

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

**RESPONSE AND REPLY BRIEF
OF PLAINTIFF-APPELLANT/CROSS-APPELLEE**

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PRELIMINARY STATEMENT

Hananel argues for reversing the District Court's finding of jurisdiction only by ignoring the relevant evidentiary standard, which requires that Adelson's evidentiary assertions be taken as true. Hananel does not deny that the evidence presented by *Adelson* is sufficient to establish jurisdiction. Nor does Hananel even address affidavits he himself filed in Israel, which affirmatively show his substantial contacts with Massachusetts.

On *forum non conveniens*, Hananel simply dodges the legal issues: whether a court can dismiss a case when finding that almost every factor is "in equipoise" and whether concurrent litigation is even relevant to the doctrine. Instead, he relies on general but irrelevant dicta from the case law and on his alternative version of the facts, which the District Court has already rejected.

COUNTER-STATEMENT OF THE ISSUE ON THE CROSS-APPEAL

Did the District Court properly assert personal jurisdiction over a defendant who, among other significant contacts, was physically present in the forum State where he negotiated and formalized the contract out of which the plaintiff's cause of action arises?

COUNTER-STATEMENT OF THE CASE ON THE CROSS-APPEAL

Adelson accepts Hananel's addition to the Statement of the Case on the main appeal (Def. Br. 2) but notes that the counts that the District Court dismissed for lack of jurisdiction were numbered 2 through 4, not 2 through 7. ADD-24.

COUNTER-STATEMENT OF FACTS ON THE CROSS-APPEAL

Under the prima facie standard for establishing personal jurisdiction, the plaintiff's evidence is accepted as true. Accordingly, the following facts, which demonstrate that Hananel had substantial contacts with Massachusetts, are taken from affidavits and other evidence that Adelson presented below. That Hananel's own affidavits, as described in his Statement of Facts, present a different version of events is not relevant. *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 675 (1st Cir. 1992).

The Contract Was Formed in Needham

The District Court found that:

the December 5th meeting occurred [in Needham]; the meeting resulted in a formal, albeit oral, agreement or execution of the terms of the employment and that thereafter defendant began his transition into the job of IPI's general manager in Israel, as distinct from filling in for or helping plaintiff out as he had in the past.

ADD-9. These findings about a material event underlying the case are supported by the record.

Hananel admits that he came to Needham on December 5, 1995 and met with Adelson. Def. Br. 8. Prior to Hananel's arrival, Adelson told IPI's counsel, Paul Roberts, "the terms he wished to offer to Hananel for employment with IPI and directed [Roberts] to discuss and finalize the employment terms with Hananel when he was in the Needham office." A-105 ¶7; A114-15 ¶5; A-494-95 ¶6. Roberts and Hananel met at IPI's office at 300 First Avenue, Needham, and, "after some discussion, [they] settled on" terms. A-105-06 ¶8. On December 10, Hananel for the first time requested IPI business cards, which included the addresses of IPI's offices both in Tel Aviv and in Needham. A-331.

Hananel claims that his employment began long before the Needham meeting. Def. Br. 5-6. When Hananel faxed Adelson his travel schedule on December 3, however, he used the stationary of Galilee Tours, for which he worked at the time. A-330. After his firing in 2000, moreover, Hananel signed a settlement of accounts, and IPI filled out an official termination form, as required by Israeli law. These documents, signed under oath, contradict that assertion, stating that Hananel's employment actually began on January 1, 1996 (the date on which his pay began as well), which is consistent with the testimony of Roberts and Adelson. A-333; A-335.

The Needham Office Supervised Hananel, And Hananel Had Regular Contact With IPI Employees In Massachusetts

During Hananel's employment, he conducted "constant telephonic and written communication" with "IPI in Massachusetts," and IPI set up a 1-800 number for this purpose. A-495-96 ¶9. Hananel stated that he "maintained daily and current telephone contact with" Adelson. A-179 ¶8; A-195 ¶27.4 ("[I]n the context of my employment with Interface and Adelson, Adelson demanded to talk with me every day. Adelson would call me and talk with me on various and varied subjects, twice a day, for at least one hour each time, in the morning and in the evening, seven days a week, every day, from any place in the world and to any place in the world."). Many of these calls occurred while Adelson was in Needham or elsewhere in the U.S. A-494 ¶5; A-497 ¶14.

Among other things, Hananel told the Needham office of the Israeli branch's "funding requirements." A-508-09; A-518 ¶¶4-5; A-521-30. As Stephen O'Connor, IPI's Chief Financial Officer, explained,¹ because "the Israeli branch of IPI was not self-sufficient," monies needed to finance its operations and investments were "wired to IPI's account(s) in Israel, usually from accounts

¹ Contrary to Hananel's allegations (Def. Br. 10-11), the Magistrate Judge, who was intimately familiar with the dozens of filings on Hananel's motions to dismiss, "view[ed] the timing of the [O'Connor] affidavit as reflecting merely a later discovery of the information by counsel or a later appreciation of the significance of the information rather than any sort of improper attempt to mislead the defendant or gain some tactical advantage by improper gamesmanship." ADD-4 n.2.

maintained in Massachusetts,” either “Mr. Adelson’s personal accounts maintained or administered in Massachusetts, or from the IPI bank accounts in Massachusetts.” A-518-19. See generally ADD-17.

Hananel Traveled To The United States And Around The World Under His Contract With IPI

As the District Court found, there is “ample evidence that after consummating the contract Hananel transacted considerable business in Massachusetts as an employee of IPI.” ADD-16. In 1999, iMD Soft, Ltd., on whose board of directors Hananel sat by virtue of an investment in the firm by IPI, “entered into negotiations with Agilent Technologies, Inc. of Andover, Massachusetts, a subsidiary of Hewlett Packard[,] to form a partnership or some other form of strategic alliance.” A-496 ¶11. In connection with those negotiations, Hananel communicated regularly with Agilent employees in Massachusetts. See, *e.g.*, A-502-03. On February 8, 2000, Hananel met with iMD Soft executives and five Agilent managers in Andover. A-497 ¶12; A-504. Hananel admitted participating in that meeting, another Andover meeting with Hewlett-Packard on July 31, 1998 (A-536-37), and a December 29, 1996 meeting in Andover discussing “a proposed medical research collaboration” between iMD Soft and a German company. A-536; Def. Br. 10. Hananel has told the Israeli court, furthermore, that he traveled “for Interface” to the “United States — for meetings with Adelson in New York, Boston and Chicago. Contrary to the

statements made in the Complaint, these were not meetings on personal matters.” A-222 ¶65.

Hananel’s globetrotting is not limited to his trips to Massachusetts on IPI business. Indeed, Hananel has asserted that, “as part of my duties and all through the years of my work for Interface and Adelson, I was required to take many trips to different countries.” A-179 ¶8. He referred to trips “for business objectives” to Belgium, France, Barcelona, London, Germany, Switzerland, Japan, and the United States. A-192 ¶23; see also A-208 ¶30. The District Court further found that Hananel traveled to Austria to attend a concert, to Bulgaria for a memorial service, and to Ireland for vacation. ADD-21-22.

SUMMARY OF THE ARGUMENT

Hananel’s argument on jurisdiction rests almost entirely on his disputed version of the facts. The applicable evidentiary standard, however, only requires Adelson to present a prima facie case of Hananel’s contacts with Massachusetts. Adelson has plainly done so. According to affidavit and documentary evidence presented below, Hananel discussed and formalized his employment contract in Needham in December 1995, communicated regularly with Adelson and IPI employees in Massachusetts, requested and received funds from Massachusetts accounts, and attended meetings in Massachusetts on IPI business, any of which is independently sufficient to establish jurisdiction over Adelson’s contract claim.

Hananel has not, moreover, established that the gestalt factors overwhelmingly disfavor the exercise of that jurisdiction.

On *forum non conveniens*, Hananel depends largely on a comment by this Court that *forum non conveniens* is “flexible and practical,” a truism that cannot supersede the extensive legal rules that govern the doctrine. Hananel provides no support for the Magistrate Judge’s decision to rely exclusively on the pendency of Hananel’s Israeli suit in deciding to dismiss this one. And Hananel’s attempts to retry issues of fact do not come close to proving that the Magistrate Judge’s rejection of those arguments below was “a clear abuse of discretion.” Applying the correct legal standard to the Magistrate Judge’s findings of fact should result in a reversal.

ARGUMENT

I. The District Court Correctly Held That It Had Personal Jurisdiction Over Hananel

A. Personal Jurisdiction Exists Where The Claim Relates To The Defendant’s Activities In The Forum

The exercise of personal jurisdiction over a defendant who is not actually present in the forum is appropriate so long as the defendant has “certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). This

minimum contacts requirement can be satisfied in two ways. Under a theory of general jurisdiction, “the litigation is not directly founded on the defendant’s forum-based contacts, but the defendant has nevertheless engaged in continuous and systematic activity, unrelated to the suit, in the forum state.” *Foster-Miller, Inc. v. Babcock & Wilcox Canada*, 46 F.3d 138, 144 (1st Cir. 1995). Under a theory of specific jurisdiction, the “controversy is related to or arises out of a defendant’s contact with the forum.” *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984). In the present case, the District Court’s assertion of jurisdiction over Hananel was properly based on the latter theory.

A plaintiff seeking to establish the existence of specific personal jurisdiction must show two things. First, the state in which the federal district court sits must have a long-arm statute that grants jurisdiction over the defendant. Second, the exercise of statutory jurisdiction must satisfy the strictures of the United States Constitution, in particular the Due Process Clause. See *Foster-Miller*, 46 F.3d at 144; *United Elec., Radio & Mach. Workers of Am. v. 163 Pleasant Street Corp.*, 960 F.2d 1080, 1086 (1st Cir. 1992).

