

1 SUPREME COURT OF THE STATE OF NEW YORK
2 COUNTY OF NEW YORK : CIVIL TERM : PART 54

2 -----X

3 YOUNG VENTURE CAPITAL, LLC,

4 Plaintiff,

5 -against-

INDEX NO:
654762/2022

6 YUEYUAN HAN,

7 Defendant.

7 -----X

8 New York Supreme Courthouse
9 60 Centre Street
New York, New York 10007
August 1, 2023

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12 J U S T I C E

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1 THE COURT: Let's start with appearances beginning
2 with the plaintiffs.

3 MR. KUSHNER: Good morning, your Honor. My name is
4 Amiad Kushner from Seiden Law. I am here with my colleagues
5 Jennifer Blecher and Xintong Zhang for the plaintiffs.

6 THE COURT: Good morning. And for the defendant.

7 MS. WHITE: Good morning, your Honor. Madelyn
8 White from Carter Ledyard here with Jeffrey Boxer and Sarah
9 Ganley for the defendant.

10 THE COURT: Okay. Interesting motion this morning.

11 So it's defense's motion to dismiss the complaint
12 on CPLR 327 grounds and also to compel arbitration. So
13 whoever wants to get us started. If you can do the argument
14 from the lectern, I would appreciate it.

15 MS. WHITE: Your Honor, so we think quite simply
16 this is a case that does not belong in this court. It's 93
17 plaintiffs, all citizens --

18 THE COURT: Where does it belong?

19 MS. WHITE: It belongs in China, your Honor.

20 THE COURT: And sometimes with cases like this,
21 when we dismiss them on forum non, if we do, we do it on
22 condition that the defendant agree to accept service and
23 waive all sorts of other bars to do that. It seems like
24 that might not work here.

25 MS. WHITE: I'm not authorized to, you know, agree

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1 to any of that here today. I don't think that's a
2 prerequisite.

3 If you look at New York law, while the availability
4 of an alternative forum is an important factor, it's not
5 dispositive.

6 THE COURT: I saw that, and the Islamic case that
7 comes from is sort of an unusual one where the Court really
8 couldn't even adjudicate the case here.

9 But so should I assume, and I appreciate the
10 careful way that you argued it in the brief -- should I
11 assume that if I dismiss this here, this case is really not
12 going to be litigated anywhere because they make a pretty
13 credible argument that your client would be very unlikely to
14 appear in China for litigation, and they put in evidence
15 that even if he did, it wouldn't proceed because the
16 criminal action has to go first.

17 So I agree with you that there is law to say that I
18 can -- one can dismiss on forum non conveniens grounds even
19 if that one factor about the availability of an alternative
20 forum isn't present, but I should assume it sounds like that
21 there is no alternative forum because you're not here as the
22 party with the burden of proving all of these things to get
23 dismissal. You're not saying that your client is amenable
24 to suit in China.

25 MS. WHITE: Correct, your Honor, but I don't think

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1 you should assume that there is no alternative. I think --

2 THE COURT: Well, if you don't prove it, I have
3 nothing to base a finding that there is an alternative
4 forum.

5 MS. WHITE: If you look at the cases, your Honor,
6 while we have the burden to show that dismissal is
7 appropriate under forum non, for the issue of whether
8 there's an alternative forum, it's actually the plaintiff's
9 burden to show that the forum is unavailable.

10 I understand that they have put in some proof
11 arguing -- making that argument, but I don't think that
12 proof is by any means conclusive.

13 There is no suggestion that they tried to bring
14 suit in China and were unable to. We have pointed to other
15 lawsuits.

16 Yes, you know, they have said that Chinese law says
17 criminal cases have to go forward first, but that does not
18 mean that once those criminal cases proceed, you can't then
19 seek a civil remedy even if my client is located in
20 New York. The companies that are at the heart of this
21 litigation are all located in China. There's been no
22 suggestion that they wouldn't be able to sue those companies
23 following any criminal proceedings and maybe seek redress
24 that way.

25 THE COURT: Okay.

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1 MS. WHITE: And we think that even if there is no
2 alternative forum, the other factors so strongly weigh in
3 favor. I mean, this case, everything about it is centered
4 in China. The allegedly fraudulent misrepresentations were
5 made in China. The conversion of funds would have happened
6 in China. The 93 plaintiffs are all in China, and if it
7 goes forward, it will be an immense burden on the Court and
8 on Mr. Han because all of the non-parties, all of the
9 documents are located in China outside of subpoena power.

10 A few foreign plaintiffs have indicated their
11 willingness to travel here, but they only submitted
12 affidavits from nine of the 93, so that leaves 84
13 plaintiffs. It's not clear if they will come.

14 Do we have to do depositions over Zoom which would
15 be very burdensome? Do we have to go to China? Everything
16 has to be translated. I'm assuming that even if the
17 plaintiffs speak English, they would want translators since
18 English isn't their native language. It will just be
19 immensely burdensome to everybody, and the claims are under
20 Chinese statutory law, so the Court will have to be hearing
21 from dueling experts for that. Even some of the allegedly
22 fraudulent statements involve Chinese law.

23 If you look at the complaint, they say some of the
24 misrepresentations were due to the registration status of
25 the companies whether or not they were authorized to offer

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1 the investment products that they were offering. That's
2 going to be under Chinese law again. So it's just -- if you
3 look at all of the factors, the residence of the party,
4 where the transaction took place, location of witnesses and
5 documents, burden on the Court and the potential hard --
6 potential hardship to Mr. Han, those factors just are so in
7 favor of dismissal.

8 THE COURT: Most of these cases -- you don't tend
9 to see a lot of cases that are factually quite similar, but
10 the plaintiffs have cited one that's pretty close, the Kwok
11 case, K-W-O-K. My colleague Justice Ostrager who was
12 reversed for dismissing on forum non conveniens grounds on
13 facts that with the sole exception of the fact that the
14 agreements for whatever reason in that case existed in
15 English. Seems very similar. Chinese real estate
16 development project. Contracts under Chinese law executed
17 in China. Defendant was a Chinese citizen but fled to
18 New York seeking asylum and was considered a fugitive. And
19 therefore, Court found that he was not able to return to
20 China to have a lawsuit there, and they were -- they
21 reversed a discretionary dismissal which is something that
22 gets my attention.

23 How do you distinguish that?

24 MS. WHITE: That's the Pacific Alliance Asia
25 Opportunity Fund case, your Honor?

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1 THE COURT: For the record, 160 AD3d 452, First
2 Department, 2018.

3 MS. WHITE: I think there are two important
4 distinguishing factors there. The first is not all of the
5 documents were negotiated and executed in China. I believe
6 most of them, but not all of them were.

7 Here, we have all of them were negotiated. And
8 then the other big distinguishing factor is that there the
9 agreements were in English. Here, the agreements are all in
10 Chinese. And also, there you had -- I don't know what
11 representations were made about the plaintiff's willingness
12 to come to New York.

13 THE COURT: Well, it says that they seem to just
14 represent that they -- that plaintiff's employees are
15 willing to travel here at no expense to defendant, so it's a
16 little soft, I guess.

17 MS. WHITE: But here, we have 93 plaintiffs, and
18 only nine have represented that they are willing to come to
19 New York. So we have 84 plaintiffs who have not made that
20 representation. So I think just based on the unknowing --
21 not knowing whether all of the plaintiffs will come here,
22 the agreements being in the foreign language and the fact
23 that we have all of the agreements were negotiated and
24 executed in China, I think those are very important
25 distinguishing factors.

