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COURT OF APPEALS

STATE OF NEW YORK

BEN-DOR,

Respondent,

-against-

NO. 98

ALCHEMY CONSULTANT,

Appellant.

20 Eagle Street
Albany, New York
October 16, 2025

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

ELLIOT H. SCHERKER, ESQ.
GREENBERG TRAUIG, LLP
Attorney for Appellant
One Vanderbilt Avenue
New York, NY 10017

MICHAEL P. BOWEN, ESQ.
GLENN AGRE BERGMAN & FUENTES, LLP
Attorney for Respondent
1185 Avenue of the Americas
22nd Floor
New York, NY 10036

Brandon Deshawn
Official Court Transcriber

1 CHIEF JUDGE WILSON: Next case is Ben-Dor v.
2 Alchemy Consultant.

3 MR. SCHERKER: May it please the court. Elliott
4 Scherker, on behalf of JPMorgan Chase. I respectfully
5 request three minutes for rebuttal.

6 CHIEF JUDGE WILSON: Yes.

7 MR. SCHERKER: The essence of our argument to
8 this court cannot be framed any better than it is in the
9 First Department dissent, which puts the issue to the court
10 as clearly as it could - - - as it could be stated. What
11 the dissent says is, at page 278 of the record, given the
12 long history of the consumer banking industry and the
13 omnipresence of customer-bank relationships, it is telling
14 that plaintiff cannot point to any New Jersey appellate
15 precedent directly supporting her position.

16 JUDGE RIVERA: So - - - so is that - - - does
17 that mean it's an open question? We would be deciding an
18 open question of a sister jurisdiction; is that correct?

19 MR. SCHERKER: That is correct, Your Honor.

20 JUDGE RIVERA: Okay.

21 JUDGE CANNATARO: Is there anything barring us
22 from deciding an open question from another jurisdiction in
23 this case?

24 MR. SCHERKER: What - - - what the dissent is
25 saying is there's no authority for the position urged by

1 the plaintiff.

2 JUDGE CANNATARO: True. And what the majority
3 responded to was, well, just because there is no authority
4 doesn't mean we can't divine where New Jersey would go on
5 this.

6 MR. SCHERKER: Correct. And we define where - -
7 - where New Jersey would go based on the Central Check
8 Cashing case, which explicitly says what the dissent relies
9 on, which is that the - - - you start with a basic fact
10 that the relationship between a depositor and a bank is an
11 arm's length debtor-creditor relationship, but - - -

12 JUDGE GARCIA: Counsel, who - - - this case was
13 brought in New Jersey - - - in New York, right, by the
14 plaintiff?

15 MR. SCHERKER: That's correct, Your Honor.

16 JUDGE GARCIA: Did you ever try to have it
17 removed to New Jersey?

18 MR. SCHERKER: I believe that it would be
19 difficult for Chase, based in New York, to remove it to New
20 Jersey.

21 JUDGE GARCIA: And that was the basis for
22 jurisdiction in New York - - -

23 MR. SCHERKER: That's correct, Your Honor. New
24 Jersey citizen bringing - - - bringing the action in New
25 York. And the - - -

1 JUDGE GARCIA: Understood. New York, yes.

2 MR. SCHERKER: - - - the oddity is, of course,
3 this court is being asked to decide a question of New
4 Jersey law.

5 JUDGE RIVERA: Yes. Yes.

6 MR. SCHERKER: And this court's decision would
7 not necessarily be binding - - - would not be binding in
8 New Jersey. It would be binding in New York. And I would
9 only point out that New Jersey law on this issue derives
10 from New York law. So that that - - -

11 JUDGE RIVERA: It's all - - - all - - - all good
12 all the way around.

13 CHIEF JUDGE WILSON: Have you found a New Jersey
14 case that - - -

15 MR. SCHERKER: Yes.

16 CHIEF JUDGE WILSON: - - - in which the court
17 found a special duty existed, period, in any circumstance?

18 MR. SCHERKER: No, Your Honor. Not off the top
19 of my head. The special relationship has to come from one
20 of three things under New Jersey law. And that's pretty
21 much uniform throughout - - - throughout the country, that
22 there must be a special relationship to impose an extra
23 contractual duty on a bank in terms of a depositor.

24 JUDGE HALLIGAN: In your view, does the customer-
25 noncustomer distinction bear on what's required?

1 MR. SCHERKER: It does not, Your Honor.

2 JUDGE HALLIGAN: So it's the same regardless?

3 MR. SCHERKER: Correct.

4 JUDGE HALLIGAN: And - - - and why - - - why is
5 that? Why wouldn't there perhaps be a - - - a heightened
6 showing for a noncustomer who's essentially a stranger
7 other than perhaps a - - - a member of the public?

8 MR. SCHERKER: The New - - - the - - - the New
9 Jersey case that we - - - we refer to, Your Honor, is
10 unreported. It's noted in all of the parties' papers.
11 It's noted by the - - - by the trial court and by the
12 Appellate Division. And that's the Harry Kuskin case - - -

13 JUDGE HALLIGAN: Yeah. I - - - I read it.

14 MR. SCHERKER: - - - which - - - which deals with
15 the customer. Now - - - but to answer the question
16 directly, and I think this case is the perfect vehicle for
17 answering that question, Ben-Dor does not say she saw or
18 heard any of the alleged publicity.

19 JUDGE HALLIGAN: Well, that's a reliance question
20 maybe, but - - -

21 MR. SCHERKER: It - - - it is, Your Honor. But -
22 - - but the statements are made to the immediate world as -
23 - - as the Bank Secrecy Act seems - - - seems to require
24 and - - - and a noncustomer who did business with a
25 fraudster who had an account at Chase is no different than

1 the customer who has the - - - who - - - who - - -

2 JUDGE HALLIGAN: Why - - - why - - -

3 MR. SCHERKER: - - - made a payment. There's - -

4 -

5 JUDGE HALLIGAN: Why is that? Why wouldn't the -
6 - - the customer be able to expect, perhaps, that a special
7 relationship could be established on - - - on some lesser
8 proof?

9 MR. SCHERKER: Well, again, this customer doesn't
10 allege that she expected anything.

11 JUDGE CANNATARO: No. But this - - -

12 JUDGE HALLIGAN: No.

13 JUDGE CANNATARO: - - - customer does allege, I
14 chose to bank at Chase - - - or I don't know if she says
15 she chose to bank at Chase. But she does allege that she
16 was acting in reliance on Chase's representations about
17 anti-fraud safeguards that they put in place when deciding
18 whether to transfer money.

19 MR. SCHERKER: And she argues that.

20 JUDGE CANNATARO: Yeah.

21 MR. SCHERKER: But that's not what the complaint
22 says.

23 JUDGE CANNATARO: So she - - - your position is,
24 she never looked at those things. She didn't really know
25 anything about those things at the time she made the

1 transfer?

