No. 18-128

In the Supreme Court of the United States

MOHAMED ABOUELMAGD,

Petitioner,

v.

DEBRA NEWELL,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of California, Fourth Appellate District, Division Three

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondent sued Petitioner in the California Superior Court, alleging in the subject complaint that, while in the course of a deep personal relationship, they entered into a loan agreement with a stated personal purpose, and Petitioner never repaid the loan in full. Respondent was not in the loan business.

Respondent asserts the following issues:

1. Given the complaint herein alleged specifically, as noted by the Court of Appeals, that the Respondent's loan originated out of a personal love relationship with Petitioner, and the factual allegations of the complaint must of course for demurrer purposes be treated as true, how can Petitioner contend that the transaction should, for purposes of review, be treated as a purely business transaction, subject to the commerce clause?

2. Given governing case authority to the effect that a personal loan between individuals or a one-time business loan amongst friends do not fit within the penumbra of commerce clause, how can Petitioner claim that the commerce clause applies and has been violated?

3. Given that Petitioner has not cited in his brief when he raised discrimination in the lower Courts, how can it be raised now for the first time in this Petition as an issue?

4. What possible issues of sufficient magnitude are presented in these undisputed facts involving a married man welching on a loan from his lover

to merit Supreme Court review (and on an Demurrer posture)?

PARTIES TO THE PROCEEDING

At all times stated herein, the Petitioner is and was an out-of-state resident who has never lived in California and whose primary residence is in New Jersey or New York, and the Respondent is and was a California resident.

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INTRODUCTION

Respondent Debra Newell loaned her former lover, Petitioner Mohamed Abouelmagd, a married man, nearly a million dollars. Petitioner failed to repay the loan. Petitioner was an out-of-state resident at all times; and never resided in California.

In Petitioner's Appendix Exhibit 13, he confirms the loan was for personal and business purposes. There is no allegation that Respondent was in the loan business, or ever made any other loan. The essence of the Respondent's complaint is that the loan was motivated by a love relationship. The loan does not involve a standard commercial transaction of a business. This legal issue arose on a demurrer posture. In the first Amended Complaint (Appendix H), Petitioner alleged that the loan was personal (Appendix H, paragraph 11, page 80 of Petition for Writ of Certiorari). Only after the money was loaned, did Petitioner represent it would in part become an investment in Bary Group. He never gave Respondent any investment interest in the Bary Group.

The Court of Appeals decision herein described the situation as follows: "Plaintiff, a California resident, and defendant, a New York and/or New Jersey resident, met in Las Vegas. He represented to her he was not married, which later proved to be false, and they became romantically involved. Because of their intimate relationship, when defendant encountered financial hardship in mid-1999, plaintiff orally agreed to loan him money." The communications regarding love and the business purpose became entwined, as the Court of Appeals decision notes: "In one of the many "love letters" written by defendant to plaintiff after she

had loaned him the majority of the money, he indicated one proposal he could offer her was to give her half of the shares he owned in his businesses. He also stated that if he were to be successful in his business, he would "reward" her with the original money borrowed and a high percentage of interest."

While Petitioner tries to give the loan a commercial flavor here, he has throughout this appeal sought to characterize the relationship as one involving a scorned lover: Throughout the personal nature of the relationship clearly indicates a loan based upon emotional involvement and not some mere arms length business loan.

Despite Petitioner's argument, there is no real public policy appeal in having the Supreme Court spend time on a case that arises out of a man, claiming to be unmarried, trying to defraud almost a $1,000,000 from his lover. This is a personal relationship and honesty issue, not a business and commerce clause issue. There are no businesses involved.

Pursuant to CCP Section 351 any statute of limitations defense was tolled and the matter was ordered to proceed on the merits. The Court of Appeals properly found that the transaction did not involve interstate commerce or implicate the dormant commerce clause.

The Petitioner contends that the matter falls subject to the dormant commerce clause related to interstate commerce and that use of CCP Section 351 is unconstitutional/discriminatory. Respondent asserts that the Court of Appeals was correct that the statute of limitations is tolled by CCP Section 351 and the

transaction does not implicate interstate commerce or the commerce clause and that there is no valid issue of constitutionality. Furthermore, the claim that involves essentially theft of loaned money by an out of state debtor/lover does not merit Supreme Court review, nor does it merit create of new law limiting CCP Section 351.

