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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

WIMBLEDON FINANCING MASTER FUND, LTD., Plaintiff and Appellant, v. DAVID MOLNER et al., Defendants and Respondents.	B276434 (Los Angeles County Super. Ct. No. BC466001)

APPEAL from an order of the Superior Court of Los Angeles County. Stephanie Bowick, Judge. Affirmed.

Caldwell Leslie & Proctor; Boies Schiller Flexner, David K. Willingham, Alison Mackenzie; Kaplan Rice, Howard J. Kaplan and Michelle A. Rice, for Plaintiff and Appellant.

David Molner, in pro. per., for Defendant and Respondent.

Plaintiff Wimbledon Financing Master Fund, Ltd. (Wimbledon) appeals from an order staying this action under Code of Civil Procedure section 410.30, subdivision (a).[1] Wimbledon is a Cayman Islands entity, and its lawsuit alleges that the defendants engaged in fraud in soliciting investment in, and operating, another Cayman Islands entity, the Aramid Entertainment Fund Limited (AEF). The trial court found that the Cayman Islands is a more convenient forum for Wimbledon's claims, and therefore stayed the case to permit a lawsuit to be filed there.

Wimbledon contends that the trial court applied the wrong legal standard and abused its discretion in finding that the Cayman Islands is a more convenient forum for this action. We conclude that the trial court applied the correct standard and appropriately exercised its discretion. We therefore affirm.

BACKGROUND

1. *Wimbledon's Allegations*

Wimbledon filed its Third Amended Complaint (Complaint) on September 30, 2015. In that Complaint, Wimbledon alleges that it "is a company organized under the laws of the Cayman Islands, with its principal place of business in the Cayman Islands." The Complaint names as defendants David Molner, AEF, Screen Capital International Corp. (SCI), and Aramid Capital Partners LLP (ACP).[2]

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[1] Subsequent undesignated statutory references are to the Code of Civil Procedure.

[2] Molner, SCI and ACP are the respondents in this appeal. We refer to them collectively as Respondents. AEF filed for

The Complaint alleges that SCI is incorporated in Delaware and has its principal place of business in Los Angeles, and that Molner is "a citizen of the State of California." ACP is a United Kingdom partnership. AEF is "organized under the laws of the Cayman Islands, with its principal place of business in the Cayman Islands."

AEF has corporate offices in the Cayman Islands and the United Kingdom. Molner is the sole owner of SCI, which, along with two other entities, owns ACP. ACP holds all of the voting shares of AEF.

According to the Complaint, Molner fraudulently induced Wimbledon to invest in AEF by misstating AEF's business purpose, its ability to carry out its business, and its financial condition. Molner's misrepresentations were included in an offering memorandum dated November 16, 2006 (Offering Memorandum). AEF's stated business purpose was to provide short to medium-term loans "to producers and distributors of film, television and other media, secured by a variety of the borrowers' assets." Wimbledon alleges that, contrary to those stated purposes, Molner "sought Wimbledon's money for the purpose of self-dealing, engaging in insider transactions, and lending to insiders or their entities at below-market terms while paying themselves or their entities enormous and unjustified fees for 'finding' and 'negotiating' those transactions."

The Complaint describes various alleged self-dealing

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bankruptcy. Wimbledon claims that it reached a settlement with AEF as part of the bankruptcy proceedings and that AEF is therefore no longer a defendant.

transactions that were made "outside of the parameters set forth in AEF's Offering Memorandum." The Complaint also alleges that Molner "caused AEF" to take various actions that masked these insider transactions. Those actions included withholding various loans from independent evaluation, but including them in the "net asset value" of AEF's portfolio. Wimbledon alleges that the defendants "stifled and prevented" attempts by its auditor, Ernst & Young, to complete any audits after 2008.

In March, 2010, Wimbledon and other shareholders expressed concerns to AEF's directors about a number of transactions. In response, the directors agreed to appoint an independent director. However, Molner "and the directors" refused to cooperate with the new director's review.

Wimbledon claims that it made multiple requests to AEF to redeem its shares in 2008. AEF made some distributions, but Molner allegedly withheld $1.6 million of distributions from Wimbledon to "punish Wimbledon for attempting to protect its rights and uncover his malfeasance." Wimbledon alleges that this conduct violated Molner's fiduciary duties and AEF's agreements with Wimbledon.

2. *Procedural History*

Wimbledon filed its initial complaint in this action on July 22, 2011. Defendants removed the action to federal court on September 16, 2011, apparently on the ground that Wimbledon's claims were subject to a federal arbitration convention and therefore raised a federal issue.

While in federal court, AEF filed a motion to dismiss on the ground of forum non conveniens, in which Respondents joined. The district court apparently never decided that motion, instead denying the defendants' motion to compel arbitration and

ordering the case remanded to state court. The court ordered a stay to permit an appeal, which the Ninth Circuit decided against the defendants on June 12, 2014. (*Wimbledon Fin. Master Fund, Ltd. v. Molner* (9th Cir. 2014) 578 Fed.Appx. 691, 2014 U.S.App. Lexis 10961.) Following the appeal, the district court ordered the case remanded to state court on November 12, 2014.

Following remand, proceedings were delayed while the parties determined whether a coplaintiff originally named in the complaint, Stillwater Market Neutral Fund III SPC (Stillwater), would proceed with its claims. The case was subject to a discovery stay until December 17, 2015. At a conference on that date, the trial court dismissed Stillwater, lifted the discovery stay, and ordered Respondents to file an answer to Wimbledon's Complaint by January 19, 2016. Respondents filed an amended answer to Wimbledon's Complaint on February 3, 2016, and filed their forum non conveniens motion three months later on May 3, 2016.