The Massachusetts long-arm statute provides that a “court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person’s * * * (a) transacting any business in this commonwealth.” M.G.L. ch. 223A §3(a) (2000). As this Court

has recognized, the Massachusetts courts have consistently construed the statute “as extending jurisdiction as far as permitted by the due process clause of the Fourteenth Amendment.” *Cambridge Literary Props., Ltd. v. W. Goebel Porzellanfabrik G.m.b.H. & Co.*, 295 F.3d 59, 63 (1st Cir. 2002). See, e.g., *Good Hope Indus., Inc. v. Ryder Scott Co.*, 389 N.E.2d 76, 79-80 (Mass. 1979); *Automatic Sprinkler Corp. of Am. v. Seneca Foods Corp.*, 280 N.E.2d 423, 424 (Mass. 1972). Accordingly, when personal jurisdiction issues arise in cases originating in Massachusetts, the Court can “sidestep the statutory inquiry and proceed directly to the constitutional analysis” because the two are one and the same. *Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A.*, 290 F.3d 42, 52 (1st Cir. 2002); see also *Sawtelle v. Farrell*, 70 F.3d 1381, 1388 (1st Cir. 1995).

The constitutional standard for specific personal jurisdiction has three elements. First, the defendant must have “‘purposefully directed’ his activities at residents of the forum.” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985). The defendant’s contacts with the forum need not be extensive; to the contrary, the Supreme Court has made clear that “[s]o long as it creates a ‘substantial connection’ with the forum, *even a single act can support jurisdiction.*” *Burger King*, 471 U.S. at 475 n.18 (quoting *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 223 (1957) (emphasis added)). Second, the plaintiff’s cause of action must “‘arise[] out of or relate[] to’ defendant’s contacts with the forum

state.” *Ticketmaster-New York, Inc. v. Alioto*, 26 F.3d 201, 206 (1st Cir. 1994) (quoting *Helicopteros*, 466 U.S. at 414). As discussed above, it is this requirement that distinguishes specific jurisdiction from general jurisdiction. “Third, if the proponent’s case clears the first two hurdles, the court must then analyze the overall reasonableness of an exercise of personal jurisdiction in light of a variety of pertinent factors that touch upon the fundamental fairness of an exercise of jurisdiction.” *Phillips Exeter Academy v. Howard Phillips Funds, Inc.*, 196 F.3d 284, 288 (1st Cir. 1999).²

B. The Prima Facie Standard Requires The Court To Accept Adelson’s Version Of The Facts

The “most commonly used method of determining a motion to dismiss for want of personal jurisdiction” — and the method used by the District Court in this case (ADD-14) — is the “prima facie standard.” *Boit*, 967 F.2d at 675. Under this standard, a showing of personal jurisdiction must be based on “evidence of specific facts set forth in the record.” *Id.*

It is crucial, however, that in determining whether the plaintiff has proffered sufficient evidence to overcome a motion to dismiss for lack of personal

² This Court has made clear that there is considerable overlap between the first two elements of the constitutional test and the standards under the Massachusetts long-arm statute. See *Foster-Miller*, 46 F.3d at 144 n.3; *163 Pleasant Street*, 960 F.2d at 1087. Accordingly, the cases interpreting and applying the Commonwealth’s long-arm statute are also relevant to the due process inquiry.

jurisdiction, the district court “acts not as a factfinder, but as a data collector.” *Foster-Miller*, 46 F.3d at 145. At this stage, the court must take “facts affirmatively alleged by plaintiff as true” and must construe “disputed facts in the light most hospitable to plaintiff.” *Ticketmaster*, 26 F.3d at 203 (emphasis added); see also *Foster-Miller*, 46 F.3d at 145 (noting the “lack of differential factfinding” under the prima facie standard). Under this “generous” standard, the plaintiff’s “burden of proof is light” (*Jet Wine & Spirits, Inc. v. Bacardi & Co. Ltd.*, 298 F.3d 1, 7-8 (1st Cir. 2002)), and personal jurisdiction is to be found so long as the plaintiff’s account of the relevant jurisdictional facts is legally sufficient, regardless of whether the defendant offers a different account. See *N. Laminate Sales, Inc. v. Davis*, 403 F.3d 14, 22 (1st Cir. 2005). Indeed, evidence put forward by the defendant is relevant only insofar as it is “uncontested.” *Jet Wine & Spirits*, 298 F.3d at 4. Applying this standard, the District Court correctly determined that Adelson presented evidence sufficient to establish both that Hananel transacted business in Massachusetts and that those forum contacts are related to Adelson’s contract claim.

C. Hananel Transacted Business In Massachusetts And Purposely Availed Himself Of The Forum

1. Hananel's December 5, 1995, Meeting In Needham Was A Business Transaction Establishing Minimum Contacts With Massachusetts

With respect to personal jurisdiction, the most significant business transaction in this case was Hananel's December 5, 1995, meeting in Needham, Massachusetts with Paul Roberts (IPI's General Counsel) and Adelson. As described in detail by Roberts in two affidavits submitted to the District Court, the purpose of this meeting was to negotiate and formalize an employment contract between Hananel and IPI. A-105-06; A-494-95. Although Hananel had previously performed certain limited services for IPI, Roberts's affidavit makes clear that before the December 5 meeting, Hananel was not yet an IPI employee and had no contract with the company. A-105. In anticipation of the meeting, Adelson told Roberts the terms of employment that he wished to offer Hananel and directed him to "discuss and finalize the employment terms with Hananel when he was in the Needham office." A-105 ¶7.

The meeting went according to plan. When Hananel arrived at IPI's Needham offices, Roberts informed him of the general terms that he had previously discussed with Adelson; Roberts and Hananel then discussed those arrangements further. Ultimately the two men settled on a set of specific terms, including that Hananel would become a full-time IPI employee as of January 1,

1996, that he would begin to receive an annual salary, and that he would devote all of his time to IPI. A-105-06. Roberts offered to prepare a written contract memorializing these terms, but Hananel said that was not necessary because of his close relationship with Adelson. A-106. At that point, Adelson himself arrived in the office. Roberts told him what he had negotiated with Hananel; both Adelson and Hananel said that they agreed with the arrangement, and the three men shook hands to close the deal. A-105-06. Adelson's own affidavit confirms Roberts's account, stating expressly that "the terms of Hananel's employment by IPI, Ltd. were discussed and acknowledged between Hananel and me" at the December 5 meeting. A-114. Properly applying the prima facie standard, the District Court accepted this version of events for jurisdictional purposes. ADD-8-9.

Contrary to Hananel's assertions (Def. Br. 31-32), the Roberts and Adelson affidavits plainly are "properly supported proffers of evidence." *Boit*, 967 F.2d at 675. Roberts's account of the December 5 meeting is detailed, clear, and not contradicted by anything other than Hananel's own statements, which of course are irrelevant under the prima facie standard. This evidence does not consist of "conclusory allegations," nor it does not require "farfetched inferences." *Ticketmaster*, 26 F.3d at 203. This Court's cases thus require, as the District Court held, that Adelson's evidence be accepted as true and construed "in the light most

congenial to the plaintiff's jurisdictional claim." *Mass. School of Law at Andover, Inc. v. Am. Bar Ass'n*, 142 F.3d 26, 34 (1st Cir. 1998).

Similarly misguided is Hananel's effort to cast doubt on Adelson's description of the Needham meeting on the grounds that Adelson did not mention in the Israeli litigation any connection between that meeting and the employment contract. Def. Br. 32. That silence is unsurprising — the location of contracting is irrelevant to the Israeli litigation. Finally, Hananel tries (Def. Br. 7) to manufacture an internal contradiction by pointing to Adelson's deposition testimony that, as a general matter, he did not allow Roberts to make "business decisions." A-645. There is no inconsistency. As both Roberts and Adelson made clear in their affidavits, Adelson specifically asked Roberts to take the lead in finalizing the employment contract with Hananel when Hananel came to Massachusetts. A-417; A-495. Adelson made this request because he and Hananel had been close friends and he did not like "negotiating with friends." A-417. At the same time, however, whatever Roberts negotiated would remain "subject to Adelson's final approval." A-495 ¶6. Accordingly, at the Needham meeting, Roberts was not exercising the kind of unbridled authority discussed in Adelson's testimony (testimony that, it should be noted, was not even about that meeting). To the contrary, Roberts was acting pursuant to express instructions from Adelson

in helping to negotiate a contract that would ultimately be approved and formalized by Adelson himself. A-114.

The December 5 meeting, which culminated in the execution of a final employment contract between Hananel and Adelson, plainly constituted the transaction of business in Massachusetts and was sufficient to establish Hananel's minimum contacts with Massachusetts. As to the long-arm statute: "Both federal and state courts have regularly construed the 'transacting any business' language of the statute in a generous manner." *163 Pleasant Street*, 960 F.2d at 1087. Thus, in *Carlson Corp. v. University of Vermont*, 402 N.E.2d 483, 485 (Mass. 1980), the Massachusetts Supreme Judicial Court squarely held that there "can be no doubt that physically signing a contract in Massachusetts" is the transacting of business in the State. The defendant in *Carlson* was the University of Vermont, which had no land, offices, or other places of business in Massachusetts. *Id.* at 484. The plaintiff, a Massachusetts corporation, had initiated negotiations to build a new building for the University in Vermont. The only part of the process that occurred in Massachusetts was the final contract signing; performance occurred exclusively in Vermont, and the Court assumed that the defendant did not return to Massachusetts in connection with the construction project. *Id.* at 484-85 & n.4.

Nevertheless, the Court concluded that asserting personal jurisdiction over the University was consistent with both the long-arm statute and the Constitution:

Whatever the university's reasons for scheduling the contract signing ceremony in Boston, the defendant's physical presence in Massachusetts to execute the contract was a deliberate action and is properly characterized as an affirmative, intentional act of the defendant. Where a contract is made in this state and a cause of action arises out of such contract, the consummation of the contract in (the forum State) constitutes the transaction of business or the minimum contacts necessary to invoke personal jurisdiction.

