2d Civil No. B174254

COURT OF APPEAL
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

EVE STERNLIGHT COHEN, as Co-Special Administrator of the Estate of Sara Sternlight and as Co-Trustee of the Sternlight Family Trust, including subtrusts,

Plaintiff and Appellant,

vs.

BANK LEUMI LE-ISRAEL (SWITZERLAND), a Swiss business entity, form unknown, et al.,

Defendants and Respondents.

Appeal from the Los Angeles Superior Court,
Los Angeles Superior Court Case No. SC 075 491,
Honorable Paul G. Flynn, Judge

APPELLANT'S OPENING BRIEF

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INTRODUCTION

The trial court's order quashing service of summons and dismissing this lawsuit for financial dereliction reflects 19th Century thinking in what is a decidedly 21st Century case.

The defendant is a bank chartered in Switzerland. The bank's motion to quash stressed that the bank is physically located in Switzerland; that its legal identity is separate from that of a sister bank that has a branch on Wilshire Boulevard; and that the happenstance of its having done business from Switzerland with a customer in California should not subject it to the California courts' jurisdiction now that disputes have arisen in connection with its dealings with that customer. The superior court agreed, noting, "Everything happened in Switzerland." (RT 2.)

Both the bank and the superior court, however, are seriously out of touch with contemporary standards governing nonresident jurisdiction. The defendant's physical presence in California certainly is not required. While "minimum contacts" remains key to the analysis, the more commerce is conducted through correspondence, telephone, electronic and other virtual means, the broader and looser the variety of "contacts" that suffice to satisfy the "minimum" presence threshold for requiring a nonresident to submit to the jurisdiction of California courts. This should be especially true for a financial institution that deals in intangible products and services.

Here, there are sufficient contacts for specific jurisdiction. The bank carried on an active business relationship with its California customer over a period of seven years. Its obliging, attentive service enabled that customer to steal over $1 million in California-based assets from her parents and the family trust they created. With nary a question about some obviously questionable maneuvers, the bank allowed the customer first to

tuck away the assets – physically stolen from California and transported to Switzerland – in an account that, although it was in her dependent, ailing mother's name, she could and did readily access by means of a power of attorney, then to move the assets to a joint account with her mother, and finally, to place them in a third account belonging to the California customer alone. On dozens of occasions over the course of years, the bank had, at the customer's directions (communicated from California), wired the stolen funds to various accounts that the customer maintained in California. This is as much a contact with California as selling and sending a tangible product for use here.

For good measure, the bank obliged the customer by supplying correspondence characterizing the nature of the accounts and her use of them according to her specified instructions, so that the customer could use that correspondence to her advantage in divorce proceedings pending in a California court. The customer sent her request to the bank from California. The bank sent the requested correspondence to California.

When her scheme came to light, the customer was criminally charged and pleaded *nolo contendere* in California.

In its standard forms, the bank reserves the right to sue in any jurisdiction it chooses, including a customer's domicile. And yet the bank maintains here that if its customer's victims want to seek redress from it for its negligence in facilitating the customer's financial crimes, they must come to Switzerland. The bank can't have it both ways.

In this electronic age, a bank cannot immunize itself from process in a state where it undeniably did business, simply by showing that it physically conducted that business from the comfort of its own turf. In short, the bank's contacts with California connected to the facts at issue

here palpably are adequate to warrant California's exercising specific jurisdiction over the bank.

The superior court erred in quashing service of summons and dismissing this lawsuit. Its order should be reversed, and the bank held to answer.

STATEMENT OF FACTS

A. Cast of Characters.

Morris and Sara Sternlight were an older, well-to-do married couple residing in Beverly Hills, California. They had three grown children – Eve Sternlight Cohen, Joseph Sternlight and Helen Fabe. (AA 214.)

Bank Leumi Le-Israel (Switzerland) ("Bank Leumi" or "the Bank") – defendant here – is a Swiss banking corporation. (AA 151; see generally www.leumi.ch.) The Bank manages the assets of some 4,000 clients in more than 80 countries. (AA 220-221, 308.) The Bank is a subsidiary of Bank Leumi le-Israel, B.M., an Israeli banking corporation. (AA 151.) The parent has other subsidiaries, including Bank Leumi USA, which has a branch in Beverly Hills. (AA 220, 343; see generally www.leumiusa.com.)

B. Creation Of The Sternlight Family Trust in California.

In December 1986, Morris and Sara Sternlight established the Sternlight Family Trust. (AA 214.) The trust's substantial assets were intended to benefit the surviving spouse when Morris or Sara died, and, after the surviving spouse's death, to benefit the Sternlights' three children. (AA 214.) After Morris died in November 1993, three subtrusts were created in accordance with the family trust's terms. (AA 214.)

C. With The Opening Of An Account At Bank Leumi Le-Israel (Switzerland) In Sara Sternlight's Name, The Plundering Begins.

By the end of 1992, Helen Fabe hatched a plot to plunder her parents' wealth. (E.g., AA 1779.) Unbeknownst to other members of the family, she obtained a limited conservatorship over her ailing father (though not one actually giving her any authority over his assets) and traveled with her frail, dependent mother in tow to Zurich, Switzerland, to open a bank account at Bank Leumi Le-Israel (Switzerland). (AA 215-216, 222-242, 1779.)

Ms. Fabe also brought along about $1.7 million in high-interest tax-free California state and municipal bonds and a few non-California bonds. (E.g., AA 216, 731-787.) The bonds belonged to Morris, Sara, and/or the Sternlight Family Trust. (AA 216.)

On January 27, 1993, the Bank opened an individual account, number 10.014, in the name of Sara Sternlight, and deposited the $1.7 million in trust assets into the account. (AA 215, 222-242, 1779.) The account documentation included a power of attorney giving Ms. Fabe the authority to act on her mother's behalf. (AA 24, 228.)[1] When the bonds were placed in the 1993 account, Ms. Sternlight (or Ms. Fabe, acting under power of attorney) signed the bonds, but Morris Sternlight never signed, either in his own behalf or on behalf of the Trust. Instead, Ms. Fabe signed the bonds purportedly on Morris's behalf as his conservator. (AA 216.)

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[1] The documentation on all the relevant Bank Leumi accounts made clear that the depositor and her daughter resided in California. (E.g., AA 67-70, 224, 228, 245.)

