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 REPLY BRIEF

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INTRODUCTION

Despite Bank Leumi's assertion that it did not do business in California, the undisputed and indisputable facts prove otherwise. The fact is that the Bank availed itself of the opportunity to do business with Helen Fabe continuously for several years, knowing that she was in California all the while, receiving and implementing her inquiries and directions from California, and, at her direction, moving large amounts of stolen funds out of, into and around California. The fact is that the Bank negligently facilitated Ms. Fabe's plundering of her California-based family's California assets. And the fact is that the Bank's actions injured plaintiff Eve Sternlight Cohen, co-special administrator of the Estate of Sara Sternlight and co-trustee of the Sternlight Family Trust, including subtrusts, in California.

Despite the Bank's cramped interpretation of California's long-arm jurisprudence, the fact is that our courts liberally exercise jurisdiction over foreign defendants on the broadest bases permissible under the California and United States Constitutions. And despite the Bank's misreading of *Asahi Metal Industry Co., Ltd. v. Superior Court* (1987) 480 U.S. 102 [107 S.Ct. 1026, 94 L.Ed.2d 92], the fact is that no special rule governs the determination whether to exercise jurisdiction over a defendant that is foreign because it hails from a different country rather than from a different state. Whether the non-resident defendant reached out to California from as far away as Switzerland or as close by as Arizona, the inquiry remains the same: Are the non-resident's "minimum contacts" with the state sufficient to make the maintenance of the action inoffensive to traditional concepts of fair play and substantial justice? The answer here is yes.

California has a legitimate interest in protecting its citizens from torts allegedly committed by those who avail themselves of the benefits of doing business in California. After carrying on an active business relationship with its California customer for some seven years, the Bank could hardly be surprised to find itself haled into court in California to defend the various banking transactions with that California customer that are alleged to have caused injury to her family in California. It does not matter that Ms. Fabe rather than the Bank initiated the relationship and the transactions that took place over its course; "she started it" is not a defense to minimum contacts.

As for the forum selection clauses that are proffered as an alternative ground supporting the judgment of dismissal, they gain the Bank no ground. In the face of substantial evidence showing that the clauses were not freely and voluntarily negotiated, the Bank cannot negate the reasonableness of the trial court's determination that the clauses are not controlling here.

In doing business with Ms. Fabe, Bank Leumi established the requisite minimum contacts with California to support the exercise of specific jurisdiction. This lawsuit arises out of those contacts. It is fair and just that the Bank be held to answer in California for injuries alleged to arise from its negligence in providing banking services to its customer in California. The order quashing service of summons and dismissing this lawsuit should be reversed, and the Bank held to answer.

STANDARDS OF REVIEW

Our Appellant's Opening Brief and the Bank's Respondent's Brief each detail the various standards of review governing different aspects of this appeal. (AOB 12-13; RB 16-20.) In certain respects, the two briefs are in accord. The Bank agrees that to the substantial extent the evidence of jurisdictional facts is unconflicting, the question of long-arm personal jurisdiction is one of law, for this court's *de novo* consideration. (See RB 16-17; e.g., *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 449.) There is no dispute, either, that the trial court's factual determinations made on conflicting evidence are left undisturbed on appeal if substantial evidence supports them. (See AOB 12; RB 17-19; e.g., *Vons Companies, Inc. v. Seabest Foods, Inc.*, *supra*, 14 Cal.4th at p. 449.)

The Bank takes issue with the opening brief's discussion, however, on a couple of other points. It disputes that it waived its evidentiary objections by failing to secure a ruling on them (RB 19-20); and, citing the principle that affirmance is required if any ground exists in the record to support the disposition being reviewed, it disagrees that the trial court's ruling rejecting its alternative contention, by which it sought dismissal based on the forum selection clauses, is reviewed only for abuse of discretion (RB 24). As to each of these matters, the Bank is wrong and the opening brief got it right.