REASONS FOR DENYING THE PETITION

I. THE APPLICATION OF CCP SECTION 351 BY THE COURT OF APPEALS TO TOLL THE STATUTE OF LIMITATIONS WAS PROPER AND DOES NOT RAISE ISSUES OF CONSTITUTIONALITY.

A. CCP Section 351 Properly Applies.

CCP Section 351 finds robust support under California law. The California Supreme Court stated in *Dew v. Appleberry*, 23 Cal. 3d 631, 633 (1979), "[s]ince the statute's enactment over 100 years ago, decisions of this [California Supreme] court and of the Court of Appeal have uniformly interpreted section 351 to give effect to its clear and unambiguous meaning." Both the California Courts of Appeal and the California Supreme Court have consistently held that § 351 applies to a cause of action to toll the statute of limitations **even when the defendant has never been physically present in the state**. (*Appleberry*, *supra*, 23 Cal. 3d at 636; *Kohan v. Cohan*, 204 Cal. App. 3d 915 (1988); *Green v. Zissis*, 5 Cal. App. 4th 1219, 1223 (1992)). The Second District has also held that § 351's tolling statute depends on defendant's physical presence in the state of California and not whether he is available for service of process. (*Garcia*

v. Flores, 64 Cal. App. 3d 705, 709 (1976)). Indeed, it is the absence from the state of California, not a defendant's amenability to service of process, that propels the limitations tolling of § 351. (*Appleberry*, *supra*, 23 Cal. 3d at 636). The California Supreme Court has tolled the statute of limitations even where the defendant is a California resident and only took brief trips outside of the state. In *Appleberry*, *supra*, 23 Cal. 3d at 633, the Supreme Court relied upon *Rogers v. Hatch*, 44 Cal. 280, 283 (1872), to determine, "this court held that if, when a cause of action accrues, the defendant resides in California and afterward departs from California, his 'successive absences ... from the State are to be aggregated,' and are deducted from the whole time which has elapsed since the cause of action accrued." The court in *Fielding v. Iler*, 39 Cal. App. 599 (1919) upheld the trial court's aggregation of defendant's successive absences from the state to toll the statute of limitations pursuant to § 351. Until a state has exercised jurisdiction over a particular defendant, the statute of limitations does not begin to run. (*Cvecich v. Giardino*, 37 Cal. App.2d 394, 398 (1940)). In *Cvecich*, the Respondent argued that because the Appellant was out of the state from the inception of the obligation at issue and was not subject to jurisdiction until she consented to personal jurisdiction by making an appearance in the case, the statute of limitations was tolled during that period. (*Id*. at 398). The Appellate Court found for the Respondent, holding that § 351 applies even in instances where defendant has not been physically present in the state when the obligation arises. (*Ibid*). The Court reasoned that if it were to only allow tolling in instances where a defendant has at some time before the commencement of the cause of action been physically

present within the state, thereupon leaving the state and then returning "it would lead to confusion and unfairness." (*Ibid*). "It would seem that the statute was not intended to have that result." (*Ibid*). The Appellate Court further explained its rationale, stating, if appellant's construction [of § 351] were adopted, it would lead to confusion. At what time must the defendant have been within the state prior to the commencement of the action? Must he have been within the state at some time after the creation of the obligation, and then left and returned, or is it sufficient that he may have been within the state at some remote past time? It would seem unlikely that the legislature could have intended that the operation of the statute should turn upon such uncertain and immaterial factors. (*Id.* at 397-398). The same rationale must be applied to the facts of Appellant's case.

In sum, on these facts, involving a personal loan transaction involving individuals, one of whom, the Defendant, never resided in California this is a quintessential case for application of CCP Section 351.

B. There Is No Valid Constitutionality Issue.

Petitioner argues that under Eighth and Ninth Circuit Authority CCP Section 351 should be deemed unconstitutional here because it treats differently in state and out of state residents.