With the Bank Leumi account in place, Ms. Fabe, without Ms. Sternlight's knowledge or approval, began using her power of attorney to have the Bank liquidate the bonds by selling them or redeeming them for cash. (E.g., AA 216-217, 1779-1785.)[2]

D. The California Family's Assets Are Moved To A Second Sara Sternlight Account At Bank Leumi, This Time A Joint Account With Helen Fabe.

In 1995, Ms. Fabe again took her mother to Switzerland. (AA 217, 1779.) This time, at Ms. Fabe's behest, the Bank opened a joint account in the names of Sara Sternlight and Helen Fabe, account number 10.398. (AA 217, 244-264.) All assets from Ms. Sternlight's 1993 account were transferred to the 1995 joint account, and the 1993 account was closed. (AA 217, 266.)

E. Acting From California, Helen Fabe Moves The Family Assets To A Third Bank Leumi Account, This One Solely In Her Own Name.

Around June 1998, the Bank mailed to Helen Fabe, at her Beverly Hills address, the forms necessary for her to open a new account with the Bank. (AA 392.) Ms. Fabe signed the documents in Beverly Hills and returned them to the Bank in Switzerland. A new individual account, number 10.902, was opened in Helen's name alone. (AA 218, 276-290.)

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[2] Morris never knew that Ms. Fabe was stealing family assets, and the trustees of the Trust did not find out until years later. (AA 216.)

In a letter to a Bank officer, Ernst Baumberger, Ms. Fabe asked the Bank to transfer all assets from the 1995 account (except for $100,000) to the new 1998 account. (AA 292, 551.) The Bank did so.

F. The Bank Assists Various Machinations By Ms. Fabe In California.

For about seven years, Ms. Fabe conducted an active relationship with the Bank from her home in California by fax, phone and letter. (E.g., AA 391, et seq., 443, 448, 454, 460, 463, 466, 472, 475, 478, 481, 487, 493, 496, 502, 528-575, 1495, 1650.)

For instance, on numerous occasions between 1995 and 1998, at Ms. Fabe's behest communicated from California, the Bank wired funds from the 1995 account to Ms. Fabe's personal bank account with the Bank of America in Beverly Hills, and to other bank and credit card accounts, also in California. (E.g., AA 271-273.) Between April 1996 and October 1998 alone, there were at least 30 such wire transfer transactions, amounting to more than $313,700. (*Ibid.*)

Meanwhile, Ms. Fabe was divorcing in California, and she enlisted the Bank's help in explaining the stream of money she was diverting from the Bank Leumi accounts. In a May 25, 1998, letter to Mr. Baumberger, Ms. Fabe (along with directing that another $10,000 be wired to her Bank of America account) requested a letter from Bank Leumi stating that all the money in the 1995 account belonged to her mother and that Ms. Fabe's name appeared on the account as co-owner only for "convenience of management" due to Ms. Sternlight's advanced age. (AA 451.) Ms. Fabe explained that her husband "may or may not make a problem for me" and

that she needed the letter "JUST IN CASE this issue happens to arise." (*Ibid.*)

The Bank obliged, sending the requested letter to Ms. Fabe in California. (AA 392-393.)

A few months later, also in connection with the divorce, Ms. Fabe asked the Bank's Mr. Baumberger to prepare her a list of all withdrawals from the 1995 account between two named dates, showing that all the funds originated from her mother's account and reflecting a final balance of $70,000 or $80,000 in the 1995 account. (AA 294-295.) Ms. Fabe also asked the Bank to specify that there was only one account and that it belonged to her mother. (AA 295.)

Again the Bank obliged, sending the requested materials to Ms. Fabe in California, where she used them to avoid incurring support obligations in her California divorce and in ongoing concealment of the nature and extent of her theft. (E.g., AA 1686, 1746, 1756-1757, 1769, 1770, 1773.)

In November 1998, Ms. Fabe persuaded Mr. Baumberger to sign a letter claiming falsely that he personally had loaned her $100,000. (AA 541.) Mr. Baumberger sent the letter to Ms. Fabe in California, where she used it in the divorce proceedings. (AA 433.)

G. Helen Fabe's Thievery Unravels.

Eventually, Ms. Fabe's fraud began to unravel.

Sara Sternlight died in April 2000. (AA 214.)

Ms. Fabe's siblings, Ms. Cohen and Joseph Sternlight, learned about the Swiss bank accounts and the details of Ms. Fabe's relationship with Bank Leumi. (AA 216, 219-220.)

A Swiss court froze the money remaining in the 1995 and 1998 accounts and that money (in excess of $900,000) was returned to the Trust in California. (AA 219.)

Ms. Fabe was charged with grand theft, elder abuse of her mother and financial elder abuse. She pleaded *nolo contendere*. (AA 1777-1785 [plea transcript].)[3]

STATEMENT OF THE CASE

Acting as co-special administrator of her mother Sara Sternlight's estate and as co-trustee of the Sternlight Family Trust, including subtrusts ("the Trust"), Eve Sternlight Cohen sued Bank Leumi (and various Does) on January 24, 2003. (AA 7.) The complaint states a cause of action in negligence against the Bank based on the plundering of the Sternlight estate effectuated through the Bank's dealings with Ms. Cohen's sister, Helen Fabe. (AA 7-17.)

After obtaining relief from an initial default (AA 113 [entry of default]; 129 [order setting default aside]), Bank Leumi moved to quash service of summons and for dismissal of the action, contending that the Bank is based in Zurich, Switzerland, and conducts its business wholly there, and that California courts therefore lack jurisdiction over it. (AA 131-146.) The Bank also argued that forum selection clauses in Ms. Fabe's account agreements mandated that all disputes be litigated in Zurich. (AA 147-150.)

Ms. Cohen filed opposition, arguing that the Bank had sufficient (indeed, ample) contacts with California connected with the events at issue

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[3] Additional facts are supplied in the Statement of the Case and in the Legal Discussion.

to warrant the exercise of specific (but not general) jurisdiction. (AA 194-210; see AA 213-1793, 1880-1884 [supporting evidence].) The opposition also demonstrated the forum selection clauses to be inapplicable. (AA 210-212.)

Bank Leumi filed a reply. (AA 1796.) It also submitted evidentiary objections to the declarations filed by Ms. Cohen and her counsel in support of Ms. Cohen's opposition to the motion to quash. (AA 1807-1857; see AA 1858-1879 [responses to objections].)