In June, 2012, while this case was pending in federal court, Wimbledon began court proceedings in the Cayman Islands to compel the transfer of its shares in AEF from the legal custodian back to Wimbledon. That dispute was resolved pursuant to a "Deed of Acknowledgment and Waiver" (Deed). The Deed bears signatures on behalf of AEF, ACP, and Wimbledon.[3] The Deed contains a release that, by its terms, "waives and forever discharges [AEF], its directors, ACP and any other person or entity who or which has provided services of any kind whatsoever

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[3] Wimbledon apparently contends that this Deed was fraudulently executed on behalf of Wimbledon.

to [AEF] from any direct, indirect, or derivative obligation, liability, action, claim and/or demand under or in respect of the Articles of Association of [AEF] and/or any offering memorandum issued for, by and/or on behalf of [AEF] or with respect to the business of [AEF] . . . ." The Deed states that it "shall be governed by the laws of the Cayman Islands."

3. *Respondents' Forum Non Conveniens Motion*

In their forum non conveniens motion, Respondents argued that most of the relevant evidence is located in the Cayman Islands, including several AEF directors, AEF's auditors (Ernst & Young), and AEF's legal counsel that prepared the allegedly fraudulent Offering Memorandum. Respondents also argued that the Cayman Islands has the greater public interest in the dispute, including an interest in the scope of the Release in the Deed and in the application of Cayman Islands law under a choice of law provision in a shareholder agreement. Respondents supported their motion with several declarations, including from an AEF director and from Molner. In his declaration, Molner testified that he had been a resident of New York since 2008, and that SCI does not maintain any offices in California.

Prior to filing an opposition to Respondents' motion, Wimbledon applied ex parte for a continuance to obtain more time to prepare a response. In opposition, Respondents argued that no additional time was necessary as their motion largely tracked arguments made in the forum non conveniens motion in federal court, to which Wimbledon had filed a response. The trial court denied Wimbledon's continuance request.

Wimbledon filed its opposition papers on May 12, 2016. Wimbledon argued that Respondent's motion was untimely; that Respondents' alleged wrongdoing occurred in California; and that

the court should defer to Wimbledon's choice of forum. Wimbledon did not submit any evidence concerning the location of witnesses or documents, but argued that the court should be skeptical of Respondents' evidence in light of the lack of discovery, and should credit Wimbledon's allegations in the Complaint concerning the location of the wrongdoing.

The trial court heard the motion on June 22, 2016. The trial court issued a detailed tentative decision that it adopted as its final order after the hearing. The court granted Respondents' motion, finding that: (1) the motion was timely and the delay before filing the motion did not cause Wimbledon prejudice; (2) the Cayman Islands is a suitable alternative forum; and (3) the private and public interest factors both favor the Cayman Islands as a forum for the action. The court ordered the action stayed "pending legal proceedings moving to the Cayman Islands . . . ."

Following the trial court's ruling, Wimbledon filed an action against Respondents in New York. That action is apparently still pending.

DISCUSSION

1. *The Legal Standard Governing Forum Non Conveniens Motions*

Under section 410.30, subdivision (a), when a court "upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just." Ruling on a motion under this section requires a two step process.

In the first step, the court must decide whether there is a suitable alternative forum. (*Stangvik v. Shiley, Inc.* (1991)

54 Cal.3d 744, 751 (*Stangvik*).) An alternative forum is suitable if it has jurisdiction over the dispute and an action brought in that forum will not be barred by the statute of limitations. (*Guimei v. General Electric Co.* (2009) 172 Cal.App.4th 689, 696 (*Guimei*).) The relevant issue is whether the action may be adjudicated in the alternative forum, not whether the law in that forum is as favorable or whether recovery will be more difficult. (*Ibid.*)

In the second step, a court considers "the private interests of the litigants and the interests of the public in retaining the action for trial in California." (*Stangvik, supra,* 54 Cal.3d at p. 751.) The private interest factors are "those that make trial and the enforceability of the ensuing judgment expeditious and relatively inexpensive, such as the ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the availability of compulsory process for attendance of unwilling witnesses." (*Ibid.*) The public interest factors include "avoidance of overburdening local courts with congested calendars, protecting the interests of potential jurors so that they are not called upon to decide cases in which the local community has little concern, and weighing the competing interests of California and the alternative jurisdiction in the litigation." (*Ibid.*) The defendant, as the moving party, bears the burden of proof. (*National Football League v. Fireman's Fund Ins. Co.* (2013) 216 Cal.App.4th 902, 918 (*NFL*).)

We review the trial court's ruling on the second part of this analysis–the balancing of the various interest factors–for abuse of discretion. (*NFL, supra,* 216 Cal.App.4th at p. 918.) We give "substantial deference" to the trial court's decision. (*Ibid.*) We will interfere with the court's discretion only if we find that,

" ' "under all the evidence, viewed most favorably in support of the trial court's action, no judge could have reasonably reached the challenged result." ' " (*Ibid.,* quoting *Guimei, supra,* 172 Cal.App.4th at p. 696.)[4]

2. *The Trial Court Applied the Correct Legal Standard*

A trial court abuses its discretion if it applies the wrong legal standard to a discretionary decision. (*Fox Factory, Inc. v. Superior Court* (2017) 11 Cal.App.5th 197, 207 (*Fox Factory*).) Wimbledon argues that the trial court applied the wrong legal standard in two respects. First, citing *Stangvik,* it claims that the trial court "failed to apply the presumption of convenience arising from defendants' residence in California." (See *Stangvik, supra,* 54 Cal.3d at p. 760 ["a presumption of convenience to defendants arises from the fact that Shiley is incorporated in California and has its principal place of business here"].) Second, it contends that the trial court failed to "require that defendants establish that California is a 'seriously inconvenient' forum." Neither argument is persuasive.

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[4] There is some uncertainty whether the de novo standard or the substantial evidence standard of review applies to a trial court's ruling concerning the first step of the analysis (i.e., the availability of a suitable alternative forum.) (See *NFL, supra,* 216 Cal.App.4th at p. 918.) We need not consider that issue because, as discussed below, Wimbledon did not argue below that the Cayman Islands is an unsuitable forum, and we would uphold the trial court's findings on that issue under either standard of review.

a. *The "presumption of convenience"*

i. *Wimbledon's request for judicial notice*

Wimbledon filed a Request for Judicial Notice dated February 15, 2017, asking this court to take judicial notice of a number of pleadings filed in bankruptcy proceedings and other litigation. Wimbledon cites several of those pleadings which it claims show that Molner and SCI listed a California address after 2008. Wimbledon argues that those pleadings are inconsistent with Molner's testimony that he has resided in New York since 2008 and that SCI currently has no office in California.