A case relied on by Petitioner regarding constitutionality of tolling statutes under the commerce clause *is Bendix Autolite Corp. v. Midwesco Enterprises*, *supra*, 486 U.S. 888 (1988). In *Bendix*, Bendix Autolite Corporation, a corporation residing in

Ohio, entered into an agreement with Midwesco Enterprises, Inc., a corporation residing in Illinois. (*Id*. at 889-890 [108 S. Ct. at 2219-2220].) When Bendix sued Midwesco for breach of contract and Midwesco asserted a statute of limitations defense, Bendix contended that the statutory period had been tolled. Like Code of Civil Procedure section 351, the pertinent Ohio tolling statute provided that the statutory period did not run while a defendant was outside of the state. It is a case involving BUSINESSES and BUSINESS TRANSACTIONS, not a personal loan; it is a case unlike here, that properly involves the commerce clause.

To gain the protection of the statute of limitations period, the out of state company, which had no corporate office in Ohio and was not registered to do business there -- would have had to appoint a resident agent for service of process in Ohio and subject itself to the Ohio courts' general jurisdiction. Thus, the out-of-state company would have been burdened with the need for an in state agent for service of process, despite no other in state presence. Thus, in a plainly corporate business setting, the court found an interstate commerce burden imposed by Civil Code Section 351 on these facts of an out of state business needing an in state agent for service of process in order to invoke the statute of limitations.

In assessing whether this tolling statute violated the commerce clause, the court in *Bendix* stated that, as a general rule, "[w]here the burden of a state regulation falls on interstate commerce, restricting its flow in a manner not applicable to local business and trade, there may be either a discrimination that

renders the regulation invalid without more, or cause to weigh and assess the State's putative interests against the interstate restraints to determine if the burden imposed is an unreasonable one. [Citation.]" (486 U.S. at 891 [108 S. Ct. at 2220-2221].) Applying the latter balancing test, the *Bendix* court held that Ohio's tolling statute was constitutionally infirm under the circumstances of the case, noting that "[a]lthough statute of limitations defenses are not a fundamental right, [citation], it is obvious that they are an integral part of the legal system and are relied upon to project the liabilities of persons and corporations active in the commercial sphere." (*Id*. at 893 [108 S. Ct. at 2221-2222].) The *Bendix* court reasoned that the statute burdened interstate commerce by barring foreign corporations from asserting a statute of limitations defense unless they maintained a presence in Ohio, but served no weighty state interest because Ohio's long-arm statute permitted service on foreign corporations like Midwesco throughout the period of limitations. (*Id*. at 893-895 [108 S. Ct. at 2221-2223].)

In *Abramson v. Brownstein*, 897 F.2d 389 (9th Cir. 1990), the Ninth Circuit decided a similar question concerning Code of Civil Procedure section 351. In *Abramson*, the plaintiffs, two California residents, entered into an agreement for the sale of gold coins and bullion with the defendant, a resident of Massachusetts. (897 F.2d at 390.) The plaintiffs subsequently sued the defendant, alleging breach of contract and fraud. (*Ibid*.) When the defendant asserted a statute of limitations defense, the plaintiffs argued that the statutory periods were tolled under section 351. (897 F.2d at 391.) Following *Bendix*, the Ninth Circuit held that section 351 impermissibly

burdened interstate commerce in the case of nonresident defendants engaged in commerce within California, reasoning that although such defendants were subject to service under California's long-arm statute, section 351 denied them a statute of limitations defense unless they maintained a presence in California.

Unlike the courts in *Bendix* and *Abramson*, we confront whether Code of Civil Procedure section 351 is constitutionally sound when its tolling provisions are applied to a resident making a loan. Thus, this is for example, a totally different scenario from corporate agent for service of process under *Bendix*. The case does not involve the commerce clause. It does not involve a business and involves a loan alleged to have been personal between lovers.

Additionally, though case law indicates that there is no valid constitutionality issue on these facts, whether or not the commerce clause applies. Generally, such cases involve a constitutional right, such as the ability of people to cross state lines.

Here, the Court of Appeals acting as a fact-finder found that the commerce clause did not apply: "here was no violation of the Commerce Clause, he declared, because there was no interstate commerce involved." Determinations of the fact-finder, such as the Court of Appeals here, are not readily subject to overturning and are accorded deference. *Vorse v. Sarasy*, 53 Cal. App. 4th 1002 (1997).

This is not a case involving the movement of people across state lines. The Petitioner has **never** lived in California. Thus, the reasoning of *Heritage Marketing*

and Insurance Services, Inc. v. Chrustawka, 160 Cal. App. 4th 754 (2008) concerning the impediment posed of requiring that residents continue to live in California and not move across state lines is inapposite.