The superior court, Judge Paul G. Flynn, heard the motion to quash on January 22, 2004. (RT 1-28.) At the outset, the court noted it found the forum selection clauses "are not controlling here," but announced its inclination to grant the motion on the ground the Bank lacked minimum contacts with California. (See RT 2 ["Everything happened in Switzerland"].) After hearing argument from both sides, the court ruled, "I'm going to grant the motion to quash the service of summons, and I'm going to dismiss the matter." (RT 28.) Bank Leumi's counsel was directed to prepare an order. (*Ibid.*)

The Bank's evidentiary objections received passing mention at the hearing. (RT 2 [court "considered" the objections], RT 18 [Bank's counsel mentions objections].) However, no ruling on the objections appears in the record. (See AA 1885 [minute order]; 1894-1897 [order granting motion and dismissing action]; RT 1-28 [hearing transcript].)

On March 1, 2004, the court filed its order granting Bank Leumi's motion to quash service of summons, quashing summons, and dismissing the action. (AA 1894.) Bank Leumi served notice of entry of the court's order on March 3, 2004. (AA 1898.)

Ms. Cohen timely filed her notice of appeal on March 19, 2004. (AA 1908; see Cal. Rules of Court, rule 2(a)(2) [notice of appeal due 60

days following party's service of notice of entry of appealable judgment or order].)

STATEMENT OF APPEALABILITY

The March 1, 2004, order granting Bank Leumi's motion to quash service of summons, quashing summons and dismissing Ms. Cohen's complaint is appealable under Code of Civil Procedure section 904.1, subdivision (a)(3), which provides that "An appeal . . . may be taken from . . . an order granting a motion to quash service of summons . . . ."

STANDARDS OF REVIEW

This appeal seeks review of an order that quashed service of process on jurisdictional grounds based on inadequate contacts with California. In such an appeal, "[w]hen there is conflicting evidence, the trial court's factual determinations are not disturbed on appeal if supported by substantial evidence." (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 449.) To the extent the evidence of jurisdictional facts is free of conflict, however – as is essentially the case here – the question of personal jurisdiction is one of law, and the reviewing court engages in an independent (i.e., *de novo*) review of the record. (E.g., *Ibid.*; *Tri-West Ins. Services, Inc. v. Seguros Monterrey Aetna, S.A.* (2000) 78 Cal.App.4th 672, 677; *Jewish Defense Organization, Inc. v. Superior Court* (1999) 72 Cal.App.4th 1045, 1055; *Pennsylvania Health & Life Ins. Guarantee Assn. v. Superior Court* (1994) 22 Cal.App.4th 477, 480.)

The trial court rejected Bank Leumi's alternative contention that the action should be dismissed because forum selection clauses in the agreements establishing the bank accounts at issue required all disputes arising out of the agreements to be litigated in Zurich. That ruling is reviewed only for abuse of discretion. (E.g., *Bancomer, S.A. v. Superior Court* (1996) 44 Cal.App.4th 1450, 1457 [reciting abuse of discretion standard]; *America Online, Inc. v Superior Court* (2001) 90 Cal.App.4th 1, 7-9 [applying abuse of discretion standard; noting and rejecting minority line of cases applying substantial evidence review]; see *Smith, Valentino & Smith, Inc. v. Superior Court* (1976) 17 Cal.3d 491, 493 [concluding trial court "acted within its discretion" in enforcing a forum selection clause].)

Finally, because Bank Leumi failed to obtain a ruling on its evidentiary objections, those objections are waived. (E.g., *City of Long*

Beach v. Farmers & Merchants Bank (2000) 81 Cal.App.4th 780, 784 ["Beginning in 1872 . . . , the California Supreme Court has consistently held that when a judge fails to rule on evidentiary objections during a trial, they are deemed waived"]; 3 Witkin, Cal. Evidence (4th ed. 2000), Presentation at Trial, § 389, p. 482 ["If the point is not pressed and is forgotten, the party may be deemed to have waived or abandoned it, just as if he or she had failed to make the objection in the first place"].) This Court, accordingly, must view the challenged evidence as part of the record. (E.g., *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 670, fn. 1.)

LEGAL DISCUSSION

I.

THE ORDER QUASHING SERVICE OF SUMMONS AND DISMISSING THE ACTION SHOULD BE REVERSED BECAUSE BANK LEUMI'S CONTACTS WITH CALIFORNIA ARISING OUT OF THE FACTS AT ISSUE AMPLY WARRANT THE EXERCISE OF SPECIFIC JURISDICTION.

This lawsuit seeks to hold Bank Leumi responsible for its negligence in facilitating Helen Fabe's plundering of Sternlight family trust assets. True, the Bank is physically located in Switzerland. But Ms. Fabe conducted her machinations – with the Bank's faithful assistance – from California. While the superior court found the California connection with Ms. Fabe inadequate to support jurisdiction over Bank Leumi because "everything happened *in* Switzerland" (RT 2), the court's analysis was shortsighted and the result reached incorrect, as we shall show.

A. California Courts Have Jurisdiction Over Any Defendant Having Sufficient Minimum Contacts with California So That Maintenance of an Action Against that Defendant Doesn't Violate Traditional Notions Of Fair Play and Substantial Justice.

Code of Civil Procedure section 410.10 provides:

> A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.

The statute thus extends the jurisdiction of California courts to the outer limits of constitutional due process. (*Cornelison v. Chaney* (1976) 16 Cal.3d 143, 147; see *Sibley v. Superior Court* (1976) 16 Cal.3d 442, 445 [statute "manifests an intent to exercise the broadest possible jurisdiction, limited only by constitutional considerations"].) Under due process principles, a state court may assume jurisdiction over a nonresident defendant where the defendant's "minimum contacts" with the state are sufficient to make the maintenance of the action inoffensive to traditional concepts of fair play and substantial justice. (*International Shoe Co. v. Washington* (1945) 326 U.S. 310, 320 [66 S.Ct. 154, 160, 90 L.Ed. 95]; *Pavlovich v. Superior Court* (2002) 29 Cal.4th 262, 268.)

The "minimum contacts" standard is familiar to anyone who has completed the first-year law school course in Civil Procedure. The cases hold that minimum contacts exist where the defendant's conduct in or connection with the forum state is such that the defendant should reasonably anticipate being subject to suit in the state. (*Keeton v. Hustler Magazine, Inc.* (1984) 465 U.S. 770, 774, 781 [104 S.Ct. 1473, 1478, 1481, 79 L.Ed.2d 790]; *World-Wide Volkswagen Corp. v. Woodson* (1980) 444 U.S. 286, 297 [100 S.Ct. 559, 567, 62 L.Ed.2d 490].)[4]

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[4] The minimum contacts standard encompasses two types of jurisdiction – general and specific (or special). General jurisdiction exists where the defendant's contacts with the forum state are so systematic and continuous as to make it fair to subject the defendant to the forum's jurisdiction even where the cause of action is unrelated to the contacts. (E.g., *Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 536.) Ms. Cohen makes no general jurisdiction claim here. (See RT 2; AA 202.)

