21-975-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ESTER LELCHOOK, AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DAVID MARTIN LELCHOOK, MICHAEL LELCHOOK, YAEL LELCHOOK, ALEXANDER LELCHOOK, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DORIS LELCHOOK, MALKA KUMER, CHANA LIBA KUMER, MIRIAM ALMACKIES, CHAIM KAPLAN, RIVKA KAPLAN, BRIAN ERDSTEIN, KARENE ERDSTEIN, MA'AYAN ERDSTEIN, CHAYIM KUMER, NECHAMA KUMER, LAURIE RAPPEPPORT, MARGALIT RAPPEPORT, THEODORE (TED) GREENBERG, MOREEN GREENBERG, JARED SAUTER, DVORA CHANA KASZEMACHER, CHAYA KASZEMACHER ALKAREIF, AVISHAI REUVANE, ELISHEVA ARON, YAIR MOR, MIKIMI STEINBERG,

Plaintiffs-Appellants,

and

DORIS LELCHOOK,

Plaintiff,

(Caption Continued on the Reverse)

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF AND SPECIAL-APPENDIX FOR PLAINTIFFS-APPELLANTS

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v.

FRANSABANK SAL, MIDDLE EAST AFRICA BANK SAL, BLOM BANK SAL, BYBLOS BANK SAL, BANK AUDI SAL, BANK OF BEIRUT SAL, LEBANON AND GULF BANK SAL, BANQUE LIBANO-FRANCAISE SAL, BANK OF BEIRUT AND THE ARAB COUNTRIES SAL, JAMMAL TRUST BANK SAL, JOHN DOES 1-50,

Defendants,

and

SOCIETE GENERALE DE BANQUE AU LIBAN SAL,

Defendants-Appellees.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

The District Court had original jurisdiction over this action under 28 U.S.C. § 1331 and 18 U.S.C. § 2338. On March 31, 2021, it entered a Memorandum & Order granting a motion to dismiss filed by Defendant-Appellee Société Générale de Banque au Liban SAL, thereby dismissing all claims in the case (A399-403), and entered final judgment the same day. (District court ECF no. 92). Plaintiffs-Appellants filed a timely notice of appeal on April 19, 2021. (A404-405). This Court has jurisdiction under 28 U.S.C. § 1291, because this is an appeal from a final judgment that disposed of all parties' claims.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Plaintiffs-Appellants ("Plaintiffs") are the estate and family members of a U.S. citizen who was killed, and 21 other U.S. citizens who were harmed, in rocket attacks carried out by the Hizbollah[1] terrorist organization against civilian population centers in Israel between July 12 and August 14, 2006.

The Lebanese Canadian Bank, SAL ("LCB") provided extensive financial assistance to Hizbollah for years prior to the 2006 rocket attacks. In 2008, eighteen of the Plaintiffs herein brought an action against LCB under the Antiterrorism Act

[1] The terrorist organization's name is spelled in a variety of ways, including "Hizbollah." For consistency purposes, regardless of how source materials spell the terrorist organization's name, it is spelled "Hizbollah" herein.

("ATA"), 18 U.S.C. § 2333, due to its aiding and abetting of Hizbollah. That action has engaged this Court repeatedly. In 2013, this Court held that LCB is subject to personal jurisdiction in that ATA action. *Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161 (2d Cir. 2013). And on June 9, 2021, this Court held that the Plaintiffs' action against LCB stated a valid claim for secondary liability against LCB under the ATA. *Kaplan v. Lebanese Canadian Bank, SAL*, 999 F.3d 842 (2d Cir. 2021).

On June 22, 2011, with Plaintiffs' ATA action against LCB already pending, the Defendant-Appellee here, Société Générale de Banque au Liban SAL ("SGBL"), entered into an Sale and Purchase Agreement with LCB, under which SGBL purchased all of LCB's assets and assumed **all** of LCB's "liabilities and/or obligations and/or debts of any kind, character or description, absolute or contingent, accrued or unaccrued, disputed or undisputed, liquidated or unliquidated, secured or unsecured, joint or several, due or to become due, vested or unvested, determined, determinable or otherwise, to the extent they relate to [LCB's] Business." (A21-22 at ¶ 12; A52-53 at ¶¶ 121-127; A60-62). LCB, which had been a highly profitable enterprise, was rendered insolvent by the liability-and-asset transfer to SGBL. (A53-54 at ¶¶ 128-130; A63-66).

The Plaintiffs therefore filed the action below against SGBL, asserting their ATA claims against SGBL as LCB's successor.

SGBL moved to dismiss for lack of personal jurisdiction and failure to state a claim. In response to SGBL's jurisdictional challenge, Plaintiffs argued that because this Court had already determined that LCB is subject to personal jurisdiction in Plaintiffs' ATA action against LCB, and because SGBL had explicitly assumed all of LCB's liabilities when it purchased all of LCB's assets, SGBL is subject to personal jurisdiction in Plaintiffs' ATA successor liability action under **both** federal common law (and New York common law) rules of succession, **and** the "substantial continuity" test developed and applied by the federal courts where, as here, the underlying claim is a statutory federal cause of action. (A179-194).

The district court nevertheless dismissed the action against SGBL for lack of personal jurisdiction.[2] It ruled that personal jurisdiction in this federal question case is governed **solely** by New York law, and held as a matter of New York common law that the jurisdictional status of a predecessor corporation is attributed to its successor **only** in the case of a merger. (A399-403). The district court entirely failed to address (or even acknowledge) Plaintiffs' wholly separate argument that SGBL is subject to personal jurisdiction under federal common law and under the federal "substantial continuity" test. (*Id.*, *passim*).

The issues on appeal are therefore:

[2] It did not reach the motion to dismiss for failure to state a claim.

1) Whether the district court erred by finding, as a matter of New York common law, that the jurisdictional status of a predecessor corporation is attributed to its successor **only** in the case of a merger, and that SGBL is therefore not subject to personal jurisdiction under New York common law in Plaintiffs' action;

2) Whether the district court erred by finding that personal jurisdiction in this case is controlled solely by New York common law, and by failing to address (much less accept) Plaintiffs' argument that federal common law governs (to the extent it conflicts with New York common law), and that SGBL is subject to personal jurisdiction under federal common law; and

3) Whether the district court erred by failing to address Plaintiffs' additional/alternative argument that SGBL is subject to personal jurisdiction under the federal "substantial continuity" test, and by failing to find that SGBL is subject to personal jurisdiction in Plaintiffs' action under that federal test.