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1 THE COURT: They are. They are certainly
2 differences, but you know, the -- some of it maps pretty
3 well. And you know, the Court certainly seemed concerned in
4 this particular setting about the absence of an alternative
5 forum which again is not dispositive, but it's -- it is
6 important.

7 As I said, you know, in addition to that being a
8 factor, if you search through the forum non conveniens
9 dismissals over the last few years which I did read a lot of
10 them, conditional dismissals, and I do this a lot too
11 because, you know, I essentially put the defendant to the
12 test because the defendant is saying, hey, look, this case
13 should be in England or Greece or wherever. And so the
14 dismissal is okay as long as that can actually happen.
15 That's fine. That's part of the reasonable conditions
16 language of 327 that leads to that. So courts are worried
17 to some extent about situations where dismissal basically
18 means that's the end of it.

19 Having said that, as you point out, you know, I
20 mean, this is really more for my conversation with your
21 colleagues, but this -- the quirks of the Chinese legal
22 system is I suppose, you know, why does that fall on this
23 court which is kind of what the Lobby case was about.

24 MS. WHITE: Right. And there are more recent
25 cases. There's Payne, 83 AD3D 518 which is a 2011 First

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1 Department case where they said the action was properly
2 dismissed even though plaintiff may have no alternative
3 forum. So certainly, while it is an important factor, it is
4 by no means dispositive, and I just think in this case where
5 everything else is weighing so strongly -- and again, we
6 don't concede that there is no alternative forum. They have
7 put in their arguments. There is nothing to suggest that
8 they couldn't bring the lawsuits in China against the
9 companies once the criminal actions have concluded. There
10 have been some lawsuits filed against Mr. Han. They did not
11 try to bring lawsuits in China before jumping to the United
12 States.

13 THE COURT: Presumably at least reading the
14 complaint, I think it says that the companies don't have any
15 money. The allegation is that the money all came with Mr.
16 Han to the United States. So suing an empty shell,
17 presumably not -- if that's true is not a very welcome
18 proposition.

19 MS. WHITE: Correct, your Honor.

20 But under American law, if you have a case like
21 that, you would then sue the company and then proceed on a
22 piercing corporate veil type of theory to then get the
23 assets that were improperly diverted.

24 I mean, you can't just -- so I don't think that
25 says that they don't have any potential remedy.

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1 THE COURT: That's kind of what this case is;
2 right? In other words, you know, Mr. Han, as far as I can
3 tell -- I haven't seen the contracts -- didn't sign the
4 contracts in his own name. So their whole case against him
5 here would have to be on some sort of either a direct fraud
6 theory or some sort of a piercing corporate veil, but the
7 inconvenience to Mr. Han you are focused on is -- it's
8 unclear whether even the plaintiffs will make themselves
9 amenable. There are ways to deal with that.

10 In other words, if they -- if you bring a case in
11 this Court and you do not cooperate in reasonable discovery,
12 your case can be dismissed depending on how bad it gets.

13 So there might be ways to deal with that if that's
14 what happens. You know, obviously, the -- I think this was
15 running through that Pacific Alliance case too. It's a
16 little difficult for Mr. Han to say that litigating here
17 where he lives is inconvenient in the traditional sense.

18 MS. WHITE: Correct. Clearly, it's not
19 inconvenient for him to come to a New York courthouse. He
20 lives here. He can communicate with us, but it's burdensome
21 in other ways. Because all of the claims are under Chinese
22 law, he will need two sets of attorneys. We are New York
23 litigators. I'm not familiar with Chinese law. We will
24 have to hire a team of Chinese experts. All of the
25 documents are in Chinese. We are going to have to somehow

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1 figure out how to do document review for relevance and
2 privilege. I can't look at Chinese documents and do that,
3 so it will be burdensome in other ways besides having to
4 make the trip down to the courthouse.

5 He is going to be essentially paying two sets of
6 legal teams to do everything twice. And then if the case
7 goes to trial, we are going to have to have translators
8 here. It's -- it will make everything much longer and much
9 more cumbersome.

10 THE COURT: Yeah. I mean, it's one of those where
11 you -- I know you're also -- we haven't gotten to the
12 arbitration piece yet.

13 One thing did occur to me as I was thinking about
14 this because they -- the other side talks about that, well,
15 an arbitration wouldn't work either, that even if you had an
16 arbitration agreement that applied to Mr. Han, the same
17 blockade on proceeding with civil actions would also apply
18 to that.

19 I mean, I suppose one thing the parties could
20 consider is agreeing to arbitrate the dispute here and you
21 can choose a Chinese arbitrator in the United States and
22 make the whole thing easier that way. That's not something
23 I can mandate you do. But I do agree. I mean, having gone
24 through in practice the expense of translating which I
25 assume we are going to Mandarin to English, even a single

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1 page is enormously expensive. I don't know if the
2 plaintiffs have investigated all of this, but I remember
3 being just stunned by how much it costs to do a certified
4 translation of -- from Mandarin to English.

5 Now, maybe technology has made that a little easier
6 and cheaper. Do you happen to know in terms of -- you say
7 that it's a burden. Have you any way of ball parking how
8 expensive that is, how time consuming that is?

9 MS. WHITE: I don't, your Honor. We -- attached to
10 our papers, samples of all of the different agreements, and
11 we just translated a couple of pages, and that was -- it was
12 not cheap. I don't remember how much it was off hand, but
13 the reason that we only picked a couple of -- you know, a
14 couple for each type of agreement, and we only translated
15 the relevant portion relating to the arbitration provision
16 was because if we had done everything, it would have just
17 been thousands and thousands of dollars.

18 THE COURT: My experience in this is five or
19 six years old and back then it was a staggering amount per
20 page.

21 MS. WHITE: It's a lot, and then it just takes
22 time. And again, when we are sitting there reviewing
23 documents, I mean, we don't want to translate everything,
24 but it's hard to know what's relevant and needs to be
25 translated until you have a sense of what the document says,

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1 and I'm unable to do that.

2 THE COURT: So let's turn to the arbitration
3 argument that this -- the alternative argument you have is
4 to I guess -- typically, what we do is stay a case and
5 compel arbitration. The argument the other side makes, it
6 seems to me is that Mr. Han under Chinese law wouldn't be
7 able to affect this.

8 I agree with you under the Hirschfeld case, if this
9 were subject to New York law, he would have a pretty decent
10 argument that if the only reason you are being sued is
11 because of stuff you did as an officer of a company that
12 signed an arbitration agreement. There is certainly case
13 law that would permit defensively a corporate officer to get
14 the benefit of an arbitration provision, but they say
15 China's different.

16 MS. WHITE: They do. But all of the cases they
17 cite are distinguishable. None of them address the
18 situation we have here which is a nonparty seeking to
19 enforce the arbitration agreement after being sued by the
20 signatory. So the signatory obviously are bound by them.
21 The question is whether Mr. Han has the ability to enforce
22 it.

23 We attached one case to the affirmation in reply
24 which said that it would be illogical to allow, you know,
25 the claims to proceed in court when clearly they were

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1 related to the -- the contract that had the arbitration
2 provision.

3 THE COURT: They have -- typically, when you have
4 to prove up foreign law, you have to drag in a foreign law
5 expert, and it's considered a question of fact as opposed to
6 just an American lawyer arguing, reading cases, you know,
7 decided in China. I don't -- is there anything to rebut
8 their expert?