2 MR. SCHERKER: No. It wasn't alleged she did.

3 She - - - she - - -

4 JUDGE CANNATARO: So there's an absence of proof.

5 MR. SCHERKER: She's a - - - in the same position
6 as a member of the general public, but - - -

7 JUDGE RIVERA: So - - - so let - - - let me - - -
8 let me ask you this. Let's assume - - - I have some
9 questions for him, but let's assume for one moment that the
10 pleading alleges that there's a special relationship based
11 on the - - - the website, public statements, those public
12 representations. Why isn't that an undertaking? Why
13 doesn't that get you the special relationship?

14 MR. SCHERKER: Number one, it's not an agreement.
15 That's the first basis for creating a special relationship.

16 JUDGE RIVERA: No. I'm not asking about that
17 one. Keep going. An - - - an undertaking.

18 MR. SCHERKER: And it's - - - nor is it an
19 undertaking that the - - -

20 JUDGE RIVERA: That's the one I'm asking about.

21 MR. SCHERKER: An undertaking is an agreement
22 with the - - - that I will do this for you.

23 JUDGE HALLIGAN: But it can be a contact also, I
24 thought.

25 MR. SCHERKER: The contact is the squishiest of

1 the three.

2 JUDGE HALLIGAN: Okay. So why isn't it a contact
3 - - -

4 MR. SCHERKER: A - - - a con - - -

5 JUDGE RIVERA: I'm sorry. Before you get to - -
6 - I'm sorry. I'm just not clear on this issue. I - - - I
7 - - - I just want to understand, when you are taking this
8 position on undertaking, you're saying there has to already
9 be an express agreement?

10 MR. SCHERKER: No, Your Honor. And I - - - I
11 think - - - I think it works best in - - - in reverse. A
12 contract is a form of an undertaking. But an - - - an - -
13 - an undertaking is not a contract.

14 JUDGE RIVERA: Right.

15 MR. SCHERKER: It is something less than a
16 contract because on a contract, both sides have to agree.
17 An - - - an undertaking is, I will do this for you. It's
18 not asking you to do anything for me.

19 JUDGE RIVERA: So why is - - - why - - - why
20 aren't the public representations, which clearly are
21 targeting both a - - - a - - - a - - - a client as well as
22 a prospective client enough under New Jersey law?

23 MR. SCHERKER: Your Honor, I'm - - - I'm - - -
24 I'm trying to answer two different questions because - - -

25 JUDGE RIVERA: No. But that's a different

1 category.

2 MR. SCHERKER: That - - - that question was - - -

3 JUDGE RIVERA: I - - - I just wasn't clear on
4 this one.

5 MR. SCHERKER: That - - - that question was
6 noncustomers and customers. And I'm saying that
7 noncustomers and customers either see or don't see the same
8 things. The - - - there's nothing in the contract between
9 - - - between Ben-Dor and Chase that has any of this in it.

10 JUDGE RIVERA: I don't - - - again, why isn't it
11 an under - - - why aren't the representations an
12 undertaking? That's - - - that's a straight question.

13 MR. SCHERKER: Well, the only undertaking you can
14 get, Your Honor, from those representations - - -

15 JUDGE RIVERA: Yes.

16 MR. SCHERKER: - - - has nothing to do with what
17 happened - - -

18 JUDGE RIVERA: Okay.

19 MR. SCHERKER: - - - in the Ben-Dor's complaint.

20 JUDGE CANNATARO: Okay.

21 JUDGE RIVERA: Now, is that because one is about
22 credit cards and the other one is about - - -

23 MR. SCHERKER: LLCs.

24 JUDGE RIVERA: - - - the business account - - -
25 opening the business account?



1 MR. SCHERKER: Yes, Your Honor. It doesn't say,
2 I will protect you against a fraudster who has an account
3 at your bank.

4 JUDGE RIVERA: Okay.

5 MR. SCHERKER: There's - - - there's nothing that
6 even suggests that. The twenty-four - - -

7 JUDGE RIVERA: My apologies to Judge Halligan. I
8 believe she had a question for you.

9 JUDGE HALLIGAN: Not at all. I - - - I think we
10 were asking questions along the same lines. My question
11 was, I thought that a contact could give rise to an
12 undertaking; is that right? So why - - -

13 MR. SCHERKER: A contact can give rise to a
14 special relationship.

15 JUDGE HALLIGAN: Yeah. Sorry. Yes, to a special
16 relationship. Thank you. Why does the contact here in the
17 form of the advertisements not give rise to a special
18 relationship?

19 MR. SCHERKER: There's no allegation of a
20 contact.

21 JUDGE HALLIGAN: Well, the posting of
22 advertisements, I'm asking, why is that not a contact for
23 purposes of this framework?

24 MR. SCHERKER: It's not a contact with Ben-Dor.
25 There's no allegation that it was a contact with Ben-Dor.

1 JUDGE HALLIGAN: Okay. If - - - if - - -

2 JUDGE CANNATARO: What's your definition of
3 contact?

4 JUDGE HALLIGAN: If - - - if - - -

5 MR. SCHERKER: If I'm going to - - -

6 JUDGE HALLIGAN: If you had - - -

7 MR. SCHERKER: I'm going to read from the Central
8 - - - from the Central Check Cashing case - - -

9 JUDGE HALLIGAN: Well, but - - - but before - - -
10 before you do, let me just ask you a hypothetical instead.
11 If you had someone who said, I read the advertisements,
12 would that be a contact?

13 MR. SCHERKER: Arguably, yes, Your Honor.

14 JUDGE HALLIGAN: Okay. And just to shift gears
15 for a moment, it might not surprise you I'm more familiar
16 with New York law than New Jersey law. And - - - and under
17 New York law, there are, and may well be true under New
18 Jersey law, consumer protection statutes that allow for a
19 cause of action where a consumer alleges a deceptive
20 practice. And I - - - I think that that's essentially what
21 the allegations here are suggesting.

22 So in a hypothetical circumstance, if a business
23 makes a representation to the public in an ad, for example,
24 about their product and consumers look at those statements
25 and engage the services of that company in reliance, would

1 there be an action there that sounds in deceptive
2 practices?

3 MR. SCHERKER: Quite possibly, Your Honor. But
4 this is not a deceptive practices case.

5 JUDGE HALLIGAN: I understand that.

6 MR. SCHERKER: And - - - and - - - and I - - -
7 I've been thinking about the case along those lines because
8 it seems to me it's a - - - it's an end run consumer - - -
9 consumer fraud case by trying to - - - to shoehorn it into
10 negligence on the part - - - on the part of the bank by
11 someone who can't even allege that she relied on any
12 statement by the bank that has anything to do with the
13 events that occurred - - -

14 JUDGE RIVERA: Would she have been able to allege
15 deceptive practices - - -

16 MR. SCHERKER: I don't know, Your Honor.

17 JUDGE RIVERA: - - - claim under New Jersey law?

18 MR. SCHERKER: I don't - - - I don't - - - I
19 don't know, Your Honor, for sure - - - for - - - because I
20 don't know what she relied on. She doesn't say what she
21 relied on. The complaint doesn't plead it.