STATEMENT OF THE CASE

I. Relevant Background

a. Hizbollah's 2006 Rocket Attacks

From July 12 until August 14, 2006, the Hizbollah terrorist organization fired thousands of rockets and missiles at civilian population centers in Israel. One of these Hizbollah rockets struck and killed David Martin Lelchook, an American citizen, while he was riding a bicycle on a kibbutz in northern Israel, on August 2,

2006. Many other U.S. citizens were physically injured or otherwise harmed by these rocket attacks. The Plaintiffs herein are the estate, widow, daughters and other family members of decedent David Martin Lelchook, and 21 other American citizens who were harmed as a result of Hizbollah's 2006 rocket attacks. (A20-21; A32-39).

b. Lebanese Canadian Bank, SAL

Hizbollah did not act alone. In order to recruit, obtain and deploy the extensive human and material assets needed to build, maintain and operate its massive rocket and missile arsenal in the years leading up to the summer of 2006, Hizbollah needed partners and supporters. One of Hizbollah's key partners and supporters in this effort was Lebanese Canadian Bank, SAL ("LCB"). (A27-32; A39-51).

LCB was a rogue bank. LCB knowingly provided many millions of dollars in wire transfer and other banking services to Hizbollah over a period of many years, beginning in 2002 or earlier. LCB's services enabled Hizbollah to carry out the rocket attacks in which the decedent was murdered and the other Plaintiffs harmed. *Id*. *See also, generally, Kaplan*, 999 F.3d 842 (2d Cir. 2021).

c. The Licci v. LCB Action

LCB's role as Hizbollah's banker eventually caught up with it. In 2008, eighteen of the Plaintiffs herein filed suit against LCB and its New York correspondent bank, American Express Bank ("Amex Bank"), in New York County Supreme Court, asserting non-federal claims under Israeli law. *Licci, et al. v.*

American Express Bank Ltd., et al., Index No. 109548/08. Amex Bank then removed the action to federal court. *Licci, et al. v. American Express Bank Ltd., et al.*, No. 08-cv-7253-GBD (S.D.N.Y.) ("*Licci*").[3] After removal, the *Licci* plaintiffs filed an amended complaint, asserting claims against LCB under the Anti-Terrorism Act ("ATA"), 18 U.S.C. § 2331, *et seq.*, and various non-federal causes of action.[4]

Both LCB and Amex Bank moved to dismiss for failure to state a claim, and LCB also contested personal jurisdiction. On March 31, 2010, the district court (Daniels, J.) dismissed the *Licci* action against Amex Bank for failure to state a

[3] The Plaintiffs herein who are also plaintiffs in *Licci* are: Chaim Kaplan; Rivka Kaplan; Brian Erdstein; Karene Erdstein; Ma'ayan Erdstein; Chayim Kumer; Nechama Kumer; Laurie Rappepport; Margalit Rappeport; Theodore (Ted) Greenberg; Moreen Greenberg; Jared Sauter; Dvora Chana Kaszemacher; Chaya Kaszemacher Alkareif; Avishai Reuvane; Elisheva Aron, Yair Mor; and Mikimi Steinberg. The Plaintiffs herein who are not plaintiffs in *Licci* are: Ester Lelchook (individually and as personal representative of the estate of David Martin Lelchook); Michal Lelchook; Yael Lelchook; Alexander Lelchook (individually and as personal representative of the estate of Doris Lelchook); Malka Kumer; Chana Liba Kumer; and Miriam Almackies.

[4] The original plaintiffs in *Licci* also included several score Israeli and Canadian citizens who had been harmed in the 2006 Hizbollah rocket attacks. Their claims were ultimately dismissed in 2016 for reasons not relevant here. *Licci v. Lebanese Canadian Bank, SAL*, 834 F.3d 201, 219 (2d Cir. 2016).

Thus, from 2016 on, the eighteen Plaintiffs herein who were also plaintiffs in *Licci*, were the only plaintiffs remaining in *Licci*.

claim, and dismissed the action against LCB for lack of personal jurisdiction. *Licci v. Am. Exp. Bank Ltd.*, 704 F. Supp. 2d 403, 408 (S.D.N.Y. 2010).[5]

On appeal, this Court certified the question of personal jurisdictional over LCB to the New York Court of Appeals. *Licci v. Lebanese Canadian Bank, SAL*, 673 F.3d 50 (2d Cir. 2012). The New York Court of Appeals found that the New York long arm statute, N.Y. C.P.L.R. § 302(a)(1), reached LCB due to its purposeful availment of New York correspondent accounts to process transfers on behalf of Hizbollah. *Licci v. Lebanese Canadian Bank, SAL*, 20 N.Y.3d 327, 960 N.Y.S.2d 695, 984 N.E.2d 893 (2012). This Court then found that exercise of personal jurisdiction over LCB comported with due process, and reversed and remanded. *Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161, 165 (2d Cir. 2013).

On remand, the district court dismissed the *Licci* plaintiffs' ATA claims as precluded by *Kaplan v. Central Bank of Islamic Republic of Iran*, 961 F. Supp. 2d 185 (D.D.C. 2013), which had held that Hizbollah's 2006 rocket attacks constituted an "act of war" and were therefore not actionable under the ATA pursuant to 18 U.S.C. § 2336(a). *Licci v. Lebanese Canadian Bank, SAL*, 2015 WL 13649462, at *3 (S.D.N.Y. April 14, 2015) *aff'd*, 659 F. App'x 13 (2d Cir. 2016).

[5] This Court affirmed the dismissal of the claims against Amex Bank. *Licci v. Lebanese Canadian Bank, SAL*, 672 F.3d 155 (2d Cir. 2012).

The D.C. Circuit later vacated *Kaplan* (*see Kaplan v. Central Bank of Islamic Republic of Iran* in 896 F.3d 501 (D.C. Cir. 2018)), and Congress eliminated the "act of war" exception for attacks carried out by designated Foreign Terrorist Organizations such as Hizbollah. The *Licci* plaintiffs therefore moved to vacate the earlier "act of war" dismissal of their ATA claims against LCB. The district court granted that motion and reinstated the ATA claims against LCB. *Licci v. Lebanese Canadian Bank, SAL*, 2018 WL 5090972 (S.D.N.Y. Oct. 3, 2018).

Following reinstatement of their case, the *Licci* plaintiffs filed a second amended complaint, asserting primary and secondary liability claims against LCB under ATA §§ 2333(a) and 2333(d). The district court then granted LCB's motion to dismiss *Licci* for failure to state a claim. *Kaplan v. Lebanese Canadian Bank, SAL*, 405 F. Supp. 3d 525 (S.D.N.Y. 2019).[6]

However, on June 9, 2021, this Court reversed that dismissal and remanded *Licci* back to the district court, after finding that the *Licci* plaintiffs (all of whom are also Plaintiffs herein, as noted), had stated a valid ATA secondary liability claim against LCB. *Kaplan*, 999 F.3d 842.