9 MS. WHITE: We did not submit an expert affidavit,
10 but I think if you look at the cases their expert is relying
11 on, none of them fit the situation here where the
12 non-signatory is seeking to enforce against the signatory.

13 THE COURT: As a U.S. lawyer, how would I even go
14 about making that kind of judgment as to whether one case is
15 distinguishable from another since I don't have the basic
16 grounding in just sort of analytical framework?

17 MS. WHITE: Well, I think for the question of
18 arbitrability, the -- this is to be heard under the Beijing
19 arbitration commission, and the Beijing arbitration
20 commission rules say questions of arbitrability are
21 determined by the arbitrator. So I think it would be a
22 question to be determined in Beijing. And then going back
23 to our overriding point which is this case just does not
24 belong here, this is just highlighting all of the
25 difficulties we're going to have litigating this case.

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1 THE COURT: That, I think was your -- the best
2 argument is that, you know -- you know, should this --
3 should that issue be sent over at least and stay the case
4 while the arbitrators decide. You know, again, they make a
5 broader argument that the arbitration can't even proceed on
6 the same theory that the -- while a criminal case is
7 pending. The BAC won't even look at it.

8 MS. WHITE: I don't know why that would prevent a
9 question of whether or not Mr. Han could enforce the
10 agreement, but it could -- that question I believe has to be
11 answered by the BAC.

12 THE COURT: Now, I don't think -- are there 94
13 different agreements that we have to look at or how many
14 different agreements are encompassed here? I think you said
15 that you had submitted some.

16 Is it your understanding that all of them have
17 arbitration provisions?

18 MS. WHITE: So my understanding is all of the
19 plaintiffs signed individual agreements each time they made
20 an investment pursuant to new investment product. So some
21 of the plaintiffs invested in multiple products. I believe
22 that for each product, the agreements are the same, and it's
23 just a different signature. And standing here today, I
24 don't know how many there are because if you look at --

25 THE COURT: But I kind of remember there being a

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1 somewhat equivocal statement that many have arbitration
2 agreements or something like that. I may be mixing up
3 whatever I read in our papers and what I read in the cases.
4 But is it your understanding based on what you have seen so
5 far anyway that the arbitration issue would take out all of
6 the plaintiff's claims?

7 MS. WHITE: I believe all of them, and I don't have
8 those papers in front of me. They all have arbitration
9 provisions. I believe one of them is not a mandatory, but
10 all of the others are mandatory.

11 THE COURT: And by one, you mean one of the 90
12 something?

13 MS. WHITE: One of the types of investments. So it
14 would cover -- might cover all of the plaintiffs, but it
15 might not cover all of the investment agreements because
16 again, like if you have one plaintiff who invested in five
17 products, maybe four of those are subject to mandatory
18 arbitration but one product would not be.

19 So it's not as simple as just saying, well, here's
20 the plaintiff's and here are the products because you have
21 multiples in each.

22 THE COURT: So that would mean at least putting the
23 forum non conveniens to the side, on the arbitration front,
24 the motion to compel arbitration can really only apply to
25 the ones where there is a mandatory. So that would still

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1 leave part of the case here if that was the only thing that
2 was left.

3 MS. WHITE: It would leave a very small part here.
4 But again, we would say even if that would then simplify the
5 case, it would still not belong here. Everything about this
6 case happened in China except for the fact Mr. Han happened
7 to move here after most of the investments were made.

8 I believe if you look at the appendix to their
9 complaint, there were five transactions which happened after
10 he is alleged to move here. Everything else happened before
11 while he was in China. The statements were in China.
12 Everything was in China.

13 THE COURT: Mr. Han and allegedly the money.

14 MS. WHITE: Allegedly the money.

15 THE COURT: Mr. Han and Mr. Green as some would put
16 it moved to the United States.

17 Let me hear from the plaintiffs, please.

18 Thank you.

19 MR. KUSHNER: Your Honor, it's actually a very
20 straightforward case. Mr. Han stole the plaintiff's money.
21 He came to live in New York City. He opened New York bank
22 accounts. He brought tens of millions of dollars from China
23 to his newly opened New York bank accounts the very week he
24 got to New York. \$28 million transferred from China to
25 New York within three months of him setting foot in New York

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1 City. He came here, and over a three-year period between
2 2018 and 2021, he communicated directly with my client in
3 China from New York, and he lied to them about what happened
4 to their money.

5 THE COURT: The fraud was already complete by that
6 time; right? In other words, I saw that, you know, these
7 investor calls, but the bamboozling if it happened had
8 already happened.

9 MR. KUSHNER: Absolutely, your Honor. Absolutely,
10 but that's not this case. This is not a case about
11 pre-contractual representations. It's not a typical
12 securities fraud case where you're alleging fraudulent
13 inducement or fraudulent statement was made to induce a
14 purchaser to buy securities.

15 You don't -- it's not a breach of contract case.
16 I'm not alleging that an investment agreement was breached.
17 All of our claims and causes of action relate to what
18 happened after the plaintiffs invested.

19 THE COURT: All right. Well, walk me through that
20 because he had already according to what you just said at
21 the beginning stole all of the money before he moved to New
22 York.

23 MR. KUSHNER: Well, we don't know how he stole the
24 money. We don't know the exact, you know, mechanics of it.

25 THE COURT: I read the complaint. You know, this

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1 is -- I think it's fair to say that you allege that the
2 whole thing was a scheme from the outset. It doesn't become
3 a scheme after he moved here. But why don't you focus on --
4 so you're saying that the -- your claim does not relate to
5 things that happened while he was in China at all?

6 MR. KUSHNER: No, I didn't say it didn't -- the
7 claims don't relate to what happened in China. I am saying
8 that the focus of the claims is on what happened after we
9 invested and that there is a substantial nexus between what
10 happened in New York and our claims.

11 Now, our cause of actions -- there are four causes
12 of action, your Honor, aiding and abetting fraud,
13 conversion, aiding and abetting conversion and unjust
14 enrichment.

15 Under Chinese law, aiding and betting fraud is very
16 broadly defined. Here, just making a false statement to my
17 clients from New York City and saying you're going to get
18 your money back, we think that's aiding and abetting fraud
19 under Chinese law.

20 It's not about making a fraudulent statement to
21 induce someone to invest in China. We are talking about the
22 statement in New York City. That's --

23 THE COURT: What action did your clients take in
24 reliance on that promise?

25 MR. KUSHNER: We don't have to show reliance under

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1 Chinese law. And again, for our aiding and abetting fraud
2 claim. I think that's the point that my adversary has
3 conveniently failed to address is that what are the causes
4 of action in this case. This is not a securities fraud
5 case. We don't have to prove reliance. The focus of the
6 causes of action in this case, the looting, the conversion,
7 the taking our assets and the bringing them to New York City
8 and the lying about what happened to those assets --

9 THE COURT: Well, let's split that into two things.
10 The assets were taken when the investment was made. In
11 other words, your client parted with it's -- clients parted
12 with their money in China to the companies in which they
13 invested, I guess, and those companies were then
14 investigated according to the complaint for all sorts of
15 misbehavior in terms of the attracting those investments and
16 what they promised. That's all in the complaint; right?

17 MR. KUSHNER: That's right.

18 THE COURT: And so then -- but now you're saying
19 that the real critical part of the story for this case is
20 after he left to the U.S., the siphoning off the money or
21 the transfer of the money to New York, that's the real tort?