Ms. Cohen does assert that California should exercise specific jurisdiction over Bank Leumi. This type of jurisdiction, in contrast to general jurisdiction, is case-specific. It exists if: (1) the defendant has

(continued...)

What contacts satisfy the minimum contacts standard has evolved and broadened over the years. As the United States Supreme Court explained nearly 50 years ago, in an observation even truer today than it was then, the continuing modernization of commerce inexorably requires widening of the boundaries of nonresident jurisdiction:

> Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.

(*McGee v. International Life Ins. Co.* (1957) 355 U.S. 220, 222-223 [78 S.Ct. 199, 201, 2 L.Ed.2d 223]; see *Hanson v. Denckla* (1958) 357 U.S. 235, 250-251 [78 S.Ct. 1228, 1238, 2 L.Ed.2d 1283] ["As technological progress has increased the flow of commerce between the States, the need for jurisdiction over nonresidents has undergone a similar increase"].)

Consistent with this evolution, hard and fast requirements in minimum contacts analysis by now are few, the courts having recognized that the test "'is not susceptible of mechanical application; rather, the facts

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[4] (...continued)
purposefully availed itself of forum benefits with respect to the matter in controversy; (2) the controversy is related to or arises out of the defendant's contacts with the forum; and (3) the assertion of jurisdiction would comport with fair play and substantial justice. (E.g., *Pavlovich v. Superior Court*, *supra*, 29 Cal.4th at p. 269; *Vons Companies, Inc. v. Seabest Foods, Inc.*, *supra*, 14 Cal.4th at pp. 446-447.)

of each case must be weighed to determine whether the requisite "affiliating circumstances" are present.'" (*Pavlovich v. Superior Court*, *supra*, 29 Cal.4th at p. 268, quoting *Kulko v. California Superior Court* (1978) 436 U.S. 84, 92 [98 S.Ct. 1690, 1697, 56 L.Ed.2d 132], in turn quoting *Hanson v. Denckla*, *supra*, 357 U.S. at p. 246 [78 S.Ct. at p. 1235, 2 L.Ed.2d 1283].) Physical presence of the defendant has long since ceased to be a requirement. (See, e.g., *Pavlovich v. Superior Court*, *supra*, 29 Cal.4th at p. 278 [internet presence may suffice, although rejected under particular facts]; *Hall v. LaRonde* (1997) 56 Cal.App.4th 1342, 1347 [telephone and internet communication may suffice]; *In re Stevens* (2004) 119 Cal.App.4th 1228, 1234 ["Electronic communication may establish the necessary minimum contacts in a state to establish jurisdiction over a defendant"].)

As the United States Supreme Court explained in *Burger King Corp. v. Rudzewicz* (1985) 471 U.S. 462 [105 S.Ct. 2174, 85 L.E.2d 528], the key factor in evaluating minimum contacts often lies in determining whether the defendant has purposely and voluntarily derived benefit from its connections with the forum State. If so, jurisdiction, as a matter of fairness, will lie. (*Id.* at pp. 473-474 [105 S.Ct. at pp. 2182-2183] ["A State generally has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors. [Citations.] Moreover, where individuals "purposefully derive benefit" from their interstate activities, [citation], it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities; the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed"].)

By the same token, purposefully causing an effect in the forum state, sometimes even without more, is recognized as a valid basis for exercising

nonresident jurisdiction. (E.g., *World-Wide Volkswagen Corp. v. Woodson*, *supra*, 444 U.S. at pp. 297-298 [100 S.Ct. at pp. 567-568, 62 L.Ed.2d 490]; *Calder v. Jones* (1984) 465 U.S. 783, 788-791 [104 S.Ct. 1482, 1486-1488, 79 L.Ed.2d 804]; see *Pavlovich v. Superior Court*, *supra*, 29 Cal.4th at p. 278 [knowledge of causing effect in California plus some evidence of aiming effects at California can support jurisdiction].)

Here, both the effects Bank Leumi purposefully caused in California and the benefits it derived from its connections with Ms. Fabe in California should lead the Bank reasonably to anticipate being subject to process in California, and thus warrant requiring the Bank to submit to California's jurisdiction in this lawsuit.

B. California Courts Can And Should Exercise Specific Jurisdiction Over Bank Leumi Based On The Bank's California Contacts Giving Rise To This Lawsuit.

In moving to quash, Bank Leumi stressed that everything it does, it does in Switzerland. (E.g., AA 136-138.) It persuaded the superior court to its view that geography doomed jurisdiction. (RT 2 ["Everything happened in Switzerland"].) Both the Bank and the superior court failed to analyze the "minimum contacts" question properly.[5]

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[5] As plaintiff, Ms. Cohen has the burden to establish sufficient minimum contacts to warrant jurisdiction, a task we address in subsection I(B)(1). Once minimum contacts have been established, the burden shifts to the defendant to "'present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.'" (*Hall v. LaRonde*, *supra*, 56 Cal.App.4th at p. 1347, quoting *Burger King Corp. v. Rudzewicz*, *supra*, 471 U.S. at p. 477 [105 S.Ct. at p. 2185, 85 L.Ed.2d 528.) In subsection I(B)(2), we demonstrate that Bank Leumi cannot carry that burden.

The facts pleaded in this lawsuit and supported by the evidence Ms. Cohen introduced in opposition to the motion to quash amply warrant the exercise of specific jurisdiction over Bank Leumi, because (1) the Bank purposefully availed itself of California benefits; (2) the controversy arises out of the Bank's contacts with California; and (3) California's assertion of jurisdiction comports with fair play and substantial justice. (See note 4, *supra*.) Moreover, Bank Leumi cannot show that requiring it to litigate in California would be an unreasonable burden.

1. Bank Leumi's Contacts With California Related To Or Arising Out Of The Facts Behind This Lawsuit Satisfy The "Minimum Contacts" Standard And Thus Warrant The Exercise Of Specific Jurisdiction.

a. Bank Leumi has purposely availed itself of California benefits and caused effects in California through its activities.

The first criterion in evaluating specific jurisdiction asks whether the defendant has purposefully availed itself of forum benefits in respect to the matter in controversy. (E.g., *Pavlovich v. Superior Court*, *supra*, 29 Cal.4th at p. 269.)

