananel did, a business relationship with a Massachusetts entity knowing that his activities abroad would have ramifications here is “indicative of the defendant’s intention to involve [himself] in Massachusetts commerce.” See *Good Hope Industries*, 389 N.E.2d at 82 n.17.

3. Massachusetts litigation was foreseeable.

Hananel’s terse argument on foreseeability (Br. 32-33) can be dispatched quickly. In the prior appeal, this Court noted that “Hananel knowingly affiliated himself with a corporate entity which was based primarily in Needham,

Massachusetts and, thus, the possibility of a suit there was amply foreseeable.” *Adelson*, 510 F.3d at 51.⁵ This Court also found that the allegation, later proved, that Hananel’s “business card acknowledged his ongoing relationship with the state” by listing a Needham address alongside his Ramat Gan [Israel] address supported a finding of foreseeability. *Id.* at 50.

Hananel argues, contrary to the district court’s findings, that he contracted not with IPI, but with Adelson, “a Nevada domiciliary.” Br. 32. He also contends, somewhat confusingly, that “while the IPI corporate ‘officers’ to which the Court referred were located in Needham, Massachusetts, they were not employees of IPI nor did IPI have an office in Massachusetts.” *Id.* at 32-33. This Court need not resolve Hananel’s allegations that IPI officers are not IPI employees: it is undisputed that, whoever those people were, they were in Massachusetts, and Hananel interacted with them extensively as part of his job. Their technical status has no bearing on foreseeability, and the district court’s findings on that point should not be disturbed.

Further, the district court’s findings that Hananel regularly communicated with IPI officers in Massachusetts easily distinguish this case from *Phillips Exeter Academy v. Howard Phillips Fund*, where the defendant’s “only pertinent contacts

⁵ Again, the district court’s findings of fact are consistent with the allegations that this Court previously relied on. See Add-26.

with [Massachusetts]” were sending payments here. 196 F.3d 284, 292 (1st Cir. 1999) (cited at Hananel Br. 32).

B. Hananel Has Not Proven That Commencement of This Case Is So Unreasonable as to Destroy Jurisdiction.

Hananel also argues that the exercise of jurisdiction was unreasonable. This Court already decided that issue, and Hananel points to no significant change in the facts since then. *Adelson*, 510 F.3d at 51. As the district court found, “[t]hese factors have remained unchanged since consideration of Hananel’s initial appeal.” Add-27.

In the prior appeal, after full briefing, this Court concluded that “[t]he court below found that the Gestalt factors support the conclusion that jurisdiction is reasonable. We agree.” *Adelson*, 510 F.3d at 51. In doing so, it addressed every one of the objections that Hananel makes now:

- “Admittedly, Hananel lives and works in Israel and is a legally blind diabetic. While those facts evoke sympathy for the undeniable burden placed upon Hananel, the district court properly concluded that no ‘special or unusual burden’ existed here. The court noted that neither his foreign residence nor his medical condition precluded him from traveling internationally in the course of his employment or from agreeing to work for an American company.” 510 F.3d at 51; *contra* Hananel Br. 36-37.
- “The state’s interest in the case is further heightened by the involvement of IPI’s executive officers who are employed in Massachusetts and of funds which are held and managed in Massachusetts. Although Hananel casts doubt upon Adelson’s ability to claim that Massachusetts is more convenient than Israel, he fails to

recognize that this factor requires deference to a plaintiff's choice of forum." 510 F.3d at 52; *contra* Hananel Br. 37-38.

- “Lastly, while the interests of the judicial system in achieving efficient resolution militate against Adelson because of the prior suits pending in Israel, the district court properly concluded that this factor alone was insufficient to tip the constitutional balance on the facts of this case.” 510 F.3d at 52; *contra* Hananel Br. 39-40.

The only change that Hananel posits between the prior appeal and now is evidence that Adelson’s domicile is in Nevada. Br. 35. He quotes the district court’s observation that Adelson “currently is domiciled in Las Vegas” (Add-3) and baldly asserts that this Court previously rejected his jurisdictional argument “under the assumption that Adelson was a Massachusetts resident.” That is incorrect.