22 MR. KUSHNER: Absolutely, your Honor. And look,
23 for the standpoint of the forum non conveniens analysis, we
24 don't have to show that New York is the only place where
25 this case could be brought or the case "belongs in

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1 New York." We do have to show a substantial nexus to
2 New York. That's the language that you see in the cases
3 over and over again.

4 Respectfully, your Honor, I would submit when you
5 put together the fact that the defendant has lived here for
6 five years, he committed at least two types of torts in New
7 York City. Okay.

8 Number one, he made false statements from New York
9 City to my client in China about the status of their funds
10 and so on and so forth.

11 Number two, we have cited case law which says that
12 using a New York bank account to further a fraudulent scheme
13 constitutes a tort in the State of New York.

14 So when you put those together, you have a
15 substantial nexus.

16 THE COURT: That might be relevant for
17 jurisdictional analysis if the claim was based on that, but
18 I am having still a little trouble understanding -- I guess
19 I see the conversion where you're saying the -- you allege
20 that he transferred funds from those companies that your
21 clients invested into himself personally. So he withdrew
22 the funds and claimed dominion over them to use the
23 conversion mantra. That's the act that you're really
24 seizing on.

25 MR. KUSHNER: Yes. The conversion may have started

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1 in China, your Honor, but funds were brought here. And your
2 Honor, in addition to the Kwok case that you cited, I
3 think -- I want to point to you three other cases.

4 First of all, this question that you are now
5 focused on with respect to conversion. Let's assume the
6 conversion happened in China. The First Department in the
7 Amlon Metals case -- this is from 2002 -- says, and I'm
8 quoting that defendant's alleged conversion and other torts
9 were committed in China and that some of defendant's
10 respective witnesses reside there and that Chinese law may
11 govern do not present a balance of factors which so strongly
12 favored defendant that they weren't disturbing plaintiff's
13 choice of forum.

14 So that's an example of the case where the First
15 Department is telling you, look, the fact that --

16 THE COURT: Was the plaintiff in this case a U.S.
17 citizen?

18 MR. KUSHNER: The plaintiff's principle place of
19 business was New York. However, the defendant owned real
20 estate in New York and maintained a bank account in
21 New York.

22 THE COURT: I know. Look, all of these cases have
23 lots of little twists and turns in them and courts do look
24 at, you know, I think throwing a New York citizen out of a
25 New York court for the conveniens of the defendant is a

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1 heavier lift than telling a Chinese investor who invested in
2 a Chinese company subject to all of what that means in terms
3 of enforceability under Chinese law and having them come to
4 New York when Chinese law lets them down is a different kind
5 of set of facts to me.

6 MR. KUSHNER: Your Honor, yes. I wasn't saying it
7 was the only -- you know, the residence of the defendant is
8 the only factor. Obviously, there is a multi-factor test,
9 but there's other cases that all kind of weigh in our favor.

10 Can I just walk you through two other cases?
11 Elmaliach versus Bank of China, First Department, 2013.
12 Plaintiffs in that case were 50 domiciliaries of the state
13 of Israel. So all the plaintiffs are not New York
14 residents. They were allegedly impacted by terrorist
15 attacks in Israel. All of their claims were brought under
16 Israeli law. The only nexus to New York in this case -- and
17 the claims were against the Bank of China New York's branch.

18 The only nexus was that money was wired through
19 Bank of China's corresponding accounts in New York and then
20 deposited, your Honor, in China. The money actually didn't
21 end up in New York City, and still the First Department said
22 the case should stay here.

23 First Department said New York has a sufficient
24 interest in and nexus with the claims because New York
25 banking facilities were allegedly used to process the wire

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1 transfers.

2 THE COURT: Yeah. And there are courts that have
3 said just as strongly the other way. The fact that New York
4 is a big banking center doesn't mean that we get saddled
5 with every dispute that happens to touch the banking
6 community.

7 MR. KUSHNER: But we have a lot more here, your
8 Honor. You know, it's -- here, the money actually ends up
9 in New York City. Mr. Han transfers over \$60 million from
10 China here. He clearly uses the proceeds of the fraud as we
11 allege to start buying property here, and he makes New York
12 the locus of his sort of ongoing fraud. So you start to
13 layer it together, your Honor. It's not just that he lives
14 here. It's not just that he is over three years making
15 misrepresentations to my clients from New York, but he's
16 wiring my client's money to New York, and the money is here,
17 and he keeps arguing, well, the case should be brought in
18 China knowing that he's never going to go back to China to
19 face justice.

20 My clients are willing to wait on the doorstep of
21 the court for justice. They are all willing to come here.
22 It's not just that only nine of them are willing to come
23 here.

24 THE COURT: So you are making that representation.

25 MR. KUSHNER: Absolutely, I am.

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1 Your Honor, the only reason we didn't put in 93
2 affidavits is because we didn't want to burden your Honor
3 with that. We said in our affidavit, the affirmation of
4 Olivia Huang, UCF number 44 at Paragraph 22. "Plaintiffs
5 have informed us that they are prepared to travel to
6 New York or Hong Kong for depositions, court hearings and/or
7 trial at their own expense and that they are able to travel
8 to the United States within the terms of their valid U.S.
9 visa."

10 THE COURT: And that's all plaintiffs?

11 MR. KUSHNER: All of the plaintiffs, and if your
12 Honor desires, we can put into the record --

13 THE COURT: No. I just -- what I would say is that
14 I may hold them to that some day.

15 MR. KUSHNER: Absolutely, your Honor, and as your
16 Honor correctly pointed out, if it turns out that the
17 plaintiffs at some future point in this case don't
18 cooperate, there are ways that your Honor could deal with
19 that.

20 THE COURT: So I'm trying to be practical here as
21 well.

22 This is just hearing about the amount of Chinese
23 language documents and testimony that we are going to deal
24 with and Chinese law at every turn which I can already tell
25 is a little bit unfamiliar. How is this going to work in

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1 the real world?

2 Have you investigated how much it is going to cost
3 to make all discovery available in translated form?

4 MR. KUSHNER: Yeah. Look, your Honor, I deal with
5 dozens -- you know, probably several hundred China-related
6 cases in my career. I happen to be very experienced in this
7 area. I dare say I am one of the more active New York
8 lawyers in China-related matters.

9 Translation is something that, you know, we deal
10 with all the time. We have very inexpensive translators in
11 mainland China that we use. I think my adversary
12 respectfully exaggerated the cost.

13 Although there are 93 agreements, they are
14 essentially identical. They are only like two or three
15 pages each. This is not a breach of contract case. It's
16 actually a very simple case.

17 Mr. Han stole my client's money. The money is here
18 in New York City. What could be simpler than that? We
19 don't have to prove that any statements made to my clients
20 when they invested were false. And your Honor, if it's so
21 difficult --

22 THE COURT: I am still struggling because when I
23 read complaint, they do seem -- the complaints -- the
24 complaint does seem to take a more holistic view of this
25 transaction, you know, including at the inception.

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1 MR. KUSHNER: Your Honor, we were providing you
2 with backgrounds as to who Mr. Han is, what --

3 THE COURT: But the whole thing that's going on in
4 China is -- are accusations that this whole thing was, you
5 know, inappropriate from the start in terms of the
6 investments that were brought in to these companies on false
7 pretenses and maybe you're not making that -- those
8 allegations are in there, and you're saying now that they
9 are not really what your allegations are?