We decline to consider those pleadings, which Wimbledon could have, but did not, present to the trial court. (See *Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 325 ["a reviewing court will ordinarily look only to the record made in the trial court"].) Moreover, although we make take notice of pleadings filed in a judicial proceeding, we may not simply accept the truth of factual representations in such pleadings. (*Wolf v. CDS Devco* (2010) 185 Cal.App.4th 903, 915.) Wimbledon cites the pleadings from other litigation in support of a factual contention concerning the current residence and business activities of Molner and SCI. We cannot resolve this factual dispute in the first instance, much less reverse the trial court's factual findings based upon evidence that was never presented to that court.

It would be particularly inappropriate to make any factual inferences here, as Wimbledon itself argued in the action it filed in New York that "Molner has been a resident of New York since 2008, and has at all times owned and controlled SCI and Aramid Capital. He has directed their activities, which, upon information and belief, necessarily occurred in New York." In its

brief on this appeal Wimbledon similarly asserts that "Molner resides in New York and controls both SCI and ACP."

We therefore deny Wimbledon's February 15, 2017 Request for Judicial Notice, with the exception of exhibits 1 and 2 to that Request, which are complaints filed in New York after Wimbledon filed its opposition in the trial court, and exhibit 9, which is the docket from this action when it was pending in federal court.

ii. *The record does not support applying a presumption of convenience here*

Wimbledon did not argue below that the trial court should apply a "presumption of convenience" based upon the defendants' residence. Indeed, it did not even attempt to establish the facts on which such an argument could be based.

Wimbledon did not dispute Respondent's evidence presented to the trial court that Molner was a resident of New York at the time of the motion and that SCI no longer had an office in California. Molner's declaration stated that he had been a resident of New York since 2008, and that SCI does not maintain any offices in California. Wimbledon did not dispute these facts. To the contrary: Wimbledon relied on Molner's declaration for its own claim that New York was a more convenient forum than the Cayman Islands. Wimbledon told the trial court that it "would not object to litigating in Mr. Molner's home state, which is also presumably the current home state of SCI," and arguing that "New York is likely an even more suitable alternative forum given Mr. Molner's claim that it is his (and presumably SCI's) current residence." Wimbledon also submitted a previous declaration that Molner had prepared in connection with the forum non conveniens motion in federal court, in which

Molner testified that "[a]s of approximately Fall 2008, my primary residence is in New York, New York." Molner stated in that declaration that he spent "approximately two weeks a month in New York, and the rest is typically split between Los Angeles and London."

"[I]t is fundamental that a reviewing court will ordinarily not consider claims made for the first time on appeal which could have been but were not presented to the trial court." (*Asbestos Claims Facility v. Berry & Berry* (1990) 219 Cal.App.3d 9, 26 (*Asbestos Claims*).) This ordinary rule of forfeiture takes on added significance when a new argument on appeal is inconsistent with a position taken in the trial court. (*In re M.H.* (2016) 1 Cal.App.5th 699, 711-712.)

Thus, Wimbledon has forfeited any argument that a presumption of convenience arises from the current residence of Molner and SCI. Wimbledon may not claim on appeal that the trial court erred in failing to apply a presumption that it never told the court it should apply, based on alleged facts contrary to those that Wimbledon accepted as true.

Wimbledon did argue below that SCI "was indisputably headquartered in Los Angeles in 2011" and claimed that the alleged wrongdoing was "planned and executed by Molner and his associates in California." But that contention concerned a different point. In *Stangvik,* our Supreme Court explained that a defendant's residence in the forum "has two aspects." (*Stangvik, supra,* 54 Cal.3d. at p. 756, fn. 10.) One aspect concerns public policy considerations, such as "California's interest in deciding actions against resident corporations whose conduct in this state causes injury to persons in other jurisdictions." (*Ibid.*) The second aspect "relates to the convenience of the parties." (*Ibid.*)

Wimbledon's argument that Respondents engaged in wrongdoing in California concerned the public policy point, for which their residence at the time of the alleged wrongdoing was relevant. However, *current* location is what matters for the issue of convenience to the parties. A forum is not presumptively convenient for trial simply because a party previously lived there.

We also reject Wimbledon's argument on the merits. The evidence in the trial court was uncontroverted that Molner has resided primarily in New York since 2008 and that SCI has no office in California.

Wimbledon argues that, despite the uncontroverted evidence, the trial court was obligated to accept the allegation in its Complaint that California is where Molner resides and is SCI's principal place of doing business. The authority that Wimbledon cites does not support this claim.

Wimbledon cites *Snyder v. Evangelical Orthodox Church* (1989) 216 Cal.App.3d 297, but that case did not concern a forum non conveniens motion. Rather, it involved a motion to dismiss for lack of subject matter jurisdiction on the ground that the claims concerned an nonjusticiable ecclesiastical dispute. The court stated the general rule that, "for the purposes of a motion to dismiss, a court must assume the allegations made in the complaint to be true." (*Id*. at p. 306.) The case is not apposite; the issue of whether claims as alleged may properly be adjudicated under the United States and California Constitutions is far different from the question of whether a different forum would be more convenient to adjudicate a plaintiff's claims.

Wimbledon also cites several federal cases that accept facts as alleged in the plaintiff's complaint as true for the purpose of reviewing forum non conveniens dismissals. (*Carijano v.*

Occidental Petroleum Corp. (9th Cir. 2011) 643 F.3d 1216, 1222; *Vivendi SA v. T-Mobile USA Inc.* (9th Cir. 2009) 586 F.3d 689, 691, fn. 3.) However, those cases also recognize the trial court's responsibility to weigh the *evidence* bearing upon the balance of convenience. (See *Carijano,* at p. 1231 [district court should have considered "countervailing evidence in the form of five declarations" from witnesses concerning their willingness to testify in Los Angeles]; *Vivendi,* at p. 696 ["The decision as to whether a forum is 'convenient' for litigation and, perhaps, trial is fundamentally a factual determination by the district court"]. At most, those cases suggest that a court may accept the allegations in a plaintiff's complaint for the purpose of understanding the nature of the case. The cases do not hold that a trial court is obligated to accept allegations rather than evidence concerning convenience factors. And they certainly do not suggest that a court must accept a plaintiff's *allegations* concerning a defendant's residence rather than the defendant's own testimony about where he or she currently lives.