[6] That 2019 decision (and the subsequent June 9, 2021, decision of this Court reversing it) were captioned as "*Kaplan*" rather than "*Licci*," because the original lead plaintiff, Mr. Licci, was not a U.S. citizen and had been dismissed from the case (along with the other non-Americans) in 2016. But for the sake of simplicity and consistency, that case is referred to herein as "*Licci*."

d. SGBL Assumes LCB's Liability for the Hizbollah Rocket Attacks

On June 22, 2011, SGBL entered into a Sale and Purchase Agreement ("Purchase Agreement") with LCB. Pursuant to paragraphs 2.1, 2.2 and 2.3 of the Purchase Agreement, which was attached to and incorporated into Plaintiffs' operative complaint below (their First Amended Complaint—"FAC"), SGBL purchased all of LCB's assets, and assumed **all** of LCB's liabilities. Thus, Paragraph 2.1 of the Purchase Agreement expressly provides that LCB "shall transfer, convey, and assign … to [SGBL], and [SGBL] shall receive and assume from [LCB], **all of [LCB]'s Assets and Liabilities**." (A52-53; A60-62, emphasis added).

Paragraph 2.2 of the Purchase Agreement makes clear that the term "all" used in Paragraph 2.1 does indeed mean, literally, "all," clarifying that SGBL was purchasing LCB's entire business and all its assets, including, "*inter alia*":

> any and all rights, titles and interests of [LCB] in and to the Properties, assets, and rights of every nature, kind and description, tangible and intangible whether real, personal or mixed, whether accrued or unaccrued, absolute or contingent, disputed or undisputed, liquidated or unliquidated, secured or unsecured, joint or several, due or to become due, vested or unvested, determined, determinable or otherwise as at the Completion Date, to the extent they relate to [LCB]'s Business, including without limitation: Advances, Commitments, Assumed Contracts, Disclosure Documents, Securities, Leases, Owned Properties, IT System, Equipment, Supplier Contracts, Books, good will, shares held by [LCB] in its Subsidiaries, profits for the fiscal years 2010 and 2011 and all rights in connection with the Business, all as at the Completion Date.

(A61 at Paragraph 2.2).

Clearly, SGBL bought out LCB lock, stock and barrel. Moreover, after acquiring all of LCB's assets, SGBL continued LCB's business operations effectively unchanged, from the same locations and using the same personnel—but under the SGBL name. For example, in a press release issued on September 9, 2011, SGBL announced that: "As of today, **all of the 35 branches that were acquired [from LCB] will become under SGBL's signage and will therefore display the brand's colors and corporate identity**." (A52-53 at ¶ 125, emphasis added). And in an interview with Lebanon's LBC TV on March 3, 2011, the governor of Lebanon's Central Bank Riad Salameh stated that SGBL had "pledged to **keep all LCB employees**." (*Id*., emphasis added).

Like its purchase of LCB's assets, SGBL's assumption of LCB's liabilities under the Purchase Agreement was sweeping and all inclusive, encompassing "*inter alia*":

> any and all of [LCB]'s liabilities and/or obligations and/or debts of any kind, character or description, absolute or contingent, accrued or unaccrued, disputed or undisputed, liquidated or unliquidated, secured or unsecured, joint or several, due or to become due, vested or unvested, determined, determinable or otherwise, to the extent they relate to [LCB]'s Business, all as at the Completion Date.

(A61 at Paragraph 2.3).

Notably, at the time SGBL assumed all of LCB's liabilities, on June 22, 2011, the *Licci* action was still pending on appeal before this Court. (*See Licci, et al. v. American Express Bank Ltd., et al.*, No. 10-1306).[7] Thus, when it assumed all of LCB's liabilities, SGBL knew full well both that: (i) those liabilities included LCB's tort liability to the *Licci* plaintiffs (including eighteen of the Plaintiffs here) and to other, similarly-situated victims of Hizbollah terrorism aided and abetted by LCB; and (ii) LCB—and thus SGBL—might be subject to suit in New York or other U.S. courts in actions brought by such plaintiffs.

Furthermore, in February 2011, the U.S. Treasury publicly designated LCB as a "primary money laundering concern" due to its extensive involvement with and support for Hizbollah. 76 Fed. Reg. 9403, Feb. 17, 2011. (A51 at ¶ 117). Thus, when it assumed all of LCB's liabilities, in June 2011, SGBL was well aware that the United States government had confirmed the facts of LCB's relationship with and provision of material support to Hizbollah.

LCB's liability-and-asset transfer to SGBL has rendered it judgment-proof. **Before** SGBL stripped it of its assets and assumed its liabilities, LCB was an extremely profitable and wealthy entity, which consistently enjoyed economic growth and success. This fact is reflected in a document entitled "Financial Figures"

[7] During oral argument before this Court on February 25, 2011, members of the panel indicated that they were considering certifying the personal jurisdiction question to the New York Court of Appeals—which of course they later did.

published by LCB in February 2011, which was attached to and incorporated into the FAC. (A53 at ¶ 128; A63-66). But **after** SGBL's purchase of LCB's assets and assumption of its liabilities, LCB represented to the United States Supreme Court that it had been rendered "defunct, insolvent, and unable to pay any judgment rendered against it." (A54 at ¶ 129, quoting LCB's Brief in Opposition in *Licci v. Lebanese Canadian Bank*, No. 16-778 (U.S.), (Feb. 17, 2017), at 4; available at 2017 WL 712025 and at https://www.scotusblog.com/wp-content/uploads/2017/02/16-778-BIO.pdf).

Thus, LCB is now unable to satisfy any judgment against it; yet, absent and but for SGBL's purchase of LCB's assets and assumption of its liabilities, LCB would easily have been able to satisfy a judgment against it in favor of the Plaintiffs. (A54 at ¶ 130). Accordingly, the Plaintiffs filed the action below.

e. The Proceedings Below

Plaintiffs' FAC details the facts supporting LCB's liability under the ATA (A19-51) and relating to SGBL's assumption of that liability (A51-54). The FAC alleges that LCB's conduct gives rise to both primary and secondary liability under the ATA, and that SGBL bears successor liability for LCB's conduct.[8] (A54-58).

[8] It is well established that "a successor liability claim can be pursued in a separate suit, *see, e.g., AW Indus., Inc. v. Sleepingwell Mattress Inc.,* No. 10-CV-4439, 2011 WL 4404029, at *5 (E.D.N.Y. Aug. 31, 2011) ("Although a separate corporate entity, [the defendant] could be held liable for [another entity's] acts or judgments as an alter ego, mere continuation, or liable successor of [that entity], and

Seeking to enjoy all the benefits of its bargain with LCB while dodging its assumption of LCB's liabilities to the victims of Hizbollah's rocket attacks, SGBL moved to dismiss Plaintiffs' action for lack of personal jurisdiction and for failure to state a claim. (A67-162).[9]

Plaintiffs opposed that motion. In response to SGBL's lack of personal jurisdiction claim, Plaintiffs demonstrated that because LCB is subject to personal jurisdiction in actions arising from its aiding and abetting of Hizbollah (as this Court held in Plaintiffs' *Licci* action), and because SGBL had expressly assumed all of LCB's liabilities when it acquired all of LCB's assets, SGBL is subject to personal jurisdiction in Plaintiffs' successor liability action under **both** federal and New York common law rules of succession, **and** the "substantial continuity" test that has been developed by federal courts when the underlying claim is a statutory federal cause of action. (A179-194). Plaintiffs expressly argued to the court below that, "[t]his is

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[the] plaintiff is free to initiate a separate action to that effect.")." *Lin v. Toyo Food, Inc.*, 2016 WL 4502040, at *3 (S.D.N.Y. Aug. 26, 2016). *See also e.g. Call Ctr. Techs., Inc. v. Grand Adventures Tour & Travel Publ'g Corp., Inc.*, 2009 WL 10687800, at *6 (D. Conn. Nov. 19, 2009) (same).