In *Mounts v. Uyeda*, 227 Cal. App. 3d 111 (1991), the court generally addressed the reasoning in rejecting constitutionality challenges which is also on point here: "In determining a statute's constitutionality, we start from the premise that it is valid, we resolve all doubts in favor of its constitutionality, and we uphold it unless it is in clear and unquestionable conflict with the state or federal Constitutions. (*County of Sonoma v. State Energy Resources Conservation etc. Com*., 40 Cal. 3d 361, 368 (1985) [220 Cal. Rptr. 114, 708 P.2d 693].) **Among other considerations, there is no constitutionality issue per this decision where interstate commerce is not involved**."

Accordingly, where no commerce clause is involved, there is no valid constitutionality question. Here the Court of Appeals found as fact-finder that no interstate commerce was involved, e.g, the transaction involved a personal loan, and that should end the matter.

Further, the courts have been reticent to find constitutional issues where the Defendant contesting CCP Section 351 was simply outside of California and the case did not involve issues of travel from California to other states. Thus, the court in the court in *Filet Menu v. Cheng*, 71 Cal. App. 4th 1276 (1999), found section 351 violates the commerce clause when applied to a resident who travels outside California for interstate business but not when applied to a resident who is out of state for reasons unrelated to interstate

commerce, because the tolling rule of section 351 does not burden interstate commerce in that instance.

C. Petitioner Should Not Be Permitted Now for the First Time to Raise Discrimination on Appeal.

Now, for the first time in the writ of certoriari, Petitioner challenges the alleged discriminatory impact of CCP 351 in this factual context. In reviewing the Petitioner's Court of Appeals' brief, it is apparent that while Petitioner challenges constitutionality based upon the commerce clause, discrimination is not raised and is first raised on certiorari.

The primary role of the California Courts of Appeal is to review error. Accordingly, an argument or objection not made in the trial court is waived on appeal. (*Ochoa v. Pacific Gas & Electric Co.*, 61 Cal. App. 4th 1480, 1488 n.3 (1998) ["It is axiomatic that arguments not asserted below are waived and will not be considered for the first time on appeal."]; *Carian v. Agricultural Labor Relations Bd.*, 36 Cal.3d 654, 668 n.6 (1984); *Franklin Mint Co. v. Manatt, Phelps & Phillips, LLP*, 184 Cal. App. 4th 313, 332 (2010).)

The rule barring new arguments on appeal is founded on considerations of fairness to the opposing party and the orderly and efficient administration of justice. (*Rand v. Board of Psychology*, 206 Cal. App. 4th 565, 587 (2012).) Permitting new arguments on appeal would deprive the trial courts and the parties of the opportunity to correct errors and would require the appellate courts to spend valuable resources to address purported errors that could have been corrected in the trial court had an objection been made. (*Dietz v.*

Meisenheimer & Herron, 177 Cal. App. 4th 771, 799-800 (2009).) Stated another way, a party that fails to make an objection or argument in the trial court invites the error. A party that induces the commission of error is estopped from asserting an invited error on appeal as a basis for reversal. (*San Mateo Union High School Dist. v. County of San Mateo*, 213 Cal. App. 4th 418, 436 (2013).)

Accordingly, Petitioner should not be permitted to raise now for the first time an issue of discrimination but even if Petitioner were permitted to do say, any such issue has no merit on appeal.

Further, here there is no genuine discriminatory impact: the court in *Fielding v. Iler*, 39 Cal. App. 599 (1919) upheld the trial court's aggregation of defendant's successive absences from the state to toll the statute of limitations pursuant to § 351. Until a state has exercised jurisdiction over a particular defendant, the statute of limitations does not begin to run. Note also, *Cvecich v. Giardino*, 37 Cal. App. 2d 394, 398 (1940). In *Cvecich*, the Respondent argued that because the Appellant was out of the state from the inception of the obligation at issue and was not subject to jurisdiction until she consented to personal jurisdiction by making an appearance in the case, the statute of limitations was tolled during that period. (*Id.* at 398). The Appellate Court found for the Respondent, holding that § 351 applies even in instances where defendant has not been physically present in the state when the obligation arises. (*Ibid*). The Court reasoned that if it were to only allow tolling in instances where a defendant has at some time before the commencement of the cause of action been physically