Id. at 485 (internal quotation marks and citations omitted). Both the Supreme Judicial Court and this Court have repeatedly reaffirmed *Carlson's* basic holding that a defendant who executes a contract in Massachusetts thereby subjects himself to personal jurisdiction the state. See *Tatro v. Manor Care, Inc.*, 625 N.E.2d 549, 552 (Mass. 1994); *N.H. Ins. Guaranty Ass'n v. Markem Corp.*, 676 N.E.2d 809, 812 (Mass. 1997) (long-arm statute satisfied if defendant "contracted for the policy in question in this State"); *163 Pleasant Street*, 960 F.2d at 1087 (citing *Carlson* for the proposition that "signing a contract in Massachusetts" is sufficient).

Just as Hananel's decision to formalize his employment contract in Massachusetts satisfies the transacting business requirement of the State's long-arm statute, it also satisfies the Constitution's minimum-contacts requirement. Hananel's voluntary and substantive participation in the Needham meeting was an "act by which the defendant purposefully avail[ed himself] of the privilege of conducting activities within the forum State." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). Indeed, the Supreme Court has observed with respect to contractual obligations that "parties who 'reach out beyond one state and create continuing

relationships and obligations with citizens of another state’ are subject to regulation and sanctions in the other State for the consequences of their activities.” *Burger King*, 471 U.S. at 473 (quoting *Travelers Health Ass’n v. Va.*, 339 U.S. 643, 647 (1950)). That is precisely what Hananel did here, and it is easily enough to render him subject to suit in Massachusetts.

2. Hananel’s Attempts To Discount The Jurisdictional Significance Of The Needham Meeting Fail

In his brief, Hananel makes several efforts to undermine the legal and factual importance of the December 5 meeting; each of these efforts fails. Hananel’s first attack is to contend — erroneously — that nothing of consequence occurred at the meeting because the contract effectively had already been concluded between Adelson and Hananel. Def. Br. 7-8, 31-33. Regardless of whether Hananel and Adelson had engaged in previous negotiations, the evidence introduced by Adelson clearly demonstrates both that substantive discussions about the terms and conditions of Hananel’s employment took place when Hananel was in Needham and that the employment contract itself was concluded and formalized there. In particular, Roberts’s affidavit states that, after “some discussion,” he and Hananel “settled on” the terms that would govern Hananel’s subsequent employment relationship with IPI. A-105. In the face of this evidence, and given the nature of the prima facie standard, the district court was correct to reject Hananel’s revisionist account of the Needham meeting and instead to find that “the meeting

resulted in a formal, albeit oral, agreement or execution of the terms of the employment.” ADD-9.

Hananel seeks shelter in *Burger King*, arguing that, even if he did enter into a contract in Massachusetts, “a contract alone is insufficient to establish minimum contacts.” Def. Br. 33. But *Burger King* is no help to Hananel. In that case, the Supreme Court **approved** the exercise of jurisdiction in Florida even though the defendants — Michigan residents who negotiated and executed a franchise agreement with a Florida corporation by telephone and mail — had never even visited Florida. The Court held only that that the **existence** of “an individual’s contract with an out-of-state **party** alone” does not “automatically establish sufficient minimum contacts in the other party’s home forum.” 471 U.S. at 478. See *Phillips Exeter*, 196 F.3d at 290 (“[T]he *Burger King* Court made clear that the **mere existence** of a contractual relationship between an out-of-state defendant and an **in-state plaintiff** does not suffice * * *”) (emphasis added). But where, as here, the defendant not only contracts **with** a forum resident, but **physically enters** the forum to formulate and conclude the contract, jurisdiction is proper. See *Burger King*, 471 U.S. at 476 (“[T]erritorial presence frequently will enhance a potential defendant’s affiliation with a State and reinforce the reasonable foreseeability of suit there”).

The case law is consistent on this point, making clear that a “showing that a defendant purposefully availed himself of the privilege of doing business in a forum state typically consists of evidence of the defendant’s actions in the forum, such as executing or performing a contract there.” *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004). See also, e.g., *NUCOR Corp. v. Aceros Y Maquilas de Occidente, S.A. de C.V.*, 28 F.3d 572, 581 (7th Cir. 1994); *Grand Entm’t Group, Ltd. v. Star Media Sales, Inc.*, 988 F.2d 476, 482 (3d Cir. 1993) (“telephone calls and correspondence sent into New Jersey * * * , coupled with a meeting in New Jersey to facilitate the closing of a loan provided the minimum contacts needed to satisfy due process”). Thus, for example, the Seventh Circuit held in *Deluxe Ice Cream Co. v. R.C.H. Tool Corp.*, 726 F.2d 1209, 1216 (1984), that “[b]y choosing to come to Illinois to reach an agreement with SMW about the terms under which SMW equipment would be sold to the plaintiff, the defendant corporation invoked the benefits and protections of Illinois law during the course of its business dealings.”

Consistent with these decisions and with *Burger King* itself, it is not the “mere existence of a contractual *relationship*” that creates the minimum contacts in this case. *Phillips Exeter*, 196 F.3d 290 (emphasis added). Instead, the defendant actually was present in Massachusetts, where he deliberately participated in the negotiation and execution of the contract on which the action is

based. The parties' "negotiations" and "actual course of dealings" with respect to the contract (*Burger King*, 471 U.S. at 479) provide more than a sufficient connection with the forum to support the assertion of personal jurisdiction.

Next, Hananel attempts a misdirection ploy by contending that "there is no specific evidence that the Dec. 5 meeting added any cognizable term to the previously concluded agreement." Def.. Br. 8. In the first place, it is inaccurate to suggest that the agreement was "previously concluded." To the contrary, Roberts's affidavit makes clear that before the December 5 meeting "Hananel had not gone on the IPI payroll or been officially hired." A-105 ¶7. Even more to the point, however, the question of whether a cognizable term was added to the contract as a result of the discussions in Needham is a red herring. As discussed above, a defendant like Hananel, who voluntarily enters the forum State and, while there, discusses and formalizes a contract with a forum resident undoubtedly has sufficient contacts to satisfy the purposeful availment requirement. Whether the parties also used the occasion to negotiate new terms is irrelevant.

In a final bid to suggest that the December 5 meeting is insufficient to create minimum contacts with Massachusetts, Hananel asserts that he came to the Commonwealth not for an employment discussion, but for a medical visit. (Def. Br. 8-9; 34. This claim is both factually misleading and legally irrelevant. The Roberts affidavit stated that "Mr. Hananel was coming to Massachusetts for a

business meeting with me on December 5, 1995 and also to visit the Joslin Clinic.”

A-495 ¶7. Hananel also advised The Interface Group (a firm that shares the Needham office with IPI) that “I will try to be in Boston the first week of December. Do you think a meeting in Jocelyn Clinique [*sic*] could be arranged?”

The note makes clear that the Joslin visit was not the sole, or even primary, purpose of his trip. A-501.

More importantly, however, even if Hananel’s version of events were correct, his contacts with Massachusetts would still have constituted purposeful availment. Whether or not the original purpose of Hananel’s trip was medical, the fact remains, as the District Court observed, that “Hananel sought and obtained employment with IPI of his own volition, and while in Massachusetts, negotiated and executed his employment contract” (ADD-19), and “the meeting with Roberts at least became a goal of Hananel’s once he was in Massachusetts.” ADD-8.

Indeed, despite Hananel’s suggestion to the contrary, the fact that he may not have anticipated meeting with Roberts at the time he left Israel in no way makes his subsequent meeting involuntary. Nor does it mean that the jurisdictional consequences of attending that meeting and executing that contract were unforeseeable. In this respect, Hananel fundamentally misunderstands the nature and purpose of the minimum contacts standard. The “purposeful availment requirement ensures that a defendant will not be haled into a jurisdiction solely as a

result of ‘random,’ ‘fortuitous,’ or ‘attenuated’ contacts,” that is, contacts resulting from events beyond the defendant’s control. *Burger King*, 471 U.S. at 475 (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)). What matters, therefore, is that Hananel’s decision to meet in Massachusetts with Roberts about his employment was entirely his own, *i.e.*, that those actions were the result neither of chance nor of “unilateral activity of another party of a third person.” *Helicopteros*, 466 U.S. at 417. The possibility that the original purpose of the trip may have been personal is beside the point. Instead, because Hananel “deliberately * * * engaged in significant activities within [Massachusetts]” and created “continuing obligations between himself and residents of the forum,” the purposeful availment requirement is satisfied. *Burger King*, 471 U.S. at 475-76 (internal quotation marks omitted).