This Court did not assume anything: in fact, it noted that “Adelson is not a Massachusetts domiciliary.” *Adelson*, 510 F.3d at 53. The statement about Adelson’s “residen[ce]” was not limited to legal domicile (*id.* at 51); rather, it was properly based on the undisputed facts that Adelson is a Massachusetts native and long-time resident and that he continues to have a home in Newton, though it is not his primary residence. In fact, the district court, in the same opinion that Hananel cites for Adelson’s Nevada domicile (Add-3) quoted this Court’s conclusions regarding residence and remarked that “[t]hese factors have remained unchanged.” Add-27.

Moreover, there is nothing in the prior opinion that suggests the implausible conclusion that if the Court thought that Adelson was a Nevada resident that it would require him to litigate in Israel. As noted above, the Court found that *none* of the Gestalt factors favored denying jurisdiction.⁶ And that conclusion was correct—the company that Hananel contracted with and worked for was, as the district court found, “a company with a Massachusetts office and Massachusetts-based officers, which received substantial assistance from a related Massachusetts-based company.” Add-26.

III. Judge Saris’s Denial of an Adverse Inference Was Not an Abuse of Discretion.

Hananel’s third appellate issue is another alleged trial error, the court’s refusal to grant an adverse inference from Adelson’s decision not to call Danny Raviv as a witness. Judge Saris’s ruling was not an abuse of discretion, and there is no indication that it affected the outcome of the trial.

A. Raviv Was Not Practically Unavailable.

A party may obtain an adverse inference where his opponent fails to call a witness if the witness is (1) “peculiarly available to” the party against whom the inference is sought (“practical” unavailability) or (2) “favorably disposed” to a party who nonetheless made no attempt to obtain the witness’s testimony (“legal”

⁶ In fact, this Court did not even find that this was the type of “close case” that would make those factors relevant at all.

unavailability). See *United States v. Spinosa*, 982 F.2d 620, 631-32 (1st Cir. 1999); *Steinhilber v. McCarthy*, 26 F. Supp. 2d 265, 280 (D. Mass. 1998). Neither theory applies here.

To show that a witness is “peculiarly available” to only one party, the proponent of the inference must show “that the witness is physically available only to the opponent.” Aside from “a claim of favorable disposition,” addressed below, “where a witness is equally available to either party there is ordinarily no basis for a missing witness instruction.” *United States v. St. Michael’s Credit Union*, 880 F.2d 579, 597 (1st Cir. 1989); see also *Oxman v. WLS-TV*, 12 F.3d 652, 661 (7th Cir. 1993). Contrary to Hananel’s assertion (Br. 42), the ability to compel a witness’s testimony is highly relevant to a finding that the witness was “peculiarly available” to the other party. See *United States v. Anderson*, 452 F.3d 66, 82 (1st Cir. 2006) (denying instruction because “Anderson had the same ability as the government to seek a subpoena to require Besore’s appearance at trial. . . . The fact that Anderson was able to subpoena Besore yet failed to do so gives us additional reason to believe that the district court was correct in finding that Besore was not ‘peculiarly available’ to the government.”). In fact, the only case on which Hananel relies, *Steinhilber*, contradicts his position: it denied an instruction because the proponent “could have issued subpoenas for [missing witnesses] and conducted their depositions.” 26 F. Supp. 2d at 280.

Here, there is no allegation that Adelson concealed Raviv or prevented him from testifying. See *United States v. Ariza-Ibarra*, 651 F.2d 2, 17 (1st Cir. 1981) (where defendant knew of witness’s “whereabouts” and there was no suggestion that prosecution “had attempted to interfere with defendants’ ability to obtain his testimony,” witness was “equally available to both parties”). There is no dispute that Hananel could have obtained Raviv’s testimony through letters rogatory and trial depositions, as he did with other witnesses. In fact, there is not even any dispute that Hananel made no effort whatsoever to obtain Raviv’s testimony. Missing-witness instructions are unnecessary where the “appellant attempts no explanation for the failure to take reasonable efforts to subpoena the ‘missing witness’ to testify for the defense.” *United States v. Arias-Santana*, 964 F. 2d 1262, 1268 (1st Cir. 1992). Because he did not try to secure Raviv’s testimony, Hananel cannot “show that the missing witnesses were peculiarly available to [the other side] or within his exclusive control.” *Steinhilber*, 26 F. Supp. 2d at 280.