Regarding evidentiary objections, the Bank is mistaken that failure to secure a ruling waives the objection only in summary judgment proceedings. On the contrary, that has been the general rule in California since the 19th century. (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"].) Its incorporation into Code of Civil Procedure section 437c merely *extended* the rule to the summary judgment context. (See, e.g., *Haskell v. Carli* (1987) 195 Cal.App.3d 124, 129-130 [noting that "the waiver rules did not apply to summary judgment proceedings prior to the 1980 amendment of Code of Civil Procedure section 437c (citation)"].) Since the Bank does not deny its failure to secure a ruling on its evidentiary objections, those objections are waived and the challenged evidence must be viewed as part of the record. (See, e.g., *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 670, fn. 1; *City of Long Beach v. Farmers & Merchants Bank*, *supra*, 81 Cal.App.4th at p. 784 ["*Ann M.* and *Sharon P.* are merely the application of the trial rule concerning waiver of evidentiary objections in the law and motion context"].)

Moreover, the Bank does not supply substantial argument or authorities concerning its evidentiary objections on appeal. A contention unsupported by analysis or argument also is waived. (*Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 366, fn. 2.) The Bank's passing reference to its trial court objections (see RB 43-44) "is an inadequate substitute for appellate argument." (*San Mateo County Coastal Landowners' Assn. v. County of San Mateo* (1995) 38 Cal.App.4th 523, 559.)

As to review of the forum selection clauses, the Bank misses the point. It is true, certainly, that this court will affirm an order that was based on erroneous reasoning if there is an alternative ground available in the record to support it. (E.g., *Davey v. Southern Pacific Co.* (1897) 116 Cal. 325.) But where the proffered alternative ground is one that the trial court actually considered and rejected, and that would be reviewed for abuse of discretion had the trial court instead relied on it, that ground is not available

as a basis for affirmance unless the trial court's rejection of the ground constituted an abuse of discretion. (See, e.g., *Kasel v. Remington Arms Co.* (1972) 24 Cal.App.3d 711, 729 [in approaching and ultimately rejecting alternative ground as basis for affirmance, appellate court noted, "we are obligated to view the circumstances in the light most favorable to the trial court's ruling in the choice of law phase of this case"]; *Elam v. Elam* (1969) 2 Cal.App.3d 1013, 1020-1021 [rejecting alternative ground proffered by respondent, noting, "it cannot be said that the trial court abused its discretion or that the evidence was insufficient as a matter of law to establish defendant's extreme cruelty"]; *Low v. Golden Eagle Ins. Co.* (2003) 110 Cal.App.4th 1532, 1545 [in reviewing point that could have been raised defensively by respondent to show "that the appellant did not suffer prejudice from any errors it claims," appellate court noted that it "must, of course, approach that holding with deference to all supported findings and inferences"].)

Had the trial court dismissed this action based on the forum selection clauses, that ruling would be reviewed only for abuse of discretion. (See, e.g., *Bancomer, S.A. v. Superior Court* (1996) 44 Cal.App.4th 1450, 1457 [applicability of forum selection clause reviewed for abuse of discretion].) Accordingly, as we said in the opening brief, the trial court's rejection of the Bank's alternative contention that the action should be dismissed because the forum selection clauses required disputes to be litigated in Zurich is, likewise, reviewed only for abuse of discretion. (See AOB 12.)

LEGAL DISCUSSION

I.

THIS LAWSUIT SHOULD BE REINSTATED BECAUSE MS. COHEN HAS SHOWN THAT BANK LEUMI'S CONTACTS WITH CALIFORNIA ARISING OUT OF THE SALIENT FACTS EASILY WARRANT THE EXERCISE OF SPECIFIC JURISDICTION.

Bank Leumi doesn't dispute the basic legal principles governing the exercise of specific jurisdiction over foreign defendants in California; it just puts a spin on them that contorts their application in ways our courts have not intended or endorsed. Likewise as to the facts, the Bank picks a few nits to create the erroneous impression that the opening brief misreported the record, but this is merely a diversionary tactic; the Bank doesn't really challenge the core undisputed facts that should subject it to California's jurisdiction in this lawsuit. We address these matters in turn.

A. California And United States Supreme Court Jurisprudence Support Exercising Long-Arm Jurisdiction On The Broadest Possible Basis Consistent With Constitutional Considerations.