10 MR. KUSHNER: Your Honor, I'm making a technical
11 distinction between the factual allegations in the complaint
12 and the cause of action.

13 So if you just look at the cause of action in the
14 complaint, if you look starting at the cause of action
15 section which is Page 21 of the complaint, if you look, for
16 example, at the first cause of action aiding and abetting
17 fraud, it starts at Paragraph 100 of the complaint. It
18 focuses on diversion of investor funds, conversion.

19 There's no allegation in this cause of action about
20 a false statement that induced anyone to invest or that
21 anyone relied on in making an investment.

22 THE COURT: But this one is -- this is not him
23 taking the money from China and moving it to New York. This
24 is he aided and abetted his companies in their fraud scheme
25 in numerous ways, and that all happens in China; right?

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1 MR. KUSHNER: No.

2 THE COURT: The relationship between your clients
3 and company is China-based; yes?

4 MR. KUSHNER: Your Honor, I would say it started in
5 China but continued here. So the diversion of the funds, it
6 probably started from a Chinese bank account. He probably
7 transferred it at some point to Hong Kong and then to
8 New York because if your Honor looks at the Kwok
9 affirmation, docket number 44, we list out his wire
10 transfers. You'll see that most of them are from Hong Kong.
11 There's I believe one from China directly to New York. So
12 he probably started transferring money from mainland China.
13 Maybe the first stop was generally Hong Kong and then it
14 comes to New York City.

15 From a forum non conveniens standpoint, I would
16 respectfully submit, your Honor, it's not dispositive where
17 it started. What matters is whether there is a substantial
18 nexus in New York, and we have cited to you a number of
19 cases where the conversion happens outside New York.

20 THE COURT: Right. I get the part there is a nexus
21 to New York. I mean, you know, take the allegations as true
22 which I must I think at this stage. A very important part
23 of the allegation at least we can debate how central or
24 whether it's the most central, but is ultimately the
25 air-lifting of the money to or e-lifting of the money,

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1 whatever happened, to New York.

2 MR. KUSHNER: Your Honor, it's a pretty big piece.
3 And remember, the case law talks about substantial justice.
4 I mean, that overlays all the factors. We have the alleged
5 thief residing openly in New York City. He transferred the
6 money to New York City, and he is claiming that we should be
7 in China even though he knows that we can never sue him in
8 China.

9 THE COURT: That's the -- I don't like to read
10 between the lines of the Appellate Division decision, but
11 that's kind of what I thought was going on in the Kwok case.

12 MR. KUSHNER: Absolutely, your Honor. Your Honor
13 was correct to point that out as being directly on point
14 because Mr. Kwok was also the subject of Chinese criminal
15 investigations, and there was no chance that he was going to
16 go back to Hong Kong or China.

17 I also should point out in terms of the New York,
18 you know, nexus, some of the cases talk about using the
19 New York courts, and we've pointed out a case in which one
20 of Han's companies actually was a plaintiff in a New York
21 case. That's another important point.

22 THE COURT: I'm curious. How are you going to make
23 this not a nightmare for the New York courts? Because I'm
24 seeing in my future all sorts of, you know, translation,
25 discovery disputes, and the like, you know.

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1 The Courts have said a lot of times including in
2 the Kwok case that, you know, we deal with non-U.S. law all
3 the time which is true, but in terms of the factor of a
4 burden on the courts and on the parties, I do see if the
5 case does stay here lots of logistical difficulties which
6 I'm going to be looking for ways for the parties to make
7 easier for the Court rather than the other way around
8 because you chose to bring it here, and you've got to make
9 it -- you know, ultimately, is this going to be a jury trial
10 in front of a New York jury that's going to have to sort
11 through jury instructions on Chinese law? And it's a lot.

12 MR. KUSHNER: Your Honor, I appreciate that, and we
13 certainly, if your Honor keeps the case here, are going to
14 endeavor to do our very best to streamline and make it as
15 manageable as possible.

16 THE COURT: And the main line -- the Chinese
17 translators that you intend to use, that can be a certified
18 transcript that -- certified translation that will satisfy
19 New York evidentiary rules?

20 MR. KUSHNER: Absolutely. We routinely submit
21 certified translations from our translators in mainland
22 China. They are accepted all the time. We do that every
23 day in my firm, your Honor.

24 THE COURT: How do you anticipate it between you
25 and the defendant? Would plaintiff bear the cost of that?

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1 MR. KUSHNER: Well, we have already spent a lot of
2 money on translation, and we are willing to bear the cost of
3 translations. I think that we can probably -- if we are
4 looking at the same document, we can probably split the cost
5 of translation. But if something is exclusively in their
6 possession, and you know, I'm not sure that sharing would be
7 appropriate. We can talk about that.

8 There are ways of dealing with this, your Honor.
9 The parties could agree on a using a single translation firm
10 and then that firm could agree to a discounted rate.

11 THE COURT: Well, because the argument -- the
12 burden argument they make and they acknowledge, it's not
13 difficult for Mr. Han personally, but he will have to have
14 two law firms which you may or may not have to do. I don't
15 know.

16 You know, the harm they have they allege or the
17 burden they have is, you know, hiring two law firms and all
18 the expenses that normally they wouldn't have to undertake.

19 What's the response to that?

20 MR. KUSHNER: Your Honor, just every single
21 international case where you have multiple jurisdictions or
22 different legal regimes, you have different law firms
23 collaborating. We do have PRC counsel, so we are bearing
24 that expense. Just about every single China case that I'm
25 involved in, I have worked with PRC counsel. Whenever I

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1 have clients in China, it's often the PRC counsel that has
2 the direct client relationship. That's routine.

3 Your Honor, it's routine in this court to deal with
4 foreign law. It's also routine to deal with translations.
5 Your Honor, respectfully, I don't think that this case is
6 more complicated than the complex commercial cases that are
7 generally being heard here. I really do think it's a fairly
8 straightforward case in terms of Mr. Han stealing the money.
9 He made it easy for us. He left a very clear paper trail.
10 I mean, this defendant was open and brazen. I mean, we are
11 talking about tens of millions of -- you know, hundreds of
12 millions of dollars just kind of siphoned into a couple of
13 accounts. It's really brazen. It's really open. It's not
14 that difficult a case to prove.

15 This is not a case, you know, involving, for
16 example, a flawed designed of a nuclear reactor or a mass
17 tort case. There are nightmare cases out there in the
18 courts where you've got decades timeframe and thousands of
19 witnesses and extremely complicated issues involving drugs
20 or, you know, how do power plants work.

21 This is a simple case, your Honor. He took our
22 money, and we can put the paper trail together, just a
23 couple of account statements and show you. We can prove it
24 to you, and I think a New York jury is not going to have
25 much difficulty understanding that.

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1 THE COURT: Well, I'll have to mark that down for
2 later reference when I'm sorting through expert affidavits
3 on what Article 1169 of the PRC Civil Code means that you
4 promised me this would be simple.

5 MR. KUSHNER: Should I turn to arbitration for a
6 minute?

7 THE COURT: Yes.

8 MR. KUSHNER: Yeah. So first of all, as your Honor
9 correctly pointed out, they have not put in a PRC law
10 affirmation. Your Honor's absolutely right that only a
11 subset of the agreements even contain an arbitration clause.

12 We've cited cases where the courts in China have
13 dismissed cases where somebody is trying to join a
14 non-signatory to an arbitration, and it's a very
15 well-established principle under Chinese law. You can't do
16 that.