B. Raviv Was Not Legally Unavailable.

Hananel further argues that Raviv was “legally unavailable” because of his “favorable disposition” toward Adelson. Br. 41-42. But here, too, Hananel’s decision not to take any steps to secure Raviv’s testimony is fatal to his claim that the court below abused its discretion by declining to penalize Adelson for Raviv’s absence. A party may not “s[ee]k the dual benefit of avoiding [the witness]’s

potentially harmful testimony at trial, while at the same time obtaining the advantage of a negative inference drawn by the jury about the [other side's] failure to produce [him] as a witness.” *Spinosa*, 982 F.2d at 633 (denying “favorable disposition” instruction); *United States v. Deluca*, 137 F.3d 24, 38 (1st Cir. 1998) (noting potential gamesmanship and finding no abuse of discretion for denial of missing-witness instruction). Hananel’s request for an adverse inference, “notwithstanding the favorable disposition of [a missing witness],” “is indicative of an attempt to obtain an-after-the-fact advantage.” *Steinhilber*, 26 F. Supp. 2d at 282.

Hananel, in fact, admits that the decision not to depose Raviv was a tactical one. He says now that he “preferred to cross-examine Raviv live at trial.” Br. 43 n.18.⁷ Preference for cross-examination is not a legitimate reason to avoid taking a witness’ direct testimony, suggests gamesmanship, and cannot be the basis for a missing-witness inference. See *Deluca*, 137 F.3d at 38; *Steinhilber*, 26 F. Supp. 2d at 280. As this Court has explained, a party’s decision to pursue a missing-witness instruction, rather than the witness himself, “sometimes indicates that defense counsel is more interested in exploiting the witness's absence than seeing him

⁷ Nor does Hananel’s failure to “learn” that Raviv would not be called as a witness excuse his failure to seek his deposition. Although Raviv appeared on a list of witnesses that Adelson “may call in his case-in-chief,” filed four days before trial, on May 14, 2009, Adelson nowhere promised to call Raviv. A242–43. By waiting to see if Raviv would appear for cross-examination, Hananel chose to gamble a portion of his case, and this Court need not refund the wager.

produced.” *United States v. Diaz*, 535 F.2d 130, 135 n.5 (1st Cir. 1976) (cited in *United States v. Anderson*, 452 F.3d 66, 82 (1st Cir. 2006)). Especially because the district court concluded that Raviv’s testimony would “likely cut both ways,” on this basis, it was not an abuse of discretion to forbid Hananel from wrongfully profiting from his own failure to call Raviv as a witness. Add-22 n.3.

C. Any Error Was Harmless.

Hananel does not even attempt to argue that the denial of an adverse inference was prejudicial. For several reasons, it is clear that it was not. First, Judge Saris found that “even were the court to accept Hananel’s version of the option” *and* “Hananel’s best case” of the facts surrounding the Macau project, Hananel “still would not be entitled to an interest in the Macau casino.” Add-37-38. No adverse inference from Raviv’s absence could have affected that analysis.

Second, this was a bench trial. Even if the inference were available, the judge, as factfinder, was free to give it little or no weight:

The ‘missing witness’ rule permits, rather than compels, the factfinder to draw an adverse inference from the absence of a witness, particularly where the factfinder concludes that the party who requested the adverse inference failed to subpoena a witness otherwise available to testify.

Bogosian v. Woloohojian Realty Corp., 323 F.3d 55, 67 (1st Cir. 2003) (citing *Niziolek v. Ashe*, 694 F.2d 282, 292 (1st Cir. 1982)). Here, there is no indication that, as a factual matter, Judge Saris was inclined to give Raviv’s absence any weight. To the contrary, she found that his “testimony would likely cut both

ways.” Add-22 n.3.⁸ Hananel does not argue that that separate decision was clearly erroneous.

Third, when the factfinder (usually a jury) is made aware of the missing-witness issue, the absence of a formal instruction on that point is almost always harmless error. See *Ariza-Ibarra*, 651 F.2d at 16 (“defendants repeatedly argued . . . that the jury should draw a negative inference from the government’s failure to call Larain as its witness. That they did so materially undercuts appellants’ argument that the denial of a missing witness instruction deprived them of an inference favorable to the defense.”); *United States v. Martinez*, 922 F.2d 914, 925 (1st Cir. 1991) (same); *Steinhilber*, 26 F. Supp. 2d at 283 (same). Here, Judge Saris obviously was aware of the issue, which Hananel argued not only in briefing, but in his closing argument. Tr. Vol. 15 at 64:16–68:2.

