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

REPLY BRIEF
FOR PLAINTIFFS-APPELLANTS

Robert J. Tolchin
THE BERKMAN LAW OFFICE, LLC
Attorneys for Plaintiffs-Appellants
111 Livingston Street, Suite 1928
Brooklyn, New York 11201
718-855-3627

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.

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INTRODUCTION

As shown below, the brief filed by Defendant-Appellee Société Générale de Banque au Liban SAL ("SGBL") fails to undermine plaintiffs' showing that the decision of the district court is erroneous and should be reversed.

Lacking any substantive defenses, SGBL resorts to attempts to reshuffle the factual record and flip the script. SGBL falsely and repeatedly claims that plaintiffs have no one but themselves to blame for SGBL's predecessor, Lebanese Canadian Bank, SAL ("LCB"), being rendered insolvent by LCB's 2011 liability-and-asset transfer to SGBL, because they could have attached the proceeds of that transaction. As discussed below, this claim is patently untrue because (among many reasons), during that period plaintiffs' claims against LCB were on appeal after being dismissed for lack of personal jurisdiction.

SGBL also claims—without an iota of support in the record—that the full agreement between LCB and SGBL is "complex [and] confidential," and insinuates without elaboration that the absent pages of the agreement may limit the clear terms of the assumption of LCB's liabilities contain in the provisions of the agreement submitted to the court below and contained in the record. (Op. 1-2, n.2).[1] SGBL should not be permitted to play hide-and-seek with the Court: if it believed the other

[1] All citations herein to the Brief for Defendant-Appellee are to "Op. __."

provisions of the agreement were helpful, it should have submitted them to the court below (under seal if necessary) or sought leave to supplement the record in this appeal. Having failed to do so, it is bound by the existing record. Indeed, SGBL's decision not to submit the other pages triggers a presumption that they would **harm** its case. "Where relevant information … is in the possession or control of one party and not provided, then an adverse inference may be drawn that such information would be harmful to the party who fails to provide it." *Weeks v. ARA Servs.*, 869 F. Supp. 194, 195 (S.D.N.Y. 1994). *Cf. LiButti v. United States*, 178 F.3d 114, 120 (2d Cir. 1999) ("An adverse inference may be given significant weight because silence when one would be expected to speak is a powerful persuader.").[2]

Therefore, and for the reasons set forth in plaintiffs' opening brief and below, this Court should vacate the dismissal and remand the case for further proceedings.

ARGUMENT

I. Personal Jurisdiction Exists Under New York Law

The district court held that under New York law the jurisdictional status of a predecessor corporation is attributed to its successor **only** in the case of a merger. (A399-403). In their brief, plaintiffs showed that this holding is incorrect, and cited numerous decisions from New York state and federal courts recognizing multiple

[2] While SGBL obviously has the full agreement, plaintiffs do not. The pages in plaintiffs' possession were obtained from the **open** docket in *Abu Nahl, et al. v. Jaoude, et al.*, 15-civ-9755 (S.D.N.Y.), which is an action brought against LCB's former managers and other defendants.

bases for the inherited jurisdictional status of successors under New York law—including where, as here, the successor assumed the liability of the predecessor.

SGBL responds to plaintiffs' showing by claiming that its position is supported by three New York appellate decisions: *Semenetz v. Sherling & Walden*, 801 N.Y.S.2d 78 (2005); *BRG Corporation v. Chevron U.S.A.*, 82 N.Y.S.3d 798 (2018); and *Matter of Gronich & Company v. Simon Property Group*, 119 N.Y.S.3d 456, 467 (2020). Op. 20-26.

But **none** of these cases support SGBL:

As this Court has noted, *Semenetz* held that "in certain circumstances the successor corporation may inherit its predecessor's jurisdictional status." *U.S. Bank N.A. v Bank of Am. N.A.*, 916 F.3d at 157 (2d Cir 2019) (quotation marks omitted). Those circumstances include where the successor "is subject to all the liabilities of the acquired companies," (*id*. at 155-56), as SGBL is here, by express agreement. *Cf. Perry Drug Stores v. CSK Auto Corp.*, 93 F. App'x 677, 681 (6th Cir. 2003) ("A court may impute the jurisdiction of a corporate predecessor to its successor where the successor expressly assumed the liability of the predecessor corporation.").

Nor does *Gronich* provide any succor to SGBL. As shown in plaintiffs' brief (Pls. Br. 20-21) *Gronich* held only that, "where the 'successor' has **merely** acquired the assets of the predecessor company … the contacts are not imputed." *Id*. at 457.