22 JUDGE RIVERA: But say she relied on those
23 representations. Let's just say she relied on those
24 representations.

25 MR. SCHERKER: No, not these representations, no.

1 Because she wasn't injured by - - - by those represent - -
2 - by those representations. She allegedly was injured
3 because the bank allowed someone to open an account. Now,
4 the documents about that account were - - -

5 JUDGE RIVERA: Because it's in - - - well, she
6 argues because you - - - the bank violated its own policies
7 and practices as set out in those representations.

8 MR. SCHERKER: That's correct. No, not in those
9 representations that they - - - the LLC representations - -
10 -

11 JUDGE RIVERA: Yes.

12 MR. SCHERKER: - - - which are not public
13 advertisements. That's a bank policy. Those are bank
14 policy documents.

15 JUDGE RIVERA: They weren't - - -

16 MR. SCHERKER: They're not - - -

17 JUDGE RIVERA: I'm sorry. So - - -

18 MR. SCHERKER: They're not spread - - -

19 JUDGE RIVERA: So - - -

20 MR. SCHERKER: - - - out all over the newspapers.

21 JUDGE RIVERA: Where - - - where would they have
22 been?

23 MR. SCHERKER: I don't know, Your Honor. They're
24 attached to the complaint, but they're not - - - they - - -
25 if you look - - -

1 JUDGE RIVERA: They were attached to the
2 complaint?

3 MR. SCHERKER: Yes. If you look at the - - - if
4 you look at the documents, they're not advertisements.

5 JUDGE RIVERA: Okay.

6 MR. SCHERKER: I mean, on their face, they're not
7 advertisements.

8 JUDGE RIVERA: Do you know if - - - I'm sorry.
9 Do you know if the language is set out in those documents
10 was in effect at the time she alleges that she was
11 defrauded?

12 MR. SCHERKER: I don't - - - I don't know whether
13 that policy was in effect.

14 JUDGE RIVERA: Okay.

15 MR. SCHERKER: The case never got that far. I -
16 - - I see my - - - my - - - I have one minute of time
17 remaining - - - remaining, so I'll save that for rebuttal,
18 if I might. Thank you.

19 CHIEF JUDGE WILSON: Of course.

20 MR. BOWEN: May it please this court. I'm
21 Michael Bowen. I represent the respondent and the
22 plaintiff below, Gisele Ben-Dor, who is a retiree who lost
23 \$300,000 because the bank told her your security - - - your
24 security - - -

25 JUDGE RIVERA: When did the bank do that?



1 MR. BOWEN: Well, in the complaint, we - - -

2 JUDGE RIVERA: They had a conversation with her,
3 you mean?

4 MR. BOWEN: In direct emails, Judge. She - - -
5 she was a private banking customer. She had a private
6 banker who was a Chase banker.

7 JUDGE RIVERA: Is this in the complaint?

8 MR. BOWEN: It's not in the complaint.

9 JUDGE RIVERA: Okay. So I'm just interested in
10 what's in the complaint - - -

11 MR. BOWEN: Okay.

12 JUDGE RIVERA: - - - with respect to the
13 allegations. I read that complaint to allege that the duty
14 that was breached is the duty based on the fact that she
15 was a customer. I can't find anything else other than
16 that. So can you help me and point to the paragraphs - - -

17 MR. BOWEN: Yes.

18 JUDGE RIVERA: - - - that say it's more than just
19 being a customer? Because under New Jersey law, that's
20 insufficient.

21 MR. BOWEN: It is more. And it is in the
22 complaint.

23 JUDGE RIVERA: Okay.

24 MR. BOWEN: Paragraph 5 of the complaint, which
25 is - - -

1 JUDGE RIVERA: Okay.

2 MR. BOWEN: - - - page 12.10 in the record - - -

3 JUDGE RIVERA: Yes.

4 MR. BOWEN: - - - says that the plaintiff - - -
5 the plaintiff - - -

6 JUDGE RIVERA: Yes.

7 MR. BOWEN: - - - was encouraged by the bank - - -
8 -

9 JUDGE RIVERA: Yes.

10 MR. BOWEN: - - - to have confidence that the
11 intrabank transfers - - - intrabank, and you know - - -

12 JUDGE RIVERA: Yes.

13 MR. BOWEN: - - - one Chase account to the next
14 are legitimate, properly vetted bank accounts. That's the
15 allegation.

16 JUDGE HALLIGAN: But where is there an allegation
17 that she actually read these?

18 MR. BOWEN: Well, the reality is, is that the
19 complaint doesn't make it that explicit because - - -

20 JUDGE HALLIGAN: Well - - - well, where would you
21 point us to at all to suggest that she read them in the
22 complaint?

23 MR. BOWEN: It's a fair inference from - - - from
24 way - - - the way that the complaint is written. And
25 paragraph 5, which is in the very beginning of the

1 complaint - - -

2 JUDGE RIVERA: Does it say that policy was in
3 effect at the time of the fraud?

4 MR. BOWEN: The bank policy?

5 JUDGE RIVERA: Yes. That's attached to the
6 complaint. You agree it's attached to the complaint?

7 MR. BOWEN: The - - - there was nothing attached
8 to the complaint. That was a misstatement by counsel.

9 JUDGE RIVERA: Oh, okay.

10 MR. BOWEN: That's just not true.

11 JUDGE RIVERA: I didn't see any attachments.
12 Were there attachments?

13 MR. BOWEN: No, there were not.

14 JUDGE RIVERA: Okay.

15 MR. BOWEN: The reason - - - there were
16 attachments later on because when the bank moved to dismiss
17 after discovery started, they tried to short circuit
18 discovery when we were demanding to take depositions of
19 their officers by moving to dismiss - - -

20 JUDGE RIVERA: Yes.

21 MR. BOWEN: - - - on this concept of no duty and
22 also moving for summary judgment, saying that they actually
23 complied - - - complied with their own statements of how
24 they vet these accounts. When - - - in responding to that,
25 we put in what we had known publicly.