Fourth, any inference from Raviv’s absence would have been minimal, especially given that Raviv lives thousands of miles away, in Israel. As the Third Circuit explained in *United States v. Busic*, a party’s failure to call a witness does not usually permit—and certainly does not require—an inference that the testimony would have been devastating:

a party’s failure to call a witness does not necessarily imply that the witness’s testimony would have been unfavorable to that party. . . . Every experienced trial lawyer knows that the decision to call a witness

⁸ Hananel does not dispute that finding. He argues only that Raviv’s testimony could have been “highly relevant.” Br. 43.

often turns on factors which have little to do with the actual content of his testimony. Considerations of cumulation and jury fatigue may preclude calling a witness who is entirely helpful; calculations that a witness may help a lot but hurt a little may compel restraint when counsel believes that his burden is already met. Then, too, questions of demeanor and credibility, hostility, and the like may influence the government not to produce a witness whose testimony might be entirely harmful to the defendant. And, of course, as we noted in *Hines*, in many instances, a witness's testimony might have been neither Helpful nor Adverse to the party who failed to call him.

587 F.2d 577, 586 (3d Cir. 1978) (footnote omitted), *rev'd on other grounds*, 446 U.S. 398 (1980). The court concluded that “cases such as this one where both parties fail to call an available witness shatter the myth that an absent witness’s testimony might be expected to be particularly favorable to either side.” *Id.* The Seventh Circuit, too, recognized that a factfinder “can only infer [that the missing] evidence [was] not sufficiently helpful to present whether because of jury fatigue, burden of proof already met, unsavory demeanor of witness, etc.” *Chicago College of Osteopathic Med. v. George A. Fuller Co.*, 719 F.2d 1335, 1354 n.33 (7th Cir. 1983) (citing *Busic*).

Hananel cites no case in which a trial court has been reversed even for failing to give a missing-witness instruction, let alone for failing to grant a formal adverse inference on that basis in a bench trial. This is not the case to break that ground. Even if the district court abused its discretion by failing to consider Raviv eligible for an adverse inference, the error was harmless.

IV. The District Court’s Conclusion That No Meeting of the Minds Occurred Is Supported by Substantial Evidence.

Hananel urges this Court to reject the district court’s finding that there was no “meeting of the minds” regarding the alleged option term of his employment contract. His argument is based on a one-sided view of the evidence, primarily his own testimony, which Judge Saris found “not credible,” as well as irrelevant settlement communications and the option contracts of LVSI employees, who, unlike Hananel, actually worked on the Macau development.

A factfinder’s evaluation of the credibility of testimony is virtually unreviewable. See *Anderson*, 470 U.S. at 575 (“[W]hen a trial judge’s finding is based on his decision to credit the testimony of one of two or more witnesses, . . . that finding, if not internally inconsistent, can virtually never be clear error.”). Given Judge Saris’s credibility findings, Hananel’s testimony, disputed by Adelson and Roberts, cannot require reversal. Even if the evidence appears equivocal after review, this Court must give due deference to the lower court’s findings. See *Northern Ins. Co.*, 579 F.3d at 67.

A. Hananel Did Not Prove the Terms of His Contract.

The gulf between the parties’ understanding of Hananel’s oral employment contract is vast. To enforce his alleged right to a 12% share in the multi-billion-dollar Macau development, Hananel must prove that the option term of his contract (1) reached all Adelson-related investments, no matter where they were located

and what industry they were in, (2) survived Hananel's termination, (3) lasted indefinitely, and (4) was triggered for any given investment by Hananel's mere mention of an idea to Adelson. Adelson disputed each point vigorously, and the district court resolved none in Hananel's favor. Add-9, 37. The evidence that he cites on appeal, without even mentioning the countervailing evidence or the court's credibility finding, is not enough to warrant a different conclusion regarding even one of these points, let alone all four, as would be required to reverse.

1. Settlement communications do not prove Hananel's contract, because they show that the parties disagreed about the alleged option.