[9] SGBL's Rule 12(b)(6) motion was based primarily on the argument that the decision of the district court in *Kaplan*, 405 F. Supp. 3d 525, dismissing the *Licci* action for failure to state an ATA claim against LCB, precludes the Plaintiffs herein from asserting an ATA successor claim against SGBL. (A100-107). That argument has obviously been mooted by the June 9, 2021, decision of this Court in *Kaplan*, 999 F.3d 842, reversing the district court decision.

a federal question case under the ATA, and personal jurisdiction is governed by federal, not state, law (to the extent there is any conflict)." (A191).

On March 31, 2021, the district court (Dearie, *D.J.*), entered an unpublished Memorandum & Order dismissing the action for lack of personal jurisdiction.[10] The district court erroneously held that personal jurisdiction in this case should be determined exclusively under New York law and that, as a matter of New York law, the jurisdictional status of a predecessor corporation is attributed to its successor **only** in the case of a merger. (A399-403).

The district court failed to address (or acknowledge) Plaintiffs' arguments that: (1) federal common law, which governs this federal question case to the extent that it differs from New York common law, clearly permits the exercise of personal jurisdiction over a successor that expressly assumes the liability of a predecessor; and (2) personal jurisdiction over SGBL exists under the federal "substantial continuity" test for successor liability in cases asserting a federal cause of action.

Plaintiffs appeal from that decision.

SUMMARY OF THE ARGUMENT

There is no question that in the 2011 Purchase Agreement SGBL expressly assumed all of LCB's liabilities, including LCB's liability to the Plaintiffs herein.

[10] The district court did not reach SGBL's motion to dismiss for failure to state a claim.

Under federal and New York common law of succession, a successor that explicitly assumed the liabilities of its predecessor as part of an asset purchase constitutes one of the four traditionally recognized exceptions to the general rule that an asset purchaser does not acquire the liabilities of the seller. SGBL therefore bears in full LCB's liability to the Plaintiffs under federal and New York common law.

Precedents from this Court and other New York federal and state courts hold unanimously that a successor which meets one of the four exceptions to the nonliability rule—including a successor that explicitly assumed the liabilities of its predecessor—will also be subject to the jurisdictional status of the predecessor in respect to that liability. The district court therefore erred when it held that under New York law jurisdiction follows liability only in case of a merger, but not where, as here, the successor explicitly assumed the liability.

Alternatively, even if the district court's understanding of New York law was correct, under federal common law the jurisdictional status of the predecessor will attach to a successor that explicitly assumes the liabilities of the predecessor. Therefore, since this case is brought under a federal cause of action, personal jurisdiction may be exercised over SGBL under Fed. R. Civ. P. 4(k)(2) (if it cannot be exercised under New York law).

Alternatively, SGBL is subject to successor liability and personal jurisdiction under the federal "substantial continuity" test. SGBL meets that test because the

ATA protects vital federal interests, and because SGBL had notice of the claim prior to the acquisition of LCB's assets and liabilities, SGBL substantially continued the business operations of LCB, and LCB is unable to provide the relief sought.

ARGUMENT

The Court reviews *de novo* a dismissal for lack of personal jurisdiction, "construing all pleadings and affidavits in the light most favorable to the plaintiff and resolving all doubts in the plaintiff's favor." *SPV Osus Ltd. v. UBS AG*, 882 F.3d 333, 342 (2d Cir. 2018) (citation and quotation marks omitted).

I. SGBL Is Subject to Personal Jurisdiction As LCB's Successor Under Both New York and Federal Common Law

As will be shown below, the district court erred when it held that under New York common law, a successor corporation inherits the jurisdictional status of its predecessor **only** in the case of a merger.

First, there is no question (and it was not seriously contested below) that SGBL bears successor liability to Plaintiffs for LCB's conduct under any common law standard, because it assumed that liability. As this Court has taught:

> Under **both New York law and traditional common law**, a corporation that purchases the assets of another corporation is generally not liable for the seller's liabilities. Both New York law and traditional common law, however, recognize certain exceptions to this rule.… [A] buyer of a corporation's assets will be liable as its successor if: (1) **it expressly or impliedly assumed the predecessor's tort liability**, (2) there was a consolidation or merger of seller and purchaser, (3) the purchasing corporation was

> a mere continuation of the selling corporation, or (4) the transaction is entered into fraudulently to escape such obligations.

New York v. Nat'l Serv. Indus., Inc., 460 F.3d 201, 209 (2d Cir. 2006) (citations and quotation marks omitted) (emphases added).

As shown above (and in the court below), SGBL clearly meets the first of these four common law exceptions, because SGBL expressly assumed in the Purchase Agreement "any and all of [LCB]'s liabilities and/or obligations and/or debts of any kind, character or description, absolute or contingent, accrued or unaccrued, disputed or undisputed, liquidated or unliquidated, secured or unsecured, joint or several, due or to become due, vested or unvested, determined, determinable or otherwise, to the extent they relate to [LCB]'s Business." (A61 at Paragraph 2.3; *see also* A21-22 at ¶ 12; A52-53 at ¶¶ 121-127).

In *LiButti v. United States*, 178 F.3d 114 (2d Cir. 1999), this Court held that successors inherit the jurisdictional status of their predecessor, "simply as a consequence of their status as a successor in interest, without regard to whether they had any other minimum contacts with the state," provided that they meet **any** one of the four "traditional" common law exceptions to nonliability of successors—including where, as here, the successor "agreed to assume" the liabilities of the predecessor. *Id*. at 123-124. *See also ILKB, LLC v. Singh*, 2021 WL 2312951, at *2 (E.D.N.Y. June 7, 2021) (citing *LiButti* for the rule that a successor inherits

jurisdictional status of its predecessor whenever successor liability is based on one of the four common law exceptions to nonliability of successors, including where the successor "expressly or impliedly assumed the predecessor's tort liability."); *Gentry v. Kaltner*, 2020 WL 1467358, at *7 (S.D.N.Y. Mar. 25, 2020) (same); *Fly Shoes s.r.l. v. Bettye Muller Designs Inc.*, 2015 WL 4092392, at *2-3 (S.D.N.Y. July 6, 2015) (same).