(emphasis added). *Gronich* **did not negate** imputation of jurisdictional status where, as here, the successor expressly assumed all of the liabilities of the predecessor.

SGBL's reliance on *BRG* is also meritless. That decision made crystal clear that it was following *Semenetz* **only** because: "Plaintiffs **do not challenge** *Semenetz*'s holding or its rationale, nor do they ask us to chart our own course on **this novel and unsettled jurisdictional issue**." *BRG*, 163 A.D.3d at 1496 (emphasis added).

The fact that the BRG court carefully went out of its way: (1) to state that it was following *Semenetz* **only** because the plaintiffs had not challenged that case or its rationale and (2) to describe the question as a "novel and unsettled jurisdictional issue," show that *Semenetz* has not gained traction outside of the Third Department.

Thus, if anything, BRG indicates that New York law is not settled on this point, which means that: (1) this Court is in not bound by New York state intermediate appellate decisions: (2) SGBL's argument (Opp. 32-33) the federal cases cited by plaintiffs are no longer good law in New York is baseless; and (3) certification to the New York Court of Appeals might be appropriate here.

II. Federal Common Law Controls Personal Jurisdiction In This Action, If New York Common Law Does Not Permit Exercise of Jurisdiction

In their opening brief, plaintiffs argued that if this Court affirms the district court's holding that New York law does not permit the exercise of personal

jurisdiction over SGBL, it should find that SGBL is subject to personal jurisdiction under federal (*i.e.* traditional) common law.[3] Pls. Br. 22-25.[4]

SGBL attempts to respond to this argument on the merits, and also claims that plaintiffs forfeited the argument by not citing Fed. R. Civ. P. 4(k)(2) during the proceedings in the district court. As shown below, SGBL's defenses both fail.

a. SGBL's Challenge on the Merits Fails

SGBL first asserts that Rule 4(k)(2) applies only if the defendant "violated" federal law, or has sufficient contacts with the United States as a whole, and SGBL is not alleged to have violated federal law or to have contacts with the United States. Op. 37, n.20.[5] But Rule 4(k)(2) does not require a "violation" of federal law; it requires only that the "claim … arises under federal law." (*Id.*). Plaintiffs' successor liability claim is brought under the ATA, and therefore "arises under federal law." And SGBL's claim that Rule 4(k)(2) requires that the defendant **itself** have contacts with the United States is just another way of saying that federal law does not recognize the inherited jurisdictional status of a successor. But the cases cited by plaintiffs prove exactly the contrary. *See e.g. LiButti v. United States*, 178 F.3d 114,

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[3] In *Nat'l Serv. Indus.*, 460 F.3d 201, this Court used the terms "traditional common law" and "federal common law" interchangeably. (*Id.* at 206).

[4] All citations herein to Plaintiffs-Appellants' prior brief are to "Pls. Br. __."

[5] Plaintiffs certified in their brief that, if New York law does not permit exercise of jurisdiction, SGBL is not subject to jurisdiction in any specific state. (*Id.* at 22). Because SGBL has not argued otherwise, it has conceded that Rule 4(k)(2) applies. *In re S. Afr. Apartheid Litig.*, 643 F. Supp. 2d 423, 429 (S.D.N.Y. 2009).

123-124 (2d Cir. 1999) (successors that "agree[] to assume" the liabilities of a predecessor inherit their jurisdictional status, "simply as a consequence of their status as a successor in interest, without regard to whether they had any other minimum contacts"); *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) (citation 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).").

Finally, SGBL argues that the exercise of personal jurisdiction does not comport with due process. Op. 37, n.20; 38-42. Faced with the multiple cases to the contrary cited in plaintiffs' brief, including this Court's decision in *Transfield ER Cape Ltd. v. Indus. Carriers, Inc.*, 571 F.3d 221 (2d Cir. 2009), SGBL attempts to explain them all away, arguing that they dealt with Rule 25 successors and entities that were alter egos of the original debtor. But this explanation falls flat. In respect to Rule 25 successors, SGBL's only "argument" is the passing statement that Rule

25 "involves different due process considerations." (Op. 41). SGBL does not cite any authority for this novel claim, nor even attempt to articulate it. It cannot.

SGBL's claim that *Transfield* and some of the other cases cited involved alter ego defendants fares no better: this Court's holding in *Transfield* expressly mentions successors: "[I]t 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."). *Transfield* at 224 (quoting *Patin v. Thoroughbred Power Boats*, 294 F.3d 640, 653 (5th Cir. 2002)) (emphasis added).