17 They put in three cases which they claim are
18 examples of situations in which a non-signatory is compelled
19 to arbitrate. They make this claim without a PRC law
20 affirmation, but they are dead wrong.

21 The third case which is Exhibit C to the Boxer
22 affirmation was actually vacated by Chinese Appellate Court.
23 It's vacated, your Honor. But none of those cases hold what
24 they claim they hold. In several of the cases what the
25 Court did was it said, Look, I'm dismissing the case and you

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1 got to go to arbitration because the arbitrators are the
2 ones that have to decide in the first instance who can be
3 compelled to arbitrate.

4 THE COURT: Which that is a pretty consistent theme
5 in arbitration panels -- arbitrations throughout the world;
6 isn't it?

7 MR. KUSHNER: It is. It is. And it's not the same
8 thing as a holding that a non-signatory must arbitrate.

9 THE COURT: Well, to the extent that some of the
10 contracts have mandatory arbitration provisions, and I don't
11 think there is a dispute that at least some of them do, why
12 shouldn't -- you know, then the question is how broad is the
13 arbitration provision and would it encompass the kind of
14 claims you brought here.

15 As you say, you haven't brought breach of contract
16 claims probably and partly for this reason, but many
17 arbitration provisions are broad enough to include tort
18 claims arising under or relating to the contractual
19 relationship.

20 You know, generally speaking, under the Federal
21 Arbitration Act, we are fairly -- can I just ask folks on
22 the phone to mute your line, please.

23 We are fairly differential to arbitrators when the
24 parties agree that a dispute is subject to mandatory
25 arbitration. So that part is different than the -- just the

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1 forum non conveniens which is discretionary.

2 If there is a mandatory arbitration provision,
3 we're supposed to honor that. And in this case, I
4 understand there is a quirky issue as to whether Mr. Han is
5 able to invoke that provision. But why shouldn't that be
6 decided by the BAC or whoever the arbitration panel is in
7 the first instance?

8 MR. KUSHNER: Well, first of all, the FAA points
9 you towards Chinese law on the question of whether the Court
10 can compel a non-signatory to arbitrate. So that's the
11 Motorola decision that we've cited. Because Chinese law
12 governs the arbitration, the underlying agreements that my
13 client signed with the companies, it also governs the
14 question of whether a non-signatory can be compelled to
15 arbitrate.

16 THE COURT: But this is the -- what we call the who
17 decides question.

18 Is it the Court or the arbitrator who decides in
19 the first instance?

20 MR. KUSHNER: You know, I think that at least in
21 the United States, it's the Court.

22 THE COURT: And -- that's not quite right. It's --
23 if there is a broad arbitration provision and it refers to
24 the rules of an arbitration organization, then the First
25 Department law pretty clearly is that the parties have

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1 unmistakably evinced an intent that all issues under the
2 contract including what the arbitration provision means go
3 to the arbitrator.

4 MR. KUSHNER: Yeah, your Honor. You may be talking
5 about what is sometimes referred to as the question of
6 arbitrability which deals with which claims are subject to
7 arbitration.

8 What I'm talking about is something a little bit
9 different which is which parties can be compelled to
10 arbitrate. I believe -- and you know, I don't think we
11 briefed this specific point, but I believe on the question
12 of whether a particular party can be compelled to arbitrate,
13 it's for the Court. But if your Honor is interested, we can
14 submit briefing on that issue.

15 THE COURT: Well, it's an interesting question.
16 The way the Courts have looked at it is question one is is
17 there an arbitration agreement. That's always for the
18 Court.

19 The next question of whether this dispute is
20 subject to the arbitration or within the ambit of the
21 arbitration provision, that can be delegated to the
22 arbitrator. So your point is since there's no arbitration
23 agreement between Mr. Han and the plaintiffs, it has to be
24 for the Court to determine whether he can invoke --

25 MR. KUSHNER: Exactly. Your Honor just put it very

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1 eloquently. That's what I was trying to say.

2 Your Honor, more fundamentally, even if -- even if
3 we somehow could proceed, we agree voluntarily, they agree
4 to arbitrate, the arbitration panel could not proceed given
5 this Chinese law bar to have a civil proceedings continue
6 when there's a pending criminal case.

7 THE COURT: Even a private arbitration?

8 MR. KUSHNER: Absolutely. Those are the cases that
9 we've cited. And your Honor, it's really disingenuous of
10 them to suggest that, you know, we should proceed to
11 arbitration because they know that the arbitration couldn't
12 go anywhere.

13 In fact, your Honor, if the arbitrators issued an
14 award, they could then go in the Chinese courts and get the
15 award vacated, and then the award would be unenforceable
16 anywhere in the world.

17 So it's an empty offer on their part or empty sort
18 of gesture to say, Oh, this should be arbitrated. We didn't
19 do that. And your Honor, again, look at the equities of the
20 situation.

21 The reason why we can't sue them in China, whether
22 in court or arbitration is because Mr. Han is here.
23 Criminal case can't proceed against him because he's here.
24 So he can unilaterally by remaining here unilaterally has
25 the ability to frustrate not only the criminal case in China

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1 against him in China but all civil proceedings against him
2 in China. And so it's disingenuous of him to say that he
3 shouldn't be subject to suit in New York because the proper
4 forum is China. The equities just scream out for my clients
5 to be allowed to bring the case here. And --

6 THE COURT: All right. Thank you. Anything
7 further?

8 MS. WHITE: If I could just respond very briefly.

9 THE COURT: Sure.

10 MS. WHITE: So your Honor, the case I heard just
11 described was not necessarily the case I understood from
12 reading the complaint.

13 Plaintiff's counsel appear with saying this is a
14 very simple case. It's just about what happened when he was
15 in New York. When he was in New York, he stole the money.

16 If you read the complaint, that's not what this
17 case is about. It's about what happened in China, the
18 representations that were made to get their clients to
19 invest. What happened to the money after it was invested
20 while it was sitting in bank accounts in China? And I think
21 the clearest sign that this case is about what happened in
22 China, not happened in New York is the fact that plaintiffs
23 asserted four causes of action all under Chinese statutory
24 law.

25 If they think Mr. Han was committing torts while

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1 present in New York, they could have drafted their complaint
2 very differently under New York law.

3 THE COURT: Yeah. One thing that occurred to me is
4 if one of the claims is somebody sitting in New York
5 stealing money electronically, it's not entirely clear to me
6 that would be subject to Chinese law anyway, but that's the
7 way it's pled so.

8 MS. WHITE: Exactly, your Honor. This is pled
9 under Chinese statutory law. That was plaintiff's choice,
10 and it's because this case is what happened in China and it
11 belongs there, and they are saying, well, it's about the
12 equities. That's a matter for Chinese law.

13 If China is concerned that Chinese citizens have
14 been deprived of money, there are remedies I'm sure that the
15 Chinese courts could fashion, but I don't believe it's the
16 place for the United States courts to be called upon to
17 enforce equities for 93 plaintiffs sitting in China when all
18 of the actions happened there.