present within the state, thereupon leaving the state and then returning "it would lead to confusion and unfairness." (*Ibid*). "It would seem that the statute was not intended to have that result." (*Ibid*). The Appellate Court further explained its rationale, stating, If appellant's construction [of §351] were adopted, it would lead to confusion. At what time must the defendant have been within the state prior to the commencement of the action? Must he have been within the state at some time after the creation of the obligation, and then left and returned, or is it sufficient that he may have been within the state at some remote past time? It would seem unlikely that the legislature could have intended that the operation of the statute should turn upon such uncertain and immaterial factors. (*Id*. at 397-398). The same rationale must be applied to the facts of Appellant's case.

The requirements of § 351 apply equally to all defendants and makes no distinctions between residents and non-residents for the purposes of tolling the statutes of limitations. (*Pratali v. Gates*, 4 Cal. App. 4th 632, 641 (1992). The Appellate Court in *Pratali* determined that "[t]he statute as written is facially neutral." (*Ibid*). The Ninth Circuit in *Abramson*, *supra*, 897 F.2d at 392, which Petitioner cites extensively throughout his Brief as being directly on point with the facts of this case itself states, "[o]n its face, California's tolling statute is non-discriminatory because it treats alike residents and nonresidents of California." § 351 is distinguishable from statutes found to be discriminatory. (*See*, for example, *City of Philadelphia v. New Jersey*, 438 U.S. 617 (1978) [holding a New Jersey law prohibiting the importation of waste that originated from or was collected from

outside the state was facially discriminatory] and *Granholm v. Heald*, 544 U.S. 460 (2005).

By contrast, the California legislature enacted § 351 to alleviate the adverse effect on in-state resident plaintiffs created by out-of-state defendants who could not be served with a summons and complaint in an in personam action. (*Appleberry*, *supra*, 23 Cal. 3d at 633-34). The Court in *Appleberry* noted that though the original purpose of § 351 has been diminished since subsequent legislation provides for alternative methods of service adequate to confer jurisdiction, the legislature "may justifiably have concluded that a defendant's physical absence impedes his availability for suit, and that it would be inequitable to force a claimant to pursue the defendant out of state in order effectively to commence an action within the 42 limitations period." Thus, § 351 was not enacted with discriminatory intent.

Section 351 does not create a discriminatory impact on out-of-state defendants because it does not provide differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. Despite this, Petitioner argues § 351 is discriminatory when applied to any non-California resident, contrary to the Supreme Court's holding in *Appleberry*, *supra*, 23 Cal. 3d at 630. (Resp. Brief at p. 43). Since *Bendix* was determined, several lower California courts and the Ninth Circuit have considered the validity of § 351 as against a Commerce Clause challenge. In *Abramson*, *supra*, 897 F.2d at 389, California residents filed suit against a Massachusetts resident regarding the sale of gold coins. Though the Court ruled § 351 was not facially unconstitutional, the

Appellate Court found the transaction was rooted in interstate commerce, and therefore pursuant to *Bendix*, § 351 was being used to discriminate against the out-of-state defendant to unfairly toll the statute of limitations. (*Id*. at 392). In *Kohan*, *supra*, 204 Cal. App. 3d at 915, the suit concerned an agreement entered in Iran between three brothers regarding distribution of their joint assets. The plaintiff brought suit in California and the Court determined § 351 was properly applied to toll the statute of limitations, finding no discriminatory impact because "acts giving rise to the causes of action herein occurred in Iran while defendants were residents of that country [do] not affect interstate commerce or commerce between the United States and Iran, nor does it establish that defendants were engaged in interstate commerce by any definition of that term." (*Id*. at 924).