A forum non conveniens motion is not a demurrer or motion for judgment on the pleadings, which seek dismissal on the ground that a plaintiff's complaint is insufficient. The nature of such a motion requires that the court accept the plaintiff's claims as true for purposes of the motion. (See *Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1034.) In contrast, a forum non conveniens motion simply seeks a ruling that the plaintiff's claims should be brought in another forum.

In that sense, a forum non conveniens motion is more similar to a motion to quash for lack of personal jurisdiction than to a demurrer. Such a jurisdictional motion is decided upon evidence rather than allegations. (*ViaView, Inc. v. Retzlaff* (2016)

1 Cal.App.5th 198, 209-210, 216-217.)

Evidentiary submissions are clearly appropriate for a forum non conveniens motion and, on some issues, may be necessary, as the pleadings will not address all the relevant factors (such as the location of witnesses and documents). (See *Price v. Atchison, T. & S. F. Ry. Co.* (1954) 42 Cal.2d 577, 579-580 (*Price*) [relevant facts for forum non conveniens motion determined from "pleadings and affidavits"]; *Piper Aircraft Co. v. Reyno* (1981) 454 U.S. 235, 258-259 (*Piper*) [noting that the defendants provided information adequate for the district court to balance the parties' interests in the form of affidavits "describing the evidentiary problems they would face if the trial were held in the United States"].) A rule that the trial court must accept allegations in a pleading over contrary evidence would be inconsistent with the "substantial deference" given to the trial court in deciding a forum non conveniens motion. (*Stangvik, supra,* 54 Cal.3d at p. 751.)

As the court explained in *NFL*, any proof requirement beyond "establishing a suitable alternate forum and providing the trial court with sufficient facts to carry out its weighing and balancing analysis . . . would appear to conflict with the clear mandate that the analysis [of a forum non conveniens motion] is entrusted to the trial court's discretion." (*NFL, supra,* 216 Cal.App.4th. at pp. 933-934, fn. 15.) The same reasoning applies to a rule that would require trial courts to accept allegations in pleadings rather than contrary evidence. Such a rule would also encourage decisions that are based on mere assertions rather than substantiated facts. We therefore decline to apply such a rule here.

b. *Whether California is a "seriously*

inconvenient forum"

Wimbledon argues that the trial court should not have granted Respondent's motion absent a showing that California is a " 'seriously inconvenient' forum" for trial. In support, Wimbledon cites a Judicial Council comment to section 410.30 and several cases that use that language.

We conclude that standard is not applicable here. As several recent decisions have explained, the "seriously inconvenient" language reflects the substantial deference given to California residents who choose to sue in their home state. Such deference is not warranted where, as here, the trial court stays a case brought by a foreign plaintiff.

The Legislature codified the forum non conveniens doctrine by enacting section 410.30 in 1969. (See Stats. 1969, ch. 1610, § 3, p. 3363.) In a 1969 commentary on that section, the Judicial Council stated that, "[u]nder the doctrine of inconvenient forum, a court, even though it has jurisdiction, will not entertain the suit if it believes that the forum of filing is a *seriously inconvenient* forum for the trial of the action." (See Judicial Council of Cal., com., reprinted at 14A West's Ann. Code Civ. Proc. (2004 ed.) foll. § 410.30, p. 486 (Comment), italics added.)

In *NFL,* the court concluded that this Comment "was intended to describe the quantum of evidence needed to justify a dismissal in the face of the strong presumption favoring a resident plaintiff's choice to sue in its home state court system." (*NFL, supra,* 216 Cal.App.4th at p. 932.) The conclusion is supported by the text of the Comment.

As the court noted in *NFL,* the Comment cited the Restatement Second of Conflict of Laws for the proposition that one of the " 'two most important' " factors a court should consider

in deciding a forum non conveniens motion is " 'that since it is for the plaintiff to choose the place of suit, his choice of a forum should not be disturbed except for weighty reasons.' " (*NFL, supra,* 216 Cal.App.4th at p. 924, quoting Comment, *supra,* 14A West's Ann. Code Civ. Proc., foll. § 410.30, at p. 488.) The Comment also cited as "illustrative cases" several California decisions that the Comment characterized as holding that the inconvenient forum doctrine is "extremely limited where the plaintiff is a bona fide resident of the forum state," and that the "domicil of plaintiff in the state would ordinarily preclude granting a defendant's motion for dismissal." (Comment, at pp. 486-487, citing *Thomson v. Continental Ins. Co.* (1967) 66 Cal.2d 738, 742; *Goodwine v. Superior Court* (1965) 63 Cal.2d 481, 485.)[5]

Thus, the Comment does not support applying a "seriously inconvenient" standard where a *foreign* plaintiff chooses to file a lawsuit in California.