1 JUDGE RIVERA: So is that policy - - - is that
2 policy publicly posted?

3 MR. BOWEN: Well, it is publicly posted in the
4 sense that what the bank says repeatedly is your security
5 is our - - -

6 JUDGE RIVERA: No, no, no, no.

7 MR. BOWEN: - - - number one priority.

8 JUDGE RIVERA: I walk into Chase. Would I see
9 this policy somewhere?

10 MR. BOWEN: It's on their website.

11 JUDGE RIVERA: That policy?

12 MR. BOWEN: Yes.

13 JUDGE RIVERA: That you attached?

14 MR. BOWEN: Yes.

15 JUDGE RIVERA: Is on the website?

16 MR. BOWEN: The - - - the - - - we didn't get
17 that in discovery.

18 JUDGE RIVERA: For anybody, not just for - - -

19 MR. BOWEN: Correct.

20 JUDGE RIVERA: - - - customers?

21 MR. BOWEN: Correct.

22 JUDGE RIVERA: Okay. The - - - the credit card I
23 know is from the website, right? Would you describe - - -

24 MR. BOWEN: Yes.

25 JUDGE RIVERA: That's the - - -



1 MR. BOWEN: We attached that - - -

2 JUDGE RIVERA: Yes. That's from the website.

3 MR. BOWEN: - - - also in our opposition summary
4 judgement.

5 JUDGE RIVERA: So how - - - how do
6 representations regarding credit cards go to the fraud that
7 she's alleging, which has nothing to do with credit cards?

8 MR. BOWEN: Because the representations that are
9 alleged in the complaint - - -

10 JUDGE RIVERA: Yes.

11 MR. BOWEN: - - - from the bank don't specify
12 credit cards. They say that your security is our number
13 one priority. Not just credit cards, but all of your
14 bank's - - - banking security.

15 JUDGE RIVERA: I'm sorry. I didn't see that. I
16 saw only language related to the credit cards or the - - -
17 or these other kinds of special cards.

18 MR. BOWEN: That's not in the complaint. We - -
19 - we don't - - -

20 JUDGE RIVERA: Well, that's - - - that's - - -
21 yes, that's right. It's not in the complaint because it's
22 - - - it's the - - - you don't - - - you didn't attach it.
23 So we're left with whatever language you have.

24 MR. BOWEN: What we - - - what we had and what we
25 allege in the complaint was based on what the plaintiff

1 understood at the time from her memory that we were trying
2 to get this stuff in discovery, which never - - -

3 JUDGE HALLIGAN: But what - - - what can we go on
4 - - -

5 MR. BOWEN: - - - even today is not finished,
6 though.

7 JUDGE HALLIGAN: What can we go on other than
8 what's in the complaint in evaluating - - -

9 MR. BOWEN: The fair inference - - -

10 JUDGE HALLIGAN: - - - what they purport?

11 MR. BOWEN: The fair inference from the complaint
12 - - -

13 JUDGE HALLIGAN: And - - - and where - - -

14 MR. BOWEN: The fair inference - - -

15 JUDGE HALLIGAN: What language would you point us
16 to to draw an inference? Well, first of all, what exactly
17 is the inference, that - - - that she reviewed and relied
18 upon the representations?

19 MR. BOWEN: Yes.

20 JUDGE HALLIGAN: Okay.

21 MR. BOWEN: Because that's stated in paragraph 5,
22 that she was encouraged by the bank to rely on this
23 representation.

24 JUDGE CANNATARO: You - - - counsel, I - - -

25 JUDGE HALLIGAN: Now, I - - - I don't - - - I



1 don't know - - - okay.

2 JUDGE CANNATARO: I - - - I just want to ask. I
3 - - - I certainly understand that reliance is one of the
4 prongs of what I'm going to assume is New York and New
5 Jersey sort of common special duty jurisprudence, but it's
6 - - - it has to be reliance on something that has been
7 recognized as creating a special duty. Your adversary
8 said, a contract, an undertaking, or maybe - - -

9 MR. BOWEN: Contact.

10 JUDGE CANNATARO: -- - maybe contact. So which
11 - - - which one of those are you going on here when you say
12 she relied? Certainly not a contract, right?

13 MR. BOWEN: No. Undertaking.

14 JUDGE CANNATARO: And - - - and - - - and where -
15 - - where was the undertaking to say - - - because my
16 understanding is, I think, roughly similar to - - - to your
17 adversary's, which is, there has to be something like - - -
18 where you say, don't worry, we've got you covered. And - -
19 - and you're saying that's in the - - - the materials?
20 That's it?

21 MR. BOWEN: That's - - - that's what the bank was
22 saying through its advertising campaign to its customers.
23 It was saying, we - - - don't worry. We have you covered.

24 JUDGE CANNATARO: So they've - - - they've
25 covered - - -

1 MR. BOWEN: Your security is our concern.

2 JUDGE CANNATARO: Everybody who - - - who reads
3 that should consider themselves covered for anything?

4 MR. BOWEN: It was for the benefit of the
5 customers that the bank was taking that on anything.

6 JUDGE GARCIA: For anything - - - for any harm
7 that comes to them through any kind of fraud in the bank,
8 they're covered - - -

9 MR. BOWEN: No.

10 JUDGE GARCIA: - - - by saying, your security is
11 our top priority?

12 MR. BOWEN: Because they are - - - they have
13 common sense security measures in place.

14 JUDGE GARCIA: For anything. So if - - -

15 MR. BOWEN: Well, yes.

16 JUDGE GARCIA: - - - I walked out of the bank,
17 and I was mugged, they're covered because your security is
18 their priority for me?

19 MR. BOWEN: Well, if you're inside the bank, yes.

20 JUDGE GARCIA: No. What if I walked out, but you
21 know - - - you know, I'm walking out with cash and security
22 is your top priority - - - my security.

23 MR. BOWEN: Well, I think there are limitations
24 in what we're suggesting.

25 JUDGE GARCIA: So what are the limitations?



1 MR. BOWEN: Based on the reasonableness of what
2 the bank itself is saying, the bank in - - - in this case
3 is saying, we protect our customers from fraudulent
4 transfers to bank - - - to other Chase Bank accounts - - -

5 JUDGE TROUTMAN: And is it stated they protect
6 their customers from themselves be - - - falling - - -
7 falling to improper overture that causes them to release
8 the money?

9 MR. BOWEN: Well, no. No, Judge. If - - - if
10 there is a - - - a distinction in the law between customers
11 who have the - - - their own people are embezzling the
12 money, and the bank says, we can't protect you against
13 that.

14 JUDGE TROUTMAN: No. If you voluntarily turn
15 over your money to someone, you're saying that - - - that
16 you shouldn't have given to them because they fraudulently
17 got you to turn it over, the bank is guaranteeing you that
18 they were to protect you from yourself, essentially?

19 MR. BOWEN: No. Because the - - - the - - - the
20 - - - what the representation is that we allege in the
21 bank, the - - - we allege in the complaint, the undertaking
22 was that if it's our bank account, if it's a Chase Bank
23 account, we took reasonable steps to make sure that that
24 person is real and it's a real company.

25 JUDGE TROUTMAN: So the bank here - - -

1 MR. BOWEN: And that's what the - - -

2 JUDGE RIVERA: I mean, where - - - where - - -
3 where was that in the attachments? We're going to take
4 reasonable steps. I see a list of criteria. I see a list
5 of particular documents. What I don't see is something
6 that says, and we will never open an account without any of
7 this.