"'Purposeful availment' means 'an action of the defendant purposefully directed toward the forum State.'" (*Southeastern Express Systems v. Southern Guaranty Ins. Co.* (1995) 34 Cal.App.4th 1, 6, quoting *Asahi Metal Industry Co. v. Superior Court* (1987) 480 U.S. 102, 112 [107 S.Ct. 1026, 1032, 94 L.Ed.2d 92].) "But 'purposeful availment' may be

established even if the nonresident defendant maintains no offices, property, or employees in the forum." (*Southeastern Express Systems v. Southern Guaranty Ins. Co.*, *supra*, 34 Cal.App.4th at p. 6.)

How? The courts take a "realistic approach," reviewing the defendant's relationship with the plaintiff in its totality to assess whether the defendant has derived benefit from its activities directed at the forum, or caused an effect in the forum state through its activities, or both. (*Ibid.*; see, e.g., *Hall v. LaRonde*, *supra*, 56 Cal.App.4th at p. 1346, quoting *Burger King Corp. v. Rudzewicz*, *supra*, 471 U.S. at pp. 475-476 [105 S.Ct. at p. 2184, 85 L.Ed.2d 528] [contacts sufficient "where a nonresident '"deliberately" has engaged in significant activities within a [s]tate [citation] or has created "continuing obligations" between himself and residents of the forum. [Citation.]'"].) Although the test is an elastic one, the nonresident's contacts, to warrant jurisdiction, must be "more than '"random," "fortuitous," or "attenuated."'" (*Hall v. LaRonde*, *supra*, 56 Cal.App.4th at p. 1347, quoting *Burger King Corp. v. Rudzewicz*, *supra*, 471 U.S. at p. 475 [105 S.Ct. at p. 2183, 85 L.Ed.2d 528].)

Bank Leumi does conduct its business from physical premises in Switzerland. But in establishing and conducting its banking relationship with Helen Fabe, it both purposefully availed itself of California benefits and caused effects in California within the meaning of the governing law. Its contacts with California in servicing Ms. Fabe's business, moreover, were anything but random, fortuitous or attenuated.

For example, when Ms. Fabe transported her mother and the family assets to Switzerland to open the 1993 account, she handed the Bank the opportunity to manage and reinvest $1.7 million. The Bank did not let that opportunity pass. Instead, from that point and for the ensuing seven years, the Bank conducted a business relationship with Ms. Fabe in California. A

bank does not manage and reinvest $1.7 million out of altruism, but to make money for itself. (See, e.g., *United California Bank v. First Bank of Oak Park* (1979) 98 Cal.App.3d 439, 444 ["we hold that it is reasonable to exercise jurisdiction over Oak Park because Oak Park anticipated that it would derive an economic benefit as a result of its out-of-state activities which caused effects in California. . . . This realization of economic benefit from out-of-state activity which caused effects in California makes it reasonable for California to exercise jurisdiction over Oak Park"].) Thus, in conducting its business relationship with Ms. Fabe, the Bank purposefully derived benefit from its California contacts.

Furthermore, this was not a scenario where accepting the initial deposit from a Californian constituted the sum total of a nonresident bank's contact with California. Far from it. On the contrary, Bank Leumi attentively cultivated its relationship with Ms. Fabe in California over the years. The record shows, for example, that there was an unusual volume of correspondence – between Switzerland and California – associated with servicing Ms. Fabe's accounts and related requests. (E.g., AA 297-304, 391-395, 437-438, 443-444, 451-452, 454-455, 457-458, 460-461, 463-464, 466-467, et seq.)[6]

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[6] The correspondence depicts a far closer relationship between Ms. Fabe in California and Bank Leumi in Zurich than most folks have with a bank across the street or across town. The letters are dotted with pleasantries reflecting that Ms. Fabe and the bankers at Bank Leumi had gotten to know one another very well. (See, e.g., AA 440 ["Dear Mr. Baumberger, It was a pleasure to meet with you last week. I am sure the world's financial markets are keeping you quite busy"], 448 ["I will confirm all of above with my phone call. Hope all is well in Zurich. The Asian crisis must be keeping you very busy"], 463 ["I am sending you a fax request for a wire in the amount of $10,000 . . . . P.S. Ms. Lewinsky is now in Los Angeles visiting her father"], 472 ["Please accept my and my

(continued...)

Getting into some specifics, the 1998 account was opened via correspondence between Zurich and Beverly Hills, without Ms. Fabe ever going to Switzerland. (AA 218, 276-290, 392.) Ms. Fabe repeatedly communicated from California her directions for moving the assets around. (E.g., AA 297-304, 391-395, 437, 440, 443, 448.)[7] On more than 30 occasions, at Ms. Fabe's directions communicated from California, the Bank moved funds from whichever Bank Leumi account in Switzerland Ms. Fabe was using at the time to various accounts she maintained in California. (E.g., AA 437, 440, 443, 444, 448, 454, 457, 460, 463, 466, 469, 472, 475, 478, 481, 484, 487, 490, 493, 496, 499, 502, 505, 508.) Thus, repeatedly, the Bank purposefully directed its activities to California and caused effects in California.

Indeed, there is more. The Bank assisted Ms. Fabe with her personal legal affairs in California with regard to trust assets. In particular, the Bank obliged Ms. Fabe's requests for correspondence that she could use in connection with financial disputes in her divorce proceedings in California. (E.g., AA 392-393, 451.) And the bank executive with whom Ms. Fabe evidently developed her closest contact, Mr. Baumberger, even indulged her with a letter, for use in the California divorce, falsely representing that he personally had loaned Ms. Fabe $100,000. (AA 433, 541.) Not only did these activities mislead a California superior court and thereby cause effects in the California divorce, but by concealing Ms. Fabe's ongoing thievery,

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[6] (...continued)
mother's best wishes for a glorious Christmas holiday and a successful and healthy 1998"].)

[7] As footnote 6 reflects and as Ms. Cohen pointed out in the trial court (AA 348-349), the dealings between Bank Leumi and Ms. Fabe included communications in essentially every conceivable format, including correspondence, telephone calls, faxes and wire transfers.

they also contributed to damaging Ms. Sternlight and the Trust, on whose behalf this lawsuit is brought.