Mounts v. Uyeda, 227 Cal. App. 3d 111 (1991) involved an intentional infliction of emotional distress cause of action between California residents that occurred on a California highway. The plaintiff argued § 351 applied to toll the statute of limitations because the defendant left the state for four days. (*Id.* at 121-122). The Court concluded that not only was § 351 not facially discriminatory, it did not have a discriminatory impact because since the alleged injury did not involve interstate commerce, In *Pratali*, *supra*, 4 Cal. App. 4th 632 (1992), the Court rejected the argument that *Bendix* rendered § 351 unconstitutional because a single amicable loan between acquaintances did not affect interstate commerce. Thus § 351 did not have any impact whatsoever on interstate commerce in *Pratali*. Here, because Respondent's loan to Petitioner was not for a business investment but rather for purely

personal purposes, there was no impact on commerce. Because there was no impact, there certainly was not a "discriminatory impact" as required under the Dormant Commerce Clause. In all of the cases Appellant cites herein, the courts made it clear that the Dormant Commerce Clause is an impediment to the use of § 351 to toll the statute of limitations only where particular conduct impacts interstate commerce. Conversely, courts have found no impact on interstate commerce where the action involves non-interstate commercial matters, such as an agreement made in Iran regarding money made in Iran (*Kohan*), an incident that occurred on a California highway between two California residents (*Mounts*), or a judgment entered on a promissory issued for a California resident. (*Pratali*). The alleged discriminatory impact of § 351 in this case is that it "simultaneously harm[s] non-residents in a way that [does] not harm in state residents." (Resp. Brief at p. 43). This claim of discriminatory impact is far more tenuous than the claims rejected by the Supreme Court in *Furst* and *Hoke* and by the lower courts in *Abramson*, *Heritage Marketing*, and *Dan Clark Family*. § 351, as applied to the instant case, does not prohibit the flow of any interstate goods, nor does it place any additional costs on out-of-state defendants. As a result, utilizing § 351 to toll the statute of limitations does not create a disparate impact on out-of-state defendants in a discriminatory way because, since Respondent never engaged in interstate commerce, she could not have therefore caused any impact on interstate commerce, let alone one that is discriminatory to out-of-state residents. A non-discriminatory law will be invalidated only if the burden on interstate commerce substantially outweighs the promotion of legitimate local interests.

(*Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). § 351 does not create any burden on interstate commerce, and even if it does, it provides clear benefits to important local public interests that substantially outweigh any alleged burden, and thus wholly complies with the requirements of the Dormant Commerce Clause. However, even if this Court determines that Respondent's amicable loan to Petitioner constitutes "commercial activity," which Respondent contends it does not, any incidental burden on interstate commerce is minor and substantially outweighed by the benefits to the important local interests.

In fact, despite diligent research, we have found no cases that support finding CCP 351 unconstitutional with respect to any out of state personal loan, or even more generally where the person has simply resided out of state. Thus, we believe the constitutionality argument is not valid and something of a red herring.

Accordingly, there is no constitutional mandate that in all circumstances the claims involving an in state or out of state resident defendant be treated equally. The unique business factual contexts, such as in *Bendix*, are not apposite to this personal loan context and there is no justifiable or legal reason to so obliterate CCP Section 351 or expand constitutional concerns so as to essentially sanction theft of a personal loan.

II. THE COMPLAINT HEREIN DOES NOT INVOLVE INTERSTATE COMMERCE OR IMPLICATE THE DORMANT COMMERCE CLAUSE.

Petitioner argues that the Court of Appeals decision is incorrect because the present action should be held to involve interstate commerce. This argument that permeates the entire petition is spelled out under Section C of the Petition for Writ of Certiorari, which reads:

> "The Transportation of Debra's Loans, as Well as Repayment of Same by Mohammed Through the Bank, Wire and Mail Systems, of the United States Constitute Interstate Commerce."

However, this is incorrect.

Under established case law, a personal loan does not implicate interstate commerce e*ven if it may have a business purpose*. In *Pratali v. Gates*, 4 Cal. App. 4th 632, the court in the context of a personal loan, such as here, found CCP Section 351 tolled the statute of limitations for the time period in which the applicant left the state. The Court specifically held "there were insufficient circumstances to invoke the commerce clause, and further noted, as is equally true here, that there was no evidence that the Plaintiff was in the business of making loans or otherwise engaged in interstate commerce." It further stated that it did not feel that a single amicable loan rose to the level of interstate commerce "however the proceeds are used." The Court further shook off various constitutional challenges to CCP Section 351. The Court further concluded that section 351 did not violate the

commerce clause "when applied to a noncommercial defendant not engaged in interstate commerce. [Citations.]" (4 Cal. App. 4th at 643)

Here, the second amended complaint alleges plaintiff loaned defendant money because she "had a personal, intimate relationship with [him]." The letters attached to the complaint, which defendant purportedly wrote, support such an allegation. The complaint further alleges she "was not in the business of lending money," and she made the loan without any expectation of profiting from it. As in *Pratali*, we are not dealing here with the channels or instrumentalities of interstate commerce, persons or things in interstate commerce, or activities that "substantially affect" interstate commerce; this is **not a loan transaction between businesses**. It is a personal loan.