8 MR. BOWEN: It says - - -

9 JUDGE RIVERA: Because - - -

10 MR. BOWEN: We allege - - -

11 JUDGE RIVERA: I mean, I think you understand - -
12 -

13 MR. BOWEN: I do, Judge.

14 JUDGE RIVERA: - - - that businesses often will
15 waive requirements for customers. There's nothing there to
16 suggest otherwise.

17 MR. BOWEN: Well, in paragraph 16 to 19 - - -

18 JUDGE RIVERA: Okay.

19 MR. BOWEN: - - - record page 12.12 through .13 -
20 - -

21 JUDGE RIVERA: Okay.

22 MR. BOWEN: - - - we cite the bank's public
23 representations of what it does to make sure that when a
24 business account is opened, it's a real human being behind
25 it and a real business.



1 JUDGE RIVERA: But she doesn't say - - -

2 MR. BOWEN: And - - -

3 JUDGE RIVERA: - - - I read that.

4 MR. BOWEN: Well, she says, I was encouraged by
5 the bank to understand that that's what you do.

6 JUDGE RIVERA: And - - - and how was she
7 encouraged?

8 MR. BOWEN: Because of the - - - the publication
9 of - - - of all the advertisements that we cite in the bank
10 - - -

11 JUDGE RIVERA: That she said she read them?

12 MR. BOWEN: - - - we cite in the complaint.

13 JUDGE RIVERA: She said she read them?

14 JUDGE CANNATARO: That she didn't read it?

15 MR. BOWEN: It's a fair inference that she read
16 them because she said, I was encouraged by the bank to come
17 to this conclusion.

18 JUDGE TROUTMAN: Does it matter if she actually
19 read them?

20 MR. BOWEN: Well, the fact of the matter is, is
21 that she did, and she was contacted directly by the private
22 banker.

23 JUDGE HALLIGAN: But - - - but if - - - if - - -
24 if she - - -

25 MR. BOWEN: And that's not in the record because



1 this is a motion to dismiss when it should - - - it should
2 be decided - - - this court should be deciding this issue
3 on a full record.

4 JUDGE HALLIGAN: Counsel, if she had not read
5 them, would you still have a case?

6 MR. BOWEN: That's a very interesting question,
7 Judge. I think the answer to that is no, but that's not my
8 case.

9 JUDGE HALLIGAN: Okay.

10 MR. BOWEN: She did here.

11 JUDGE HALLIGAN: And so - - - so then it seems to
12 me that - - - that the answer rises or falls on whether - -
13 - at least in part on whether or not there is a fair
14 inference to be drawn. If there isn't, it sounds like you
15 - - - you're acknowledging at least that it would be a much
16 harder climb?

17 MR. BOWEN: Judge Halligan, I agree with that.
18 But I want to point out two things, if I may. The first
19 one is that, one of the reasons why we're all the way up
20 here to the highest court in our state addressing a point
21 of New Jersey law, which I agree is really the same as New
22 York law, is that this is being done on a motion to
23 dismiss, and it's not being done on a full record. A lot
24 of the cases - - -

25 JUDGE RIVERA: Well - - - well, because there's a

1 challenge to the pleading. So we're going through the
2 pleadings. And that's why you're being asked these
3 particular questions about what would be the reasonable
4 inferences and how can we get there. So if I understood
5 you - - -

6 MR. BOWEN: But is that a clear motto, Judge?

7 JUDGE RIVERA: - - - if I've understood you,
8 paragraph 5 gets you the assertion of the duty.

9 MR. BOWEN: And a fair inference that she read.

10 JUDGE RIVERA: From - - - but only from paragraph
11 5; am I correct?

12 MR. BOWEN: Well, along with paragraph 16 to 19.

13 JUDGE RIVERA: Okay. So 5, 16, and 19, you say,
14 if I read those three, and I read nothing else - - -

15 MR. BOWEN: I'm sorry, Judge.

16 JUDGE RIVERA: - - - that's going to allow - - -
17 16 and - - -

18 MR. BOWEN: 16, 17, 18, 19, so - - -

19 JUDGE RIVERA: Oh, 16 through 19 - - - excuse me.

20 MR. BOWEN: So five all - - -

21 JUDGE RIVERA: - - - would allow - - - would
22 allow me - - - my apologies - - - would allow me to draw
23 the inference of the basis for the duty is more than the
24 mere status as a client of - - -

25 MR. BOWEN: Yeah.

1 JUDGE RIVERA: - - - of the bank?

2 MR. BOWEN: As a customer, yes. And I - - -

3 JUDGE RIVERA: Customer. I'm sorry.

4 MR. BOWEN: Yes. And I agree. And - - - and all
5 I'm asking for is just two points.

6 JUDGE RIVERA: So if we disagree with you on
7 that, then the pleading is flawed, correct?

8 MR. BOWEN: Then I should be allowed to replead.
9 And the point - - - the point I'm trying to make - - -

10 JUDGE RIVERA: Well, but - - - but - - - but with
11 respect to this pleading whether or - - -

12 MR. BOWEN: Yes. Yes.

13 JUDGE RIVERA: Right.

14 MR. BOWEN: But the point I'm trying to make,
15 Judge, is that the - - - the - - - the reason it's not
16 clearer is because these markers weren't there. There are
17 no - - - there is no case law below that says, you got to
18 make sure you plead that she heard the - - - you know, got
19 the contact of the undertaking - - -

20 JUDGE RIVERA: No. But the - - - these are
21 general pleadings, but - - -

22 MR. BOWEN: - - - or read the undertaking.

23 JUDGE RIVERA: Sir, these are general pleadings
24 standards, right?

25 MR. BOWEN: Yes. And they are general pleading

1 standard. This is not a heightened pleading standard. We
2 don't have to get into the nitty gritty. She pled, I was
3 led to believe by the bank - - -

4 JUDGE RIVERA: Yeah.

5 MR. BOWEN: - - - that this is what they do. And
6 then if you want the details, well, that's going to come
7 from discovery, and some of that we already have, so - - -

8 JUDGE RIVERA: But the basis for I was led by the
9 bank are those attachments, correct?

10 MR. BOWEN: It's not an attachment to the
11 complaint. It's the statements in the complaint.

12 JUDGE RIVERA: No, no, no. Later on - - -

13 MR. BOWEN: It's - - -

14 JUDGE RIVERA: - - - that - - - that's what
15 you're relying on?

16 MR. BOWEN: It's not - - - we're not just relying
17 on what we put in on summary judgment because that was all
18 we had, Judge. We didn't have the discovery to put in a
19 full record. That - - - all we had was what was publicly
20 available.

21 JUDGE RIVERA: Yes. But she - - - she knows what
22 she alleges she relied on, right?

23 MR. BOWEN: Yes.

24 JUDGE RIVERA: She knows for herself.

25 MR. BOWEN: Yes.



1 JUDGE RIVERA: So as far as I can tell, it's - -
2 - that's not attached to the pleading, but let's just go
3 with what appears, as I understand you to be - - - which
4 her - - - is her reference point, which is this policy, and
5 then - - - which is on the website and this website part -
6 - - the part of the website that's referring to credit
7 cards and other kinds of cards.