First, Hananel urges that a series of letters exchanged while Adelson and Hananel were winding down their relationship are *post hoc* proof of his contract terms. Hananel argued this evidence extensively in closing (Tr. Vol 15. at 70:21–80:13), and the trial court addressed it in its opinion. Add-16-17. The court found that the settlement negotiations *broke down* over precisely the topics on which it found that the parties had not had a meeting of the minds: “Hananel believed he was owed 12% of the shares of IMDSOFT and Denex at cost; Adelson thought it was 12% of profits” (Add-16), and “the details of how long the success fee remained open.” *Id.*

Those findings were not clearly erroneous. First, *ex post* severance negotiations are not particularly probative of what the parties had agreed *ex ante*. Adelson could well have been willing to offer more generous terms than Hananel

was contractually entitled to simply to wrap up Hananel’s termination and move on. See A840 (Adelson’s proposal was “the furthest stretch to be as accommodating as possible”). Second, the letters show that Adelson disputed Hananel’s account of the agreement and accused him of “‘nibbling around the edges’ to expand the deal more in [his] favor.” *Id.* That hardly constitutes an admission, as Hananel argued at trial, that the deal was as he had described. Tr. Vol. 10, 54:8–12. Further, Hananel’s willingness to agree to a “1.5% success fee in an Israeli casino” limited to “a period of 3 years” (A841-42, A1156) is completely inexplicable if he truly believed that he had a perpetual 12% option contract. In short, communications exchanged during a failed attempt at settlement are poor evidence that the relevant terms were as Hananel describes them.

2. Contracts of other employees are either irrelevant or unhelpful to Hananel.

Next, Hananel mentions the contracts of three LVSI employees (out of tens of thousands) who were central to the Macau development (Weidner, Stone, and Goldstein). That evidence does not undercut Judge Saris’s findings.

First, without proof that every employee of IPI and LVSI entered into identical employment contracts, this evidence is not even relevant. Not only was that predicate not proved, but Hananel does not cite any evidence for it. Adelson expressly testified that Hananel’s arrangement was not the same as those of other employees. Tr. Vol. 1 at 115:5–17. In addition, the other employees undisputedly

did far more to advance the Macau project than Hananel did, even taking his account at face value. Weidner, Stone, and Goldstein were hired as casino experts to assist in LVSI operations. Tr. Vol. 5 at 62–65. Adelson regarded them as unique for their talents and the circumstances of their hiring. Tr. Vol. 4 at 98–99. For example, only these employees received written contracts. Tr. Vol. 4 at 14:16–15. If Hananel’s options were, as he contends, triggered by such minimal work, then it is reasonable to infer that other terms were less favorable; thus, evidence of other employees’ agreements cannot prove all four necessary elements of Hananel’s claim.

Second, the contracts of William Weidner, Bradley Stone, or Robert Goldstein are all inconsistent with Hananel’s characterization. For example, they did not survive termination of employment. See, *e.g.*, A1193 ¶ 7(d), A1196 ¶ 11(d)(i)–(iv). At trial, Adelson testified to the absurdity of the notion that any employee, terminated or otherwise, could sit and wait for an investment to mature, and then belatedly exercise an option, to reap the benefits but avoid any potential loss. Tr. Vol. 1 at 100:12–101:11. The terms of David Farbstein’s employment likewise conflict with the terms alleged by Hananel. Farbstein was entitled to co-invest in matters he brought to the firm’s attention, but was required to make the investments “*pari passu* with Interface shareholders.” A982.

The court's finding that Adelson and Hananel did not come to an agreement about Hananel's contract is not conclusively refuted by purportedly analogous terms of LVSI employees.

3. Hananel's incomprehensible argument about his termination does not mandate reversal.

Hananel also contends that the district court committed clear error by failing to draw inferences from Adelson's purportedly pretextual firing of Hananel. The trial court wrote that Adelson "likely" fired Hananel not because Adelson had become aware of Hananel's work for Galilee Tours, but "because he was done doing business in Israel, having begun to abandon any plans for casinos there or elsewhere in the Middle East, and was turning his attention to other projects and locations, especially in the Far East." Add-17. Not surprisingly, Hananel agrees with the court's rejection of Adelson's explanation, but believes that it compelled only one conclusion: "While the District Court properly found Adelson's reasons for firing Hananel were pretextual, it should have concluded that Adelson terminated Hananel in a bad faith effort to deprive him of his options in Macau." Hananel Br. 49. That non sequitur does not demonstrate clear error.