The cases that Wimbledon cites also do not support such a standard where, as here, the plaintiff is a citizen of another

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[5] The Comment also identified *Price,* as an illustrative case for a "nonresident plaintiff," and cited the portion of that opinion in which our Supreme Court held that California has no policy of "discrimination against . . . noncitizens of California." (Comment, *supra,* 14A West's Ann. Code Civ. Proc., foll. § 410.30, at p. 487, citing *Price, supra,* 42 Cal.2d at p. 583.) However, as discussed below, the court subsequently clarified in *Sangvik* that, where a plaintiff resides in a foreign country, "the plaintiff's choice of forum is much less reasonable and is not entitled to the same preference as a resident of the state where the action is filed." (*Sangvik, supra,* 54 Cal.3d at p. 755, citing *Piper*, *supra*, 454 U.S. at p. 256.)

country. *Ford Motor Co. v. Insurance Co. of North America* (1995) 35 Cal.App.4th 604 (*Ford*), is the only case Wimbledon cites that explains the basis for its use of the "seriously inconvenient" language.[6] That case involved claims against an

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[6] *Guimei*, *supra*, 172 Cal.App.4th 689, concerned an airplane crash in China. All of the plaintiffs were citizens of foreign countries and none of the defendants had any connection to California. In affirming the trial court's decision granting a forum non conveniens motion, the appellate court simply observed that the trial court "did not abuse its discretion in determining that California is a seriously inconvenient forum." (*Id.* at p. 702.) The court did not hold that "seriously inconvenient" was the appropriate standard; indeed, the court expressly held that the plaintiffs' decision to sue in California was "of little consequence," as the plaintiffs were nonresidents. (*Ibid.*) *Morris v. AGFA Corp.* (2006) 144 Cal.App.4th 1452 (*Morris*), and *In re Marriage of Taschen* (2005) 134 Cal.App.4th 681–which the court in *NFL* labeled "*Ford* progeny"– simply cited *Ford.* (*Morris,* at pp. 1464, 1466; *Taschen,* at p. 691.) As the court noted in *NFL,* each of those cases "involved plaintiffs with tenuous connections to California," and in each case the court therefore "had no trouble upholding the trial court's stay order without needing to closely examine the genesis or validity of *Ford's* articulation of the burden of proof." (*NFL, supra,* 216 Cal.App.4th at p. 932.) Wimbledon also cites *Martin v. Detroit Lions, Inc.* (1973) 32 Cal.App.3d 472, but that case involved a motion to dismiss on grounds of lack of personal jurisdiction, not a forum non conveniens motion. The court simply noted in dicta that, if the defendant's complaint was that the lawsuit will cause "serious inconvenience," the correct remedy would be a forum non conveniens motion that would permit the court to refuse to entertain the suit if "it finds the forum of filing to be a seriously inconvenient forum for the trial of the action." (*Id.* at p. 476.)

insurance company concerning liability for environmental remediation of properties located in California. The plaintiff corporation, Ford, was not a California resident, but it had a history of substantial operations in this state. The trial court dismissed the action on the ground that Michigan was a more appropriate forum.

In reversing, the appellate court concluded that its "analysis . . . must start from the premise that defendants bore the burden of producing sufficient evidence to overcome the strong presumption of appropriateness attending plaintiff's choice of forum. That is, the inquiry is not whether Michigan provides a *better* forum than does California, but whether California is a *seriously inconvenient* forum." (*Ford, supra,* 35 Cal.App.4th. at p. 611.) The court concluded that public factors favored California as a forum, including the "state's substantial interest in regulating the conduct at issue," and that "party and witness convenience cannot be determined at this juncture." (*Id.* at p. 618.) In light of the deference given to the plaintiff's choice of forum and the "wealth of factors," favoring California, the court concluded that the trial court had abused its discretion in dismissing the action. (*Ibid.*)

Thus, the source of the "seriously inconvenient" language in *Ford* was the deference that the court concluded it should give to the plaintiff's choice of forum. Whether or not the court should have given such deference to Ford under the facts of that case, our Supreme Court's decision in *Stangvik* makes clear that where, as here, a plaintiff is from a foreign country, such

deference is not appropriate.[7]

In *Stangvik,* our Supreme Court addressed "the question of the appropriate standards to be applied in deciding whether a trial court should grant a motion based on the doctrine of forum non conveniens when the plaintiff, a resident of a foreign country, seeks to bring suit against a California corporation in the courts of this state." (*Stangvik, supra,* 54 Cal.3d at p. 749.) The plaintiffs in that case were Norwegian and Swedish families of two men who had died after receiving implants of heart valves that were designed and manufactured in California by a California corporation. The defendant filed a forum non conveniens motion arguing that the claims should be tried in Sweden and Norway. In addressing the weight that should be given to the plaintiff's choice of forum, the court cited *Piper* in explaining that, although "there is 'ordinarily a strong presumption in favor of the plaintiff's choice of forum' . . . a foreign plaintiff's choice deserves less deference than the choice of a resident." (*Id.* at p. 753, quoting *Piper, supra,* 454 U.S. at pp.

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[7] The courts in *NFL* and *Fox Factory* both rejected the analysis in *Ford* as inconsistent with our Supreme Court's explanation in *Stangvik* that the "basis of the inconvenient forum doctrine is the need to give preference to California residents and guard against the ' "unchecked and unregulated importation of transitory causes of action for trial in this state." ' " (*NFL, supra,* 216 Cal.App.4th at p. 926, quoting *Stangvik, supra,* 54 Cal.3d at p. 751; see also *Fox Factory, supra,* 11 Cal.App.5th at pp. 206-207.) We need not take a position on whether *Ford* was correctly decided because that case, unlike this one, involved a United States plaintiff that previously had extensive business operations in California.

249-250.) The court concluded that "the fact that plaintiffs chose to file their complaint in California is not a substantial factor in favor of retaining jurisdiction here." (*Stangvik, supra,* at p. 755.)

Unlike *Ford,* and like this case, *Fox Factory* involved a suit brought in California by a citizen of another country. The plaintiff was a citizen of Canada who was injured in a mountain biking accident in Canada. He sued various defendants in California, including a California company (Fox) that manufactured the racing shocks on the plaintiff's bicycle. The trial court denied Fox's forum non conveniens motion, applying the *Ford* "seriously inconvenient" standard. The Sixth District Court of Appeal granted Fox's petition for a writ of mandate, concluding that the trial court had applied the wrong legal standard. The appellate court held that applying the "seriously inconvenient" standard to the foreign plaintiff's lawsuit "would amount to according his forum preference 'great weight' " as in *Ford.* (*Fox Factory*, *supra*, 11 Cal.App.5th at p. 205.) The court concluded that applying that standard to a foreign plaintiff would contravene *Stangvik,* in which the court "clearly explained that the forum choice of a *foreign* plaintiff is not entitled to a presumption of convenience." (*Ibid.*)

We employ the same reasoning here. We reject Wimbledon's argument that the trial court erred in failing to apply the "seriously inconvenient" standard to this lawsuit brought by a foreign plaintiff.