19 THE COURT: Well, look, the burden is on you
20 because there is personal jurisdiction; right. So I have a
21 case in front of me that unless there is some -- as the
22 Court in the Kwok case said, the defendant has the heavy
23 burden of establishing that New York is an inconvenient
24 forum and that there is no substantial nexus between
25 New York and this action, and that is because once a

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1 jurisdiction attaches, my job is -- unless there's some
2 serious reason not to is to adjudicate it. This is a quirky
3 case. I get it. But I think the burden does rest squarely
4 on your client to explain why litigating it here is so
5 inconvenient, and I don't say that to suggest you haven't
6 made a compelling argument because, you know, obviously,
7 there is a way to look at this that the obvious place for
8 this to be litigated is in China which I'm sure they would
9 have been happy to do if they could, but they can't, and I
10 haven't heard any real persuasive argument to the contrary
11 that, well, sure they could. They just don't want to. It
12 sounds like they are between a rock and a hard place. And
13 the question is is what do you do with that. Is it
14 basically just tough luck? You did your -- your country's
15 legal system has let you down. That doesn't mean you come
16 and burden the U.S. legal system.

17 The main difference though which I think is the
18 problem you have in this defense is the Kwok case which I
19 keep bringing up. It came to New York. There are
20 allegations in the complaint about that the final act,
21 whether we call it the central act or the final act was
22 allegedly siphoning money that they say belongs to them out
23 of the companies and into his personal possession, and I
24 think that is -- seems to me what partially motivated the
25 First Department to reverse the dismissal in this case, and

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1 I -- it's -- you know, that same fact we have here is, you
2 know, can you really sit here in New York as a defendant
3 where I'm going to assume are not really amenable to suit in
4 China, and say well, China is where it should be. You can't
5 sue me here even though I'm here and the money is here.
6 That's a pretty tough one.

7 I'm very cognizant of the logistical difficulties
8 of litigating this case, but that's -- I have to kind of get
9 over this hurdle of, you know, the burden of showing
10 inconvenient forum is squarely on defendant, and that's --
11 it's tough here.

12 MS. WHITE: All -- these are their allegations. We
13 obviously disagree and deny them. I mean, Mr. Han moved
14 here. He's a very wealthy individual. He transferred money
15 here. We, you know, deny that he stole the plaintiff's
16 money and that was the money that was being moved here.

17 If you read the complaint, everything happened in
18 China. There is no -- we disagree there is any nexus with
19 New York.

20 THE COURT: So is it your understanding that these
21 companies that are not named here are still in possession of
22 plaintiff's investments in China?

23 MS. WHITE: That's not my representation. My
24 representation is standing here today, I don't know. If you
25 look at their complaint, they allege that over a billion

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1 dollars was misappropriated, and they allege a small
2 fraction of that is now present in New York. So I think
3 looking at this, it's a big who knows where it is. I don't.
4 And to say it's going to be a simple case, it's not going to
5 be simple because there will not be a clear path, and we are
6 going to have to get bank records from China if we can. And
7 if we can't, I don't know how they can present their claims.
8 I don't know how we will defend the claims, and that will be
9 a huge burden.

10 THE COURT: Okay. I'm going to take a short break.
11 I'll be back.

12 (Whereupon, at this time there was a pause in the
13 proceedings.)

14 THE COURT: Thank you everyone for the arguments
15 which were really very good, and my intrepid law clerk and I
16 have tossed and turned a bit over the last however long.
17 And actually, I brought out two versions of a decision, but
18 I'm going to deny the motion to dismiss and deny the motion
19 to compel arbitration.

20 With respect -- I'm going to get into the details
21 of it in a minute, but with respect to the forum non
22 conveniens -- it's probably not correct to say -- I'm not
23 denying it without prejudice, but I am basing the decision
24 on my current assessment of the inconvenience of litigating
25 this case here which I don't think has been established at a

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1 level that would warrant taking the step of dismissing the
2 case. Some of that is based on conjecture. Not to suggest
3 that either side is not being candid, but we don't really
4 know how this is going to work out.

5 I at least leave open the possibility that if the
6 various projections about how simple this will be don't bear
7 out, and it becomes apparent later on that litigating this
8 case here is exorbitantly expensive, I would at least
9 potentially think about this again, but I don't say that to
10 give a whole lot of hope to the defendants because I think
11 that the basic fact pattern is, you know, what it is. I
12 think it is a close question, but on balance, I think the
13 motion has to be denied.

14 Starting with the forum non conveniens which is
15 codified at CPLR Section 327 but also has a long common-law
16 tradition, that doctrine authorizes a Court to dismiss an
17 action where it is determined that the action although
18 jurisdictionally sound would be better adjudicated
19 elsewhere. Court must consider several factors including
20 the residence of the parties, the situs of the underlying
21 transaction, the location of potential witnesses and
22 relevant documents, the burden on New York courts, the
23 potential hardship to the defendant and the existence of an
24 adequate alternative forum. None of the -- those factors
25 are dispositive, and this is a flexible doctrine that is

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1 based on the facts and circumstances of each case.

2 So going through those factors, the residence of
3 the parties, it is true all 95 plaintiffs reside in China,
4 and the defendant resides in New York, maintains bank
5 accounts in New York and has availed himself of the New York
6 courts in other cases.

7 While the underlying investment agreements were
8 negotiated and entered into in China, at least a portion of
9 the fraud that is alleged in this case which I would note is
10 not based on the contract allegedly occurred in New York
11 when Mr. Han allegedly misled plaintiffs in various meetings
12 and I think telephonic meetings that he conducted from
13 New York in which he purportedly concealed criminal
14 investigations while telling plaintiffs that they would be
15 receiving their investments back via a series of refund
16 plans that never materialized. And most importantly, all
17 while continuing allegedly to transfer the investors' money
18 out of China into New York. So there is a nexus to New York
19 that has been alleged.

20 Plaintiff alleges that Mr. Han funneled tens of
21 millions, if not more than a billion of proceeds of his
22 fraud from China to New York bank accounts. I think that it
23 is very difficult to distinguish the case that I've
24 mentioned several times today, the Pacific Alliance Asia
25 Opportunity Fund case versus Kwok, K-W-O-K, Ho, H-O, Wan,

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1 W-A-N, 160 AD 452, First Department, 2018 which was based on
2 a Chinese real estate development property -- project --
3 sorry -- negotiated and executed in Hong Kong where very
4 similarly the defendants fled to New York and there was no
5 adequate alternative forum to bring him to bring a claim
6 against him.

7 So I think the -- so in terms of the factors here,
8 the location -- the residence of the parties, although, you
9 know, the plaintiffs who are willing to come to New York --
10 I take their representation seriously that they will do
11 that. Mr. Han who has the burden of showing the hardship
12 has no hardship of coming to court here.

13 So while most of the parties reside outside China,
14 the inconvenience is largely to them coming to New York to
15 prosecute their case, and if they choose not to participate
16 in the case, then that may go to the merits of their case
17 and their ability to prove it.

18 The site of the underlying transactions is somewhat
19 mixed. It is largely based in China. It's where the
20 original contracts took place, but based on the allegations,
21 the transaction that triggers the conversion claims and at
22 least part of the aiding and abetting claims took place in
23 New York from New York to New York initiated by Mr. Han in
24 New York with the funds flowing to New York. So I think
25 that is sufficient to create the same kind of nexus that was

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1 involved in the Pacific Alliance case.

2 The location of potential witnesses and relevant
3 documents, I think that does cut against the conveniens of
4 New York in that all of the plaintiffs -- many of the
5 documents are going to be likely in China. That is not an
6 unsolvable problem. And while it could create logistical
7 problems down the road, I think this is just a factor
8 cutting the other way.

9 The potential hardship to the defendant, again, the
10 traditional hardship of having to litigate long distance
11 from home is not apparent here. I do credit though the
12 argument made by counsel that having to litigate this case
13 here will impose additional costs potentially on all parties
14 but including the defendant in terms of having to deal with
15 a Court that will require everything that's put in front of
16 it to be translated. All Court hearings will have to have
17 translators.