Thus, under the rule enunciated in *LiButti* and its progeny, since SGBL's successor liability is based on one of the four common law exceptions to the nonliability of successors—namely, the "explicit assumption of liability" exception—SGBL has inherited LCB's jurisdictional status. And, as this Court explicitly held, exercise of personal jurisdiction over LCB in a civil action brought by persons harmed by the 2006 Hizbollah missile attacks comports with both New York law and the due process clause. *Licci*, 732 F.3d 161 (2d Cir. 2013). Therefore, SGBL is subject to personal jurisdiction in the Plaintiffs' successor liability action.

New York state courts also recognize this rule. Thus, in *Arazosa v 3M Co.*, 60 Misc. 3d 1205(A), 97 N.Y.S.3d 55, 2018 N.Y. Slip Op. 50963(U), 2018 WL 3098098, (Sup Ct, Feb. 20, 2018), the Supreme Court, New York County, granted the plaintiff's motion to take discovery for the purpose of establishing personal jurisdiction over the defendant on a theory of successor liability, and explained that a plaintiff asserting successor liability can establish "jurisdiction over a successor

premised on jurisdiction over a predecessor … if **the successor assumed that liability**." *Id*. at *2 (emphasis added). Thus, *Arazosa* confirms that under New York law, a defendant that **assumes the liability** of a predecessor, thereby also **assumes the jurisdictional status** of the predecessor in respect to that liability.

In purported support of its contrary conclusion that, under New York law, jurisdictional status is inherited only in the case of a merger, the district court cited—and mischaracterized—the decision of this Court in *U.S. Bank Nat'l Ass'n v. Bank of Am. N.A.*, 916 F.3d 143 (2d Cir. 2019). According to the district court, in *U.S. Bank* this Court "observed" that a successor corporation inherits the jurisdictional status of its predecessor "**only**" because "a successor by merger is deemed by operation of law to be both the surviving corporation and the absorbed corporation." (JA 402) (emphasis added) (citation omitted). But *U.S. Bank* observed no such thing. *U.S. Bank* stated merely that jurisdictional status is inherited in the case of a merger; it did **not** hold that jurisdictional status is inherited "**only**" in the event of a merger, as the court below would have it. The word "only" was added by the court below—it was not used by this Court. To the contrary, *U.S. Bank* explained that under New York law, "whether liability as a successor in interest also entails being subject to personal jurisdiction where the actions of the predecessor would have made the predecessor subject—**depends on the basis of the successor liability**. The fair inference of the precedents is that … successor liability based on acquisition of a

predecessor's assets **does not necessarily** make the defendant also amenable to jurisdiction where the predecessor's actions would have made the predecessor subject to specific jurisdiction." *U.S. Bank*, 916 F.3d at 156 (emphases added).

Thus, *U.S. Bank* clearly indicates that there are other circumstances, in addition to merger, under which a successor will inherit the jurisdictional status of the predecessor under New York law.

The district court also cited the decision of the First Department in *Gronich & Co., Inc. v. Simon Prop. Grp., Inc.*, 180 A.D.3d 541, 119 N.Y.S.3d 456, *leave to appeal denied,* 36 N.Y.3d 902, 159 N.E.3d 1117 (2020), as putatively holding that jurisdictional "contacts are not imputed where successor acquires assets of predecessor." (JA 401). But what the First Department actually held in *Gronich* was only that, "where the 'successor' has **merely acquired the assets** of the predecessor company … the contacts are not imputed." *Id*. at 542 (citing *U.S. Bank*, 916 F.3d at 156-58) (emphasis added). *Gronich* said nothing whatsoever about negating imputation of jurisdictional status where, as here in the case of SGBL and LCB, the successor expressly assumed all of the liabilities of the predecessor.

Indeed, the modest language employed by the First Department in *Gronich*, which carefully excepted **only** a successor that has "**merely** acquired the assets" of the predecessor from inheriting the predecessor's jurisdictional status (emphasis

added), recognizes the fact that there are many scenarios in which jurisdictional status may be imputed to a successor.

The **sole** case cited by the district court that even partially supports its conclusion is *Bartlett v. Societe Generale de Banque Au Liban SAL*, 2020 WL 7089448, at *16-17 (E.D.N.Y. Nov. 25, 2020). But *Bartlett* suffers from the same defect as the decision below here: *i.e.*, it ignores the extensive authority (cited above) holding that successor liability based on **any one** of the four traditional common law exceptions results in a transfer of jurisdictional status, and fails to cite a single case holding that jurisdictional status is conferred only in the case of merger.

Finally, to the extent (if any) that the court below held that the common law of New York differs from traditional (and federal) common law on this issue, that was also error. This Court has found that New York case law "clearly suggests that the New York Court of Appeals will not eviscerate traditional common-law norms of successor liability in tort cases." *Nat'l Serv. Indus., Inc.*, 460 F.3d at 214-15.[11]

[11] *But see BRG Corp. v. Chevron U.S.A., Inc.*, 163 A.D.3d 1495, 1496, 82 N.Y.S.3d 798, 799 (2018) (describing the question of when successor jurisdiction attaches to successor liability a "novel and unsettled jurisdictional issue."). Thus, if this Court does not reverse the decision below on other grounds, Plaintiffs respectfully request that it certify to the New York Court of Appeals the question of whether, by assuming all its liabilities, SGBL acquired LCB's jurisdictional status.

II. Alternatively, SGBL Is Subject to Successor Personal Jurisdiction Under Federal Common Law

If this Court holds that the district court's understanding of New York law was correct, it should nonetheless find that SGBL is subject to personal jurisdiction under federal law, for the reasons set forth below.

This suit asserts a federal cause of action, *i.e.*, the ATA. Rule 4(k)(2) of the Federal Rules of Civil Procedure provides that where, as here, an action is based upon "a claim that arises under federal law," service of process "establishes personal jurisdiction over a defendant if: (A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and (B) exercising jurisdiction is consistent with the United States Constitution and laws." Fed. R. Civ. P. 4(k)(2).