Simply put, Bank Leumi did not confine the reach of its activities to within Switzerland's borders. It did not require Ms. Fabe to appear personally for every transaction. Nor did it suggest that to do business with Bank Leumi in California, Ms. Fabe needed to approach its sister subsidiary, Bank Leumi USA. Rather, it accepted Ms. Fabe's business knowing she resided in California, it conducted an active, long-lasting business relationship with her via communication between Switzerland and California, and in so doing it both derived benefit from its California contacts and caused effects in California. Our courts have exercised jurisdiction based on contacts far less extensive. (E.g., *Hall v. LaRonde*, *supra*, 56 Cal.App.4th 1342 [email and telephone contacts connected with purchasing and servicing a software module]; *Seagate Technology v. A.J. Kogyo Co.* (1990) 219 Cal.App.3d 696 [jurisdiction found, based on a sending a single letter to California].)

b. The controversy arises out of Bank Leumi's contacts with California.

The second criterion in analyzing specific jurisdiction asks whether the controversy is related to or arises out of the defendant's contacts with the forum. (*Pavlovich v. Superior Court*, *supra*, 29 Cal.4th at p. 269.) In this regard, the lawsuit "need not arise directly from the defendant's forum contacts in order to be sufficiently related to the contact to warrant the exercise of specific jurisdiction. Rather, as long as the claim bears a substantial connection to the nonresident's forum contacts, the exercise of

specific jurisdiction is appropriate." (*Vons Companies, Inc. v. Seabest Foods, Inc.*, *supra*, 14 Cal.4th at p. 452.)

This criterion is amply satisfied. In fact, this lawsuit both is related to and arises directly out of Bank Leumi's contacts with California. Once Ms. Fabe took her parents' California bonds to Switzerland and ensconced them in an account at Bank Leumi, the Bank's longtime relationship with Ms. Fabe and its unquestioning responsiveness to her directions facilitated her commission of the financial crimes that underlie this lawsuit.[8]

c. California's assertion of jurisdiction comports with fair play and substantial justice.

Finally, the exercise of specific jurisdiction must comport with fair play and substantial justice. (*Pavlovich v. Superior Court*, *supra*, 29 Cal.4th at p. 269; see, e.g., *Vons Companies, Inc. v. Seabest Foods, Inc.*, *supra*, 14 Cal.4th at p. 464, quoting *Burger King Corp. v. Rudzewicz*, *supra*, 471 U.S. at p. 474 [105 S.Ct. at p. 2183, 85 L.Ed.2d 528] [defendant's conduct and connection with forum State must be such that it should reasonably anticipate being haled into court there].)

It does.

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[8] It does not matter for purposes of analyzing this criterion that the Bank's contacts were with Ms. Fabe and not Ms. Cohen. "[T]he defendant's forum activities need not be directed at the *plaintiff* in order to give rise to specific jurisdiction . . . . [T]he nexus required to establish specific jurisdiction is between the defendant, *the forum*, and the litigation – not between the plaintiff and the defendant." (*Vons Companies, Inc. v. Seabest Foods, Inc.*, *supra*, 14 Cal.4th at pp. 457-458, citations omitted.)

Bank Leumi should hardly be surprised to learn that it could be subject to California's jurisdiction in a dispute arising out of its dealings with a California resident, consisting of repeatedly moving substantial family assets out of and then back into and around California. While it may be more inconvenient for the Bank to litigate in California than in Switzerland, it would be vastly more inconvenient for Ms. Cohen, the injured plaintiff, to pursue the Bank in Switzerland. She has already been victimized once by Ms. Fabe; being forced to journey to Switzerland to seek redress (if redress even is available there) would effectively victimize her a second time. (Cf., *Yu v. Signet Bank/Virginia* (1999) 69 Cal.App.4th 1377, 1388 [California court finds Virginia judgments against Californians void, noting "They had no relationship with Virginia other than their credit card, and it was fundamentally unfair to expect them to travel thousands of miles to litigate matters concerning their account"].)

Moreover, California has a genuine interest in providing a forum to protect its residents against tortious conduct affecting them here. (E.g., *Integral Development Corp. v. Weissenbach* (2002) 99 Cal.App.4th 576, 591["California has a manifest interest in providing a local forum for its residents to redress injuries inflicted by out-of-state defendants"].) Indeed, California has manifested a heightened interest in providing redress for its residents who seek to retrieve money placed on deposit in a bank; the State has done so by providing that there is no statute of limitations on such a claim. (Code Civ. Proc., § 348 ["To actions brought to recover money or other property deposited with any bank, . . . there is no limitation"]; see, e.g., *Roy Supply, Inc. v. Wells Fargo Bank* (1995) 39 Cal.App.4th 1051, 1065 ["It has long been, and still is, the rule that there is no limitation upon the time in which a customer may bring an action to recover money deposited with a bank"].)

Under all the circumstances, it is only fair that Bank Leumi be required to submit to California's jurisdiction in this lawsuit.

2. The Bank Has Not Shown, And Cannot Show, Any Compelling Reason Why Requiring It To Submit To California's Jurisdiction In This Matter Would Be Unreasonable.

Once a plaintiff presents facts establishing minimum contacts with the forum state, a presumption arises in favor of exercising jurisdiction and the burden is on the defendant to demonstrate that jurisdiction over it would pose an unreasonable hardship. (E.g., *Vons Companies, Inc. v. Seabest Foods, Inc.*, *supra*, 14 Cal.4th at p. 449.) "A determination of reasonableness rests upon a balancing of interests: the relative inconvenience to defendant of having to defend an action in a foreign state, the interest of plaintiff in suing locally, and the interrelated interest the state has in assuming jurisdiction." (*Integral Development Corp. v. Weissenbach*, *supra*, 99 Cal.App.4th at p. 591.)

The standard is stringent and the defendant must present "a compelling case." (*Vons Companies, Inc. v. Seabest Foods, Inc.*, *supra*, 14 Cal.4th at p. 476, quoting *Burger King Corp. v. Rudzewicz*, *supra*, 471 U.S. at p. 477 [105 S.Ct. at p. 2185, 85 L.Ed.2d 528].) Indeed, in the face of minimum contacts, even "'serious burdens'" on the defendant typically will not defeat jurisdiction. (E.g., *Vons Companies, Inc. v. Seabest Foods, Inc.*, *supra*, 14 Cal.4th at p. 477, quoting *Asahi Metal Industry Co. v. Superior Court*, *supra*, 480 U.S. at p. 114 [107 S.Ct at p. 1033, 85 L.Ed.2d 92].) Rather, to overcome the presumption of jurisdiction, the defendant must show that it would be "'gravely difficult and inconvenient'" to litigate in the

forum state and that being required to do so would put the it at a "'severe disadvantage.'" (*Ibid.*, quoting *Burger King Corp. v. Rudzewicz*, *supra*, 471 U.S. at p. 478 [105 S.Ct. at p. 2185, 85 L.Ed.2d 528].)