More broadly, it is well-established that the formation of a contract between persons in different states is not within the protection of the commerce clause unless the performance of the contract falls within its protection. (*Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 253, 58 S. Ct. 546, 82 L. Ed. 823 (1938).) To do so, performance of the contract must implicate interstate commerce. Though even the United States Supreme Court acknowledges the lack of a precise definition for "interstate commerce" (*U.S. v. Lopez*, 514 U.S. 549, 552-559, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995) [detailing evolution of commerce clause jurisprudence]), its decisions have articulated three categories falling within its scope: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce, and persons or things in interstate commerce; and (3) activities that

"substantially affect" interstate commerce. (*U.S. v. Morrison*, 529 U.S. 598, 608-609, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000) (*Morrison*).)

Even if the Petitioner contends that these three categories are general, not absolute, there is no valid basis offered here to depart from the tripartite analysis. Further, the contention that the loans are business loans for business purposes might be argument for a jury at trial, but defies the demurrer requirements of taking the facts pled as true, which show a love relationship/personal relationship as being a genesis of the loans between people, regardless of any offered business purpose.

Thus, the critical question is whether performance of the loan contracts alleged in the complaint constitutes one of the three categories of interstate commerce.

A personal loan between lovers, even with a business purpose does not involve any such claim. The Court of Appeals decision herein properly concludes: "Thus, the critical question is whether performance of the loan contracts alleged in the complaint constitutes or implicates one of the three categories of interstate commerce. We conclude it does not."

The Court of Appeals decision herein explains its holding that the facts here do not involve interstate commerce: "Here, the second amended complaint alleges plaintiff loaned defendant money because she "had a personal, intimate relationship with [him]." The letters attached to the complaint, which defendant purportedly wrote, support such an allegation. The complaint further alleges she "was not in the business

of lending money," and she made the loan without any expectation of profiting from it. As in *Pratali*, we are not dealing here with the channels or instrumentalities of interstate commerce, persons or things in interstate commerce, or activities that "substantially affect" interstate commerce. (*See Morrison*, *supra*, 529 U.S. at 608-609.) Petitioner asserts the complaint's allegations "make clear" the loan was made, at least in part, for business investment purposes. Although certain allegations in the operative complaint mention use of some of the loaned money for business purposes, those allegations, as well as the letters from Petitioner attached to the complaint, indicate it was Petitioner who mentioned he would use some of the money in that manner. Petitioner provides no authority such statements, which are alleged to have been made after Respondent loaned the money, somehow turn the transaction into one involving or substantially affecting interstate commerce.

The various cases cited by Petitioner to raise a commerce clause issue purportedly because mail and wire systems are involved may be readily distinguished from the present matter as the cases involved businesses; it would be an unprecedented expansion of these cases to implicate the commerce clause in the present personal loan context. Further, the Court of Appeals properly held, "We are equally unpersuaded by Defendant's claims that interstate commerce is implicated because plaintiff sent some of the loaned money across state lines to where defendant was located, or because a few of the repayments defendant made to plaintiff were made by mail or wire transfer." Such use of mail incident to personal contract, such as

is involved here, does not give rise a commerce clause issue.

Since interstate commerce is not implicated, the dormant commerce clause is not implicated and thus, any issue regarding discrimination, which was not timely raised any way, is moot.

Additionally, case law indicates that there is no valid constitutionality issue on these facts, whether or not the commerce clause applies.

This is not a case involving the movement of people across state lines. The Petitioner has never lived in California. Thus, the reasoning of *Heritage Marketing and Insurance Services, Inc. v. Chrustawka*, 160 Cal. App. 4th 754 (2008) concerning the impediment posed of requiring that residents continue to live in California and not move across state lines is inapposite.