The opening brief summarized California's jurisprudence addressing the minimum contacts standard, including in particular its guiding principle that long-arm jurisdiction should be exercised on the broadest possible basis, limited only by constitutional due process considerations. (AOB 14-18; see, e.g., *Vons Companies, Inc. v. Seabest Foods, Inc.*, *supra*, 14 Cal.4th

at p. 444 ["California's long-arm statute authorizes California courts to exercise jurisdiction on any basis not inconsistent with the Constitution of the United States or the Constitution of California"]; *Sibley v. Superior Court* (1976) 16 Cal.3d 442, 445 [Code of Civil Procedure section 410.10 "manifests an intent to exercise the broadest possible jurisdiction, limited only by constitutional considerations]; *Malone v. Equitas Reinsurance Ltd.* (2000) 84 Cal.App.4th 1430, 1436, quoting *Rocklin de Mexico, S.A. v. Superior Court* (1984) 157 Cal.App.3d 91, 94 ["'California's "long-arm" statute extends the jurisdiction of California courts to the outermost boundaries of due process'"].)

The Bank's Respondent's Brief recites some of the same basic principles, but it ignores others, and significantly, it studiously avoids confronting the entrenched policy favoring broad exercise of jurisdiction. That concept is simply absent from the Bank's analysis. (See generally RB 25-41.) Instead the Bank insists the cases "demonstrate an extreme reluctance by California courts to exercise personal jurisdiction without a *strong* showing" that the requisites of minimum contacts (purposeful availment of forum benefits; claim arising out of forum contacts; fair play considerations) are met. (RB 39, emphasis added.) But that is not how California law works.

The Bank points to this, that and the other decision in which long-arm jurisdiction was rejected, extracts whatever language sounds good, and tries to transform it into general rules to be applied mechanically to justify rejecting specific jurisdiction here. (See, e.g., RB 26-29, citing *DVI, Inc. v. Superior Court* (2002) 104 Cal.App.4th 1080, 1090 [depicted as strictly requiring an act by the defendant committed or consummated in California]; *Mansour v. Superior Court* (1995) 38 Cal.App.4th 1750, 1759 [depicted as strictly requiring a purposeful determination to do business in California];

Carretti v. Italpast (2002) 101 Cal.App.4th 1236, 1246 [depicted as requiring tortious conduct that is expressly aimed at causing tortious effects in this state].) Once again, the Bank's "forget the forest, take a look at these trees" approach overlooks critical guiding principles, i.e., the importance of assessing each case on its particular facts and, in each instance, doing so with an eye toward exercising jurisdiction on the broadest permissible basis consistent with due process.

Furthermore, the Bank sorely misplaces its heavy reliance on the rule that it attempts to extract from *Asahi Metal Industry, Ltd. v. Superior Court*, *supra*, 480 U.S. 102 [107 S.Ct. 1026]. The Bank depicts *Asahi* as announcing a rule requiring a higher and different standard of proof of minimum contacts to justify exercising specific jurisdiction when the defendant hails from another nation. (RB 30-33.) That is incorrect. While the Court in *Asahi* did caution that "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders" (480 U.S. at p. 114 [107 S.Ct. at p. 1033]), it ultimately evaluated jurisdiction based on the same guiding principles and tests that it had articulated previously and has reiterated since. (*Id.* at p. 113 [107 S.Ct. at p. 1033] ["We have previously explained that the determination of the reasonableness of the exercise of jurisdiction in each case will depend on an evaluation of several factors. A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief"].)

True to the Court's teaching that minimum contacts analysis is in every instance fact specific, it was the particular facts in *Asahi* (facts bearing no meaningful resemblance to those at issue here) that led to the conclusion that the balance of relevant interests did not warrant California's

exercising jurisdiction. The underlying tire blow-out motorcycle accident led to a lawsuit by the injured driver against the Taiwanese tire manufacturer in a California superior court; the Taiwanese defendant cross-complained for indemnity against the Japanese valve stem manufacturer, and it was the valve stem manufacturer's jurisdictional challenge that the Court addressed. (*Id.* at pp. 105-106 [107 S.Ct. at p. 1029].) Since the Taiwanese plaintiff had not demonstrated it was more convenient for it to litigate its indemnification claim in California rather than in Taiwan or Japan, and since California's interest in the dispute was diminished sharply by the fact that the plaintiff was not a California resident, the Court concluded it would take more than just placing mass-produced tire valves into the stream of commerce knowing that a quantity of them would end up in California to justify the exercise of specific jurisdiction. (*Id.* at pp. 114-115 [107 S.Ct. at pp. 1033-1034].)