3. Hananel’s Subsequent Contract-Related Contacts With Massachusetts Further Demonstrate His Purposeful Availment Of The Forum

Although the December 5 meeting in Needham is sufficient to establish jurisdiction,³ it is not the only contact that Hananel had with Massachusetts in relation to his employment contract with IPI. As the District Court recognized, the evidence presented by Adelson describes “specific additional relevant contacts

³ Federal and state law make clear that a single act occurring within Massachusetts can be sufficient to subject a defendant to the district court’s jurisdiction. See *Burger King*, 471 U.S. at 475 n.18; *Morrill v. Tong*, 453 N.E.2d 1221, 1229 (Mass. 1983).

between Hananel and IPI in Massachusetts.” ADD-10. First, IPI’s Chief Financial Officer Stephen O’Connor and IPI’s Treasurer, both of whom worked in IPI’s Needham office, averred that they were “in consistent communication with Mr. Hananel” in regard to his duties and activities under the employment contract. A-518. Most of these communications concerned financial matters. IPI’s operations were funded from accounts maintained and administered in Massachusetts, and IPI’s financial operations were centered in Needham. A-495; A-518-19. Accordingly, Hananel was required to submit his annual budget, along with monthly or quarterly funding requests, and report “on a regular basis on how monies were spent,” to Needham. A-518-19.⁴ In this respect, although Hananel may have been in charge of the Israeli branch of IPI, he “would be required to follow the directions and procedures in the management of the branch issued from Needham.” A-495 ¶8. Hananel understood this arrangement when he agreed to work for IPI. *Id.*

Another significant jurisdictional contact with Massachusetts occurred in February 2000, when Hananel returned to the Commonwealth in order to attend a meeting in Andover on behalf of an Israeli company, iMD Soft, in which IPI had made a substantial investment. A-496-97; A-502-03. Evidence submitted by

⁴ For representative examples of these reports and communications between Hananel and IPI’s Needham offices, see A-521-30.

plaintiff confirmed Hananel's presence at this meeting and the "active role" that he played in the discussions. A-497; A-504-07.⁵

This evidence confirms the strong ties between Massachusetts and the performance of Hananel's employment contract. Because Hananel was reimbursed for expenses incurred under the contract from accounts managed in Massachusetts, he was obliged to engage in frequent business-related communications with IPI personnel in the Commonwealth. His finances, and thus his ability to perform the contract, were effectively controlled from Massachusetts.⁶ Like the defendant in *Burger King*, Hananel "knew that he was affiliating himself with an enterprise based primarily" in Massachusetts and that "all relevant notices and payments must be sent there." 471 U.S. at 480.

⁵ Hananel argues that the evidence regarding the Andover meeting should be ignored because it was beyond the scope of Adelson's interrogatory answer. Defendant. Br. 35. Hananel offers no reason to second-guess the District Court's conclusion that excluding such evidence "would disregard the fundamental principles governing civil litigation" and that any unfairness was mitigated Hananel's opportunity to supplement the record on these matters. ADD-3.

⁶ Hananel asserts that O'Connor's testimony in the Israeli proceeding somehow contradicted his affidavits discussing Hananel's frequent communications with Needham. Def. Br. 11. This simply is not so. All O'Connor said to the Israeli court was that "Hananel is the authority regarding Interface's Israeli branch" (A-678), a statement that does nothing to undermine the fact that Hananel was required to submit frequent budgets and funding requests to IPI's offices in Massachusetts. What matters for jurisdictional purposes is not the degree of business autonomy that Hananel enjoyed in Israel; instead, the question is whether, in performing his duties under the employment contract, Hananel engaged in deliberate contacts with the Commonwealth of Massachusetts or its residents. The evidence shows that he did.

Contrary to Hananel’s suggestion, these contacts were far from “incidental.” Def. Br. 37. The sole case on which Hananel relies suggests merely that a plaintiff’s unilateral decision to conduct certain activities in Massachusetts, activities that the defendant could not reasonably have expected to be performed there, is insufficient to establish that the defendant transacted business in the Commonwealth. See *Lyle Richards Int’l, Ltd. v. Ashworth, Inc.*, 132 F.3d 111, 113 (1st Cir. 1997). Here, however, Hananel was well aware from the beginning that he would have to deal frequently with IPI’s Needham office in order to ensure that he was reimbursed for legitimate expenses incurred while carrying out his contractual duties. And he proceeded to do just that for five years, sending one communication after another into Massachusetts in order to trigger the release of funds held here. The location of those funds was hardly “fortuitous” (Def.Br. 36) but rather was a direct consequence of IPI’s, and in particular its CFO’s, presence in Needham. For these reasons, Hananel’s communications, which he intended to have (and which had) direct effects in Massachusetts, are far removed from the sort of unexpected “attendant chores” that the plaintiff in *Lyle Richards* unilaterally performed in the Commonwealth.⁷

⁷ In any event, *Lyle Richards* does not control the outcome here, as the Court’s conclusion that personal jurisdiction was lacking was expressly predicated on the observation that the contract in question was not “executed by [defendant] in Massachusetts.” 132 F.3d at 113 n.2. In the present case, of course, that is precisely what happened, as Hananel physically came to Massachusetts to execute

Of more relevance than *Lyle Richards* is *Good Hope Industries, Inc. v. Ryder Scott Co.*, 389 N.E.2d 76 (Mass. 1979). There, the Massachusetts Supreme Judicial Court held that both statutory and constitutional jurisdiction existed over an out-of-state defendant based on its “sending periodic appraisal reports” to the plaintiff in Massachusetts, “its frequent initiation of telephone communications” with the plaintiff in Massachusetts, “its mailing monthly invoices,” and “regularly accepting payment by checks drawn” from plaintiff’s bank accounts in the State. *Id.* at 80. The Court held that, in so doing, the defendant “could have foreseen that significant managerial decisions, based on the information it provided, would be made in Massachusetts.” *Id.* at 82. So it is here. By knowingly engaging in business communications with parties in Massachusetts that he knew would be relied upon to make financial decisions that affected entities and funds located in the Commonwealth and traveling to Boston for business meetings (A-222 ¶65), Hananel purposefully availed himself of the benefits of Massachusetts law and subjected himself to the jurisdiction of courts in the state.

the contract from which Adelson’s cause of action springs. Similarly, Hananel’s December 2000 visit to Andover to engage in contract-related responsibilities further removes this case from the facts of *Lyle Richards*, which addressed the jurisdictional significance of the *plaintiff’s* forum-related activity.

D. Adelson’s Contract Claim Arises From And Relates To Hananel’s Contacts With Massachusetts

Count I of Adelson’s complaint — the sole remaining claim in this case — requests a declaratory judgment with respect to the employment contract between Hananel and Adelson. Specifically, Adelson seeks a declaration of the “rights of the parties” and avers that “he owes defendant nothing and that defendant is not entitled to any option, interest, profit, or claim to any business in which plaintiff has any interest.” A-24g. Such a claim clearly “arises directly out of, or relates to, the defendant’s forum-based contacts,” and thus satisfies the second statutory and constitutional requirement for specific personal jurisdiction. *163 Pleasant Street*, 960 F.2d at 1088-89.

Turning first to the statute, the Massachusetts Supreme Judicial Court has expressly held that the “arising under” language in the State long-arm statute creates a “but-for” test, according to which specific personal jurisdiction exists so long as the defendant’s forum contacts were a but-for cause of the plaintiff’s claim. *Tatro v. Manor Care, Inc.*, 625 N.E. 2d 549, 552-54 (Mass. 1994). Noting that the statute has consistently been construed “broadly,” the Court rejected the notion that the legislature “intended to foreclose a resident of Massachusetts, injured in another State, from seeking relief in the courts of the Commonwealth when the literal requirements of the long-arm statute have been satisfied.” *Id.* at 553-54. See also *Lyle Richards*, 132 F.3d at 114 (observing that the “arising from”

language is to be “generously construed in favor of asserting personal jurisdiction”). By any measure, a meeting in which the final terms of a contract are discussed and agreed to by the parties is a but-for cause of a claim seeking a declaration of the parties’ rights under that contract.

As for the constitutional issue, this Court has held that the requirement that a “suit arise out of, or be related to, the defendant’s in-forum activities” is one that “portends added flexibility and signals a relaxation of the applicable standard.” *Ticketmaster*, 26 F.3d at 206 (clarifying that the standard is disjunctive). Thus, the law of this Circuit is clear that, in “contract cases, a court charged with determining the existence *vel non* of personal jurisdiction must look to the elements of the cause of action and ask whether the defendant’s contacts with the forum were instrumental either in the formation of the contract or in its breach.” *Phillips Exeter*, 196 F.3d at 289; see also *Mass. School of Law at Andover, Inc. v. American Bar Ass’n*, 142 F.3d 26, 35 (1st Cir. 1998); *Hahn v. Vt. Law Sch.*, 698 F.2d 48, 51 (1st Cir. 1983) (holding that the “arising from” requirement is clearly satisfied where the “cause of action is for an alleged breach of contract and the business transacted was instrumental in the formation of the contract”). This test is readily met here.

There is no dispute that Adelson’s suit for a declaration of the parties’ rights arises directly out of Hananel’s employment contract. And, as discussed above,

the December 5, 1995, meeting was instrumental in the formation of that contract; after all, the Needham meeting was responsible for giving the contract its final shape and, indeed, its very existence as a legal instrument. As the District Court aptly observed, “[n]othing could be more instrumental in the formation of a contract than the literal act of forming the contract itself.” ADD-18-19. (Beyond disputing what actually happened in Needham — a dispute that is of no moment under the prima facie standard — Hananel does not seriously dispute this point.) Because Hananel’s activities in Massachusetts were a necessary predicate for Adelson’s contract claim, the latter clearly “relates to” the former, and the assertion of specific jurisdiction is appropriate.

E. The Exercise of Personal Jurisdiction Over Hananel Is Reasonable And Consistent With The “Gestalt” Factors

Observing that “concepts of reasonableness must inform a properly performed minimum contacts analysis,” *Ticketmaster*, 26 F.3d at 209, this Court has identified five specific factors that should be considered in determining whether personal jurisdiction is appropriate:

(1) the defendant’s burden of appearing; (2) the forum state’s interest in adjudicating the dispute, (3) the plaintiff’s interest in obtaining convenient and effective relief; (4) the judicial system’s interest in obtaining the most effective resolution of the controversy; and (5) the common interests of all sovereigns in promoting substantive social policies.

163 Pleasant Street, 960 F.2d at 1088 (labeling these the “Gestalt factors”). The purpose of examining these factors is to ensure that the assertion of jurisdiction comports with the elements of “fair play and substantial justice” that lie at the heart of the Due Process Clause. *Burger King*, 471 U.S. at 476-77 (quoting *Int’l Shoe*, 326 U.S. at 320). These factors “are not an end in themselves”; rather, “[i]n *very close cases*, they may tip the constitutional balance.” *Ticketmaster*, 26 F.3d at 209 (emphasis added). The Supreme Court has cautioned that courts should not lightly invoke these elements to withhold jurisdiction; to the contrary, “where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, *he must present a compelling case* that the presence of some other considerations would render jurisdiction unreasonable.” *Burger King*, 471 U.S. at 477 (emphasis added).⁸ Hananel falls well short of making such a case.