Plaintiffs are not aware of and have not asserted any basis for exercise of personal jurisdiction over SGBL anywhere in the United States other than through their successor liability argument, and for its part SGBL denies it is subject to personal jurisdiction. Therefore, if this Court finds that the court below correctly held that New York law does not allow for exercise of personal jurisdiction over SGBL as LCB's successor, the requirement in Rule 4(k)(2)(A) (that the defendant not be subject to jurisdiction in any single state) will be satisfied. [12]

[12] Because Plaintiffs certify, based on the information that is readily available to them and their counsel, that (if this Court affirms the lower court's ruling regarding New York law) SGBL is not subject to personal jurisdiction in any state,

The requirement in Rule 4(k)(2)(B)—that "exercising jurisdiction is consistent with the United States Constitution and laws"—is also satisfied here. As *LiButti* and the other cases cited above show, federal common law recognizes that a successor that expressly assumes the liability of its predecessor also acquires its jurisdictional status, and there is no due process bar to such exercise of jurisdiction. *See also e.g. Transfield ER Cape Ltd. v. Indus. Carriers, Inc.*, 571 F.3d 221, 224 (2d Cir. 2009) ("it is compatible with due process for a court to exercise personal jurisdiction over an individual or a corporation that would not ordinarily be subject to personal jurisdiction in that court when the individual or corporation is an alter ego **or successor** of a corporation that would be subject to personal jurisdiction in that court.") (quoting *Patin v. Thoroughbred Power Boats,* 294 F.3d 640, 653 (5th Cir. 2002)) (emphasis added); *Hawkins v. i-TV Digitalis Tavkozlesi zrt.*, 935 F.3d 211, 227 (4th Cir. 2019) ("where one corporation has succeeded to another's liabilities, the predecessor corporation's forum contacts can be imputed to the successor corporation"); *City of Richmond, Va. v. Madison Mgmt. Grp., Inc.*, 918 F.2d 438, 454 (4th Cir. 1990) ("The great weight of persuasive authority permits imputation of a predecessor's actions upon its successor **whenever** forum law would hold the successor liable for its predecessor's actions.") (emphasis in the original)

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the burden is shifted to SGBL to show that it is subject to jurisdiction in a particular state. *In re S. Afr. Apartheid Litig.*, 643 F. Supp. 2d 423, 429 (S.D.N.Y. 2009)

(citation omitted); *Select Creations, Inc. v. Paliafito Am., Inc.*, 852 F. Supp. 740, 765 (E.D. Wis. 1994) ("If a court has personal jurisdiction over the predecessor in interest, once successor liability is established, personal jurisdiction over the successor in interest necessarily exists."); *Rodriguez-Miranda v. Benin*, 829 F.3d 29, 45 (1st Cir. 2016) ("once personal jurisdiction is established over the original party, it is retained over Rule 25(c) successors in interest, as long as the substituted party had an opportunity to challenge its joinder or substitution. Were this not so, the owners of the property could merely transfer legal ownership of the assets from one shell corporation to another in a different jurisdiction, putting a party whose initial suit satisfied the jurisdictional requirements to the immense burden of chasing the involved assets from courtroom to courtroom.") (citations and quotation marks omitted); *Minnesota Min. & Mfg. Co. v. Eco Chem, Inc.*, 757 F.2d 1256, 1263 (Fed. Cir. 1985) ("When the successor in interest voluntarily steps into the shoes of its predecessor, it assumes the obligations of the predecessor's pending litigation if the court properly assumed jurisdiction over the predecessor and if the successor is properly served (as here).").[13]

[13] It is true that in *Licci* this Court found jurisdiction over LCB under New York law, without discussing federal law—other than the finding that exercise of jurisdiction over LCB comported with due process. But the holding that LCB is subject to jurisdiction under New York law means, a fortiori, that it is subject to jurisdiction under federal law. *Sonera Holding B.V. v. Cukurova Holding A.S.*, 895 F. Supp. 2d 513, 519 (S.D.N.Y. 2012) ("Because the requirements for personal

Therefore, if this Court does not reverse the decision of the court below in respect to New York law, it can and should find that personal jurisdiction may be exercised over SGBL under Rule 4(k)(2). [14]

III. Alternatively, SGBL Is Subject to Successor Personal Jurisdiction Under the Federal "Substantial Continuity" Test

Alternatively, this Court can and should hold that SGBL is subject to personal jurisdiction under the federal "substantial continuity" test.

The "substantial continuity" test was developed by the federal courts in order to expand successor liability beyond the traditional common law test, "when a claim arising from a violation of federal rights is involved." *E.E.O.C. v. G-K-G, Inc.*, 39 F.3d 740, 747 (7th Cir. 1994). While it has been applied most frequently in the employment law context, it is not restricted to such cases. *See e.g. Rowe Entm't, Inc. v. William Morris Agency*, 2005 WL 22833, at *79 (S.D.N.Y. Jan. 5, 2005) (applying the substantial continuity test in non-employment federal civil rights case); *U.S. v. Am. at Home Healthcare & Nursing Servs., Ltd.*, 2017 WL 2653070, at *16 (N.D. Ill. June 20, 2017) (applying substantial continuity test in False Claims Act case);

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jurisdiction under New York law are more restrictive than those under the federal constitution, satisfaction of the former necessarily entails satisfaction of the latter.").

[14] Plaintiffs argued below that this is a federal question case in which personal jurisdiction is governed by federal law (A191) but the district court did not address this argument, and erroneously based its decision entirely on New York law.

U.S. ex rel. Fisher v. Network Software Assocs., Inc., 180 F. Supp. 2d 192, 195 (D.D.C. 2002) (same).

The ATA was enacted to vindicate vital national interests, which are at least as important as those protected by the federal labor statutes. "[T]he ATA's legislative history reflects that Congress conceived of the ATA, at least in part, as a mechanism for **protecting the public's interests** through private enforcement … The District Court here appropriately recognized the **important U.S. interests** at stake in arming private litigants with the weapons available in civil litigation **to deter and punish the support of terrorism**." *Linde v. Arab Bank, PLC*, 706 F.3d 92, 112 (2d Cir. 2013) (emphasis added) (citation and internal quotation marks omitted).

Thus, "the interests of the United States weigh heavily" in ATA actions such as this (*id.*), and those national interests would be gravely harmed if U.S. terror victims are unable "to deter and punish the support of terrorism," due to devious corporate shell games which leave them with no remedy.

Accordingly, if SGBL is not found to be LCB's successor under the traditional common law test, the Court should apply the "substantial continuity" test.

When applying the substantial continuity test, "courts look at three essential factors: (1) whether the successor had notice of the claim prior to the acquisition; (2) whether the successor substantially continued the business operations of its predecessor following the acquisition; and (3) whether the predecessor is able to

provide the relief sought." *Huan Wang v. Air China Ltd.*, 2020 WL 1140458, at *6 (E.D.N.Y. Mar. 9, 2020) (quotation marks omitted).[15] "[N]o one factor is controlling, and it is not necessary that each factor be met to find successor liability." *Id*.