SGBL assumed all of LCB's liabilities in 2011 knowing full well that LCB had acted as Hizbollah's banker for many years, that LCB had already been been sued by victims of Hizbollah terrorism – including many of the plaintiffs herein—and that the question of whether LCB was subject to personal jurisdiction in the United States for its Hizbollah-related activities was pending before this Court. SGBL thereby knowingly rendered itself subject to personal jurisdiction in New York and the United States, and cannot now hide behind the Due Process clause.

b. Plaintiffs Did Not Forfeit the Argument

As this Court held in the action against LCB, personal jurisdiction in ATA actions may be established under state law, or under federal law, on the basis of the defendant's contacts with the United States as a whole:

> In this case, the plaintiffs rely solely upon Rule 4(k)(1)(A), which provides that "serving a summons establishes personal jurisdiction over a defendant who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located." …
>
> At least two other statutory bases for personal jurisdiction might be relevant to lawsuits brought under the Anti-Terrorism Act: (1) Federal Rule of Civil Procedure 4(k)(2), which provides for personal jurisdiction in federal-question cases where a defendant is "not subject to jurisdiction in any state's courts of general jurisdiction," but "exercising jurisdiction [would be] consistent with the United States Constitution and laws," Fed.R.Civ.P. 4(k)(2); and (2) the Anti-Terrorism Act's nationwide service of process provision, which provides that a defendant "may be served in any district where the defendant resides, is found, or has an agent." 18 U.S.C. § 2334(a); see also Fed.R.Civ.P. 4(k)(1)(C).

Licci v. Lebanese Canadian Bank, SAL, 673 F.3d 50, 59, n.8 (2d Cir. 2012) (ellipses and brackets omitted).

Pursuant to Rule 4(k)(2), "a defendant sued under federal law may be subject to jurisdiction based on its contacts with the United States as a whole, when the defendant is not subject to personal jurisdiction in any state. Rule 4(k)(2) confers personal jurisdiction over a defendant so long as the exercise of jurisdiction

comports with the Due Process Clause of the Fifth Amendment." *Dardana Ltd. v. Yuganskneftegaz*, 317 F.3d 202, 207 (2d Cir. 2003).

Thus, as this Court held in *Licci*, plaintiffs may establish personal jurisdiction over SGBL in this ATA action **either** under the law of New York pursuant to Rule 4(k)(1)(A), **or** pursuant to Rule 4(k)(2), based on SGBL's "contacts with the United States as a whole … so long as the exercise of jurisdiction comports with the Due Process Clause of the Fifth Amendment." *Dardana*, 317 F.3d at 207.[6]

SGBL was well aware when it filed its motion to dismiss plaintiffs' FAC that there are **two fora** relevant to the personal jurisdiction analysis here: (1) New York (under Rule 4(k)(1)(A)); and (2) the United States as a whole (under Rule 4(k)(2)). We know that SGBL clearly recognized the jurisdictional relevance of both fora, because it **repeatedly addressed** both New York and the United States as a whole, throughout its motion to dismiss:

- "SGBL itself does not have any contacts with New York **or the United States** to support this Court's exercise of personal jurisdiction." (A80) (emphasis added).
- "Plaintiffs do not allege that SGBL (or LCB for that matter) is incorporated or maintains its principal place of business in New York **or elsewhere in**

[6] Because SGBL was not served within the United States in this case, the third statutory basis cited by this Court in *Licci*, the ATA's nationwide service of process provision, 18 U.S.C. § 2334(a), and Fed.R.Civ.P. 4(k)(1)(C), are not relevant here.

the United States or has other 'exceptional' affiliations **with the United States** that are so continuous and systematic as to render the corporation 'at home' here." (A93) (emphasis added).

- "Plaintiffs do not allege – because they cannot – that the SPA has any connection or relationship to New York **or the United States**." (A93) (emphasis added).
- "The exercise of personal jurisdiction over SGBL by imputing LCB's earlier jurisdictional contacts based exclusively on a foreign asset purchase agreement that has no connection to New York **or the United States** would not comport with federal due process principles." (A97) (emphasis added).
- "[N]either SGBL independently, nor SGBL and LCB together, engaged in **any jurisdictionally relevant acts**, that is, took any action in New York **or the U.S.** …. Nor did SGBL take any act in New York **or the U.S.** that has any causal connection to Plaintiffs' injuries. (A98) (emphasis added).
- "SGBL did not purposefully avail itself of any law or benefit in New York, or purposefully direct any conduct **to the United States** … Plaintiffs cannot point to any SGBL conduct that has any relationship to New York **or the U.S.**" (A98) (emphasis added).