8 MR. BOWEN: And what she was told by the bank,
9 which is a fair inference from paragraph 5.

10 JUDGE RIVERA: Okay. You're - - - you're saying
11 that the pleading alleges an actual conversation with a
12 representative from the bank?

13 MR. BOWEN: That an undertaking that the bank
14 made - - - made directly to her, yes, because what it says
15 - - -

16 JUDGE HALLIGAN: Verbal - - - but verbally or
17 only by - - -

18 MR. BOWEN: Yes.

19 JUDGE HALLIGAN: So - - -

20 MR. BOWEN: Yes.

21 JUDGE HALLIGAN: So you're asking us to infer
22 that there was a oral conversation between a bank
23 representative and - - - and your client from the words,
24 customers like Ms. Ben-Dor?

25 MR. BOWEN: Yes. That's the - - - that's as

1 close as we get, Judge, because that's all the information
2 that we have.

3 JUDGE SINGAS: Well, don't you also have to plead
4 the requisite undertaking - - -

5 MR. BOWEN: Yes.

6 JUDGE SINGAS: - - - adequately? And look, I'm
7 no expert in New Jersey law. I have enough problem with
8 New York law. But there's a case that says - - - ADS
9 Associates Group that says, in New Jersey, you have to
10 focus on the bank's interactions with the plaintiff
11 individually. So how - - - how did you prove that, or how
12 did you adequately plead that?

13 MR. BOWEN: Well, the language both in ADS and
14 City Check Cashing, and in Kuskin, all say that the
15 undertaking has to be made, quote, "for the benefit of,"
16 not an undertaking made directly to the plaintiff. That's
17 not in the standard of those - - -

18 JUDGE SINGAS: I think ADS said they focused
19 narrowly on the bank's interactions with the plaintiff
20 individually. They weren't interested in a more
21 generalized undertaking.

22 MR. BOWEN: Well, none of those cases directly
23 address the issue of whether the undertaking had to be made
24 or communicated or relayed directly to the plaintiff.

25 JUDGE CANNATARO: Yeah. But Counsel - - -

1 MR. BOWEN: Those are not addressed.

2 JUDGE CANNATARO: - - - that question goes to
3 what's an undertaking, not who it's for the benefit of. I
4 mean, that - - - that might be perfectly valid New Jersey
5 law with respect to who - - - for whose benefit was the
6 undertaking made? But what is an undertaking? And we've
7 sort of established that an undertaking is most often or
8 maybe always some direct contact between the - - - the - -
9 - the person who's making a promise and the person who is
10 relying on the promise. And you seem to be skirting that
11 question.

12 MR. BOWEN: I don't mean to, Judge. What I mean
13 - - -

14 JUDGE CANNATARO: Was there direct contact?

15 MR. BOWEN: Well, in - - - in this case, there
16 was. And my point is - - - my position is - - -

17 JUDGE RIVERA: The - - - I'm sorry. There was or
18 was not?

19 MR. BOWEN: There was.

20 JUDGE RIVERA: There was.

21 MR. BOWEN: And my position is, you can fairly
22 infer that from what's alleged in the complaint - - -

23 CHIEF JUDGE WILSON: So why didn't you - - -

24 MR. BOWEN: - - - maybe not as clearly as it
25 could - - -

1 CHIEF JUDGE WILSON: Why didn't you - - -

2 MR. BOWEN: - - - have been written if I - - -

3 CHIEF JUDGE WILSON: Why didn't - - - right.
4 That's the question. Why didn't you plead that then?

5 MR. BOWEN: Because I'm dealing with an elderly
6 client, Judge. I was dealing with the allegations as I
7 understood them to be. My understanding was that she was
8 told this directly.

9 CHIEF JUDGE WILSON: But she doesn't know the
10 name of the banker she spoke with or the words the banker
11 used or - - -

12 MR. BOWEN: She - - - she certainly does, maybe
13 not the words, but there's no heightened pleading here.

14 JUDGE RIVERA: Well, if someone - - -

15 MR. BOWEN: I didn't have to get to that detail.

16 JUDGE RIVERA: I understand. But if some - - -

17 MR. BOWEN: And there's more than just that.

18 JUDGE RIVERA: But if someone spoke with her, it
19 certainly could plead, a bank representative told me.

20 MR. BOWEN: Yes. That could have been more
21 directly done.

22 JUDGE RIVERA: Even if she doesn't remember the
23 name, even if she doesn't remember the date, right? I mean
24 - - -

25 MR. BOWEN: My - - - my point - - -



1 JUDGE RIVERA: If - - -

2 MR. BOWEN: - - - is twofold, so - - -

3 JUDGE RIVERA: But since - - - all I'm saying is,
4 if that's not there, how are we to infer that?

5 MR. BOWEN: It's because you use the liberal
6 reading of - - - of a complaint at this early stage.

7 JUDGE RIVERA: Yeah. But how liberal can one be?
8 What - - - what words can you point - - - again, we're at 5
9 and 16 to 19?

10 MR. BOWEN: 16, yes.

11 JUDGE RIVERA: Okay.

12 MR. BOWEN: That - - - that's in my - - - my
13 second point though is that even under the precedent as it
14 existed at the time this complaint was filed five years ago
15 was, there was no clear requirement that that undertaking
16 had to be communicated directly to the plaintiff. It was
17 enough to say - - - I see I'm out of time - - - that the
18 complaint was for the benefit of a class of people and that
19 class of people were told the - - - so the customers as a
20 whole were told that. If I can have just one second
21 indulgence, there is another breach here, another duty,
22 which was never briefed below. And it's in the - - - it's
23 in the complaint and is in both of the briefs that we
24 submitted below. And that is that, at a certain point in
25 time after the fraud, the plaintiff told the bank about the

1 fraud and then the bank did nothing. Now, that is a
2 separate set of issues and a separate stand - - - set of
3 standards. We address it in our brief. It hasn't been
4 addressed.

5 JUDGE RIVERA: May I just ask? I - - - I do know
6 that - - - that, as a factual assertion, that is in the
7 complaint - - - amended complaint. You're absolutely - - -

8 MR. BOWEN: Yes.

9 JUDGE RIVERA: - - - right. Is there a cause of
10 action?

11 MR. BOWEN: Yes.

12 JUDGE RIVERA: Based on that?

13 MR. BOWEN: Yes. Negligence. The bank knew that
14 it had been an instrumentality of fraud, that it had
15 control of the proceeds of that fraud, the stolen funds,
16 and it did nothing.