Different facts, the Court readily acknowledged, will yield different results. As the Court noted, "[w]hen 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 alien defendant." (*Id.* at p. 114 [107 S.Ct. at p. 1033].) Those words could have been written with this case in mind.

B. Bank Leumi's Undeniable California Contacts Giving Rise To This Lawsuit Make The Exercise Of Specific Jurisdiction Appropriate Here.

The Bank doesn't appear really to dispute Ms. Cohen's interest in litigating in California or California's interest in affording a forum for her. It focuses tightly on minimum contacts, arguing that because it conducted

its relationship with Ms. Fabe from Switzerland and merely responded to instructions initiated by her in California, it never "purposely availed" itself of the benefits of this forum and its dealings with Ms. Fabe are an insufficient basis for finding minimum contacts permitting the exercise of specific jurisdiction. (See RB 33-40.) As a tactic to divert attention from the undisputed core facts clearly supporting jurisdiction, the Bank also contends the opening brief mischaracterizes the record. Neither part of its strategy holds up.

1. The opening brief fairly characterizes the record.

The Bank acknowledges that "[m]any facts fundamental to the question of whether personal jurisdiction can be exercised in this case were uncontested in the court below" (RB 4), but it takes issue with the way the opening brief characterizes various details. (See RB 7-16.) Actually, the opening brief fairly summarizes the record, and in any event, the core facts on the minimum contacts question – including the transfer of stolen funds in and out of California – are among those that are undisputed.

We begin by briefly addressing the contested factual details. The opening brief states, for example, that Ms. Fabe requested a letter for use in her divorce, stating that the funds she had on deposit with the Bank really belonged to her mother and that her name was on the accounts only for convenience, and that the Bank obliged the request. (AOB 7-8; see RB 8-10.) That is correct. That the Bank, citing legal reasons, declined to word the letter precisely as Ms. Fabe desired does not change the fact that Ms. Fabe made a decidedly suspect request and the Bank (evidently after consulting its legal advisors) found a way to accommodate her. (See, e.g., AA 392-393, 451.) It is also correct, as the opening brief states, that Ms.

Fabe used materials the Bank provided, including that letter, in her divorce and in concealing her theft. (See AOB 8.)

The Bank also takes exception to the opening brief's references to a letter provided to Ms. Fabe by her principal contact at Bank Leumi, Ernst Baumberger, confirming a personal loan of $100,000 that he supposedly made to her. (AOB 8, 22.) The Bank cannot deny that Mr. Baumberger was Ms. Fabe's personal banker and it agrees the letter exists, but it insists the Bank had nothing to do with it and that the personal loan has not been proven false. (RB 10-11.) In view of the professional relationship between Ms. Fabe and Mr. Baumberger at the Bank and the course of dealings reflected in the record, the opening brief's characterization of the personal loan episode is fair.

Finally, the Bank takes issue with the opening brief's entire depiction of the seven-year course of business dealings between it and Ms. Fabe, on grounds that whatever it did with Ms. Fabe's accounts, it acted in response to Ms. Fabe's requests, not as initiator, and accordingly did not purposely avail itself of forum benefits. (RB 11-16.) The Bank cites no authority, however, nor have we seen any, that establishes a "she started it" defense to minimum contacts otherwise clearly established. Leaving aside the assertions that it only acted in response to its customer's directions, the Bank does not and cannot deny the existence or the details of its continuous seven-year banking relationship with Ms. Fabe, a Californian. Those undisputed details are what warrant California's exercise of specific jurisdiction over the Bank in this lawsuit.

2. The undisputed core facts of the continuous business relationship between the Bank and Ms. Fabe support the exercise of specific jurisdiction.