Bank Leumi cannot satisfy this exacting standard.

In moving to quash, the Bank cited the cost and inconvenience of litigating this matter far away from its home office in Switzerland as factors making California jurisdiction unduly burdensome. (AA 145-146, 152.) But such considerations are inherent in nonresident jurisdiction. They literally come with the territory. In terms of making out the required compelling showing of overwhelming hardship, they just don't cut the mustard.

This is true both as a general proposition (e.g., *Vons Companies, Inc. v. Seabest Foods, Inc.*, *supra*, 14 Cal.4th at p. 477, quoting *Asahi Metal Industry Co. v. Superior Court*, *supra*, 480 U.S. at p. 114 [107 S.Ct at p. 1033, 85 L.Ed.2d 92] ["'When minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the . . . defendant'"]), and as respects the specifics of the Bank's situation.

The Bank is a sophisticated financial institution accustomed to doing business with customers in 80 countries around the world. (AA 220-221, 308.) It is hardly a novice at employing the various modern means of transportation and communication that would enable it, for example, to conduct and respond to discovery in California. The Bank unquestionably has the financial wherewithal to defend itself in California (see, e.g., AA 306-343 [2002 Annual Report]), even without taking into consideration what resources may be available to it internationally through its parent, Bank Leumi le-Israel, B.M., or locally through its sister subsidiary, Bank Leumi USA.

Moreover, in the standard forms it has developed for establishing customer accounts, Bank Leumi has taken pains to reserve to itself the right to litigate customer disputes in whatever jurisdiction it likes, including the customer's domicile. (See, e.g., AA 21 ["The Bank . . . is also entitled to sue the customer in any competent court at his domicile or any other court having jurisdiction"], and note 9, *infra*.) Thus, the Bank is in a poor position to assert that it is equipped to protect its interests only in Switzerland. And if its position, at least between the lines, is that litigation outside Switzerland is unreasonable only when it is somebody else's idea, that too does not make for a compelling hardship case.

Furthermore, as already discussed, the balance of interests and hardships clearly favors litigating this dispute in California, not Switzerland:

- California has a strong interest in providing a forum to protect its residents against tortious conduct affecting them here. (E.g., *Integral Development Corp. v. Weissenbach*, *supra*, 99 Cal.App.4th at p. 591.)
- Indeed, the State has manifested an especially strong interest by declaring that actions against banks to recover money placed on deposit are never barred by limitations. (Code Civ. Proc., § 348.)
- Plaintiff, though she sues in a representative capacity, is an individual who has been victimized by the Bank's negligence; litigating in a foreign jurisdiction is recognized to place heavier burdens on individuals than on large financial institutions. (See, e.g., *McGee v. International Life Ins. Co.*, *supra*, 355 U.S. at p. 223 [78 S.Ct. at p. 201, 2 L.Ed.2d 223] [observing that plaintiffs would be severely disadvantaged if forced to "follow the insurance company to a distant State in order to hold it legally accountable . . . thus in effect making the company judgment proof"];

Hirsch v. Blue Cross, Blue Shield of Kansas City (9th Cir. 1986) 800 F.2d 1474, 1481 [quoting *McGee*].)

- Helen Fabe, obviously anticipated to be a witness, surrendered her passport for several years pursuant to her criminal plea (see AA 220; RT 16); it would be burdensome at best to obtain her presence at proceedings in Switzerland, if it could be accomplished at all.

Simply put, there is nothing unduly burdensome in requiring Bank Leumi to submit to California's jurisdiction in this lawsuit. Since the Bank had the requisite contacts with California in connection with the underlying facts, it should be held to answer.

The superior court erred in quashing summons and dismissing the action. The court analyzed and applied the governing law incorrectly, and its order flouts California's public policy manifesting the intent "to exercise the broadest possible jurisdiction, limited only by constitutional considerations." (*Sibley v. Superior Court*, *supra*, 16 Cal.3d at p. 445.) For all the reasons addressed, this Court should reverse and reinstate this lawsuit.

II.

THE SUPERIOR COURT PROPERLY EXERCISED ITS DISCRETION IN DECLINING TO ENFORCE THE CONTRACTUAL FORUM SELECTION CLAUSES THAT BANK LEUMI PUT FORTH AS AN ALTERNATIVE GROUND FOR QUASHING SUMMONS AND DISMISSING THE CASE.

Besides contending it lacked contacts with California, the Bank had an alternative argument. It moved to dismiss this lawsuit on the ground that

forum selection clauses in the agreements establishing Helen Fabe's three accounts at Bank Leumi (in 1993, 1995 and 1998) require that any action or proceeding arising out of the accounts be litigated in Zurich, Switzerland. (AA 147-150.)[9] The superior court rejected this argument. (RT 2; see AA 1885 [minute order reflects lack of minimum contacts was sole ground for granting motion].) Rightly so.

As a general proposition, California "[c]ourts will enforce forum selection clauses contained in a contract freely and voluntarily negotiated at arm's length unless enforcement would be unfair or unreasonable." (*Hunt v. Superior Court* (2000) 81 Cal.App.4th 901, 908; see *Smith, Valentino & Smith, Inc. v. Superior Court*, *supra*, 17 Cal.3d at pp. 495-496 [same].) But that means the two threshold requirements must be met: The contract must have been freely and voluntarily negotiated at arm's length; and enforcement must not be unfair or unreasonable. (See, e.g., *America Online, Inc. v. Superior Court*, *supra*, 90 Cal.App.4th at p. 12 [threshold requirements to enforcement must be met].) Ms. Cohen provided the trial court with multiple bases for concluding that neither threshold requirement was met here and that, accordingly, the forum selection clauses cannot and should not be enforced against her.

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[9] This is the language, contained in the various account agreements, on which the Bank relied:

> Applicable Law and Jurisdiction. All legal relationships between customer and Bank shall be governed by Swiss law. Place of performance, place for collection proceedings against customers domiciled abroad and exclusive place of jurisdiction for legal proceedings of any kind shall be the domicile of the Bank in Zurich. The Bank, however, is also entitled to sue the customer in any competent court at his domicile or any other court having jurisdiction.

(AA 21; see AA 42, 51, 73, 147-148.)