17 JUDGE RIVERA: So the - - - so the fourth cause
18 of action encompasses this is what you're telling me?

19 MR. BOWEN: It's - - - it's in the - - - the
20 third - - - yes - - - the fourth cause of action, yes,
21 Judge.

22 JUDGE RIVERA: The other ones are about the
23 individuals?

24 MR. BOWEN: Yes.

25 JUDGE RIVERA: Okay.

1 MR. BOWEN: That's correct.

2 JUDGE RIVERA: Thank you.

3 JUDGE CANNATARO: Can - - - can I just ask you,
4 did - - - did - - - did your client see or receive anything
5 regarding the revocability of wire transfers?

6 MR. BOWEN: It was in some kind of customer
7 contract that - - - that when you open a bank account, they
8 give you a customer transfer?

9 JUDGE CANNATARO: No, no, no. But when you make
10 a wire transfer, do you - - - do you get anything? Do you
11 get, like, a receipt from the bank?

12 MR. BOWEN: I think - - - I think she does, Your
13 Honor. That's not been a fact that we've litigated here,
14 but it has just bare information.

15 JUDGE CANNATARO: I'm only asking because in the
16 - - - in the grand total of one wire transfer I've ever
17 done in my life, there was - - - I remember some language
18 that seems to say, once you do this, you really can't undo
19 it.

20 MR. BOWEN: Right. And we're not arguing that
21 she should have been allowed to undo that wire because she
22 did authorize it. What we're - - - our argument is that
23 the bank failed in its duty of care by allowing that
24 fraudulent fake bank account to be opened in - - - in the
25 beginning.

1 JUDGE CANNATARO: Oh, so she just - - -

2 MR. BOWEN: That bank account had an
3 identification number of 00000.

4 JUDGE CANNATARO: So are you saying she went to
5 the bank to complain about the fraud before she did the
6 wire transfer?

7 MR. BOWEN: After. So after she found out about
8 the fraud - - -

9 JUDGE CANNATARO: And you said the bank did
10 nothing about it. And my question really then boils down
11 to, what it is - - - what is it that you expected the bank
12 to do?

13 MR. BOWEN: Because the bank was told that it was
14 used as an instrumentality in committing a crime that - - -

15 JUDGE CANNATARO: What is it that you expected
16 the bank to do?

17 MR. BOWEN: To stop the money from being taken
18 out of that Chase Bank account.

19 JUDGE CANNATARO: You have about thirty minutes
20 to do that - - -

21 MR. BOWEN: I see.

22 JUDGE CANNATARO: - - - after you initiate the
23 transfer. Did she complain within thirty minutes of
24 initiating the transfer?

25 MR. BOWEN: No. It's - - - but it's not - - -

1 it's not based on the wire transfer. It's not based on her
2 saying, I made a mistake. I didn't mean to authorize that,
3 or that was not authorized. It was authorized. The
4 question is, if the bank is later told you have been
5 complicit in a crime, the - - -

6 JUDGE HALLIGAN: But that just collapses on the
7 first theory, it seems to me. Then you're basically saying
8 the bank should have prevented the harm given the
9 representations it made, which, I think, is - - - is the -
10 - - the core theory that you have.

11 MR. BOWEN: Our argument, and it is in the
12 complaint, is that it's a separate set of facts and a
13 separate duty that was - - - because they were told that
14 they were complicit in the fraud, and then they did
15 nothing.

16 JUDGE RIVERA: If they had already released the
17 money, what were they going to do?

18 MR. BOWEN: Well, then there's no recovery. And
19 there's just the - - - the - - - they didn't do anything
20 wrong. They tried to get it back, and she can't - - - it's
21 out of their hands. That's fine.

22 JUDGE RIVERA: When - - - when does the complaint
23 - - - this, I actually don't remember. Does the complaint
24 allege when she told them - - - like, how long after - - -

25 MR. BOWEN: Yes.

1 JUDGE RIVERA: - - - she had approved the
2 transfer?

3 MR. BOWEN: It does not because we - - - we
4 didn't know whether the money was still in the account at
5 that time.

6 JUDGE RIVERA: No. No. But she must know when
7 she complained.

8 MR. BOWEN: Yeah. It was a few days after.

9 JUDGE RIVERA: Okay.

10 MR. BOWEN: And I don't remember if that's in the
11 complaint or not.

12 JUDGE RIVERA: But it - - - I - - - I don't - - -

13 MR. BOWEN: But it was in a matter of days,
14 Judge.

15 JUDGE RIVERA: Okay. Thank you.

16 CHIEF JUDGE WILSON: Thank you.

17 MR. BOWEN: Thank you, all.

18 MR. SCHERKER: Paragraph 5 of the amended
19 complaint does not allege that Ben-Dor saw anything or read
20 anything. It says - - - and I'm not going to read 16
21 through 18 because all those paragraphs do is list what's
22 in the attachments that were filed after the amended
23 complaint was filed by the plaintiff. Chase Bank was at
24 all relevant times on notice that criminal elements have
25 sought and continue to seek open fraudulent bank accounts



1 with Chase Bank as a major, reputable U.S. bank in order to
2 defraud Chase Bank customers.

3 Chase Bank customers like Ben-Dor reasonably rely
4 on Chase Bank's fraud protection policies and - - - and are
5 encouraged by the bank to have confidence that intrabank
6 transfers to other Chase Bank accounts, like the transfers
7 induced by Alchemy, are to - - - are to legitimate,
8 properly vetted bank accounts, not fraudulent ones. It
9 doesn't allege anything about what Ben-Dor actually saw or
10 read. In terms of - - -

11 JUDGE RIVERA: But if it says - - - if it says
12 customers, she - - -

13 MR. SCHERKER: Reasonably rely and are encouraged
14 - - -

15 JUDGE RIVERA: And she's a customer.

16 MR. SCHERKER: She's a customer. It doesn't
17 allege all customers. It alleges that they were told what
18 - - - what it says in the complaint and what it says in the
19 advertising documents.

20 CHIEF JUDGE WILSON: It doesn't literally say she
21 relied. I'm right in front of you.

22 MR. SCHERKER: Absolutely, Your Honor.

23 CHIEF JUDGE WILSON: It actually says, customers
24 like her.

25 MR. SCHERKER: Yes. Exactly right, Your Honor.



1 CHIEF JUDGE WILSON: And if I said people like me
2 tend to love, you know, swimming, but I can't swim, that
3 doesn't mean I can swim.

4 MR. SCHERKER: Judge, I - - - I - - - I - - - I
5 wish I'd said it that well. Thank you. In terms of what
6 the law was at the time this complaint was filed, I'd refer
7 the court to the 2001 City Check Cashing case, which says
8 in so many words, an undertaking is the willing assumption
9 of an obligation by one party with respect to another or a
10 pledge to take or refrain from taking particular action.
11 That was the law in 2001. It hadn't changed be - - - it
12 hadn't changed by the time the - - - the - - - the
13 complaints were filed. The arguments on amending - - -

14 JUDGE RIVERA: Can I ask you, what about
15 paragraph 5?

16 MR. SCHERKER: What about paragraph 5, Your
17 Honor?

18 JUDGE RIVERA: When I - - - when I asked him,
19 where else can I look for the duty?

20 MR. SCHERKER: Correct.

21 JUDGE RIVERA: So what - - - what do - - - how do
22 you read that paragraph 5? You're just saying because it
23 just says customers, and therefore, it can't apply to her?
24 Or do you mean even assuming that that had been directed to
25 her and she saw it, it still wouldn't be a duty?