Hananel does not cite any record evidence to dispute the court's finding that Adelson did not pursue casino developments in the Middle East after 2000, and he does not dispute that IPI's Israeli operations closed down completely not long after Hananel left. There is no factual or logical basis for his assertion that the only

conceivable reason that Adelson could have fired him was to deprive him of options in the Macau casino. *Fortune v. National Cash Register Co.* (cited in Hananel Br. 49) says only that firing an employee who is on the brink of earning a commission is bad faith (364 N.E.2d 1251, 1257-58 (Mass. 1977)); it does not say that whenever an employee is fired, the court must infer that he was contractually entitled to a huge bonus. Having failed to prove any contractual entitlement, Hananel’s attempted use of his firing is mere bootstrapping.

B. Hananel’s Claim Fails for the Independent Reason That He Did No Work on the Macau Project.

Having found that the parties had no meeting of the minds on the option term, the district court next considered whether it could “supply a reasonable interpretation of the option term under the circumstances.” Add-37. The court concluded that Hananel would still lose, for two independent reasons. First, any reasonable term would have required far more work by Hananel than even Hananel himself claimed to have performed. Second, even taking everything that Hananel alleged at face value—both his unreasonable account of the contract *and* his alleged work as to Macau—Hananel did not satisfy the contract as he had described it. Neither of those findings was clearly erroneous.

1. A reasonable option term would have required more work than Hananel claims that he performed.

The trial court's first reason for finding that Hananel's work was insufficient to trigger any option term was that

[a] reasonable term would have required at least as much work on Hananel's part as was expected of his high tech investments—or any other principal at an investment firm—that he not only recognize an opportunity, but also that he do sufficient background research to provide a detailed recommendation of the opportunity to IPI, as well as oversee at least the beginning of IPI's investment in the venture.

Add-37.

Hananel barely disputes that reasoning. He suggests that the court “summarily adopted Adelson’s testimony” on this point (Br. 53), but that assertion is plainly incorrect.⁹ Not only does nothing in that part of the decision cite to or mention Adelson’s testimony, but the context was whether “*the Court* [could] attempt to supply a reasonable interpretation of the option term.” Add-37 (emphasis added). In other words, having rejected all of the testimony as to the actual agreement, the court was devising its own term as a gap-filler.

⁹ Even if the district court had relied on Adelson’s testimony, that would be a credibility determination that would be almost impossible for this Court to reverse. Hananel’s only objection is that because the court did not credit Adelson’s testimony on other points, it was required to reject it here as well. Br. 52-53. Then in the very next paragraph, he argues that this Court should reverse based on *Hananel’s* testimony, which the district court found was also not credible. *Id.* at 53.

In addition, ample evidence supports the conclusion that Hananel's contract required more than merely coming up with an idea. David Farbstein was expected, like Hananel, not just to recommend investments, but to ensure they were brought to a successful conclusion. Tr. Vol. 4 at 36:1-9. Since Farbstein was Hananel's immediate predecessor in Israel, this limitation is probative of the likely content of Hananel's contract, especially given that Farbstein was a member of Adelson's family. Similarly, for the casino experts hired by LVSI and subject to written contracts, co-investment rights extended only to casino holdings that they developed, and expired upon termination. Tr. Vol 5 at 76-77; A1193. There is no evidence that any IPI or LVSI employee ever was entitled to share in profits based on nothing more than mentioning a possible investment.

The court went on to conclude that, even accepting Hananel's version of the facts, his "work" on Macau was insufficient to satisfy any "reasonable" term that the court could imply:

Although Hananel may have come up with the idea of building a casino in Macau, and even recommended the venture and provided Adelson with some materials related to it, his work would have been insufficient to fulfill any reasonable requirements for such work which the Court might provide.

Add-37.

Hananel disputes that finding of fact based solely on a cryptic string of record citations. Br. 53. As recounted above at page 10, Hananel claims only that he met

once with Adelson, mentioned Macau, and “prepared some limited materials on Zhuhai and Macau.” *Id.* at 19. This supposedly occurred over two years before the Macau gaming concessions were even open for bidding. Accordingly, it was not clear error for the district court not to infer a contract term that would have entitled Hananel to 12% of the entire development based on the extremely limited efforts that Hananel describes.