Thus, SGBL's motion explicitly referenced the United States as a relevant forum for personal jurisdiction analysis no less than **eight** times. As SGBL knows, the question of SGBL's contacts outside of New York is wholly irrelevant to personal jurisdiction under New York law under Rule 4(k)(1)(A). "In determining whether minimum contacts exist sufficient to justify the exercise of personal jurisdiction over foreign defendants, acts they committed outside New York quite obviously are irrelevant for purposes of [New York] longarm jurisdiction." *Exp. Credit Corp. v. Diesel Auto Parts Corp.*, 502 F. Supp. 207, 208 (S.D.N.Y. 1980).

Therefore, because contacts in the United States outside of New York State "quite obviously are irrelevant" to jurisdiction under Rule 4(k)(1)(A), *Exp. Credit Corp.*, 502 F. Supp. at 208, SGBL's repeated and insistent denials in its motion to dismiss that it had contacts with the United States as a whole, **necessarily** constitute a denial that it is subject to personal jurisdiction **under Rule 4(k)(2)**. If SGBL believed that the only relevant jurisdictional provision was Rule 4(k)(1)(A), it would not have repeatedly referenced the United States as a whole.[7]

Similarly, SGBL's very telling statement that "neither SGBL independently, nor SGBL and LCB together, engaged in **any jurisdictionally relevant acts, that is, took any action in** New York **or the U.S.**," (A98, emphasis added), proves that

[7] As noted above, Fed.R.Civ.P. 4(k)(1)(C) is irrelevant here because SGBL was served outside of the United States, and 18 U.S.C. § 2334(a) authorizes nationwide, but not worldwide, service of process.

SGBL understood clearly that the jurisdictional analysis in this federal action is not limited to the New York forum and to Rule 4(k)(1)(A), but rather extends to the United States as a whole and to Rule 4(k)(2).

Notably, SGBL **did not cite Rule 4 at all** in its motion to dismiss. But SGBL's repeated references to both New York and the United States simply make no sense unless SGBL was invoking both Rule 4(k)(1)(A) and Rule 4(k)(2). Nor should SGBL be heard to argue that the jurisdictional analysis must be limited to Rule 4(k)(1)(A), when SGBL itself failed to cite that provision (or Rule 4) at all.

In their opposition to SGBL's motion to dismiss, plaintiffs cited numerous federal decisions finding that a successor which assumed all the liabilities of its predecessor also acquires the predecessor's jurisdictional status, and argued that: "SGBL ignores the extensive Second Circuit and other federal case law, cited and quoted above, holding that a successor inherits the jurisdictional contacts of its predecessor. This is 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).

Plaintiffs also pointed out that the holding of this Court in *Licci* that "LCB is subject to personal jurisdiction under New York law means that, a fortiori, it is subject to personal jurisdiction under federal law … 'Because the requirements for personal jurisdiction under New York law are more restrictive than those under the

federal constitution.'" (A191, n.19, quoting *Sonera Holding B.V. v. Cukurova Holding A.S.*, 895 F. Supp. 2d 513, 519 (S.D.N.Y. 2012)).

Since SGBL had already clearly and repeatedly **conceded** in its opening motion that the United States as a whole was a relevant forum for the jurisdictional analysis—thereby necessarily invoking Rule 4(k)(2)—plaintiffs had no reason to extensively belabor this **already conceded** point in their opposition.

SGBL then executed a bait-and-switch. Unable to rebut plaintiffs' argument that inherited jurisdictional status is recognized under federal law and that in the event of a conflict with New York law that federal law must prevail, SGBL blatantly switched its position in its reply: while in its opening motion to dismiss SGBL acknowledged **eight times** that the United States as a whole is a relevant forum for jurisdictional analysis—thereby also conceding the relevance of Rule 4(k)(2) in this case—in its reply SBGL argued **for the first time** that the **only** relevant forum for assessing jurisdiction is New York State. According to SGBL's reply, "Plaintiffs' primary argument that 'this is a federal question case under the ATA, and personal jurisdiction is governed by federal, not state, law' is just plain wrong," because "to determine personal jurisdiction, a federal district court applies the long-arm statute of the state in which it sits. The rule applies equally to cases involving a federal question, and a plaintiff must satisfy state standards before satisfying federal constitutional standards." (A383, citations, brackets and quotation marks omitted).