1 MR. SCHERKER: Because it isn't the - - - what is
2 told to customers - - -

3 JUDGE RIVERA: Yeah.

4 MR. SCHERKER: - - - isn't what she alleges she
5 supposedly, maybe, conceivably, in counsel's mind, relied
6 on. And if you go to paragraph 16 through - - - now 16
7 through 18, I believe - - -

8 MR. BOWEN: 19.

9 MR. SCHERKER: 19. Thank you. It's - - - it's
10 growing - - - 12.12 through 12.13 of the record, all that
11 does is recite what's in the attachments. It doesn't say
12 anything about what Ben-Dor saw.

13 JUDGE RIVERA: In the - - - in subsequent
14 submissions, the attachments.

15 MR. SCHERKER: Correct.

16 JUDGE RIVERA: Not - - - that's not attached to
17 the amended complaint.

18 MR. SCHERKER: Correct. So that's all - - - that
19 is all that it alleges in terms of duty. And if you go to
20 paragraph - - -

21 JUDGE RIVERA: And if we just look at that, as I
22 understand your position, is that not - - -

23 MR. SCHERKER: If I may, Your Honor.

24 JUDGE RIVERA: If I understand your position, the
25 language in those attachments is not enough to rise to the

1 level of creating a special relationship?

2 MR. SCHERKER: And we also have to look at
3 paragraph 55 under the fourth cause of action, which is at
4 pages 12.19 through 12.20. It lists all the alleged
5 violations of duty, none of which had anything to do with
6 returning the money. So that's important to note.

7 JUDGE RIVERA: Yeah. But the violation of the
8 duty is the breach?

9 MR. SCHERKER: Correct.

10 JUDGE RIVERA: We're - - - we're at the duty
11 stage - - -

12 MR. SCHERKER: I understand.

13 JUDGE RIVERA: - - - before we worry about
14 whether or not they properly alleged a breach.

15 MR. SCHERKER: It alleges the bank violated its
16 duty of care to plaintiff by violating its own posted
17 antifraud and fraud protection policies and procedures
18 intended to protect bank customers. That's the violation
19 and the duty all in one sentence, Your Honor. And there's
20 nothing about - - - about relying on intrabank transfers.
21 Our position, as I said earlier, is as exactly the same as
22 to both customers and noncustomers - - -

23 JUDGE RIVERA: So what about - - - I think it's
24 paragraph 54. It says they - - - they had a duty to me as
25 a customer. Isn't that the duty?

1 MR. SCHERKER: Paragraph 54 is - - -

2 JUDGE RIVERA: I think it's 54.

3 MR. SCHERKER: Defendant, Chase Bank, at all
4 times owed a duty of care to plaintiff as a customer - - -

5 JUDGE RIVERA: As a customer.

6 MR. SCHERKER: - - - as a customer, correct.

7 JUDGE RIVERA: Isn't that just the assertion of
8 the duty?

9 MR. SCHERKER: It owed - - - it owed - - - it - -
10 - it owed a duty of - - -

11 JUDGE RIVERA: That it's a customer. That's the
12 - - -

13 MR. SCHERKER: What is the duty of care, Your
14 Honor? The duty of care could be the contract. The duty
15 of care could be any number of things.

16 JUDGE RIVERA: I understand. But my - - - my
17 point is, doesn't paragraph 54 naturally read, no matter
18 how liberal one reads it, no matter how many inferences
19 you're willing to give, state that the duty is grounded on
20 her status as a customer and nothing else?

21 MR. SCHERKER: That's correct, Your Honor. That
22 is their allegation. And I'm - - - I'm - - - I was
23 responding to the question I didn't get to answer in - - -
24 in my opening about noncustomers who see the same
25 information that Ben-Dor supposedly might have conceivably

1 seen or - - - or not seen, but it's all exactly the same
2 thing. I see that advertisement. I say, well, Chase is a
3 good place for me to put my money. I'm going to put my
4 money there. And then something like what happened to Ms.
5 Ben-Dor happens to me. There's no guarantee of any kind in
6 those materials that the noncustomer is going to be treated
7 any differently than the existing customer.

8 JUDGE RIVERA: Well, how would you articulate - -
9 - I asked you at the very beginning - - - I know your red
10 light is on now, but how would you very quickly articulate
11 what is the open question of New Jersey law that's
12 presented here?

13 MR. SCHERKER: Your Honor, I would say that there
14 is no - - - in light of - - - in light of Capital City
15 Checking - - -

16 JUDGE RIVERA: Yeah.

17 MR. SCHERKER: - - - there is no open question of
18 New Jersey law - - -

19 JUDGE RIVERA: Oh, now there is no - - - okay.

20 MR. SCHERKER: - - - on what the duty of a bank
21 is to a - - - to a depositor unless there's a special
22 relationship. Otherwise, it is a creditor-debtor
23 relationship.

24 JUDGE RIVERA: So there's no open question
25 regarding whether or not these types of represent - - -

1 let's assume for one moment she saw them. Let's assume for
2 one moment she relied on them, whether or not these
3 representations - - -

4 MR. SCHERKER: I think it's fair to say that
5 there is - - -

6 JUDGE RIVERA: - - - might - - - might be enough
7 to create that special position - - -

8 MR. SCHERKER: - - - there is no New Jersey law -
9 - -

10 JUDGE RIVERA: - - - as an undertaking?

11 MR. SCHERKER: - - - there is no New Jersey law
12 on point - - -

13 JUDGE RIVERA: Okay.

14 MR. SCHERKER: - - - for general public
15 statements - - -

16 JUDGE RIVERA: Okay.

17 MR. SCHERKER: - - - of what a bank is going to
18 do to protect its customers.

19 CHIEF JUDGE WILSON: Thank you.

20 MR. SCHERKER: That - - - that would be the only
21 open question for - - - for the court.

22 CHIEF JUDGE WILSON: Thank you.

23 MR. SCHERKER: Thank you, Your Honor. Thank you
24 for the extra time.

25 (Court is adjourned)

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C E R T I F I C A T I O N

I, Brandon Deshawn, certify that the foregoing transcript of proceedings in the Court of Appeals of Ben-Dor v. Alchemy Consultant, No. 98 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Brandon Deshawn

Signature: _____

Agency Name: eScribers

Address of Agency: 7227 North 16th Street
Suite 207
Phoenix, AZ 85020

Date: October 24, 2025