To begin with, the Bank's analysis fails at the "freely and voluntarily negotiated" threshold as applied to both capacities in which Ms. Cohen appears as plaintiff. For instance, the Trust, of which Ms. Cohen is a co-special trustee, was not a party to any of the account opening agreements in which the forum selection clauses appear, so neither the Trust nor Ms. Cohen (in that capacity) "freely and voluntarily" bargained for those clauses at arm's length, or at all, and the clauses cannot be used against them.

The "freely and voluntarily negotiated" requirement likewise bars enforcement of the forum selection clauses as respects Ms. Cohen's capacity as co-special administrator of the Sara Sternlight estate. First, Ms. Sternlight herself was not a party to the 1998 Account (see AA 67-81 [opening paperwork for 1998 account]), so neither she nor any representative of her interests is bound by any provision in that account's opening documents. Beyond that, Ms. Cohen submitted sworn testimony in response to the Bank's motion, showing that when the first of the challenged accounts was opened in 1993, Ms. Sternlight was 74 years old, legally blind in one eye, and lacked capacity to understand sophisticated financial transactions and legal documents. (E.g., AA 215.) Furthermore, the Bank's account opening documentation was on standard forms and there is no evidence of the required arm's length negotiation of the forum selection clauses. (See, e.g., AA 19-38 [opening paperwork for 1993 account].) On this record, even without more, if this was the basis on which the trial court declined to enforce the forum selection clauses, the court acted well within its discretion.[10]

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[10] The court did not explain its reasoning. In any event, the ruling must be upheld on any basis the record reasonably supports. (E.g., *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *Selma Auto Mall II v. Appellate Department* (1996) 44 Cal.App.4th 1672, 1682.)

But there is more. Ms. Cohen introduced evidence showing that her mother lacked sufficient notice of the forum selection clauses to permit their enforcement. (See, e.g., AA 215.) The clauses appear in inconspicuous type, buried among lengthy small-font documents. (E.g., AA 21.) Ms. Sternlight was not physically capable (among other reasons, because of her poor eyesight) or sophisticated enough to understand the clauses or appreciate their implications. (See AA 215.) A forum selection clause cannot be enforced against a party who lacked adequate notice of the clause. (E.g., *Hunt v. Superior Court*, *supra*, 81 Cal.App.4th at p. 909; *Carnival Cruise Lines, Inc. v. Superior Court* (1991) 234 Cal.App.3d 1019, 1021.) These factors, too, support the trial court's determination not to apply the forum selection clauses.

The matters already detailed also would support the trial court in exercising its discretion to conclude that the second prerequisite to enforcement of the forum selection clauses – that enforcement must not be unfair or unreasonable – was not met. Additional considerations, brought to the trial court's attention by Ms. Cohen, only reinforce such a conclusion.

Ms. Cohen, as noted, was not a party to any of the account agreements. Not only didn't she negotiate the forum selection clauses, she had no knowledge of them until long after the accounts were established. While the clauses might nonetheless be enforceable against her if she were closely related to the contractual relationship between Ms. Fabe and the Bank (e.g., *Lu v. Dryclean-U.S.A. of California, Inc.* (1992) 11 Cal.App.4th 1490, 1494), that plainly is not the case.

In each instance where a forum selection clause has been enforced against a non-signatory, there has been a palpable closeness between the non-signatory and a contracting party or the contract's objectives, such that enforcement was neither unreasonable nor unfair. Thus, for example, the

requisite closeness has been found where the non-signatory was a third party beneficiary of the contract (e.g., *Bancomer, S.A. v. Superior Court*, *supra*, 44 Cal.App.4th 1450); or part of a business combination closely related to the signatory party (e.g., *Lu v. Dryclean-USA of California, Inc.*, *supra*, 11 Cal.App.4th at pp. 1493-1494); or a representative plaintiff suing under California's consumer protection laws (e.g., *Net2Phone, Inc. v. Superior Court* (2003) 109 Cal.App.4th 583).

Neither of Ms. Cohen's two capacities as plaintiff – co-trustee of the Trust and co-special administrator of the Sara Sternlight estate – lines up her interests with those of Ms. Fabe. Ms. Fabe, negligently aided by the Bank, established the accounts in order to steal hundred of thousands of dollars from the Trust and her parents, one of whom was Ms. Sternlight. Thus, the Trust, Ms. Sternlight and Ms. Cohen were among Ms. Fabe's victims. In no sense were they "beneficiaries" of Ms. Fabe's wrongdoing. Nor was Ms. Cohen, as co-trustee or in any other capacity, part of any business venture with Ms. Fabe. Under all the various circumstances discussed, it would be inappropriate and unfair to enforce the forum selection clauses against Ms. Cohen, and the trial court properly exercised its discretion in rejection application of those clauses.[11]

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[11] Furthermore, the clauses are internally contradictory and, contrary to Bank Leumi's interpretation, cannot be read as mandating that all actions involving the account be brought in Switzerland. Although one portion purports to establish Zurich as "the exclusive place of jurisdiction for legal proceedings of any kind," including the "place for collection proceedings against customers domiciled abroad," another portion allows the Bank to sue the customer "at the domicile of the customer or in any other court having jurisdiction." (AA 21.) Thus, under the clauses' own terms, Zurich is *not* the "*exclusive* place of jurisdiction for legal proceedings *of any kind*." The trial court would have acted within its discretion in construing the ambiguity in the Bank's standard form against the Bank, its drafter (e.g.,

(continued...)

CONCLUSION

The trial court was plain wrong in its assessment that "everything happened in Switzerland." That isn't a valid approach to minimum contacts analysis in the 21st century, and it isn't even true. In fact, defendant Bank Leumi Le-Israel (Switzerland) had more than minimum contacts with California in connection with this action, and the trial erred in concluding otherwise. On the other hand, the court rightly declined to enforce the forum selection clauses against Ms. Cohen. California therefore can and should exercise special jurisdiction over the Bank.

Accordingly, for all the reasons stated, the order quashing service of summons and dismissing this action should be reversed. The action should be reinstated and permitted to go forward, and defendant Bank Leumi Le-Israel (Switzerland) held to answer.

Dated: November 3, 2004

Respectfully submitted,

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[11] (...continued)
Civ. Code, § 1654; *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 798), and in concluding on that basis that the Bank had failed to establish exclusive jurisdiction in Zurich.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 14(c)(1), California Rules of Court, I certify that the attached Appellant's Opening Brief in *Cohen v. Bank Leumi Le-Israel (Switzerland), etc., et al.*, 2d Civil No. B174254, contains 8,742 words, as counted by Corel WordPerfect, version 9.0, the software program within which the brief was generated.

Dated: November 3, 2004

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