(*See also* at A381: "For a federal court sitting in New York to assert personal jurisdiction over SGBL, a nonresident defendant, Plaintiffs must satisfy the requirements of *both* New York's long-arm statute and the Due Process Clause of the United States Constitution … Plaintiffs' contention that state law is irrelevant to resolve the jurisdictional question has no support under Second Circuit precedent or in our federal system.") (emphasis in the original).

Thus, in order to defeat plaintiffs' argument that federal law will apply if New York law does not recognize inherited jurisdictional status, SGBL's reply purports to retract its concession, made repeatedly in its opening motion, that the United States as a whole is a forum relevant to the jurisdictional analysis—as of course is explicitly provided in Rule 4(k)(2).

The district court adopted in full SGBL's argument, which was asserted for the first time in its reply—and which directly conflicts with its position in its opening motion—that New York is the **sole** forum relevant to the jurisdictional analysis, stating that: "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." (A400).

In support of its finding, the district court cited *Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161, 168 (2d Cir. 2013). But the district court ignored this

Court's holding in *Licci*, 673 F.3d at 59, that personal jurisdiction in ATA actions can also be acquired under Rule 4(k)(2), under which New York law is irrelevant. Notably, SGBL did not cite *Licci*, 732 F.3d 161 in its motion or its reply; the district court cited that case sua sponte, but it failed to acknowledge *Licci*, 673 F.3d at 59, which squarely refutes its conclusion that only New York law is relevant.

In light of this history it is clear that plaintiffs did not forfeit the argument that the exercise of personal jurisdiction over SGBL is not restricted to New York law:

- SGBL conceded in its opening motion that New York and the United States are independently relevant fora for personal jurisdictional analysis.
- Plaintiffs accepted SGBL's concession, and argued in their opposition that if New York law did not permit jurisdiction, federal law should apply;
- SGBL acknowledged and responded to plaintiffs' argument about federal law in its reply, not by refuting it, but by pulling a bait-and-switch, abandoning its previous position, and claiming for the first time that the only jurisdictionally relevant forum in this case is New York.

Thus, the **substance** of this dispute was clearly litigated below. That none of the parties—SGBL included—cited to any specific provisions of Rule 4 does not detract from the fact that the issues themselves were addressed. Indeed, the district court itself did not cite Rule 4(k)(1)(A), or any other provision of Rule 4. But the parties and the district court necessarily invoked the provisions of Rule 4, because

"[t]he available statutory bases [for personal jurisdiction] in federal courts are enumerated by Federal Rule of Civil Procedure 4(k)." *Licci*, 673 F.3d at 59.

Having pointed to the United States as a whole as an independently relevant forum for jurisdictional analysis eight times in its motion to dismiss, SGBL cannot now be heard to claim that the plaintiffs forfeited that very same argument. SGBL itself opened the door wide to this argument, and its subsequent attempt to walk this concession back in its reply cannot un-ring that bell.

A finding of waiver is also inappropriate because Rule 4(k)(2) will not be triggered unless and until this Court affirms the district court's holding that New York law does not permit the exercise of jurisdiction here (thereby establishing for the first time that SGBL is not subject to jurisdiction under the law of any state).

Alternatively, if the Court finds that the argument was forfeited, it should nonetheless correct it under the "plain error" standard. *United States v. Brown*, 843 F.3d 74, 81 (2d Cir. 2016) ("Under the plain error standard, an appellant must demonstrate that (1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the appellant's substantial rights, which in the ordinary case means it affected the outcome of the district court proceedings; and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings.") (quotation marks omitted).

The district court's holding that jurisdiction is controlled solely by New York law is a clear and obvious error, which conflicts with the plain language of Rule 4(k)(2) and this Court's precedents, such as *Dardana*—and *Licci* itself. Unless this Court reverses on other grounds, that error will have affected the outcome below. And leaving undisturbed the clearly erroneous holding that New York law always controls jurisdiction in federal question cases would seriously affect the fairness and integrity of both this case and future judicial proceedings.