1. The Defendant’s Burden

The first factor is the burden placed upon the defendant by having to appear in the plaintiff’s chosen forum. Although there is undoubtedly some burden on

⁸ As this language from *Burger King* suggests, the burden lies with *Hananel* to show that the Gestalt factors are so decisive that they render the exercise of personal jurisdiction unconstitutional. See also *Burger King*, 471 U.S. at 482 (“Nor has Rudzewicz [the defendant] pointed to other factors that can be said persuasively to outweigh the considerations discussed above and to establish the *unconstitutionality* of Florida’s assertion of jurisdiction.”); *Ticketmaster*, 26 F.3d at 206 (“The defendant may nonetheless avoid having to defend in a strange place *if it can establish* that allowing the suit to go forward would be inconsistent with ‘fair play and substantial justice.’”) (quoting *Int’l Shoe*, 326 U.S. at 320 (emphasis added)).

Hananel to travel from Israel to Massachusetts in connection with this case, this Court has made clear that “insofar as staging a defense in a foreign jurisdiction is almost always inconvenient and/or costly, we think this factor is only meaningful where a party can demonstrate some kind of special or unusual burden.” *Pritzker v. Yari*, 42 F.3d 53, 64 (1st Cir. 1994). The District Court correctly concluded that no such special burden exists here. ADD-21-22. By his own account, Hananel is an “international businessman” (A-229 ¶74.3) who speaks fluent English and claims to have traveled all over the world in connection with his work for IPI, including on at least two occasions to Massachusetts.

Hananel’s argument that his physical ailments make it unduly burdensome for him to return to the Commonwealth is seriously undermined by the fact that in recent years he has made numerous international trips for a variety of purposes, including to Austria, Ireland, and Bulgaria. ADD-21-22. Against this backdrop, Hananel’s efforts to use his disputed medical claims to undermine the Court’s jurisdiction should be rejected.⁹ Indeed, even “without regard to whether Hananel is vastly overstating the seriousness of his health condition,” the Magistrate Judge found that these limitations are not “so great that they constitute such a significant

⁹ Hananel repeats highly questionable allegations of medical disability that he made to the District Court. Adelson submitted photo and video evidence that casts serious doubt on the veracity of Hananel’s medical complaints. See Exs. B-C to Opp. of Pl. (Dist. Ct. docket #106).

burden to warrant defeating this Court's exercise of its jurisdiction." ADD-33. That finding was well within his discretion.

2. The Forum State's Interest

The second factor — the forum state's interest in adjudicating the dispute — favors the exercise of jurisdiction. The Massachusetts Supreme Judicial Court has held that where an out-of-state party engages in commercial transactions with a Massachusetts entity "pursuant to a written contract signed in this State," Massachusetts "has an interest not only in providing a forum for its residents, but also in enforcing business transactions consummated within its boundaries." *Carlson*, 402 N.E.2d at 486. Indeed, the "failure to honor a contractual obligation incurred in a state cannot be said to be without consequences there." *Id.* (quoting *Davis H. Elliot Co. v. Caribbean Ultis. Co.*, 513 F.2d 1176, 1181-82 (6th Cir. 1975)). This Court has said likewise, observing that a state "has a legitimate and constitutional interest in * * * enforcing the contracts entered by its businesses." *Jet Wine*, 298 F.3d at 12.

Hananel tries to escape that obvious interest by claiming that Adelson brought this Massachusetts action only in order to harass and retaliate against Hananel. Def. Br. 40, 62 n.13 (describing the amendment to the Complaint as "another symbol of harassment"). Hananel has cried harassment at every turn in the parties' litigation, but every court to have considered the claim has rejected it.

The District Court found that “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.” ADD-36 n.4. The Tel Aviv District Labor Court agreed. ADD-87. (“We have not been convinced that the claim abroad was filed by [Adelson] in bad faith or that it is a vexatious claim.”). And so did the National Labor Court of Israel, which rejected Hananel’s claims that Adelson’s “filing of the proceedings in the United States was intended to ‘wear down’ [Hananel], in his words, and cause him to incur heavy legal expenses, and that the claims are vexatious.” NLC Op. ¶3.¹⁰ A defendant’s preference to litigate in his own home forum, and not in the plaintiff’s, does not make the plaintiff’s choice vexatious or harassing, no matter how many times the defendant says so.

Similarly misplaced is Hananel’s suggestion that “Israel has a stronger interest than Massachusetts in promoting the social policies (which both jurisdictions share) of enforcing employment contracts made with its citizens.” Def. Br. 43. This argument flies in the face of this Court’s observation that the “purpose of the inquiry is not to *compare* the forum’s interest to that of some other

¹⁰ This Court has taken judicial notice of the Tel Aviv District Labor Court’s decision denying Hananel’s request for an anti-suit injunction, and Adelson requests that it also take notice of the National Labor Court ruling affirming that decision. A certified translation of the National Labor Court opinion (“NLC Op.”) appears at the back of the brief.

jurisdiction, but to determine the extent to which the forum has an interest.” *Foster-Miller*, 46 F.3d at 151 (emphasis in original); see also *Good Hope*, 389 N.E.2d at 83 (“Plaintiff is not required to choose the forum with the most significant contacts as a matter of jurisdiction.”). Massachusetts has a significant interest in adjudicating a contract dispute that arises out of a contract negotiated and formalized in the Commonwealth — especially where, as here, performance of the contract required frequent communications with Massachusetts-based parties and involved payments from Massachusetts accounts. Indeed, Hananel’s focus on the interests of the Israeli legal system overlooks the fact that “minimum-contacts analysis presupposes that two or more States may be interested in the outcome of a dispute” and ignores the Supreme Court’s corresponding admonition that resolving conflicts between different forums’ laws “can usually be accommodated through choice-of-law rules rather than through outright preclusion of jurisdiction in one forum.” *Burger King*, 471 U.S. at 483 n.26.

3. Plaintiff’s Interest In Obtaining Effective Relief

The third Gestalt factor focuses on the plaintiff’s interest in obtaining effective relief in his chosen forum. In considering this factor, this Court has made clear that a plaintiff’s decision to bring suit in a particular location should not lightly be second-guessed. “[C]ourts considering jurisdictional issues generally should ‘accord plaintiff’s choice of forum a degree of deference in respect to the

issue of its own convenience.” *Foster-Miller*, 46 F.3d at 151 (quoting *Ticketmaster*, 26 F.3d at 211). Here, Hananel can point to nothing beyond his own bare assertions to suggest that Adelson’s decision to sue in Massachusetts was “contrived purely for strategic advantage.” *Id.* As noted above, both the District Court and two Israeli courts properly rejected Hananel’s allegations that this suit is motivated by an improper purpose. Indeed, given IPI’s significant corporate presence in Massachusetts, Adelson’s house in Massachusetts, and the fact that the contract at the heart of this dispute was negotiated and formalized there, Adelson’s decision to bring suit in Massachusetts is to be expected.

Hananel also points to Adelson’s wealth, contending that because Adelson is a “billionaire international businessman and investor,” his interest in obtaining relief in his chosen forum is somehow diminished. Def. Br. 41. The Supreme Court, however, has expressly rejected this line of reasoning, noting that a “defendant who has purposefully derived commercial benefit from his affiliations in a forum may not defeat jurisdiction there simply because of his adversary’s greater net wealth.” *Burger King*, 471 U.S. at 483 n.25. Accordingly, the third factor significantly weighs in favor of the exercise of personal jurisdiction in Massachusetts.

4. Judicial System’s Interest In Effective Resolution of the Dispute

The next factor is whether the exercise of jurisdiction by the forum state would further or inhibit effective resolution of the parties’ dispute. Hananel claims that dismissing the present case and allowing the Israeli action, which he instigated, to proceed would be “the only truly effective resolution of the controversy.” Def. Br. 42. This argument fails, however, because — as we explained in our opening brief — the present action and the Israeli action differ critically in scope. Pl. Br. 29-33. Whereas the Israeli case focuses only on whether Hananel is entitled to a share of the Las Vegas Sands Corp.¹¹ development in Macau, the Massachusetts case seeks to resolve whether Hananel is entitled to a share of “any business in which plaintiff has any interest.” A-22 ¶33. The Israeli litigation thus concerns a far more limited issue than does the present case. Adelson could prevail in the former action yet still face claims from Hananel that he has interests in Adelson’s businesses outside of Macau. For these reasons, dismissal of this case would hinder the effective resolution of the dispute, as it would deprive Adelson of the opportunity to achieve a comprehensive and conclusive adjudication of his dispute with Hananel.

¹¹ Adelson is the CEO, Chairman of the Board, and majority shareholder of Las Vegas Sands Corp.

In applying the fourth factor, it is also significant that the Israeli courts recently rejected Hananel's bid to block the present suit, indicating that Israel has no objection to this action going forward. ADD-84-88; NLC Op. ¶5. Moreover, given the strong interest that Massachusetts has in resolving disputes arising out of contracts executed, and which had a continuing effect, in Massachusetts, there is no reason that the present action, rather than the Israeli litigation, should give way. This is especially true given that this case was filed only two months after the Macau issue first arose in the Israeli litigation. Pl. Br. 33-35.