2. Hananel did not even satisfy his own standard, that he “initiated” the venture.

Having first found that Hananel did not satisfy any reasonable gap-filler term, the district court next concluded that he was not even entitled to options under his own account of the contract. The court wrote that:

In Hananel’s best case, he came up with the idea for building a casino in Macau, and hastily prepared some materials for Adelson. While this might make the venture Hananel’s idea, it is insufficient to constitute initiating the investment, under any reasonable understanding of the term. Hananel’s actions were not the “first step” or even the “begin[ning]” of the venture, but only the first thought concerning the venture, or the first step to beginning to consider the venture.

Add-38 (emphasis added). In fact, the court found, it would not even have been possible for anyone to initiate a casino in Macau at the time, because it would have been illegal:

In fact, it was not until many months after Hananel was fired that it would have been possible for anyone to initiate a casino venture in Macau—at the time, the law of Macau did not allow Adelson (or anyone other than Mr. Ho) to build a casino there, and any steps in anticipation of building a casino would have been significantly

premature. Thus not only did Hananel fail to take sufficient action to initiate the Macau casino, given the timing of his actions, it would not have even been possible for him to initiate it.

Id. The court concluded that “even if the parties['] minds had met, and they had met in the way Hananel claims, his actions still would not have entitled him to options in the Macau casino.” *Id.*

Hananel argues that the court’s findings are clearly erroneous because Judge Saris adopted the *American Heritage* definition of “initiate,” rather than the dictionary.com definition. Br. 50. Needless to say, even Hananel did not testify that the parties agreed to an option triggered by “initiating” **and** that they agreed to the dictionary.com definition of “initiate” as “introduc[ing] into the knowledge of some art or subject.” *Id.* The district court did not commit clear error by adopting a definition that made some commercial sense in context, rather than the definition hand-picked by Hananel’s lawyers during closing argument.

Hananel also expresses disbelief that the court could have “determined that Hananel was only responsible for the thought of Macau when it has already concluded that Adelson visited Macau in August, 1999 only after Hananel presented Macau as an investment opportunity and urged Adelson to visit.” Br. 50. Of course, where the very issue in dispute is whether Hananel was responsible for Adelson’s subsequent actions, it makes no sense to amplify Hananel’s work by referring to that of Adelson or LVSI. As Hananel himself now tells it, all that he

did was “[come] up with the idea for building a casino in Macau, and hastily prepare[] some materials for Adelson.” Add-38.¹⁰ Moreover, Hananel’s objection overlooks the district court’s independent finding that no one—even Adelson himself—could have initiated a casino development in Macau in 1999, more than two years before Stanley Ho’s monopoly expired.

C. The Trial Court Did Not Commit Clear Error Concerning Hananel’s Foreign Witnesses.

Finally, Hananel contends that Judge Saris “ignored” the testimony of his Israeli witnesses. Br. 54-56. Presumably, he means that this was some sort of reversible error, but he never says so, nor does he mention any relevant standard of review. We are not aware of any authority requiring a district court to refer to every witness and trial exhibit in its written decision, and Hananel cites none.

More strikingly, Hananel nowhere cites, summarizes, or even alludes to the substance of any of that testimony. With good reason—it was all irrelevant. Throughout the pre-trial proceedings, Hananel argued that this case could not be litigated in Massachusetts because countless foreign witnesses would be required to testify. He also succeeded in postponing trial by pursuing letters rogatory for witnesses all around the world. Now, after all that effort and delay, he cannot even point to one piece of relevant evidence offered by any of those witnesses. Judge

¹⁰ That assertion is consistent with the record, including Hananel’s own testimony. See Add-12–15; Tr. Vol. 11 at 29:19–35:23, 81–86, 94:13–96:24.

Saris's apparent finding that none of that evidence was probative was not clear error.

CONCLUSION

For all of the foregoing reasons, plaintiff-appellee Sheldon G. Adelson respectfully requests that this Court affirm the judgment below.

Dated: New York, New York
April 26, 2010

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because: this brief contains 10,979 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 2007 in 14-point Times New Roman.

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit using the appellate CM/ECF system on April 26, 2010.

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