There is no real dispute that the Bank continuously pursued an active banking relationship with Ms. Fabe for about seven years. The Bank is in Switzerland, but it knew from the outset that Ms. Fabe and her mother resided in California, so that its communications with them and the services it could be expected to perform for them would flow between Switzerland and California. And in fact, over the course of the relationship, the Bank did perform services, including moving funds out of and later back into California for Ms. Fabe. (See AOB 20-24.) To recap some of the details:

- When Ms. Fabe transported her mother and the family assets to Switzerland in 1993, she presented the Bank the opportunity, which the Bank accepted, to manage and reinvest $1.7 million. A bank does not manage and reinvest $1.7 million out of altruism, but to make money for itself. Thus, the Bank benefitted financially from its California contacts. (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"].)

- The Bank cultivated its relationship with Ms. Fabe in California. The relationship generated reams of correspondence, and the Bank has not denied that, as the opening brief details, its dealings with Ms. Fabe included communications in essentially every conceivable format,

including correspondence, telephone calls, faxes and wire transfers. (See AOB 21-22 & fn. 7.)

- The 1998 account – as the Bank concedes (RB 6-7, 12) – 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, and the Bank took action accordingly. (E.g., AA 297-304, 391-395, 437, 440, 443, 448.)

- Although the Bank downplays its role (see Section 1A, *supra*; RB 8-10), it assisted Ms. Fabe with her personal legal affairs in California. In particular, the Bank concedes supplying Ms. Fabe with a letter (albeit not worded precisely as Ms. Fabe had suggested) concerning the origin of trust assets that she requested for use in her California divorce. Along the same lines, the Bank's Mr. Baumberger also indulged Ms. Fabe with a letter for use in explaining her finances. (AA 433, 541.)

- The Bank did not confine the reach of its activities to Switzerland. It did not require Ms. Fabe to appear personally to transact business. It did not 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.

For the various reasons detailed above and in the opening brief (see AOB 18-26), these facts are ample to support the finding of minimum contacts prerequisite to California's exercising specific jurisdiction over the Bank for this lawsuit. The Bank's position that minimum contacts are not established depends on an approach to the issue that is mechanical and misguided.

The misguided character of the Bank's analysis, both as to the way the Bank conceptualizes its dealings with Ms. Fabe and its understanding of the extent of forum contacts necessary to subject it to specific jurisdiction, is epitomized in its treatment of a federal district court case, *Resolution Trust Corp. v. First of America Bank* (C.D.Cal. 1992) 796 F.Supp. 1333. The Bank likens itself to the Michigan bank that successfully resisted long-arm jurisdiction in *Resolution Trust Corp.*, but the facts are not analogous and the analysis on which the Bank relies doesn't hold up. (See RB 33.)

In *Resolution Trust Corp.*, the plaintiff sought to establish minimum contacts based on the bank's having subscribed to a wire clearinghouse system that made it foreseeable its services could be used in California. (*Resolution Trust Corp. v. First of America Bank*, *supra*, 796 F.Supp. at p. 1336.) Thus, the Michigan bank's connection with the California forum was something like that of the Japanese tire valve manufacturer in *Asahi Metal Industry, Ltd. v. Superior Court*, *supra*, 480 U.S. 102 [107 S.Ct. 1026] (on which, as discussed, the Bank also misguidedly relies): the Michigan bank merely had reason to suppose its services would reach the forum state.

Though the Bank refuses to see it, the scenario here is materially different. The Bank didn't know merely that its services could reach a California customer and could have effects in California. It is nothing like a manufacturer that produces a million widgets and sends them out randomly into the world. On the contrary, the Bank's relationship with California was quite specific: The Bank established a business relationship with a California customer and maintained a continuous course of providing banking services specifically to her, specifically in and affecting California,

for seven years. Contrary to the Bank's characterization, its dealings with Ms. Fabe were anything but random, fortuitous or attenuated. (See RB 40.)[1]