In *Mounts v. Uyeda*, 227 Cal. App. 3d 111 (1991), the court generally addressed the reasoning in rejecting constitutionality challenges which is also on point here: "In determining a statute's constitutionality, we start from the premise that it is valid, we resolve all doubts in favor of its constitutionality, and we uphold it unless it is in clear and unquestionable conflict with the state or federal Constitutions. (*County of Sonoma v. State Energy Resources Conservation etc. Com*., 40 Cal. 3d 361, 368 (1985) [220 Cal. Rptr. 114, 708 P.2d 693].) Among other considerations, there is no constitutionality issue per this decision where interstate commerce is not involved."

Further, the courts have been reticent to find constitutional issues where the Defendant contesting CCP Section 351 was simply outside of California and

the case did not involve issues of travel from California to other states. Thus, the court in *Filet Menu v. Cheng*, 71 Cal. App. 4th 1276 (1999), found section 351 violates the commerce clause when applied to a resident who travels outside California for interstate business but not when applied to a resident who is out of state for reasons unrelated to interstate commerce, because the tolling rule of section 351 does not burden interstate commerce in that instance.

Further, here there is no genuine discriminatory impact: "the court in *Fielding v. Iler*, 39 Cal. App. 599 (1919) upheld the trial court's aggregation of defendant's successive absences from the state to toll the statute of limitations pursuant to § 351. Until a state has exercised jurisdiction over a particular defendant, the statute of limitations does not begin to run. Note also, *Cvecich v. Giardino*, 37 Cal. App. 2d 394, 398 (1940). In *Cvecich*, the Respondent argued that because the Appellant was out of the state from the inception of the obligation at issue and was not subject to jurisdiction until she consented to personal jurisdiction by making an appearance in the case, the statute of limitations was tolled during that period. (*Id.* at 398). The Appellate Court found for the Respondent, holding that § 351 applies even in instances where defendant has not been physically present in the state when the obligation arises. (*Ibid*). The Court reasoned that if it were to only allow tolling in instances where a defendant has at some time before the commencement of the cause of action been physically present within the state, thereupon leaving the state and then returning "it would lead to confusion and unfairness." (*Ibid*). "It would seem that the statute was not intended to have that result." (*Ibid*). The Appellate

Court further explained its rationale, stating, If appellant's construction [of § 351] were adopted, it would lead to confusion. At what time must the defendant have been within the state prior to the commencement of the action? Must he have been within the state at some time after the creation of the obligation, and then left and returned, or is it sufficient that he may have been within the state at some remote past time? It would seem unlikely that the legislature could have intended that the operation of the statute should turn upon such uncertain and immaterial factors. (*Id*.)

III. THE CASE DOES NOT PRESENT A VALID MATTER FOR REVIEW

Petitioner presents this as an ideal case for review; Respondent respectfully disagrees.

Rule 8.500 of the California Rules of Court states:

> **b) Grounds for review**
>
> The Supreme Court may order review of a Court of Appeal decision:
>
> (1) When necessary to secure uniformity of decision or to settle an important question of law;
>
> (2) When the Court of Appeal lacked jurisdiction;
>
> (3) When the Court of Appeal decision lacked the concurrence of sufficient qualified justices; or

> (4) For the purpose of transferring the matter to the Court of Appeal for such proceedings as the Supreme Court may order.

(Subd (b) amended effective January 1, 2007.)

Thus, the Supreme Court needs to conclude that this is a properly important matter of law, but it is not.

Factually, there is nothing particularly important about allowing a person that stole over a million dollars to avoid equitable determination on the merits.

Legally, the fact pattern is a very weak one for testing the limits of CCP Section 351 as it involves a permanent out of state resident and former lover with a personal loan. If the intent were truly to test the merits of CCP Section 351 and refine the law a better fact pattern would be more conducive to that result.

Petitioner would suggest that review is needed to prevent the courts from ignoring the *Bendix* mandate and to prevent creating prejudicial and infirm statutory edict treating out of state residents differently. But comparing *Bendix* and the within case, is like comparing apples and avocados, while both involve out-of-state residents, the business edict and burden of *Bendix* is not present here, and there is no need to rewrite case law to afford broader protection to out of state residents who steal from their lovers in personal loans.

Finally, there is not a sufficient whiff of interstate commerce to make this a proper test case. The court of appeals as fact-finder so determined.

CONCLUSION

Accordingly, the Petition should be denied.

Respectfully submitted,

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