All these factors are easily met here. As discussed above, the *Licci* action (which included claims asserted by 18 of the Plaintiffs in this case) was filed against LCB in 2008, and was still pending in early 2011, when SGBL assumed all of LCB's liabilities. Obviously, then, SGBL had full notice that LCB's liabilities included claims by victims of Hizbollah terrorism. In respect to the third factor, before SGBL stripped it of its assets and assumed its liabilities, LCB was extremely profitable and wealthy, and consistently enjoyed economic growth and success. (A53 at ¶ 128; A63-66). But after SGBL's purchase of LCB's assets and assumption of its liabilities, LCB represented to the U.S. Supreme Court that it had been rendered "defunct, insolvent, and unable to pay any judgment rendered against it." (A54 at ¶

[15] Courts in this circuit often expand this test into nine factors, by breaking the "degree of continuity factor" into seven sub-factors, namely: (a) whether there has been a substantial continuity of business operations; (b) whether the successor uses the same plant; (c) whether it uses the same or substantially the same work force; (c) whether it uses the same or substantially the same supervisory personnel; (d) whether the same jobs exist under substantially the same working conditions; (e) whether it uses the same machinery, equipment, and methods of production; and (f) whether it produces the same product. *See e.g. Hidalgo v. New Ichiro Sushi, Inc*., 2017 WL 4712789, at *11 (S.D.N.Y. Sept. 27, 2017).

129, quoting LCB's Brief in Opposition in *Licci v. Lebanese Canadian Bank*, No. 16-778 (U.S.), (Feb. 17, 2017), at 4; available at 2017 WL 712025 and at https://www.scotusblog.com/wp-content/uploads/2017/02/16-778-BIO.pdf).

The "continuity of business operations" factor is also easily shown. After acquiring all of LCB's assets, SGBL continued LCB's banking operations unchanged, from the same locations and using the same personnel – merely swapping in the SGBL name. In a press release issued on September 9, 2011, SGBL announced that: "As of today, all of the 35 branches that were acquired [from LCB] will become under SGBL's signage and will therefore display the brand's colors and corporate identity." (A52-53 at ¶ 125; A295-296 (Sept. 9, 2011 press release)). And on March 3, 2011, the governor of Lebanon's Central Bank confirmed that SGBL had "pledged to keep all LCB employees." (A52-53 at ¶ 125; A297-298 (Associated Press, *Lebanese Bank Accused of Laundering to Merge*, Mar. 4, 2011)).

Thus, the "substantial continuity" successor liability test is clearly met here.[16]

Plaintiffs have been unable to locate precedents discussing the question of inherited jurisdictional status in the context of the "substantial continuity" test for successor liability. However, it stands to reason that the same federal common law principles (discussed in Part II above) that apply to the jurisdictional status of a

[16] Plaintiffs argued below at length that the federal "substantial continuity" test applies here (A184-186) but the district court did not address this argument, and erroneously based its decision entirely on New York law.

successor under common law rules of succession—namely, that jurisdiction follows liability—would apply to the "substantial continuity" test, which was developed by the federal courts for cases where, as here, federal rights have been violated.

CONCLUSION

For the reasons stated above, this Court should vacate the district court's dismissal and remand the case for further proceedings.

Dated August 9, 2021

Respectfully,

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,028 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14 point font.

Dated August 9, 2021

Respectfully,

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SPECIAL APPENDIX

Table of Contents

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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ESTER LELCHOOK, individually and as personal representative of the Estate of David Martin Lelchook; MICHAL LELCHOOK; YAEL LELCHOOK; ALEXANDER LELCHOOK, individually and as personal representative of the Estate of Doris Lelchook; MALKA KUMER; CHANA LIBA KUMER; MIRIAM ALMACKIES; CHAIM KAPLAN; RIVKA KAPLAN; BRIAN ERDSTEIN; KARENE ERDSTEIN; MA'AYAN ERDSTEIN; CHAYIM KUMER; NECHAMA KUMER; LAURIE RAPPEPPORT; MARGALIT RAPPEPORT; THEODORE (TED) GREENBERG; MOREEN GREENBERG; JARED SAUTER; DVORA CHANA KASZEMACHER; CHAYA KASZEMACHER ALKAREIF; AVISHAI REUVANE; ELISHEVA ARON, YAIR MOR; and MIKIMI STEINBERG,

Plaintiffs,

- against -

SOCIÉTÉ GÉNÉRALE DE BANQUE AU LIBAN SAL,

Defendant.
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MEMORANDUM & ORDER

19-cv-00033 (RJD) (SJB)

DEARIE, District Judge.

Plaintiffs, the estate and family members of United States citizens killed or injured as a result of a series of terrorist attacks carried out by Hizbollah in Israel in 2006, bring this action against Société Générale De Banque Au Liban SAL ("SGBL") seeking damages pursuant to the Anti-Terrorism Act ("ATA"), 18 U.S.C. § 2333. Plaintiffs' claims against SGBL are predicated on the alleged conduct of another bank, Lebanese Canadian Bank SAL ("LCB"). According to plaintiffs, SGBL is subject to jurisdiction in New York and liable for LCB's actions because SGBL purchased LCB assets and liabilities in 2011 and thus inherited LCB's jurisdictional status in the forum and assumed successor liability. Defendant moves to dismiss the amended complaint (ECF No. 73), pursuant to Federal Rules of Civil Procedure 12(b)(2) and 12(b)(6) for lack of personal jurisdiction and for failure to state a claim. The Court lacks jurisdiction over defendant. The complaint is dismissed.

BACKGROUND

For the purposes of defendant's motion to dismiss, the allegations in the complaint are assumed to be true.

SGBL is a private joint stock company with limited liability incorporated in Lebanon in 1953 with its headquarters in Beirut. (Am. Compl. ¶¶ 10-11.) On June 22, 2011, SGBL entered into a Sale and Purchase Agreement ("SPA") with LCB and pursuant to that agreement "SGBL purchased all of LCB's assets, and assumed all of LCB's liabilities." (Id. at ¶ 12.)

Plaintiffs claim SGBL's assumption of LCB liabilities renders SGBL liable for the damages plaintiffs incurred when Hizbollah, a purported banking client of LCB, carried out deadly missile attacks in Israel in July and August 2006. (Am. Compl. ¶¶ 3, 12, 16, 59-80, 118-30.) Plaintiffs do not allege SGBL, itself, provided any services to Hizbollah triggering potential direct liability for their damages under the ATA. They only allege SGBL is liable for LCB's purported conduct as a result of the SPA.

The Court assumes knowledge of facts regarding Hizbollah, the July and August 2006 rocket and missile attacks, and LCB's relevant conduct (*see* am. compl. ¶¶ 17-117), as they are the subject of extensive litigation in Kaplan v. Lebanese Canadian Bank SAL, No. 08-cv-7253 (S.D.N.Y.). Indeed, as defendant notes, the allegations supporting LCB's liability in Kaplan are virtually identical to the allegations in this action. Compare Kaplan v. Lebanese Canadian Bank SAL, No. 08-cv-7253 (GBD) (S.D.N.Y.) (ECF No. 99) with Lelchook v. Société Générale De Banque Au Liban SAL, No. 19-cv-00033 (RJD) (SJB) (E.D.N.Y.) (ECF No. 73).