Furthermore, *Resolution Trust Corp.*'s analysis is far from authoritative. As a later California federal district court decision has observed, the Ninth Circuit has adopted a more liberal approach in evaluating specific jurisdiction claims against foreign banks, making it questionable whether *Resolution Trust Corp.* carries any weight even in the federal system. (*Gutierrez v. Givens* (S.D.Cal. 1998) 1 F.Supp.2d 1077, 1082.) The Ninth Circuit decision mentioned in *Gutierrez*, *Ballard v. Savage* (9th Cir. 1995) 65 F.3d 1495, approved the exercise of specific jurisdiction over an Austrian bank that was sued for its alleged participation in a Ponzi scheme; the Austrian bank, like Bank Leumi here, had no local offices and claimed it had only fortuitous contacts with the forum state and was at most an innocent repository of funds generated by a criminal enterprise. The Ninth Circuit was unimpressed, finding sufficient minimum contacts in the bank's having "created numerous ongoing obligations to U.S. residents." (*Ballard v. Savage*, *supra*, 65 F.3d at p. 1498.) As the district court observed in *Gutierrez*, "While *Ballard* might not overrule these cases [including *Resolution Trust Corp.*], *it does signal the low threshold required to establish purposeful availment by a bank.* (*Gutierrez v. Givens*, *supra*, 1 F.Supp.2d at p. 1082, emphasis added.)

Requiring only a low threshold of forum contact to establish purposeful availment by a bank makes a good sense in this increasingly electronic age. The intangible products and services that a bank provides

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[1] The Bank's repeated observations that it currently has no California customers (RB 5, 21, 33) are irrelevant to the issue of specific jurisdiction, and no assertion of general jurisdiction has been made in this case. (See AOB 15, fn. 4.)

particularly lend themselves to being proffered and provided from afar. If more substantial contacts are held prerequisite to finding "purposeful availment" and exercising specific jurisdiction, it will be too easy for non-resident banks to elude process despite well-developed relationships with California customers. Any off-shore bank could protest, as the Bank does here, that it has never even been to California and, in providing its services, acted only in response to its customers' inquiries and instructions.

Moreover, there is nothing particularly novel in the concept that only a low threshold is required to support a finding of "purposeful availment" based on the typical sort of banking relationship. There has long been ample authority holding that one way in which a non-resident defendant "purposefully avails" itself of the benefits of the forum sufficient to justify exercising jurisdiction is by establishing a relationship that entails continuing obligations to a forum resident – just as the Bank did here. (See, e.g., *Vons Companies, Inc. v. Seabest Foods, Inc.*, *supra*, 14 Cal.4th at p. 446, quoting *Burger King Corp. v. Rudzewicz* (1985) 471 U.S. 462, 475-476 [105 S.Ct. 2174, 2184, 85 L.Ed.2d 528] [noting that Supreme Court has acknowledged various different conduct as means by which a foreign defendant may engage in minimum contacts, including where it "'has created "continuing obligations" between himself and residents of the forum'"]; *VirtualMagic Asia, Inc. v. Fil-Cartoons, Inc.* (2002) 99 Cal.App.4th 228, 239, 242-243 [foreign digital ink subcontractor for California film animator purposely availed itself of forum benefits by establishing contract that entailed continuing obligations to a forum resident].)

After conducting a robust banking relationship with Ms. Fabe in California continuously for some seven years, the Bank can hardly be surprised to learn that it could be subject to California's jurisdiction in this

dispute arising out of those dealings. Ms. Cohen has established the Bank's minimum contacts with California. Accordingly, for all the reasons addressed above and in the opening brief, the superior court's contrary finding should be reversed.

C. The Bank Tacitly Concedes That If Minimum Contacts Are Established, Then Requiring It To Submit To California's Jurisdiction Would Not Be Unreasonable.

Once a plaintiff presents facts establishing minimum contacts – as Ms. Cohen has done here – a presumption arises in favor of exercising jurisdiction and the burden is on the defendant to demonstrate that requiring it to submit to local jurisdiction would subject it to unreasonable hardship. (E.g., *Vons Companies, Inc. v. Seabest Foods, Inc.*, *supra*, 14 Cal.4th at p. 449; see AOB 26-29.) The required demonstration 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* (2002) 99 Cal.App.4th 576, 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].)

Our opening brief asserted that the Bank has never made, and cannot make, the required showing. We detailed how the balance favors Ms. Cohen as to each of the relevant interests – relative inconvenience (AOB 27-28), plaintiff's interest in suing locally (AOB 28-29), and California's

interest in providing a forum (AOB 28). The Respondent's Brief responds with silence.