III. Alternatively, the Court Should Apply the Substantial Continuity Test

Plaintiffs' brief argued that if SGBL is not found to be LCB's successor under the New York or federal (traditional) common law test, the Court should apply the "substantial continuity" test that was developed by federal courts "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). (Pls. Br. 25-29). In response, SGBL makes a smattering of unavailing arguments:

Plaintiffs' brief showed that LCB's transfer of liability and assets to SGBL satisfied all the elements of the "substantial continuity" test. (Pls. Br. 26-28). Regarding the third element of the test, namely, "whether the predecessor is able to provide the relief sought," (*id*. at 26-27[8]), plaintiffs showed that LCB has represented to the U.S. Supreme Court that it had been rendered "defunct, insolvent, and unable

[8] Quoting *Huan Wang v. Air China Ltd*., 2020 WL 1140458, at *6 (E.D.N.Y. Mar. 9, 2020).

to pay any judgment rendered against it." (Pls. Br. 27). SGBL attempts to undermine LCB's statement that it is unable to provide any relief to the plaintiffs by arguing that, "Plaintiffs could have attempted to attach a portion of $580,000,000.00 paid by SGBL to LCB during the highly-publicized asset and liability purchase, or, even more readily, move to attach $150,000,000.00 of transaction funds that the U.S. government seized and held in 2011 in the United States as part of its asset forfeiture case against LCB." (Op. 41).

This claim is false and preposterous. LCB's liability-and-asset transfer to SGBL took place in 2011. Not only did the plaintiffs not have a judgment against LCB at that time, but their action against LCB had been dismissed for lack of personal jurisdiction on March 31, 2010. *Licci v. Am. Exp. Bank Ltd.*, 704 F. Supp. 2d 403, 408 (S.D.N.Y. 2010). That dismissal was reversed by this Court only on October 18, 2013. *Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161, 165 (2d Cir. 2013). SGBL does not explain, because it cannot, how plaintiffs were to have attached funds, at a time when they not only lacked a judgment, but their action had been dismissed for lack of personal jurisdiction.

Nor does LCB explain how plaintiffs (assuming they had a judgment or even a live action at the time, which they did not) were supposed to have attached a fund transfer which SGBL itself repeatedly insists took place exclusively in Lebanon. (Op. 1, 10, 39). Nor were any LCB funds ever in the United States. The facts of the

government's $150 million seizure were as follows: SGBL deposited $150 million in a **third-party bank in Lebanon**. (A133, ¶ 6). The United States government then seized an equivalent sum from a **correspondent account of the third-party bank** held in a **fourth-party bank** in the United States, using a **forfeiture** mechanism, 18 U.S.C. § 981(k), which is completely unavailable to private litigants. (A133, ¶ 8).

In sum, SGBL's attempt to blame the plaintiffs for not policing LCB and SGBL is frivolous and in bad-faith, and does not undermine plaintiffs' showing that **all** the elements of the "substantial continuity" test have been met.

Notably, SGBL has **not** disputed that the other elements of the test are met.

SGBL also argues that this Court has restricted the application of the "substantial continuity" test to certain federal statutes, and claims that "Plaintiffs' [sic] have provided no basis for this Court to adopt a special rule either for purposes of imposing corporate liability, or in conjunction with an inheritance theory to confer personal jurisdiction." (Op. 44).

Not true. Plaintiffs explained at length, on the basis of holdings by **this** Court, that the ATA serves extremely important national interests, that those national interests would be gravely harmed if U.S. terror victims such as the plaintiffs are unable vindicate them due to devious corporate shell games, and that the "substantial continuity" test should therefore apply to the ATA. (Pls. Br. 25-26). SGBL fails completely to address, much less rebut, those arguments.

Finally, SGBL argues that "substantial continuity" is a rule for imposing liability, not for exercising jurisdiction. But it cites no cases so holding. The absence of cases on point establishes nothing. Nor is there any reason that a remedial doctrine such as "substantial continuity" should be restricted to liability, in derogation of the rule that successor jurisdiction follows successor liability. "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." *City of Richmond*, 918 F.2d at 454. *Cf. 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.") (emphasis added).

CONCLUSION

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

Dated: November 26, 2021

Respectfully,

Robert J. Tolchin
THE BERKMAN LAW OFFICE, LLC
Attorneys for Plaintiffs-Appellants
111 Livingston Street, Suite 1928
Brooklyn, New York 11201
718-855-3627

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 4,831 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: November 26, 2021

Respectfully submitted,

/s/ Robert J. Tolchin
Robert J. Tolchin
THE BERKMAN LAW OFFICE, LLC
Attorneys for Plaintiffs-Appellants
111 Livingston Street, Suite 1928
Brooklyn, New York 11201
718-855-3627