18 We're going to have to have Chinese legal experts,
19 so that will require, again, in terms of the hardship to the
20 defendant, the retention of another law firm, so I think
21 that is a mixed factor.

22 The burden on New York courts, yes, we'll have to
23 deal with Chinese law. On the other hand, the appellate
24 courts and this Court have pointed out many times that, you
25 know, that is not beyond our capability. So while it is not

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1 easy, and it's not as simple as if this were all in New York
2 causes of action, it's not by itself enough to cause me to
3 dismiss the case.

4 And finally, the existence of an adequate
5 alternative forum. You know, depending -- the defendant
6 obviously is a little bit noncommittal for reasons I
7 understand, but I think based on the record I have in front
8 of me, I have to make the assumption that based on the
9 Chinese law expert affidavit I have received and the
10 allegations as to the -- it being, you know, probably not a
11 terribly good idea for Mr. Han to voluntarily go back to
12 China at this particular point in time to face either
13 litigation or arbitration, and plaintiff has submitted some
14 evidence that civil actions against Mr. Han have been
15 dismissed in China on this ground that Chinese civil courts
16 will not proceed with a civil claim while a criminal action
17 is pending. I've seen no reason to doubt that.

18 While that is -- in some cases has been shown to be
19 not a determinative factor, I think as a practical matter,
20 it is a very important one for us in deciding these kind of
21 cases which is why you see many times when there is an
22 adequate alternative forum, the dismissal is conditioned on
23 various ways of insuring that that adequate alternative
24 forum will in fact work.

25 There have been conditional dismissals requiring

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1 the defendant to waive statute of limitation defenses,
2 sometimes agreeing to accept service, all sorts of things so
3 we can be sure we're not casting a plaintiff out into the
4 wilderness with the promise of an alternative forum that
5 doesn't really exist.

6 And while the defendant does say the case belongs
7 in China, that unfortunately rings somewhat hollow based on
8 what I'm seeing. That's not a practical solution.

9 There is certainly an argument here as I've said
10 before that the plaintiffs are residents of China. They
11 entered into this relationship under Chinese law, and you
12 know, one could argue that whatever harsh consequences there
13 are of Chinese law and procedure, that that's really not
14 either this Court's or the defendant's problem, but I think
15 as I read the law given that there is a nexus to New York
16 which is critical here, I can't conclude that maintaining
17 this action would be so inconvenient to the defendant or the
18 Court that dismissal would be appropriate.

19 So in conclusion, none of the factors and arguments
20 presented by the defendant present a balance of factors
21 which so strongly favor defendant that they warrant
22 disturbing plaintiff's choice of a forum in New York.
23 That's a quote from the Amlon case, 292 AD2d 163, First
24 Department, 2002.

25 That case involved an alleged conversion and other

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1 torts committed in China which has some vague similarities
2 to what's happening here. So the motion to dismiss on forum
3 non conveniens grounds is denied.

4 With respect to the arbitration argument which is
5 of at least some interest and creates or involves some
6 different questions, but it has one that is a complete
7 overlap which is that the evidence that has been provided by
8 the Chinese law expert is -- suggests that an arbitration
9 wouldn't work, that under current circumstances, it would
10 not be permitted to proceed. But I think going past that
11 practical point, this case is not brought under the
12 contract. If we were applying U.S. law, that wouldn't
13 necessarily preclude a finding that Mr. Han could be forced
14 to arbitrate tort claims.

15 First of all, the arbitration provisions are broad
16 and could extend potentially to those kind of claims, but
17 the threshold question here is whether there is a -- Mr. Han
18 has the ability to invoke the arbitration provisions from a
19 contract in which he is not a signatory.

20 Again, under New York law, there would be arguments
21 if this were for this Court to decide that a corporate
22 officer can invoke defensively an arbitration provision when
23 the only reason he's being sued is for things he undertook
24 in his role as a corporate officer. That's the Hirschfeld
25 case out of the Court of Appeals.

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1 Now, here, he's not being sued solely for things he
2 did as a corporate officer. The activities that he
3 undertook in New York are in his individual capacity. At
4 least, that's the allegation. The -- and beyond that, I
5 have an affidavit submitted by a Chinese law expert saying
6 definitively that China has a more restrictive view over
7 when a non-signatory such as Mr. Han can invoke these
8 agreements, and that hasn't been, at least to my
9 satisfaction, rebutted by any Chinese law expertise coming
10 from the other side, and so I really don't have a basis to
11 second question that.

12 Again, I will -- as this case moves on, I won't
13 promise not to revisit this question. If additional
14 information comes my way, that suggestion is that
15 arbitration really is where this should go which is
16 something that we do take seriously in the U.S., but based
17 on the record in front of me now, I don't think I can
18 conclude either that he is subject or can invoke the
19 arbitration provision under Chinese law or that it is
20 something that should be delegated to the Chinese
21 arbitrators to decide based on the legal expert opinion that
22 I received. I'm persuaded that the claims that are made
23 here seem unlikely to be subject to arbitration.

24 We didn't really talk much about it today, but
25 there is also a reference to the failure to include

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1 necessary parties, the failure to join Mr. Han's entities.
2 I don't find that persuasive. Whether a party is necessary
3 is a procedural question as governed by the law of the forum
4 New York.

5 Plaintiff's claims here concern Mr. Han's alleged
6 conversion of plaintiff's investment funds and Han's
7 fraudulent misrepresentations to plaintiffs concerning the
8 status of those funds.

9 Based on what I'm aware of now anyway, the entities
10 need not be joined in order to establish Han's liability for
11 these claims, and you know, whether Mr. Han is going to try
12 to assert claims or get evidence from those entities that he
13 previously controlled is something we will see down the
14 road, but I don't think that defendants have established
15 that they are necessary parties for purposes of the claim --
16 the case that plaintiff has brought.

17 So in sum, while a very interesting motion it was,
18 it must be denied.

19 So I take it there hasn't been an answer to the
20 complaint yet.

21 MR. KUSHNER: No.

22 THE COURT: So I will order that there be an answer
23 to the complaint within 21 days. I'll schedule a
24 preliminary conference for shortly thereafter. I'll put all
25 this in a written order which will basically reference back

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1 to the transcript.

2 I will ask you to contact after we are done here
3 today the court reporter to get her contact information to
4 order the transcript and then upload it to NYSCEF when you
5 get it. And you know, I will be looking to the parties to
6 not make this the procedural and logistical train wreck that
7 I fear it could become, and I will be alert for both the
8 good and the bad, people trying to solve problems and people
9 trying to not solve problems.

10 I have a fair amount of experience in these kinds
11 of cases. I don't think anyone would try to bamboozle me,
12 but I'm not easily bamboozled on discovery and translation
13 issues.

14 I am counting on folks to cooperate. My law clerk
15 and I will be on top of you quickly if we find that any side
16 is not. You know, you have a lot of logistical challenges,
17 and I'm quite relieved by Mr. Kushner's repeated assurances
18 of the simplicity of litigating this case which I intend to
19 remind him of every time I see him.

20 All right. Thank you all very much. See you next
21 time.

22 CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPT OF THE
23 ORIGINAL MINUTES TAKEN OF THIS PROCEEDING.

24

25

Karen Mangano

KAREN MANGANO, CSR
Senior Court Reporter

KM