The closest the Bank comes to acknowledging the point is in arguing obliquely (RB 7, 23-24) and in addressing the forum selection clauses (RB 48-49) that it would be convenient enough for Ms. Cohen to litigate this dispute in Switzerland rather than California, because her brother previously has pursued other litigation there related to Ms. Fabe's crimes. But even if Ms. Cohen would not be unduly inconvenienced by having to litigate abroad – the point is by no means conceded – the purported availability of relief in Switzerland is irrelevant here; the issue is long-arm jurisdiction, not forum non conveniens. (See, e.g., *American Cemwood Corp. v. American Home Assurance Co.* (2001) 87 Cal.App.4th 431, 435 [issue of convenient forum presupposes that jurisdiction exists]; *Stangvik v. Shiley Inc.* (1991) 54 Cal.3d 744, 751 [defining forum non conveniens as "an equitable doctrine invoking the discretionary power of a court to decline to exercise *the jurisdiction it has* over a transitory cause of action when it believes that the action may be more appropriately and justly tried elsewhere" (emphasis added)].)

As to the jurisdictional issue at hand, the Respondent's Brief does *not* show, or even try to show, that requiring the Bank to litigate in California would be *in*convenient – that it would subject the Bank to unreasonable hardship – and *that* is the test. By the Respondent's Brief's studious silence on the point, the Bank confirms that our opening brief's assertion was correct: it is entirely appropriate to require the Bank to litigate Ms. Cohen's claims in California.

The superior court erred in quashing summons. It botched the minimum contacts analysis and its order flouts California law and public policy manifesting the intent "'to exercise the broadest possible jurisdiction,

limited only by constitutional considerations.'" (*Archdiocese of Milwaukee v. Superior Court* (2003) 112 Cal.App.4th 423, 435, quoting *Sibley v. Superior Court* (1976) 16 Cal.3d 442, 445; see Code Civ. Proc., § 410.10 ["A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States"].) For all the reasons addressed above and in the opening brief, this Court should reverse and reinstate this lawsuit.

II.

THE SUPERIOR COURT PROPERLY EXERCISED ITS DISCRETION IN DECLINING TO ENFORCE THE FORUM SELECTION CLAUSES THAT BANK LEUMI PUT FORTH AS AN ALTERNATIVE GROUND FOR DISMISSAL.

The Bank insists that even if California jurisdiction would be proper based on minimum contacts, this lawsuit was rightly dismissed anyway because the forum selection clauses in the agreements establishing Helen Fabe's three accounts require that any action or proceeding arising out of the accounts be litigated in Zurich. (RB 45-50.) The Bank made the same argument in the trial court (see AA 147-150), and the court, having reviewed the parties' competing arguments and their conflicting evidence,[2] rejected it (see RT 1-2 [trial court "read all the materials" and based its ruling "on all the authorities that I've read, and . . . upon the declarations of

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[2] As noted, because the trial court never ruled on the Bank's evidentiary objections, those objections are waived. (See AOB 12-13; Standard of Review, *supra*.)

the individuals involved"]; RT 2 [trial court concludes, "I think the forum selection clauses are not controlling here"]).

The opening brief detailed the various reasons why the trial court flat-out ruled correctly, and certainly acted well within its substantial discretion, in declining to enforce the forum selection clauses. (AOB 29-33; see AOB 12 [citing cases reciting abuse of discretion standard applicable to review of ruling on forum selection clauses].) In attempting to rebut the opening brief's showing, the Bank rehashes the same approach it took in the trial court, stressing, for example, that "[c]hoice of law provisions . . . are widely upheld in California" (RB 46-47, quote at 46) and that the "burden of demonstrating that enforcement of the forum selection clause would be unreasonable rests with the plaintiff" (RB 47-48). In this case's current appellate posture, the Bank's approach simply does not work. The Bank has not come close to establishing that the trial court abused its discretion in rejecting its forum selection clause argument.

The Bank relies on the rule that where any ground exists in the record to support the order under review, the order should be affirmed even if the trial court's reasoning was erroneous. (RB 24; see, e.g., *J.B. Aguerre, Inc. v. American Guarantee & Liability Ins. Co.* (1997) 59 Cal.App.4th 6, 15-16; *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981.) But the Bank misconceives how that rule must be applied in the posture of this case.