3. *The Cayman Islands is a Suitable Alternative Forum*

Wimbledon argues on appeal that the Cayman Islands is not a suitable forum because the parties have "only very tenuous connections to the Cayman Islands." Wimbledon's argument is

forfeited, and in any event is based on a misinterpretation of the proof necessary to establish a suitable alternative forum.

Wimbledon did not argue in the trial court that the Cayman Islands is an unsuitable forum. Rather, Wimbledon asserted that, "[w]hile it may be true that the Cayman Islands is a suitable alternative forum, New York is likely an even more suitable alternative forum given Mr. Molner's claim that it is his (and presumably SCI's) current residence." In concluding that the Cayman Islands is a suitable alternative forum, the trial court noted that "Wimbledon does not contend otherwise in its opposition to this motion."

As discussed above, an argument that is not raised in the trial court is generally treated as forfeited on appeal. Wimbledon may not argue for the first time on appeal that the Cayman Islands is an unsuitable forum.

Wimbledon's argument also fails on the merits. As the trial court correctly ruled, a forum is suitable "if there is jurisdiction and no statute of limitations bar to the action." (*Morris, supra,* 144 Cal.App.4th at p. 1464; *Stangvik, supra,* 54 Cal.3d at p. 752.) The question is only whether the action can be brought in the other forum, not whether it can be won or even whether the law is as favorable. (*Morris,* at p. 1464*; Stangvik,* at p. 754 ["the fact that California law would likely provide plaintiffs with certain advantages of procedural or substantive law cannot be considered as a factor in plaintiffs' favor in the forum non conveniens balance"].)

Respondents consented to jurisdiction in the Cayman Islands and agreed not to raise any potential statute of limitations defenses to an action brought there. The Cayman Islands therefore constituted a suitable alternative forum.

Wimbledon argues that the Cayman Islands is not an appropriate forum in *this case* because the parties do not have sufficient connection to the forum. That argument does not concern the suitability of the Cayman Islands as a forum for the lawsuit, but instead concerns the balance of convenience factors involved in the forum non conveniens analysis. For the reasons discussed below, we conclude that the trial court acted within its discretion in balancing the private and public convenience factors.

4. *The Trial Court Acted Within Its Discretion in Weighing the Private and Public Interests in a California Forum*

The trial court concluded that both the private and public interest factors weighed in favor of the Cayman Islands. The conclusion was supported by the evidence and well within the court's discretion.

a. *Private interest factors*

Consistent with our Supreme Court's identification of the relevant private interest factors in *Stangvik,* the trial court's ruling addressed: (1) the ease of access to sources of proof; (2) the cost of obtaining attendance of witnesses; and (3) the availability of compulsory process for attendance of unwilling witnesses. The trial court concluded that each of these factors favored the Cayman Islands based on evidence that more witnesses and relevant documents are located in the Cayman Islands than in California. The evidence supports this conclusion.

According to the record evidence, the only witnesses with any current connection to California are Molner, who no longer resides in the state but regularly travels to California, and one of the five AEF directors, Thomas McGrath, who is a California

resident. There is no evidence that any relevant documents are in California.

In contrast to the minor amount of evidence in California, two AEF directors are located in the Cayman Islands. In addition, as the trial court noted, AEF's law firm involved in the initial offering of shares and AEF's auditors, Ernst & Young, are both in the Cayman Islands. Both appear to have relevant knowledge. As discussed above, Wimbledon alleges that Molner made fraudulent representations in the Offering Memorandum in connection with the initial share offering and that he interfered with Ernst & Young's audit of AEF.

Other relevant entities are also located in the Cayman Islands. Two Cayman Island companies were engaged as AEF's administrators, and AEF's "Registered Office," M&C Corporate Services Limited (M&C), is there. M&C maintained records concerning actions of the AEF directors and documents relating to investment decisions. Of course Wimbledon itself is a Cayman Islands company.[8]

Wimbledon asks this court to infer that, because AEF filed for bankruptcy in New York and its estate is currently under the control of liquidators in New York, "all of the relevant files and records are currently in New York." It is not our task to weigh the evidence. Rather, in reviewing for abuse of discretion, we

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[8] Without any citation to the record, Wimbledon claims on appeal that it is organized under Cayman law but it "never had any operations there." However, as mentioned, its Complaint alleges that it is "a company organized under the laws of the Cayman Islands, with its principal place of business in the Cayman Islands."

presume that the trial court "drew every reasonable inference necessary to support its determination." (*NFL, supra,* 216 Cal.App.4th at p. 918.) We therefore consider only whether the trial court made a reasonable inference from the evidence in concluding that pertinent documents are located in the Cayman Islands.

The trial court reasonably credited Respondents' claims about the location of relevant documents based upon evidence that they were previously located there, especially given the lack of evidence to the contrary. In any event, there was no evidence, and Wimbledon does not contend, that any of the pertinent AEF documents are in California. (See *Guimei, supra,* 172 Cal.App.4th at p. 702 [the fact that " 'some evidence concerning the aircraft's design and manufacture may be located elsewhere in the United States does not make [California] a convenient forum' "], quoting *Alma Torreblanca de Aguilar v. Boeing Co.* (E.D.Tex. 1992) 806 F.Supp. 139, 144.)

Wimbledon did not present any evidence below concerning the location of witnesses and documents, and conceded that "[t]his is information for the most part exclusively in the possession of [Respondents]." Wimbledon simply asked the trial court to be "skeptical" about Respondents' claims in light of the lack of discovery. In view of the absence of evidence to the contrary, the trial court acted within its discretion in concluding that the Cayman Islands is the location of significantly more relevant evidence than California.