5. Substantive Social Policies

The final Gestalt factor focuses on whether there are shared social policies that would be upset if personal jurisdiction were withheld or advanced if it were asserted. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). This factor also favors Adelson. As the District Court aptly observed, "Massachusetts has an interest in redressing harms inflicted on businesses operating here (or [on] the non-citizen owner of the business when the harm arises out of the business' activities within Massachusetts)." ADD-23. Hananel's suggestion that "[n]o harm will come to Massachusetts social policies from dismissal" (Def. Br. 43), overlooks the significant state interests previously discussed. It also misleadingly suggests that Adelson and IPI have no substantial connection to Massachusetts; in fact, the evidence is undisputed not only that IPI

does business (and has several officers in the Commonwealth) but also that Adelson himself owns a home and maintains an office here. A-114; A-497-98; A-517-18.

* * *

In sum, personal jurisdiction exists, as the court below found, and the balance of factors favors exercising that jurisdiction. Hananel cannot alter that fact that he “deliberately chose to do business” in Massachusetts with an entity located here. *Carlson*, 402 N.E.2d at 486. Having intentionally and voluntarily decided to do so, Hananel cannot now establish that there is anything arbitrary or unreasonable about requiring him to appear in this forum.

II. Hananel Provides No Support For The District Court’s Misapplication Of *Forum Non Conveniens*

Our opening brief pointed out several legal errors that were essential to the Magistrate Judge’s recommendation of dismissal for *forum non conveniens*. Like the Magistrate Judge, Hananel offers no relevant authority supporting the exclusive reliance on concurrent litigation as the justification for dismissing this otherwise properly maintained action, and he ignores all contrary authority. He also offers no defense of the Magistrate Judge’s decision to recommend dismissal in the absence of a finding that the relevant factors weighed *strongly* in favor of the defendant. Instead, Hananel devotes much of his brief to the contention that the Magistrate

Judge erred in evaluating fact-bound issues of party convenience and evidence availability, but he presents no evidence that the alleged error approached “a clear abuse of discretion,” the standard necessary to overturn those factual findings. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 237 (1981).

A. The Magistrate Judge Misapplied The Burden Of Proof And Failed To Find A Strong Balance In Favor of Dismissal

1. That *Forum Non Conveniens* Is “Flexible” Does Not Allow Unfettered Abdication Of Jurisdiction

Hananel virtually ignores our arguments (Pl. Br. 12-13, 17-21) that the Magistrate Judge failed to find the strong balance of convenience required to dismiss a case for *forum non conveniens*. Instead, he devotes an entire section of his brief (Def. Br. 52-54) to an isolated phrase in *Howe v. Goldcorp Invs., Ltd.* stating that *forum non conveniens* is a “flexible and practical doctrine.” 946 F.2d 944, 950 (1st Cir. 1991). That description is hardly remarkable and does not give district courts carte blanche to invent their own standards. Nor does it overcome the Supreme Court’s admonition that federal courts have a “virtually unflagging obligation * * * to exercise the jurisdiction given them.” *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

Hananel also seems to argue (Def. Br. 53) that he need not prove that Adelson’s choice of forum is vexatious because *Koster* and *Royal Bed* mention that factor in the disjunctive. See *Royal Bed & Spring Co. v. Famossul Industria e*

Comercio de Moveis Ltda., 906 F.2d 45, 48 (1st Cir. 1990) (“[T]he question to be answered is ‘whether the actions brought are vexatious or oppressive or whether the interests of justice require that the trial be had in a more appropriate forum.’”) (quoting *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 530 (1947)). Regardless of whether that language was intended as a precise test, overruling other formulations, which all make clear that a mere preponderance of conveniences is inadequate,¹² Hananel offers no explanation of how he might meet either prong (*i.e.*, vexation/oppressiveness or the interests of justice).

Hananel has alleged harassment at every turn, but, as discussed above at 32-33, every court to have considered his allegations has rejected them. A defendant’s preference to litigate in his own home forum rather than the plaintiff’s does not make the plaintiff’s choice vexatious or harassing. Hananel offers no reason to conclude that the District Court’s finding on this point was clearly erroneous.

2. The Magistrate Judge Reversed The Burden Of Proof

We pointed out that the Magistrate Judge appeared to expect Adelson to prove the superiority of Massachusetts rather than requiring Hananel to prove severe inconvenience and injustice from litigating here. Pl. Br. 17-21. Reversing the burden of proof in that manner is an error of law, mandating reversal. See

¹² Hananel’s reading is based on a single quotation and ignores other cases that use these phrases interchangeably. See cases cited in Pl. Br. 13-16 & n.4, 36-37.

Mercier v. Sheraton Int'l, Inc., 935 F.2d 419, 423-24 (1st Cir. 1991); cases cited at Pl. Br. 17 n.6.

Hananel's response is twofold. First, he argues that "courts applying flexibility and practicality under the *Howe* standard may consider the undisputed evidence that Adelson has no valid grounds for filing duplicating litigation." Def. Br. 54. That point is obviously not "undisputed." Whether Adelson had valid grounds for filing the present suit and whether this suit is "duplicating" at all are at issue on this appeal, and they are questions on which Hananel should have borne the burden of proof below. In addition, this argument betrays the absurdity of Hananel's interpretation of *Howe*: The doctrine cannot be so "flexible and practical" that a Magistrate Judge may impose the burden of proof on whichever party he chooses.

Second, Hananel argues that the Magistrate Judge did not reverse the burden of proof, because he explained why he wanted to dismiss the case. Def. Br. 54-55. We do not contend, however, that the Magistrate Judge offered no reasons for the dismissal. But what Hananel cannot deny is that the Magistrate Judge made no finding that trial in Massachusetts would subject the defendant to "manifest injustice" or that the relevant factors "*strongly* favor[] litigating the claim in the second forum," as the doctrine requires. *Mercier*, 935 F.2d at 423-24 (emphasis added).

Instead, the Magistrate Judge wrote a report that unmistakably suggests that he expected Adelson to prove why the court *should* hear the case, rather than requiring Hananel to prove why the court *should not* do so. Federal courts of appeal have reversed *forum non conveniens* dismissals for just this reason. See cases cited in Pl. Br. 17-19 & n.6; *Tech. Dev. Co., Ltd. v. Onischenko*, 174 Fed. Appx. 117, 122-23 (ADD-53) (3d Cir. 2006) (reversing because “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”) (emphasis added). Hananel notes that the courts in *Royal & Sun Alliance* and *Onischenko*, after vacating orders of dismissal, then remanded for consideration of the proper factors. Def. Br. 55-56. That does not help Hananel here, as both cases hold that a finding of equipoise is inadequate for dismissal.

3. The District Court Gave Inadequate Deference To Adelson’s Choice Of Forum

- a. Hananel’s response seriously misunderstands the case law

We explained in our opening brief that the Magistrate Judge gave inadequate deference to Adelson’s choice of forum and refused to give heightened deference in spite of Adelson’s U.S. citizenship. Pl. Br. 21-22. In response, citing *Mercier*, Hananel asserts that “a full consideration of other factors will demonstrate that this

choice [of forum] was given sufficient weight.” Def. Br. 50. But *Mercier* did not hold that deference to the plaintiff’s choice of forum may be dispensed with as long as the court fully considers other factors. Nothing in *Mercier* even hints at such a rule, which would directly contract reams of precedent. Pl. Br. 14-16.

In *Mercier*, this Court noted the lower court’s “extended discussion of the factors militating in favor of a transfer” and concluded that the district court “was fully aware of the considerable quantum of evidence required to overcome the presumption.” *Id.* The district court had considered six factors that weighed strongly toward dismissal, including a mutually-agreed forum selection clause favoring Turkey. Here, by contrast, the Magistrate Judge expressly *refused* to give Adelson’s choice of forum significant weight because of Hananel’s suit in Israel and expressly gave *no* weight to Adelson’s citizenship. ADD-36.

Hananel also mischaracterizes *Gulf Oil v. Gilbert*, which did not come close to adopting the absurd rule that “when the plaintiff has an unimpaired right to pursue his remedy in another forum, dismissal improves the administration of justice as well as the fairness to litigants.” Def. Br. 51. What *Gilbert* actually said was that “unless the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed.” 330 U.S. at 508.

b. A U.S. citizen's choice of a U.S. forum is entitled to heightened deference

Federal law is clear that the decision of a U.S. citizen to sue in a U.S. court deserves additional weight in the *forum non conveniens* analysis. In response, Hananel argues that “[a] citizen’s choice of forum should not be given **dispositive** weight” (Br. 53-54 (quoting *Piper Aircraft*, 454 U.S. at 255 n.23) (emphasis added)) and that American citizens have no “**absolute** right” to sue in U.S. courts. *Id.* at 49, 53. Neither point is responsive either to our argument or to the consistent refrain of federal courts that any plaintiff’s choice of forum must be given **substantial** weight and that the choice of a U.S. plaintiff must be given **heightened** deference.¹³ In *Mizokami Brothers v. Baychem Corp.*, on the same page that the Ninth Circuit observed that a citizen has no “absolute right to sue in a United States court,” it also noted that “[n]umerous cases suggest that a defendant must meet an **almost impossible burden** in order to deny a citizen access to the courts of this country.” 556 F.2d 975, 977 (9th Cir. 1977) (emphasis added).

¹³ Hananel suggests that we quoted the Eighth Circuit’s decision in *Reid-Walen v. Hansen*, 933 F.2d 1390, 1396 (8th Cir. 1991), out of context. Def. Br. 53. Not so. In *Reid-Walen*, the court was distinguishing cases where a U.S. citizen with no real interest was added as a nominal party to invoke heightened deference to its choice of forum. Here, of course, Adelson is the only plaintiff. Hananel contends, misunderstanding *Reid-Walen*, that Adelson has a “real interest in having Israeli courts resolve the controversy.” Def. Br. 53 (emphasis in original). Even if legally relevant, that allegation is incorrect: If Adelson preferred to litigate in Israel, he would not have sued Hananel in Massachusetts or contested the *forum non conveniens* motion.