We don't dispute that it is fair game for the Bank, as respondent, to urge that even if the trial court erred in ruling in its favor based on the minimum contacts question, dismissal was proper on an alternative ground. Code of Civil Procedure section 906 expressly allows respondents to pursue that "no harm, no foul" strategy. (See Code Civ. Proc., § 906 ["The respondent, or party in whose favor the judgment was given, may, without appealing from such judgment, request the reviewing court to and it may

review any of the foregoing matters[3] for the purpose of determining whether or not the appellant was prejudiced by the error or errors upon which he relies for reversal . . . of the judgment from which the appeal is taken"].) However, as discussed (see Standards of Review, *supra*), since the proffered alternative ground is one the trial court actually considered and rejected, this court's evaluation of whether that ground affords an available means to affirm the judgment of dismissal is to be conducted through the prism of abuse of discretion review. In other words, unless the trial court abused its discretion in rejecting the alternative ground, that ground is not viable as a basis for affirming the dismissal on appeal.

But the Bank fails to acknowledge the abuse of discretion standard, much less incorporate that standard into its argument. Instead, it merely repeats its trial court approach, urging that the record would support a ruling enforcing the forum selection clauses. (See RB 48-50.) It simply ignores the opening brief's demonstration that the record contains evidence supporting a determination that the forum selection clauses were not freely and voluntarily negotiated and that requiring Ms. Cohen to litigate this dispute in Zurich would be unreasonable (AOB 31-34), pointing only to the evidence that it contends points the other way (RB 48-50). Under the circumstances, that approach gains the Bank no ground.

Moreover, the arguments and evidence on which the Bank relies are unconvincing even taken at face value. California courts enforce forum selection clauses that are "freely and voluntarily negotiated at arm's length

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[3] "[T]he foregoing matters" refers to "any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment or order appealed from or which substantially affects the rights of a party." (Code Civ. Proc., § 906.)

unless enforcement would be unfair or unreasonable." (*Hunt v. Superior Court* (2000) 81 Cal.App.4th 901, 908; see AOB 30 [citing *Hunt* and additional authorities].) The Bank stresses the factors it believes make Zurich the reasonable place to litigate this dispute (RB 48-49), but it essentially ignores our demonstration that the clauses were not freely and voluntarily negotiated at arm's length. As the opening brief discussed (AOB 31-32), the lack of arm's length negotiation was sufficient basis in itself for the trial court to act within its discretion in finding the clauses unenforceable.[4]

Because the trial court, on conflicting evidence, rejected enforcing the forum selection clauses, that the record might have supported a contrary ruling is immaterial now. The trial court's conclusion that "the forum selection clauses are not controlling here" (RT 2) is supported by substantial evidence and was within the court's discretion. Accordingly, for all the reasons addressed here and in the opening brief, the judgment of dismissal cannot be affirmed on the ground that the forum selection clauses require that disputes between Ms. Cohen and the Bank to be litigated in Zurich.

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[4] Furthermore, our argument that the forum selection clauses are inherently contradictory and ambiguous is not specious. (AOB 33-34, fn. 11.) The Bank may understand what it intended in drafting provisions that say in one place that Zurich is "the exclusive place of jurisdiction for legal proceedings of any kind," but say elsewhere that the Bank can sue the customer "at the domicile of the customer or in any other court having jurisdiction," but the explanation the Bank gives is far from obvious on the face of the clauses.

CONCLUSION

The Bank is in denial, and its insistence that Ms. Fabe initiated all its California dealings rather than vice versa misses the point. Regardless who was the initiator, over a period of years, through a series of transactions, the Bank had more than minimum contacts with this state in connection with the underlying events. The forum selection clauses, moreover, provide no escape valve. California therefore can and should exercise specific jurisdiction over the Bank.

For all the reasons stated in this brief and in the Appellant's Opening Brief, 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: April 20, 2005

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 14(c)(1), California Rules of Court, I certify that the attached Appellant's Reply Brief in *Cohen v. Bank Leumi Le-Israel (Switzerland), etc., et al.*, 2d Civil No. B174254, contains 6,311 words, as counted by Corel WordPerfect, version 9.0, the software program within which the brief was generated.

Dated: April 20, 2005

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