Wimbledon also argues that Respondents' evidence was unreliable and "stale," as much of it dated back to 2011 when the first forum non conveniens motion was briefed in federal court. Again, this court may not substitute its judgment for the

judgment of the trial court in assessing the quantity and quality of the evidence. Respondents' task in filing its motion was to establish a suitable alternative forum and provide the trial court "with sufficient facts to carry out its weighing and balancing analysis." (*NFL, supra,* 216 Cal.App.4th at pp. 933-934, fn. 15.) Any additional evidentiary requirements would "conflict with the clear mandate that the analysis is entrusted to the trial court's discretion." (*Ibid.;* see also *Morris, supra,* 144 Cal.App.4th at p. 1462 [evidence "need only be sufficient to give the court the ability to soundly exercise its discretion regarding the applicability of the general considerations of the *Stangvik* . . . factors to the question of forum non conveniens"].) We therefore decline to impose any additional requirement concerning the age of the evidence that the trial court may consider.

Finally, Wimbledon argues that evidence on which Respondents relied below concerning the location of AEF witnesses and documents is no longer relevant as AEF is no longer a defendant. But whether or not AEF is a party, the record supports the conclusion that its witnesses and documents are relevant to Wimbledon's claims and Respondents' defenses.

Wimbledon's decision to invest in AEF and AEF's management decisions are key issues in the case. Wimbledon alleges that AEF directors acted "under Molner's direction" and that Molner "used his influence and authority" to cause AEF to make misrepresentations. Wimbledon's own summary of its claims in its opening brief on appeal highlights this point, asserting that "Molner controlled AEF through a majority of shares, or through his domination and control of ACP," and that "Defendants used their control over AEF to cause it to make

material misrepresentations and omissions to Wimbledon and other investors . . . ." One of Molner's defenses apparently will be that the AEF directors, not him, were responsible for AEF's investment decisions. Thus, AEF, its witnesses and documents remain central to the issues in the case.

The trial court also reasonably concluded that the cost of obtaining the attendance of witnesses and the availability of compulsory process favor the Cayman Islands. In light of the different locations of witnesses, the parties will need to obtain testimony from unwilling witnesses by means of deposition whether the action is to proceed in California or the Cayman Islands. Wimbledon acknowledges that the Cayman Islands courts have a procedure for obtaining depositions of witnesses located abroad. Given the international nature of the transactions, some international discovery will likely be necessary no matter where the action is pending. While requiring the action to proceed in the Cayman Islands will not eliminate the logistical challenges, the trial court reasonably concluded that the greater number of witnesses available in person in the Cayman Islands rather than California tip the balance in favor of the Cayman Islands.

We therefore conclude that the trial court properly decided that the private interest factors weigh in favor of the Cayman Islands.

b. ***Public interest factors***

The trial court did not place great weight on the burden this action would place on California courts, concluding only that "[t]his factor, though not determinative by itself, weighs in favor of the Cayman Islands, if it favors one forum at all." The trial court did not abuse its discretion in reaching this conclusion.

With respect to the burden on local jurors, the court concluded that "there does not appear to be any connection between this case and the local community" other than Molner's residency in the state "for a period of time." Wimbledon argues that this finding "ignore[s] the evidence" of California's interest in deterring wrongful conduct by its residents in the state. However, the record is clear that the trial court considered the evidence relating to where the alleged wrongful conduct occurred and drew reasonable inferences from that evidence concerning the interests of California and the Cayman Islands.

Wimbledon's Complaint contains a conclusory allegation that "[t]he majority of the acts, omissions, and injuries described in this lawsuit occurred in Los Angeles, California." But the complaint does not include specific allegations concerning any wrongful conduct within California, and Wimbledon did not provide evidence of particular conduct that occurred in California.[9] On the other hand, as the trial court correctly observed, the Cayman Islands was the location for specific alleged wrongful conduct, including "the preparation of the Offering Memorandum, the approval of insider transactions by AEF board members, the issuance of misleading financial statements, and the obstruction of Ernst & Young auditors."[10]

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[9] Wimbledon argues that a number of the investment transactions described in the Complaint related to California entities, but it does not point to any specific evidence, or even allegations, concerning where the alleged wrongful *conduct* concerning such investments occurred.

[10] The trial court made these observations in connection with considering the "[a]lleged location of tortious conduct" as a

The trial court therefore acted within its discretion in concluding that "the Cayman Islands have at least as close of a connection to the alleged wrongful conduct as California." (See *Stangvik, supra,* 54 Cal.3d at pp. 760-761 ["it is not unfair to a defendant to hold the trial in a state where a *substantial part* of the wrongful conduct was committed," italics added].) The record also supports the court's more specific conclusion that local jurors do not have an interest in this dispute.

Wimbledon also quarrels with the trial court's conclusion that the action will be governed by the law of the Cayman Islands. We need not resolve what law would be applied to each of Wimbledon's claims. The answer to that question might well be different in a California court and in a Cayman Islands court, depending upon those forum's respective choice of law rules.[11] Rather, the relevant question is the comparative interests of the two forums in exercising jurisdiction over the case, including determining what law is applicable.

The record supports the conclusion that the Cayman Islands has the greater interest. Wimbledon argues that California has an interest in applying its law to fraudulent practices that occurred in California, but, as discussed above,

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private convenience factor. However, *Stangvik* suggests that California's interest in addressing wrongful conduct committed by a resident within the state is a public interest factor, and we therefore consider it in that context. (*Stangvik, supra,* 54 Cal.3d at p. 756, fn. 10.)

[11] Without conceding the issue, Wimbledon does not dispute that Cayman Islands law likely applies to at least one of Wimbledon's claims (for breach of fiduciary duty).

other than Wimbledon's conclusory allegations the record does not show that any such conduct actually occurred in California.

On the other hand, several relevant agreements specify that Cayman Islands law should apply. Wimbledon obtained its shares in AEF through an agreement that contained a choice of law provision specifying the laws of the Cayman Islands. In addition, one of Respondents' defenses concerns a release in the Deed that was executed following the litigation in the Cayman Islands concerning the transfer of AEF shares to Wimbledon. The release applies to ACP and to "any other person or entity who or which has provided services of any kind whatsoever to [AEF]." It specifies that it "shall be governed by the laws of the Cayman Islands." The Cayman Islands has a greater interest than California in interpreting and applying agreements that specify the rights and obligations of parties in the Cayman Islands and call for the application of Cayman Islands law, particularly when such an agreement results from litigation in a Cayman Islands court.