The contrast with *Mercier* is again instructive. There, this Court found that the district court “was cognizant of the strong presumption favoring the American forum selected by American plaintiffs” and “was fully aware of the considerable quantum of evidence required to overcome the presumption.” 981 F.2d at 1355. Here, the Magistrate Judge speculated that the “presumption [in favor of a plaintiff’s choice of forum] *might* weigh more significantly in favor of Adelson” because of his citizenship, but then “note[d], however, that Adelson has not cited a case supporting this proposition.” ADD-36. That decision to ignore a critical element of the doctrine was an error of law.

c. IPI’s Israeli lawsuit does not reduce the deference due Adelson’s choice of forum

Hananel also claims that IPI’s decision to sue Hananel in Israel for misusing IPI funds, overcompensating himself, and ignoring his duties should somehow reduce the deference due Adelson’s choice of forum in this case. Def. Br. 50-51. That is incorrect: The rule is that a plaintiff’s choice must be accorded substantial deference, period. There is no exception where a party related to the plaintiff files a separate claim in the alternate forum, and Hananel offers no legal authority for such an exception. The IPI litigation could be relevant only if Adelson bore the burden of proving that litigating in Israel is impossible; it has nothing to do with whether Hananel faces manifest injustice from litigating in Massachusetts.

B. The Magistrate Judge Erred In Relying Solely On The Pendency Of Hananel's Suit In Israel

1. Hananel's Suit Does Not Duplicate This One

- a. This argument was not waived

The finding that the Israeli and Massachusetts actions were identical was made for the first time in the Magistrate Judge's Report. Adelson had no way of anticipating this finding, and he timely pointed out to the District Court that the two cases differ critically in scope — Hananel's Israeli case seeks options only in the Macau development, while Adelson seeks a declaration here as to the extent of Hananel's rights, if any, in any Adelson-related project. Objections to Magistrate Judge's Report (Dist. Ct. docket #137) at 9-10. The statements of Adelson to which Hananel points (Def. Br. 61) simply describe this case in general terms, explaining that, like Hananel's 2003 claim in Israel, this case involves Hananel's demand for options.

The differences between the two cases, and thus the importance of a comprehensive declaration, became more salient last spring, when Las Vegas Sands Corp. applied for a casino license in Hungary. The Amended Complaint incorporated new information regarding that project, which may be susceptible to Hananel's option claims. Adelson filed the Amended Complaint only eight days after the casino license application and nearly three months before the District Court's ruling. A-13-14. The Amended Complaint also reworded the request for

relief to clarify that Adelson seeks “a declaratory judgment that Hananel has no rights in any of the casino/hotel/real estate/investments anywhere in the world.” A-24h ¶42. That was not a substantive change: The original Complaint requested a declaration that “defendant is not entitled to any option, interest, profit or claim to any business in which plaintiff has any interest.” A-22 ¶33; see also A-21 ¶29 (noting dispute as to Hananel’s rights “with respect to Macau or otherwise”). When the Magistrate Judge interpreted “Macau or otherwise” to mean “Macau only,” however, clarification was in order. But even if this Court feels bound to ignore the current pleadings and consider only the original Complaint, the contrast between the two cases remains.

- b. The Israeli action does not seek a comprehensive resolution, as this case does

It is noteworthy that, in describing the relief that he seeks in Israel, Hananel relies only on general statements from the District Court. Def. Br. 62-63. He says nothing about his own pleadings in Israel, which state that “[t]his Complaint concerns the Defendants’ undertaking to give the Plaintiff stock options in a casino venture in the Macau region of the People’s Republic of China.” A-39 ¶1. That tactical decision was not accidental, as Hananel has elsewhere made it clear that he would be entitled to options not only in the Macau development but in potential developments in over a dozen countries. Pl. Br. 30 n.13. The fact that these claims are as yet “hypothetical” (Def. Br. 63) is no reason to deny Adelson declaratory

judgment — it is precisely because Hananel might hypothetically bring or threaten to bring claims against any new, multi-billion dollar development that Adelson desires a comprehensive resolution.

The consolidation of Hananel’s two Israeli claims (Def. Br. 63-64) is irrelevant. Hananel does not explain the Israeli standard for consolidation and provides no basis to believe that in deciding to consolidate Hananel’s labor law claims with his demand for options, the Israeli court gave any thought to whether the Macau claim in Israel duplicated the declaratory judgment claim here. Indeed, the Israeli National Labor Court stated that “it is doubtful whether * * * the causes [of action] were to be identical.” NLC Op. ¶6.

2. Even If The Actions Were Duplicative, That Would Be Legally Irrelevant

Hananel offers no serious rebuttal to our argument (Pl. Br. 23-29) that concurrent litigation has never been part of the *forum non conveniens* analysis and that federal courts have repeatedly denied *forum non conveniens* motions in spite of concurrent litigation. He alludes to “the quotations from *Gulf Oil* above” (Def. Br. 51), but *Gulf Oil* did not mention, nor did its facts involve, concurrent litigation. He also asserts that “many courts, in opinions cited by both parties in this case, understand the public interest factor of promoting judicial efficiency, and the private factors of the costs to the parties and the inconvenience to the witnesses of duplicative litigation to apply to the situation of the present case.” Def. Br. 57.

Yet it seems that none of those courts committed that understanding to writing, as neither Hananel nor the Magistrate Judge has ever cited authority for that proposition.

By contrast, many other cases have stated that concurrent litigation is *not* relevant to *forum non conveniens*. Pl. Br. 23-25. Hananel attempts to distinguish some on their facts (Def. Br. 58 n.10) but never denies that all stated the *legal* rule that “the pendency of [a foreign] action does not factor in a *forum non conveniens* analysis.” *Am. Stock Exch., LLC v. Towergate Consultants Ltd.*, No. 03 Civ. 856 (RMB), 2003 WL 21692814, at *5 (S.D.N.Y., July 21, 2003).

Hananel muses that “[i]t is inconceivable that any court * * * would not consider a prior pending action.” Def. Br. 57. In fact, under abstention doctrine, which directly addresses the issue of concurrent litigation, “the rule is that the pendency of an action in the state court is *no bar to proceedings concerning the same matter* in the Federal court.” *Colo. River*, 424 U.S. at 817; see also *Spring City Corp. v. Am. Bldgs. Co.*, 193 F.3d 165, 171-72 (3d Cir. 1999) (“*Colorado River* abstention must be grounded on more than just the interest in avoiding duplicative litigation.”).

Hananel’s discussion of the cases is no more persuasive. As to *Quaak v. Klynveld Peat Marwick*, he ignores not only the facts of that case but also this Court’s reiteration of “the age-old presumption in favor of concurrent parallel

proceedings * * * and [the] presum[ption] that public policy always favors allowing a suit pending in an American court to go forward without any substantial impediment.” 361 F.3d 11, 17 (1st Cir. 2004). The defendant in *Quaak* sought to thwart discovery by initiating litigation in Belgium “requesting that substantial penalties be imposed on those who might take any step of a procedural or other nature in order to proceed with the discovery-procedure” ordered by the U.S. court. *Id.* at 14 (internal quotation omitted); see also *id.* at 20. Those facts go well beyond mere duplication of judicial effort. Hananel also fails to explain how the decision below can be squared with this Court’s explicit *rejection* in *Quaak* of the rule that “an international antisuit injunction is appropriate whenever there is a duplication of parties and issues and the court determines that the prosecution of simultaneous proceedings would frustrate the speedy and efficient determination of the case.” *Id.* at 17.

Pritzker v. Yari is simply irrelevant. While it does “endorse[] the avoidance of multiple duplicate litigations” (Def. Br. 59-60), it employed that principle as a justification for *exercising* jurisdiction, a result that is hardly remarkable given the strong presumption in favor of that result. Furthermore, although both Hananel and the Magistrate Judge have relied on *Linkco, Inc. v. Nichimen Corp.*, neither of the two *forum non conveniens* motions in that case is relevant. In *Linkco*, the court granted a motion as to a defendant that had already won judgment in Japan, and it

denied a motion as to a defendant that had not participated in the prior Japanese proceedings. 164 F. Supp. 2d at 214. Neither involved *concurrent* litigation. Finally, Hananel is correct that in *MLC (Bermuda) Ltd. v. Credit Suisse First Boston Corp.*, “the court found that the parties and issues in the two actions were substantially identical.” Def. Br. 59. What he omits is that the court also found that “London is the most convenient forum” because the evidence was almost all in London and Moscow. 46 F. Supp.2d 249, 253 (S.D.N.Y. 1999).¹⁴

C. The Magistrate Judge’s Finding That The Private Factors Were “In Equipose” Was Not A Clear Abuse Of Discretion

The Magistrate Judge found that all private factors were “in equipose,” a finding that should have compelled him to recommend *denying* the motion to dismiss. ADD-32. Hananel argues that this finding was erroneous, but he never mentions that findings of fact on *forum non conveniens* are subject to review for “clear abuse of discretion.” *Piper Aircraft*, 454 U.S. at 257. These fact-bound issues were heavily disputed on the large record below, and Hananel provides no reason to think that the Court’s conclusions reflected a clear abuse of discretion.

¹⁴ Hananel also suggests that *Mercier* supports the consideration of other pending actions, because the court there dismissed the suit “in favor of an action in Turkey that ha[d] not even been commenced.” Def. Br. 52. But he ignores the fact that concurrent litigation was not the *reason* for dismissal in *Mercier*, as it was here. Rather, as discussed above, the Court found that six factors, including a forum selection clause, strongly favored sending the case to Turkey.

Hananel contends (Def. Br. 65) that Adelson has not argued inconvenience or lack of jurisdiction in Israel. In fact, Adelson raised both issues in his Answer to the 2003 claim. Even if Hananel’s assertion were true, moreover, it would be irrelevant. No matter how convenient Israel might be for Adelson, the District Court cannot refuse to exercise jurisdiction without a conclusive showing of *Hananel’s* inability to litigate *here*.