DISCUSSION

1. Legal Standard

To determine a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, a court must first determine if New York law confers jurisdiction over the defendant, and if it does, then determine whether such an exercise of jurisdiction comports with due process. See Licci ex rel. Licci v. Lebanese Canadian Bank, SAL, 732 F.3d 161, 168 (2d Cir. 2013). A plaintiff "bears the burden of showing that the court has jurisdiction over the defendant." Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d

560, 566 (2d Cir. 1996). At the motion to dismiss stage, a plaintiff need only "make a prima facie showing that jurisdiction exists," which "entails making legally sufficient allegations of jurisdiction, including an averment of facts that, if credited, would suffice to establish jurisdiction over the defendant." Charles Schwab Corp. v. Bank of America Corp., 883 F.3d 68, 81 (2d Cir. 2018).

2. Analysis

Plaintiffs do not allege SGBL is subject to personal jurisdiction in New York by virtue of its own contacts with the state. Instead, plaintiffs claim SGBL is subject to jurisdiction because the Second Circuit "determined that LCB's conduct described [in the complaint] rendered it subject to personal jurisdiction" in New York, and SGBL "assumed and bears successor liability for LCB's conduct . . . and so is also subject to personal jurisdiction in New York." (Am. Compl. ¶ 16.) SGBL contends there is no jurisdiction because jurisdiction-by-inheritance has been "squarely rejected in New York and does not comport with federal due process principles." (ECF No. 85 at 13.)

New York's long-arm statute confers jurisdiction "over any non-domiciliary" who, inter alia, "transacts any business within the state." N.Y. C.P.L.R. 302(a)(1). Under certain limited circumstances, New York also recognizes that a non-domiciliary "may inherit its predecessor's jurisdictional status." Semenetz v. Sherling & Walden, Inc., 21 A.D.3d 1138, 1140-41 (3rd Dep't App. Div. 2005). For instance, where two companies enter into an agreement containing a New York forum selection clause. Id. at 1140-41 (citing Société Générale v. Florida Health Sciences Ctr., Inc., 2003 WL 22852656, at *4 (S.D.N.Y. Dec. 1, 2003) (defining the jurisdictional issue as "whether minimum contacts could be transferred" and not "whether the defendant's assumption of its predecessor's rights and obligations constituted a voluntary adoption of all the terms of the contracts that the predecessor had executed")).

New York courts have held that short of a merger an asset acquisition is not sufficient to impute a target's jurisdictional status on an acquiror. See, e.g., Gronich & Co., Inc. v. Simon Prop. Grp., Inc., 180 A.D.3d 541, 542 (1st Dep't App. Div. 2020) (finding jurisdiction existed as to a "successor by merger," but that contacts are not imputed where successor acquires assets of predecessor); Schenin v. Micro Cooper Corp., 272 F. Supp. 523, 526 (S.D.N.Y. 1967) (finding plaintiff "failed to adduce a single shred

of probative evidence that the transaction was anything but an acquisition of assets" and accordingly dismissing because there "ha[d] been no statutory merger"). Tellingly, the term "merger" does not appear anywhere in plaintiffs' 41-page complaint. And a review of New York decisions in this area confirms the SGBL-LCB transaction does not meet the definition of a merger. Courts have held that "continuity of ownership is the essence of a merger," New York v. Nat'l Serv. Indus., Inc., 460 F.3d 201, 211-12 (2d Cir. 2006), and plaintiffs do not allege continuity of ownership between SGBL and LCB given that it was an all-cash transaction from which both continue to survive. See, e.g., Cargo Partner AG v. Albatrans, Inc., 352 F.3d 41, 47 (2d Cir. 2003) (observing that under New York law "continuity of ownership is the essence of a merger" and is distinct from an asset purchase where "the seller's ownership interest in the entity is given up in exchange for consideration"); Schumacher v. Richards Shear Co., Inc., 451 N.E.2d 195, 198 (N.Y. 1983) (no merger where predecessor survives the transaction as "a distinct, albeit meager, entity").

Still, plaintiffs urge the Court to exercise jurisdiction over defendant because it "assumed ***all*** of LCB's liabilities" as defined in the Sale and Purchase Agreement. (ECF No. 88 at 2 (emphasis in original).) But plaintiffs' emphasis on "all" liabilities is misplaced. While SGBL may be liable for any liability it assumed in the SPA, that does not address whether SGBL is subject to jurisdiction in New York. The transaction between SGBL and LCB does not fall under New York's limited merger exception for successor jurisdiction and plaintiffs do not allege SGBL is otherwise subject to jurisdiction due to a relationship or contact with the forum. Bartlett v. Société Générale De Banque Au Liban SAL, No. 19-cv-00007 (CBA) (VMS), 2020 WL 7089448, at *16-*17 (E.D.N.Y. Nov. 25, 2020).

Despite plaintiffs' arguments to the contrary, this outcome is consistent with the Circuit's decision in U.S. Bank Nat'l Assoc. v. Bank of America N.A., 916 F.3d 143 (2d Cir. 2019), where the Court observed it was only "'because a successor by merger is deemed by operation of law to be both the surviving corporation and the absorbed corporation' that the successor would incur the predecessor's jurisdiction status." Bartlett, 2020 WL 7089448, at *16-*17 (quoting U.S. Bank, 916 F.3d at 156). This rule would avoid the unfairness that would result if a corporate tortfeasor was able to evade liability

simply by subsuming itself into another entity that is not subject to jurisdiction. Critically, however, plaintiffs admit in their amended complaint, and in opposition to defendant's motion, that LCB has continued to operate since the execution of the SPA in 2011. (Am. Compl. ¶¶ 118-20; ECF No. 88 at 9-15.) Indeed, LCB is even defending itself in nearly identical ATA suits in other New York courts, as plaintiffs admit. (See, e.g., Am. Compl. at ¶¶ 91-94, 112-15, n.12). Plaintiffs have failed to allege any connection between SGBL and the forum, and have failed to allege that the two companies have merged such that SGBL is merely a continuation of LCB and so SGBL must answer for LCB's purported bad acts in this court. SGBL's potential exposure in the wake of the SPA cannot be resolved in this action, but must await an appropriate forum consistent with applicable law and perhaps the demands of due process.

CONCLUSION

Jurisdiction and liability are of course two distinct considerations. Whatever the arrangement is between the two banks where the alleged wrongdoer continues to exist as a going concern, the non-culpable purchaser of assets and liabilities does not fall within the court's jurisdiction merely by virtue of that transaction. Because plaintiffs do not allege SGBL and LCB executed a merger, SGBL did not inherit LCB's jurisdictional status in this forum and so the Court does not have jurisdiction over defendant under Rule 12(b)(2). Accordingly, defendant's motion to dismiss is granted and plaintiffs' complaint is dismissed.

SO ORDERED.

/s/ Raymond J. Dearie
Raymond J. Dearie
United States District Judge

Dated: March 31, 2021
Brooklyn, NY