We therefore conclude that the trial court acted within its discretion in ruling that public as well as private interest factors favor the Cayman Islands.

5. *The Trial Court Acted Within Its Discretion in Ruling that Respondents' Motion Was Timely*

There is no statutory time limit for filing a forum non conveniens motion. (§ 410.30, subd. (a); *Britton v. Dallas Airmotive, Inc.* (2007) 153 Cal.App.4th 127, 134-135.) However, unreasonable delay that provides an unfair advantage to the moving party or that otherwise causes prejudice to the plaintiff is a factor that a trial court may consider in deciding whether the motion should be granted. (*Britton*, at pp. 134-135*; Morris,*

supra, 144 Cal.App.4th at p. 1461.)

The trial court here acted within its discretion in concluding that Respondents' motion was timely. The court found no prejudice, as Respondents have consented to jurisdiction and agreed to waive any statute of limitations defenses in the Cayman Islands. Thus, Wimbledon will not be deprived of its right to present its claim in another forum and, if Respondents were to renege on their commitments to waive jurisdictional and statute of limitations defenses, the trial court has the ability to lift the stay.

In *Morris,* the court affirmed the trial court's order granting a forum non conveniens motion that the defendants brought a year after the plaintiffs had filed the suit and after they had pursued some discovery. (See *Morris, supra,* 144 Cal.App.4th at pp. 1460-1461.) The court concluded that the trial court properly found no prejudice because the defendants consented to jurisdiction in Texas and agreed not to assert the statute of limitations as a defense. Similarly, here, the trial court properly found no prejudice in light of Wimbledon's ability to pursue its claims in another, more suitable, forum.

The record also does not show that Respondents obtained any unfair advantage through the delay. Respondents did not seek or obtain any discovery before filing their motion. (See *Rouleir v. Cannondale* (2002) 101 Cal.App.4th 1180, 1191 [prejudice may be established "when a party uses judicial discovery procedures for an unfair advantage"].) Moreover, as the trial court noted, the delay largely resulted from the proceedings in federal court following the initial removal and

from the bankruptcies of Wimbledon and AEF.[12] Respondents joined in a forum non conveniens motion while the action was pending in federal court. After remand from federal court, the action was subject to a discovery stay until December 2015. Wimbledon then filed its Third Amended Complaint in September 2015. As the trial court noted, Respondents filed their forum non conveniens motion only four months after they answered that complaint. In view of this history, the trial court did not err in concluding that the motion was timely.

6. *Wimbledon Was Not Unfairly Prejudiced by the Trial Court's Rejection of its Request for a Continuance*

Wimbledon claims that the trial court erred in refusing to allow Wimbledon discovery to "challenge Molner's assertions" made in support of Respondents' motion. The problem with this argument is that Wimbledon did not request any particular

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[12] The trial court cited Respondents' reply papers in making this finding. Wimbledon chose not to include those reply papers in its Appendix. We note that it is an appellant's responsibility to include in its appendix any document filed in the trial court which "is necessary for proper consideration of the issues, including . . . any item that the appellant should reasonably assume the respondent will rely on." (Cal. Rules of Court, rule 8.124(b)(1)(B).) Because Respondent's reply papers are not in the appellate record, we presume that the trial court properly interpreted and relied upon them. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 [" 'All intendments and presumptions are indulged to support [the trial court's order] on matters as to which the record is silent, and error must be affirmatively shown. . . .' "].)

discovery before opposing Respondent's motion. Wimbledon did seek a continuance of the motion, but did so on the ground that it needed time to "research and fully brief" the issues and to "secure the approval of Wimbledon's court-appointed Joint Official Liquidators." In opposing the motion, Wimbledon raised the issue of the lack of discovery, but rather than seeking any particular discovery simply argued that the trial court should be skeptical of Respondents' declarations and accept the allegations in the complaint as true. Having not sought discovery in the trial court to oppose Respondents' motion, Wimbledon may not argue on appeal that the trial court erred in deciding the motion without providing the opportunity for such discovery. (*Asbestos Claims, supra,* 219 Cal.App.3d at p. 26.)

7. *The Trial Court Acted Within Its Discretion in Denying Wimbledon's Request to Find That New York was a More Suitable Alternative Forum Than the Cayman Islands*

Wimbledon requests that, if this court declines to reverse the trial court's order, it should "condition any stay or dismissal on defendants' waiving jurisdictional issues and statute of limitations issues with respect to New York." Wimbledon asks us to make such a ruling on the ground that New York is a more convenient forum than the Cayman Islands.

This court has no basis to issue such an order. Wimbledon has already filed an action in New York. We of course have no direct authority to order Respondents to waive any defenses in that action. Wimbledon's request is, in essence, an argument that we should reverse the trial court's ruling, make our own factual findings that New York is a more suitable forum, and order the trial court to stay this action conditioned upon

Respondents' agreement to waive defenses in New York. There is no basis in the record for such a ruling.

The trial court denied Wimbledon's request for a ruling that New York is a more favorable forum. The trial found that "[t]he parties have not directed their briefing to the suitability of New York." That finding is supported by Wimbledon's opposition below, which included only one conclusory paragraph asserting that Wimbledon would not object to litigating the case in New York and asserting that New York would be convenient for the defendants.

On appeal, Wimbledon concedes that it did not fully brief the issue, but argues that it did not have time to do so, because the trial court denied its request for a continuance. Whether to grant a continuance is within the discretion of the trial court. (*Dailey v. Sears, Roebuck & Co.* (2013) 214 Cal.App.4th 974, 1003-1004.) We do not find any abuse of discretion in the trial court's decision to allow Wimbledon only the time set by statute to file its opposition papers, especially in light of Respondents' argument that the bulk of the opposition had already been briefed in connection with the forum non conveniens action filed in federal court. We therefore deny Wimbledon's request to reverse the trial court on this ground.

DISPOSITION

The order is affirmed. Respondents are entitled to their costs on appeal.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

CHAVEZ, J.

HOFFSTADT, J.