1. The Parties’ Relative Financial Resources Are Not Relevant

Hananel first argues that “this Court should take into account” Adelson’s “status as a billionaire international businessman.” Def. Br. 66. Compare A-229 ¶74.3 (Hananel describing himself as “an international businessman”). A plaintiff’s wealth, however, cannot substitute for a showing that the defendant will suffer hardship from litigating in the present forum. See *Harlow v. Children’s Hosp.*, 432 F.3d 50, 68 (1st Cir. 2005) (“Even under the doctrines of *forum non conveniens* and change of venue, it is not clear that sheer disparity in wealth is legally relevant, without proof of hardship.”).

Hananel’s repeated assertion that Adelson testified “that he *intended* to bring the Macau claim here and to exhaust Hananel’s resources thereby” (Def. Br. 25, 40 (emphasis added)) is false. What Adelson said was that Hananel’s counsel was wasting Hananel’s money through dilatory discovery practices:

- Q. I have to mark a document, Mr. Adelson.
- A. Mark a document.

(Exhibit 15 marked for identification.)

THE WITNESS: It's your time you're wasting and it's Mr. Hananel's money you're wasting. One day he'll run out.

A-397. Nowhere did Adelson say that exhausting Hananel's financial resources was his own intent.

2. The Magistrate Judge Did Not Abuse His Discretion In Rejecting Hananel's Health Claims

Hananel repeats allegations of medical disability that he made before the Magistrate Judge. These claims are strongly disputed. As described above (at 31), the evidence casts doubt on the veracity of Hananel's medical complaints. Even "without regard to whether Hananel is vastly overstating the seriousness of his health condition," the Magistrate Judge concluded that "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." ADD-33. That finding was well within the District Court's discretion.

3. The *Relevant* Evidence Is Equally Available In the U.S. And In Israel

Hananel next alleges that "[t]he vast majority of the witnesses" in this case live in Israel and do not speak English. Def. Br. 66-67. Yet he does not deny that Adelson speaks only English or that all of the negotiations were in English, and he does not explain what light non-English-speaking witnesses could shed on the interpretation of the parties' oral contract.

The Magistrate Judge properly rejected Hananel's assertion, moreover, for three reasons: (1) "Hananel has not submitted any affidavit evidence detailing the substance of the anticipated testimony of these [Israeli] witnesses" or identified any relevant documents (ADD-33-34), (2) the issues to which Israeli witnesses would testify "are not very relevant, if indeed they are relevant at all" (ADD-32-33), and (3) "there is no reason these witnesses could not testify by video hook-up." ADD-33.

This case thus stands in stark contrast to *Mercier*. There, this Court found that the most "central" witness was a Turkish national who could not be compelled to testify in the U.S. (*Mercier*, 935 F.2d at 428) and that "it seems most likely that [his] credibility would be pivotal to any judicial resolution of the factual issues at the root of the parties' dispute." *Mercier*, 981 F.2d at 1356. Here, the Magistrate Judge concluded that "[e]ssentially, this case is a swearing match between Plaintiff and Defendant" and noted that "Hananel concedes that no one other than the two parties witnessed these conversations; in other words, the parties are the only percipient witnesses to either the contract or the presentation of the Macau opportunity." ADD-32. His refusal to dismiss the case based on unsubstantiated claims of Israeli evidence was not a clear abuse of discretion. See *Klonis v. Nat'l Bank of Greece*, No. 05-Civ.-6289, 2006 WL 3851146, at *6 (S.D.N.Y. Dec. 27, 2006) (denying motion where, "while there are undoubtedly some relevant

documents or witnesses in Greece, defendant has not indicated that this case is likely to involve voluminous documents or many Greek witnesses”).

Hananel says that identifying his witnesses and documents would be an “impossib[le] * * * burden.” Def. Br. 67. He apparently would require a district court to dismiss a case whenever a defendant asserts the existence of evidence in another jurisdiction. But *Mercier* held only that, where the defendant had identified a witness and detailed his relevance but not filed an affidavit, the district court did not abuse its discretion in considering the witness’s unavailability. 981 F.2d at 1356. In any event, even accepting Hananel’s claims about the *existence* of Israeli witnesses and documents, the Magistrate Judge found that none of them would be *relevant* to this case.

4. The Macau Claim Has No More Connection To Israel Than To The United States

Hananel next argues, again relying on *Mercier*, that the case should be dismissed because of the “attenuated connection” of the claims to Massachusetts. Def. Br. 67-68. Once again, *Mercier* is easily distinguishable. It involved a dispute over plaintiffs’ plan to open a casino in Turkey. 981 F.2d at 1347-48. All negotiations and alleged wrongdoing took place in Turkey, and the district court found that “[e]xcept for the fact that [plaintiffs] are American citizens, * * * this is not a local controversy.” Quoted in *Mercier*, 981 F.2d at 1355 (omission in original).

Here, the dispute centers around Hananel's employment by a U.S. corporation with a head office in Massachusetts, which involved "report[ing] to Adelson regularly." ADD-35. Specifically, it involves the interpretation of a contract that the District Court found was formalized in Massachusetts. As noted above, Massachusetts "has an interest not only in providing a forum for its residents, but also in enforcing business transactions consummated within its boundaries." *Carlson*, 402 N.E.2d at 486.

The Magistrate Judge also found that "[t]he scope of the agreement, as described by Hananel, is international" and involved worldwide travel. ADD-35-36. The option claims, in fact, all relate to developments *outside of Israel* and work that Hananel allegedly performed in Macau and elsewhere around the world. Moreover, as the Magistrate Judge found, IPI's operations in Massachusetts give the Commonwealth a further interest. ADD-22-23. Therefore, "the locus of the dispute does not decidedly tilt toward Israel or the United States. Plainly, both forums have significance, but neither is materially more important." ADD-36. The Israeli courts agree. See *supra* p. 33. Hananel has offered no reason to believe that these findings of fact were a clear abuse of discretion.

5. Choice Of Law Does Not Favor Israel

Hananel finally argues that the applicability of Israeli law favors dismissal. Def. Br. 68-70. The Magistrate Judge, however, found this issue waived, and even

if this Court wished to consider it de novo, it should not find that the applicability of Israeli law is a compelling reason to dismiss.

a. Hananel waived choice of law

Magistrate Judge Sorokin wrote that because “neither [party] has engaged in a choice of law analysis * * * I decline to resolve the choice of law issue.” ADD-37 n.5. Hananel argued below that “[t]he Magistrate Judge was essentially correct in finding that ‘neither party has engaged in a choice of law analysis.’” Response to Objections to Magistrate Judge’s Report (Dist. Ct. docket #141) at 16. Where the district court has not considered an issue because neither party raised it below, this Court will not consider it either. See *Ouimette v. Moran*, 942 F.2d 1, 12 (1st Cir. 1991).

b. Massachusetts law governs the contract

If this Court nonetheless considers choice of law, it should find that Massachusetts law applies. A diversity court applies the conflict of laws rules of the state in which it sits. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). Massachusetts follows the interest-balancing test set out in Section 188 of the Restatement (Second) of Conflict of Laws. See *Hodas v. Morin*, 814 N.E.2d 320, 324 (Mass. 2004). Section 188 establishes a multi-factor test. Massachusetts was the place of both contracting, § 188(a), and negotiation, § 188(b). ADD-15-16. According to Hananel, the contract was to be performed, § 188(c), worldwide.

A-68 ¶16, A-69 ¶19 (Hananel alleging performance through work in “Israel, Jordan, Italy, Rhodes (Greece), Bulgaria, Ireland, and elsewhere”); ADD-35-36.

The last factor is the “domicil, residence, nationality, place of incorporation and place of business of the parties.” Section 188(e). One of the contract parties, IPI, is a Delaware citizen with a principal place of business in Massachusetts. This suit also addresses the personal liability of Adelson, a U.S. citizen and Boston native who maintains a residence and an office in Massachusetts. Thus, the first two factors unequivocally favor Massachusetts law, while the last factor is at least consistent with that result. No factor points clearly in favor of the law of any other jurisdiction.

- c. Even if Israeli law applied, the case should not be dismissed

Mercier, which considered the difficulty of applying Turkish law as one of six factors pointing toward dismissal, involved an unusually difficult body of foreign law. This Court noted that “many treatises on Turkish law are unavailable in English translation” and “almost no Turkish court decisions are available in English translation.” 981 F.2d at 1357 n.10. Hananel has presented no evidence that Israeli contract law is similarly inscrutable or even that this case presents any difficult legal issues — the Magistrate Judge described it as a “swearing match.” ADD-34. Furthermore, “the need to apply foreign law is not in itself a reason to apply the doctrine of *forum non conveniens*.” *Olympic Corp. v. Societe Generale*,

462 F.2d 376, 379 (2d Cir. 1972); see also *Piper Aircraft*, 454 U.S. at 260 n.29). Indeed, the case law warns against “an excessive reluctance to undertake the task of deciding foreign law, a chore federal courts must often perform.” *Manu Int’l, S.A. v. Avon Prods., Inc.*, 641 F.2d 62, 68 (2d Cir. 1981); see also *Schexnider v. McDermott Int’l, Inc.*, 817 F.2d 1159, 1163-64 (5th Cir. 1987).

* * *

Given that the District Court’s findings that the private factors were “in equipoise” cannot be assailed as an abuse of discretion, the sole legal issue before this Court remains whether it was proper to rely entirely on the existence of the Israeli litigation to dismiss the case. As we have explained, that decision was without precedent, flies in the face of the rule that courts are obligated to exercise their jurisdiction in the absence of extraordinary circumstances, and has no basis in policy or law.

CONCLUSION

For the foregoing reasons, this Court should vacate the District Court's order of dismissal.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(c) because this brief contains 13,968 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. Pro. 32(a)(6) because this brief has been prepared in 14-point Times New Roman using Microsoft Word 2002.

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